STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2004
v	No. 246341 Wayne Circuit Court
CARLOS VALLEJO, Defendant-Appellant.	LC No. 01-008285-01

Before: Wilder, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316(1)(a), two counts of assault with intent to commit murder, MCL 750.83, possession of a firearm by a person convicted of a felony, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of life in prison for the first-degree murder conviction, eighteen to eighty-five years in prison for each assault with intent to murder conviction, and three to five years in prison for the felon in possession of a firearm conviction, to be served consecutively to a term of five years in prison for the felony-firearm conviction. He was given 415 days credit for the felony firearm conviction. We affirm.

Defendant first argues that the trial court denied him his right to confrontation by admitting hearsay testimony from three witnesses at trial. We disagree.

Defendant challenged the statements at trial, arguing that they were hearsay and irrelevant; however, he did not argue that their admission violated his right to confrontation. Thus, defendant has preserved the hearsay issue, MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), but not the constitutional issue, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A trial court's determination of evidentiary issues is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998), citing *People v Adair*, 452 Mich 473, 482; 550 NW2d 505 (1996). Unpreserved claims of constitutional error are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The error must result in the conviction of an innocent defendant or seriously affect "'the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

At trial, one witness testified that as he was exiting the bar on the night in question, he encountered three men, including defendant, entering the bar and that one of the men stated to him either "the problem ain't with you" or "we ain't got no problem with you." The prosecution sought to introduce this evidence as proof that the men were acting in concert. Defendant challenged the admission of the statement, arguing that it was inadmissible hearsay. The trial court admitted the evidence finding that it was relevant because it showed the antecedent events leading up to the shooting, knowledge on behalf of defendant, and premeditation and deliberation. The trial court further found that the evidence was not hearsay because it was not offered to prove the truth of the matter asserted, but rather to prove that the men did have a problem with someone else inside the bar. Two other witnesses testified that defendant and another man walked up to victim, and the man with defendant stated, "you're the one we're looking for." Defendant's hearsay objection was overruled.

Generally, hearsay is not admissible. MRE 802. 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). Here, the evidence sought to be admitted involved out-of-court statements, but was not offered to prove the truth of the matter asserted. Rather, the statements were offered to show that defendant acted in concert with the other men and that their actions were premeditated and deliberate. Because the statements were not offered to prove the truth of the matter asserted, they were not hearsay. *Id.*[1]

Moreover, evidence is generally admissible if it is relevant. MRE 402. Relevance involves two elements, materiality and probative value. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Materiality refers to whether the fact was truly at issue. *Id.* Here, defendant was charged with premeditated first-degree murder, MCL 750.316(1)(a); the prosecutor was required to show that the killing was willful, deliberate, and premeditated, *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002); and defendant's defense was that although he participated in assaulting the victim, he walked away before the victim was shot, and he denied any intent to shoot and kill the victim. Therefore, defendant's state of mind was truly at issue. Because the statements made defendant's knowledge, deliberation, and premeditation more probable, the statements were probative. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Thus, the statements were relevant, and the trial court did not abuse its discretion by admitting them. Because the statements were properly admitted, defendant cannot demonstrate that plain error occurred. *Carines, supra* at 763-764.

[1] We reject defendant's argument that the statements were admitted in violation of the United States Supreme Court's decision in *Crawford v Washington*, ___ US ___; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Court clearly indicated that its decision only involved testimonial evidence. *Id.* at ___, 1374. Although the Supreme Court did not comprehensively define testimonial evidence, it gave several examples of what it would consider testimony, *id.* at ___, 1374, none of which apply to the statements made in the instant case. Moreover, it noted that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at ___, 1364. Clearly, the statements here fall in the latter category.

Defendant's second issue on appeal is that he was deprived of his right to due process when the trial court refused his request to instruct the jury pursuant to CJI 2d 8.3. We disagree.

"Claims of instructional error are reviewed de novo on appeal." *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). We review jury instructions in their entirety to determine whether they "'fairly presented the issues to be tried and sufficiently protected the defendant's rights.'" *People v Green*, 260 Mich App 392, 414; 677 NW2d 363 (2004), quoting *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Defendant's theory at trial was that the common plan was to assault, rather than to kill the victim, and that he could only be convicted of murder if the killing was within the scope of the common plan. Thus, he requested CJI 2d 8.3, an aiding and abetting instruction dealing with separate crimes within the scope of the common unlawful enterprise.

"Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories *if the evidence supports them*." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000) (emphasis added). The trial court refused to give the instruction, reasoning that it was not supported by the evidence presented at trial. Here, there was no evidence to support defendant's theory that the common plan was to assault the victim rather than kill him. An intent to kill may be inferred from any evidence presented. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Defendant and his associate both walked into the bar armed with firearms. Both men used their firearm to beat the victim in the head, and as soon as the victim was shot, defendant turned around and shot two other men. From defendant's use of a deadly weapon, it could reasonably be inferred that he possessed the intent to kill. *People v Turner*, 213 Mich App 558, 566-567; 540 NW2d 728 (1995). Therefore, we find that CJI 2d 8.3 was inapplicable, and defendant was not deprived of his right to due process by the trial court's failure to give the instruction.

Affirmed.

/s/ Kurt T. Wilder
/s/ Joel P. Hoekstra
/s/ Donald S. Owens