

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD BISHOP THOMPSON,

Defendant-Appellant.

UNPUBLISHED

January 24, 2013

No. 305760

Wayne Circuit Court

LC No. 10-008679-FC

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant, Ronald Bishop Thompson, appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to consecutive sentences of life imprisonment without the possibility of parole for the first-degree-murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I. VICTIM'S IDENTIFICATION OF DEFENDANT

Defendant first claims that the trial court erred by admitting the victim's handwritten statement identifying defendant as the assailant under the dying-declaration exception to the hearsay rule, MRE 804(b)(2). We disagree. Defendant properly preserved this issue for appellate review by making a pretrial motion to suppress the victim's statement. See *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). We review "a trial court's admission of evidence under a hearsay exception to determine whether there has been an abuse of discretion." *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence," which is subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

"Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted." *Stamper*, 480 Mich at 3, citing MRE 801(c). Hearsay "is generally inadmissible unless it falls under one of the hearsay exceptions set forth in the Michigan Rules of Evidence." *Id.*, citing MRE 802. "One of these exceptions is MRE 804(b)(2), commonly known as the dying declaration exception, which provides that a statement by a declarant is admissible if the declarant is unavailable as a witness and the statement was made 'while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant

believed to be impending death.” *Id.* at 3-4, quoting MRE 804(b)(2). “If the surrounding circumstances clearly establish that the declarant was *in extremis* and believed that his death was impending, the court may admit statements concerning the cause or circumstances of the declarant’s impending death as substantive evidence under MRE 804(b)(2).” *Id.* at 4. “MRE 804(b)(2), by its explicit terms, imposes the requirement that the declarant be under the belief that his or her death was imminent,” *People v Orr*, 275 Mich App 587, 595; 739 NW2d 385 (2007), although “it is not necessary for the declarant to have actually stated that he knew he was dying in order for the statement to be admissible as a dying declaration,” *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988), superseded on other grounds as recognized in *Orr*, 275 Mich App at 594 n 13. Instead, the surrounding circumstances, including “the apparent fatal quality of the wound,” can establish that a declarant believed his death to be imminent. *People v Schinzel*, 86 Mich App 337, 343; 272 NW2d 648 (1978), rev’d in part on other grounds 406 Mich 888 (1979), citing McCormick, Evidence (2d ed), § 282, pp 680-681.

At issue in this appeal is whether the victim believed his death to be imminent when he made the statement identifying defendant as the assailant. After reviewing the record, we find that the trial court could reasonably infer from the circumstances surrounding the making of the statement that the victim clearly believed his death was imminent. See *id.* The “apparent fatal quality” of the victim’s gunshot wound is evident given its nature and location in the middle of his throat. *Id.* This is especially so in light of the victim’s progressively worsening condition over the duration of the 911 call, as evidenced by his increased difficulty speaking and breathing, and also his heightened desperation for assistance, as indicated by the increased frequency of his pleas for help, his apparent concern if and when help would arrive, and the 911 operator’s comments clearly attempting to calm him down.¹ Testimony indicated that, by the time responding police officers arrived at the scene, the victim was physically distressed, he was no longer able to verbally communicate, his labored breathing had become more pronounced, and he was “hysterical” and “panicking.” Testimony also indicated that the victim’s condition was life-threatening and that efforts were made at the hospital to “save his life.”

From these circumstances surrounding the statement, the court could reasonably infer that the victim feared for his life and believed his death was imminent when he identified defendant as the assailant, despite his apparent mobility and consciousness and the lack of “gushing” blood from his throat. See MRE 804(b)(2); *Stamper*, 480 Mich at 3-4. Additionally, although there was no evidence indicating that the victim was actually informed of his critical condition or that he made any specific statements signifying his belief that his death was imminent, “it is not necessary for the declarant to have actually stated that he knew he was dying in order for the

¹ Testimony by a medical examiner who listened to the 911 call indicated that in the beginning of the call the victim could not speak a sentence, his words were in “short bursts,” he had to pause to force more air through, and his breathing was labored; after four minutes, the victim’s labored breathing and bursts were more pronounced; and after nine minutes, as the victim became weaker, it became “a lot more difficult” for him to speak and he had “trouble” with labored breathing. The court in considering defendant’s motion to suppress the statement also reviewed the 911 tapes and found it “very clear” that the victim found it “very difficult” to breathe.

statement to be admissible as a dying declaration.” *Siler*, 171 Mich App at 251. Further, the victim’s failure to identify defendant as the assailant during the 911 call does not necessarily indicate a belief that his death was not imminent. To the contrary, it was also reasonable to infer from the victim’s numerous, continual pleas for help during the 911 call that he was solely focused on obtaining assistance because he feared for his life.² Accordingly, we find no error in the trial court’s ruling that the victim’s handwritten statement identifying defendant as the assailant was admissible under MRE 804(b)(2) as a dying declaration and no abuse of discretion in the court’s admission of the statement as substantive evidence.

II. SCOPE OF EXPERT TESTIMONY

Defendant next claims that expert testimony by Dr. Somerset, a forensic pathologist, regarding the victim’s labored breathing during the 911 calls exceeded his area of expertise in violation of MRE 702 and MRE 703. We disagree. Defendant failed to preserve his claim challenging Dr. Somerset’s testimony for appellate review by objecting to the challenged testimony. See *Unger*, 278 Mich App at 216, 247. We review unpreserved issues for plain error affecting a defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Under MRE 702, “expert testimony must be limited to opinions falling within the scope of the witness’s knowledge, skill, experience, training, or education.” *Unger*, 278 Mich App at 251, citing MRE 702. “Consequently, an expert may not opine on matters outside his or her area of expertise.” *Id.*

We fail to find any plain error in allowing the admission of Dr. Somerset’s expert testimony into evidence. See *Carines*, 460 Mich at 763-764. The trial court qualified Dr. Somerset as a forensic pathologist; thus, he could properly offer an opinion on the cause and manner of the victim’s death. See *Unger*, 278 Mich App at 251-252. During his testimony at issue, Dr. Somerset explained how the gunshot wound to the victim’s throat physically impeded his ability to breathe and speak. This testimony concerned the victim’s wounds and suffering, matters within the expertise of a forensic pathologist. *Id.* at 252. The effect of the gunshot wound on the victim’s ability to breathe was also related to the cause of death, i.e., “respiratory distress syndrome,” which was within a forensic pathologist’s area of expertise. *Id.* at 251-252. Regardless, in light of the strong evidence establishing defendant’s guilt, we cannot say that the admission of Dr. Somerset’s testimony concerning the effect of the gunshot wound on the victim’s ability to breathe was outcome determinative. See *Carines*, 460 Mich at 763-764.

² Defendant also asserts that, on the next day at the hospital, the victim wrote “10 days” to indicate how long he would be on the ventilator, which, according to defendant, supports a finding that he did not believe his death was imminent. However, this fact was not in evidence, and thus, cannot be considered on appeal. See *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000) (explaining that this Court does not consider matters outside of the record on appeal). Regardless, the pertinent issue is whether the circumstances indicate that the victim believed that his death was imminent at the time he made the statement, not a day later.

We disagree with defendant's contention that, without the victim's medical records in evidence, there were no facts to form the basis of Dr. Somerset's opinion that the blood from the wound aspirated into the victim's lungs causing him to experience difficulty breathing. Defendant correctly asserts that MRE 703 requires that the "facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." Here, the evidence contained actual facts to establish that the victim was, in fact, bleeding from the gunshot wound to his throat. The officer who responded to the 911 call testified that every time the victim breathed or attempted to speak blood would "dribble out" of the wound, and the victim's girlfriend detailed the spots of blood throughout the victim's home. In accordance with MRE 703, from these facts Dr. Somerset could opine, in light of his general training and experience as a medical doctor and experience with injuries to the throat, that the victim's impeded breathing was caused by blood aspirating in his lungs. See *People v Yost*, 278 Mich App 341, 395; 749 NW2d 753 (2008).

We likewise find no merit to defendant's claim that defense counsel was ineffective for failing to object to Dr. Somerset's testimony. Because Dr. Somerset's expert testimony concerning the victim's wound was properly allowed under MRE 702, any objection by defense counsel to its admission would have been futile; therefore, defense counsel could not have been ineffective on that basis. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Moreover, in light of the strong evidence establishing defendant's guilt, defendant failed to establish a reasonable probability that the jury would not have convicted him if the challenged testimony had been excluded. See *Unger*, 278 Mich App at 242. Accordingly, defendant has not established his claim of ineffective assistance of counsel.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next claims that the evidence was insufficient to support his conviction of first-degree premeditated murder. We disagree. In evaluating a challenge to the sufficiency of the evidence, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Ortiz*, 249 Mich App 297, 300; 642 NW2d 417 (2001). "Circumstantial evidence and reasonable inferences arising [from the evidence] may constitute satisfactory proof of the elements of the offense." *Unger*, 278 Mich App at 223. "All conflicts with regard to the evidence are resolved in favor of the prosecution." *Ortiz*, 249 Mich App at 300. This Court "will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *Id.* at 300-301.

We conclude that the evidence in this case, viewed in the light most favorable to the prosecution, was sufficient to support the jury's determination that the prosecution proved the elements of first-degree premeditated murder beyond a reasonable doubt. See *id.* at 300. "In order to convict defendant of first-degree, premeditated murder, the prosecution was required to prove that defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *Id.* at 301; see also MCL 750.316(1)(a). "Premeditation is an essential element of first-degree, premeditated murder." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

First, there was sufficient evidence from which the jury could reasonably infer that the killing was intentional, including testimony regarding the life-threatening nature and location of the wound, testimony regarding the nonverbal gestures that the victim made to the responding police officers indicating that he opened the door and that the assailant pointed a gun at his throat and shot him, and the medical examiner's characterization of the manner of death as homicide. There was also sufficient evidence linking defendant directly to the shooting from which the jury could reasonably conclude that defendant was responsible for the homicide beyond a reasonable doubt. See *Ortiz*, 249 Mich App at 302. More specifically, the victim's handwritten statement identifying defendant as the assailant, properly admitted as a dying declaration, demonstrated that defendant committed the homicide. Furthermore, additional evidence corroborated the identification evidence. Specifically, a forensic cellular-telephone analysis led to the reasonable inference that defendant called the victim minutes before the shooting, went to his home and shot him, and then fled the crime scene, which supports an inference of "consciousness of guilt." See *Unger*, 278 Mich App at 226. Further, defendant's noticeable absence during the victim's two-week hospital stay and his visitation and funeral services in light of the overwhelming testimony about the extremely close relationship between defendant and the victim leads to the reasonable inference that defendant was avoiding the hospital and funeral out of consciousness of guilt.

We also conclude that the evidence, viewed in the light most favorable to the prosecution, supports a reasonable inference that defendant premeditated and deliberated to kill the victim. See *Plummer*, 229 Mich App at 299; *Ortiz*, 249 Mich App at 301. To establish premeditation, "sufficient time must have elapsed to allow the defendant to take a 'second look.'" *Plummer*, 229 Mich App at 300. "The elements of premeditation and deliberation may be inferred from circumstances surrounding the killing." *Ortiz*, 249 Mich App at 301, quoting *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998); see also *Plummer*, 229 Mich App at 301. Pertinent factors in determining whether premeditation has been established include the following: "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *Plummer*, 229 Mich App at 300-301.

In this case, testimony indicated that, merely two weeks before the shooting, defendant accused his wife of sleeping with the victim, which provided a clear motive for defendant to kill the victim. "Although motive is not an essential element of the crime, evidence of motive in a prosecution for murder is always relevant," *Unger*, 278 Mich App at 223, and supports an inference of premeditation and deliberation, *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988); *People v Waters*, 118 Mich App 176, 186-187; 324 NW2d 564 (1982). Further, viewing the cellular telephone records in the light most favorable to the prosecution, the jury could reasonably infer that defendant called the victim in advance in an attempt to determine if he was home and then proceeded to go to his home with a deadly weapon to kill him, which reasonably points to the existence of a premeditated plan. See *Youngblood*, 165 Mich App at 387 (premeditation and deliberation may be inferred from the circumstances surrounding the killing). There was sufficient time between the time defendant called the victim and the time he arrived at the victim's home for defendant to take a "second look." *Plummer*, 229 Mich App at 300. The victim's hand gestures to the responding officers, indicating that when he answered the door the assailant pointed a gun at his throat and shot him, and the lack of any forced entry or "sudden affray" in the victim's home, to indicate that the shooting occurred suddenly or was

impulsive, support an inference that defendant acted with premeditation, especially in light of the existence of a motive to kill the victim. *People v Tilley*, 405 Mich 38, 44-45; 273 NW2d 471 (1979); see also *People v Morrin*, 31 Mich App 301, 331; 187 NW2d 434 (1971).

Accordingly, we conclude that the evidence at trial, when viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to reasonably conclude beyond a reasonable doubt that defendant committed first-degree murder.

To the extent that defendant argues on appeal that the jury's verdict was against the great weight of the evidence, we disagree. There is nothing in the record indicating that defendant ever moved for a new trial as required to preserve a claim that the verdict was against the great weight of the evidence. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Accordingly, our review is limited to plain error affecting his substantial rights. *Id.* For the same reasons that we rejected defendant's claim challenging the sufficiency of the evidence, we conclude that defendant's convictions were not against the great weight of the evidence. We cannot say that the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. See *id.* at 218-219. Defendant's arguments merely concern the weight or credibility of the evidence, which are properly within the province of the jury. See *Unger*, 278 Mich App at 232; see also *Ortiz*, 249 Mich App at 300-301. Defendant has, therefore, failed to demonstrate plain error affecting his substantial rights. See *Musser*, 259 Mich App at 218.

Defendant finally claims that the evidence presented at the preliminary examination was insufficient to support the decision to bind him over on the charge of first-degree murder. We reject this argument. This Court has found that "the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless." *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). Because we conclude that the evidence presented at trial was sufficient to support defendant's jury conviction of first-degree premeditated murder, appellate relief is not warranted on the basis that the evidence at the preliminary examination was insufficient to bind him over for trial. Regardless, we find that the evidence presented at the preliminary examination was sufficient to create probable cause to believe that defendant committed first-degree murder, i.e., that he intentionally killed the victim and that his act was premeditated and deliberated. *People v Harlan*, 258 Mich App 137, 145; 669 NW2d 872 (2003); *Ortiz*, 249 Mich App at 301.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering