STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT BERNARD HEARD,

Defendant-Appellant.

UNPUBLISHED
June 28, 2002

No. 221827
Oakland Circuit Court
LC No. 98-163897-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN TYRAN HARRIS,

Defendant-Appellant.

No. 222017
LC No. 98-163900-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY WAYNE SMITH,

Defendant-Appellant.

No. 222018

LC No. 98-163898-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTWAN LAMONT WILLIAMS,

No. 222019
LC No. 98-163897-FC

Defendant-Appellant.

Before: Whitbeck, C.J., and Holbrook, Jr., and Zahra, JJ.

PER CURIAM.

In these consolidated cases, defendant Heard appeals as of right in docket no. 221827 from his jury trial convictions of first-degree premeditated murder, MCL 750.316, conspiracy to commit first-degree murder, MCL 750.157a, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court imposed terms of life imprisonment for the first-degree murder and conspiracy convictions, and mandatory consecutive two-year terms for the felony firearm convictions. In docket no. 222017, defendant Harris appeals as of right from his jury trial convictions of conspiracy to commit first-degree murder, MCL 750.157a, and felony-firearm, MCL 750.227b. The court imposed a term of life imprisonment for the conspiracy conviction, and a consecutive two-year term for the felony-firearm conviction. In docket no. 222018, defendant Smith appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316, conspiracy to commit first-degree premeditated murder, MCL 750.157a, and two counts of felony-firearm, MCL 750.227b. The court imposed terms of life imprisonment for the first-degree murder and conspiracy convictions, and mandatory consecutive two-year terms for the felony-firearm convictions. Finally, in docket no. 222019, defendant Williams appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, conspiracy to commit first-degree murder, MCL 750.157a, and two counts of felony-firearm, MCL 750.227b. The court imposed terms of life imprisonment for the second-degree murder and conspiracy convictions, and mandatory consecutive two-year terms for the felony-firearm convictions. We affirm.

All the convictions stem from the shooting death of Lonnie Adams. The victim, a resident of Ypsilanti, came to Pontiac on August 30, 1995. According to his grandmother, Adams was there to visit family. Sometime around midnight that night, several people in the neighborhood heard gunshots. Several eyewitnesses testified at trial that, after having heard the volley of gunshots, they saw four men in dark clothing standing around Adams' body. Two witnesses testified that they believed they saw shots fired at the victim as he lay on the ground. One eyewitness testified that she saw four men chasing and shooting at Adams. According to this witness, one of the four exclaimed, "You trying to rob me. I've got something for your ass."

Some of the most dramatic testimony was offered by a minor. Almost thirteen years old at the time of the shooting and seventeen years old as of trial, this witness testified that she saw Adams pounding and screaming at the door of her residence. This witness saw three men chase and shoot Adams after he left her residence. The witness identified one of the three shooters as Terry Cooley, who had died as of trial. When the witness showed reluctance in naming the other two, the trial judge cleared the courtroom of all spectators. Then, outside of the presence of the jury, the court questioned the witness about her reluctance to testify. She indicated that she was afraid to identify the other two men because she feared for her life. After the jury returned, the witness identified defendants Heard and Smith as the other two men she saw chase and shoot Adams.

Dion Coleman testified that he and the four defendants were members of a street gang known as Project Posse. Coleman testified that Adams and defendant Williams got into an argument while at a dice game on the night of the shooting. Coleman testified that after Adams left the game, the four defendants and Antoine McNeal engaged in a conversation during which they discussed killing Adams. According to Coleman, he and McNeal declined to go along with the murder. McNeal also testified that while he and Coleman were present when the murder was being planned, he and Coleman backed out. Coleman further testified that he saw the four defendants later that evening dressed in black and carrying a variety of weapons. According to Coleman, the men left with Cooley, traveling in a group of three and a group of two. McNeal testified that he witnessed the five men chasing Adams, and saw sparks fly from the group as they chased the victim.

According to McNeal, Smith later told him that the four defendants and Cooley had killed Adams. Coleman testified that Smith also admitted his involvement in the murder. According to Coleman, the day after the murder, he, the four defendants, Cooley, and McNeal, met and agreed to keep quiet. Coleman indicated he at first kept the agreement, even going so far as to lie about the incident to the police and in another proceeding held in the district court. Coleman admitted on cross-examination that the police had told him that he could be charged with the murder if he continued to be uncooperative.

Shelia Scott, defendant Heard's girlfriend, testified that she was present when the four defendants, McNeal and Cooley met up before the murder at Heard's station wagon. Heard and Harris gave her some unidentified personal items to hold, and Williams gave her a bike. The men then ran off, the hoods of their sweaters over their heads. At some later point in time, Scott witnessed the four defendants and Cooley chasing the victim. Soon thereafter, she heard the sound of gunshots. Heard then returned to his car, and the two drove to a liquor store. According to Scott, while the two were at the store, Heard stated the men had killed Adams. Later, Heard explained to Scott that Adams "was going to stick them up so they had to get him before he got them."[1]

Joseph Morris testified that he was incarcerated with defendant Harris at some point after the Adams murder. According to Morris, while the two were in their cell, Harris confessed to being involved in the murder.

Docket No. 221827

Heard first argues that he was denied his constitutionally protected right to a fair trial by the individual and cumulative effect of prosecutorial misconduct that occurred throughout the trial. We disagree. This court reviews claims of prosecutorial misconduct on a case-by-case

[1] Throughout her testimony, Scott indicated that one of her interviews with the police had been recorded. The officers involved in the interviews, including the one identified by Scott as doing the taping, all denied that she had been taped. Evidence was subsequently adduced that Scott had been taped by other officers during an interview about a complaint Scott had made against a different police officer. The court specifically found that no relevant tape recording of Scott had been withheld.

basis, *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995), reviewing the pertinent portion of the record to examine the prosecutor's alleged misconduct in context to determine if defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). The test is not whether the prosecutor engaged in misconduct, but whether the result was that defendant was denied a fair and impartial trial. *Id.*

While it is true that the prosecutor did improperly pose numerous leading questions throughout trial, defendant has failed to show that any of the evidence suggested by the individual questions could not have been elicited through proper questioning, nor has defendant shown that the questions actually influenced the witnesses' answers. Rather, defendant only offers his speculations that such dangers are inherent in leading questions. Further, the trial court did a commendable job assuring the fundamental fairness of the proceedings by sustaining defendant's valid form objections, admonishing the prosecutor when she continued to pose leading questions, prompting the prosecutor on how to elicit the information she was seeking, instructing the jury on the proper and improper use of leading questions, and instructing the jury that defense counsel's objections to the prosecutor's leading questions were proper.

Heard is correct that the prosecutor improperly suggested that Heard's counsel read into the record two statements made by Heard to the police on August 17, 1998.[2] However, defendant fails to show how this incident with the two McNeal reports denied him a fair trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). The same is true of an incident that occurred during the testimony of the seventeen year old who witnessed the shooting when she was about thirteen. As previously noted, this witness was very reluctant to testify because she feared for her safety. When this witness was hesitating on identifying the three men she saw shoot Adams, the prosecutor wrote some names on a board and showed it to the witness. Defendants objected, and the court ordered that the board be immediately turned around. Given the brevity of this incident and the trial court's prompt, proper, and effective response, we see no error requiring reversal. *Id.*

As for certain statements made by the prosecutor during closing arguments, we conclude that the cited comments made during closing were not improper, and while the comments made during rebuttal closing were improper, any prejudicial effect was cured by the timely and specific curative instruction.

None of the four defendants raised a contemporaneous objection to the comments cited from the prosecutor's closing argument. The issue is therefore reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is

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[2] Defendant is incorrect in characterizing these reports as polygraph reports. The reports are not provided for this Court to review, and the contents are not specifically identified in the transcript. However, the implication left by the transcript is that these were pre- and post-polygraph interviews with McNeal.

warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

Defendant asserts that the prosecutor improperly appealed to the sympathy of the jury when she made the following comments during her closing argument:

> I wish there was some way that I could have put you in a protective bubble and taken you out there that night so you could have heard with you own ears what it sounded like for Lonnie Adams to scream for help. So that you could have heard with your own ears what it sounded like when he said no, no, no as he was being chased.

There was testimony that Adams was yelling or screaming while he was being chased, and that at some point he did yell "no, no, no." The prosecutor need not refer to this evidence during closing arguments in the blandest of terms. *Aldrich*, *supra* at 112. Therefore, because the remarks were not improper, defendant has failed to satisfy his burden under the plain error rule. *Carines*, *supra* at 763-764.

Conversely, the following remarks made by the prosecutor during closing rebuttal were clearly improper: "The defense has one job, ladies and gentlemen and that job is to lead you astray on any issue it can. Any side issue. To take you away from the physical evidence that I've been talking to you about . . . ." Defense counsel interrupted the prosecutor with objections to the comments, and immediately thereafter, the court instructed the jury as follows: "Ladies and gentlemen, the job of the defense is to provide a defense. How they do that within the bounds is perfectly acceptable . . . And has been perfectly acceptable." We conclude that any prejudice created by the prosecutor's ill-advised commentary was mitigated by this immediate and specific curative instruction.

Reviewing the cumulative effect of each instance of prosecutorial misconduct, we do not believe that in the context of the whole trial, this conduct combined to undermine the fairness of the proceedings. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). In each instance, prompt action taken by the trial court obviated any prejudicial effect that would have undermined the fairness of the trial. Defendant was entitled to a fair trial, not a perfect one, and the actions of the court assured that he received one. See *People v Kelly*, 231 Mich App 627, 646; 588 NW2d 480 (1998).

Next, defendant argues that the instructions on accomplice testimony were misleading and thus denied defendant a fair trial. The instructions regarding the testimony of McNeal and Coleman came at the conclusion of a lengthy series of instructions on evaluating witness testimony:

> Before you may consider what Antoine McNeal and . . . Dion Coleman . . . [s]aid in Court, you must consider whether he took part in the crime the defendant is charged with committing. Antoine McNeal and Dion Coleman have not admitted taking part in the crime. But, there is evidence to lead you to think

> that they did. A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice. When you think about Antoine McNeal and Dion Coleman's testimony first decide if they were an accomplice. If after thinking about all the other evidence you decide that they did not take part in this crime, judge their testimony as you judge any other witness. But, if you decide that Antoine McNeal and Dion Coleman were accomplices, then you must consider their testimony in the following way. You should examine an accomplice's testimony closely and be careful about accepting it. You may think about whether the accomplice's testimony is supported by other evidence. Because, then it may be more liable [sic]. However, there is nothing wrong with the prosecutor using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt. When you decide whether you believe an accomplice, consider the following. Was the accomplice's testimony falsely slanted to make the defendant's seem guilty because of the accomplice's own interest, bias or for some other reason. Has the accomplice been offered an award or been promised anything that might lead him to give false testimony. The witnesses have not been charged with the crimes arising out of this incident. Has the accomplice been promised that he will not be prosecuted or promised a lighter sentence or allowed to plead guilty to a less serious charge. If so, could this have influenced his testimony. Does the accomplice have a criminal record. In general, you should consider an accomplice's testimony more cautiously then [sic] you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

These instructions are accurate and complete.

The abandonment instruction was delivered at the start of the instructions on the crimes charged, which immediately followed the above excerpted accomplice testimony instruction:

> In this case, the defendants are charged with committing or intentionally assisting someone in committing first degree, premeditated murder and conspiracy to commit first degree premeditated murder or the lesser charges of second-degree murder . . . .
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> Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abetter. . . .
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> A person who aids and abets a crime and thereafter abandons the person, the crime may not be convicted as an aider and abetter. An abandonment occurs when a person freely and completely gives up the idea of committing the crime.

These instructions are also accurate and complete. They do not indicate that abandonment is a defense to conspiracy to commit murder. Rather, they state that a person cannot be convicted of aiding and abetting a conspiracy to commit murder if they withdraw from the enterprise.

While these instructions were proper, a problem arose when the prosecutor made the following remarks during her rebuttal closing argument:

> Another thing that you were told, ladies and gentlemen is that [I] . . . will suggest to you that Antoine can't be charged because he abandoned his crime. [I'm] . . . not suggesting anything to you. But, listen to the instructions given by Judge Howard. He will instruct you that a person who abandons a crime may not be charged with committing that crime.

Heard's counsel immediately objected. The court sustained that objection, and further stated to the jury, "The instruction will be as I give it to you and it will be provided." The prosecutor then continued: "Listen to the Judge's instructions and I believe that what the Judge is going to tell you with regard to abandonment is something very similar to what I just told you, if not on point." Counsel again objected, and the court responded as follows: "Again, if the attorneys say something different than what I say, follow what I say when it comes to the special instruction of abandonment."

The prosecutor's comments improperly bridged the two sets of instructions excerpted above, i.e., the prosecutor left an impression with the jury that McNeal's alleged abandonment of the conspiracy to commit murder meant that he could not be charged with that crime. The jury could have easily understood the subsequent instructions through this impression. However, abandonment is not a defense to conspiracy in Michigan.[3]

Thus, properly framed, defendant's argument is not that the court erred in the instructions given, but that the court should have sua sponte altered its abandonment instruction after the actions of the prosecutor. While an instruction clearing up any potential ambiguity would have been desirable, we conclude that the failure to do so constitutes harmless error. The jury was still instructed that it was the court's responsibility to instruct the jury on the applicable law. Further, the jury was also given the following instructions, which they are presumed to have followed:

> You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none or part of any person's testimony. In deciding which

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[3] While a majority of states have followed the lead of the Model Penal Code, MPC § 5.03, and rejected the traditional rule that withdrawal is not a defense by adopting some form of abandonment defense for the crime of conspiracy, Michigan has yet to follow this trend. Instead, the traditional rule is still followed in Michigan. See *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991) ("The crime of conspiracy is complete upon the formation of the agreement. . . . Moreover, withdrawal from the conspiracy is ineffective because the heart of the offense is the participation in the unlawful agreement."); *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987)("A withdrawal from a conspiracy is ineffectual.").

> testimony you believe, you should rely on your own common sense and every day experience. . . . There is no thick set of rules for judging whether you believe a witness. But, it may help you to think about these questions. . . . Does a witness have any bias, prejudice or personal interest in how this case is decided. Have there been any promises, threats, suggestions or other influences that affected how the witness testified. In general, does a witness have any special reason to tell the truth or any special reason to lie. All in all, how reasonable does the witness' testimony seem when you think about all the other evidence in the case.
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> [Y]ou may conclude that a witness deliberately lied about something that is important to how you decide the case. If so, you may choose not to accept anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest.
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> You should . . . not decide this case on who presented more witnesses. Instead, you should think about what each witness said and each piece of evidence and whether you believe them. Then you must decide whether the testimony and evidence you believe proves beyond a reasonable doubt the defendant is guilty.

Given the totality of the instructions and the weight of the evidence, we do not believe that defendant has established a miscarriage of justice requiring reversal. MCL 769.26. For these same reasons, we reject the argument that reversal is required because CJI2d 5.4 (Witness an Undisputed Accomplice) should have been sua sponte given by the court, even though McNeal's testimony has him taking actions in furtherance of the conspiracy after his purported withdrawal.

In a related issue, defendant argues that his counsel's failure to correct the court on its misstatement of the law of abandonment and his failure to request CJI2d 5.4 amounted to ineffective assistance. We disagree. As we have just observed, the court's statement of the law was correct. Counsel cannot be faulted for raising a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). As for CJI2d 5.4, defendant fails to establish that counsel's failure to request this instruction "prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

Finally, defendant argues that he was denied the effective assistance of counsel because of his counsel's failure to introduce into evidence a letter sent to him from Scott. Defendant asserts that this letter could have been used to impeach and attack her credibility. However, there is nothing in the existing record that supports any of defendant's claims regarding the letter. There is no evidence that defendant sent counsel a letter requesting he contact Scott and no evidence that defendant delivered to his counsel a letter sent to him by Scott. Assuming arguendo that the letter from defendant to counsel was sent, there is no evidence that counsel failed to contact Scott. As for the letter from Scott to defendant, defendant admits in his rule 11 brief that he doesn't even have a copy of it (instead, he offers what he claims to be a re-creation

of the letter by Scott). Accordingly, defendant has failed to show that counsel's performance was ineffective. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Docket No. 222017

Defendant Harris first argues that he was denied a fair trial by prosecutorial misconduct. Most of the alleged instances of misconduct were also raised by defendant Heard. For the same reasons stated in docket no. 221827, we find that these instances did not deny him a fair trial. See *supra* pp 3-5.

Defendant also argues that he was denied a fair trial by comments made by the prosecutor indicating that she had personal knowledge of defendant's guilt. We agree that these comments were improper. However, we believe any prejudice was cured by the court's immediate and specific curative instruction:

> Ladies and gentleman of the jury, in a case like this or in any case that will go on at times it becomes heated. That is because counsel is doing their job to the best of their ability. Sometimes, however in the heat of the argument they say things that perhaps they shouldn't. I am again instructing you that the defendants are innocent until proven guilty beyond a reasonable doubt. Any statements to the contrary, you shall ignore. You all understand that? Again, ignore all statements with regard to may or may not be their guilt. It is for you to decide and that standard is beyond a reasonable doubt and you must consider the defendants not guilty until proven otherwise. Do you understand and you understand what the standards are. Okay. . . .

Next, defendant argues that the closure of the courtroom during the testimony of the seventeen-year-old eyewitness denied defendant his constitutionally guaranteed right to a public trial. We disagree. Every criminal defendant is guaranteed the right to a "speedy and public trial." US Const, am VI; Const 1963, art. 1, § 20. "'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Waller v Georgia*, 467 US 39, 45; 104 S Ct 2210; 81 L Ed 2d 31 (1984), quoting *Press-Enterprise Co v Superior Court of California, Riverside County*, 464 US 501; 104 S Ct 819; 78 L Ed 2d 629 (1984). A compelling interest needs to be shown for a total closure, and a substantial interest needs to be shown for a partial closure. *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992).

> The requirements for the total closure of a trial were set forth by the Supreme Court in *Waller*: (1) "The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure." [*Id.*]

The witness testified that the reason she would not identify defendants in open court was because she had been threatened and was afraid for her life if she did so. The court made the following findings regarding its decision to totally close the court from the public:

> The Court would note that based upon the questioning both in chambers and out that it appears that someone or some individuals[sic] is trying to obstruct justice and that they may be tampering with the ability of a [witness] and in fact threaten a [witness[4]] . . . . That those threats may be having an impact upon the ability of this witness to testify.

The protection of a witness against intimidation and threats and insuring the integrity of the judicial system and furthering the search for truth are clearly compelling and/or substantial interests. This closure was no broader than necessary to protect these overriding interests. The closure was brief, and was only resorted to after alternative attempts to develop the witness's testimony failed.[5] It is conceivable that other alternatives could have been pursued (e.g., apprehending those who threatened the witness). It is also true that the witness testified that those who threatened her were not in court that day. Nonetheless, the court's decision to briefly close the courtroom was not an abuse of discretion. Closing the courtroom at this point not only protected the identified interests, but it also assured that the trial would not become unnecessarily delayed. We also find that while brief, the reasons articulated for the closure satisfied the rule of *Waller*.

Defendant also argues that the trial court erred in denying his motion for a directed verdict. Again, we disagree.

> When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. [*People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Defendant's argument focuses solely on his conviction for conspiracy. MCL 750.157a provides that "[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein." "Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective." *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993).

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[4] The court had mistakenly stated "juror" in the bracketed portions of the quotation.

[5] For example, after the court explained to the witness her obligations pursuant to the subpoena, the witness was able to continue. This worked until the witness was asked to name the men she saw shoot Adams. At this point, when the witness again refused to answer the prosecutor's questions, the trial court closed the courtroom.

Much of defendant's argument is focused on the credibility of the witnesses and the alleged inconsistencies in their testimony, particularly the testimony of McNeal and Coleman. "However, it is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Credibility questions are to be left to the trier of fact. *People v Palmer*, 392 Mich 370, 375; 220 NW2d 393 (1974).

Two witnesses testified at trial that they saw four males come up to Adams body as it lay on the ground. Both also saw a gunshot fired from the group at Adams as he lay on the ground. Another witness testified that she saw four men chasing Adams. She observed gunshots fired from the group at Adams, who subsequently fell to the ground. Coleman testified that he and McNeal were present at a conversation where defendant, Smith, Heard, and Williams all agreed to kill Adams. McNeal agreed that the conversation had taken place and that the four defendants had agreed to kill Adams. Coleman saw the four defendants leave and return wearing black clothing. McNeal witnessed defendant, Smith, Heard, and Williams chasing Adams, as well as seeing sparks fly near the four men as they ran, allowing the inference that they were firing guns. Scott testified that she observed defendant, Smith, Heard, Williams, McNeal and Cooley run off together with hoods up over their heads. At some point, Scott saw defendant, Smith, Heard, and Williams chasing Adams, and Adams running away in fear. Several minutes later she heard the sounds of gunshots. After the shooting, Smith told McNeal that the four had killed Adams. Williams also confessed to McNeal, and Heard confessed to Scott, that the group had killed Adams. Coleman testified that the day after the murder, he, defendant, Smith, Heard, Williams, Cooley, and McNeal, met and agreed to keep quiet about the murder. Morris testified that while incarcerated with defendant, defendant told him about his involvement in the murder. "[H]e told me there was several other guys with him and they all had hoods on and he pointed to fire his gun but it jammed and he raised it up in the air and shot it," Morris testified.

Viewed in a light most favorable to the prosecution, this evidence and the reasonable inferences drawn therefrom were sufficient to allow a rational trier of fact to conclude that the elements of conspiracy to commit murder were proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997); *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

We also reject defendant's assertion that the trial court erred in denying his motion for severance. This Court reviews a trial court's decision on a motion for severance for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). A defendant does not have an absolute right to a separate trial. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Indeed, the interests of judicial economy and administration favors joint trials. *Id.* Where two defendants are charged with the same or related offenses, a trial court must sever the trials "only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana*, *supra* at 346. If defendant fails to make this showing, reversal is precluded, "absent any significant indication on appeal that the requisite prejudice in fact occurred at trial." *Id.* at 346-347.

Initially, defendant argued, as he does now on appeal, that the evidence against him was

weaker that against the other three defendants. When asked by the court to satisfy the rule of *Hana*, defendant's counsel responded as follows:

> The only thing I can specif-, I cannot offer to the Court an Affidavit showing that my client is gonna raise an antagonistic defense. My concern . . . is that if Mr. Harris elects to testify, and I believe this is a concern with the other three Defendants, if they elect to testify and raise antagonistic defenses during a Trial, then we would have that problem at that point.

Later, counsel argued that he believed "this case is ripe for antagonistic defenses . . . ."

We conclude that defendant failed to clearly, affirmatively, and fully demonstrate below that his substantial rights would be prejudiced if severance were not granted. Defendant could only offer the speculative assertion that the upcoming case against him was weaker than it was against the others. He also asserted that antagonistic defenses were likely, but failed to identify what those defenses were to be, let alone that the tension between them would be such that the jury would have to believe one defendant at the expense of the others. *Hana*, *supra* at 350.

Defendant has also failed to show that his substantial rights were indeed prejudiced by the joint trial. While there was some difference in the evidence presented against the four, defendant was able to point this out to the jury and use it to his advantage. For example, defendant was able to point out and argue that some of the witnesses could not place him at the scene even though they could place one or more of the others there. He was also able, as were the rest of the defendants, to vigorously challenge the credibility of the prosecution's witnesses. Further, there was nothing antagonistic about the defenses presented. In fact, each defendant argued a version of the same theory to the jury, i.e., that the witnesses against them are incredible, and thus the prosecution has failed to meet its burden of proof.

Finally, for the same reasons already stated in docket no. 221827, we reject defendant's argument that he was denied the effective assistance of counsel because counsel did not object to the accomplice instructions given by the court, or request that CJI2d 5.4 be given. See *supra* pp 5-8.

Docket No. 222018

Defendant Smith also challenges the trial court's abandonment and accomplice instructions for the same reasons raised by defendants Heard and Harris, and argues that that he was denied the effective assistance of counsel because counsel did not object to the instructions given or request that CJI2d 5.4 be given. We reject these arguments for the same reasons previously stated. See *supra* pp 5-8. Additionally, Smith argues that he was denied a fair trial by the cumulative effect of the prosecutor's misconduct. Again, we find this argument to be without merit. See *supra* pp 3-5.

Docket No. 222019

Defendant Williams first argues that his convictions are against the great weight of the evidence. We disagree. A verdict may be overturned on appeal only when it is manifestly against the clear weight of the evidence, and substantial deference will be given by this Court to

a trial court's determination that a verdict is not against the great weight of the evidence. *Wischmeyer v Schanz*, 449 Mich 469; 536 NW2d 760 (1995); *Arrington v Detroit Osteopathic Hospital Corp*, 196 Mich App 544; 493 NW2d 492 (1992). See also MCR 2.611(A)(1)(e).

Defendant has failed to establish that any of his convictions are manifestly against the great weight of the evidence. In fact, the great weight of the evidence actually preponderates in the other direction. The evidence established that Adams died as the result of multiple gunshot wounds, inflicted from behind. Two witnesses testified that they saw four males come up to Adams body as it lay on the ground. Both also saw a gunshot fired from the group at Adams as he lay on the ground. Another witness testified that she saw four men chasing Adams. She observed gunshots fired from the group at Adams, who subsequently fell to the ground. Coleman testified that he and McNeal were present at a conversation where defendant, Smith, Heard, and Harris all agreed to kill Adams. McNeal agreed that the conversation had taken place and that the four defendants had agreed to kill Adams. Coleman saw the four defendants leave and return wearing black clothing. McNeal gave defendant a gun to use in the murder. McNeal witnessed defendant, Smith, Heard, and Harris chasing Adams, as well as seeing sparks fly from the four as they ran. Scott testified that she observed defendant, Smith, Heard, Harris, McNeal and Cooley run off together with hoods up over their heads. At some point, Scott saw defendant, Smith, Heard, and Harris chasing Adams, and Adams running away in fear. Scott saw defendant, who at the time was wearing a leg cast, hobbling along as he chased Adams. Several minutes later she heard the sounds of gunshots. After the shooting, Williams confessed to McNeal, and Heard confessed to Scott the group's involvement in the murder. Smith also told McNeal that the four had killed Adams. Coleman testified that the day after the murder, he, defendant, Smith, Heard, Harris, Cooley, McNeal and Coleman met and agreed to keep quiet about the murder. McNeal testified that defendant called him from jail and told McNeal "to get rid of the goods." McNeal then broke down a gun he believed defendant had used in the murder and threw the pieces into a nearby lake.

Much of defendant's argument is focused on the credibility of the witnesses and the alleged inconsistencies in their testimony, particularly the testimony of McNeal and Coleman. However, defendant has not shown that this testimony was patently incredible or inherently implausible. *People v Lemmon*, 456 Mich 625, 642, 647; 576 NW2d 129 (1998).

We also reject defendant's argument that he was denied a fair trial by the misconduct of the prosecutor. See *supra* pp 3-5. In addition to the allegations raised by the other defendants, Williams also argues that the presence of the victim's family at the murder scene when it was being viewed by the jury undermined his ability to receive a fair trial. However, there is no evidence that the prosecution arranged for the family to be present.

Further, there is no evidence that the prosecutor intentionally mislead the jury on the issue of abandonment. It appears from the transcript that the prosecutor misunderstood the law as it exists in Michigan. As for testimony on why Adams was present in Pontiac on the night of the murder, this evidence was not an appeal to the sympathy of the jury, but simply background information explaining Adams presence in a city where he did not live.

Additionally, defendant argues that his convictions for second-degree murder and conspiracy to commit first-degree premeditated murder are inconsistent and must be set aside. We disagree. It is well settled in Michigan that jury verdicts need not necessarily be consistent,

and seemingly inconsistent verdicts do not warrant reversal. *People v Vaughn*, 409 Mich 463, 465; 295 NW2d 354 (1980).

> "Because the jury is the judge of all the facts, it can choose, without any apparent logical basis, what to believe and what to disbelieve. . . ."
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> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*Id.* at 466, quoting *People v Chamblis*, 395 Mich 408, 420; 236 NW2d 473 (1975).]

In this state, whenever a jury is instructed on first-degree murder, the jury must also be instructed on second-degree murder. *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975). Thus, the possibility that a jury will choose to convict of the lesser offense under facts that support equally the greater offense inheres in our system.

The jury's decision to convict of second-degree murder instead of first-degree murder in this instance may have been a simple exercise of mercy. "Although some compromise verdicts may be assailable in logic, they are supportable because of the jury's role in our criminal justice system . . . ." *People v Cazal*, 412 Mich 680, 687; 316 NW2d 705 (1982). "'"That the verdict may have been the result of compromise, or of a mistake on the part of the jury is possible. But verdicts cannot be upset by speculation or inquiry into such matters."'" *Id.* at 688, quoting *Chamblis*, *supra* at 426,[6] quoting Justice Holmes in *Dunn v United States*, 284 US 390, 394; 52 S Ct 189; 76 L Ed 356 (1932). Instead, the inquiry is whether the verdict upon which the jury did agree is supported by the evidence. *Cazal*, *supra* at 688.

In short, where the evidence produced at trial would have supported a conviction for a greater offense, a defendant has suffered no prejudice if the jury instead convicted of a lesser-included offense. *People v Torres (On Remand)*, 222 Mich App 411, 422; 564 NW2d 149 (1997). Accordingly, defendant is not entitled to reversal of his convictions on this ground.

Defendant's argument that reversal is warranted because a special instruction was not given that a verdict needs to be unanimous is also without merit. Defendant has failed to establish that the standard jury instruction given on unanimity of verdicts was inadequate. We also reject defendant's challenge to the trial court's abandonment and accomplice instructions,

[6] Overruled in part on other grounds, *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982).

and his related argument that he was denied the effective assistance of counsel because counsel did not object to the instructions given or request that CJI2d 5.4 be given. See *supra* pp 5-8. Defendant's challenge to the court's closing of the courtroom during the testimony of the seventeen year old is also meritless. See *supra* pp 9-10.

Finally, defendant argues that he was denied a fair trial by the cumulative effect of the errors argued on appeal. However, defendant's cursory argument fails to show that the cumulative effect of any errors that occurred undermined his due process rights. Defendant may not just announce an argument and leave it to this Court to supply the reasoning. See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 115-116; 593 NW2d 595 (1999). Following our review of the record, we conclude that defendant was not denied a fair trial because no errors of consequence occurred, and because the record shows that he suffered no serious prejudice from a combination thereof. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Affirmed.

/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra