

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 10, 2013

v

MELVIN VITO DALTON,

Defendant-Appellant.

No. 310531
Oakland Circuit Court
LC No. 2011-237299-FC

Before: BECKERING, P.J., and O’CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant, Melvin Vito Dalton, appeals as of right his jury-trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 562 to 900 months’ imprisonment for his second-degree murder conviction and to 60 months’ imprisonment for the felony-firearm conviction. We affirm.

I. BASIC FACTS

This case stems from the fatal shooting of Sean Taylor on the morning of September 16, 2008. Brooke Feddersen testified at trial that she and Taylor, who was her boyfriend, had driven to an alley in order to buy 300 Vicodin pills from Thomas Roberson, Jr. (a/k/a “Teelee”). Taylor had purchased drugs from Roberson many times before.¹ The alley was their usual meeting place to engage in drug transactions. When Taylor and Feddersen were pulling into the alley, they saw Roberson’s sister (Rachel), from whom Taylor usually purchased crack cocaine, talking on a cellular telephone. Taylor had stolen a marijuana plant from Rachel’s home two weeks earlier, and the two discussed the missing marijuana plant. As Taylor approached the meeting

¹ Feddersen testified that Taylor was addicted to drugs but that she was not. She also testified that Taylor was seeking to buy the Vicodin in order to sell it for a profit so that she did not have to work. Roberson, from whom Taylor usually purchased heroin, contacted Taylor and indicated that he could get the Vicodin.

spot, he received a call from Roberson, and Taylor indicated that he had arrived in the alley. While Taylor and Feddersen waited for Roberson to arrive, defendant approached the passenger side of their vehicle where Feddersen was sitting, crouched down, and asked them if they wanted the pills. Taylor told Feddersen not to talk to defendant. Defendant walked around the car, tapping on it with what sounded like a metal object, and proceeded to Taylor's window, which was partially open. Defendant asked Taylor if he wanted any "hard," which Feddersen understood to mean hard drugs. Taylor declined and asked defendant if he ever figured out who took the marijuana plant.² Defendant took a step back and then stepped forward and put a gun in Taylor's window. Taylor put the car in drive, and defendant instructed him not to drive away or he would shoot Taylor. Defendant shot Taylor through the open window when Taylor attempted to drive away.

II. ANALYSIS

A. WITNESS AVAILABILITY AND RIGHT TO CONFRONTATION

Defendant first argues that the trial court abused its discretion by ruling that Roberson was unavailable as a witness and by admitting his preliminary-examination testimony at trial. Defendant also argues that the admission of this testimony violated his right to confrontation. We disagree.

We review for an abuse of discretion the trial court's determination of whether a witness was unavailable. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). Whether the admission of evidence "violated defendant's Sixth Amendment right of confrontation is a question of constitutional law that this Court reviews de novo." *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011).

The trial court admitted Roberson's preliminary-examination testimony pursuant to MRE 804(b)(1). The trial court ruled that Roberson was unavailable for two reasons. First, it determined that Roberson was "unavailable because he clearly has some potential to incriminate himself by the testimony that he would give." Second, the trial court determined that Roberson's fear of testifying based on recent threatening events was credible. Thus, the trial court concluded that his refusal to testify based on such fear also made him unavailable.

MRE 804 provides exceptions to the hearsay rule when the declarant is unavailable as a witness. According to the rule, unavailability includes when a declarant "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." MRE 804(a)(2). In addition, a witness who invokes his Fifth Amendment privilege against self-incrimination is "unavailable" as defined in MRE 804(a). *People v Meredith*, 459 Mich 62, 66; 586 NW2d 538 (1998). A witness can only be compelled to testify if the court "can foresee, as a matter of law, that such testimony could not incriminate the witness." *People v*

² Evidence was presented at trial that defendant was Rachel's boyfriend.

Dyer, 425 Mich 572, 578-579; 390 NW2d 645 (1986). If the declarant is unavailable, MRE 804(b)(1) provides that “former testimony” is not excluded by the hearsay rule:

Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

In this case, Roberson was physically present at the trial, but he refused to testify. Before the beginning of defendant’s jury trial, the trial court called Roberson to the stand, placed him under oath, and questioned him regarding his refusal to testify. Roberson acknowledged that he was present in court because he had received a subpoena but that he feared for his and his family’s lives. He testified that he had received a threatening letter two weeks earlier that stated, “don’t come to court or die.” He burned the letter. Three days after receiving the letter, someone shot at him when he entered his car outside a gas station—the bullet shot out the back window of his car. The trial court found Roberson to be credible with respect to his account of the threats that he received. Although the court noted that somebody who engages in drug trafficking could be shot at by anybody at any time, the threatening letter was a concern because it was clearly directed at Roberson and the testimony he was intending to give at trial.

We conclude that the trial court did not err by finding Roberson “unavailable.” Roberson’s refusal to testify at trial justified the trial court’s characterization of Roberson as an “unavailable” witness. The record reveals that Roberson was persistent in his refusal to testify because he was fearful. When a witness “adamant[ly] refus[es] to testify at trial,” the trial court is justified in finding that the witness is unavailable without threatening contempt charges. *People v Burgess*, 96 Mich App 390, 401; 292 NW2d 209 (1980).

Furthermore, the trial court did not abuse its discretion when it determined that Roberson had a Fifth Amendment privilege and, thus, was “unavailable.” Before voir dire, Roberson stated that he did not want to testify. The trial court asked Roberson whether he had any concerns about incriminating himself. Roberson initially said “yes.” He then changed his answer to “no” and then back to “yes,” although it appears that he was basing his response on a fear for his life if he testified. When asked whether his testimony might result in his making statements under oath that would cause him to be charged with a crime, Roberson said “yes” but then changed his mind and said “no.” The trial court noted that Roberson may not have a grasp of the Fifth Amendment and his right against self-incrimination. Subsequently, the prosecutor urged the trial court to determine that Roberson was an unavailable witness because he may implicate himself. The prosecutor argued that the evidence supported a theory that Roberson was involved in the crime. Defense counsel noted that Roberson was considered a suspect at one point and that he gave three inconsistent statements to the police. Defense counsel also noted that the defense theory of the case was that Roberson was involved in the crime. Accordingly, the trial court did not abuse its discretion by finding Roberson “unavailable” because there was possibility that he would incriminate himself and, thus, that he had a valid Fifth Amendment privilege.

Defendant also argues that the admission of Roberson’s preliminary-examination testimony violated his right to confrontation because the trial court erred by finding that

Roberson was an “unavailable” witness. “Both the United States and Michigan constitutions guarantee a criminal defendant the right to confront witnesses against him or her.” *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009). “The Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.” *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008). Statements made during a preliminary examination are testimonial and implicate the confrontation clause. See *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Because Roberson’s preliminary-examination testimony is testimonial, the Sixth Amendment demands that Roberson was “unavailable” at trial and that there was a prior opportunity for cross-examination for that testimony to be admitted.

Defendant does not raise any issue regarding his opportunity for cross-examination of Roberson at the preliminary examination. Defendant’s sole contention is that his right to confront Roberson was violated because Roberson was an available witness. As noted above, the trial court did not abuse its discretion by declaring Roberson unavailable. Accordingly, defendant’s contention fails.

B. EVIDENCE OF FLIGHT

Defendant also contends that the trial court abused its discretion when it allowed a witness to testify about defendant’s alleged flight to Georgia because there was no evidence that defendant was acting to avoid detection. We disagree.

We review the trial court’s decision to admit evidence for an abuse of discretion. *People v Katt*, 248 Mich App 282, 289; 639 NW2d 815 (2001). “An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.” *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Errors in the admission of evidence are nonconstitutional. *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). Nonconstitutional errors that are preserved will not result in a reversal of a conviction unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

It is well established that evidence of flight is admissible to support an inference of a defendant’s consciousness of guilt. *Unger*, 278 Mich App at 226. While flight evidence is insufficient to sustain a conviction, it is probative because it may show consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). “Flight” includes: fleeing the scene of the crime, leaving the state of jurisdiction, running from the police, or attempting to escape custody. *Id.* In addition, “[t]he remoteness of the flight from the time of defendant’s arrest [does] not affect the admissibility of the evidence, but [is] relevant only to the weight of the evidence.” *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). The prosecutor is not required to prove that defendant left the jurisdiction due to a fear of apprehension. *People v Smelley*, 485 Mich 1023; 776 NW2d 310 (2010). Nor is the prosecutor required to disprove other innocent explanations for defendant’s conduct. See *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006) (stating that the prosecution need not negate every reasonable theory consistent with the defendant’s innocence).

In this case, the trial court allowed Deputy Steve Armstrong, an officer assigned to the Fugitive Apprehension Team, to testify about the police efforts made to locate defendant following the shooting. His testimony established that defendant left Michigan shortly after the shooting of Taylor. About three days after the shooting, the police identified defendant as the main suspect and issued an arrest warrant. The police immediately began to search for defendant. They focused their search efforts around his girlfriend's home where defendant was living before the shooting. The police also searched his relatives' homes, his girlfriend's relatives' homes, and the surrounding neighborhoods. During the search, the police determined that defendant's girlfriend had family in Georgia, and Armstrong contacted the United States Marshall's Office to facilitate the interstate search of defendant in Georgia. After two years, defendant was located in Georgia and extradited back to Michigan.

We conclude that the trial court did not abuse its discretion by allowing this testimony because it was sufficient to support an inference that defendant fled the jurisdiction after the shooting. Contrary to defendant's assertion, the prosecutor was not required to prove that defendant left the jurisdiction due to a fear of apprehension or to avoid detection. See *Smelley*, 485 Mich at 1023. Moreover, whether defendant fled to Georgia for reasons other than his consciousness of guilt regarding the shooting affects only the weight and not the admissibility of the flight evidence. See *Unger*, 278 Mich App at 226 (“[I]t is always for the jury to determine whether evidence of flight occurred under such circumstances as to indicate guilt.”).

Moreover, contrary to defendant's assertion, the evidence was not unfairly prejudicial. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. “All evidence offered by the parties is ‘prejudicial’ to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded.” *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod and rem'd 450 Mich 1212 (1995). Evidence is unfairly prejudicial if “a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect” or where “it would be inequitable to allow the proponent of the evidence to use it.” *Id.* at 75-76. Evidence that is unfairly prejudicial is evidence that injects into trial considerations that are extraneous to the merits of the case, i.e., bias, sympathy, anger, or shock. *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994). Here, evidence that defendant went to Georgia after the shooting did not inject considerations into the trial that were extraneous to the merits of the case. This is not the type of evidence that would inject bias, sympathy, anger, or shock into the minds of jurors. Indeed, the prosecutor did not argue that defendant fled the jurisdiction or that the jury could infer from his conduct a consciousness of guilt. Accordingly, defendant's assertion fails because the evidence was not unfairly prejudicial.

Even if the admission of the evidence was erroneous, defendant is not entitled to a new trial because the error was not outcome determinative. See *Lukity*, 460 Mich at 495-496. A preserved nonconstitutional error in the admission of evidence is presumed to be harmless. *Id.* The error justifies reversal only if it is more probable than not that it determined the outcome of the case. *Id.* An error is not outcome determinative unless it undermines the reliability of the verdict in light of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

In this case, the admission of evidence that defendant was located in Georgia two years after the shooting and extradited back to Michigan was not outcome determinative in light of the evidence of defendant's guilt. Armstrong testified that just because an individual is located in another state does not mean that he was attempting to elude arrest. Furthermore, the prosecutor presented substantial evidence at trial to support the jury's verdict of second-degree murder, particularly Feddersen's testimony that she witnessed defendant shoot Taylor. Accordingly, any alleged error by allowing the evidence of defendant's alleged flight was harmless.

C. OFFENSE VARIABLE (OV) 10

Finally, defendant contends that the trial court erred by scoring OV 10 at 15 points because there was no evidence of predatory conduct. We disagree.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* Thus, in this case, we review for clear error the trial court's factual finding that defendant engaged in predatory conduct. We review de novo whether the facts are sufficient to assess 15 points for OV 10.

OV 10 addresses exploitation of a vulnerable victim. MCL 777.40. Fifteen points may be scored for OV 10 where "[p]redatory conduct was involved." MCL 777.40(1)(a). The phrase "predatory conduct" means "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011), the Michigan Supreme Court clarified that "predatory conduct"

does not encompass *any* "preoffense conduct," but rather only those forms of "preoffense conduct" that are commonly understood as being "predatory" in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or "preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection."

In addition, a victim's "vulnerability" may arise from a victim's inherent characteristics, personal relationships, and external circumstances. *Id.* at 464–466. Further, "a defendant's 'predatory conduct,' by that conduct alone (*eo ipso*), can create or enhance a victim's 'vulnerability.'" *Id.* at 468. For example, "a person walking alone at night in a parking lot while two armed people hidden from that person's view lie in wait to rob that person is a vulnerable victim because he or she would have a readily apparent susceptibility . . . to injury [or] physical restraint . . ." *Id.* at 467, quoting MCL 777.40(3)(c).

At trial, the prosecution's theory was that Taylor was set up by Roberson, his sister Rachel, and defendant because Taylor stole a marijuana plant from Rachel and defendant's home. At sentencing, the prosecution contended that a reasonable inference from the facts was that defendant, Rachel, and Roberson conspired to lure Taylor into the isolated alley for the purpose of killing Taylor because he stole the marijuana plant. The trial court found that the circumstantial evidence presented at trial supported the prosecutor's argument.

We conclude that the trial court did not clearly err in its factual findings and that the evidence was sufficient to assess 15 points for OV 10. A reasonable inference from the evidence was that defendant, along with Rachel, Roberson, or both, conspired to set up Taylor and lure him to the isolated alley, where defendant could seek retribution against Taylor for stealing the marijuana plant. Furthermore, a preponderance of the evidence supports a finding that defendant was aware that Taylor was going to be at the isolated alley and that he was lying in wait for Taylor to arrive in order to harm or kill him. Taylor was also a vulnerable victim because he parked his vehicle in an isolated alley, which was not used for vehicular traffic.

We further conclude that even if the trial court had erroneously scored 15 points for OV 10, defendant would not be entitled to resentencing. Defendant's prior-record-variable score is 35 points, his OV score is 120 points, and he is a second-offense habitual offender; thus, his guidelines range is 270 to 562 months' imprisonment. See MCL 777.61; MCL 777.21(3)(a). Defendant's guidelines range would remain the same even if zero points were scored for OV 10. See MCL 777.61; MCL 777.21(3)(a). "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006), citing *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Affirmed.

/s/ Jane M. Beckering
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro