

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 22, 2011

V

No. 299419
Kent Circuit Court
LC No. 10-000592-FC

MARCUS LAVILLE HARRISON,
Defendant-Appellant.

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for first-degree premeditated murder, MCL 750.316(1)(a), and assault with intent to murder, MCL 750.83. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to life imprisonment with no possibility of parole for the first-degree murder conviction, and to 32 to 80 years' imprisonment for the assault with intent to murder conviction. Because we find that the prosecutor's improper remark did not affect defendant's substantial rights, we affirm.

Defendant argues he was denied a fair trial because the prosecutor improperly argued facts not in evidence during closing arguments.¹ Specifically, the prosecutor said: "Ladies and gentlemen, Marcus Harrison is your shooter. He just told you that. I didn't create that, and it's not speculation. It's his testimony." Claims of prosecutorial misconduct are generally reviewed de novo to "determine whether defendant was denied a fair and impartial trial." *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). "Issues of prosecutorial misconduct are

¹ Defendant also argues that the prosecutor's comment constituted misconduct because the prosecutor had actual knowledge that defendant was not the shooter based on the results of a polygraph test defendant took. We find defendant's argument unavailing. Evidence regarding the polygraph test was not admitted during trial, and the prosecutor did not improperly imply that he had special knowledge in regard to whether defendant was the shooter. See *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003) ("testimony concerning the result of a polygraph examination is not admissible at trial"); *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995) (prosecutor cannot imply that he has special knowledge regarding the truth of testimony given at trial).

decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). However, because defendant failed to preserve this issue by objecting at trial, we review the alleged prosecutorial misconduct for plain error affecting defendant's substantial rights. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

To demonstrate plain error, a defendant must show: (1) error occurred; (2) the error was plain; and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* The burden is on defendant to demonstrate prejudice. *Id.* Even after plain error has been established, this Court must exercise its discretion in deciding whether reversal is warranted. *Id.* Reversal is not warranted unless the plain error resulted in a conviction of an "actually innocent defendant" or where the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 763-764.

We find the prosecutor's claim that defendant admitted he was the shooter to be unsupported by the record. Defendant did not testify at trial. Because a prosecutor may not argue facts that are not in evidence, *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001), we find defendant demonstrated that plain error occurred when the prosecutor indicated that defendant "just told" the jury he was that shooter, and that it was "his testimony."

Despite demonstrating plain error, we find defendant cannot demonstrate he was prejudiced by this error. First, the jury instructions cured any error stemming from the improper comment. The trial court instructed the jury that "lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." Defendant cannot show he was prejudiced because the trial court read the curative instruction that the lawyers' arguments are not evidence and "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Unger*, 278 Mich App at 235 (citations omitted). "[J]urors are presumed to follow their instructions." *Id.* We find the trial court's instruction "that arguments of attorneys are not evidence" dispelled any possible prejudice. See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Further, we do not view a prosecutor's comments in isolation, but must examine them in context. *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). Evaluating the lone improper comment in context, we find defendant was not denied a fair trial. See *Cox*, 268 Mich App at 450-451. The evidence admitted in this case clearly demonstrated defendant was an aider and abettor, not the shooter. We will not reverse a defendant's conviction where a single improper remark did not affect the fairness of the proceedings. See *People v Guenther*, 188 Mich App 174, 183; 469 NW2d 59 (1991) ("We decline to reverse a conviction where isolated improper remarks [by the prosecutor] did not cause a miscarriage of justice."). We find the evidence strongly supported defendant's convictions as an aider and abettor for both first-degree murder and assault with intent to murder. An aider and abettor may "be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. As our Supreme Court in *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *Carines*, 460 Mich at 768, explained:

The general rule is that, to convict a defendant of aiding and abetting a crime, a prosecutor must establish 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.”

Our Supreme Court also held, in *People v Robinson*, 475 Mich 1, 11-12; 715 NW2d 44 (2006), that an aider and abettor may be responsible for the “natural and probable consequence” of the common criminal enterprise.

“The elements of premeditated murder are (1) an intentional killing of a human being (2) with premeditation and deliberation.” *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009); MCL 750.316(1)(a). “The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The evidence presented at trial demonstrated that defendant aided the shooter, who defendant knew had a gun, in finding the intended victim, Chad Brian Lax, and in the commission of the crimes. The intent to kill may be inferred from the use of a dangerous weapon, such as a gun. See *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993). Further, defendant admitted to police he knew what was going to happen. Defendant and codefendant Wendell Taylor discussed the plan to find Lax and harm him before the shooting and defendant helped Taylor hunt Lax down. These actions demonstrated premeditation. Even if defendant only believed Taylor planned to physically assault Lax, defendant is charged with knowledge that the criminal enterprise may result in murder because “a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into a murder.” *Robinson*, 475 Mich at 11. With respect to the second victim, Mallory Matthews, Taylor’s intent to kill Lax transferred to Matthews. In light of the evidence admitted against defendant during trial, defendant has failed to establish that the prosecutor’s improper comments were prejudicial, and has accordingly failed to demonstrate that the plain error affected his substantial rights.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello