STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2008
v SAMMIE RAY BAILEY, JR., Defendant-Appellant.	No. 278411 Kent Circuit Court LC No. 06-006768-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TERRILL LASHON LAMBETH, Defendant-Appellant.	No. 278519 Kent Circuit Court LC No. 06-006804-FC

Before: O'Connell, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Codefendants Sammie Ray Bailey, Jr. and Terrill Lashon Lambeth stood trial jointly before separate juries for the May 2006 shooting death of Keith Hoffman, the victim. Bailey's jury convicted him of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Lambeth's jury found him guilty of first-degree premeditated murder, MCL 750.316(1)(a), and felony-firearm. The trial court sentenced Bailey to a term of 20 to 50 years' imprisonment for the second-degree murder conviction, and a consecutive two-year term for the felony-firearm count. The trial court imposed on Lambeth mandatory terms of life imprisonment without parole for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. In these consolidated appeals, defendants appeal as of right, and we affirm.

Defendants are half-brothers. Around May 2006, their mother lived in southeast Grand Rapids near the intersection of Prince and Dallas streets, where the shooting of the victim occurred on the afternoon of May 3, 2006. The victim regularly sold drugs in the neighborhood, and according to the prosecutor, defendants killed the victim to avenge his previous robberies of

Lambeth. Three eyewitnesses testified at trial that they observed two African-American males approach the victim and fire multiple gunshots at him, including after the victim had fallen to the ground. Defendants maintained that they shot the victim in self-defense.

I. Docket No. 278411, *People v Bailey*

A. Character Evidence of the Victim

Defendant Bailey first contends that the trial court erred by precluding him from eliciting at trial police officer testimony that would have established the victim's reputation for violence and his history of firearm-related arrests, which matters were highly relevant in light of defendants' self-defense claim. "The decision whether to admit evidence is within a trial court's discretion," and this Court thus will review a trial court's ultimate evidence admissibility ruling for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). But to the extent the issue of admissibility "involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence," we consider these legal questions de novo. *Id*.

Bailey had sought permission to inquire at trial of Detective Patrick Needham regarding the victim's criminal and violent character. Needham testified at the preliminary examination, in relevant part, as follows:

Q. Did you have other information about [the victim] robbing other individuals?

A. Not robbing.

Q. Robbing. Just drugs?

A. Drugs and firearms.

Q. You had firearm, information that [the victim] carried a firearm?

A. We—he had been stopped in the past for those, yes.

Q. Do you know what type of firearm?

A. No.

Q. Could you get that information?

A. I could get that.

Q. Can you get that and give it to Mr. Floyd and I?

A. Yes.

Q. Was it recent?

A. Oh, probably in the last two or three months. Yeah, it's—

Q. Prior to his death?

A. Right.

Q. Was he stopped carrying a gun in a—in a vehicle or just walking?

A. Well, he was never convicted of anything or charged with anything.

Before trial, the defense requested to cross-examine Needham again regarding his knowledge whether the victim had possessed weapons before May 2006.[1] Counsel for Lambeth also expressed a desire to cross-examine Needham regarding statements he made to the *Grand Rapids Press*, "indicating that the deceased had caused trouble and an understanding or acknowledgment that—how difficult it is to live in the community where my client [Lambeth] lives and how those pressures can build up."

The trial court ruled that the defense could not cross-examine Needham about "what he heard that [the victim] did or didn't do, nothing about the reputation that [the victim] has among the police, and no characterizing of life in the so-called 'neighborhood' to which reference was made." The trial court reasoned that although the defense could introduce evidence of "major violence" committed by the victim, "it's not proper to offer that evidence in the form of rank hearsay through police officers." The trial court further explained, "that police officers knew of the reputation says nothing at all as to whether or not the defendant knew of that reputation. In fact, there's solid reason to conclude that there is a disconnect between the two. Police acquire their information far differently than do defendants, living in a community."

Two court rule provisions govern the admissibility of the character-related evidence proffered by defendants in this case. The first contemplates that evidence of character, though generally inadmissible "for the purpose of proving action in conformity therewith on a particular occasion," may be admissible "[w]hen self-defense is an issue in a charge of homicide . . . ." MRE 404(a)(2). The second applicable court rule delineates as follows the appropriate means of proving character:

> (a) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.
>
> (b) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct. [MRE 405.]

Here, Bailey alleges that the trial court erred by excluding Detective Needham's testimony that the victim "had been stopped in the past" regarding firearm offenses. Needham

[1] On February 21, 2007, the trial court conducted a pretrial hearing regarding defendants' offer of proof concerning Needham's testimony. The trial court reserved its ruling until the trial.

provided no details regarding these past "stops," other than that the victim had not been convicted or charged. Needham's testimony plainly describes specific acts of conduct, rather than the victim's character for violence.[2] A victim's character generally "may not be shown by specific instances of conduct unless those instances are independently admissible to show some matter apart from character as circumstantial evidence of the conduct of the victim on a particular occasion." *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998).

In *Harris*, the Michigan Supreme Court emphasized the important distinction between character evidence that supports an essential element of a charge, claim or defense, and character evidence used to prove a specific act:

> (W)hen character is not an essential element, it may be shown only by reputation or opinion evidence. . . . Hence, construed literally, Rule 405 does not permit a defendant to use specific instances to show that the victim was the aggressor since the aggressive character of the victim is not an essential element of the defense of self-defense since the aggressive character of the victim is introduced as circumstantial evidence to show that the victim committed the first or primary *act* of aggression against the defendant, which is to say that *the defense of self-defense in this situation makes an act of the victim, rather than a trait of the victim's character, the material issue.* [*Harris*, *supra* at 319, quoting 1A Wigmore, Evidence (Tillers rev), § 63.1, p 1382-1383 n 1 (emphasis added).]

Because Bailey sought to introduce evidence of the victim's character for violence solely to prove that the victim had behaved violently on the day of the shooting, the trial court properly found Needham's recollections of specific instances of the victim's conduct inadmissible under MRE 405. *Id*., quoting 1A Wigmore, Evidence, § 63.1, p 1382-1383 n 1.

Needham's statement to the *Grand Rapids Press*, described only as "indicating that the deceased had caused trouble," also implicates specific instances of conduct, rather than evidence of the victim's reputation or character. Therefore, Bailey's argument that the trial court denied him an opportunity to present admissible *character* evidence of the victim through Needham lacks factual support in the record. Because Needham's proffered testimony concerning specific instances on which "the deceased had caused trouble" was inadmissible under MRE 405(a), we conclude that the trial court properly excluded it.

B. Self-Defense Instructions

Bailey next raises several claims of instructional error. This Court reviews jury instructions as a whole to determine whether a trial court committed error requiring reversal. *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). "The instructions must not be 'extracted piecemeal to establish error.'" *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant's rights." *McLaughlin*, *supra* at

[2] Nothing in Needham's preliminary examination testimony reveals that Needham could have offered evidence relevant to the victim's general character or reputation.

668. A defendant claiming instructional error bears the burden of proving a miscarriage of justice. MCL 769.26.

We review de novo jury instruction issues that involve questions of law. *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005), mod on other grounds in *People v Derror*, 475 Mich 316, 320; 715 NW2d 822 (2006). "But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Hawthorne*, 474 Mich 174, 181; 713 NW2d 724 (2006).

1. Self-Defense Elements

Bailey asserts that the trial court's "erroneous, muddled, and confusing" self-defense instructions violated his right to due process by lessening the prosecutor's burden of proof.

> As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat. [*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).]

In addition to these general concepts, the Supreme Court emphasized in *Riddle* that "a person is *never* required to retreat from a sudden, fierce, and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon." *Id*. (emphasis in original). "[A]s long as he honestly and reasonably believes that it is necessary to exercise deadly force in self-defense, the actor's failure to retreat is never a consideration," and "he may stand his ground and meet force with force." *Id*.

In contrast, when a defendant "is voluntarily engaged in mutual, nondeadly combat that escalates into sudden deadly violence," the defendant must retreat. *Riddle*, *supra* at 131-132. The Supreme Court in *Riddle* explained further the following situation in which an affirmative obligation to retreat exists:

> One who was the aggressor in a chance-medley (an ordinary fist fight, or other nondeadly encounter), or who culpably entered into such an engagement, finds that his adversary has suddenly and unexpectedly changed the nature of the contest and is resorting to deadly force. *This . . . is the only type of situation which requires 'retreat to the wall.'* Such a defender, not being entirely free from fault, must not resort to deadly force if there is any other reasonable method of saving himself. Hence if a reasonable avenue of escape is available to him he must take it *unless he is in his 'castle'* at the time. [*Id*. at 133 (citation omitted, emphasis in original).]

"Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Elkhoja*, 251 Mich App 417, 443; 651 NW2d 408 (2002), vac'd in part on other grounds 467 Mich 916 (2003).

Bailey submits that the following instructions of the trial court regarding the concept of an aggressor effectively eliminated his claim of self-defense:

> You've also got to remember that a person forfeits self-defense, even if they'd otherwise have it, have the right to it, if they were the first to use deadly force, that's the ultimate bootstrapping. You can't use deadly force, and then have someone respond to deadly force and say, Now I can use deadly force to defend myself. You just can't do that.
>
> *Nor can a person claim self-defense if they provoked the other person into using deadly force. They deliberately provoke them into using deadly force, and then say, Well, now that they are, I can respond to it.*
>
> *Nor can a person claim self-defense if what they do is confront someone, intending, by their mere presence, to provoke that person into doing something, and then take advantage of it. That is all making the person who is claiming self-defense the aggressor. You have to be without fault. Without fault means that you can't be the first one to use, and you can't provoke the other person into doing it, and you can't set up a situation where what you mean for them to do is to take the first step so that you are then claiming to take the second step.* [Emphasis supplied.]

In *People v Heflin*, 434 Mich 482, 509 (opinion by Riley, C.J.); 456 NW2d 10 (1990), the Supreme Court explained that "an act committed in self-defense but with excessive force or in which defendant was the initial aggressor does not meet the elements of lawful self-defense." In *People v Van Horn (On Remand)*, 64 Mich App 112, 115; 235 NW2d 80 (1975), this Court quoted with approval from *Wharton's Criminal Law & Procedure* (Anderson ed), § 229, p 501: "It is generally held that the aggressor is the one who first does acts of such nature as would ordinarily lead to a deadly combat or as would put the other person involved in fear of death or serious bodily injury."

We find that the trial court improperly stated the law regarding the concept of an "aggressor," particularly as to defendant Bailey, when he instructed the jury in this regard. No legal authority in Michigan supports that one becomes an aggressor merely by presenting oneself to the victim on a public street, even if armed. In *People v Bright*, 50 Mich App 401, 405; 213 NW2d 279 (1973), this Court held that "merely possessing a loaded weapon does not take away the claim of self-defense from an individual." In *People v Townes*, 391 Mich 578, 586-592; 218 NW2d 136 (1974), our Supreme Court rejected the notion that the defendant's trespass at a tire store and his attempted provocation of a store employee precluded him from arguing self-defense. Although the defendant shared some degree of "fault" for the encounter, he was nevertheless entitled to claim self-defense.

Similarly, in *Riddle*, the Supreme Court explained that even one who is "an aggressor in a chance-medley" may be entitled to use deadly force, depending on the circumstances. *Riddle*, *supra* at 133. The Supreme Court stated that "where a defendant 'invites trouble' or meets nonimminent force with deadly force, his failure to pursue an available, safe avenue of escape might properly be brought to the attention of the factfinder as a factor in determining whether the defendant acted in reasonable self-defense." *Id*. at 127. "Inviting trouble," according to *Riddle*,

includes "voluntarily participating in mutual nondeadly combat." *Id*. at 142. Further, it is generally accepted that

> [o]ne may, without forfeiting his right to defend himself against attack, seek an interview with another in a peaceable manner, for the purpose of demanding an explanation of offensive words or conduct or demanding the settlement of a claim, and according to many decisions, he need not go in a friendly spirit. He may, it seems, assert self-defense as excuse or justification, even though he arms himself before seeking the interview. [26 Am Jur, Homicide, § 131].

Standing alone, Bailey's armed presence on the street does not amount to either fault or provocation. Contrary to the trial court's charge, "confront[ing] someone, intending, by their mere presence" to provoke an affray does not eliminate one's potential opportunity to invoke a self-defense. Rather, Bailey's actions amount to conduct that a jury must evaluate, along with the totality of the surrounding circumstances, in deciding whether he "started an assault … with deadly force [or] with a dangerous or deadly weapon." CJI2d 7.18. The trial court's "mere presence" instruction additionally contradicts CJI2d 7.19, "Nondeadly Aggressor Assaulted with Deadly Force":

> A defendant who (assaults someone else with fists or a weapon that is not deadly / insults someone with words / trespasses on someone else's property / tries to take someone else's property in a nonviolent way) does not lose all right to self-defense. If someone else assaults him with deadly force, the defendant may act in self-defense, but only if he retreats if it is safe to do so.

Furthermore, no record evidence supports that Bailey "intended by his mere presence" to incite or provoke the victim. Construed in the light most favorable to the prosecution, the record reveals that Bailey did not know the victim, and agreed to accompany Lambeth so that Lambeth could confront the victim. Contrary to the trial court's instruction, Bailey's mere presence at this confrontation, without more, did not automatically render him an "aggressor," and did not eliminate his ability to claim self-defense.

2. Self-Defense Burden of Proof

Bailey avers that the trial court's instructions "lowered the prosecution's burden of disproving self defense and defense of another" because the court repeatedly referred to self-defense as a "limited" defense and failed to specifically instruct the jury that the prosecution bore the burden of proving that defendants did not act in self-defense.

The trial court's instructions regarding the prosecutor's burden of disproving self-defense appear in the following excerpt:

> The first thing you have to keep in mind is that the lack of justification has to be proven here. The defendant doesn't have to prove justification. The evidence has to establish the lack of justification. Now, that's an awkward way of saying things. It is talking about proving a negative, which is technically correct, but hard to talk about. Let's turn it around and talk about it positively.

> Since it has got to be proven beyond a reasonable doubt, just like you contributed to the murder, that a person did not kill with justification, I'm going to state it this way: If there is a realistic possibility, based upon the evidence presented here, that one or both of the defendants acted in either self-defense or defense of another person, then we don't have a murder, if there was a realistic possibility. If, on the other hand, it's not a realistic possibility, no possibility at all, or even just a mere possibility, just a possibility, not a realistic possibility, then murder is back on the table, because then the thing which would eliminate it; justification, doesn't exist.

We conclude that the trial court erred by failing to properly instruct the jury regarding the applicable burden of proof. The trial court's instruction that "[t]he defendant doesn't have to prove justification" is correct. Had the trial court followed this statement with language similar to that contained in CJI2d 7.20, the jury would have been more completely and properly instructed. Instead, the trial court continued, "The evidence has to establish the lack of justification. Now, that's an awkward way of saying things. It is talking about proving a negative, which is technically correct, but hard to talk about." During the trial court's ensuing effort to clarify the law, the court entirely neglected to inform the jurors that the prosecutor bore the burden to disprove defendants' self-defense claims.

3. Nature of Self-Defense Instructional Errors

In *Martin v Ohio*, 480 US 228, 233-234; 107 S Ct 1098; 94 L Ed 2d 267 (1987), the Supreme Court held that a state may constitutionally require that a defendant affirmatively establish self-defense by a preponderance of the evidence, as long as the prosecution is required to prove all the elements of murder beyond a reasonable doubt. The Supreme Court distinguished between shifting the burden of proving self-defense to the defendant and eliminating self-defense altogether:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i.e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and plainly run afoul of *Winship*'s[3] mandate. The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime. [*Id.* (citation omitted).]

The reasoning in *Martin* compels us to reject Bailey's contention that the trial court's erroneous self-defense instructions qualify as constitutional error.

[3] *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

4. Harmless Error Analysis

Because the challenged instructions implicate preserved nonconstitutional error, we must determine whether it affirmatively appears from the entire record that the instructional errors were outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Pursuant to MCL 769.26,

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury … unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

"Stated another way, the analysis focuses on whether the error undermined reliability in the verdict." *People v Cornell*, 466 Mich 335, 364; 646 NW2d 127 (2002).

Here, unequivocal evidence demonstrates that Bailey shot the victim from a distance of at least four feet, and continued firing his weapon even after the victim had fallen to the ground. Four of Bailey's shots entered the victim's back, and the fatal shot penetrated the victim's side. No weapon was ever found on the victim's body. The sole evidence supporting Bailey's claim of self-defense or the defense of another was provided by Lambeth, whose testimony the prosecutor thoroughly discredited. Moreover, our Supreme Court has held that it is not error to fail to specifically charge "that the burden was upon the people to prove that the killing was not done in self-defense," particularly when the instructions otherwise fairly presented the prosecution's burden of proof. *People v Hunley*, 313 Mich 688, 695; 21 NW2d 923 (1946); *People v Palma*, 111 Mich App 684, 690-691; 315 NW2d 182 (1981). We conclude that the erroneous self-defense instructions did not undermine the reliability of the verdicts.

C. Aiding and Abetting or Contribution Instructions

Bailey next alleges that the trial court inaccurately answered the jury's questions during deliberations concerning whether he "contribut[ed]" to or aided and abetted the victim's death. "[T]he three elements necessary for a conviction under an aiding and abetting theory [are]: (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 that [the defendant] gave aid and encouragement." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). "A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." *Id*. at 15.

The standard criminal jury instruction describing aiding and abetting, CJI2d 8.1, is a "clear and proper statement of the law." *People v Champion*, 97 Mich App 25, 32; 293 NW2d 715 (1980), rev'd in part on other grounds 411 Mich 468; 307 NW2d 681 (1981). Defendants requested that the trial court read the standard instruction, which states,

> (1) In this case, the defendant is charged with committing [murder] or intentionally assisting someone else in committing it.

(2) 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 abettor.

(3) To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:

(a) First, that the alleged crime was actually committed, either by the defendant or someone else. It does not matter whether anyone else has been convicted of the crime.

(b) Second, that before or during the crime, the defendant did something to assist in the commission of the crime.

(c) Third, the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance.

Although the trial court did not employ the standard instructions, Bailey does not dispute the legal accuracy of the trial court's initial jury instructions with respect to aiding and abetting.

Bailey focuses his criticism on the trial court's supplemental instructions to the jury during deliberations, which he asserts essentially directed the jury to find him guilty of aiding and abetting the killing of the victim. During the first full day of deliberations, Bailey's jury asked several questions regarding the trial court's "contributing" and the aiding and abetting instructions, including, "Please provide a more elaborate explanation of contributing to death." After the trial court clarified, "I think what you really mean is please, provide a more understandable explanation rather than a more elaborate one," the court commenced lengthy supplemental instruction.

The first portion of the supplemental instruction specifically challenged by Bailey consists of the following:

Now, you don't have to have meant to help them do exactly what they ended up doing or you don't have to know that they were going to do exactly what ended up. What you've got to do is mean to help them commit to do something that was wrong, for example, to assault a person.

If you find that both people meant to threaten [the victim] with a gun, if you find that, that's an assault. And then, the law says if what you do is you mean to help in that kind of a situation, and it balloons into a homicide, since that homicide—the killing of someone—is kind of an expected consequence—you know, guns go off, they get fired, people get killed—that you are responsible even though your intention was to help only to a point. But, if the point goes beyond that, and it's a natural and probable consequence, then, you're responsible.

* * *

> As our Supreme Court said, in our judgment a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into a murder.

Bailey also criticizes the following response by the trial court to the jury's second question, "Does the deliberately contribute to the death apply to second degree murder?"

> Yes, it does. But, let's not get—we're using the word "deliberately" here and this is our fault in two different ways. We're talking about deliberately helping, and then, premeditated and deliberate. And deliberate simply means that you thought about it ahead of time, and that's different from contributing. I'm going to focus just on the contributing. That's the issue you've asked me about.
>
> * * *
>
> You have to—you know, if you walk up and just mean to say hello to someone, and someone ends up killing them, well, it's not natural and probable that saying hello is going to develop into a killing. So, you're not responsible for that.
>
> But if, as I said there, there's an effort to have an assault, such as threatening somebody with a gun and that develops into a homicide, then, the law says, they're both responsible because the homicide is not an unexpected consequence of that happening. We wish it wouldn't happen. We hope it doesn't blossom that way, but if it does, you can't after the fact, say I only meant to go so far and no further.

Bailey lastly complains about the trial court's reply to the query, "What if there was no proof that Mr. Bailey knew the reason he was going down there?" The trial court answered by instructing the jury to decide the case on the basis of the proofs presented, and continued,

> Just because someone didn't say this person knew or it or that [sic], doesn't mean they didn't, if the circumstances reveal that. But if, in your conclusion, there is no proof that he knew what was going on, he can't have been a contributor unless, before it happened, he got information and figured it out. You don't have to know at the beginning. You just got to know before you ultimately help.

Contrary to Bailey's argument that the trial court's answers were "tantamount to a directed verdict," we find that the supplemental instructions reasonably and in a legally accurate fashion explained the relevant aiding and abetting principles. *Robinson*, *supra* at 11-13 (explaining that an aider and abettor "is criminally liable as long as the crime is within the natural and probable consequences of the intended assaultive crime"). The evidence at trial revealed that Bailey and Lambeth each armed themselves before setting off to confront the victim. A jury reasonably could conclude that the actions of two people bringing firearms to a meeting with the purportedly violent-natured victim exhibited a "willful and wanton disregard for whether death will result." *Id.* at 11 (finding that the victim's death was "clearly within the common enterprise the defendant aided because a homicide 'might be expected to happen if the

occasion should arise' within the common enterprise of committing an aggravated assault"). The trial court properly instructed the jury that "if … there's an effort to have an assault, such as threatening somebody with a gun and that develops into a homicide, then, the law says, they're both responsible because the homicide is not an unexpected consequence of that happening." We conclude that the challenged instructions fairly presented the aiding and abetting issue to the jury.

Bailey's related contention that the trial court's use of examples "took away the jury's ability to make the critical determination of whether . . . [he] aided and abetted a murder" also lacks merit. The supplemental instructions properly offered the jury alternative decisional options, including, "If you find that both people meant to threaten [the victim] with a gun, if you find that, that's an assault," and that "if, as I said there, there's an effort to have an assault, such as threatening somebody with a gun and that develops into a homicide, then, the law says, they're both responsible because the homicide is not an unexpected consequence of that happening." These are correct statements of the law that did not invade the province of the jury, and did not leave the jury with no alternative besides a guilty verdict.

D. Mere Presence Instruction

In a somewhat related argument, according to Bailey the trial court erred by failing to give a requested standard jury instruction regarding mere presence at a crime scene, CJI2d 8.5. Bailey correctly observes that mere presence, even with knowledge that an offense is about to be committed or is being committed, does not suffice to prove that a person is an aider and abettor. *People v Rockwell*, 188 Mich App 405, 412; 470 NW2d 673 (1991).

Here, however, the trial court's instructions properly conveyed to the jury that Bailey could be convicted as an aider and abettor only if he knew what was going to happen and assisted, or if he helped Lambeth "commit one crime" that "escalate[d]" into something more, "so long as the something else was kind of a natural and probable thing." Although this specific portion of the court's aiding and abetting instruction is neither particularly clear nor strictly accurate, other portions of the instructions emphasized that Bailey had to possess the intent to commit murder or to commit an assault. The jury could not have been confused concerning the requirement that an aider and abettor must possess a specific intent because the trial court repeatedly referred to an intention to act jointly, or to help, or to "knowingly" participate in the confrontation with the victim. Furthermore, because the evidence demonstrated that Bailey deliberately attended an armed discussion with the victim and fired his weapon, the evidence at trial did not support the requested "mere presence" instruction.

E. Imperfect Self-Defense/Voluntary Manslaughter Instruction

Bailey additionally maintains that because the trial court instructed the jury that he could not assert self-defense if he "provoked" the victim, the court should have provided the jury with a voluntary manslaughter instruction. Bailey theorizes that the trial court's "aggressor" instructions injected an "imperfect self-defense," which can mitigate an act of second-degree murder to voluntary manslaughter, and therefore mandated that the jury consider whether he was guilty of voluntary manslaughter, a necessarily included lesser offense of murder.

In light of Bailey's admission that his counsel did not request a voluntary manslaughter instruction, we review this unpreserved issue only for any plain error affecting his substantial rights. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005). Imperfect self-defense can mitigate second-degree murder to voluntary manslaughter, but only where the defendant would have been entitled to claim self-defense had he not been the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). In this case, however, Bailey's counsel insisted throughout trial that he was not the initial aggressor and did nothing to "provoke" the victim. A voluntary manslaughter instruction would have contradicted Bailey's entire defense that defendants sought only a peaceful discussion with the victim regarding his alleged theft of Lambeth's ring. Because the evidence did not support an instruction regarding voluntary manslaughter, we ascertain no plain error affecting Bailey's substantial rights.

F. Prosecutorial Misconduct

Bailey asserts that the prosecutor in her rebuttal argument (1) improperly referred to his failure to testify, which violated his Fifth Amendment right to remain silent, and (2) argued facts not in evidence that unfairly vouched for the victim's character. Because Bailey did not object to either of the prosecutor's challenged comments, we review this issue only to determine whether any plain error affected his substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Reversal is warranted only if the prosecutor's comments plainly qualified as misconduct, and if they resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.*

"Questions of misconduct by the prosecutor are decided case by case. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial." *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). This Court will not find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. *Callon*, *supra* at 329-330. Otherwise improper argument by the prosecutor may not require reversal if it is responsive to issues raised by the defense. *Id.* at 330. "Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Id.*

Our review of the record reveals that the prosecutor's comments that "[w]e don't know what Sammy Bailey actually believed," and that "[t]here has been no evidence about what Sammy Bailey actually believed," did not violate his Fifth Amendment privilege against self-incrimination. A prosecutor may not argue that a defendant's silence substantively evidences his guilt. *People v Fields*, 450 Mich 94, 111; 538 NW2d 356 (1995). However, a prosecutor may fairly respond to defense counsel's arguments and strategy. *United States v Robinson*, 485 US 25, 33; 108 S Ct 864; 99 L Ed 2d 23 (1988). Here, the prosecutor bore the burden of proving that Bailey shot the victim in the absence of an honest or reasonable belief that the victim's actions created an imminent threat of death or serious injury. In his closing argument, Bailey's counsel contended that Bailey had shot the victim in self-defense:

> The Judge is going to give you an instruction of in self-defense of others. Listen to that instruction. The burden of proof is not on me or Mr. Bailey. The burden of proof is on the prosecutor to prove beyond a reasonable doubt that he did not act in self-defense of his brother. . . . I honestly expected him to take the

> witness stand and say, "You know what, Ladies and Gentlemen of the Jury? I shot those shots. Let my brother go." Selfish. Right down to the wire, selfish. He left his brother hangin' like a wet sheet, ladies and gentlemen.
>
> I'm asking for verdict of not guilty. This does not belong on Sammie's shoulders. He should not be in this courtroom. He should not be on trial for this. Please, when you go in the jury room, read between the lines of this whole thing here. What's going on here? Who had the beef? Who had the argument? Who had the problem? Who had the .9 millimeter? Who had the guns? Who left Grand Rapids? Who fled? Who had the money? Who's sellin' drugs? Who's robbin' people? Who has the name Killer-Keith? There's only two people really involved in this whole thing. Mr. Lambeth pulled in his momma, his grandfather, and placed his brother in such an awkward position to be facing first-degree murder and/or second-degree murder.

Fairly construed in context, the prosecutor's rebuttal comment that "we don't know what Sammie Bailey actually believed" addressed the inherent weaknesses of Bailey's defense, and did not focus on Bailey's failure to testify. *Fields*, *supra* at 111.

The prosecutor's comments regarding the victim's character may have amounted to "unfair vouching" and reference to facts not in evidence.[4] But given the brief and isolated nature of the remarks, and the trial court's instruction that the attorney's arguments did not constitute evidence, we conclude that the remarks did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of Bailey's trial. *Callon*, *supra* at 329.

II. Docket No. 278519, *People v Lambeth*

A. Minority Juror Exclusion

Lambeth insists that the prosecutor improperly exercised two peremptory challenges to strike otherwise-qualified African-American jurors, which the trial court should have rejected. According to the trial court, Lambeth's venire contained a total of 52 prospective jurors, including three African-Americans. Lambeth ultimately stood trial before a jury that did not include any African-Americans.

1. Governing Legal Principles

Batson v Kentucky, 476 US 79, 89, 96-98; 106 S Ct 1712; 90 L Ed 2d 69 (1986), forbids the use of peremptory challenges to strike prospective jurors on the basis of race. The *Batson* decision "set forth a three-step process for determining an improper exercise of peremptory

[4] The prosecutor commented, "I know that it does weigh on you that a mother has two sons who made terrible choices. But there is another mother who's [sic] son got gunned down. He got ambushed. I guarantee you that [the victim] never gunned anybody down in broad daylight on the streets …."

challenges." *People v Bell*, 473 Mich 275, 282 (opinion by Corrigan, J.); 702 NW2d 128, amended 471 Mich 1201 (2005).

The first *Batson* step requires the establishment of a prima facie case of racial discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, *supra* at 93-94. To satisfy the initial showing, a defendant must prove membership in "a cognizable racial group," and "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id*. at 96. During this first step, "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id*. The defendant must demonstrate that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id*. In *Batson*, the Supreme Court observed that a "pattern" of strikes against African-American jurors may "give rise to an inference of discrimination," as may "the prosecutor's questions and statements during *voir dire*." *Id*. at 97.

When a defendant establishes a prima facie case of purposeful discrimination, "[t]he prosecutor … must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, *supra* at 98. Step two in the *Batson* analysis requires the prosecutor to "give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e]." *Id*. at 98 n 20 (internal quotation omitted). If the prosecutor's explanations qualify as race-neutral, "we pass to the third step of *Batson* analysis to determine whether the race-neutral and facially valid reason was, as a matter of fact, a mere pretext for actual discriminatory intent." *People v Knight*, 473 Mich 324, 344; 701 NW2d 715 (2005), quoting *United States v Uwaezhoke*, 995 F2d 388, 392 (CA 3, 1993).

Step three concerns whether the defendant "carried his burden of proving purposeful discrimination." *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991). The burden of persuasion regarding purposeful discrimination falls on and never leaves the opponent of a strike. *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). In *Miller-El v Cockrell*, 537 US 322, 338-339; 123 S Ct 1029; 154 L Ed 2d 931 (2003), the Supreme Court observed that "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." "[T]he issue comes down to whether *the trial court* finds the prosecutor's race-neutral explanations to be credible." *Id*. (emphasis supplied). In *Snyder v Louisiana*, __ US __; 128 S Ct 1203, 1207-1208; 170 L Ed 2d 175 (2008), the Supreme Court expounded on the trial court's central role in ascertaining a *Batson* violation:

> On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and the best evidence (of discriminatory intent) often will be the demeanor of the attorney who exercises the challenge. In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must

> evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province, and we have stated that in the absence of exceptional circumstances, we would defer to (the trial court). [Internal quotation omitted, alteration in original.]

The Michigan Supreme Court also has emphasized that reviewing courts should defer to a trial court's resolution of a *Batson* challenge. In *Knight*, *supra* at 344, our Supreme Court explained that appellate courts review for clear error a trial court's determination that the opponent of the peremptory challenge has proved purposeful discrimination. "Moreover, the trial court's ultimate factual finding is accorded great deference." *Id*.[5]

2. Juror Exclusion Analysis

We initially observe that the trial court incorrectly found that Lambeth's counsel's challenge of the prosecutor's strike of juror Tamala Ewing "wasn't lodged at the appropriate time." *Batson* specifically permits a defendant to challenge a prosecutorial peremptory strike after "a 'pattern' of strikes against black jurors" has emerged. *Batson*, *supra* at 97. The Supreme Court in *Batson* characterized as "timely" an objection made before the jury was sworn. *Id*. at 83, 100. In *Knight*, *supra* at 348, our Supreme Court held that "a *Batson* challenge is timely if it is made before the jury is sworn." Indisputably, Lambeth raised his *Batson* challenge before the jury was sworn, and thus in a timely fashion.

But the trial court otherwise thereafter properly utilized the *Batson* framework when analyzing the propriety of both peremptory strikes by the prosecutor. The prosecutor provided the following "race neutral" explanation for the challenges:

> With respect to Mr. [Allen] James, umm, he clearly did not want to be here. He was very rushed in his questioning (sic), and I was very uncomfortable with some of his answers, some of his responses to the questions regarding his contacts with the police in his capacity as a trucker. That is the reason I excused him.
>
> With respect to Ms. Ewing, one, she had a theft offense; and two, she clearly did not take responsibility for it. Umm, so I was, again, very uncomfortable with that response with her handling of that situation.

[5] In *Knight*, *supra*, our Supreme Court described in detail the standards of review that govern *Batson* claims of juror exclusion. The applicable standard of review varies according to the *Batson* step at issue in a particular appeal. *Id*. at 338. During *Batson*'s first step, questions of law are reviewed de novo, and factual findings for clear error. *Id*. at 343. De novo review "governs appellate review of *Batson*'s second step." *Id*. at 344. We apply the clear error standard to "a trial court's resolution of *Batson*'s third step." *Id*. at 345.

The trial court reasoned as follows that it would accept the prosecutor's explanations:

> . . . [The prosecutor] is right; *Batson* simply requires that she give a race neutral reason which is not incredible on its face. She has done that. She did it at the bench and reiterated it here a moment ago. Not only was Ms. Ewing convicted of a crime, perhaps, a misdemeanor that wouldn't disqualify her, but is still a matter of some significance, but, most importantly, she plainly—I have to agree with [the prosecutor]—minimized her involvement. She admits she pled guilty to a crime that she says she knew nothing about, because someone dropped a CD in her purse. I suppose that's possible, but not very likely. The prosecutor is certainly entitled to conclude that the person is still in the minimization/denial stage, which can have all kind of repercussions about their ability to fairly and accurately assess somebody else's guilt.
>
> [W]ith regard to Mr. James[,] [a]gain, the prosecutor has stated two very credible race neutral reasons. He did in fact express some displeasure with the police. It's true that a lot of other jurors said they thought the police did a good job. But we're not talking about a challenge for cause, we're talking about one, peremptorily. [Defense counsel] could have excused those jurors as well. I should say those jurors who expressed satisfaction with the police.
>
> Dissatisfaction is a legitimate thing for the prosecutor to be concerned about. And it was also very apparent that Mr. James just didn't want to be here. Granted, we could have ordered him to be here at a great financial loss to himself, but I can't order him to do that if one of the parties wants to excuse him for that reason. And, I think one of the standard reasons lawyers excuse witnesses—jurors who don't want to be here is that, because the person who doesn't want to be here is the proverbial loose cannon. You don't know what an individual who is unhappy about being here is going to do.
>
> In all my years of practice, I don't think I ever left on the jury, if I had a challenge to use, a juror who claimed they didn't want to be here.
>
> Accordingly, under *Batson*, ample cause was given to justify the exercise of the peremptory challenges. Turns out, therefore, to be something that the Court must accept as purely coincidental, that two of the ten peremptory challenges exercised by the prosecution were of African-American juries (sic)—jurors. They were excused for other reasons.

This Court must afford deference to the trial court's determination that the prosecutor supplied credible race-neutral reasons for the strikes. *Knight*, *supra* at 344. Although Lambeth alleges that the prosecutor supplied pretextual "rationales in support of the challenges," he fails to describe any factual or legal basis for this conclusion. Because juror Ewing's prior misdemeanor conviction and juror James's "displeasure with the police" both qualified as legitimate, race-neutral reasons to strike these jurors, the trial court did not err by permitting the prosecutor to exercise the peremptory challenges.

B. Character Evidence of the Victim

Lambeth also challenges the trial court's exclusion of Detective Needham's testimony concerning the victim's violent tendencies. Because Lambeth raises precisely the same argument advanced by codefendant Bailey in Docket No. 278411, our analysis in part I(A) of this opinion demonstrates the lack of merit in Lambeth's contention.

C. Self-Defense Jury Instructions

Like Bailey, Lambeth criticizes the trial court's self-defense jury instructions as "confusing and burden-shifting," as well as improper and prejudicial. For the reasons discussed in parts I(B)-(F) of this opinion, no prejudicial error arose from the trial court's defective self-defense jury instructions.

Although the trial court improperly directed the jury to find that if Lambeth was an "aggressor," he forfeited altogether his self-defense claim, we detect no likelihood that the inaccurate instructions altered the result or undermined the reliability of Lambeth's trial. Lambeth admitted having arming himself to confront the victim regarding his prior robberies of Lambeth, and to taking Bailey with him to "watch my back." No evidence tended to establish that the victim had a weapon. All of the multiple gunshots struck the victim's back or his side. In summary, overwhelming evidence demonstrated that Lambeth behaved as the aggressor, intending to ambush the victim in retaliation for the previous robberies.

D. Issues Raised in Lambeth's Pro Per Supplemental Brief

1.

Lambeth first argues in his supplemental brief that the trial court's admission into evidence of a recorded statement by Bailey deprived Lambeth of a fair trial. On May 3, 2006, the day of the shooting, Bailey gave three statements while in custody at a police station. The trial court ruled with respect to the first two custodial statements made by Bailey that the prosecutor potentially could introduce them solely for impeachment, "should [Bailey] testify to the contrary." Regarding a third "statement made by [Bailey] to his mother," the trial court ruled that the prosecutor could utilize the statement "as evidence in its case-in-chief."

Lambeth now suggests that the playing at trial of the third, recorded statement by Bailey prejudiced him. But Lambeth entirely ignores the crucial fact that the trial court only permitted the prosecutor to play Bailey's recorded conversation with his mother in the presence of Bailey's jury, and after the court had excused Lambeth's jury from the proceedings for the day. Irrespective of the merits of the trial court's evidentiary ruling, Lambeth's claim of error in this regard lacks merit because he cannot establish that the trial court's ruling prejudiced the jury in his case, which did not hear Bailey's recorded statement. MCL 769.26.

2.

Lambeth next asserts that the trial court's ruling to permit Bailey's counsel to cross-examine Lambeth at trial rendered the proceedings unfair. On appeal, Lambeth implicitly acknowledges that in *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), our Supreme

Court held that under MCR 6.121(C), severance of a joint trial "is mandated . . . 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." At trial, Lambeth's counsel urged the court to limit Bailey's counsel's cross-examination of Lambeth, but he failed to identify any specific manner in which this questioning would prejudice Lambeth's substantial rights. On appeal, Lambeth also entirely fails to identify any specific and substantial prejudice resulting from his cross-examination by Bailey's counsel. Applying the Supreme Court's holding in *Hana*, the only Michigan authority Lambeth identifies on appeal, to his complaint about cross-examination by Bailey's counsel, we conclude that Lambeth's "failure to make this showing [clearly, affirmatively, and fully demonstrating prejudice to his substantial rights] in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, . . . preclude[s] reversal of a joinder decision," or in this case the trial court's cross-examination ruling. *Id.* at 346-347. We further reject Lambeth's invitation to adopt the dissenting opinion in *Hana* because he offers no subsequent Michigan or other authority tending to criticize or undercut the opinion of the Court in *Hana*.

3.

Lambeth contends that the trial court erred by refusing to admit character evidence in the form of a toxicology report concerning the victim, which tended to show that the victim had elevated levels of controlled substances. During testimony by the forensic examiner who autopsied the victim, Lambeth's counsel sought to introduce a three-page toxicological report documenting the substances present in various fluids from the victim's body. The trial court allowed counsel to display the report with an overhead projector while cross-examining the forensic examiner at length regarding its contents. Because the record reflects that Lambeth's counsel elicited a complete list of all the controlled substances that the toxicology report identified as present in victim's body, and extensively cross-examined the forensic examiner on this subject, Lambeth endured no prejudice arising from the trial court's exclusion of the printed toxicological report. MCL 769.26.

4.

Lambeth additionally challenges the sufficiency of the evidence supporting his first-degree murder conviction. We review sufficiency of the evidence claims de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

To establish first-degree murder under MCL 750.316(1)(a), the prosecutor must prove "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). Premeditation and deliberation involve an "interval between the initial thought and ultimate action . . . long enough to afford a reasonable person time to take a 'second look.'" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Premeditation and deliberation can be inferred from the circumstances surrounding the victim's death. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001); *Saunders*, *supra* at 496. Factors relevant in establishing premeditation and deliberation include evidence of 1) the parties' prior relationship; 2) the defendant's actions

before the killing; 3) the circumstances of the killing itself, including the manner of the victim's death; and 4) the defendant's actions after the killing. *People v Bowman*, 254 Mich App 142, 152; 656 NW2d 835 (2002); *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Minimal circumstantial evidence suffices to prove a defendant's state of mind. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

Our review of the record reveals that the prosecutor presented ample evidence supporting the jury's rational conclusion beyond a reasonable doubt that Lambeth premeditated and deliberated his killing of the victim. The evidence showed that Lambeth and the victim had a prior relationship, specifically through the victim's multiple robberies of Lambeth. The evidence also reflected that on the afternoon of the shooting, Lambeth armed himself, recruited Bailey who also was armed as an accomplice, and that Lambeth and Bailey approached the unarmed victim and proceeded to shoot him multiple times, including in his back, killing him before any discussion had occurred or the victim had a chance to attempt flight. To the extent that Lambeth insists that he "honestly and reasonably believed that his life was in danger," the jury plainly found Lambeth's description of the killing incredible, and we will not second guess the fact finder's credibility determination in this regard. *Nowack*, *supra* at 400 (cautioning a reviewing court to "make all credibility choices in support of the jury verdict").

5.

Lambeth also maintains that the introduction of evidence that the police found (1) a small scale in Bailey's home at the time of his arrest, and (2) $10,000 in Lambeth's car when they arrested him, deprived him of a fair trial. Because Lambeth failed to object at trial to the introduction of evidence regarding the cash or the scale, he must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error affecting Lambeth's substantial rights because (1) each of the challenged references occurred in isolated fashion, and (2) as discussed, overwhelming evidence established Lambeth's guilt of first-degree premeditated murder.

6.

Lambeth next complains that the trial court improperly refused his request for exculpatory evidence and the production of res gestae witnesses. But Lambeth's supplemental brief concedes that he "received the particular evidence requested," and otherwise fails to identify any res gestae witnesses who were not endorsed or any improperly excluded res gestae witness testimony. Consequently, Lambeth has abandoned this claim. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) (observing that an "appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue").

7.

Lambeth contends that the trial court's improper admission of evidence "in violation of MRE 404(b)" infringed on his right to a fair trial. Tina Sterling testified regarding a June 2005 encounter between Lambeth and the victim. According to Sterling, her daughter had observed the victim wearing what "look[ed] like [Lambeth's] jewelry," called to advise her boyfriend Lambeth, and Lambeth arrived shortly thereafter and threatened to kill the victim "wherever I see" him. Defense counsel did not object to this testimony, presumably because Sterling's

testimony qualified as admissible as tending to prove that Lambeth had a motive for visiting revenge on the victim; MCR 404(b)(1) expressly contemplates admissibility for this purpose. Even assuming some error in the admission of Sterling's testimony, no plain error affected Lambeth's substantial rights given the abundant evidence of his guilt in shooting the victim.

8.

Because Lambeth offers on appeal no factual development of his contentions that the prosecutor committed misconduct, i.e., by improperly bolstering "the credibility of h[er] witnesses" and denigrating the believability of defense witnesses, he has abandoned these assertions. *Harris*, *supra* at 50.

9.

Lambeth additionally raises two alleged instances of ineffectiveness by his trial counsel, first that counsel never advised him of a proffered plea bargain, and second that his counsel inadequately impeached several witnesses at trial. With respect to the first ineffective assistance claim, the trial court observed the following at defendants' sentencing hearing on May 14, 2007:

> I had not planned on addressing the plea agreement which was offered in the case. But, since there is some public dispute as to whether there was one and what it was, I think in the spirit of openness, it needs to be identified. A plea agreement was indeed offered to both Mr. Bailey and Mr. Lambeth. Both were offered the opportunity by the prosecution to plead guilty to murder in the second degree, which would have eliminated the mandatory sentence of life imprisonment without parole.
>
> It was anticipated that the guidelines, had they entered those pleas, would have called for sentences in the range of 15 to 22-and-a-half years. That was specifically addressed. I agreed to impose a sentence, if there were pleas to second-degree murder, within the guidelines range.
>
> The pleas, however, were rejected. And, of course, in the case of Mr. Lambeth, the conviction mandates a sentence far more than was even contemplated by that plea agreement.

In an April 2008 affidavit attached to his supplemental brief, Lambeth insists that he "had no prior knowledge of a plea agreement," that his counsel "did not discuss . . . [the] plea agreement with me prior to proceeding with trial," and that had he known he "would have accepted the terms of the agreement rather than proceeding with trial." Because the record, as summarized by the trial court that presided throughout the circuit court proceedings, belies Lambeth's self-serving, postconviction affidavit protestations that he did not know about the plea offer, we reject that his counsel was ineffective in this respect. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Concerning Lambeth's second allegation of ineffective assistance, he has supplied little for this Court to consider. He merely avers generally that he "pointed out numerous perjured testimonies" to his counsel at trial and requested that counsel impeach the witnesses in

accordance with their contrary statements in police reports and the preliminary examination transcript, which counsel neglected to do. Because Lambeth once again offers on appeal no factual development of his contentions, he has abandoned these assertions. *Harris, supra* at 50.

10.

Lambeth lastly submits that the trial court deprived him of due process by seizing and refusing to return $10,000 that the police found in Lambeth's vehicle at the time of his arrest. In June 2007, the trial court "ordered that the $10,000 cash held by the Grand Rapids Police Department . . . be released to the Kent County Circuit Court Clerk to be disbursed" as follows: "1. $2000 to the Crime Victims Rights Compensation Commission, 2. $2700 to Christine Patton, . . . 3. $700 to Charon Investigations, LLC, . . .4. $4600 to Kent County Friend of Court ($2300 for Case No. 97-004556-DP and $2300 for Case No. 05-009078-DP)." We have located no records or documentation of any kind in the circuit court file substantiating that the trial court employed any statutory forfeiture proceedings to retain and ultimately disburse Lambeth's money. But pursuant to the trial court's order, the funds have been distributed, without a timely objection by Lambeth. We decline to address the merits of this unpreserved question because it qualifies as moot, given the trial court's disbursement of the funds. *Attorney Gen v Pub Service Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005) ("An issue is moot if an event has occurred that renders it impossible for the court to grant relief."); *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002) ("[T]his Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us . . . ."), clarified on other grounds in *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006).

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher