

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ANTHONY GOODWIN,

Defendant-Appellant.

UNPUBLISHED

August 19, 2003

No. 231211

Oakland Circuit Court

LC No. 99-169379-FC

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant and a codefendant, Qwan Green, were tried before separate juries in connection with the fatal shooting of Alvin Powell that occurred while Powell and William Wilkerson were talking in a parking lot outside of an apartment building. Defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, carrying a concealed weapon (“CCW”), MCL 750.227, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction, 17-1/2 to 40 years’ imprisonment for the assault with intent to commit murder conviction, and three to five years’ imprisonment for the CCW conviction, to be served consecutively to concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

We first address defendant’s argument that the procedure used by the trial court to select replacement jurors deprived him of a fair trial. We review defendant’s claim de novo in light of the record developed in the trial court. *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998). Unlike the procedure used in *People v Green (On Remand)*, 241 Mich App 40; 613 NW2d 744 (2000), the procedure here did not involve disclosure to the attorneys of a list of pre-selected, randomly-drawn replacement jurors. Hence, there was no risk that the attorneys could manipulate the selection process through the exercise of peremptory challenges. The fact that the trial court had access to the list did not deprive defendant of a fair and impartial method of jury selection. MCR 2.511(A)(4). Due process requires an unbiased and impartial decisionmaker. *Cain v Dep’t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). A trial court is presumed to be fair and impartial. *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810-811; 286 NW2d 34 (1979). A party challenging the trial court for bias must overcome a heavy presumption of impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). There being no claim by defendant that the trial court was biased or partial, it follows

that defendant has not demonstrated that he was deprived of a fair and impartial method of jury selection. *Schmitz, supra*.

We next consider the two evidentiary issues raised by defendant. We review the trial court's ruling to allow the prosecutor to introduce evidence that defendant tried to hire a hit man to kill three witnesses for an abuse of discretion, but review questions of law bearing on the court's decision de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Although we are not fully in accord with the trial court's reasoning, we conclude that the court reached the correct result in allowing the evidence.

We disagree with the trial court's conclusion that the evidence was relevant to show defendant's intent and the absence of a mistake. Although intent and absence of mistake are permissible uses of other-acts evidence, the prosecutor failed to show a sufficient nexus between defendant's subsequent act of attempting to have three witnesses, including Wilkerson, killed and the earlier shooting incident underlying the charged offenses. MRE 401; MRE 404(b); *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000); *People v Crawford*, 458 Mich 376, 391, 393; 582 NW2d 785 (1998).

We reject the prosecutor's theory that evidence of defendant's subsequent attempt to hire a hit man was relevant as part of the res gestae of the charged offenses. Defendant's statement about a \$75,000 debt was admissible as evidence of motive with regard to defendant's involvement in the shooting. Although not an essential element, motive is generally relevant to show the requisite intent for murder. *People v Herndon*, 246 Mich App 371, 413; 633 NW2d 376 (2001). Further, the rule of completeness may support admission of the proffered evidence to provide context concerning defendant's statement about the \$75,000. See *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990) (under the rule of completeness, evidence may be admitted based on the premise that "a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed"). However, evidence that defendant tried to hire a hit man was not so blended or connected with the charged offenses that it could be said that the proffered evidence incidentally involved or explained the circumstances of the charged offenses. Thus, the proffered evidence was not admissible as part of the res gestae. *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983).

Nevertheless, as we have already indicated, the prosecutor made a sufficient showing that the proffered evidence was relevant to motive. Further, the trial court correctly found that evidence that defendant tried to hire a hit man was admissible to show consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). MRE 404(b) was not implicated because the evidence was relevant and did not involve an intermediate inference of character. See generally *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); cf. *United States v Mendez-Ordiz*, 810 F2d 76, 79 (CA 6, 1986) (because spoliation evidence tends to establish consciousness of guilt without any inference of the spoliator's character, its admission does not violate FRE 404[b]). The relevance of this type of evidence lies in the fact that it indicates a person's consciousness or belief that one's cause is weak or unfounded. *Id.* at 79. As explained in 2 Wigmore, Evidence (Chadbourn rev), § 278, p 133:

It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's *falsehood* or *other fraud* in the

preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth or merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause. [Emphasis in original.]

Because the probative value of the evidence that defendant tried to hire a hit man was strong, particularly with regard to the consciousness-of-guilt theory of relevance proffered by the prosecutor, we uphold the trial court's decision to admit it. We disagree with defendant that the trial court should have excluded the evidence under MRE 403. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *Sabin (After Remand)*, *supra* at 71; *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). It was for the jury to determine the significance of defendant's conduct in conjunction with the other trial testimony. *Sholl*, *supra* at 740.

We also reject defendant's claim that the trial court abused its discretion by allowing evidence of a .38 caliber hollow point bullet. *Lukity*, *supra* at 488; *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). Given the demonstrative purpose of the evidence proffered by the prosecutor, we agree that the .38 caliber bullet was relevant as an aid to illustrate the firearm examiner's testimony concerning his testing of the .45 caliber hollow point bullet that struck the victim. It was not necessary that the prosecutor use the same caliber bullet as demonstrative evidence. *Lopez v General Motors Corp*, 224 Mich App 618, 628, n 13; 569 NW2d 861 (1997). Furthermore, even if the trial court's ruling amounted to an abuse of discretion, we would not reverse. We find no basis for defendant's claim that the trial court's ruling, if erroneous, represents constitutional error. Not all trial errors effectively present constitutional violations. *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). The alleged error here regarding the trial court's evidentiary ruling is properly classified as a preserved, nonconstitutional error. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). Considering the other trial evidence about the .45 hollow point bullets that were recovered during the police investigation, and which were admitted as evidence, any error regarding the .38 caliber bullet was harmless because it is not more probable than not that the trial court's evidentiary ruling was outcome-determinative. *Lukity*, *supra* at 495-496.

Defendant's additional claim that the .38 caliber hollow point bullet should have been excluded under MRE 403, even if relevant, was not preserved for appeal because defendant did not object on this ground at trial. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). We further conclude that defendant has forfeited his unpreserved claim concerning the prosecutor's use of the .38 caliber hollow point bullet when questioning the firearms expert about the .38 caliber shell casings. Given defendant's failure to show plain error affecting his substantial rights, defendant's newly raised claims of evidentiary error afford no basis for relief. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Next, defendant argues that the evidence was insufficient to support his convictions of assault with intent to commit murder and first-degree premeditated murder. We review de novo the trial court's denial of defendant's motion for a directed verdict. *People v Sexton*, 250 Mich

App 211, 222; 646 NW2d 875 (2002). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The prosecutor need not negate every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Rather, the prosecutor need only prove the elements of the crime beyond a reasonable doubt in the face of whatever contradictory evidence a defendant may provide. *Id.* at 400.

Viewed most favorably to the prosecutor, the evidence was sufficient to establish defendant’s culpability for both convictions as an aider and abettor to codefendant Green. *Carines, supra* at 770; *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001); see also *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). A rational trier of fact could find that Green, upon exiting the vehicle and firing a single gunshot from his .45 caliber gun, had the requisite intent to kill Wilkerson, with whom Green had an ongoing feud, but missed his intended target. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Defendant’s culpability as an aider and abettor could be inferred from his concerted actions of exiting the vehicle along with Green, pulling a .38 caliber gun out from under his shirt, firing at least three shots, and then returning to the vehicle and departing with Green and Keyon Jackson. Evidence regarding defendant’s flight, his lies to the police after he was arrested, and his attempt to hire a hit man could properly be considered as circumstantial evidence of defendant’s consciousness of guilt. *Sholl, supra*; *People v Cutchall*, 200 Mich App 396; 504 NW2d 666 (1993), overruled on other grounds by *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). Although no single item of evidence established that defendant had the requisite intent, the circumstantial evidence, cumulatively considered, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was guilty under an aiding and abettor theory of assault with intent to commit murder.

Because the first-degree premeditated murder charge was based on a theory of transferred intent and also required an intent to kill, the evidence was also sufficient to establish the requisite intent for first-degree murder. *People v Langworthy*, 416 Mich 630, 650; 331 NW2d 171 (1982); *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988). Further, the circumstantial evidence was sufficient to establish the elements of premeditation and deliberation. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001); *People v Plummer*, 229 Mich App 293, 300-301; 581 NW2d 753 (1998). Viewed most favorably to the prosecutor, the evidence established a shooting by defendant and Green, under circumstances sufficient to allow the jury to infer that defendant and Green acted in concert to kill Wilkerson by ambush, but shot Powell instead, causing his death.

Because the evidence was sufficient to sustain defendant’s convictions of first-degree murder and assault with intent to commit murder, we reject defendant’s claim that his felony-firearm convictions predicated on these offenses must be vacated.

Finally, we reject defendant’s claim that a new trial is required because of misconduct by the prosecutor. The test for prosecutorial misconduct is

whether the defendant was denied a fair and impartial trial. Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. [*People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999). Citations omitted.]

Limiting our review to the three specific instances of misconduct briefed by defendant on appeal, we find no basis for reversal.

First, we agree that defense counsel's objection to the prosecutor's "manufacturing evidence" remark was sufficient to preserve defendant's claim on appeal that the remark improperly denigrated defense counsel. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Upon de novo review, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), we further conclude that the remark was improper because it suggested that defense counsel tried to distract the jury from the truth. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); see also *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984).

However, examined in context, it is apparent that the prosecutor was not attacking defense counsel's veracity, but rather used an inappropriate choice of words to explain a proper evidentiary objection in the presence of the jury. We note that the matter could have been avoided by a hearing outside the presence of the jury. MRE 103(c). Further, defense counsel could have pursued his objection after the lunch break by renewing his request to have the prosecutor's remark stricken or by requesting an appropriate cautionary instruction. The purpose of a defense objection to improper remarks is a curative instruction. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). Absent such action, however, we conclude that any prejudice was sufficiently cured by the trial court's instruction to the jury that

[a]t times during the trial, I've excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. *Make your decision only on the evidence that I let in and nothing else.* [Emphasis added.]

The prosecutor's remark, while improper, was not so inflammatory that it deprived defendant of a fair trial. In the haste and heat of a trial, it is not humanly possible to obtain absolute perfection. *People v Lawton*, 196 Mich App 341, 354; 492 NW2d 810 (1992), citing *People v DeLano*, 318 Mich 557, 569; 28NW2d 909 (1947).

Second, we find that the defense objection at trial to the prosecutor's remark, "No, I think you do it before you try to poison the jury and maybe create reversible error," lacked sufficient specificity to preserve defendant's claim of prosecutorial misconduct with regard to this issue. *Rice, supra* at 435; *Nantelle, supra* at 86-87. Hence, we review this issue for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). While the prosecutor's remark reflects a poor choice of words, it was made by the prosecutor in the context of a proper evidentiary objection, which was affirmed by the trial court. Considered in this context, the remark did not amount to plain error affecting defendant's substantial rights.

Third, we find that defense counsel's objection to the prosecutor's redirect examination of Pontiac Detective Sarterno Serna was sufficient to preserve defendant's final claim of misconduct. Although a prosecutor should refrain from injecting unfounded prejudicial innuendo into a trial, *People v Williams*, 114 Mich App 186, 198; 318 NW2d 671 (1982), otherwise improper prosecutorial remarks generally do not require reversal if the remarks are responsive to issues raised by defense counsel. *Schutte, supra* at 721. A defense counsel's questioning of a witness may elicit testimony that opens the door for the prosecutor to pursue questioning on the matter. See generally *Lukity, supra* at 498; *People v Gibson*, 71 Mich App 543, 547; 248 NW2d 613 (1976).

Examined in context, the prosecutor's questions about whether defendant was taking care of business were not totally unfounded, given the evidence regarding defendant's statement about a \$75,000 debt. We note that the prosecutor did not pursue an answer to an earlier question about whether Detective Serna knew whether defendant was a hit man. In any event, it is clear from the record that the prosecutor neither anticipated nor elicited any positive answers from Detective Serna. The prosecutor's brief questioning does not require reversal, given that it was responsive to defense counsel's own irrelevant cross-examination regarding Detective Serna's familiarity with individuals who commit crimes in Pontiac and lack of familiarity with defendant. Any prejudice was cured by the trial court's instruction to the jury that the lawyers' questions were not evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Whether examined singularly or cumulatively, we hold that defendant has not established any actual errors that deprived him of a fair trial. *Id.* at 292, n 64.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper