

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKIE L. MILLER,

Defendant-Appellant.

UNPUBLISHED
September 4, 2001

No. 218922
Wayne Circuit Court
Criminal Division
LC No. 98-001560

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to commit first-degree murder, MCL 750.157(a). He was sentenced as a fourth habitual offender, MCL 769.12, to mandatory life imprisonment. He appeals as of right. We affirm.

Defendant argues that there was insufficient evidence to support his conspiracy conviction. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, we are required to view the evidence in a light most favorable to the prosecution and 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 Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

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 Buck*, 197 Mich App 404, 412; 496 NW2d 321 (1992). The essence of the conspiracy is the agreement itself, and it is sufficient if the acts of the parties establish the agreement. *Id.* The crime is complete when the agreement is made, whether or not some overt act is taken in order to further the conspiracy. *Id.* To prove conspiracy to commit murder, it must be demonstrated that each conspirator had the requisite intent to commit the murder. *Id.* The prosecution must demonstrate that the conspirators deliberated and planned the crime with the intent to kill the victim. *Id.* Additionally, direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts and conduct of the parties. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997).

In this case, Ronald Mullins indicated that there was a plan for defendant to “do hits” or “kill people” for Edward Sims. Mullins recounted an incident where defendant and the other

alleged co-conspirators looked for the victim at a motorcycle club. Mullins testified that he and Sims later bonded defendant out of jail. The next day, he and defendant convened in the bathroom at Club Rose, the nightclub at which the shooting took place. At that time, defendant pulled out a gun, which Sims later said was his, and stated that he intended to kill the victim. Edward Griffin then joined them in the bathroom. Defendant did not know the victim, so he told Griffin to dance by the victim so defendant would know who he was. Griffin did so and defendant subsequently shot the victim, killing him. Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant was involved in a conspiracy to kill the victim.

In the context of deciding the sufficiency issue, we reject defendant's claim that he was deprived of a fair trial because of the improper admission of hearsay testimony. Because defendant failed to object to the challenged testimony at trial, appellate relief with respect to this issue is foreclosed absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 370 (2001).

Defendant's statement to Mullins directing him to dance beside the victim was not hearsay because it was a party admission. MRE 801(d)(2)(A). Also, the challenged testimony by Mullins and Griffin regarding Sims' statements was admissible under MRE 801(d)(2)(E), as statements by coconspirators in furtherance of the conspiracy. Therefore, plain error has not been shown.

Defendant also complains that the prosecutor failed to present evidence that was mentioned in her opening statement. This issue is also unpreserved because it was not raised at trial. In light of Griffin's testimony at trial admitting that he told the police that he saw Sims give money to defendant after the shooting, we find no plain error with respect to the challenged statement by the prosecutor. Thus, this unpreserved issue does not warrant appellate relief. *Carines*, *supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Next, defendant argues that he was deprived of a fair trial because Griffin testified that he pleaded guilty of conspiracy to murder and the court failed to give a limiting instruction with respect to this testimony. Because defendant did not object to this testimony at trial, the issue is not preserved, thus foreclosing appellate relief absent plain error affecting defendant's substantial rights. *Pesquera*, *supra* at 316; *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Here, there was no plain error because Griffin was a witness at trial, was subject to cross-examination, and the circumstances involving the guilty plea in exchange for the dismissal of greater charges was relevant to Griffin's credibility. Disclosure of the guilty plea to blunt the impact of attacks on the witness' credibility served a legitimate purpose and was permissible. *United States v Veltre*, 591 F2d 347, 349 (CA 5, 1979); see also *United States v Carr*, 647 F2d 867, 869 (CA 8, 1981); *State v Borden* 605 SW2d 88, 90 (MO, 1980). Moreover, defendant's substantial rights were not affected by the failure to give a limiting instruction, because there was no attempt to use the fact of Griffin's guilty plea as substantive evidence of defendant's guilt, and the court provided a cautionary instruction on accomplice testimony. *United States v King*, 505 F2d 602, 607 (CA 5, 1974); *State v Just*, 441 A2d 98, 104-105 (Conn, 1981); *People v Coles*, 79 Mich App 255, 265-269; 261 NW2d 280 (1977), affirmed 417 Mich 523; 339 NW2d 440 (1983).

Next, defendant argues that the court's conspiracy instructions were deficient. Once again, because defendant failed to object to the court's instructions at trial, we review this under the plain error standard. *Knapp, supra* at 375. We are satisfied that, viewed in their entirety, the court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Thus, plain error has not been shown.

Defendant argues that the trial court also erred in admitting Mullins' testimony concerning what Sims told him. Defendant maintains that the testimony was inadmissible hearsay. We disagree. The trial court did not abuse its discretion in admitting the testimony because it was admissible as the statement of a coconspirator under MRE 801(d)(2)(E). *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

Defendant also argues that the court erred in instructing the jury in accordance with CJI2d 5.5 (Witness a Disputed Accomplice) with respect to Mullins' testimony. Because defendant did not preserve this issue with an appropriate objection at trial, he must show plain error affecting his substantial rights. *Knapp, supra* at 375. Because Mullins did not explicitly admit to participating in the crime, the court's decision to give CJI2d 5.5 is not plainly erroneous. Moreover, we conclude that the doctrine of judicial estoppel has no applicability here.

Next, defendant's failure to object to the court's decision to allow the jury to rehear Griffin's testimony pursuant to its request precludes appellate relief absent plain error affecting defendant's substantial rights. See *People v Nash*, 244 Mich App 93, 96-97; 625 NW2d 87 (2000). It was within the trial court's discretion to allow the jury to rehear the testimony. MCR 6.414(H). Defendant has not shown that the request was unreasonable or that unfairness resulted. Plain error has not been shown.

Finally, we reject defendant's claim that reversal is required because he was denied the effective assistance of counsel. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). A defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). In attempting to persuade a reviewing court that counsel was ineffective, a defendant must also overcome the presumption that the challenged action was trial strategy, and must establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Id.* at 6.

Most of defendant's claims pertain to matters previously addressed in this opinion, which we have concluded are without merit. Counsel was not ineffective for failing to make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Furthermore, defendant was not prejudiced by counsel's failure to more vigorously argue the directed verdict motion because it is apparent from the record that the trial court was aware of the facts and the applicable standard, and properly concluded that a directed verdict was not warranted.

Affirmed.

/s/ Helene N. White

/s/ David H. Sawyer

/s/ Henry William Saad