

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CEDRICK JAMES SAMS,

Defendant-Appellee.

UNPUBLISHED

February 22, 2000

No. 208903

Ingham Circuit Court

LC No. 96-071031 FC

Before: McDonald, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and conspiracy to commit first-degree premeditated murder, MCL 750.157a; MSA 28.354(1); MCL 750.316(1)(a); MSA 28.548(1)(a). He was sentenced to life in prison without the possibility of parole for the first-degree premeditated murder conviction and to 40 to 80 years in prison for the conspiracy conviction. Defendant appeals as of right. We affirm.

The instant case arose out of the shooting death of 15-year-old Kenyata Duke in July, 1995, at his home in Lansing. The prosecutor's theory was that the bullets that killed Kenyata Duke were meant for his father, Kenny Duke. According to the prosecutor, the motive for the murder was that, approximately three or four weeks before the shooting, defendant purchased heroin from Kenny Duke that turned out to be unsatisfactory, and Kenny Duke refused to refund the money defendant paid for the heroin. The prosecutor argued that, while defendant was not the shooter and was not present at the scene of the shooting, he aided and abetted the murder.

Defendant first argues that the trial court erred in excluding the testimony of Marilyn Griffin, Gloria Gibson, and Ethel Mitchell on the basis of the rule prohibiting the use of extrinsic evidence to impeach a witness on a collateral matter. Defendant further argues that the exclusion of the evidence violated his right to present a defense. We disagree. A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Whether the trial court's decision violated defendant's right to present a defense is a question of constitutional law, which we review de novo. *People v Echavarria*, 233 Mich App 356, 358; 592 NW2d 737 (1999).

Defendant argues that the trial court abused its discretion in excluding the testimony of Byron Moore's sister, Marilyn Griffin, and Gloria Gibson, a Century Cellunet employee, to rebut Moore's testimony that Griffin called him while he and defendant were on their way to Kenny Duke's house to kill Duke on the day they received the bad heroin from him. Defendant further argues that the trial court erred in excluding the testimony of Ethel Mitchell, Judy Booker's mother, to rebut Booker's testimony that she stopped by her mother's house shortly after the shooting.

Extrinsic evidence may not be used to impeach a witness on a collateral matter. *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981). A matter is collateral if it is neither "relevant to the substantive issues in the case" nor "independently provable by extrinsic evidence, apart from the contradiction, to impeach, or disqualify the witness." *Id.*, quoting McCormick on Evidence (2d ed), § 47, p 99; § 36, pp 70-71.

Here, the trial court correctly determined that Griffin's proffered testimony that she did not call Moore on the night in question involved a collateral matter. The testimony was offered to impeach Moore by showing that, if the conversation did not take place, then the remainder of Moore's testimony regarding his and defendant's plan to kill Duke may also be false. However, whether Griffin called Moore to tell him about a dream she had was not relevant to any fact that was of consequence to defendant's guilt or innocence. Because the only purpose of the testimony was to impeach Moore's general credibility, and the issue on which Moore would have been impeached was a collateral matter, the trial court properly excluded Griffin's testimony.

Similarly, the trial court did not abuse its discretion in excluding Gloria Gibson's testimony. Moore testified at defendant's first trial that he was in possession of defendant's cellular telephone on the day after the shooting, and that he received calls on that telephone from defendant and defendant's mother. Moore also testified that he used cloned cellular telephones. According to Moore, during the call from defendant, defendant stated that the wrong person had been shot. Gibson's testimony was offered to show that, contrary to Moore's testimony, Moore could not have received the calls on defendant's cellular telephone because defendant's cellular telephone had been turned off for nonpayment approximately two to three days before the shooting. Defendant also indicated that Gibson would have testified that Century Cellunet would have been notified if defendant's cellular telephone had been connected to another carrier, and that cloned telephones cannot receive calls.

However, testimony that Moore could not have received calls on defendant's cellular telephone the day after the shooting was not relevant to defendant's guilt or innocence of the charges, but only would impeach Moore's credibility by contradicting his testimony. Furthermore, whether Moore received the alleged calls on defendant's telephone was not "independently provable by extrinsic evidence, apart from the contradiction" where, in light of evidence of the availability of cloned telephones and the fact that cellular telephones are, in the words of the trial court, "virtually indistinguishable," it could not be clearly shown that Moore was using defendant's telephone. *Teague, supra*. We therefore conclude that the trial court did not abuse its discretion in excluding Gibson's testimony.

The proffered testimony of Ethel Mitchell was also properly excluded. Judy Booker testified that shortly before midnight on the day of the shooting, she heard defendant state “F--- this sh--, let’s go take care of this,” and that she then observed defendant, Moore, Ellis, and Butler get into defendant’s van and drive off. Booker further testified that she learned of Kenyata Duke’s death early the next morning when she stopped by her mother’s house shortly after midnight. Defendant sought to admit Mitchell’s testimony that Booker did not stop by her house early that morning to show that Booker was mistaken regarding the day she stopped by her mother’s house and, therefore, she also must have been mistaken when she testified that she saw defendant and the other men drive off in the van on the day of the shooting.

It is clear that Mitchell’s testimony related to a collateral matter. Whether Booker was at her mother’s house on the night in question does not relate to a substantive issue in the case and is not independently provable by extrinsic evidence apart from the contradiction. *Teague, supra*. Therefore, Mitchell’s testimony was properly excluded.

Furthermore, the exclusion of the proffered testimony did not violate defendant’s right to present a defense. A criminal defendant has a state and federal constitutional right to present a defense. US Const, Ams VI, XIV; Const 1963, art1, § § 13, 17, 20; *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). The right to present a defense is a fundamental element of due process, but is not an absolute right. *Hayes, supra* at 279. The defendant still must comply with “‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *Id*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Here, because the challenged testimony was properly excluded pursuant to an established evidentiary rule, *Teague, supra*, defendant’s right to present a defense was not violated.

Defendant next argues that insufficient evidence was presented at trial to support his first-degree murder conviction. We disagree. When reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a 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, amended 441 Mich 1201 (1992).

To prove first-degree premeditated murder, the prosecution must show that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* at 370-371. Circumstantial evidence and the reasonable inferences drawn from the evidence may constitute satisfactory proof of the elements of the crime. *Id.* at 371. Here, the prosecutor argued that defendant was guilty of first-degree murder as an aider and abettor. A conviction of aiding and abetting requires proof of the following elements: 1) the underlying crime was committed by the defendant or some other person, 2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and 3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999). An aider and abettor’s state of mind may be inferred from the facts and circumstances, such as a close association between the defendant and the principal and the defendant’s participation in the

planning or execution of the crime. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995).

First, the evidence was sufficient to establish that the underlying crime of first-degree premeditated murder was committed by Ellis. Moore's testimony indicated that, the day before the shooting, defendant had a discussion with Ellis regarding Kenny Duke's failure to refund the heroin money, during which defendant told Ellis that the situation "had to be squashed," which meant that Kenny Duke had to be killed. The next day, Kenya Duke was killed by multiple gunshot wounds after two men came to his door, asked for Ken Duke, and then fired multiple shots when Kenya came to the door. Moore further testified that, on the night of the shooting, Ellis and Butler arrived at an apartment Moore was visiting and Ellis stated, "I got the motherf-----, I got him." The fact that Ellis may have intended to kill Kenny Duke, rather than the actual victim, Kenya Duke, is of no consequence. The doctrine of transferred intent provides that where a defendant intends to kill one person, but by mistake kills an unintended victim, the intent to kill the intended victim is transferred to the unintended victim. *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988).

Second, sufficient evidence was presented to show that defendant performed acts or gave encouragement that aided and abetted the commission of first-degree murder. According to Moore's testimony, the day before the shooting, defendant told Ellis, who was in town to help defendant and Moore collect drug debts, that Kenny Duke had to be killed. Furthermore, there was evidence that the weapon used in the shooting was a .38, and Moore testified that, the day after the shooting, a .38 was missing from the arsenal he and defendant kept in one of the apartments. There was also evidence that the white Dodge Shadow belonging to defendant was used by the shooters to leave the scene of the shooting. The evidence that defendant told Ellis that Kenny Duke had to be killed, and that the car and gun used in the shooting belonged to defendant was sufficient to justify a finding that defendant performed acts or gave encouragement that assisted in the shooting.

Finally, the evidence presented at trial demonstrated that defendant intended the commission of the crime or had knowledge that Ellis intended its commission at the time he gave aid or encouragement. The evidence indicated that defendant had a motive to have Kenny Duke killed, as Moore testified that Duke refused to refund money that defendant paid for heroin defendant determined to be unsatisfactory. In addition, Moore testified that the day before the shooting, defendant told Ellis that Duke had to be killed and Ellis responded that he would "take care of" the situation. Other evidence indicated that defendant's car and gun were used in the shooting. Moore further testified that, after the shooting, defendant remarked that the wrong person had been killed.

When viewed in the light most favorable to the prosecution, the foregoing evidence was sufficient to support a finding that defendant was guilty beyond a reasonable doubt of aiding and abetting the first-degree murder of Kenya Duke. Although defendant argues that Moore's testimony was not credible, credibility issues are for the trier of fact, and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant next argues that the evidence presented at trial was insufficient to support his conviction of conspiracy to commit first-degree murder. We disagree.

“A conspiracy is an agreement, express or implied, between two or more persons to commit an unlawful or criminal act.” *People v Weathersby*, 204 Mich App 98, 111; 514 NW2d 493 (1994). “In general, each coconspirator is held criminally responsible for the acts of his associates committed in furtherance of the common design, and, in the eyes of the law, the acts of one or more are the acts of all the conspirators.” *People v Grant*, 455 Mich 221, 236; 565 NW2d 389 (1997). The elements of a conspiracy are satisfied immediately upon entry by the parties into a mutual agreement, and no overt acts need be established. *People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988). Establishing a conspiracy requires evidence of a specific intent to combine with others to accomplish an illegal objective. *People v Turner*, 213 Mich App 558, 570; 540 NW2d 728 (1995). Furthermore,

To prove the intent to combine with others for an unlawful purpose, it must be shown that the intent, including knowledge, was possessed by more than one person. A defendant may become a member of an existing conspiracy if he cooperates knowingly to further the object of the conspiracy, although mere knowledge that someone proposes unlawful action is alone not enough. For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective. [*Id.* (citations omitted).]

Much of the same evidence that supported defendant's conviction for aiding and abetting first-degree murder also supports his conspiracy conviction. Defendant's intent to combine with others to commit first-degree murder was shown by the evidence that, the day before the shooting, defendant told Ellis that Duke had to be killed and that Ellis responded that he would take care of the situation. Moreover, evidence that defendant's car and one of defendant's guns were used in the shooting was sufficient to demonstrate that defendant knowingly cooperated with Ellis to accomplish the killing.

We therefore conclude that the evidence presented at trial was sufficient to support defendant's convictions for first-degree murder and conspiracy to commit first-degree murder.

Affirmed.

/s/ Gary R. McDonald
/s/ Martin M. Doctoroff
/s/ Janet T. Neff