STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BETTY JEAN DENNIS,

Defendant-Appellant.

UNPUBLISHED
June 8, 1999

No. 184623
Recorder's Court
LC No. 94-008310

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions of conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1), assault with intent to commit murder, MCL 750.83; MSA 28.278, and solicitation of first-degree murder, MCL 750.157b; 28.354(2). Defendant was sentenced to serve concurrent terms of life imprisonment for the conspiracy conviction, and twenty to fifty years' imprisonment each for the assault with intent to commit murder and solicitation to commit murder convictions. We affirm.

The prosecution alleged that defendant and her daughter, Debra Starr,[1] solicited Randy Rasnick[2] to kill defendant's then sixty-five year old husband. Rasnick was to be paid $3,000 for the murder. On January 29, 1994, the victim, who was confined to a wheel chair and resided at a Veteran's Administration hospital, was stabbed by Rasnick eighteen times in the chest with an awl. Defendant's husband survived the attack. The purported motive for the attack was twofold: (1) that the victim could allegedly link Starr and defendant to a 1984 murder, and (2) also to conceal defendant's alleged bigamy.

I

Defendant first claims that her convictions are null and void because the Recorder's Court Judge who presided over the case was without jurisdiction to do so under Local Court Rule 6.102(E).[3] We disagree. We initially note that, contrary to defendant's claim, this type of jurisdictional claim may be waived. Although defects in subject-matter jurisdiction, which involve the court's power over a class of cases, may never be waived and may be raised at any time, defects in personal jurisdiction, which

involve a court's jurisdiction over a particular defendant, may be waived. See *People v Richards*, 205 Mich App 438, 444; 517 NW2d 823 (1994).

It appears that defendant did file the proper request under LCR 6.102(E). However, the trial court apparently did not see the request until the issue was raised in defendant's motion for new trial. As the trial court noted, no other action was taken by defendant in pursuance of this issue until after trial. Instead, defendant continued through a full trial, jury deliberations, jury verdict, and sentencing without ever objecting to the fact that a Recorder's Court judge was presiding over the case. Under these facts, defendant cannot now be allowed to complain where she acquiesced to the proceedings and did not otherwise object to having the matter conducted by a Recorder's Court judge, contrary to her earlier request. ""To hold otherwise would allow defendant to harbor error as an appellate parachute.'" *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995), quoting *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

II

Defendant next claims that the trial court abused its discretion in allowing the prosecutor to amend the information before jury selection with regard to the time frame of the conspiracy. We disagree. A trial court "may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76; MSA 28.1016. Accord MCR 6.112(G).[4] When a request for such an amendment is made, the court should consider whether the requested amendment would cause "unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). Accord MCR 6.112(G).

We initially note that a change in the time frame of the conspiracy charge did not create a new crime. The crime of conspiracy is a continuing offense that "'is presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the object of the conspiracy.'" *People v Denio*, 454 Mich 691, 710; 564 NW2d 13 (1997), quoting *United States v Castro*, 972 F2d 1107, 1112 (CA 9, 1992). Additionally, we are not persuaded that defendant was prejudiced by the amendment, because the record shows that she was aware of the allegations of her alleged prior involvement in a conspiracy before January 1994, and was aware of the bigamy charge. Finally, throughout the preliminary examination and trial, defendant's sole defense was that she was never involved in the attempt on her husband's life. Thus, defendant's defense was unaffected by the change in the time frame of the conspiracy. Therefore, because no prejudice has been demonstrated, we conclude that the trial court did not abuse its discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

III

Defendant next argues that the trial court abused its discretion in admitting the hearsay statements of coconspirator Starr. Again, we disagree. "[W]e review a trial court's decision to admit evidence for an abuse of discretion." *Id.*

MRE 801(d)(2)(E) provides in pertinent part that a statement is not hearsay if it "is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." After reviewing the evidence, we are convinced that such independent proof was offered at trial. For example, Michael Silagi testified that sometime in January 1994, defendant and her daughter offered him $5,000 to kill defendant's husband. Further, Rasnick testified at length about how the two women discussed with Rasnick his failed attempt to kill defendant's husband on January 28, 1994, when Rasnick had been unable to find the victim's room at the VA hospital. Rasnick testified that on the day of the attack, the two women accompanied him to the hospital. Defendant then accompanied Rasnick into the building and showed Rasnick where her husband's room was located. Accordingly, the trial court did not abuse its discretion in admitting the coconspirator statements into evidence.

IV

Defendant next argues that there was insufficient evidence to support defendant's convictions. We disagree. "When reviewing a challenge to the sufficiency of the evidence, appellate courts examine the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). Accord *People v Wolfe*, 440 Mich 508, 516; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1992).

Much of defendant's argument is predicated on the assumption that Starr's testimony was improperly admitted. As we have just indicated, such an assumption is erroneous. See discussion *supra* part III. In any event, having reviewed the evidence at length we are convinced that there was sufficient evidence to support each of defendant's convictions. See *People v Blume*, 443 Mich 476, 481-483; 505 NW2d 843 (1993) (conspiracy); *Barclay*, *supra* at 674 (assault with intent to murder); *People v Vandelinder*, 192 Mich App 447, 450; 481 NW2d 787 (1992) (solicitation to commit murder).

V

Defendant next raises twelve claims of prosecutorial misconduct. However, she objected to only eight of the twelve claims at trial. Therefore, the remaining four claims were not preserved for appellate review and thus, relief is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). In each of these four instances, we conclude that under the attendant circumstances, the prosecutor's conduct was not improper.

With regard to the eight preserved claims, "this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *McElhaney*, *supra* at 283 (citations omitted). We have reviewed the alleged instances of prosecutorial misconduct and conclude that defendant was not denied a fair and impartial trial. Most of the alleged instances of misconduct involved proper argument.

The few remarks that can be characterized as improper involved either insignificant subject matters or were cured by the trial court's instructions. Viewed as a whole, the prosecutor's remarks did not deprive defendant of a fair trial. *McElhaney*, *supra* at 285.

VI

Next, defendant argues that the trial court erred when it failed to *sua sponte* give a cautionary instruction after the prosecution elicited testimony from Rasnick that he was testifying pursuant to a plea agreement. Because defendant failed to request such an instruction, appellate review is foreclosed absent manifest injustice. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). "Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case." *Id*.

In *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995), our Supreme Court held that reference to a plea agreement containing a promise of truthfulness is in itself not grounds for reversal. *Id.* at 276. Defendant acknowledges the existence of the rule set forth in *Bahoda*, but maintains that he was deprived of a fair trial because the trial court failed to *sua sponte* give the jury a cautionary instruction about the testimony. We disagree. After reviewing the questions and answers in context, we do not believe that they conveyed to the jury the message that the prosecutor had some special knowledge concerning the witness's truthfulness. In addition, we note that the trial court specifically instructed the jury that they are the sole judges of credibility, that the arguments of attorneys are not evidence, and that accomplice testimony should be carefully considered before being accepted.

VII

Defendant also argues that she was denied a fair trial because the prosecution never filed a notice of intent under MRE 404(b)(2) to introduce evidence of her prior conviction of larceny by false pretenses,[5] her inadequate care of the victim, or her alleged financial motivation to kill. Defendant failed to timely object to the admission of this evidence on this ground at trial. "Therefore, this issue is reviewed only to the extent that a substantial right of defendant's was affected." *Barclay*, *supra* at 673. See also MRE 103(a)(1).

With regard to defendant's care of the victim, we note that there was no testimony that complainant's care was inadequate. Rather, the social worker agreed that complainant was "getting an acceptable standard of care," but that she thought that "it could be improved." As for defendant having a financial motivation to kill, while we agree that the prosecution should not have tried to introduce the evidence in question, we find this error to be harmless in light of the brevity of testimony on the matter and the overwhelming weight of the properly admitted evidence. *People v Gearns*, 457 Mich 170, 206-207; 577 NW2d 422 (1998) (Brickley, J.).

With regard to defendant's prior false pretenses conviction, the record indicates that the trial court admitted this evidence under MRE 609, and defendant does not challenge that ruling on appeal. Rather, defendant alleges that the prosecution's extended questioning about the conviction went beyond what is allowable for impeachment purposes. We note, however, that the length of the examination

regarding the conviction was determined entirely by the evasiveness of defendant's answers to the prosecutor's questions. Furthermore, the trial court gave CJI2d 4.11, which provides that the jury should not use evidence of defendant's prior conviction for an improper purpose.[6] Accordingly, grounds for reversal have not been shown.

VIII

Defendant also claims that she was denied her right to effective assistance of counsel.

> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. [*People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).]

Having carefully considered defendant's claims, we conclude that defendant has failed to establish that counsel's performance fell below an objective standard of reasonableness in any of the instances cited.

IX

Defendant's final claim is that the cumulative effect of the errors denied her a fair trial. While it is possible that the cumulative effect of a number of errors may constitute error warranting reversal, *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984), because "[n]o cognizable errors have been identified that deprived defendant of a fair trial . . . , reversal under this theory is unwarranted." *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] In a separate proceeding, Starr pleaded guilty to three counts of solicitation to commit murder, MCL 750.157b; MSA 28.354(2) and MCL 750.316; MSA 28.548. She was sentenced to concurrent terms of fifteen to thirty years' imprisonment. This Court rejected Starr's challenge to the proportionality of her sentence. *People v Starr*, unpublished memorandum opinion of the Court of Appeals, issued September 27, 1996 (Docket No. 186290).

[2] In a separate proceeding, Rasnick pleaded guilty to assault with intent to commit murder. He was sentenced to fifteen to twenty-five years' imprisonment. This Court rejected Rasnick's challenge to the

proportionality of his sentence. *People v Rasnick*, unpublished memorandum opinion of the Court of Appeals, issued August 25, 1995 (Docket No. 175880).

[3] LCR 6.102(E), which was vacated on October 10, 1995, provided:

> The prosecutor or the defendant may request that, after arraignment on the information, only judges elected or appointed to that case's court of origin shall be eligible for the blind draw assignment of that case. The request must be filed in writing within seven calendar days after the magistrate signs the return. A timely written request must be granted. The request shall also control the assignment of any codefendants' cases.

[4] MCR 6.112(G) reads in pertinent part: "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant."

[5] MCL 750.218; MSA 28.415.

[6] We note that defendant claims on appeal that the instruction was insufficient because it did not list the specific acts of misconduct. However, defense counsel requested that the court only use the term "crime." Defendant may not assign error on appeal to something her counsel deemed proper at trial. *Barclay, supra* at 673.