STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 323084 Wayne Circuit Court
ALVIN DEMETRIUS CONWELL, Defendant-Appellant.	LC No. 13-008466-FC

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, 20 to 50 years' imprisonment for each of the assault with intent to commit murder convictions, and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises from the murder of 12-year-old Kenis Green (Kenis), which occurred in the early morning hours of August 31, 2013, at a house party located at 14125 Rutherford, in the city of Detroit. On appeal, defendant first argues that the prosecutor did not present sufficient evidence to sustain his conviction of first-degree premeditated murder. We disagree.

We review de novo a defendant's challenge to the sufficiency of the evidence. *People v Lane*, 308 Mich App 38, 57; 862 NW2d 446 (2014). "We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution had proved the crime's elements beyond a reasonable doubt." *Id*. The standard of review for a claim challenging the sufficiency of the evidence is deferential. *People v Powell*, 278 Mich App 318, 320; 750 NW2d 607 (2008). Conflicts in the record evidence are resolved in favor of the prosecution, and reasonable inferences must be made in favor of the jury verdict. *Id*.

To establish first-degree premeditated murder, the prosecution was required to prove that defendant (1) intentionally killed Kenis with (2) premeditation and deliberation. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). Premeditation and deliberation relate to a defendant's opportunity to take what is known in the law as "a second look." *People v Orr*, 275 Mich App 587, 591; 739 NW2d 385 (2007) (citation and quotation marks omitted). To

sustain a first-degree premeditated murder conviction, the prosecution needed to establish that defendant possessed a "premeditated intent to kill." *Id*.

> Premeditation and deliberation can be established through (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 and quotation marks omitted).]

Evidence of a person's motive can also provide circumstantial evidence of premeditation. *People v Herndon*, 246 Mich App 371, 416; 633 NW2d 376 (2001).

In the instant case, the prosecution proceeded on the theory that defendant was guilty of first-degree premeditated murder as both a principal, and that defendant aided and abetted in the murder of Kenis. The relevant statute, MCL 767.39, provides as follows with regard to aiding and abetting:

> 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.

To convict a defendant under an aiding and abetting theory, the prosecution was required to prove the following elements:

> (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) (citations and quotation marks omitted; alteration in *Robinson*).]

Defendant's argument on appeal concerning the sufficiency of the evidence is essentially two-fold. First, defendant contends, without providing supporting authority or a clear argument in support of his assertion, that the record evidence did not establish the premeditation or deliberation necessary to support a conviction of first-degree premeditated murder. Defendant also appears to challenge the very fact that he killed Kenis, essentially contending that the prosecutor proved that the bullet that killed Kenis came from an assault rifle, and there is no evidence that the occupants of the van that fired on 14125 Rutherford possessed an assault rifle. In his brief on appeal, defendant repeatedly refers to defense counsel's comments during closing argument, in which defense counsel argued that the prosecutor had established that a gunshot from an assault rifle killed Kenis, but had not proven that the occupants of the van had an assault rifle.

Viewed in the light most favorable to the prosecution, the record evidence was indeed sufficient to support the jury's verdict convicting defendant of first-degree premeditated murder. The prosecution proceeded on alternate theories that defendant was culpable as a principal, or that he aided and abetted in the murder of Kenis. The record evidence was ample to support both

theories, as well as the jury's findings that Kenis's murder was the result of premeditation and deliberation.

As a preliminary matter, abundant record evidence placed defendant at the scene of Kenis's murder. Sunsearae Owens (Sunsearae) was familiar with defendant, having seen him around her neighborhood driving his red van, and she identified defendant as being the driver of the red van that pulled up in front of 14125 Rutherford on the night her son was murdered. She further stated that she heard gunshots coming from the van. Gregory Owens (Gregory), Jamika Jackson (Jackson), Raymond Williams (Raymond), and Juray Williams (Juray) also testified that defendant was driving the red van that pulled up in front of 14125 Rutherford and that they saw or heard gunshots coming from the van. There was also a plethora of evidence regarding defendant's prior physical and verbal altercations with the residents of 14125 Rutherford, some of which involved defendant brandishing firearms in the presence of others and making very serious threats against the safety of others. There was testimony that, during an incident that occurred a couple of weeks before the shooting, defendant threatened to shoot at the house and threatened to kill everyone who was at the house, including any children. Evidence of defendant's prior relationships with those who resided at 14125 Rutherford, and his hostile and aggressive behavior toward others leading up to the night of the murder provided evidence of his motive and supported a finding of premeditation and deliberation. See *Orr*, 275 Mich App at 591; *Herndon*, 246 Mich App at 416.

With regard to defendant's culpability as a principal, Sunsearae testified that she observed defendant in the van that pulled up in front of 14125 Rutherford and that defendant leaned out the window of the van toward 14125 Rutherford. Defendant had a handgun in his hands, which he stuck out of the window. Additionally, Jackson was questioned regarding a statement that she gave during an investigatory subpoena proceeding on September 4, 2013, in which she confirmed that defendant told her that he had fired once, but that the gun had jammed. The prosecution's theory of defendant's participation in Kenis's murder as an aider and abettor was also well-supported by the record evidence since multiple people observed defendant driving the red van from which gunshots were fired on 14125 Rutherford, the van belonged to defendant's employer and was later found riddled with bullets, and Gregory and Sunsearae saw defendant in the driver's seat next to the unidentified assailant who was holding a gun. By defendant's own admission, he was present in the van when the shooting took place. Thus, there was sufficient evidence that defendant participated in the murder as a principal or as an aider and abettor. See *Robinson*, 475 Mich at 6; *Taylor*, 275 Mich App at 179.

In his brief on appeal, defendant puts great emphasis on the fact that the record evidence was not entirely clear regarding whether a handgun or assault rifle may have been fired from the van, what specific bullet killed Kenis, and where the bullet was specifically fired from. We acknowledge there were conflicts and open-ended questions in the evidence on these issues. For example, Gregory testified he was shot with a revolver, Torrey Brown, who was also at the party, saw the flame of a revolver, and Sunsearae was unsure what types of handguns the occupants of the van possessed. A 7.62 mm bullet was found in the foyer of 14125 Rutherford. Detective Sergeant Dean Molnar, Jr., testified that a 7.62 mm bullet is shot from a rifle. The assistant medical examiner who performed the autopsy, Dr. Francisco Diaz, did not recover a bullet from Kenis's body, and he was unable to say whether Kenis's wound was caused by a handgun or an assault rifle.

While there were open-ended questions and inconsistencies apparent from the record evidence, these issues are properly reserved to the trier of fact, and it was the jury's role to evaluate, consider, and weigh the evidence. See *People v Unger*, 278 Mich App 210, 228-229; 749 NW2d 272 (2008). This Court will afford much deference to the jury's "special opportunity" to weigh the evidence and evaluate the credibility of witnesses. *Id*. The record evidence, viewed in the light most favorable to the prosecution, was indeed sufficient for the jury to conclude that defendant was guilty of first-degree premeditated murder.

Defendant next argues that the prosecutor made several improper statements during trial. We disagree.

To preserve a claim of prosecutorial error, a defendant is required to advance a contemporaneous objection and seek a curative instruction from the trial court. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant concedes in his brief on appeal that defense counsel did not object to the prosecutor's conduct in the trial court. Accordingly, this issue is not preserved. Since the issue is unpreserved, it is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. With regard to the third element, a defendant must show prejudice, meaning that the error affected the outcome of the trial proceedings. *Id*.

> Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id*. (citation and quotation marks omitted; alteration in *Carines*).]

" 'Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect.' " *Bennett*, 290 Mich App at 476 (citation omitted; alteration in *Bennett*).

To assert a successful claim of prosecutorial error, defendant must make a showing that he was denied a fair and impartial trial. *People v Cooper*, 309 Mich App 74, 88; 867 NW2d 452 (2015). Prosecutors are given significant latitude with their arguments and conduct at trial. *Id*. at 90. This Court reviews a prosecutor's comments in context, viewed against defense counsel's arguments, and considers the relationship of the comments to the evidence admitted at trial. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). When stating inferences and conclusions arising from the evidence, a prosecutor is not required to use the blandest terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Prosecutors are not permitted, however, to appeal to the jury's sympathy for the victim. *Unger*, 278 Mich App at 237.

In support of his argument that the prosecutor's behavior during trial was improper, defendant first points to statements the prosecutor made to the jury during her opening statement and closing argument, essentially arguing that the comments asked the jury to put its focus on the young victim in this case, rather than on whether the prosecutor had proven that defendant

committed first-degree premeditated murder. The first statement that defendant complains of occurred during the prosecutor's opening statement to the jury, during which the prosecutor stated, "Good morning, ladies and gentlemen. Kenis Littlejohn Green, I want you, and I want to ask you and everybody in this courtroom throughout this trial to remember that name because that's why we're here." During closing argument, the prosecutor made the following comments:

> Good morning, ladies and gentlemen. Kenis Littlejohn Green, first, last and always, that's what this case is about. I started by saying that in opening statements, and we've come full circle with the evidence in this case.
>
> This little boy is dead, because of this man's jealousy, hostility, and need to try to control others. It should never have happened.

When viewed in context, it is clear that the prosecutor was reminding the jury to stay focused on the young victim in this matter and to not be distracted by the fact that defendant's involvement in these crimes was precipitated by a litany of disputes he had with other adults in the neighborhood. Therefore, the prosecutor did not err in making these statements. See *Cooper*, 309 Mich App at 88; *Unger*, 278 Mich App at 237.

Defendant also complains that the prosecutor acted improperly when she asked Raymond the following question after he repeatedly testified that he did not remember the answers to her questions: "You don't remember. Is it, sir, everyday, that a little twelve-year-old boy gets shot in the head on your street? Does that happen every day?" Viewed in context, it is clear that the prosecutor was simply expressing her frustration after examining a particularly recalcitrant and reluctant witness, rather than improperly attempting to evoke the jury's sympathy for the victim. See *Unger*, 278 Mich App at 237.

Finally, defendant also challenges the prosecutor's repeated references to Kenis as "little Kenis" throughout her closing argument. Defendant also points to a portion of the prosecutor's closing argument in which, after arguing that defendant should not be convicted of the lesser charge of second-degree murder and urging the jury not to give defendant "a break to a less serious charge," she stated, "Nobody gave little Kenis Green a break out there when they shot him in the head." In our view, these statements, viewed in context, were made to encourage the jury to focus on the key issue at trial, the murder of a child, and to not be distracted by the accompanying evidence of disputes defendant had with other adults in the case. Thus, the prosecutor did not err in making the statements. See *Cooper*, 309 Mich App at 88; *Unger*, 278 Mich App at 237.

Even if we were to accept defendant's contention that the prosecutor's behavior amounted to prosecutorial misconduct, a curative instruction from the trial court would easily have alleviated any prejudicial effect to defendant. See *Bennett*, 290 Mich App at 476. "[J]urors are presumed to follow their instructions." *Unger*, 278 Mich App at 237 (citation omitted). In this case, the trial court did indeed instruct the jury during its final instructions that the statements and arguments of the lawyers are not evidence and that the jury could not allow sympathy or prejudice to influence its decision in any way. Therefore, the curative instructions alleviated any prejudicial effect. See *Bennett*, 290 Mich App at 476. In sum, defendant has not

demonstrated that the prosecutor's conduct during trial amounted to plain error affecting his substantial rights. See *Carines*, 460 Mich at 763.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher