# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 28, 2000 |
| v | No. 213260<br>Eaton Circuit Court |
| TIMOTHY LANDIN RODRIGUEZ,<br><br>Defendant-Appellant. | LC No. 97-020388-FC |

Before: Doctoroff, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316; MSA 28.548, conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to two concurrent terms of life imprisonment for the first-degree murder and conspiracy convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals by right. We affirm.

Defendant argues that the trial court erred in allowing evidence of his membership in the street gang Jungle People Vice Lords. Defendant contends that the evidence constituted improper character evidence and was unduly prejudicial, causing the jury to convict him because he was a gang member. We disagree. The decision whether to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Evidence of other bad acts, such as membership in a street gang, is inadmissible for the purpose of showing bad character. MRE 404(b); *Starr*, *supra* at 495. However, such evidence is admissible under MRE 404(b) if, (1) it is offered for a purpose other than to establish the defendant's character to show his propensity to commit the offense, (2) it is relevant, and (3) its probative value is not substantially outweighed by the potential for unfair prejudice under MRE 403. *Starr*, *supra* at 496, quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).

Here, the prosecution's theory of the case was that defendant planned the victim's murder so that defendant's gang could take over the victim's place in the Eaton County drug trade. Thus, the evidence pertaining to defendant's gang membership was directly relevant to the alleged

motive to commit the charged offenses. Because the evidence was offered for a proper purpose under MRE 404(b), and because the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, MRE 403, the trial court did not abuse its discretion in admitting the evidence.

Defendant next argues that evidence of his prior criminal history was improperly received. Because defendant did not preserve this issue with an appropriate objection at trial, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Considered in the context of the case, the reference to defendant's prior criminal history, which was both isolated and unsolicited, did not affect defendant's substantial rights. See *People v McNutt*, 220 Mich 620, 623-624; 190 NW 750 (1922); *People v Meyers (On Remand)*, 124 Mich App 148, 163; 335 NW2d 189 (1983); *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973). Therefore, appellate relief is not warranted.

Defendant also argues that the prosecutor presented insufficient evidence to establish his involvement in the charged offenses. We disagree.

We review the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could find that the elements of the charged offenses were proved beyond a reasonable doubt. *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). Here, defendant was prosecuted for first-degree murder under an aiding and abetting theory. To establish a defendant's guilt as an aider and abettor, the prosecution must prove that (1) the defendant or another committed the substantive criminal offense, (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 the giving of aid or encouragement. *People v Beard*, 171 Mich App 538, 541-542; 431 NW2d 232 (1988).

The evidence at trial was sufficient to establish that defendant conspired to murder the victim and that he aided and abetted Matthew Harton in the commission of the offense. Harton testified that he discussed the murder beforehand with defendant, who ordered Harton to "go through with it" and told Harton that killing the victim would allow Harton and the rest of defendant's gang to make money supplying drugs to the victim's customers. Harton testified that defendant gave him a .22 semiautomatic gun and ammunition to be used to shoot the victim. The offense was subsequently committed when the victim was lured to an unoccupied house where Harton was waiting and where he repeatedly shot the victim. Viewed most favorably to the prosecution, this testimony was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant conspired to murder the victim and also aided and abetted in the premeditated killing of the victim. See *People v Justice (After Remand)*, 454 Mich 334, 345-348; 562 NW2d 652 (1997); *People v Atley*, 392 Mich 298, 310-311; 220 NW2d 465 (1974); *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991); *Beard, supra*. Further, because a conspiracy is complete when the agreement is made, *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982); *Cotton, supra* at 393, and because the evidence showed that defendant possessed a firearm at the time he conspired to kill the victim, there was sufficient evidence to convict defendant of felony-firearm.

Defendant next argues that the trial court erred in admitting statements by Matthew Harton because they were made after the killing occurred and after the conspiracy had ended. However, because the conspiracy consisted of a larger scheme to control marijuana trafficking in the area, the trial court's determination that Harton's statements were made "in furtherance" of an ongoing conspiracy is not clearly erroneous. *People v Bushard*, 444 Mich 384, 395-396 (Boyle, J.); 508 NW2d 745 (1993). Therefore, the statements were admissible under MRE 801(d)(2)(E).

Defendant also complains that the trial court improperly allowed testimony to be presented concerning the fact that the gun used in the killing was also used by gang members to commit unrelated robberies. The record indicates that defense counsel attempted to use this evidence to defendant's benefit, arguing that defendant did not control the weapon and that Harton was acting on his own volition when he killed the victim. A defendant may not harbor error as an appellate parachute, nor may a defendant claim that error requiring reversal exists based upon the introduction of evidence that he purposefully used to support his defense theory. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998); *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

Defendant also claims that his pretrial motion for change of venue was improperly denied. The record indicates that defendant did not renew his motion following jury selection, nor did he exhaust his peremptory challenges or express dissatisfaction with the jury panel. Accordingly, this issue is not preserved. *People v Jendrzejewski*, 455 Mich 495, 514 n 19; 566 NW2d 530 (1997); *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). Regardless, the record does not demonstrate a pattern of strong community feeling or prejudice against defendant such that jurors could not render a fair and impartial verdict. *People v Harvey*, 167 Mich App 734, 741-742; 423 NW2d 335 (1988).

Lastly, the trial court did not abuse its discretion in denying defendant's motion for a new trial based upon alleged newly discovered evidence that Harton's statements at trial concerning defendant's involvement were perjurious. Considering Harton's trial testimony during cross-examination, it is apparent that the evidence could have been discovered before trial, and further, that it would have been cumulative. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

We affirm.

/s/ Martin M. Doctoroff
/s/ Joel P. Hoekstra
/s/ Jane E. Markey