

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY MYLES,

Defendant-Appellant.

UNPUBLISHED

September 19, 2000

No. 208773

Recorder's Court

LC No. 96-008888

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1) and MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life imprisonment for the conspiracy conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first claims that the trial court erred in refusing to grant his motion for a directed verdict on the charge of conspiracy. We disagree. In reviewing the denial of a motion for directed verdict, this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the prosecutor proved the elements of the offense beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

A conspiracy is a mutual agreement between two or more individuals to commit a criminal act or to accomplish a legal act through criminal means. *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991). The essence of a conspiracy is the agreement itself, and the acts of the parties are sufficient to establish the agreement. *Id.* at 392-393. The crime is complete when the agreement is made. *Id.* at 393. To prove conspiracy to commit murder, the prosecutor must demonstrate that each conspirator had the requisite intent to commit murder. *Id.*

In this case, the prosecutor presented the testimony of Maronda Bell and Mitchell LaGron, as well as statements that defendant and Nataurus McIntosh gave to the police. This evidence established

that defendant was present at a meeting on Rosedale Street where an alleged co-conspirator made comments indicating that the shooting would take place that night, that defendant was armed with a gun, and that defendant was present when the shooting occurred later that night. Viewed in a light most favorable to the prosecution, this evidence was sufficient to enable a rational trier of fact to infer the existence of an agreement based on defendant's conduct. *Cotton, supra* at 393. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict. Defendant's reliance on the so-called "*Davenport* rule"¹ is misplaced, inasmuch as this Court has since rejected that rule, holding instead that the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); *People v Nash*, 110 Mich App 428, 451; 313 NW2d 307 (1981). Defendant's reliance on *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), is likewise misplaced because it has also been expressly overruled. See *People v Graves*, 458 Mich 476, 488; 581 NW2d 229 (1998).

Defendant next argues that reversal is required because the trial court made certain prejudicial comments. We disagree. A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *People v Moore*, 161 Mich App 615, 616-617; 411 NW2d 797 (1987). A court may question witnesses in order to clarify testimony or elicit additional relevant information, but must avoid any invasion of the prosecutor's role and exercise caution so that its questions will not be intimidating, argumentative, prejudicial, unfair or partial. *Id.* The test is whether the judge's questions and comments may well have unjustifiably aroused suspicion in the mind of the jury regarding a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of defendant's case. *Id.* at 617.

We find no merit in defendant's claim that the court responded inappropriately when counsel for a codefendant complained that a witness was being evasive. The record reveals that the witness attempted to answer the defense counsel's question regarding how the group had run. Apart from repeatedly explaining that the group ran in a bunch, the witness indicated that everyone ran in unison, crowded together, and that he could not tell who ran first, second or third. The trial court concluded that the witness was not being evasive and was doing the best he could to recall the events in question. Viewed in context, the court's response did not pierce the veil of judicial impartiality, and reversal is not required. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). Further, the court's questioning of a police homicide investigator was intended to elicit additional relevant information and was therefore not improper. Finally, while the court's questioning of the victim's sister regarding whether the death of her brother had affected her grades in school was unnecessary, in our view it was not calculated to unjustifiably arouse suspicion in the mind of the jury regarding the witness' credibility or to influence the jury to the detriment of defendant's case.

Next, defendant argues that several evidentiary rulings denied him a fair trial. The decision whether to admit evidence is within the discretion of the trial court. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). We will find an abuse of discretion only when an unprejudiced person,

¹ *People v Davenport*, 39 Mich App 252, 256; 197 NW2d 521 (1972).

considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

Defendant argues that evidence of other bad acts was improper under MRE 404(b)(2), because the prosecutor failed to give advance notice of his intent to introduce such evidence. We disagree. Here, the challenged evidence was so inextricably blended with the conspiracy charge that it was admissible without regard to MRE 404(b) to explain the complete circumstances of the crime. *People v Cash*, 419 Mich 230, 249; 351 NW2d 822 (1984); *People v Delgado*, 404 Mich 76, 83-84; 273 NW2d 395 (1978). Moreover, MRE 404(b) was inapplicable to the evidence of the Harmon Street shooting, inasmuch as that incident did not involve another bad act. Rather, the prosecution's theory was that the Harmon Street shooting was part of the conspiracy that defendant was charged with. Therefore, we reject defendant's claim that evidence of these other shootings was improper.

We also reject defendant's claim that reversal is required because a police officer referred to a location where defendant allegedly fled as a "vacant crack house." Defendant did not preserve this issue with an appropriate objection at trial. Therefore, appellate relief is precluded unless an instruction to the jury could not have cured the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Defendant contends that the reference to a "crack house" was unduly prejudicial because it concerned the subject of narcotics, an inherently inflammatory subject. However, the jury was already aware from other properly admitted evidence that the case revolved around drug trafficking. In this context, the officer's use of the term "crack house" did not cause defendant to suffer a miscarriage of justice.

Defendant also argues that his police statement was inadmissible under MRE 801(d)(2)(E). However, the statement was independently admissible as defendant's own statement under MRE 801(d)(2)(A), without regard to MRE 801(d)(2)(E). Therefore, this issue is without merit.

Defendant next argues that reversal is required because of instructional error. We disagree. "In reviewing issues related to jury instructions, this Court reviews the instructions in their entirety to determine if error requiring reversal occurred." *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). "Instructions may not be extracted piecemeal to establish error. The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. Even if the instructions are somewhat imperfect, there is no error if they fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant." *Id.* (citation omitted).

In this case, defendant did not object to the instructions that he now challenges on appeal. Therefore, our review is limited to a determination whether defendant suffered plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Mass*, 238 Mich App 333, 338-339; 605 NW2d 322 (1999). The court's instructions on conspiracy to commit first-degree murder, while imperfect, fairly presented to the jury the issues to be tried and sufficiently protected defendant's rights. When reinstructing the jury, the court stated that the prosecution charged defendant with conspiracy to commit first-degree murder and that the prosecutor was required to prove that defendant and someone else knowingly agreed to commit murder in the first-

degree, i.e., premeditated murder. Contrary to what defendant argues, the jury was not given the option of convicting defendant of conspiracy to commit second-degree murder, a nonexistent crime. Compare *People v Gilbert*, 183 Mich App 741, 744; 455 NW2d 731 (1990).

Nor do we find merit in defendant's claim, in his standard 11 brief, that the court failed to adequately instruct the jury regarding the requisite intent for first-degree murder and conspiracy. The court instructed the jury that the prosecution was required to prove that defendant intended to kill, that the intent to kill was premeditated, and that the killing was deliberate. This instruction sufficiently conveyed the requisite intent for first-degree murder. See *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992).

Next, the court's failure to include "moral certainty" language in its instruction defining reasonable doubt does not require reversal. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Our review of the instruction indicates that the court adequately conveyed the concept of reasonable doubt to the jury. *Id.* at 488. Also, absent a request, the court did not have a duty to provide a cautionary instruction regarding the limited purpose of other acts evidence. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999); CJI2d 4.11.

Defendant also argues that the trial court erred in failing to give an instruction on the reckless use of firearms. However, we conclude that defendant has abandoned this issue because he failed to argue it in his brief. See *People v Canter*, 197 Mich App 550, 565; 496 NW2d 336 (1992).

Defendant contends that reversal is required because the trial court improperly allowed multiple peremptory challenges, rather than requiring each dismissed juror to be replaced before another challenge was exercised, contrary to MCR 2.511(F). However, because defendant did not object to the jury selection procedure employed at trial,² any deviation from the procedure prescribed in MCR 2.511(F) does not require reversal. *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987); *People v Lawless*, 136 Mich App 628, 636; 357 NW2d 724 (1984).

Next, defendant argues that he is entitled to a new trial because he did not receive effective assistance of counsel. We disagree. Courts presume that assistance of counsel was effective and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant claims that counsel was ineffective for failing to object to other acts evidence. However, the record indicates that counsel repeatedly objected to the challenged evidence, which was

² Indeed, the record indicates that it was defendant who first employed the method that he now challenges on appeal.

admitted over counsel's objections. Moreover, as discussed previously, the challenged evidence was properly admitted. Thus, this claim has no merit.

Defendant also contends that counsel was ineffective for failing to call an identification expert. The decision to call a witness is ordinarily a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Relief is available only if counsel's failure to call a witness deprived the defendant of a substantial defense that affected the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987). In this case, two witnesses positively identified defendant. One of these witnesses was familiar with defendant, having frequently seen him in the neighborhood prior to the incident. Under these circumstances, we doubt that an expert witness on identification would have affected the outcome of the trial.

Defendant also asserts that counsel was ineffective because he failed to request a special instruction regarding identification. The court gave the standard jury instructions on identification, which alerted the jury to carefully consider the witnesses' identification. Under the circumstances, an additional instruction was not likely to affect the outcome of trial.

Finally, defendant contends that counsel was ineffective for failing to request proper instructions on conspiracy to commit first-degree murder, the use of similar acts evidence, and reasonable doubt. As discussed previously, however, the conspiracy and reasonable doubt instructions were proper, so counsel was not ineffective for not objecting to those instructions or requesting additional instructions. While CJI2d 4.11 (addressing the use of other acts evidence) may have been relevant, defendant has not overcome the presumption that counsel's decision not to request such an instruction constituted sound trial strategy so as not to emphasize the matters in the minds of the jurors. See *Rice (On Remand)*, *supra* at 444-445. Thus, we conclude that defendant was not denied the effective assistance of counsel.

In light of the foregoing discussion, we reject defendant's claim that he was denied a fair trial because of the cumulative effect of several errors. See *People v Cross*, 202 Mich App 138, 145; 508 NW2d 144 (1993).

In his standard 11 brief, defendant also argues that reversal is required because of prosecutorial misconduct. Questions of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Viewing the challenged remarks in context, in our view the prosecutor was merely arguing the evidence and reasonable inferences from that evidence as it related to his theory of the case, which he was entitled to do. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Accordingly, the prosecutor's remarks were not improper.

Finally, contrary to defendant's argument, his two-year term for the felony-firearm conviction was not unconstitutional. See *People v Cooper*, 236 Mich App 643, 660-664; 601

NW2d 409 (1999).

Affirmed.

/s/ Roman S. Gibbs

/s/ Janet T. Neff

/s/ Peter D. O'Connell