STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2011
v ARSHAD HAMZA AL-JAMAILAWI, Defendant-Appellant.	No. 292774 Wayne Circuit Court LC No. 08-012046-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ZARD RICARDO REED, Defendant-Appellant.	No. 292865 Wayne Circuit Court LC No. 08-012046-FC

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendants Arshad Hamza Al-Jamailawi and Zard Ricardo Reed were tried jointly, before separate juries. Defendant Al-Jamailawi was convicted of first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm by a felon (felon-in-possession), MCL 750.224f, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant Reed was convicted of a single count of second-degree murder, MCL 750.317. Al-Jamailawi was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of life without parole for the murder conviction, 3 to 7 years for the felon-in-possession conviction, and 3 to 6 years for each felonious assault conviction. He was also sentenced to a consecutive two-year prison term for the felony-firearm conviction. Reed was sentenced to 15 to 30 years in prison for his murder conviction. Defendant Al-Jamailawi appeals as of right in Docket No. 292774, and defendant Reed appeals as of right in Docket No. 292865. We affirm in both appeals.

I. FACTS AND PROCEEDINGS

Defendants' convictions arise from the July 12, 2008, shooting death of Daniel Conner in Detroit. The evidence showed that Reed confronted the victim on a neighborhood street in Detroit. The confrontation led to a heated argument during which another member of Reed's group made a telephone call, following which Al-Jamailawi and another man arrived. Reed, Al-Jamailawi, and the others continued to argue with the victim. Several of the victim's friends and acquaintances, including Adam Conner (the victim's uncle), were present. Reed and his group eventually left, but witnesses heard Reed tell the victim in a loud voice that he should "strap up" because Reed intended to return.

A few minutes later, Reed, Al-Jamailawi, Lionel Butler, and five to seven other men returned and rushed onto the lawn where the victim was standing. One man, identified by some witnesses as Butler, hit the victim with brass knuckles. According to several witnesses, Al-Jamailawi brandished what appeared to be a nine-millimeter semiautomatic handgun and warned the onlookers not to get involved. Reed fought with Adam Conner, apparently to prevent him from coming to the victim's aid. Other members of Reed's group surrounded the victim to isolate him from his group. The witnesses gave conflicting accounts of who shot the victim. Two witnesses testified that Al-Jamailawi shot the victim. Another witness testified that the victim was shot by both Al-Jamailawi and Butler. Other witnesses identified Butler as the shooter, and described his gun as a .25-caliber semiautomatic. One witness testified that someone fired shots from a vehicle on the street. The victim died from two gunshot wounds. Two bullets were recovered from the victim's body. Both bullets were .25-caliber in size and were fired from the same gun. The police also found four spent casings in the vicinity of the shooting, all of which were .25-caliber in size and were fired from the same gun.

II. DOCKET NO. 292774

A. ADMISSIBILITY OF CODEFENDANT REED'S STATEMENTS

Al-Jamailawi first argues that the trial court erred by allowing several witnesses to testify that they heard codefendant Reed warn the victim to "strap up" before Reed left the area during the initial encounter with the victim. Al-Jamailawi argues that Reed's statement was inadmissible hearsay by a nontestifying codefendant and its admission also violated his constitutional right of confrontation. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Spangler*, 285 Mich App 136, 143; 774 NW2d 702 (2009). Preliminary issues of law, such as the admissibility of evidence pursuant to the rules of evidence or the constitution, are reviewed de novo. *Id.*; see also *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). Generally, hearsay is not admissible except as provided by the rules of evidence. MRE 802. In this case, Reed's statement was not hearsay because it was not offered to prove the truth of the matter asserted. The statement was not a declaration of fact, but an imperative sentence. The prosecutor did not introduce the statement to prove the matter asserted, i.e., to prove Reed's

intent relative to the victim and his friends, but rather to show that Al-Jamailawi returned to the area and participated in the attack against the victim with knowledge of Reed's earlier professed threat. Because the statement was not offered for its truth, it was not hearsay.

Further, the record does not support Al-Jamailawi's argument that there was no foundation for admitting Reed's statement because he was in a position to hear the statement. The testimony showed that Reed's statement was made in the presence of Al-Jamailawi, that Reed spoke in a loud voice, and that Reed spoke loud enough for his statement to be overheard by several other witnesses. This was sufficient to establish that Al-Jamailawi also heard the statement.

Al-Jamailawi also challenges the admissibility of an additional statement by Reed in which he threatened to "beat the f***" out of the victim. This latter statement was made during the same timeframe as the "strap up" statement. Because Al-Jamailawi did not object to the admission of this statement at trial, this issue is not preserved. MRE 103(a)(1); *People v Pipes*, 475 Mich 267, 278 n 37; 715 NW2d 290 (2006). We review unpreserved claims of evidentiary error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). Once again, the record discloses that the statement was not offered for its truth, but rather for the nonhearsay purpose of showing that Al-Jamailawi had knowledge of Reed's professed intent before Al-Jamailawi later returned with Reed. Further, testimony that the statement was made in Al-Jamailawi's presence and that Reed "screamed" the statement was sufficient to establish that it was heard by Al-Jamailawi. Thus, there was no plain error.

We also disagree with Al-Jamailawi's argument that admission of Reed's statements violated his constitutional right to confront the witnesses against him. In *People v Lewis (On Remand)*, 287 Mich App 356, 359-360; 788 NW2d 461 (2010), this Court explained:

> The Confrontation Clause provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Amend VI. Our state constitution also guarantees the same right. Const1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 50-51, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). Statements are testimonial where the "primary purpose" of the statements or the questioning that elicits them "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

"However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 11. "Thus, a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Id.* Because Reed's statements were not offered to prove the truth of the matters asserted, their admission did not violate Al-Jamailawi's rights under the Confrontation Clause.

B. SUFFICIENCY OF THE EVIDENCE

Al-Jamailawi next argues that the evidence was insufficient to support his conviction of first-degree premeditated murder. This Court reviews de novo a defendant's challenge to the sufficiency of the evidence. *People v Chapo*, 283 Mich App 360, 363; 770 NW2d 68 (2009). We consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the killing was done with premeditation and deliberation. MCL 750.316(1)(a); *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999) (citation omitted). The following factors may be considered: "'(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide.'" *Id.* (citation omitted).

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. For conviction under an aiding and abetting theory, the prosecutor must prove that

> "(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) (citation omitted).]

Thus, to establish first-degree premeditated murder under an aiding and abetting theory, the prosecution was required to show that Al-Jamailawi either participated in the offense with the required premeditated and deliberate intent to kill the victim, or gave aid knowing that the principal had such intent. *People v Usher*, 196 Mich App 228, 232-233; 492 NW2d 786 (1992), overruled on other grounds *People v Perry*, 460 Mich 55 (1999).

As an initial matter, we disagree with Al-Jamailawi's contention that the prosecutor effectively limited herself to prosecuting him under an aiding and abetting theory. Although the prosecutor asserted in her opening statement that "[t]here's no person who can tell you for certain that it was a bullet from Al-Jamailawi's gun that killed Daniel Conner," this statement should not be construed as a concession by the prosecutor that the evidence was insufficient to convict Al-Jamailawi as a principal. The prosecutor acknowledged that there was conflicting testimony concerning the identity of the shooter and the type of gun used to shoot the victim, but also argued that there was significant chaos and confusion at the crime scene and that some witnesses may have been confused about what they saw. Despite the inconsistencies in the testimony, at least three witnesses, Zachary Jamie, Jennifer Valdes, and Leslie David, identified Al-Jamailawi as the person who shot the victim. Although witnesses described Al-Jamailawi's

gun as a nine-millimeter semiautomatic gun, and the physical evidence established that the victim was shot with two .25-caliber bullets, the jury could have resolved this conflict by crediting the witnesses' identification testimony, but finding that the witnesses were either confused or mistaken about the type of gun possessed by Al-Jamailawi. "[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented." *Perry*, 460 Mich at 63. When evaluating a challenge to the sufficiency of the evidence, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). The eyewitness testimony identifying Al-Jamailawi as the person who shot the victim was sufficient for the jury to find that Al-Jamailawi killed the victim.

The evidence was also sufficient to prove that Al-Jamailawi had sufficient time to premeditate the decision to kill. According to testimony at trial, the victim was shot after he broke away from a physical altercation with another person and was attempting to cross the street, in the direction of his uncle. David testified that Al-Jamailawi ran after the victim and fired at his back. Valdes testified that Al-Jamailawi ran toward the victim while holding a gun, and that the victim put his hands up and said, "I'm done," at which point Al-Jamailawi pointed the gun at the victim and shot him in the chest. Jamie testified that the victim freed himself from the man who was fighting with him and started across the street, at which time Al-Jamailawi shot the victim twice in the back. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Al-Jamailawi had sufficient time to reflect upon his actions, and that he acted with premeditation and deliberation when he chased after the victim and shot him as the victim was attempting to flee or give up.

Additionally, the evidence was sufficient to convict Al-Jamailawi of first-degree premeditated murder under an aiding and abetting theory. The evidence showed that Al-Jamailawi was present when Reed threatened the victim just before the group left after the initial verbal confrontation. Witnesses testified that when the group returned and began to physically attack the victim, Al-Jamailawi used a gun to prevent the victim's friends from coming to his assistance. Al-Jamailawi argues that the fact that the second altercation began with a physical assault, rather than the immediate use of deadly force, is inconsistent with a finding of premeditation and deliberation. However, the jury could have found that the group planned to kill the victim all along, but wanted to prolong his suffering before killing him. The jury also could have found that the testimony describing how Al-Jamailawi chased after the victim and fired a gun toward him supported an inference that he, himself, possessed the requisite premeditated and deliberate intent to kill, even if Al-Jamailawi was not the person who actually shot and killed the victim. Thus, there was sufficient evidence for the jury to find that Al-Jamailawi possessed the requisite premeditated and deliberate intent to kill, or assisted in the commission of the crime knowing that the shooter had such intent. *Usher*, 196 Mich App at 232-233.

C. GREAT WEIGHT OF THE EVIDENCE

Al-Jamailawi alternatively argues that he is entitled to a new trial because his conviction of first-degree premeditated murder was against the great weight of the evidence. Because Al-Jamailawi did not raise this issue in a motion for a new trial, our review is limited to plain error affecting Al-Jamailawi's substantial rights. *People v Horn*, 279 Mich App 31, 41; 755 NW2d

212 (2008). A new trial may be granted if a jury's verdict is against the great weight of the evidence, but only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627, 635; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

Al-Jamailawi's argument focuses on the conflicting accounts of the fight and the circumstances surrounding the victim's shooting. "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial." *Id.* "Absent exceptional circumstances, issues of witness credibility are for the trier of fact." *Id.* Although Al-Jamailawi correctly observes that there were conflicting witness accounts of the shooting, it was within the province of the jury to resolve the conflicts and determine which witness accounts were credible. Moreover, despite the conflicting accounts, the witnesses agreed that Al-Jamailawi was armed with a gun and used it to support his co-felons' attack against the victim. Under these circumstances, the jury's verdict was not against the great weight of the evidence. Al-Jamailawi is not entitled to a new trial on this ground.

III. DOCKET NO. 292865

A. SUFFICIENCY OF THE EVIDENCE

Defendant Reed first argues that the evidence was insufficient to support his conviction of second-degree murder. We disagree. "[T]o convict a defendant of second-degree murder, the prosecution must prove: '(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.'" *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (citation omitted). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* "Malice may be 'inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.'" *Id.* (citation omitted) "'The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences.'" *Id.* (citation omitted). In addition, a defendant may be convicted of second-degree murder under an aiding and abetting theory. "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." *Robinson*, 475 Mich at 15.

The evidence established that Reed initially confronted the victim and made a series of verbal threats, including a threat to return and physically assault the victim, and also warned the victim to "strap up," suggesting that Reed intended an armed confrontation upon his return. Shortly thereafter, Reed returned with a larger group, including men who were armed with guns and brass knuckles, some of whom proceeded to physically attack the victim while Reed and others prevented the victim's friends from coming to the victim's aid. Although Reed was not directly implicated in the victim's shooting death, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Reed returned to the scene with an intent to cause great bodily harm, if not death, and that the natural and probable consequences of the intended group attack would lead to the use of deadly force.

We find no merit to Reed's argument that he could not be convicted of aiding and abetting because he was "merely present" at the scene of the homicide. We acknowledge that mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person liable as an aider or abettor; nor is mere mental approval, passive acquiescence, or consent sufficient. *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983). However, the evidence in this case did not show that Reed was "merely present." Rather, it showed that he was actively involved in instigating the confrontation and carrying out the offense, risking the possibility that the confrontation would escalate with deadly consequences. The evidence fully supported Reed's conviction of second-degree murder under an aiding and abetting theory.

B. GREAT WEIGHT OF THE EVIDENCE

Reed alternatively argues that he is entitled to a new trial because his conviction was against the great weight of the evidence. Because Reed did not raise this issue in a motion for a new trial, this Court's review is limited to plain error affecting Reed's substantial rights. *Horn*, 279 Mich App at 41. Although there were conflicting accounts concerning each person's role in the offense, the testimony focused on Reed as the person who primarily instigated the group attack against the victim. The evidence did not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon*, 456 Mich at 627. Accordingly, Reed is not entitled to a new trial on this ground.

C. MOTION FOR A MISTRIAL

Reed next argues that the trial court abused its discretion by denying his motion for a mistrial based on Officer Jimenez's testimony. We review a trial court's decision regarding a motion for a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). A mistrial should be granted only for an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *Id.*

Reed moved for a mistrial based on two incidents that occurred while Officer Jimenez was testifying. First, while the prosecutor was attempting to show that Reed's police statement was given voluntarily, she asked Officer Jimenez, "Before you asked him to read these [*Miranda*] rights aloud did you determine his educational level?" Officer Jimenez replied, "Yes. He said that he had graduated from Cody High School, and he also had some prior—." Officer Jimenez did not respond further because the trial court sustained defense counsel's objection. The second incident occurred during defense counsel's cross-examination of Officer Jimenez. Counsel asked the officer if Reed had been "cooperative" during the interview. Jimenez replied that Reed had answered the questions, but noted that he believed Reed had been lying. Reed later moved for a mistrial. The trial court denied the motion, but agreed to strike the objectionable testimony.

The trial court did not abuse its discretion by denying a mistrial based on Officer Jimenez's reference to "some prior—." Defense counsel's prompt objection prevented Officer Jimenez from completing his answer, and it was not obvious from the context that Officer Jimenez intended to refer to prior criminal activity, as Reed contends. Indeed, the statement was made in the context of referring to Reed's educational level. With regard to the second basis for

a mistrial, unresponsive testimony by a prosecution witness generally does not justify a mistrial. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Although police witnesses have a special obligation not to venture into forbidden areas when testifying, *People v Holly*, 129 Mich App 405, 415-416, 341 NW2d 823 (1983), Reed provides no support for his assertion that Officer Jimenez's testimony should be attributed to the prosecution. The prosecutor did not play any role in inducing the testimony. Further, the testimony was arguably responsive to defense counsel's question concerning whether "[Reed was] unresponsive to your questions, that is, did he answer or did he not answer [the] questions?" Defense counsel's question arguably related to Reed's cooperativeness in answering the officer's question. It was not unreasonable for Officer Jimenez to distinguish Reed's cooperativeness (in the sense of giving answers) from what he perceived as Reed's uncooperativeness (in the sense of giving false answers). Regardless, the jury was instructed to disregard Officer Jimenez's opinion concerning the truthfulness of Reed's statements. Under the circumstances, the trial court did not abuse its discretion by determining that this instruction was sufficient to cure any prejudice. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). The trial court did not err by denying Reed's motion for a mistrial.

D. PROSECUTOR'S CONDUCT

Reed next argues that he was denied a fair trial by the prosecutor's characterization of him and his friends as "thugs." We review issues of prosecutorial misconduct de novo to determine whether the alleged misconduct deprived the defendant of a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). The prosecutor's comments must be read in their entirety and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

A prosecutor may not intentionally use inflammatory arguments to arouse prejudice. *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). Further, a prosecutor may not express personal opinions about a defendant's guilt. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). However, prosecutors are afforded great latitude in their arguments. They may argue the evidence and all reasonable inferences that arise from the evidence in relationship to their theory of the case, and they need not state their inferences in the blandest possible language. *Id.* at 282; *Dobek*, 274 Mich App at 66.

Here, the evidence established that Reed gathered a group to violently confront the victim. After the initial confrontation, Reed returned with a larger group. At least two members of that group had guns, and one used brass knuckles to assault the victim. Reed and other members of the group instigated fights with the victim and the victim's uncle, while another member threatened onlookers with a firearm. The evidence amply supported the prosecutor's use of the term "thug" to describe Reed and his cohorts. We perceive no error in this regard.

E. SCORING OF OFFENSE VARIABLE 6

Reed lastly argues that the trial court erred by assessing 25 points for offense variable (OV) 6. We review the trial court's scoring decision to determine whether the trial court

properly exercised its discretion and whether the evidence adequately supported the particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

MCL 777.36(1) provides that OV 6 is scored by determining which of the following categories applies, and by assigning the number of points attributable to the applicable category with the highest number of points:

> (b) The offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result . . . . . 25 points
>
> (c) The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life . . . . . 10 points
>
> (d) The offender had no intent to kill or injure . . . . . 0 points

The sentencing judge must score OV 6 consistent with the jury's verdict unless the judge has information that was not presented to the jury. MCL 777.36(2)(a). Ten points are scored "if a killing is intentional within the definition of second degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent." MCL 777.36(2)(b). Here, the 25-point score was consistent with the jury's verdict of second-degree murder, which required proof that the defendant acted with the intent to kill, or the intent to inflict great bodily harm, or with the willful and wanton disregard for whether death would result. The killing in this case did not occur in a combative situation or in response to victimization of the offender by the decedent. The confrontation was Reed's own creation. When the victim left the initial confrontation, Reed pursued him to another street, threatened him again, and promised to return. Reed later returned with weapons and additional reinforcements. Under the circumstances, the trial court did not err by assessing 25 points for OV 6.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly