STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORON CORTEZ FISHER,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 348183
Genesee Circuit Court
LC No. 17-042233-FC

Before: REDFORD, P.J., and RIORDAN and TUKEL, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), second-degree murder, MCL 750.317, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life imprisonment for the first-degree murder conviction and a concurrent prison term of 25 to 50 years for the second-degree murder conviction, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. We affirm.

I. FACTUAL BACKGROUND

Defendant's convictions arise from the shooting deaths of Sasha Bell and Sacorya Reed in their Flint apartment during the early morning hours of April 18, 2016. Bell was the former girlfriend of defendant's cousin, Malek Thornton. At trial, the prosecution advanced the theory that in December 2015 Bell and Reed set up Thornton to be robbed and defendant assisted Thornton in getting revenge against them.

Thornton, originally charged with two counts of first-degree premeditated murder, entered a plea agreement under which he pleaded guilty of two counts of second-degree murder and two counts of felony-firearm for which he would receive minimum sentences of 20 years in prison for each murder conviction, to be served concurrently, and an additional two years' imprisonment for the felony-firearm convictions. The plea agreement required Thornton to testify truthfully at defendant's trial. Thornton served as the prosecution's principal witness at trial.

At trial, Thornton explained that after being robbed he became upset and immediately went to defendant's house where they discussed taking action against Bell. A few months later, after Thornton acquired some firearms, Thornton was at Bell's apartment, became suspicious of her actions, and called defendant as "backup." Defendant arrived, armed with a .45-caliber firearm, and followed Thornton upstairs to Bell's room where Thornton fatally shot Bell in the neck. Defendant and Thornton then walked downstairs where defendant pulled out a gun, pointed it at Reed's head, and shot her.

The police later arrested Thornton after a neighbor reported seeing him at the victims' apartment. Defendant initially left Michigan but returned. Thornton concealed defendant's involvement for more than a year but later entered into the plea agreement that required him to testify at defendant's trial. At trial, defendant presented the defense theory that he was not involved in either victim's death, and that Thornton lacked credibility. The jury convicted defendant of second-degree murder for the death of Bell and first-degree premeditated murder for the death of Reed.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution failed to present sufficient evidence that he aided or abetted Thornton in the shooting death of Bell, and failed to prove his guilt of first-degree premeditated murder in the shooting death of Reed. We disagree.

We review de novo a challenge to the sufficiency of the evidence. *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015). When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational tier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

1. SECOND-DEGREE MURDER OF BELL

The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). At trial, the prosecutor advanced the theory that defendant was guilty of the murder of Bell as an aider or abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show 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 [either] intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement[,]" *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001) (citation omitted), "or, alternatively, that the charged offense was a

natural and probable consequence of the commission of the intended offense," *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider or abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines*, 460 Mich at 757; *People v Bennett*, 290 Mich App 465, 474; 802 NW2d 627 (2010).

First, it is undisputed that codefendant Thornton, who described defendant as his cousin, best friend, and "right hand man," shot Bell in the neck, causing Bell's death. Second, viewed in a light most favorable to the prosecution, the evidence sufficed to enable the jury to find beyond a reasonable doubt that defendant assisted Thornton in Bell's murder by (1) previously discussing with Thornton that Thornton needed to "take action" against the victims for setting up Thornton to be robbed, (2) on the day of the offense, going to the victims' apartment after Thornton, whom defendant knew had begun carrying guns and knew his feelings toward the victims, had summoned him as "backup," (3) bringing a .45-caliber gun to the victims' apartment, (4) acting in concert with Thornton by following him upstairs to Bell's room, (5) looking at Thornton, who "was reading [defendant's] eyes," right before Thornton pulled out his gun and shot Bell, and (6) walking downstairs, shooting Bell's roommate, and leaving Bell (and Reed) fatally wounded in their apartment. Third, based on the aforementioned facts, the evidence also sufficed to enable rational triers of fact to find beyond a reasonable doubt that defendant intended or had knowledge that codefendant Thornton was acting with the requisite malice[1] regarding Bell at the time defendant gave aid and encouragement. Thus, viewed in a light most favorable to the prosecution, the record reflects that the prosecution presented sufficient evidence from which reasonable fact-finders could find beyond a reasonable doubt that defendant participated in Bell's murder as an aider or abettor.

Defendant argues that the evidence was insufficient to sustain his conviction because codefendant Thornton "never claims that [defendant] ever indicated an intent to help [him] assault anyone," and "never testified" that he called defendant to the victims' apartment to help him kill the two young women." Defendant challenges the lack of *direct* evidence that he aided or abetted Thornton. Defendant also makes much of the fact that during cross-examination Thornton testified that "[t]his just happened, it had never been talked about with [defendant], it wasn't planned, none

[1] "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.' " *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted). Malice may be inferred from facts in evidence. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004). "[M]inimal circumstantial evidence will suffice to establish the defendant's state of mind[.]" *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

of it, it was right off the top of my head[.]" Defendant's challenges, including what inferences could have been drawn from the evidence, relate to the weight and credibility of the evidence rather than its sufficiency. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). Indeed, these same challenges were presented to the jury during trial. The jury was free to believe or disbelieve all or any portion of Thornton's trial testimony, and this Court "will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008) (citation omitted). Further, in making these arguments, defendant appears to ignore that when evaluating the sufficiency of evidence, this Court is required to resolve all conflicts in the evidence in favor of the prosecution, *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012), that this deferential standard of review is the same whether the evidence is direct or circumstantial, *Nowack*, 462 Mich at 400, and that it is well established that "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *Id*. (citation omitted).

The prosecution did not have to prove that Thornton expressly communicated an intent to kill Bell for defendant to be found guilty of second-degree murder as an aider or abettor in Bell's shooting death. Although Thornton denied that he planned her murder, he admitted that he knew that he "was going to do it" when Bell initially left the house. Defendant arrived afterward and accompanied Thornton upstairs to Bell's room and shot Bell after communicating nonverbally with defendant. Although Reed's murder occurred moments later, defendant's unsolicited and unprovoked participation in that shooting death supported an inference that he possessed the requisite malice minutes earlier when he acted as backup for Thornton when Thornton shot Bell. Accordingly, the prosecution presented sufficient evidence from which the jury could find beyond a reasonable doubt that defendant committed second-degree murder of Bell under an aiding or abetting theory.

2. FIRST-DEGREE MURDER OF REED

First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.[2] *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). Premeditation and deliberation require "sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "That is, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation, but it is within the province of the fact-finder to determine whether there was sufficient time for a reasonable person to subject his or her action to a second look." *People v Oros*, 502 Mich 229, 242; 917 NW2d 559 (2018) (quotation marks and citation omitted). "While the minimum time necessary to exercise this process is incapable of exact determination, it is often said that premeditation and deliberation require only a brief moment of thought or a matter of seconds[.]" *Id*. at 242-243 (quotation marks, brackets, and citations omitted). "The requisite state of mind may be inferred from defendant's conduct judged in light of the circumstances." *Id*. at 243 (citation omitted.) The following factors may be considered to establish premeditation: "(1) the prior relationship of the parties, (2) the defendant's actions before

[2] Defendant contends only that there was insufficient evidence to establish the requisite element of premeditation.

the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide." *Unger*, 278 Mich App at 229. As noted previously, "minimal circumstantial evidence will suffice to establish the defendant's state of mind[.]" *Kanaan*, 278 Mich App at 622.

The prosecution presented evidence that defendant became upset when Thornton, his close family member and best friend, told him that Bell and Reed had set him up to be robbed, that defendant talked with Thornton about "tak[ing] action" against Reed and Bell, that on the day of the offenses defendant went to the victims' apartment armed with a firearm, walked upstairs where he watched Thornton shoot Bell, and then walked down the stairs to the living room where Reed sat, got within three feet of Reed, and shot Reed in the head. When viewed in a light most favorable to the prosecution, this evidence sufficed to enable the jury to find beyond a reasonable doubt that defendant acted with premeditation and deliberation. From this evidence the jury could reasonably infer that, after aiding and abetting Thornton in shooting Bell, defendant formed a plan to also kill Reed, a witness to the offense against Bell, and that defendant had an adequate opportunity to take a "second look" at his actions during the period after Bell's shooting while defendant walked down the stairs with Thornton, and before Thornton confronted Reed. The evidence that defendant aimed and fired the gun at Reed's head further supports an inference that he deliberated killed Reed. The evidence established that defendant chose a course of action rather than acted under an unplanned impulse. Accordingly, defendant's claim that the prosecution presented insufficient evidence to support his conviction of first-degree premeditated murder lacks merit.

B. PHOTOGRAPHIC EVIDENCE

Defendant also argues that the trial court erred by admitting certain crime scene and autopsy photographs. We disagree. To preserve an evidentiary issue for appeal, the party opposing the admission of the evidence must object at trial and specify the same grounds for the objection on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). Although defendant objected to the crime scene photographs at trial, thereby preserving this issue with respect to those photos, he did not object to the autopsy photographs. Accordingly, this issue is unpreserved with respect to the autopsy photographs. Defendant moved for a new trial, challenging the admissibility of certain autopsy and crime scene photographs, and defense counsel's failure to object to the autopsy photographs. Therefore, defendant's appellate claims relating to his motion for a new trial are preserved.

1. THE CRIME SCENE PHOTOGRAPHS–PRESERVED CLAIM

Defendant challenges the admission of five crime scene photographs, which depict aspects of the crime scene as found by the police. Three photographs depict Reed in the location where she was found and the bullet wounds she suffered, and the other two photographs show Bell and the bullet wounds that she suffered. At trial, the trial court overruled defendant's objection, finding that the probative value of the photographs did not substantially outweigh the danger of unfair prejudice. The decision to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Head*, 323 Mich App 526, 539-540; 917 NW2d 752 (2018). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013). This Court reviews a trial court's decision denying

a motion for a new trial for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these [evidence] rules, or other rules adopted by the Supreme Court" and "[e]vidence which is not relevant is not admissible." MRE 402. "A trial court admits relevant evidence to provide the trier of fact with as much useful information as possible." *People v Cameron*, 291 Mich App 599, 612; 806 NW2d 371 (2011). Relevant evidence, however, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. MRE 403 is not intended to exclude "damaging" evidence, because any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury" or "it would be inequitable to allow the proponent of the evidence to use it." *Id*. at 75-76. Unfair prejudice "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Cameron*, 291 Mich App at 611 (quotation marks and citations omitted).

"Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *Mills*, 450 Mich at 76 (citations omitted). "Photographs may also be used to corroborate a witness' testimony." *Id*. (citation omitted). "Gruesomeness alone need not cause exclusion." *Id*. (citations omitted). "The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Id*.

We have viewed the challenged photographs in the context of the record in this case, and although understandably disturbing, conclude that the trial court did not abuse its discretion by admitting them. The trial court determined that the photographs "accurately depict" what occurred. The photographs were relevant for aiding the jury's understanding of (1) where the victims' bodies were found, (2) the condition of the bodies, which was relevant to the disputed matter of when the murders occurred, and (3) the forensic analysis of the bullet wounds. The photographs corroborated Thornton's testimony concerning what he observed and his own actions during the incident, and also illustrated and corroborated the trial testimony provided by a police crime scene response member, police officers who attended the scene, and the medical examiner. While defendant emphasizes that the use of only those photographs from a distance, as opposed to "close-up" photographs, would have been less likely to affect the jurors' emotions, a relevant photograph is not inadmissible merely because it may arouse emotion. The photographs were not offered simply to inflame the jury but were presented to establish material facts and conditions of the charged offenses. The trial court considered the parties' arguments at trial, and agreed that the photographs were graphic but appropriately found them both relevant and not unduly prejudicial. The trial court correctly weighed the probative value of the photographs against their potentially prejudicial nature. The trial court, therefore, did not abuse its discretion by admitting them.

2. THE AUTOPSY PHOTOGRAPHS–UNPRESERVED CLAIM

Defendant also challenges seven autopsy photographs, which includes one "post-incision" photograph arguing their admission denied him a fair trial. We disagree.

The photographs, were admitted during the testimony of the medical examiner, who testified that the photographs would be helpful in explaining the bases of his opinions to the jury and, indeed, he used them to explain the victims' injuries and causes of death. The photographs were relevant and admissible to corroborate the testimony of the medical examiner and Thornton. *Mills*, 450 Mich at 71-72. The photographs were instructive in depicting the location, nature, and severity of the injuries which had relevance to establish the defendants' intent when the victims were shot. Contrary to defendant's suggestion, the fact that he did not dispute the cause of the victims' deaths does not render the photographs inadmissible. *Id*. at 71. "Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *Id*. at 76. Moreover, defendant disputed the issue of his intent, and the nature and location of the victims' injuries were probative of that issue. Further, a relevant photograph is not inadmissible merely because of its gruesome or shocking nature. *Id*. The trial court correctly determined that the photographs were relevant and that their probative value was not substantially outweighed by the danger of unfair prejudice. Therefore, the trial court did not abuse its discretion by denying defendant's motion for a new trial on this basis.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant alternatively argues that defense counsel provided ineffective assistance by not objecting to the autopsy photographs at trial. "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013) (citation omitted). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Id*. Because admission of the autopsy photographs did not constitute an abuse of discretion, defense counsel's failure to object was not objectively unreasonable. Failure to advance a "futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

D. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecution improperly vouched for Thornton's credibility by referencing the truthfulness requirement of the plea agreement under which he testified, and that the trial court erred by denying defendant's postconviction motion for a new trial on this ground. We disagree.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *Bennett*, 290 Mich App at 475. Defendant acknowledges that he did not object to the challenged questions by the prosecution during trial. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Roscoe*, 303 Mich App 633, 648; 846 NW2d 402 (2014).

"Reversal is only warranted if defendant was actually innocent and the plain error caused defendant to be convicted or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of defendant's innocence." *Id*. (quotation marks and citations omitted). Further, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (quotation marks and citation omitted).

Defendant takes issue with the following questions during trial that the prosecution asked Thornton regarding the details of his plea agreement:

> *Q*. Okay. Now, I understand that this is something that is a difficult thing to do but you understand you—that there's an agreement here that you are participating in to come in here and provide truthful testimony about this case, you understand that, correct?
>
> *A*. Yeah.
>
> * * *
>
> *Q*. Okay, so that's where we are and I want you to fully understand that your obligation here is to tell the truth whether I'm asking the questions or whether [defense counsel] is asking the questions, the Judge, or any of these jurors, are you good with that?
>
> *A*. Yes.

Defendant correctly observes that a prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). But the mere disclosure of a plea agreement with a prosecution witness, which includes a provision for truthful testimony, does not constitute improper vouching or bolstering by the prosecution, provided the prosecution does not suggest special knowledge of truthfulness not available to the jury. *Id*.; *People v Cooper*, 309 Mich App 74, 90; 867 NW2d 452 (2015).

When questioning Thornton, the prosecution did not state or imply that the prosecution had some special knowledge regarding the truthfulness of Thornton's testimony. Rather, the prosecution merely recounted the details of the plea agreement, which included a provision for Thornton to tell the truth. The prosecution did not make any comments about the credibility of Thornton and the questions posed were not improper.

Defendant argues that, even if the challenged questions were not improper, when considered with the prosecution's recounting of Thornton's various stories, the jury "could only . . . conclude that the prosecution was asking them to infer that it had some 'special knowledge' unavailable to them." We disagree. The prosecution's questions regarding the plea agreement were not instantly followed by questions reviewing Thornton's prior inconsistent stories, but occurred much later during direct examination. Further, if anything, the jury's knowledge of the plea agreement and Thornton's previous false accounts benefited defendant by

tending to undermine Thornton's credibility. Indeed, defense counsel questioned Thornton at length about his prior differing stories, the plea agreement, and his motivations to lie.

Moreover, the trial court instructed the jury that the lawyers' questions, statements, and arguments are not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was free to believe or disbelieve all or any portion of a witness's testimony. Juries are presumed to follow their instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). Defendant has failed to present anything to overcome the presumption that the jury followed these instructions, and he has failed to establish plain error affecting his substantial rights, or that the trial court abused its discretion by denying his motion for a new trial.

Within this issue, defendant also argues that defense counsel provided ineffective assistance by failing to object. Because the prosecutor's reference to the provision in Thornton's plea agreement requiring him to tell the truth was not improper, defense counsel's failure to object was not objectively unreasonable. Further, the record does not support the contention that a reasonable probability existed that, but for counsel's failure to object, the outcome of defendant's trial would have been different. The trial court's jury instructions were sufficient to dispel any possible prejudice. Therefore, defendant has not established a claim of ineffective assistance of counsel.

Affirmed.

/s/ James Robert Redford
/s/ Michael J. Riordan
/s/ Jonathan Tukel