STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 5, 2010
v ROWMOTO ANTWION ROGERS, Defendant-Appellant.	No. 291180 Wayne Circuit Court LC No. 08-009271-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TONY ANTHONY HURD, Defendant-Appellant.	No. 291212 Wayne Circuit Court LC No. 08-009271-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendants Rowmoto Antwion Rogers and Tony Anthony Hurd were tried jointly before a single jury, which convicted each of first-degree premeditated murder, MCL 750.316(1)(a), four counts of assault with intent to commit murder, MCL 750.83, and felon in possession of a firearm, MCL 750.224f. Defendant Rogers was also convicted of possession of a firearm during the commission of a felony, MCL 750.227b. Both defendants were sentenced to life imprisonment for the murder conviction, to be served concurrent to prison terms of 25 to 40 years for each assault conviction and two to five years for the felon-in-possession conviction; defendant Rogers was also sentenced to a consecutive two-year prison sentence for the felony-firearm conviction. Defendant Rogers appeals as of right in Docket No. 291180, and defendant Hurd appeals as of right in Docket No. 291212. The appeals have been consolidated for this Court's consideration. We affirm.

I. FACTS AND PROCEEDINGS

Defendants' convictions arise from a January 2008 shooting incident in the city of Detroit during which shots were fired into a Jeep Commander occupied by five individuals: Davon Perry, his younger brother Rayvon Perry, and three teenage female passengers, Dominique Spillman, Tiffany Whatley, and Martha Barnett. Martha Barnett died from gunshot wounds to her head and back. None of the occupants of the Commander were able to identify any of the shooters. The principal evidence against defendants was the testimony of Rayvon Perry. Rayvon testified that he knew both defendants and saw them at a "hang-out" house later on the day of the shooting. According to Rayvon, defendant Rogers admitted to him that he and another person, DeAndre Woolfolk, shot at the Commander from a car driven by defendant Hurd. Rogers explained that they "messed up" by shooting at the wrong vehicle. Rayvon stated that Hurd nodded in a manner expressing his agreement with Rogers's statements, and Hurd also stated that he drove away from the shooting when a burglar alarm in a nearby store was activated. Rayvon did not initially disclose this information to the police, but eventually revealed it in response to the prosecutor's investigative subpoena.

II. ADMISSION OF PHOTOGRAPHS

Both defendants argue that the trial court abused its discretion by admitting autopsy photographs depicting close-up views of the victim's gunshot wounds. We review the trial court's decision to admit photographic evidence for an abuse of discretion. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 544; 775 NW2d 857 (2009). A court abuses its discretion when its decision is not within the range of principled outcomes. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

Defendants argue that the photographs should have been excluded under MRE 403 because they were not probative of their identity as the shooters, which was the principal issue at trial, and because their primary purpose was to inflame the jurors' emotions. We disagree.

MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" See *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). Autopsy photographs are relevant where they are instructive in depicting the nature and extent of the victim's injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Photographic evidence is also admissible for the purpose of corroborating a witness's testimony. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). If photographs are admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. *Id.*; *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). Further, photographs are not deemed inadmissible simply because other testimony or evidence encompasses the same issue. *Mills*, 450 Mich at 76; *People v Unger (On Remand)*, 278 Mich App 210, 257; 749 NW2d 272 (2008).

The three photographs in this case depict the entrance wound on the back of the victim's skull, an entrance wound on her back, and an exit wound through her right eyelid. The two entrance wound photographs were relevant to illustrate the medical examiner's testimony that the wounds were irregularly shaped, which led him to conclude that the bullets passed through intermediary targets before striking the victim. The third photograph, depicting the exit wound,

corroborated the medical examiner's testimony that the bullet passed into the victim's skull, traveled through her brain, and exited through the front of her head. The photographs were relevant to prove the cause of the victim's death. Although neither defendant disputed the cause of death, the prosecution is required to prove each element of a charged offense regardless whether the defendant specifically disputes or offers to stipulate to any of the elements. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Further, the photographs were relevant to illustrate the basis for the medical examiner's testimony that the bullets that struck the victim likely first passed through an intermediary target, such as a vehicle, thereby indicating that the shots originated from outside the vehicle. Although neither defendant disputed that the shots originated from outside the vehicle, evidence at trial indicated that the two male occupants of the vehicle, Davon and Rayvon Perry, each tested positive for the presence of gunshot residue after the shooting, and that Davon Perry was admittedly armed with a gun. The prosecution was entitled to present evidence to erase any doubts the jury might have regarding whether the shots may have originated from within the vehicle.

Finally, the photographs are not so gruesome as to outweigh their probative value. The two photographs of the entrance wounds are close-up shots of the wounds and are not immediately recognizable as photographs of a human body. The photograph of the exit wound depicts only a small portion of the victim's face around her closed eye. No blood is depicted in any of the photographs. Rather than being particularly gruesome, the photographs are "rather clinical," *Hoffman*, 205 Mich App at 19, and they were used to illustrate clinical medical testimony. Because the photographs were relevant to a proper purpose, and are not so gruesome or shocking as to inflame the jurors' passions and emotions, the trial court did not abuse its discretion in admitting them.

III. PROSECUTOR'S CONDUCT

Defendant Rogers argues that the prosecutor improperly vouched for Rayvon's credibility during his closing argument, and also presented an impermissible civic duty argument when he argued that Rayvon was a "reluctant hero" and "went against the grain" when he decided to come forward and disclose the information he had learned, knowing that he would be labeled a "snitch." Defendant Hurd presents similar arguments in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Because neither defendant objected to the prosecutor's comments at trial, this issue is unpreserved. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

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 Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). A prosecutor may, however, argue from the facts that a witness is credible. *Id.* It is also improper for a prosecutor to inject issues broader than a defendant's guilt or innocence into the proceedings by appealing to the jurors' fears and prejudices, *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005), or by urging a jury to convict a defendant out of a sense of civic duty or sympathy for the victim. *Unger*, 278 Mich App at 237.

In this case, the prosecutor discussed how the pejorative term "snitch" reflects a common attitude favoring loyalty to friends and neighbors and disfavoring cooperation with law

enforcement, thus providing substantial motive for Rayvon to remain silent and not disclose the information he had learned from defendants regarding the shooting, and yet Rayvon agreed to come forward and testify, against his own self-interests. The prosecutor did not improperly vouch for Rayvon's credibility, but rather properly presented reasons, grounded in the evidence, for why the jury should find his testimony credible. Further, the prosecutor's characterization of Rayvon as a "reluctant hero" for coming forward and cooperating was not an appeal to any sense of the jurors' civic duty, but rather was a comment on Rayvon's circumstances as reflecting reasons for finding his testimony credible. The prosecutor's comments were not improper and, therefore, did not amount to plain error.

Although defendant Hurd also argues in his pro se brief that his attorney was ineffective for failing to object to the prosecutor's arguments, because those arguments were not improper, any objection would have been futile. Defense counsel was not ineffective for failing to make a futile objection. *Unger*, 278 Mich App at 255-256.

IV. DEFENDANT ROGERS'S ADDITIONAL ISSUE IN DOCKET NO. 291180

Defendant Rogers argues that his convictions are against the great weight of the evidence, and therefore, that a new trial is warranted. Because defendant Rogers did not raise this issue in a motion for a new trial, it is not preserved. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, our review is limited to plain error affecting defendant Rogers's substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219; *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

Defendant Rogers's argument is not directed at the elements of the crimes of which he was convicted, but rather solely at the credibility of Rayvon's testimony linking him to the crimes. A court may not act as a "thirteenth juror" when evaluating a challenge to the great weight of the evidence, and "may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). In *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998), our Supreme Court recognized that a court may grant a new trial based on questions of witness credibility only in limited circumstances, such as when the witnesses' testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable jury could not believe it.

Here, Rayvon's testimony was not patently incredible, it did not defy physical realities, and it was not so inherently implausible that it could not be believed. Thus, the determination of Rayvon's credibility was entirely within the province of the jury and this Court may not attempt to resolve that question differently. *Lemmon*, 456 Mich at 643-644; *Gadomski*, 232 Mich App at 28. Further, a defendant's uncorroborated confession is sufficient to establish his identity as the perpetrator of a homicide where, as here, other evidence has independently established a death by criminal agency. *People v Cotton*, 191 Mich App 377, 389-390; 394, 478 NW2d 681 (1991). Consequently, defendant Rogers's convictions are not against the great weight of the evidence.

V. DEFENDANT HURD'S ADDITIONAL ISSUES IN DOCKET NO. 291212

A. SUFFICIENCY OF THE EVIDENCE

Defendant Hurd argues that his convictions were not supported by sufficient evidence. We disagree. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a reasonable juror could find the defendant guilty 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).

The elements of first-degree premeditated murder are that the defendant killed the victim and that the killing was "willful, deliberate, and premeditated." MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). "The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). A defendant is criminally liable for offenses that he specifically intends to aid or abet. *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006).

In this case, Rayvon Perry testified that defendant Hurd acknowledged being the driver of the vehicle from which defendant Rogers unleashed a barrage of gunshots at the victims' automobile, and that defendant Hurd expressed agreement with defendant Rogers's statements that they intended to kill the occupants of the other vehicle, but "messed up" by shooting at the wrong vehicle. If believed, this testimony was sufficient to establish defendant Hurd's guilt of each of the charged crimes under an aiding and abetting theory. Although defendant Hurd argues that Rayvon Perry was not credible, the credibility of his testimony was for the jury to resolve, and this Court may not resolve it anew. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Thus, the evidence was sufficient to support defendant Hurd's convictions.

B. DEFENDANT HURD'S SENTENCES

Defendant Hurd lastly argues that his 25-year minimum sentences for the assault convictions are unconstitutionally cruel or unusual, contrary to US Const, Am VIII (prohibiting "cruel *and* unusual" punishment), and Const 1963, art 1, § 16 (prohibiting "cruel *or* unusual" punishment). There is no merit to this argument.

Defendant Hurd does not dispute that his sentences are within the appropriate guidelines range.[1] A sentence within the appropriate guidelines range is presumptively proportionate, and a

[1] Defendant Hurd does not challenge the scoring of the guidelines or the trial court's determination of the appropriate guidelines range. "Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, this limitation on review is not applicable to claims of constitutional error." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

proportionate sentence is neither cruel nor unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Defendant Hurd has not overcome the presumptive proportionality of his sentences. His only argument is that the evidence of his guilt was weak, but as previously explained, the evidence was sufficient to establish each of his convictions beyond a reasonable doubt. Defendant Hurd intentionally assisted two co-felons in unleashing deadly force against an occupied vehicle, intending to kill the occupants. He has three prior drug-related convictions and committed the instant offenses while on parole. Under these circumstances, there is no merit to defendant Hurd's argument that his sentences are unconstitutionally cruel or unusual.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck