

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 14, 2014

v

JAREN TERRELL WADE,

Defendant-Appellant.

No. 315790
Cass Circuit Court
LC No. 11-010147-FC

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); carrying a weapon with unlawful intent, MCL 750.226; carrying a concealed weapon, MCL 750.227; unlawfully driving away a motor vehicle, MCL 750.413; and three counts of carrying a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the murder conviction, 38 months to 5 years' imprisonment for the carrying a weapon with unlawful intent conviction and the carrying a concealed weapon conviction, 23 months to 5 years' imprisonment for the unlawfully driving away a motor vehicle conviction, and two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right. For the reasons explained in this opinion, we affirm.

Defendant's convictions arose out of the death of Darius Nickens (the victim) in Dowagiac, Michigan. Defendant and the victim had an ongoing dispute related to defendant's treatment of the victim's niece, with whom defendant had a romantic relationship. In addition, on April 12, 2011, both defendant and the victim participated in a dice game at the home of Andre Murff. During the game, the victim called defendant a "tissue-paper-ass n*****," meaning that defendant was "soft," and the victim physically attacked defendant.

The following day, April 13, 2011, defendant returned to Murff's house. Also there were Arvin Joseph, Jevon Bomer, and Willis Warren. The men were outside listening to music, when the victim arrived at Murff's house in a minivan. Warren then left, after defendant told him that it was okay to leave and that he "had nothing to do with it." Defendant handed a bottle of liquor to Joseph and walked to the passenger's side of the minivan. After a short conversation with the victim, who remained in the van, defendant pulled a gun from his back pocket and shot the victim three times.

In recorded interviews with police, which were played for the jury, defendant acknowledged approaching the minivan to talk to the victim, and he admitted having a gun in his possession at that time. He claimed, however, that he did not intend to shoot the victim. According to defendant, when he asked the victim about the previous night, the victim replied that “we can do whatever” and “let’s do it,” which, according to defendant, meant that the victim wanted a fight. Defendant indicated that the victim began to get out of the van at which time defendant began shooting.

At trial, the defense theory of the case was that defendant killed the victim, but that he did so in a moment of fear out of a sense of self-preservation and thus could not be guilty of homicide, or, at a minimum, defendant lacked the premeditation and intent necessary to support a first degree murder conviction and should be guilty of no more than manslaughter.

The jury convicted defendant on all counts as noted above. He now appeals as of right.

I. PROSECUTORIAL MISCONDUCT

Defendant argues that misconduct by the prosecutor denied him a fair trial. In particular, defendant maintains that the prosecutor: (1) impermissibly appealed to the jury’s emotions by eliciting testimony regarding Murff’s five-year-old child who was nearby at the time of the shooting, (2) improperly appealed to the jury’s sympathy for the victim, and (3) argued facts not in evidence during closing statements by mischaracterizing a witness’s testimony.

Because defendant failed to object on the basis of prosecutorial misconduct to any of the alleged misconduct and failed to request a curative instruction, defendant’s claims are unpreserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant’s substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Under this standard, “the defendant must demonstrate that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant’s substantial rights.” *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). A defendant’s substantial rights are affected if the error affected the outcome of the proceedings. *Id.* Reversal is not warranted where a curative instruction could have alleviated any prejudicial effect occasioned by the prosecutor’s conduct. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, with the prosecutor’s challenged conduct examined in context. *McLaughlin*, 258 Mich App at 644. The propriety of a prosecutor’s remarks depends on all the facts of the case as well as arguments from defense counsel. *People v Brown*, 279 Mich App 116, 135-136; 755 NW2d 664 (2008). Generally, prosecutors are afforded great latitude regarding their arguments and conduct at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). A prosecutor may not, however, appeal to the jury’s emotions and sympathy, *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001), and, more specifically, a prosecutor may not appeal to the jury to sympathize with the victim, *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

Moreover, a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented at trial. *Watson*, 245 Mich at 588. However, a prosecutor may argue reasonable inferences from the evidence. *Id.* And, a prosecutor need not confine his or her argument to the blandest terms possible. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Defendant first claims that the prosecutor impermissibly appealed to the jury's emotions by eliciting testimony that defendant shot the victim while Murff's five-year-old son was present, and also referencing the child's presence during his opening statement. There was nothing improper, however, in eliciting testimony on the full transaction of events in order to equip the jury to perform their sworn duty. See *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *Id.* at 741. Here, the "complete story" of events included the persons who were present at Murff's house and in the nearby area at the time the shooting occurred. The child's presence provided context to events, from which the prosecutor suggested a jury could infer that, because defendant shot the victim while Murff's son was in the area, defendant had come to Murff's house committed to shooting the victim and that nothing could have deterred him. The prosecution's good faith effort to introduce evidence on this point, which was at least arguably admissible, did not constitute misconduct. *Dobek*, 274 Mich App at 70.

It follows that the prosecutor's comment about Murff's son in his opening statement was also not plainly improper. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), *aff'd* sub nom *People v Tilley*, 405 Mich 38 (1979). In referencing Murff's son, the prosecutor told the jury about the evidence that he planned to elicit, and then indicated that the expected evidence regarding Murff's son would, along with other evidence, show that defendant intended to kill the victim. There was nothing improper in this conduct.

Defendant also claims that the prosecutor committed misconduct when he appealed to the jury's sympathy for the victim. Defendant asserts that the prosecutor evoked sympathy for the victim through the testimony of Shirley Nickens (the victim's mother), Amy Hall (the mother of two of the victim's children), and Jamal Nickens (the victim's brother), as well as through the admission of a photograph of the victim and autopsy pictures. However, as already stated, a prosecutor's good-faith effort to admit evidence does not constitute misconduct, *Dobek*, 274 Mich App at 63, and nothing in the record indicates that the prosecutor elicited the challenged testimony or admitted the pictures for the purpose of evoking sympathy for the victim.

First, background evidence regarding the parties may be introduced to aid in the general understanding of the case. 1 Robinson & Longhofer, Michigan Court Rules Practice, Evidence, § 401.2, p 227. There is nothing in the record to indicate that the prosecutor had a purpose for introducing the photograph of the victim other than showing the jury what the victim looked like before he died. Shirley Nickens's identification of the individual depicted in the photograph also confirmed the identity of the victim in this case. Further, defense counsel made specific arguments regarding the victim's size and age relative to that of defendant, and the prosecutor may well have wanted to provide the jurors an opportunity to assess the victim's physical

characteristics for themselves. Second, defendant's intent in shooting the victim was at issue, particularly given defendant's arguments regarding his lack of intent and his claims that he shot blindly out of a sense of fear. Evidence of injury is admissible to show intent to kill, *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995), and the autopsy pictures, depicting three gunshot wounds, were used to explain the victim's injuries. Cf. *People v Howard*, 226 Mich App 528, 550; 575 NW2d 16 (1997) (finding autopsy photographs depicting injury properly admitted as probative of the issue of intent). The prosecution's good faith introduction of this evidence did not constitute misconduct. *Dobek*, 274 Mich App at 63.

Third, the record indicates that Shirley Nickens's brief testimony regarding the victim's personal history, i.e., that the victim was born in 1982, had three children, and was a high school graduate, was elicited for the purpose of providing basic background information as an aid to the jury's understanding of the case. 1 Robinson & Longhofer, Michigan Court Rules Practice, Evidence, § 401.2, p 227. In fact, the prosecutor similarly asked several witnesses, especially those who were at Murff's house for the dice game and the shooting, about their background. The questions were brief and in no way denied defendant a fair trial. Fourth, Hall's testimony that the victim was the father of her two children, as well as her testimony that the victim occasionally spent the night with her, explained her relationship to the victim and why she was testifying at trial. And, Hall's testimony about the victim's activities on the morning of April 13, 2011, helped the jury understand the full context in which the disputed events took place. *Sholl*, 453 Mich at 741-742. The jury's knowledge of the victim's activities and demeanor the morning after the dice game could have aided the jury in evaluating defendant's claim of what happened between defendant and the victim at the minivan, and in particular in assessing defendant's claim that the victim intended to start a fight. Fifth, Jamal Nickens's testimony about what happened in the hospital appears to have been elicited in response to defendant's cross-examination of Dr. Michael Chapman, who attended to the victim in the emergency room, regarding what happened after Chapman delivered the news of the victim's death. Specifically, in response to a question by defense counsel, Chapman testified that there were threats and accusations made by the family, while Jamal Nickens's description of events at the hospital included no such conduct. Because Jamal's testimony was given in response to testimony that defendant had elicited, defendant cannot now be allowed to complain about it. See *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003) (recognizing a prosecutor is allowed to "fairly respond to issues raised by" the defendant). Finally, in regard to Shirley Nickens's testimony that she saw the victim lying on the ground and tried to talk to him, and Jamal's testimony that the police would not let him help the victim, that he did not get a chance to talk to the victim, and that he sees and tries to take care of the victim's children, we cannot conclude that the elicitation of this testimony was plain error affecting defendant's substantial rights. Much of the testimony on these points can be construed as supplying the jury with information on the full transaction of events surrounding the victim's death. *Sholl*, 453 Mich at 741-742. In any event, the testimony elicited on these points was isolated and relatively brief, and not so inflammatory as to prejudice defendant. See *Watson*, 245 Mich App at 591. Further, any potential prejudice from the testimony could have been alleviated by a timely objection and appropriate curative instruction. See *Callon*, 256 Mich App at 329.

Indeed, even if any of the challenged elicitations of evidence can be construed as an improper appeal to the jury's emotions and sympathy, the misconduct did not affect defendant's substantial rights. The trial court instructed the jury that it was to decide the case based on the

evidence and that it was not to let sympathy or prejudice influence its decision. “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

In a related argument, defendant further claims that the prosecutor evoked sympathy for the victim when, during his closing argument, he stated that the victim, who by his mother’s testimony was a “good kid,” did not “deserve to be executed in the van.” Relevant to the prosecutor’s argument, it was the prosecutor’s theory that defendant, because he had been disrespected by the victim at the dice game, shot the victim three times execution style. In contrast, the defense maintained throughout trial that defendant acted out of self-preservation after having been long subjected to “intimidation and bullying and . . . terrorizing” by the victim and others. In this context, the prosecutor’s argument was not an appeal to the jury’s sympathies, but an argument that the killing was murder and that the victim’s past behavior, whatever his transgressions, did not justify his execution by defendant. There was nothing improper in this argument. See *Aldrich*, 246 Mich App at 112.

Additionally, defendant argues that the prosecutor committed misconduct during his closing argument when he misstated the testimony of Dr. Stephen Cohle, the forensic pathologist who performed the autopsy on the victim’s body, by stating that the gunshot to the victim’s arm was the first shot fired. There was no mischaracterization of the evidence. Cohle testified that the gunshot to the victim’s arm was not the fatal shot. Thus, the prosecutor accurately stated the evidence when he told the jury that the gunshot to the victim’s arm did not kill him. Although Cohle did not give an opinion regarding the order of the gunshots, he agreed that the gunshot wounds were consistent with the victim getting shot in the arm, turning, and, then getting shot two times in the back. Chapman gave similar testimony. Accordingly, by arguing that the first gunshot was to the victim’s arm, the prosecution was arguing the evidence and the inferences as they related to its theory of the case. *Watson*, 245 Mich at 688. The prosecutor’s remarks were proper.

II. BAD ACTS EVIDENCE

Relying on MRE 404(b), defendant argues that he was denied his rights to due process and a fair trial when the recordings of his interviews with Detective Jarrid Bradford were not redacted to prevent the jury from hearing his statements about other bad acts by him.¹ The specific evidence at issue involved (1) defendant’s indication that he had been falsely accused of

¹ Defendant’s argument on appeal attempts to analogize the present case to *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013). *Musser* makes plain that the contents of a recorded police interview are not automatically admissible in their entirety without regard to the rules of evidence. See *id.* 349-350, 353-354. Beyond this general principle, *Musser* provides little guidance in the present case as it involved redaction of remarks by police officers, made during an interview with a suspect, which tended to vouch for the credibility of another person. *Id.* at 353-354. In contrast, in the present case, whether redaction of defendant’s statements was appropriate requires analysis under MRE 404(b). See generally *People v Smith*, 120 Mich App 429, 435-437; 327 NW2d 499 (1982).

sexually assaulting “Bootsy’s” niece; (2) defendant’s admission that he robbed “Big Dog” of some marijuana; (3) defendant’s acknowledgement that he always carried a gun; and (4) defendant’s statement that he smoked 10 to 15 “blunts” a day and spent a week in jail for a marijuana offense.

At trial, defendant did not request redaction of these remarks from the recording of his interviews. In fact, when the prosecution moved for introduction of the recordings, defense counsel affirmatively stated that he had “[no] objection.” By virtue of defense counsel’s affirmative agreement to the evidence’s admission, defendant waived any challenge to the evidence’s admission. See *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011) (recognizing that “express and unequivocal indications” of approval at trial constitute waiver of a claim); *People v McDonald*, 293 Mich App 292, 295; 811 NW2d 507 (2011) (stating “affirmative approval” of hearsay evidence’s admission constituted waiver).

Indeed, it is clear from the record that defendant’s theory of the case benefited from the admission of the recordings which tended to support his theory of the case. That is, defendant did not dispute that he shot the victim. Rather, the defense theory was that the victim had bullied, intimidated, and terrorized defendant for years and that defendant only shot the victim out of fear after the victim told defendant that he was going to finish what he had started at the dice game. Part of the defense theory was that defendant always had a gun on him for protection because he so feared the victim and others involved with intimidating defendant.

Given defendant’s theory of the case, his statements to Bradford that he always had a gun on him clearly supported his position. In fact, defendant’s statements on this point were the only evidence at trial about him “always” carrying a gun for protection. Likewise, defendant’s statements to Bradford about Bootsy’s accusation and the theft of marijuana from Big Dog supported the defense theory. From defendant’s statements, one could infer that the rape accusation and the theft of marijuana were reasons, in addition to defendant’s treatment of the victim’s niece, for the victim’s bullying of defendant. The record supports that defense counsel wanted the now-challenged statements put before the jury. A defendant may not assign error on appeal to something that his own counsel deemed proper. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). See also *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (“Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this issue.” (citation omitted)). In sum, because defendant affirmatively approved the evidence’s introduction, and his theory of the case benefited from the evidence, he cannot now claim introduction of the evidence requires reversal of his conviction.

In any event, were we to consider the admission of the other acts evidence under MRE 404(b), defendant’s claim would be without merit. Because defendant failed to seek redaction of the contested statements in the trial court, the issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims of evidentiary error for plain error affecting the defendant’s substantial rights. *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011).

Evidence of a defendant’s other bad acts is admissible under MRE 404(b) if three conditions are met: (1) the evidence is offered for a proper purpose, which is any purpose other

than establishing the defendant's character; (2) the evidence is relevant under MRE 402; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). In addition, upon request, a trial court may give a limiting instruction under MRE 105. *Knox*, 469 Mich at 509.

In this case, there was a proper purpose, other than establishing defendant's character, for defendant's statements about carrying a gun, Bootsy's rape accusation, and the robbery of Big Dog. *Steele*, 283 Mich App at 479. The main issue at trial was defendant's intent in shooting the victim. While the prosecutor maintained that the shooting was premeditated and deliberate, the defense claimed that defendant shot the victim out of fear after being subjected to years of bullying and intimidation. Defendant's statements, which evidenced a long running dispute between defendant and the victim, were probative of his state of mind and intent on April 13, 2011, the day of the shooting, meaning the evidence was relevant to a material fact of consequence. Compared to the high probative value of the evidence, there was minimal danger that the jury would draw improper inferences from the evidence. See *People v Ortiz*, 249 Mich App 297, 306-307; 642 NW2d 417 (2002). Indeed, as discussed, far from prejudicing defendant, the evidence he now contests lent some support to his theory of the case. In sum, exclusion of the evidence defendant now challenges was not warranted under MRE 404(b).

Additionally, assuming, without deciding, that there was some error in the failure to redact defendant's statements that he smoked 10 to 15 blunts a day and that he had previously spent a week in jail for a marijuana offense, defendant has not shown plain error affecting his substantial rights. There was evidence, apart from any of defendant's statements to Bradford, that defendant used and sold marijuana. Murff testified that everyone smoked marijuana at the dice game, and Brandon Douglas testified that, after the shooting, he and defendant smoked marijuana in Elkhart, Indiana. Jamal testified without objection that he had previously bought marijuana from defendant. Given the other uncontested evidence regarding defendant's marijuana use, we cannot see that further cumulative evidence on this point prejudiced defendant. See *People v Rodriguez*, 216 Mich App 329, 332; 549 NW2d 359 (1996). In any event, as discussed *infra*, there was strong evidence from which the jury could conclude that the shooting of the victim was premeditated and deliberate. Under these circumstances, any error in failing to redact defendant's statements regarding marijuana did not affect the outcome of defendant's trial. See *McLaughlin*, 258 Mich App at 645.

To the extent defendant now regrets the lack of limiting instruction on the use of the other bad acts evidence, because defendant never requested a limiting instruction, no plain error occurred when the jury was not given such an instruction. A trial court is under no obligation to give a limiting instruction sua sponte. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel. Because defendant never moved for a new trial or a *Ginther*² hearing, our review of defendant's claims is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation omitted).

Defendant asserts that defense counsel was ineffective for failing to object to the prosecutor's misconduct. However, as discussed *supra*, the prosecution did not commit misconduct, and any objection to the alleged misconduct would have been futile. Defense counsel was not ineffective for failing to make futile objections. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Further, because the trial court instructed the jury that it was not to let sympathy or prejudice influence its decisions and that the lawyers' statements and arguments were not evidence, defendant cannot show that, but for defense counsel's alleged deficient performance, the result of his trial would have been different. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant also asserts that defense counsel was ineffective for failing to seek redaction of his statements about his other bad acts from the recorded interviews. To establish that defense counsel's performance was deficient, a defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant fails to overcome this presumption with regard to his statements about him always carrying a gun, Bootsy's rape accusation, and the robbery of Big Dog. As stated *supra*, these statements supported the defense theory and there were thus sound reasons for defense counsel's decision not to object to the admission of this evidence.

Defendant also fails to overcome the presumption of sound trial strategy with regard to his statements about smoking 10 to 15 blunts a day and spending a week in jail for a marijuana offense. There are times when it is better not to make an objection. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Given the testimony from other witnesses that defendant smoked and sold marijuana, defense counsel's opening statement in which he told the jury that defendant sold marijuana to Warren on April 13, 2011, and the evidence that Bomer and the victim had possessed or used marijuana, defense counsel may have believed that it was better not to redact defendant's statements from the recorded interviews and risk the jury speculating that information was being withheld. Counsel may have believed that the best course of action was to allow the jury to hear the recorded interviews without any interruptions. On this record,

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant has not overcome the strong presumption that counsel's decision not to object was a matter of sound trial strategy. *Toma*, 462 Mich at 302. Moreover, given the other evidence regarding defendant's marijuana use and, more importantly, the strong evidence of defendant's guilt, defendant has not shown that, but for counsel's failure to object to this portion of the interview, there was a reasonable probability of a different outcome. See *Uphaus (On Remand)*, 278 Mich App at 185.

Additionally, defendant argues that defense counsel was ineffective for failing to request a limiting instruction on the use of the other acts evidence. The decision of counsel to request a limiting instruction is a matter of trial strategy, and we will not second-guess counsel's decision. *Rice (On Remand)*, 235 Mich App at 444-445. See also *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) ("This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight."). It may well have been defense counsel's strategy to downplay defendant's past improper conduct by not requesting such an instruction. Cf. *Rice (On Remand)*, 235 Mich App at 444-445. Regardless, defendant fails to show that, but for defense counsel's decision not to request a limiting instruction, there was a reasonable probability that the result of defendant's trial would have been different. *Uphaus (On Remand)*, 278 Mich App at 185. As set forth *infra*, there was substantial evidence from which the jury could have found that the shooting of the victim was premeditated and deliberate. In addition, although defendant points out that the prosecutor referred to his other bad acts in closing arguments, defendant makes no assertion that the jury was actually asked to engage in any forbidden character-to-conduct reasoning. The only statements by the prosecutor to which defendant makes specific reference are that defendant is "no angel" and that "it goes to his motive and his intent and premeditation," statements that the prosecutor made after explaining that defendant carried a gun because of Bootsy's accusation and his robbery of Big Dog. The jury had already heard that defendant was no angel, because defense counsel made such a statement in his opening statement. The prosecutor's statement – that defendant's act of always carrying a gun, and the reasons for him doing so, went to defendant's motive and intent – did not ask the jury to make an improper use of the other acts evidence. And, indeed, it seems implausible that the jury would have inferred defendant's guilt on the serious charges at hand from evidence of past marijuana use or even theft of marijuana. Cf. *Ortiz*, 249 Mich App at 307 ("The crime for which defendant was on trial was not the same as his previous crimes. This greatly lessened the danger that the jury would conclude that 'if he did it before, he probably did it again.' "). Under these circumstances, defense counsel's action in not requesting a limiting instruction does not undermine confidence in the outcome of trial. *Carbin*, 463 Mich at 600.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that his conviction for first-degree premeditated murder is not supported by sufficient evidence. In particular, defendant asserts that there was insufficient evidence for the jury to find that the shooting of the victim was premeditated and deliberate. We review *de novo* a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *Id.* Any conflicts in the evidence are resolved in favor of the prosecution. *People v Harrison*, 283 Mich App 374, 378;

768 NW2d 98 (2009). “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

“In order to 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.” *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). To “premeditate” is to think about beforehand, and to “deliberate” is to measure and evaluate the major facets of a choice. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (citation omitted). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Kelly*, 231 Mich App at 642. Although there is no specific time requirement, “one cannot instantaneously premeditate a murder.” *Plummer*, 229 Mich App at 300, 305. Premeditation and deliberation may be inferred from the circumstances surrounding the killing, including (1) the prior relationship between the victim and the defendant; (2) the defendant’s actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant’s conduct after the killing. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Given the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient. *Ortiz*, 249 Mich App at 301.

In this case, there was a prior relationship between the victim and defendant marked by confrontation and bad feeling. First, there was a long standing disagreement between defendant and the victim. The victim did not like the way defendant treated his niece. Defendant told Bradford that the victim, as well as Jamal, had told defendant what they would do to him. There was also evidence that the victim bullied defendant because of a rape accusation and defendant’s theft of marijuana from Big Dog. Defendant left Michigan and went to Arkansas for some time to get away from the threats against him. Douglas recalled an incident where the victim and defendant exchanged harsh words and where they almost got into a physical altercation. Second, the day before the murder, defendant and the victim had a physical altercation. At the dice game, the victim called defendant a “tissue-paper-ass n*****” and then physically attacked him. Defendant later told Bomer that he felt played and disrespected. Defendant’s contentious history with the victim clearly supports the inference that he acted with premeditation and deliberation.

Moreover, on April 13, 2011, defendant took a gun with him to Murff’s house, from which it can be inferred that the homicide was premeditated and deliberate. Although defendant told police that he always carried a gun, Joseph and Murff testified that they had never previously seen a weapon on defendant. In addition, defendant’s demeanor on the day in question struck those around him as unusual. Specifically, according to Bomer and Murff, defendant was quieter than usual that day. Bomer believed that defendant was upset.

Most significantly, the circumstances immediately surrounding the shooting support a finding that defendant had time to take a “second look” before killing the victim. See *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). According to Joseph, when the victim arrived in the minivan, defendant approached the passenger’s side window. On his way to the minivan, defendant handed Joseph a bottle of liquor without even looking at Joseph. Defendant also told Warren to go ahead and leave because he “had nothing to do with it.” Once defendant reached the van, a conversation ensued with the victim, during which, according to Joseph, defendant looked upset. The victim then started to take off his seatbelt, at which time defendant

reached into his back pocket and pulled out his gun. Defendant pointed the gun in the car and pulled the trigger, but the gun did not shoot. Despite this additional reprieve during which to reconsider his actions, defendant then pulled “it” back and shot the gun three times inside the passenger’s side window at the victim. See *Plummer*, 229 Mich App at 301 (“A pause between the initial homicidal intent and the ultimate act may, in the appropriate circumstances, be sufficient for premeditation and deliberation.”). After the shooting, defendant stole a car belonging to Bomer’s mother and fled the scene. He later went to Indiana where he stayed until he was apprehended more than two months later.

Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecutor proved beyond a reasonable doubt that defendant had sufficient time to take a “second look” before killing the victim. *Kelly*, 231 Mich App at 642. Defendant’s conviction for first-degree premeditated murder is thus supported by sufficient evidence. See *Cline*, 276 Mich App at 642.

V. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that the jury’s verdict of first-degree premeditated murder is against the great weight of the evidence. We review a trial court’s decision on a motion for a new trial based on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). A trial court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes. *Id.*

A verdict is against the great weight of the evidence when “the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *Id.* A verdict may be vacated only when it is not reasonably supported by the evidence and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *Id.*

In this case, defendant concedes that he killed the victim and there was strong evidence for a rational trier of fact to find beyond a reasonable doubt that defendant’s killing of the victim was premeditated and deliberate. Thus, the evidence reasonably supports the jury’s verdict of first-degree premeditated murder and, accordingly, the jury’s verdict should not be vacated. *Id.* The trial court did not abuse its discretion in denying defendant’s motion for a new trial.

Affirmed.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Joel P. Hoekstra