

STATE OF MICHIGAN

COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

January 24, 2013

Plaintiff-Appellee,

v

No. 309363

Wayne Circuit Court

SYLVESTER LOTT,

LC No. 11-001013-FC

Defendant-Appellant.

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Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, three 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 concurrent sentences of natural life for his murder conviction, 240 months to 30 years' imprisonment for his assault convictions, and a consecutive five-year sentence for his felony-firearm conviction. For the reasons stated in this opinion, we affirm.

The charges against defendant arose following an incident that occurred in the early morning hours outside the Wild Cats motorcycle club. The evidence presented at trial was that a

physical fight broke out outside of the club between the female members of two other motorcycle clubs, the Sons of Zodiac and the Dragons. Witnesses testified at the trial that defendant, who was the president of the Dragons, provided Iesha Elmore, a female member of the Dragons, with a gun and told her to shoot the female members of the Sons of Zodiac. One member of the Sons of Zodiac was killed, and three other members were shot. After hearing all of the evidence, a jury found defendant guilty of all the charged crimes.

Defendant first argues that his convictions should be vacated and that he should be granted a new trial because the trial court's time limitation on defendant's attorney's participation in voir dire denied defendant the ability to pick an impartial jury and denied him due process.

The scope of voir dire is within the discretion of the trial court. MCR 6.412(C)(1); *People v Harrell*, 398 Mich 384, 388; 247 NW2d 829 (1976). A trial court abuses its discretion when it limits voir dire such that the parties are unable to develop an adequate showing of facts that could be employed in exercising challenges for cause and peremptory challenges. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). However, since defendant made no specific objections, thus allowing the trial court to address the objection on the record, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

The record in this case shows that before jury selection began the trial court told the attorneys that it would hold them "very tightly to the voir dire" and that the attorneys would be afforded an opportunity to question the jurors, but that they would get no more than ten minutes. Jury selection then commenced with the trial court questioning the impaneled jurors by asking each of the jurors where they were from; what they did for a living; whether they were married and, if they were, what their spouse did for a living; whether they had any children; what was their highest level of education; and whether there was any reason why they could not be fair and impartial. The court also asked whether any of them had been on a criminal jury before; whether anyone had themselves been or had a family member or a close friend that had been arrested or charged with a crime other than a traffic offense; whether anyone or a member of their family or close circle of friends had been a victim of a crime; and whether anyone on the panel had attorneys or police officers in their family or as very close friends. If any of the jurors answered yes, the trial court questioned them on the circumstances and asked whether that occurrence would interfere with their ability to be fair and impartial in this case.

The court then allowed the attorneys to ask questions. The prosecutor asked the jurors whether anyone close to them had been the victim of a homicide or had been accused of a homicide; whether anyone close to them had been the victim of a gun related crime or been accused of a gun related crime; and whether any of them were familiar with motorcycle gangs or had close friends or family members who were members of a motorcycle club. Defense counsel asked the jurors whether they understood that they did not have to leave their common sense at the door; whether they would all participate and listen carefully with an open mind; whether they would be patient and wait for all of the questions to be asked of a witness; and whether they had

ever been falsely accused of saying or doing something and if they understood that concept. Defense counsel then stated he had no other questions.

The trial court then allowed defense counsel an opportunity to challenge the jurors for cause and to exercise defendant's right to peremptory challenges. Before using all of his allotted peremptory challenges, defense counsel stated his satisfaction with the jury.

Based on this record, we find no basis on which to conclude that the parties were not given sufficient opportunity through voir dire to develop an adequate showing of facts that could be employed in exercising challenges for cause and peremptory challenges. See *Tyburnski*, 445 Mich at 623, 630. Similarly, we cannot conclude, based on this record, that the voir dire was merely a "perfunctory" exercise. *Id.* at 622 n 6. Not only did the trial court ask probing questions of each of the jurors, but each of the attorneys had the opportunity to ask probing questions as well. Defendant contends that defense counsel was not allowed the opportunity to submit questions and could only ask the jury one question. However, this was not a case in which the trial court did not allow defendant the opportunity to ask questions. Although the trial court did caution the attorneys that they would be limited to ten minutes to ask questions, the trial court did not interfere with the attorneys' ability to ask questions and did not cut the attorneys off during their voir dire of the jury, nor is there any indication in the record that the attorneys were precluded from submitting questions. Each of the attorneys was permitted to ask multiple questions of the potential jurors without interruption by the trial court. Defendant's attorney had ample time to ask the questions of the jury that defendant now on appeal argues were critical to him having an unbiased jury decide his case. He did not choose to do so and, in fact, asked other questions of the jury. Furthermore, defendant does not provide a showing that the jury was biased or that other questions would have resulted in a different outcome for him. Accordingly, defendant has failed to demonstrate plain error affecting his substantial rights.

Defendant also argues that defendant's due process rights to a fair trial and a fair voir dire process "trump" judicial economy. While we agree that defendant's due process rights must be protected, we find that the trial court did not violate these rights due to judicial economy. The trial court gave defense counsel every opportunity to question the jurors regarding their beliefs and biases. There was no evidence that defendant's rights to an impartial jury and due process were violated.

Next, defendant argues for the first time on appeal that the prosecutor denied defendant his due process right to a fair trial by personally vouching for the credibility of one of the prosecution witnesses.

Defendant failed to preserve this challenge "by making a timely, contemporaneous objection and request for a curative instruction." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review unpreserved claims of prosecutorial misconduct for plain error that affected defendant's substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

It is improper for the prosecutor to vouch for the credibility of a witness or question a witness in a way that conveys the message that the prosecutor has some special knowledge regarding the truthfulness of the witness. *People v Bahoda*, 448 Mich 261, 276–277; 531 NW2d 659 (1995). However, “[a] prosecutor is afforded great latitude regarding his or her arguments and conduct at trial.” *Fyda*, 288 Mich App at 461. Accordingly, “a prosecutor may comment on his or her own witnesses’ credibility, especially when credibility is at issue. The prosecutor is free to argue from the evidence and its reasonable inferences in support of a witness’s credibility.” *People v Bennett*, 290 Mich App 465, 478; 802 NW2d 627 (2010).

Defendant argues that misconduct occurred when the prosecutor pointed out in closing argument that witness and assault victim Sharon Matthews was credible because she was a member of the Sons of Zodiac and testified that she did not see defendant hand a gun to Elmore, although she saw Elmore with a gun. However, our review of the prosecutor’s closing argument shows that, while reviewing the testimony of the witnesses and the vantage point they each had of defendant and Elmore and where their focus was at that point in time, the prosecutor pointed out that Matthews’s view was obstructed and that her focus was not on defendant. The prosecutor also pointed out that because Matthews was a member of the Sons of Zodiac, she might have come in and corroborated the testimony of the other members of the Sons of Zodiac who stated that they did see defendant hand a gun to Elmore, but she did not. We find that the prosecutor in this case summarized all of the evidence and all of the testimony of the witnesses based on the evidence introduced at trial. He did not in any way convey some special knowledge regarding the truthfulness of the witness. His comments regarding the testimony of Matthews were consistent with his right to argue from the evidence and reasonable inferences in support of a witness’s credibility. Thus, we conclude that defendant has failed to demonstrate plain error warranting reversal.

Finally, defendant argues that the evidence was insufficient to convict him of first-degree premeditated murder and that his convictions were not supported by the great weight of the evidence.

A defendant is not required to preserve a challenge to the sufficiency of the evidence by a motion for directed verdict or post verdict motion for new trial, *People v Patterson*, 428 Mich 502, 514–515; 410 NW2d 733 (1987), but is required to move for a new trial to preserve a claim that his conviction is against the great weight of the evidence, *People v Cameron*, 291 Mich App 599, 617–618; 806 NW2d 371 (2011). Here, defendant failed to move for a new trial; accordingly, his great weight of the evidence challenge is not properly preserved for appeal. *Id.*

We review de novo a sufficiency of the evidence claim. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). “When reviewing a claim that the evidence presented was insufficient to support the defendant’s conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime.” *People v Kissner*, 292 Mich App 526, 533–534; 808 NW2d 522 (2011). Our review of defendant’s unpreserved great weight of the evidence claim is limited to plain error affecting defendant’s substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

Defendant first argues that the witnesses who testified that he gave the gun to Elmore, the actual shooter, were not credible. First, they were members of the Sons of Zodiac and came to the club on the night in question to instigate a fight with the members of the Dragons. Defendant infers that their testimony was biased because they were seeking revenge for their injuries. Second, they each testified that they saw a revolver being passed from defendant to the shooter and heard six to ten shots being fired from the gun. Defendant argues that this is not consistent with the number of bullet casings found at the scene and that a revolver only has six chambers for bullets. Defendant also argues that the witnesses who testified that defendant told the shooter to “shoot [those] bitches” were biased and that a witness standing right next to defendant never heard him say that.

It is the jury’s role to weigh the credibility of witnesses, and this Court will not disturb the jury’s credibility determinations. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). To the extent that there were conflicts in the testimony, it was the jury’s role to weigh the evidence and resolve any conflicts. *Fletcher*, 260 Mich App at 561-562. Three witnesses, who were all members of the Sons of Zodiac, testified that they saw defendant pull a gun from either behind his jacket or inside the top of his pants and put the gun in the shooter’s hand. Although assault victim Matthews testified that she did not see the handoff, she saw Elmore with the gun and thought that defendant gave it to her because the murder victim screamed, “he gave her the gun,” and defendant was the only male close by. This action occurred during a fight among a group of individuals from two separate motorcycle clubs so it is very feasible that each individual there did not witness defendant handing the gun to the shooter. The jury obviously believed the witnesses who testified that defendant retrieved the gun from his person and handed the gun to Elmore. They also believed the witnesses who testified that defendant directed Elmore and encouraged her to shoot the Zodiac women. These actions are sufficient to find that defendant aided and abetted Elmore in shooting four victims, killing one of them. We will not disturb the jury’s determination of credibility. *Id.* at 562.

Defendant also argues that the prosecution failed to provide any evidence of either premeditation or deliberation, which is necessary to prove guilt of first-degree murder and assault with intent to murder. Defendant argues that the prosecution did not show that defendant was lying in wait or had made plans to kill the victim but instead a fight broke out and the shooter obtained a gun that she used in the heat of the moment to shoot four people.

First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001); *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). “To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.” *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). However, the time required need only be long enough “to allow the defendant to take a second look.” *Schollaert*, 194 Mich App at 170. “The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The following nonexclusive list of factors may be considered to establish premeditation: “(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.*

Viewed in a light most favorable to the prosecution, we conclude that the evidence was sufficient to convict defendant of first-degree murder and assault with intent to commit murder as an aider and abettor of Elmore, the shooter. *Kissner*, 292 Mich App at 533-534. The evidence presented by the prosecution showed that there was a physical altercation between the female members of two motorcycle clubs and that defendant entered into the fray. Defendant was identified as the president of one of the motorcycle clubs that was involved in the fight. Witnesses testified that at some point defendant was standing next to the shooter, Elmore. Three of the witnesses who were members of the other motorcycle club involved in the altercation testified that they saw him reach into an area around the waistband of his pants or under his coat, pull out a gun, and place the gun into the hand of Elmore, a female member of his club. At this point, the female members of the Sons of Zodiac turned and started to run away. Witnesses testified that, after Elmore received the gun, she hesitated, and defendant ordered her to "shoot [those] bitches" and to "chase them." The evidence as a whole supported an inference that defendant had sufficient time to take a second look before the victims were shot. Defendant made a decision to enter the fray armed with a gun, made a decision to reach for his gun while in the fray, made a decision to put the gun in Elmore's hand, and when she hesitated, he made a decision to order her to chase and shoot the victims. While different inferences could be drawn from the evidence, it is for the jury, not this Court, to decide what inferences can be fairly drawn from the evidence and to judge the weight to accord those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). When reviewing a challenge to the sufficiency of the evidence, this 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). The evidence was sufficient to sustain defendant's convictions.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kirsten Frank Kelly

/s/ Jane M. Beckering