STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2010
v	No. 281972 Wayne Circuit Court
HOUSAM J. BAYDOUN, Defendant-Appellant.	LC No. 07-003296-FC

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), and three counts of assault with intent to commit murder, MCL 750.83. He was sentenced to a single term of life imprisonment for first-degree murder, and concurrent prison terms of 300 to 600 months each for the assault convictions. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Peter Issa. The prosecution's theory at trial was that defendant lured his intended victim, Mustapha Dallal, and three other men, Issa, Scotty Khemoro, and Rony Khemoro, to a gas station in Detroit under the pretext that he would sell them Vicodin. Instead, he sent a hired gunman, Dedrick McCauley, to conduct the transaction, rob the buyers, and kill Dallal. According to testimony at trial, McCauley met with the buyers at the gas station, produced a gun, and began shooting. Issa was killed, Dallal and Scotty were wounded, and Rony was not harmed.

I. Sufficiency of the Evidence

Defendant first challenges his felony-murder conviction, arguing that there was insufficient evidence to show that Issa was killed during the perpetration of a predicate felony because the evidence indicated that an actual robbery was never committed. Defendant does not specifically challenge the sufficiency of the evidence in support of his premeditated murder conviction. Instead, defendant claims that the first degree felony firearm charge was unsupported by the evidence and that its submission to the jury, along with the first degree premeditated murder charge, caused him prejudice because the dual charges encouraged the jury to reach a compromise verdict. We find no merit to these claims.

A challenge to the sufficiency of the evidence in a criminal case considers the evidence in a light most favorable to the prosecution to determine whether it would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002.) Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *Nowack*, 462 Mich at 400. Any conflicts in the evidence are to be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004).

A conviction of first-degree felony murder requires proof that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of a predicate felony enumerated in MCL 750.316(1)(b). *People v Bulls*, 262 Mich App 618, 624-625; 687 NW2d 159 (2004). The malice necessary for felony murder can be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *Id.* at 626.

In this case, the prosecutor argued that defendant was guilty of felony murder under an aiding and abetting theory. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). Aiding and abetting describes all forms of assistance rendered to the perpetrator, including any words or deeds that may support, encourage, or incite the commission of a crime. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988). "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

In this case, the predicate felony for the felony-murder charge was robbery. Contrary to what defendant argues, the fact that the evidence did not establish a completed robbery did not preclude a conviction of felony murder. MCL 750.316(1)(b) specifically provides that a person is guilty of felony murder if a murder is committed in the perpetration of, *or attempt to perpetrate* . . . a . . . robbery[.]" Thus, it is sufficient to show that a robbery was attempted to establish the predicate felony for felony murder. *Bulls*, 262 Mich App at 624-625. "'The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant was armed with a weapon described in statute .'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted); MCL 750.529.

The evidence at trial showed that defendant agreed to meet with Dallal and three others for the purpose of selling them Vicodin, and that defendant arranged to meet the group at a Speedy gas station at an appointed time. According to a witness, Michael Jacobs, defendant conveyed to him that he had arranged a fake drug deal as a trap to have Dallal killed, as revenge for a prior robbery. Defendant told Jacobs that he hired a gunman to conduct the transaction in his place and to rob and kill Dallal. At the time and date of the planned transaction, McCauley

met the group at the Speedy gas station in defendant's place. After McCauley approached the men, he began shooting and fired several shots into the car that the men were occupying. Scotty was able to drive away. Telephone records revealed that shortly before the offense, numerous cell phone calls were placed between defendant's cell phone and a cell phone linked to McCauley. Viewed in a light most favorable to the prosecution, the evidence was sufficient to show that defendant assisted in the offense by arranging the transaction with Dallal and the others, and that, in accordance with defendant's intent and plan, McCauley attempted to rob Dallal and his associates and fired several gunshots at them, causing Issa's death. Thus, the evidence was sufficient to support defendant's felony-murder conviction.

Furthermore, there is no merit to defendant's argument that he was prejudiced by the submission of the separate first-degree murder charges to the jury. This case is distinguishable from *People v Olsson,* 56 Mich App 500; 224 NW2d 691 (1974), in which the jury was permitted to convict the defendant of either first-degree premeditated murder or first-degree felony-murder without being required to unanimously agree on which theory to apply. Unlike in *Olsson,* defendant here has not shown that there was insufficient evidence to support a conviction under one of these theories. See *People v Smielewski*, 235 Mich App 196, 205-206; 596 NW2d 636 (1999). Further, the two charges in this case were submitted as separate counts, and the jury was instructed that it was required to consider each count separately, and that its verdict for each count had to be unanimous. Accordingly, there was no error in permitting the jury to consider both first-degree premeditated murder and first-degree felony murder.

II. Failure to Preserve Video Evidence

Defendant argues that his due process rights were violated because Officer Shea failed to preserve a video recording from a surveillance camera at the Speedy gas station where the shooting took place. Because defendant did not raise this issue below or request any relief based on the absence of the video recording, this issue is not preserved. Unpreserved claims of constitutional error are reviewed for plain error affecting a defendant's substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

To establish a due process violation, defendant must show that missing evidence was exculpatory or that law enforcement personnel acted in bad faith in failing to preserve the evidence. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). Due process also requires that the prosecution disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the evidence. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). The failure to preserve evidence that may potentially exonerate a defendant does not constitute a denial of due process unless the police acted in bad faith. *Arizona v Youngblood,* 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). Similarly, an adverse inference instruction need not be given where the defendant has not shown that the prosecutor acted in bad faith in failing to produce evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

Here, the record does not establish either that the police failed to preserve evidence, or that the evidence in question was potentially exculpatory. Officer Shea testified that he did not obtain a copy of the video surveillance recording, and instead only watched it at the gas station, because the gas station's equipment did not permit the video to be downloaded. Defendant does

not claim that this explanation was false. Similarly, defendant does not claim that he was somehow prevented from independently investigating the equipment at the gas station, and there is nothing suggesting that the video would not have been available for viewing by defense counsel if he had visited the gas station. Furthermore, the available testimony indicates that the video would not have been useful. According to Officer Shea, the camera was trained only on the interior of the gas station, not the outside area where the shooting took place. Defendant did not challenge this information. On this record, there is no basis for finding that the police failed to preserve the evidence, that the evidence would have been exculpatory, or that the police acted in bad faith. Accordingly, defendant has not established a plain error affecting his substantial rights.

III. Motion for Mistrial

Defendant next argues that he was unfairly prejudiced by Officer Shea's testimony that he determined from McCauley's step-mother, Shaundra Reed, that a telephone number that appeared in defendant's and Dallal's cell phone records was the number for a cell phone used by McCauley, the identified shooter. He argues that the trial court should have granted his motion for a mistrial because Shea's testimony was inadmissible hearsay, and also violated his constitutional right of confrontation. We disagree.

A trial court's decision on a motion for mistrial is reviewed for abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo,* 214 Mich App 699, 704; 542 NW2d 921 (1995).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). The Confrontation Clause, US Const, Am VI, guarantees a criminal defendant the right to confront the witnesses against him. See also Const 1963, art 1, § 20. In *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that 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. A pretrial statement is testimonial if the declarant should have reasonably expected the statement to be used in a prosecutorial manner, and if the statement is made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at 51-52; *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005).

It is not apparent that Officer Shea's challenged testimony was based on hearsay. First, Officer Shea did not clearly testify regarding any out-of-court statement by Reed. The challenged testimony occurred in the context of the prosecutor asking Officer Shea why he had identified a given phone number with the identified shooter, McCauley. The following exchange occurred:

Q. And there's some highlighting on your copy; is that correct?

A. Yes.

Q. Is that something you did?

A. Yes, but I think that there is one number from Dedrick McCauley to Mustapha Dallal on that and I just highlighted it.

Q. Okay. And is that your writing on the side?

A. Yes, it says Dedrick.

Q: *How did you determine that was the shooter's phone number?*

A. From his step-mom.

Although Officer Shea stated that he determined the shooter's number from Reed (McCauley's step-mother), he did not indicate whether his conclusion was based on something Reed actually said, or whether it was based on him drawing the inference that the phone number was associated with McCauley because it belonged to a phone registered to Reed, McCauley's step-mother. Officer Shea had already testified that he determined that the phone number was for a phone registered to Reed. There was no clear reference to any out-of-court statement by Reed in Shea's challenged testimony.

Second, to the extent that officer Shea's testimony could be understood as implicitly referring to an out-of-court statement by Reed, the testimony was not offered for its truth. Rather, the purpose of the testimony was to explain why Officer Shea wrote McCauley's first name beside a number on Dallal's cell phone records. Accordingly, there was no out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c); *McLaughlin*, 258 Mich App at 651. In addition, because Shea did not reveal any testimonial statement by Reed, the Confrontation Clause is not implicated.

We also note that while defendant complains that the testimony improperly allowed the prosecutor to connect him with McCauley, this connection was not dependent on any statement by Reed. Officer Shea had already testified that he determined that the cell phone number appearing in defendant's records was for a cell phone registered to Reed. That was not hearsay information obtained from Reed. Evidence that a number on defendant's cell phone was linked to a cell phone registered to the step-mother of McCauley, the identified shooter, alone served to connect defendant to McCauley (by showing that the number was registered to a phone to which McCauley would have had access).

In view of these circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

IV. Prosecutor's Conduct

Defendant argues that the prosecutor's conduct denied him a fair trial. Because defendant did not object to the prosecutor's conduct at trial, our review of this issue is limited to plain error affecting defendant's substantial rights. *McLaughlin,* 258 Mich App at 645.

This Court reviews claims of prosecutorial misconduct case-by-case, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor's comments must be read as a whole and evaluated in light of their relationship to defense arguments and the evidence presented at trial. *Id.*

Defendant's first argues that the prosecutor improperly commented on possible disposition or punishment through the following remarks during closing argument:

> *Every single person involved in this case is going to be held accountable for their part. Everybody did wrong there is no doubt about it.*
>
> Mr. Dallal and Rony and Scotty and Peter shouldn't have been involved in a drug deal. *But we don't have the death penalty in Michigan* and we certainly don't have it for doing drugs. [Emphasis added.]

As defendant correctly observes, it is improper for a prosecutor to comment on a defendant's possible sentence or disposition. *People v Torres (On Rehearing)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Here, however, defendant improperly presents the prosecutor's remarks out of context, ignoring the portions surrounding the emphasized comments. Viewed in context, the prosecutor was arguing that the victims' illegal conduct did not excuse defendant's guilt. The prosecutor did not ask the jury to consider defendant's possible disposition or punishment. Thus, there was no plain error.

Defendant next argues that the prosecutor improperly injected ethnic prejudices by asking him whether he spoke Arabic. A prosecutor may not inject racial or ethnic remarks into a trial for the purpose of arousing the prejudices of the jurors. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). In this case, the prosecutor's questioning was relevant because a witness testified that he overheard a cell phone conversation in which the caller spoke with an Arabic accent. The challenged line of questioning occurred when the prosecutor attempted to establish a foundation for impeaching defendant's credibility with regard to telephone calls that he placed from the Wayne County Jail. Defendant initially denied speaking Arabic during the calls, but then conceded that he may have said a few Arabic words because his mother did not understand English. Defendant did not object to this brief questioning, but instead used it as an opportunity to argue that the prosecutor was "trying to throw on all of these grass roots out of all of these seeds and hopefully it will take root." Viewed in the context of the evidence and the issues raised at trial, the prosecutor did not inject the issue of defendant's ethnicity in an attempt to arouse prejudices, but merely explored the issue whether defendant spoke Arabic, which was a relevant issue at trial. Thus, there was no plain error.

Defendant next argues that the prosecutor improperly vouched for Scotty Khemoro's credibility. We disagree. The prosecutor acknowledged that the three surviving victims had not been entirely honest with the police early in the investigation. During her rebuttal argument, she stated:

> Absolutely these witnesses were not forthcoming at first. It's human nature to minimize and try to not to be forthcoming and take responsibility for what you've done.

> Some people eventually do, some people don't. I would suggest to you that the three of the witnesses who surveyed who were in that car they were different.
>
> Scotty's whose best friend was killed I would suggest to you was probably the most forthcoming and honest and took the most responsibility for what happened.
>
> And I would suggest to you that he's a very credible witness. And I hope that you will think back about what you heard when you listened to these witnesses.

A prosecutor may not vouch for a witness's credibility or suggest that the government has some special knowledge that a witness's testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor permissibly argued from the evidence that Scotty was the most credible of the witnesses, because he was the most forthcoming about his drug-dealing plans. Contrary to what defendant argues, the prosecutor did not state that all of Scotty's testimony was fully truthful and reliable, nor did she suggest that the jury should accept his testimony because she had some special knowledge that it was truthful. Accordingly, there was no misconduct.

Defendant lastly argues that the prosecutor denied him a fair trial when she stated that defendant knew that Scotty customarily carried large sums of cash. Defendant argues that there was no evidence to support this assertion. In her closing argument, the prosecutor stated:

> Mr. Baydoun lured those young men there knowing they would have money because he told them to bring money for a drug deal.
>
> I would assume that he also knew that Scotty always carried all his money with him. He knew he had money. Heck, he probably thought these guys could get their fee off them when he robbed them.

Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to their theory of the case. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Here, the prosecutor's statement that defendant knew that the prospective buyers would be carrying money was a reasonable inference from the evidence presented. To the extent that it was improper for the prosecutor to state that she assumed that defendant knew that Scotty always carried his money, her characterization of this statement as an assumption tempered any prejudicial effect. Furthermore, the trial court instructed the jury that the attorney's statements are not evidence. Under the circumstances, the trial court's instruction was sufficient to protect defendant's substantial rights.

For these reasons, the prosecutor's conduct did not deny defendant a fair trial.

V. Newly Discovered Evidence.

In a supplemental brief, defendant argues that McCauley's testimony at his own trial, which was held approximately four months after defendant's trial, is newly discovered evidence that entitles him to a new trial.[1] McCauley testified at his trial that he met defendant on the day before the shooting and defendant asked him to sell Vicodin for him. According to McCauley, when he met with Dallal and his associates, Rony pulled out a gun. McCauley claimed that he was able to remove the clip from the gun, but then heard a gunshot, after which he fired three shots in self-defense.

In *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), our Supreme Court stated:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [Internal quotations and citation omitted.]

McCauley's whereabouts were unknown at the time of defendant's trial. McCauley was later apprehended and his trial was held four months after defendant's trial. Consequently, his testimony is newly discovered evidence. McCauley's testimony was not cumulative of the evidence at defendant's trial because the Vicodin buyers denied displaying guns or acting as the initial aggressors to the shooting. There is no indication that defendant knew of McCauley's whereabouts; in any event, defendant could not have compelled McCauley to give self-incriminating testimony. Thus, the first three requirements of the test set forth in *Cress* are satisfied.

However, McCauley's testimony would not make a different result probable on retrial. McCauley's testimony contradicts material portions of defendant's testimony. In particular, defendant denied knowing McCauley and claimed that he never sent anyone to sell Vicodin in his place. Defendant also testified that he was never able to locate enough Vicodin to sell to Dallal and his associates, so he did not go to the gas station and did not send anyone in his place. In contradiction to defendant's testimony, McCauley testified that he and defendant met the day before the shooting to arrange the sale of Vicodin. Thus, McCauley's testimony actually lends credence to the prosecutor's theory of the case rather than making defendant's acquittal more probable on retrial.[2] Accordingly, defendant is not entitled to a new trial.

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[1] This Court denied defendant's motion to remand with respect to this issue, but permitted defendant to expand the record on appeal to include McCauley's testimony at his subsequent trial and granted defendant leave to file a supplemental brief raising issues with respect to McCauley's testimony. *People v Baydoun*, unpublished order of the Court of Appeals, entered June 2, 2008 (Docket No. 281972).

[2] We note that Courts in other jurisdictions have rejected defense motions for new trials where the motions were based on newly discovered testimony that contradicted the defendant's own

(continued…)

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot

(…continued)

trial testimony. See *Davila v State*, 147 SW3d 572, 578 (Tex App 2004), and *Newman v State*, 156 Md App 20; 845 A2d 71 (2003), rev'd on other grounds 384 Md 285 (2004).