

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
November 22, 2016

v

WALTER EDWARD GREEN,  
Defendant-Appellant.

No. 328840  
Wayne Circuit Court  
LC No. 13-009540-01-FH

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Before: M. J. KELLY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

Defendant Walter Edward Green appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), third-degree fleeing or eluding a police officer, MCL 257.602a(3), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

This case arises from the drive-by shooting death of Robert Carter. Carter's brother, Kevin Lovely, testified that he was in the family's living room when he heard six gunshots in rapid succession. He ran outside and saw that his brother was bleeding from his chest. Lovely recounted that his brother stated he was unable to breathe. Lovely called an ambulance, but then decided to take his brother to the hospital himself. On the way to the hospital, Carter continued to state that he could not breathe, and, as they arrived at the hospital, he told Lovely that "Hobsquad Lloyd" shot him. Carter died at the hospital from a gunshot wound to the chest.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Green argues that there was insufficient evidence to convict him of first-degree premeditated murder. A challenge to the sufficiency of the evidence is reviewed *de novo*. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). When reviewing a defendant's challenge to the sufficiency of the evidence at trial, we review the evidence in the light most favorable to the prosecution. *Id.* The determinative question is whether a rational trier of fact could ultimately determine that the prosecution proved the elements of the crime beyond a reasonable doubt. *People v Henderson*, 306 Mich App 1, 9; 854 NW2d 234 (2014).

## B. ANALYSIS

The elements of first-degree premeditated murder are the intentional killing of another person, with premeditation and deliberation. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). Circumstantial evidence, “including the defendant’s behavior before and after the crime[,]” can support the elements of premeditation and deliberation. *Id.* Additionally, identification is an essential element of any criminal offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Finally, because Green was convicted on an aiding and abetting theory, the prosecution also had to prove:

(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 Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010), quoting *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (quotation marks and citations omitted in original).]

Green first argues that the prosecution did not prove that he drove the vehicle carrying Carter’s assailant. However, witnesses testified that the shooter and driver were in a gold Jeep or a gold or silver Nitro that sped away from the scene after the shooting. A police officer saw a vehicle matching the description given by the witnesses. The officer made a U-turn and activated his sirens and lights in an attempt to stop the vehicle. In response, the vehicle sped away and attempted to evade police pursuit by taking several turns, including making a U-turn and passing the police cruiser going in the opposite direction. The officer, who saw the driver of the gold Jeep as it passed him, identified Green as the driver. Further, the Jeep, which was later recovered, had a shell casing in the back that matched casings located at the scene of the shooting. Viewed in the light most favorable to the prosecution, this evidence was sufficient to establish that Green was the driver.

Green next argues that, under an aiding and abetting theory, there is insufficient evidence that he intended to kill Carter, or that he knew that Lloyd West, his codefendant, intended to kill Carter. However, “minimal circumstantial evidence will suffice” where the prosecution is seeking to establish the defendant’s state of mind on issues such as knowledge and intent. *Henderson*, 306 Mich App at 11 (citation omitted). Here, there was sufficient evidence to establish that West was the shooter<sup>1</sup> and that he was friends with Green. Further, the evidence supports an inference that Green was involved in planning the shooting because Green was identified by Toni Vadio, the owner of the gold Jeep, as one of the individuals that carjacked the getaway vehicle two days before the shooting. As already noted, the jury could infer that Green was the driver and, in that role, he pulled up slowly enough that West could fire six shots at Carter. He then fled the scene at a high rate of speed, and once he was spotted by the police, he

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<sup>1</sup> Carter told his brother that Hobsquad Lloyd had shot him. West was affiliated with the Hobsquad gang and his first name was Lloyd. Further, cell phone records placed West’s phone in the area of the shooting at the time of the shooting.

led them on a dangerous, high speed chase throughout residential neighborhoods before entering I-94, speeding up to over 100 miles per hours, and passing traffic on the right-hand shoulder. The Jeep was subsequently recovered by the police the next day after it was abandoned in the middle of a street in a haphazard fashion. These actions following the murder are evidence of consciousness of guilt. *Id.* Viewed in the light most favorable to the prosecution, this evidence was sufficient to support the jury's conclusion that Green intended to murder Carter, or that he had knowledge of West's intentions to do so when he pulled up to Carter's home.

### III. OTHER ACTS EVIDENCE

#### A. STANDARD OF REVIEW

Green next argues that the trial court erred in allowing other acts evidence relating to a shooting that took place two days later on September 13, 2013, resulting in the death of two people. This Court reviews a trial court's determination to admit evidence for an abuse of discretion. *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014). An abuse of discretion will occur where the trial court's decision fell outside the range of principled outcomes. *Id.* When the evidentiary question raises a preliminary question of law, our review is de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

#### B. ANALYSIS

MRE 404(b) provides that 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." The evidence, however, may "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." MRE 404(b).

Here, the prosecution filed a motion to admit evidence of a drive-by shooting that happened two days after the shooting in this case. According to the prosecutor's offer of proof at the motion hearing, the evidence would show (1) both shootings occurred during the day, (2) both shootings occurred in the same general area, (3) West's cell phone was in the same area as both shootings at the time that they occurred, and (4) the shell casings located at the scene of both shootings matched. Further, the prosecutor asserted that the vehicle used in the shooting in this case was similar to the vehicle used in the second shooting because (1) both vehicles were stolen a few days before the respective shootings, (2) both vehicles were higher which allowed for a better shooting angle, (3) both vehicles had tinted windows, and (4) both vehicles were abandoned shortly after the shootings. Finally, the prosecutor asserted that witnesses saw someone leaving the second vehicle in a field. A sketch was prepared of the individual and, according to the prosecutor's offer of proof, the person in the sketch was similar to Green. Moreover, after a lineup, one of the witnesses identified Green as the person he observed leaving the area where the vehicle was abandoned. Based on this offer of proof, the trial court held that it would allow the prosecutor to present other acts evidence.

That decision was not an abuse of discretion. When reviewing whether evidence was properly admitted under MRE 404(b), we must consider (1) whether the evidence was “offered for a proper purpose under Rule 404(b)”;

(2) whether the evidence was “relevant under Rule 402 as enforced through Rule 104(b)”;

(3) whether the evidence’s probative value was substantially outweighed by unfair prejudice as provided in MRE 403; and (4) whether the trial court provided “a limiting instruction to the jury.” *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). “At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity.” *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). Here, the prosecutor asserted that the evidence was admissible to establish identity and that Green was acting pursuant to a common plan or scheme, so it is clear that it was offered for a proper purpose. More importantly, it was relevant for that purpose. The similarities outlined by the prosecutor, coupled with evidence suggesting that Green was involved made it more likely that Green was the getaway driver when Carter was shot. See MRE 401. Moreover, the trial court determined that the prejudicial effect of that evidence did not outweigh its probative effect. That finding was not outside the range of principled decisions, especially given that the probative value was great considering the similarities in the plan employed in both shootings and given that the prejudicial effect could have been lessened by a cautionary instruction to the jury on how to use the other acts evidence. Accordingly, based on the prosecutor’s offer of proof, the trial court did not abuse its discretion in admitting evidence of the second shooting under MRE 404(b).

Green’s argument on appeal, however, directs us to the evidence that was *actually* produced at trial, which was significantly more limited than the offer of proof presented at the motion hearing. At trial, a witness testified that he heard ten or twelve shots and ran outside. He observed a grey minivan speeding away and discovered that two people had been shot multiple times in a nearby vehicle. Both people died. A police officer testified that shell casings recovered at the shooting matched shell casings recovered from the scene where Carter was shot. He testified that both shootings were five or seven miles apart. Finally, another officer testified that West’s cell phone was in the area of the second shooting during the second shooting. Critically, none of the testimony even suggested that Green was involved in the second shooting. Thus, arguably, the evidence *actually admitted at trial* was insufficient to satisfy the requirements of MRE 404(b) and could have been properly excluded as irrelevant evidence as to Green.

Green’s lawyer, however, did not attempt to have the evidence stricken from the record, nor did she renew her objection based upon MRE 404(b). Regardless, even assuming *arguendo* that the evidence should not have been admitted, Green cannot establish that he is entitled to reversal of his conviction. An evidentiary error is “presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative.” *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002) (citation omitted). It is plain that at trial Green was not linked to the second shooting by anything other than his association with West. Thus, the probative value *and the prejudicial effect* of the second shooting *as to Green*

was insignificant.<sup>2</sup> In contrast, there was strong evidence showing that Green aided and abetted West in shooting Carter. The testimony established that he was involved in carjacking the vehicle used in the drive-by shooting, that he was driving the vehicle when West shot Carter, and that he eluded the police following a high-speed chase shortly after the shooting. Thus, on this record, any error in admitting the evidence was harmless.

#### IV. PROSECUTORIAL MISCONDUCT

##### A. STANDARD OF REVIEW

Finally, Green argues that he is entitled to a new trial on the basis of prosecutorial misconduct. Because he did not contemporaneously object to the alleged instances of prosecutorial misconduct, this issue is unpreserved. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). We review a defendant's unpreserved claims of prosecutorial misconduct for plain error. *Id.* "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." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Additionally, we will not "find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id.* at 329–330.

##### B. ANALYSIS

Green first claims that the introduction of other acts evidence relating to the second shooting was not a good-faith effort to admit evidence because it was not specific enough to establish Green's modus operandi, and it did not even prove that he was involved in the second shooting. To sustain a claim of prosecutorial misconduct relating to the admission of evidence, the defendant must make a showing that the prosecutor was motivated by bad faith. *People v Brown*, 294 Mich App 377, 383-384; 811 NW2d 531 (2011). "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Before trial, the prosecutor made a detailed offer of proof, but, at trial, a large portion of the evidence was not admitted. Based on the record, it does not appear that the prosecutor was acting in bad-faith when he failed to present more evidence showing the similarities between the two shootings and Green's involvement in the second shooting. The prosecutor noted that he had subpoenaed a police officer who failed to appear for trial. It is reasonable that, had that officer showed up, he would have testified to details showing additional

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<sup>2</sup> This fact is emphasized by the lack of argument regarding the second shooting during closing arguments. The prosecution briefly noted that the second shooting had the same shell casings, that West's phone was in the area, and that the method was similar. Significantly, that argument suggests that West, not Green was involved in the second shooting. Green's lawyer treated the evidence even more lightly, merely noting that Green was not on trial for that shooting.

similarities between the two shootings and showing Green's purported involvement. Thus, the record simply does not manifest a finding of bad faith on the part of the prosecutor. *Brown*, 294 Mich App at 384.

Green next claims that the prosecutor acted in bad faith by attempting to introduce the Michigan State Police report a police officer relied on to match the shell casings from Carter's murder to those found at the scene of the second shootings. West's lawyer objected to admission of the report, however, and the trial court sustained the objection. Accordingly, even if the prosecutor should not have tried to admit it, Green was not denied a fair trial by the attempt.

Green nevertheless argues that the prosecutor committed misconduct when referring to the police report during closing argument. During closing, the prosecutor told the jury that the match between the shell casings at both shootings "was confirmed by the Michigan State Police." Contrary to Green's arguments on appeal, this argument was based on facts in evidence given that, even though the report was not admitted into evidence, the officer's testimony that the shell casings were matched by the Michigan State Police was properly in evidence. And again, there is nothing in the record suggesting that the prosecutor was acting in bad faith when commenting on this evidence during closing argument. Moreover, this Court will not conclude that an error occurred requiring reversal of a defendant's conviction where a curative instruction would have alleviated any prejudice to the defendant. *Callon*, 256 Mich App at 329-330. Here, if Green had raised a timely objection to the challenged portion of the prosecutor's closing argument, a curative instruction would have remedied any prejudicial effect inuring from the prosecutor's statements.

Finally, Green asserts that the prosecutor's introduction of Vadio's testimony was not made in good faith because the prosecutor ought to have introduced her testimony pursuant to MRE 404(b) because Green and West were not charged with carjacking her vehicle. Green characterizes Vadio's testimony as "peripheral" and not necessary to prove the charges against him. Vadio's testimony, however, was relevant because it established that Green was one of the individuals that stole the vehicle used during the drive-by shooting of Carter. The key issue at trial was identification, and this circumstantial evidence was presented to the jury, who could have drawn the reasonable inference that Green was involved in Carter's shooting given that he helped carjack the getaway vehicle. It also goes toward the element of premeditation and knowledge that a shooting was going to take place. Accordingly, the record does not yield any finding of bad faith on the part of the prosecutor. *Brown*, 294 Mich App at 384.

Finally, although Green asserts that the cumulative effect of the prosecutor's misconduct deprived him of a fair trial, the record does not support this conclusion. See *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007) ("Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal.").

Affirmed.

/s/ Michael J. Kelly  
/s/ Christopher M. Murray  
/s/ Stephen L. Borrello