

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 17, 2012

v

ALISON LANE MARTIN,  
  
Defendant-Appellant.

No. 302071  
Allegan Circuit Court  
LC No. 10-016790-FC

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Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree murder, on alternate theories of premeditated murder and felony murder, MCL 750.316(1)(a) and (b); conspiracy to commit murder, MCL 750.157a; kidnapping, MCL 750.349; and torture, MCL 750.85. The trial court sentenced defendant to life imprisonment for the first-degree murder and conspiracy convictions and to sentences of 180 months to 30 years for the kidnapping conviction and 225 months to 50 years for the torture conviction. We affirm.

This case involves the murder of Brandon Silverlight, which happened around 12:00 a.m. on November 14, 2009. Defendant and Silverlight exchanged text messages before Silverlight's murder; they arranged to meet at a South Haven restaurant and arranged for Silverlight to follow defendant back to her parents' trailer, where they would engage in a sexual liaison with a third person. When defendant and Silverlight arrived at the trailer on November 13, 2009, codefendant Justin Terpstra ambushed Silverlight. Then, according to statements that defendant made to Shawn West, a friend, and to April Golombieski, a fellow inmate at the Allegan County Jail, defendant and Terpstra proceeded to torture Silverlight. They hit him on the head with a post, stabbed him multiple times, and set his body on fire. At trial, defendant claimed that there was no plan to kill, or to even hurt, Silverlight and that Terpstra acted alone and on his own accord in murdering Silverlight.

On appeal, defendant argues that statements Silverlight made to police officers Danielle Gylds and Michael Hecht in December 2007 regarding a stalking complaint against defendant were not admissible under MRE 804(b)(6) and that admission of the statements violated her right of confrontation because there was no evidence that she killed Silverlight in order to prevent him from testifying. Because defendant did not raise these objections to the admission of Silverlight's statements below, the claim of error is unpreserved. See *People v Stimage*, 202

Mich App 28, 30; 507 NW2d 778 (1993) (“[a]n objection based on one ground is insufficient to preserve an appellate attack based on a different ground”). We review unpreserved claims of constitutional and nonconstitutional error for plain error affecting the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Under the Confrontation Clause, a defendant has the right to be confronted with the witnesses against him. US Const, Am VI; *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). Specifically, the Confrontation Clause bars the admission of testimonial statements of a witness who does not testify at trial unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 68-69; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *Crawford*, the United States Supreme Court did not provide a comprehensive definition of “testimonial statements,” but it held that, at a minimum, testimonial statements include testimony given at a preliminary examination, before a grand jury, or at a former trial, as well as statements given during police interrogations. *Id.* at 68. Recently, the United States Supreme Court stated, “the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.” *Michigan v Bryant*, \_\_\_ US \_\_\_; 131 S Ct 1143, 1155; 179 L Ed 2d 93 (2011). When a statement is not procured with the primary purpose of creating an out-of-court substitute for trial testimony, the admissibility of the statement is governed only by rules of evidence, not the Confrontation Clause. *Id.* In *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), the United States Supreme Court considered whether statements given to law enforcement officers are testimonial. It stated:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Id.* at 822.]

Testimonial statements from a witness whose unavailability was procured by a defendant can, in some circumstances, be admissible even if the defendant is denied the opportunity to confront the witness. See *Giles v California*, 554 US 353, 358; 128 S Ct 2678; 171 L Ed 2d 488 (2008). For the so-called forfeiture-by-wrongdoing theory to apply, the defendant must have caused the witness to be unavailable *in order to prevent the witness from testifying*. *Id.* at 361.

Here, as defendant contends, there was no evidence to suggest that defendant procured Silverlight’s unavailability by killing him in order to prevent him from testifying. When Silverlight was murdered, there was no possible or existing case against defendant in which Silverlight was expected to testify. Accordingly, Silverlight’s statements to Gylds and Hecht did not fall within a valid forfeiture-by-wrongdoing theory. Therefore, if Silverlight’s statements to Gylds and Hecht were testimonial, their admission violated defendant’s right of confrontation because defendant did not have a prior opportunity to cross-examine Silverlight. *Crawford*, 541 US at 68-69.

Silverlight's statements to Gylds and Hecht were not given to meet an ongoing emergency, and we will assume for purposes of this appeal that Silverlight's statements to Gylds and Hecht were testimonial and, therefore, that their admission violated defendant's right of confrontation.<sup>1</sup>

Although there was an apparent Confrontation Clause violation, defendant has not shown that this error affected her substantial rights. *Carines*, 460 Mich at 763. The evidence concerning the December 2007 stalking complaint was admitted as other-acts evidence under MRE 404(b). At the conclusion of trial, the trial court instructed the jury that it could only consider the "evidence that was introduced to show that the defendant committed improper acts for which she is not on trial" for the purpose of deciding whether "defendant had a motive to hurt Brandon Silverlight." The same motive for defendant to hurt Silverlight that was indicated by Silverlight's statements to Gylds and Hecht was also established through defendant's own statements. Hecht testified that defendant told him that she was obsessed with Silverlight and that she had called him 30 to 40 times in one year and visited him at his place of employment. Ryan Moore, an ex-boyfriend of defendant's, testified that defendant told him that Silverlight was abusive and she wished someone would beat up Silverlight. David McClendon, a former roommate of defendant's, testified that defendant often said that she hated Silverlight, that she expressed a desire to drag Silverlight in a field behind a pickup truck, and that she offered him several hundred dollars to beat up Silverlight. Golombieski testified that defendant told her that she loved Silverlight and that she was hurt because Silverlight wanted to end their relationship. Defendant herself testified that she was obsessed with Silverlight in 2007 and in 2009 and that Silverlight had abused her. Given defendant's own statements about Silverlight and her past actions, the admission of Silverlight's statements to Gylds and Hecht did not affect the outcome of defendant's trial. *Carines*, 460 Mich at 763. Accordingly, defendant is not entitled to a new trial based on a Confrontation Clause violation.

Defendant also argues that the admission of Terpstra's statements made to Timmy Story at the Allegan County Jail violated her right of confrontation. Because defendant did not object to the admission of Terpstra's statements on the basis of a Confrontation Clause violation, this claim of error is unpreserved, see *Stimage*, 202 Mich App at 30, and we review it for plain error affecting defendant's substantial rights, *Carines*, 460 Mich at 763-764.

Terpstra's statements to Story were nontestimonial. While Terpstra and Story were not longstanding friends—they did not meet until they were placed in the same holding cell—Terpstra made his statements informally to Story. The statements were made while Terpstra and Story were in a holding cell, sitting against the wall. The statements were not made during a police interrogation or any other formal out-of-court proceeding. In addition, there was no state actor involved. Story testified that he did not talk with the police before Terpstra made his statements. Furthermore, Story only asked one question of Terpstra; he asked Terpstra why he was in jail. Story testified that Terpstra just talked to him and that he even told Terpstra that

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<sup>1</sup> We need not, therefore, consider their admissibility under MRE 804(b)(6).

Terpstra should not be telling him what he was saying. There was no evidence of any circumstances to indicate that the primary purpose of Terpstra's statements was to establish or prove past events for a future criminal prosecution. *Davis*, 547 US at 822; *People v Taylor*, 482 Mich 368, 378; 759 NW2d 361 (2008). Accordingly, Terpstra's statements were nontestimonial and the admission of the statements did not violate defendant's right of confrontation.<sup>2</sup>

Defendant next argues that the trial court erred in admitting text messages that were sent from her cellular telephone. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

Defendant first claims that the trial court erred in concluding that the text messages sent from her cellular telephone were admissible under MRE 801(d)(2)(A) as admissions of a party opponent because the messages were not authenticated as being sent by her.<sup>3</sup> She asserts that Terpstra could have used her telephone. "A statement cannot be used as a party admission unless the party made the statement." *Merrow v Bofferding*, 458 Mich 617, 633; 581 NW2d 696 (1998).

MRE 901(a) states, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, West testified that defendant told him that she exchanged text messages with Silverlight in which she promised a sexual liaison if he agreed to meet her. Moreover, defendant testified that she sent text messages to Silverlight about meeting him the night of the murder and that in the text messages she discussed a sexual liaison. The evidence also showed that text messages were sent from defendant's telephone to Silverlight while Terpstra was at work on November 13, 2009, and that soon after certain messages were sent, there were telephone calls between defendant and Terpstra. This evidence was sufficient to support a finding that the text messages sent from defendant's telephone were sent by defendant. Accordingly, we reject defendant's argument that the text messages were not properly authenticated as being sent by her.

Defendant does not contest that if the text messages sent from her telephone were properly authenticated as being sent by her, the text messages qualified as admissions of a party opponent under MRE 801(d)(2)(A). Nonetheless, she claims that the text messages were inadmissible because the messages were contained in a second level of hearsay, the telephone

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<sup>2</sup> Although defendant, in his appellate brief, focuses on the Confrontation Clause and does not adequately or clearly argue for the inadmissibility of the statements under MRE 804(b)(3), we nonetheless note that the statements were admissible under this rule.

<sup>3</sup> The trial court, in concluding that the text messages were admissible under MRE 801(d)(2)(a), implicitly rejected defendant's argument that the text messages were not authenticated as being sent by her.

records of the text messages, which the trial court held were not admissible under MRE 803(6). “Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided” in the Michigan Rules of Evidence. MRE 805; see also *People v Mesik*, 285 Mich App 535, 538; 775 NW2d 857 (2009). Accordingly, the text messages were admissible if the messages and the telephone records in which the messages were contained fell within a hearsay exception. The trial court held that the telephone records of the text messages did not qualify as business records under MRE 803(6).<sup>4</sup>

MRE 803(6) provides:

**Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances or preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

“The business records exception is based on the inherent trustworthiness of business records.” *People v Jambor (On Remand)*, 273 Mich App 477, 482; 729 NW2d 569 (2007). We disagree with the trial court’s conclusion that, because Sprint is not “personally invested” in the accuracy or the truthfulness of text messages sent and received by its customers, the telephone records of the text messages lacked trustworthiness.

Donna Hernandez, a custodian of records for Sprint, testified that Sprint retains the content of text messages sent and received by its customers for 7 to 14 days and that they do so as a service for its customers. Her testimony indicated that when Sprint receives a request for a customer’s text messages, a Sprint employee enters the relevant criteria into a computer and the content of the text messages is printed from the database. Given Hernandez’s testimony, there is nothing in the record to suggest a lack of trustworthiness in the source of information contained in the telephone records or in the method or circumstances of preparation of the records. MRE 803(6). There was no evidence that Sprint had any motivation to misrepresent the information in

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<sup>4</sup> The trial court did not engage in the relevant multiple-hearsay analysis but focused only on the content of the messages, concluding that it was admissible under MRE 801(d)(2)(A).

the telephone records. Cf. *Solomon v Shuell*, 435 Mich 104, 126-127; 457 NW2d 669 (1990) (opinion by ARCHER, J.). In addition, while there was no evidence to suggest that Sprint was concerned with whether text messages sent and received by its customers contained accurate and truthful information, this fact does not affect the trustworthiness of the telephone records themselves. The purpose of the telephone records of text messages is to provide Sprint customers with the content of the text messages, i.e., the *actual* message that was sent or received by the customer, regardless whether the message itself was accurate and truthful. The purpose of the telephone records of text messages is not to convey the text messages for the truth of the matters asserted in the messages. Under the circumstances, the telephone records were admissible under MRE 803(6).<sup>5</sup>

Even if there had been error in the admission of the text messages, the error would not entitle defendant to a reversal of her convictions. “[A] preserved nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999) (internal citation and quotation marks omitted). The burden is on the defendant to demonstrate prejudice. *Id.* at 495.

Defendant asserts that the text messages provided a critical link to her direct involvement in the murder of Silverlight and that the admission of the text messages eviscerated the defense theory of minimizing her involvement in the murder and pointing fault at Terpstra. The text messages showed that defendant had arranged to meet Silverlight at a restaurant and to have him follow her back to her parents’ trailer, where they would engage in a sexual liaison with a third person. However, there was other evidence presented that defendant arranged to get Silverlight to her parents’ trailer by promising him a sexual liaison. For example, West testified that defendant told him that she exchanged text messages with Silverlight and promised him sexual intercourse if he agreed to meet her. In addition, Story testified that Terpstra told him that his girlfriend used a cellular telephone to lure Silverlight to the area in question. Accordingly, even absent the text messages, the jury heard the pertinent evidence. Further, the text messages were not inconsistent with the defense theory, which was that defendant arranged to get Silverlight to her parents’ trailer so that she and Terpstra could confront Silverlight about a picture that he had sent but that Terpstra, on his own accord and without defendant’s assistance, beat up and murdered Silverlight. The text messages did not establish that defendant was directly involved in the murder of Silverlight. That defendant was directly involved in the murder of Silverlight was established by the testimony of West and Golombieski regarding what defendant told them about the period after she and Silverlight arrived at her parents’ trailer. Accordingly, defendant

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<sup>5</sup> We disagree with defendant that the admission of text messages sent by Silverlight under MRE 804(b)(6) denied her the right of confrontation. The Confrontation Clause only applies to testimonial statements. *Crawford*, 541 US at 68. Here, where Silverlight’s text messages were sent to defendant, his ex-girlfriend, with the general purpose of setting a time to see her, the text messages were not testimonial. The text messages were not procured to establish or prove past events relevant to a criminal prosecution. *Davis*, 547 US at 822.

has failed to establish that any theoretical error in the admission of the text messages more probably than not affected the outcome of her trial. *Id.* at 496.

Finally, defendant argues that the trial court erred in excluding the proposed expert testimony of Dr. Ravinder Mediratta regarding post-traumatic stress disorder. Defendant had likened this testimony to expert testimony regarding battered-woman syndrome. We review a trial court's decision to exclude expert testimony for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

Expert testimony is necessary when a witness's actions or responses are incomprehensible to the average person. *People v Christel*, 449 Mich 578, 592, 597; 537 NW2d 194 (1995). Thus, where a witness or a defendant is a battered woman, an expert may testify about the "generalities or characteristics" of battered-woman syndrome for the limited purpose of describing the "uniqueness of a specific behavior brought out at trial." *Id.* at 591 (internal citation and quotation marks omitted); *People v Daoust*, 228 Mich App 1, 10; 577 NW2d 179 (1998), overruled in part on other grounds by *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008). See also *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995), wherein the Michigan Supreme Court held that a child sexual-abuse expert may testify regarding the typical symptoms of child abuse for the limited purpose of explaining the victim's specific behavior that might be construed by the jury as inconsistent with that of a sexual-abuse victim.

Here, defendant claims that the proffered expert testimony was relevant to establish that her "emotional pain and trauma [were] genuine and substantial"<sup>6</sup> and to explain her response to Silverlight's death. She argues that the expert testimony would explain why she did not leave Terpstra, why she did not seek help, and why she did not report Silverlight's murder. At trial, defendant explained why she did not call the police after Terpstra drove away in Silverlight's car with Silverlight in the trunk and why she did not report the murder to two detectives when they interviewed her. Defendant testified that she was scared, she wanted to protect herself and Terpstra, and she did not want Terpstra, who was her fiancé and who had simply accepted her for who she was, to go back to prison. Defendant does not explain how her conduct was, in any way, a response to the alleged abuse she suffered by Silverlight. Moreover, she does not articulate how her conduct was incomprehensible to the average person such that expert testimony was needed to explain it. *Christel*, 449 Mich at 597. Defendant's behavior, as explained by her at trial, was comprehensible to the average person. An average person could understand why a person would choose not to provide information to the police that could send the person's fiancé to prison for life. Accordingly, defendant has not shown that she engaged in any unique and specific behavior that needed to be explained by expert testimony. The trial court did not abuse its discretion in excluding the expert testimony of Mediratta.

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<sup>6</sup> It appears, from her argument as a whole, that defendant is referring to the pain and trauma caused by her relationship with Silverlight.

Affirmed.

/s/ Patrick M. Meter  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey