STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2009
v	No. 280726 Ottawa Circuit Court
ANTONIO RIORDAN LICEAGA, Defendant-Appellant.	LC No. 07-031053-FC

Before: Owens, P.J. and Sawyer and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive prison terms of 160 to 240 months for the murder conviction, and two years for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of his friend, Felipe Van, who died from a single gunshot to the left frontal area of his head. Gunpowder was embedded in the skin around the entry wound, indicating that Felipe was shot at close range. The principal issue at trial was defendant's state of mind at the time of the shooting. Defendant admitted shooting Felipe, but claimed it was an accident. Defendant testified that he and Felipe had a habit of playing with the gun and that, when the shooting occurred, he did not know there was a bullet in the chamber.

Defendant was acquitted of first-degree premeditated murder, but argues on appeal that the trial court erred in denying his motion for a directed verdict of that charge because there was insufficient evidence of premeditation to submit the charge to the jury. He also argues that the evidence was insufficient to support his conviction of second-degree murder. We disagree.

In ruling on a motion for a directed verdict, the trial court must view the evidence presented up to that time in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Similarly, in reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v*

Oliver, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Contrary to what defendant argues, "[c]ircumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *Schultz, supra* at 702.

To prove first-degree premeditated murder, the prosecution must prove beyond a reasonable doubt that the killing was premeditated and deliberate. *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). Premeditation and deliberation can be inferred from the circumstances surrounding the killing, and

> may be established through evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, (4) the defendant's conduct after the killing. Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation. However, the time required need only be long enough to allow the defendant to take a second look. [*Id.* (citations omitted).]

To prove second-degree murder, the prosecution must present evidence of a death, caused by the defendant, with malice, and without justification. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). To prove malice, there must be evidence that "the killing was done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Abraham*, 256 Mich App 265, 269-270; 662 NW2d 836 (2003).

With respect to the element of premeditation, evidence was presented that defendant was hotheaded and had a temper. According to a witness, Dalvin Kann, defendant and Felipe were playing around, but Kann could tell from defendant's facial expression and tone of voice that he was getting mad. Shortly before the shooting, defendant told Felipe that he was going to "grab my gun and shoot you." Evidence was presented that defendant had shot the gun one or two days earlier, and that he told others on the day before the shooting that he had two or three bullets left, thus supporting an inference that defendant knew that the gun was operational and loaded when he obtained it. After obtaining the gun, defendant approached Felipe, pointed the gun at him, and stated, "Do you want to play?" Kann heard a clicking sound, following which a shot was fired. The evidence of a clicking sound supports an inference that defendant manually cocked the gun before firing it. The evidence also indicated that the gun was placed near or against Felipe's head when it discharged, which supports an inference of a deliberate intent to kill. After the shooting, defendant hid the gun and ran from the house. Defendant's statements and the circumstances surrounding the shooting, viewed in a light most favorable to the prosecution, were sufficient to submit the issue of premeditation and deliberation to the jury. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict on the charge of first-degree murder.

We also reject defendant's argument that there was insufficient evidence of malice to support his conviction of second-degree murder. The evidence that defendant became angry, obtained a gun that was known to be operational and loaded, approached Felipe, manually cocked the gun, held the gun to Felipe's head, and pulled the trigger, was sufficient to enable the jury to find beyond a reasonable doubt that defendant acted with malice. See *People v Bulls*, 262

Mich App 618, 627; 687 NW2d 159 (2004) (malice may be inferred from the use of a deadly weapon). Although defendant argues that the evidence could also be construed in a manner consistent with his claim of accident, we are required to view the evidence in the light most favorable to the prosecution and give deference to the jury's resolution of disputed issues of fact. *Nowack*, *supra*. Moreover, to prove malice, the prosecution was not required to prove that defendant actually intended to harm or kill the victim, only that he intended to do an act that was in obvious disregard of life-endangering consequences. *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002). There was sufficient evidence of malice to support defendant's conviction of second-degree murder.

Defendant also argues that he is entitled to a new trial because the jury's verdict is against the great weight of the evidence. The trial court denied defendant's motion for a new trial on this ground. We review the trial court's decision for an abuse of discretion. *Unger*, *supra* at 232.

"A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* Even if we were to credit defendant's argument that he never intended to actually harm or kill Felipe, the evidence that he obtained a gun that was known to be both operational and loaded, that he pointed the gun at Felipe and held it near or against his head, and that it was necessary to cock the gun before firing it and that a cocking sound was heard before the gun discharged, provided ample support for a finding that, at a minimum, defendant acted with an intent to create a very high risk of death with the knowledge that his act was likely to cause death or great bodily harm. The evidence did not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow it to stand. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.

Defendant next argues that the trial court erroneously allowed the prosecutor to introduce evidence of other improper acts under MRE 404(b)(1), and erroneously admitted a photograph from defendant's MySpace.com website which depicted defendant holding the gun that was used to shoot Felipe and "throwing" a gang sign. We review these preserved evidentiary issues for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Defendant also argues that he was prejudiced by testimony that he was observed handling and using the gun on other occasions before the charged shooting, and by testimony about gang membership. Because defendant did not object to this testimony at trial, these issues are not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"Under MRE 404(b)(1), evidence of other acts may be admitted if (1) it is offered for a proper purpose, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense." *People v Rice (On Remand)*, 235 Mich App 429, 439-440; 597 NW2d 843 (1999).

In this case, the other acts evidence was offered for the limited purpose of proving defendant's intent, and to show a characteristic plan or scheme in committing the offense, which are proper purposes under MRE 404(b)(1). The prosecution offered evidence that defendant had previously pointed the same, loaded gun at Tony Hov, Sam Chan, and Jamie Hov in a threatening manner and asked them if they wanted "to play." This evidence was relevant to defendant's intent when he used the same phrase while pointing the same gun at Felipe. Similarly, evidence that defendant displayed the gun in a confrontation with local gang members, and on another occasion suggested that he could use the gun to shoot Felipe in the leg and that Felipe could then shoot him back, and that defendant's friends had told defendant that he should not use the gun in that manner, was relevant to defendant's familiarity with the weapon and to show that he had knowledge of its potential to cause death or great bodily harm, and thus knowingly acted in disregard of life-endangering consequences when he shot the victim. Accordingly, the trial court did not abuse its discretion in determining that the evidence was relevant to a proper purpose under MRE 404(b)(1). Moreover, the probative value of the evidence was high because defendant's intent was the principal issue at trial, and the evidence was not unduly prejudicial because, although the prosecution used the evidence to argue that defendant had the requisite intent to commit the charged crimes, the defense was able to argue that defendant's pattern of playing with the gun led to his false belief that no one would be hurt by his actions, thereby supporting his claim of accident. In addition, the trial court gave a cautionary instruction that further reduced the prejudicial effect of the evidence. Therefore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403, and the trial court did not abuse its discretion by admitting the evidence.

We reject defendant's next argument that he was prejudiced by testimony from several witnesses describing his use of the gun during the weeks preceding the shooting. This evidence was relevant to defendant's familiarity with the gun, which in turn was probative of defendant's knowledge and intent when Felipe was shot. Moreover, the defense used this testimony to support its theory that defendant treated the gun as a plaything, and that the charged shooting was accidental. Accordingly, this testimony did not constitute plain error that affected defendant's substantial rights.

Regarding the MySpace photograph, three witnesses used the photo to identify defendant as the person who previously threatened them with the gun used in this case while asking them, "Do you want to play?" The photograph was also relevant to defendant's familiarity with the weapon used in this offense. For these reasons, the trial court did not abuse its discretion in admitting the photograph.

The unchallenged testimony about gang membership was first introduced by defense counsel, who elicited that all three witnesses had gang involvement, thereby providing an explanation for why defendant may have acted in a threatening manner toward them.

Considering the context in which the testimony was received, there was no plain error affecting defendant's substantial rights.

Defendant next argues that the prosecutor's conduct at trial denied him a fair trial. Because defendant did not object to the prosecutor's conduct at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Prosecutorial misconduct issues are decided case by case. *Id.* at 721. We evaluate the prosecutor's conduct in context to determine whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor is not required to use the "blandest possible terms" to state his inferences and conclusions, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), but rather may use strong and emotional language in making his argument so long as the evidence supports it, *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

Defendant first argues that it was improper for the prosecutor to introduce the evidence of his prior gun use previously discussed in this opinion, as well as evidence that he took a hunter's safety class. Defendant asserts that this evidence was irrelevant and tended to cause the jury to convict him for reasons unrelated to the charged offense. A finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). As discussed previously, the evidence of defendant's prior use of the gun was relevant to the issues of defendant's knowledge and intent. Similarly, the evidence of the hunter's safety course was relevant to defendant's knowledge and awareness of gun safety. In light of defendant's claim that he did not know there was a bullet in the chamber of the gun at the time of the shooting, and that the shooting was an accident, evidence of defendant's prior experience and training with weapons, and his knowledge of gun safety, was relevant. Accordingly, it was not improper for the prosecutor to offer this evidence at trial.

Defendant next argues that the prosecutor improperly elicited sympathy and appealed to the jury's civic duty through the following remarks in closing argument:

> Defendant wants you to believe that this was all an accident. As if what happened on January 20, 2007 was the hand of fate as he decides to cut the life of Felipe Van. And we know that neither the Gods [sic] nor man can prevent the will of fate when it is written. But it was not written that Felipe Van had to die on January 20, 2007. And it was not written that Felipe Van will never see his family again. And it was not written that Felipe Van would never breathe again, for it was not the will of fate or the will of the Gods [sic] that took the life of Felipe Van. It was the will of man.

"[P]rosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jurors . . . ." *People v Schmitz*, 231 Mich App 521, 533; 586 NW2d 766 (1998). Also, a prosecutor may not appeal to the sympathies and emotions of the jurors. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

Here, the prosecutor did not ask the jury to convict defendant out of a sense of civic duty. Further, viewed in context, the prosecutor's remarks did not constitute an improper appeal for sympathy. The prosecutor was principally responding to the defense theory that the shooting was an accident. The prosecutor was attempting to explain that Felipe's death was not attributable to accidental causes, and to emphasize defendant's role in causing his death. The argument was not an improper appeal for sympathy. Moreover, to the extent that the remarks could be characterized as such, the trial court later instructed the jury that it "must not let sympathy or prejudice influence [its] decision." This instruction was sufficient to protect defendant's substantial rights.

We also find no merit to defendant's argument that the prosecutor misstated the law, thereby denying defendant a fair trial. Viewing the challenged remarks in context, the prosecutor merely stated that in determining defendant's intent and state of mind, the jury should evaluate defendant's words, actions, and conduct in light of common sense. It is not improper for a prosecutor to ask the jury to use common sense and everyday experiences in evaluating the evidence. *People v Simon*, 189 Mich App 565, 567; 473 NW2d 785 (1991). Further, the prosecutor's statement that he was not required to prove motive was a correct statement of the law, inasmuch as motive is not an element of murder. *People v Yost*, 468 Mich 122, 133 n 13; 659 NW2d 604 (2003). Defendant also asserts that the prosecutor misstated the law when he argued that defendant's statement, "Do you wanna play," accompanied by defendant's actions in bringing out a gun and pulling the trigger by choice showed that he was guilty of second-degree murder. Defendant argues that the prosecutor's statement is inaccurate because "there are other suppositions" that could negate a finding of murder. However, the prosecutor was merely arguing the evidence and reasonable inferences arising from it as they related to his theory of the case, which is not improper. *Bahoda*, *supra* at 282; *Unger*, *supra* at 236. Thus, there was no plain error.

Defendant next argues that the prosecutor improperly denigrated defendant and the defense. Although a prosecutor must refrain from denigrating a defendant with intemperate and prejudicial remarks, *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005), the challenged remarks here merely conveyed the prosecutor's contention that the evidence demonstrated that Felipe's death was caused by defendant's willful conduct, and that defendant's claim of accident was not credible. Considering the prosecutor's great latitude in closing argument, *Bahoda*, *supra* at 282, the prosecutor's remarks were not improper.

Similarly, the prosecutor did not make a statement of fact that was not supported by the evidence. The prosecutor's argument that defendant felt a "rush" by loading and pointing his gun, and that the gun made him feel powerful were reasonable inferences arising from the evidence presented at trial. Accordingly, they were not improper. *Unger*, *supra* at 236, 241.

Finally, defendant argues that defense counsel was ineffective to the extent that he failed to object to the various evidentiary matters and prosecutorial misconduct issues raised on appeal. Having considered each of defendant's arguments and having found no error, we likewise conclude that defense counsel was not ineffective for failing to object. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); see also *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to make a futile objection).

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey