

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK B. LARABEE,

Defendant-Appellant.

UNPUBLISHED

July 10, 2008

No. 275658

Wayne Circuit Court

LC No. 06-001552-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KRISTOPHER ALLEN BAYONES,

Defendant-Appellant.

No. 275985

Wayne Circuit Court

LC No. 06-001552-02

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In Docket No. 275658, defendant Larabee appeals as of right his jury trial conviction of first-degree premeditated murder, MCL 750.316. The trial court sentenced Larabee to natural life in prison for that conviction. In Docket No. 275985, defendant Bayones appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. The trial court sentenced Bayones to 12 to 18 years in prison for that conviction. We affirm both cases.¹

On appeal, Larabee first argues that the trial court erred in failing to provide a voluntary manslaughter instruction. We disagree. We review de novo preserved claims of instructional

¹ Defendants were tried as codefendants before separate juries, and this Court consolidated their appeals. *People v Larabee & Bayones*, unpublished order of the Court of Appeals, entered March 19, 2007 (Docket Nos. 275658 and 275985).

error, *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002), but review a trial court’s determination as to whether a jury instruction is applicable to the facts of the case for an abuse of discretion.” *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

A trial court must include an instruction for a necessarily included lesser offense if a rational view of the evidence supports such an instruction, and voluntary manslaughter is a necessarily included lesser offense of first-degree murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). *Id.* We conclude, however, that the trial court did not err in failing to give the requested voluntary manslaughter instruction because a rational view of the evidence did not support it.

“[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.” *Id.* at 535-536. The degree of provocation must be one “which causes the defendant to act out of passion rather than reason.” *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), *aff’d* 461 Mich 992 (2000). The provocation is adequate if it “would cause a *reasonable person* to lose control.” *Id.* (emphasis in original).

No evidence was presented showing adequate provocation. On the contrary, although the victim, Jamie Colby, accosted Larabee at Meijer and had a loud conversation with him, Larabee and Douglas Hall indicated that Colby was only asking for money and offering to sell drugs. Larabee even admitted that when Colby was rebuffed, Colby acted like he wanted to fight in a *playful* manner. Despite Larabee’s claim that he feared Colby may try to rob him and Larabee’s “angry” comments to Meijer employees that Larabee wanted to “kick [Colby’s] ass,” Larabee was able to leave Meijer safely. Larabee noted that the reason he returned with Bayones and Hall to offer Colby a ride was because it was cold outside and made no mention of anger or passionate feelings. When Sergeant Michael Moening later pulled the men over, he did not notice any animosity nor did anyone in the Jeep articulate any concern of fear to him.

Although Larabee asserted that after arriving at the apartment complex and walking to the playground area Colby demanded money and gestured as if he had a weapon, this was not Colby’s first request for money that night. Moreover, Larabee contended that he struck Colby out of fear that Colby “was about to do something to my friend.” If Larabee’s version of events were believed, it appears Larabee’s action was one of calculated self-defense rather than one executed in the heat of passion. Indeed, according to Larabee, he took the wrench with which he struck Colby from Bayones’s Jeep *before* accompanying Colby to the playground area because Larabee had known Colby to possess a gun on a previous occasion. Also, Larabee offhandedly asked Meijer employees if they would claim Larabee acted in self-defense if he killed Colby. In light of this, the evidence did not support an instruction of voluntary manslaughter.

Larabee next argues that the evidence was insufficient to support his conviction for first-degree premeditated murder. We disagree. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence *de novo* in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find

that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992).

[T]o convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. [*People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998) (citations omitted).]

Evidence of the parties prior relationship, a defendant's actions before and after the killing, as well as the circumstances of the killing itself, including the type of weapon used and the location of the wounds inflicted, can establish premeditation and deliberation. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993). Given the difficulty in proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

When viewed in the light most favorable to the prosecution, sufficient evidence existed to support Larabee's conviction. Before taking Colby to the apartment complex, Larabee and Colby engaged in a loud conversation while at Meijer after which Larabee not only indicated repeatedly that he wanted to "kick [Colby's] ass," but also asked a Meijer employee whether she would say it was self-defense if Larabee beat or killed Colby. After leaving Colby at Meijer, Larabee returned with Bayones and Hall to provide Colby a ride. Once at the apartment complex, Larabee took a breaker bar from Bayones's Jeep *before* accompanying Colby to a playground area. As Hall prepared to offer Colby a drink while seated at a picnic table, Larabee struck Colby repeatedly on the head and face with the breaker bar. Larabee left the scene to wash the blood from his clothes before returning to place a picnic table on Colby's head on which he jumped twice. Larabee then burned his shirt, jacket, shoes, Colby's box of doughnuts, and the breaker bar.

It is worth noting that the autopsy report revealed that Colby sustained 16 blows to his head and that portions of his scalp were missing and bones were imbedded in his brain tissue. Moreover, a medical expert testified that each blow to Colby could have been independently fatal and that it would only require one blow to cause unconsciousness. Additionally, police found brain matter and coagulated blood on the picnic table bench near Colby's body. Although the brutal nature of a killing alone does not establish premeditation, it may show that a defendant had time for a second look. *Johnson, supra* at 733. In light of these facts, when Larabee's actions before, during, and after the killing are considered as a whole, a reasonable jury could infer that Larabee acted with premeditation and deliberation and had time for a second look before killing Colby.

Larabee claims he acted in self-defense or defense of others. The elements of self-defense and defense of others are: (1) the defendant honestly and reasonably believed there was danger; (2) this danger amounted to serious bodily harm or death; (3) the defendant's actions at this time were reasonably necessary for self-defense or defense of others; and (4) the defendant was not the initial aggressor. *People v Riddle*, 467 Mich 116, 119, 120 n 8; 649 NW2d 30 (2002). Evidence that a defendant's belief of imminent danger was not honest or reasonable is sufficient to defeat a claim of self-defense or defense of others. *People v Fortson*, 202 Mich App

13, 20; 507 NW2d 763 (1993). The prosecution need not negate every reasonable theory of innocence, but must only prove its case beyond a reasonable doubt despite any contradictory evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

First, Larabee was the initial aggressor, thereby precluding a claim of self-defense. Further, Colby's injuries create the inference that Larabee used excessive force, which also negates a claim of self-defense. *In re Gillis*, 203 Mich App 320, 322; 512 NW2d 79 (1994). Despite Larabee's claim that he struck Colby to defend himself and others for fear that Colby would rob or shoot him, it was for the jury to resolve issues of witness credibility and to weigh the evidence, *Wolfe, supra* at 514-515, and the jury apparently did not find Larabee credible in this regard. Therefore, sufficient evidence existed to support Larabee's conviction, notwithstanding Larabee's claims of self-defense and defense of others.

Bayones argues on appeal that insufficient evidence existed to convict him as an aider and abettor to second-degree murder. We disagree. "The elements of second-degree, or common-law, murder are (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm [i.e., malice]." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996) (quotation and citation omitted); MCL 750.317. A conviction of a defendant as an aider and abettor requires the prosecution to show "that [1] the crime was committed by the defendant or another, [2] that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and [3] that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance." *People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Regarding intent:

a defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, 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, 14-15; 715 NW2d 44 (2006).]

Although a close call, viewing the evidence in the light most favorable to the prosecution, a reasonable jury could infer that Bayones is liable for second-degree murder as an aider and abettor. *Tombs, supra*; *Wolfe, supra* at 513-514. Bayones correctly points out that "[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999). However, Bayones's involvement amounted to more than just his "mere presence." It was Bayones who drove back to Meijer to offer Colby a ride, which occurred only *after* Larabee told Bayones that he wanted to "beat [Colby's] ass." Despite the fact that Bayones claimed Larabee "says that stuff all the time," Bayones admitted that he was aware Larabee disliked Colby and recalled that "words were exchanged" between Larabee and Colby after Colby initially approached Larabee at Meijer.

It was the jury's role to determine the credibility of evidence, and this Court must resolve any conflicts in the prosecution's favor. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Taken together with the evidence that Bayones subsequently drove Colby to the apartment complex, accompanied Larabee and Colby to a secluded area where Larabee beat Colby to death in the middle of the night, waited for Larabee while he returned to the murder scene to make sure there were no witnesses, and then assisted Larabee in washing and disposing of his bloodstained clothing and the murder weapon, a reasonable jury could infer that Bayones assisted Larabee in killing Colby with the knowledge of Larabee's intended actions. Given the circumstances surrounding the killing, it was reasonable for Bayones to expect that Colby's death would be the natural and probable cause of the intended wrongdoing. Therefore, sufficient evidence existed to support Bayones's conviction.

Bayones contends that he was denied his right to present a defense because *People v Cornell*, 466 Mich 335, 354-357; 646 NW2d 127 (2002), precluded an instruction on the uncharged cognate offense of accessory after the fact, MCL 750.505.² We disagree. We note that this issue is not properly before the Court because Bayones failed to raise it in his statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); MCR 7.212(C)(5). Regardless, we will review this unpreserved instructional issue for plain error affecting substantial rights. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Insofar as Bayones's argument related to the application of *Cornell*, as a Michigan Supreme Court decision, stare decisis requires us to follow its holding forbidding instruction on uncharged, cognate offenses. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002). In any event, our Supreme Court has found that the offense of accessory after the fact is not a cognate offense of murder. *People v Perry*, 460 Mich 55, 66; 594 NW2d 477 (1999). Rather, the offense of accessory after the fact is a separate and distinct offense that may only occur after murder is committed. *People v Bargy*, 71 Mich App 609, 614-615 n 5, 616-617; 248 NW2d 636 (1976). Thus, Bayones's claim that he was entitled to this instruction is meritless.

We are also unpersuaded that the admission of Larabee's statements to Meijer employees violated Bayones's Sixth Amendment right to confrontation. We review a trial court's decision to admit evidence for an abuse of discretion, but review de novo the constitutional issue of whether admission of evidence violates the Confrontation Clause. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000).

The Sixth Amendment guarantees a criminal defendant "the right . . . to be confronted with the witnesses against him." US Const, Am VI; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The *Crawford* Court held that under the confrontation

² "The crime of accessory after the fact is a common-law felony punishable under the catch-all provision of MCL 750.505 . . ." *People v Cunningham*, 201 Mich App 720, 722; 506 NW2d 624 (1993).

clause, out-of-court “testimonial” statements are inadmissible unless the declarant is unavailable and the accused had a prior opportunity to cross-examine the declarant. *Id.* at 59, 68; *People v Jambor*, 273 Mich App 477, 486; 729 NW2d 569 (2007). “Nontestimonial” hearsay does not implicate the confrontation clause. *Crawford, supra* at 60-68. Although the *Crawford* Court did not provide a comprehensive list of “testimonial” hearsay, it held that “prior trial testimony clearly constituted testimonial hearsay, as did pretrial statements if the declarant could reasonably expect that the statement would be used in a prosecutorial manner, and if the statement was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Jambor, supra* at 486-487 (internal quotations and citations omitted).

Utilizing that test, we conclude that Larabee’s statements to the Meijer employees are not “testimonial.”³ Larabee made his comments in passing while at a checkout lane to people he did not even know. Both Meijer employees testified that the comments were made in a joking or silly tone and they did not take them seriously. Indeed, these comments bear more resemblance to “[a]n off-hand, overheard remark” that the *Crawford* Court noted the confrontation clause was not designed to target, rather than a “formal statement to government officers.” *Crawford, supra* at 51. Under the circumstances, it can hardly be said that Larabee made these comments in anticipation of trial. Therefore, the statements at issue were not “testimonial” hearsay and were admissible if they fell within a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.” *Id.* at 60, 68.

MRE 803(3) provides an exception to the hearsay rule for the declarant’s “then existing mental, emotional, or physical condition,” as follows:

A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

Spontaneous statements concerning a mental, emotional, or physical condition are considered reliable, *People v Moorer*, 262 Mich App 64, 68-69; 683 NW2d 736 (2004), as are “[f]orward looking statements of the intention [of the declarant]” McCormick, § 276, p 279. Here, Larabee’s off-hand remarks in a checkout lane were made without any prompting from the Meijer employees. As such, these comments were a spontaneous, forward looking explanation of Larabee’s existing state of mind on which he later acted in a gruesome fashion. In addition, the statements were not unfairly prejudicial to Bayones under MRE 403, as the statements did not implicate Bayones, who was 23 checkout lanes away from Larabee at the time. Accordingly, the statements were admissible as “nontestimonial” hearsay and their admission did not violate the confrontation clause.

³ Larabee asserted his Fifth Amendment right and did not testify at trial, making him an unavailable witness under MRE 804(a)(1).

Bayones claims that Larabee's statements violated the confrontation clause because they implicated him in the crime. This argument fails. "In *Bruton* [*v United States*, 391 US 123, 126; 88 S Ct 1620; 20 L Ed 2d 476 (1968)], the United States Supreme Court held that a defendant is deprived of his Sixth Amendment right to confront witnesses against him when his nontestifying codefendant's statements implicating the defendant are introduced at their joint trial." *People v Pipes*, 475 Mich 267, 275-276; 715 NW2d 290 (2006).⁴ As noted above, however, Larabee made no reference to Bayones in his statements to the Meijer employees. Further, it appears Bayones was unable to hear anything Larabee said given that he was 23 checkout lanes away from Larabee. In any event, even if the statements did implicate Bayones, the error was harmless in light of Bayones's statement to police regarding Larabee's comment to Bayones in the Jeep that was nearly identical to his statement to the Meijer employees. *Id.* at 276-277. Therefore, Bayones's claim fails.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis

⁴ We note that *Bruton* provides a brightline rule regarding the introduction of a nontestifying codefendant's statements implicating a defendant at a joint trial irrespective of *Crawford's* testimonial statement analysis. *Crawford, supra* at 59, 68.