

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL LOGAN,

Defendant-Appellant.

UNPUBLISHED

August 7, 2012

No. 303269

Macomb Circuit Court

LC No. 2010-002981-FC

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a); possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to concurrent terms of life in prison for the murder conviction, and 38-60 months in prison for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony firearm conviction. We affirm.

Defendant and the victim had a son in common and shared custody of him, but were no longer in a dating relationship. At approximately 2:00 p.m. on April 11, 2010, the victim drove to defendant's house in order to pick up their son. Defendant was sitting on the front porch with a loaded gun in his pocket when the victim arrived. The victim parked her car, and exited, speaking to defendant from a distance. After a short period of time, defendant's mother exited the house, with the couple's son in her arms, intending to bring the child to the victim. Defendant pushed past his mother and walked toward the victim. As he approached her, defendant drew his gun and shot the victim four times. The victim was able to run to a neighbor's house, and defendant fled the scene. The victim died in the hospital several days later. At trial, defendant acknowledged that he shot and killed the victim, but claimed that he blacked out and did not have the requisite intent for first-degree murder. The defense's sole argument was that defendant lacked premeditation and that the jury should convict defendant of the alternate lesser offense of voluntary manslaughter or second-degree murder.

Defendant first argues on appeal that the admission of the victim's written statements from her previous domestic violence complaints and petitions for personal protection orders violated his right to confrontation and warrants a reversal. We find that the admission of the

victim's written statements did violate defendant's right to confrontation, but that this error was harmless beyond a reasonable doubt and, thus, reversal is unwarranted.

We review constitutional issues de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009). "If a case involves nonstructural, preserved constitutional error, an appellate court should reverse unless the prosecution can show that the error was harmless beyond a reasonable doubt." *People v Plumaj*, 284 Mich App 645, 650; 773 NW2d 763 (2009) (quotation omitted). Under this standard, we "conduct a thorough examination of the record in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) (internal quotation marks and citation omitted).

"The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). However, two forms of testimonial statements – dying declarations and statements from a witness whose unavailability was procured by the defendant (also known as the forfeiture by wrongdoing doctrine) – are admissible even if the defendant is denied the opportunity to confront the witness. *Giles v California*, 554 US 353, 358; 128 S Ct 2678; 171 L Ed 2d 488 (2008).

In this case, the trial court admitted the victim's written statements, which were clearly "testimonial" and on which defendant did not have a prior opportunity to cross-examine the victim. *Walker (On Remand)*, 273 Mich App at 60-61. However, the prosecution argued that the victim's written statements were nonetheless admissible under the forfeiture by wrongdoing doctrine. Although a defendant may forfeit his right to confrontation when he engages in conduct that causes the declarant to be unavailable, the United States Supreme Court has made it clear that the forfeiture by wrongdoing doctrine requires that defendant's conduct be intended or "designed to prevent the witness from testifying." *Giles*, 554 US at 360-361. The prosecution did not argue and the record fully supports that defendant did not murder the victim for the purpose of preventing her from testifying. Under *Giles*, defendant did not forfeit his right to confrontation and we conclude the admission of the victim's written statements violated his Confrontation Clause rights. *Id.* Nevertheless, the error, in admitting the evidence does not warrant reversal if "it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *Shepherd*, 472 Mich at 348 (quotation and citation omitted).

To secure a conviction for first degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim. *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). The prosecution must also prove that the killing was premeditated and deliberate. *Id.* at 229.

Premeditation may be established through evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide. Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation. However, the time required need only be long enough to allow the defendant to take a second look. Circumstantial

evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of premeditation and deliberation. [*Id.* at 229 (internal citations and quotations omitted)].

Here, defendant and his mother, Brenda Logan, both testified that he had anger problems and had physically abused the victim in the past and defendant acknowledged sending the victim text messages just four days before the murder in which he told her that he was going to kill her and go to jail for murder. Officer Thomas Pfeifer also testified that defendant admitted that he threatened to kill the victim approximately one month before the murder. Thus, to the extent that the victim's written statements were evidence of defendant's premeditation, they were cumulative to other evidence properly admitted and their admission was harmless beyond a reasonable doubt. *People v Matuszak*, 263 Mich App 42, 52; 687 NW2d 342 (2004) (finding that because the error "was cumulative of the admissible evidence . . . , to the extent this rose to the level of constitutional error, it was harmless beyond a reasonable doubt").

Moreover, it was uncontroverted that defendant was on his front porch, armed with a loaded gun, when the victim arrived and that he followed her to her car and shot her multiple times from relatively close range. Defendant also fled after the murder and was arrested in Lansing. Further, defendant's testimony that he ingested ecstasy earlier that day and the victim's inflammatory statements caused him to "black out," was contradicted by defendant's statement to the investigating detective that he had not consumed any drugs on the day in question, and Brenda's testimony that defendant was unusually calm at the time of the shooting. Considering the entire record, it is clear beyond a reasonable doubt that the jury would have found premeditation absent the admission of the victim's written statements, most of which were from 2008. Thus, defendant is not entitled to relief. *Shepherd*, 472 Mich at 348; see also *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000) ("Premeditation . . . may be inferred from the circumstances surrounding the killing.").

Defendant next argues that the admission of five text messages exchanged between the victim and her new boyfriend hours before the shooting violated the rule against hearsay and defendant's right to confrontation. However, there were no objections to text messages and defendant's trial counsel affirmatively stated that defendant had no objection to the admission of the challenged text messages. Defendant has thus waived appellate review of this issue. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v McDonald*, 293 Mich App 292, 295; 811 NW2d 507 (2011), (holding that the defendant waived his claim that the challenged evidence "constituted inadmissible hearsay and was a violation of his right to confront the witnesses against him" where defendant "affirmatively stated that he had no objection to the admission of the" challenged evidence).

Defendant next contends that the prosecutor engaged in five separate acts of misconduct that warrant reversal. We disagree.

Defendant did not object to any of the alleged instances of misconduct, such that his claims of misconduct are unpreserved. "A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Parker*, 288 Mich App 500, 509; 795

NW2d 596 (2010). Under the plain error rule, defendant must show that an obvious error occurred and “that the error affected the outcome of the lower court proceedings.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.” *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009).

We find that three of the alleged acts did not constitute prosecutorial misconduct. First, the prosecutor did not commit misconduct by eliciting testimony from Brenda that defendant was verbally abusive toward her and had an ongoing anger problem. Although “this Court is not hesitant to reverse where potentially inflammatory references are intentionally injected, with no apparent justification except to arouse prejudice[.]” *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995), a prosecutor’s admission of evidence in good faith does not constitute misconduct. *People v Brown*, 294 Mich 377, 383; 811 NW2d 531 (2011) (citation omitted). Moreover, “[p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial” and “are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case[.]” *Unger*, 278 Mich App at 236 (citations omitted).

Here, the prosecution’s theory was that defendant intentionally killed the victim out of anger over losing her. As such, Brenda’s testimony regarding defendant’s verbal abuse of her and ongoing anger management problem was relevant and defendant has not shown that the prosecutor had a bad faith motive in introducing such testimony. *Brown*, 294 Mich App at 383. Moreover, there was ample other evidence that defendant had an ongoing anger problem and a history of abuse, and the record does not support that Brenda’s testimony “[led] to a decision based on prejudice rather than” defendant’s guilt, *Bahoda*, 448 Mich at 266.

Second, we do not find that the prosecutor committed misconduct by eliciting proper testimony in good faith from Officer Pfeifer regarding his observations following defendant’s March 10, 2010, arrest for felonious assault against defendant. *Brown*, 294 Mich App at 383. Officer Pfeifer testified that he did not believe that defendant was being forthright with his account of the alleged assault and that defendant’s behavior and statements raised “red flags” regarding the victim’s safety. He further testified that he noted in his police report that they should pay special attention to defendant’s girlfriend. There was nothing improper about Officer Pfeifer’s testimony regarding his firsthand observations of defendant and his opinions rationally based on his perceptions of defendant, and the prosecutor did not commit misconduct by eliciting this testimony. See *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988), mod 433 Mich 862 (1989); MRE 701.

Third, we do not find that the prosecutor committed misconduct by allegedly vouching for the credibility of Brenda and Officer Pfeifer during her closing argument. “The prosecutor cannot vouch for the credibility of a witness or suggest that she has some special knowledge concerning a witness’s truthfulness.” *People v Laidler*, 291 Mich App 199, 201; 804 NW2d 866 (2010), rev’d on other grounds ___ Mich ___ (2012). “However, a prosecutor may comment on his or her own witnesses’ credibility, especially when credibility is at issue. The prosecutor is

free to argue from the evidence and its reasonable inferences in support of a witness's credibility." *People v Bennett*, 290 Mich App 465, 478; 802 NW2d 627 (2010).

Here, although the prosecutor stated that she thought Brenda was "very honest" and "extremely credible," the comments were based on the evidence and reasonable inferences and the prosecutor also pointed out inconsistencies in Brenda's testimony that undermined the credibility of certain portions of Brenda's testimony. With respect to Officer Pfeifer, in response to defendant's testimony directly contradicting that of Pfeifer, the prosecutor emphasized that Pfeifer had no motive to lie. Thus, the prosecutor properly argued "from the evidence and its reasonable inferences" when she commented on the credibility of Officer Pfeifer, *id.*, and her statements did not suggest that she had "some special knowledge concerning a witness's truthfulness[.]" *Laidler*, 291 Mich App at 201.

However, we do find that the prosecutor committed misconduct where she appealed to the jury to sympathize with the victim. During closing argument, the prosecutor stated, "[a]s a mother, my biggest fear . . . is that I wouldn't live long enough for them to remember. I wanted to make memories and get to that point. So that if something happened to me they would remember me. He has robbed his son of remembering his mother." These statements were clearly intended to invoke the jury's sympathy. "A prosecutor may not appeal to the jury to sympathize with the victim." *Unger*, 278 Mich App at 237. The prosecutor also engaged in misconduct by eliciting testimony from defendant that Brenda, Officer Pfeifer, and the victim (through her previous statements) lied in their statements. "A prosecutor may not ask a defendant to comment on the credibility of prosecution witnesses because a defendant's opinion of their credibility is not probative." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Nevertheless, reversal is not proper on the basis of prosecutorial misconduct unless defendant shows that the prosecutor's misconduct "affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763; see also *Parker*, 288 Mich App at 509. Given the magnitude of the evidence against defendant, we cannot conclude that the misconduct affected the outcome of the trial.

Moreover, defendant did not request a curative instruction, although such an instruction could have alleviated any prejudicial effect. Reversal is unwarranted "if a curative instruction could have alleviated any prejudicial effect, given that jurors are presumed to follow their instructions." *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010). Additionally, the trial court instructed the jury that arguments and statements by counsel were not evidence and as to its role as the fact-finder. Such instructions dispelled any prejudicial effect stemming from the prosecutor's misconduct. *Callon*, 256 Mich App at 330-331. Accordingly, defendant has not shown that the prosecutor's conduct affected his substantial rights as under the plain error rule, *Parker*, 288 Mich App at 509, particularly in light of the substantial evidence of defendant's guilt.

Defendant next asserts that his trial counsel denied him his right to the effective assistance of counsel. We disagree.

Because defendant failed to move for a new trial or request a *Ginther*¹ hearing below, our review of this issue is limited to mistakes apparent on the appellate record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94, 100 (2002). “[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). “To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Defendant bases his ineffective assistance claims on his prior allegations of error. Specifically, defendant asserts that counsel was ineffective in failing to object to the admission of the victim’s written statements, the text messages between the victim and her new boyfriend, and to the alleged instances of prosecutorial misconduct. Having found that the admission of the victim’s written statements was harmless, counsel was not ineffective for failing to object to that issue.

On the other hand, we find that trial “counsel’s performance fell below an objective standard of reasonableness” where he failed to object to the admission of the five challenged text messages, which constituted inadmissible hearsay, and thereby waived appellate review of this error. *Id.* The text messages were hearsay to which no exception applied. MRE 803. However, we find that defendant cannot show “that there is a reasonable probability that, but for counsel’s” failure to object to the challenged text messages, the jury would not have found that defendant acted with premeditation. *Id.* On appeal, defendant only challenges the admission of five text messages, the content of which indicated that defendant sought to cause “conflict” or “a problem” for the victim because he was upset about losing her. This evidence, while prejudicial to an extent, was cumulative to other evidence properly admitted at trial. Defendant testified that the victim was his “first love” and he was devastated over losing her. Defendant also testified that his relationship with the victim was tumultuous and she often made him very angry. Thus, in light of the cumulative evidence and the ample evidence of defendant’s premeditation, defendant cannot show a reasonable probability that, but for the erroneous admission of the challenged text messages, the jury would not have found that he acted with premeditation. *Id.*

We also find that trial counsel’s failure to object to the alleged instances of prosecutorial misconduct did not deny defendant his right to the effective assistance of counsel. Where defendant’s claim of ineffective assistance of counsel is premised on defense counsel’s failure to object to prosecutorial misconduct, defendant must show the existence of prosecutorial misconduct. Here, defendant was able to show two separate acts of prosecutorial misconduct. With respect to defendant’s two meritorious claims of prosecutorial misconduct, we find that counsel’s conduct in failing to object to the prosecutor’s repeated questions calling on defendant to describe other witnesses as liars fell below an objective standard of reasonableness. There was no rationale for not objecting to this line of questioning.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

With respect to the prosecutor's appeal to sympathy in closing argument, defendant must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Michigan courts have held that "there are times when it is better not to object and draw attention to an improper comment[.]" *Bahoda*, 448 Mich at 287 n 54, and that "declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy[.]" *Unger*, 278 Mich App at 242. Where, as here, the comment was fleeting, and objecting may have served to draw more unwanted attention to the comment, counsel's failure to object was not objectively unreasonable. Regardless, defendant cannot meet his burden of showing that but for counsel's performance, there is a reasonable probability that the result of the proceeding would be different. *Yost*, 278 Mich App at 387. The trial court's jury instructions alleviated any prejudicial effect stemming from the misconduct, *Callon*, 256 Mich App at 330-331, and the evidence against defendant was otherwise substantial.

Defendant's final argument is that the cumulative effect of the errors below denied him his right to a fair trial. We disagree.

"We review this issue to determine if the combination of alleged errors denied defendant a fair trial." *Dobek*, 274 Mich App at 106. "[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). "[C]umulative error,' properly understood, actually refers to cumulative unfair *prejudice*[.] *Id.* at 592 n 12 (emphasis in original). Moreover, "[o]nly the unfair prejudice of several *actual* errors can be aggregated . . ." *Id.* (emphasis in original).

As discussed above, we find that that the trial court erred by admitting the victim's written statements in violation of defendant's Confrontation Clause rights, the prosecutor committed two separate acts of misconduct, and trial counsel erred by not objecting to the admission of the challenged text messages. With respect to the instances of prosecutorial misconduct, we find that no prejudice resulted from these errors for the reasons stated above. However, the trial court's improper admission of the victim's written statements prejudiced defendant by introducing evidence that he had previously physically abused and threatened the victim; and trial counsel's failure to object to the admission of the challenged text messages prejudiced defendant by not suppressing evidence that defendant sought to cause problems for the victim because he was upset about losing her. As discussed above, however, the victim's written statements and the challenged text messages were cumulative to other properly admitted evidence. Moreover, absent the improper admission of the victim's written statements and challenged text messages, the overwhelming evidence still supported the jury's finding that defendant acted with premeditation when he shot and killed the victim. See *Coy*, 243 Mich App at 315. Consequently, defendant has not shown that the cumulative prejudicial effect of the actual errors below denied him a fair trial. *LeBlanc*, 465 Mich at 592 n 12; *Dobek*, 274 Mich App at 106.

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Kelly