

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE JAMES JONES,

Defendant-Appellant.

UNPUBLISHED

March 22, 2005

No. 250326

Wayne Circuit Court

LC No. 03-002673-01

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316, and solicitation to commit first-degree murder, MCL 750.157b(3) and MCL 750.316, arising out of the shooting death of Kenneth Flowers on February 17, 2001. The trial court sentenced defendant to nineteen to thirty years' imprisonment for the second-degree murder and solicitation convictions and to life imprisonment for the conspiracy conviction. We affirm.

Defendant first argues that the trial court erred by admitting prior bad acts evidence involving an altercation at a liquor store in which he was allegedly carrying a gun. Because defendant did not preserve this issue by objecting to this evidence at trial, this Court's review of this issue is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Carines, supra* at 763.

MRE 404(b)(1) governs a trial court's decision whether to admit prior bad acts evidence. Whether other acts evidence is admissible under MRE 404(b)(1) depends upon four factors. First, the evidence must be offered for a permissible purpose, i.e., for a purpose other than showing character or a propensity to commit the charged crime. *People v Drohan*, 264 Mich App 77, 85; 689 NW2d 750 (2004). Second, the evidence must be relevant to an issue or fact at trial. *Id.* Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id.* Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id.*

Admission of the evidence was not plain error. It showed the prior relationship between McLister Trice, defendant, and Flowers, and was relevant to whether defendant aided and abetted the shooting, whether he solicited Flowers' murder, or whether he conspired with another to shoot Flowers. These issues were the primary issues in the case. The evidence was not offered to show defendant's character or propensity to commit murder. Rather, it was offered as proof of motive and intent, which are proper purposes under MRE 404(b)(1). The evidence established an acrimonious relationship between Flowers and Trice in which defendant may have become involved, depending upon whose testimony is believed. Jeff Adams testified that Flowers punched defendant in the face and that Flowers ran to the car and wanted to leave right away because defendant had a gun. Conversely, Trice and defendant both testified that Flowers hit Trice and that defendant was not involved in the altercation and was not carrying a gun at that time. Adams' testimony established a motive to seek revenge against Flowers and an intent to retaliate against him. The evidence was also admissible to show identity of the person who arranged for Flowers' shooting. None of the witnesses to the shooting had ever seen the shooter before, and the shooter did not say anything substantive to Flowers or indicate any reason why he was shooting at Flowers. Thus, the circumstances of the shooting tended to show that another individual may have conspired with the shooter to kill Flowers, and evidence of the altercation at the liquor store tended to show the identity of the person who had hired the unknown individual to do the shooting. Motive, intent and identity are all permissible purposes under MRE 404(b)(1).

Further, the probative value of the evidence was not substantially outweighed by unfair prejudice. Unfair prejudice exists when the jury might give marginally relevant evidence undue or preemptive weight or when it would be inequitable to allow use of the evidence. *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 404; 571 NW2d 530 (1997). The evidence did not *unfairly* prejudice defendant or tend to allow the jury to give undue or preemptive weight to the evidence. In fact, Adams admitted at trial that he did not personally go inside the store and that he only knew what Flowers had told him happened inside the store. Both Trice and defendant denied that defendant was involved in the altercation and denied that defendant had a gun. Moreover, although Adams testified that Flowers had punched defendant in the face, he did not testify that defendant fought back against Flowers. Thus, the only "bad act" that may have negatively impacted defendant was the testimony that defendant was carrying a gun. We cannot conclude that this factor so prejudiced the jury that it amounted to unfair prejudice, especially considering that it was not alleged that defendant was the shooter.

Defendant next contends that the trial court erred by admitting Trice's prior inconsistent statements implicating defendant in Flowers' shooting death. Because defendant preserved this issue for appellate review, we review the trial court's decision admitting the disputed evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs only if an unprejudiced person, considering the facts on which the trial court relied, would find that there was no justification or excuse for the ruling made. *Id.* A decision on a close evidentiary question ordinarily cannot constitute an abuse of discretion. *Id.*

The challenged evidence consists of a statement that Trice made to Flowers on the day of the shooting stating that Flowers was going to die that day and that defendant was making arrangements to have Flowers killed. The evidence also includes a statement that Trice made to her stepmother saying that defendant was going to "take care of it that day," in reference to

Trice's hostile relationship with Flowers. After denying the prosecutor's motion to admit the above hearsay statements under MRE 803(3), the trial court ruled that the evidence was admissible for impeachment purposes under MRE 603(b). That rule states, in pertinent part:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

A previous inconsistent statement, while admissible to impeach credibility, is not an exception to the hearsay rule because it is not offered as substantive evidence to prove the truth of the statement, but rather, to prove that the witness in fact made the statement. *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998).

The trial court did not abuse its discretion by admitting evidence of Trice's statements for impeachment purposes. On cross-examination, Trice testified that she made a statement implicating defendant only because the police mistreated her, improperly influenced her to do so, "turned her words around," and released her from custody only after she gave the statement. She further testified that defendant did not explain what he was talking about when he said that he "paid the nigger" and that she did not know what he meant by this statement. She also testified that she did not know what defendant meant when he said that "the order" had been taken care of. Given Trice's testimony that she had no knowledge or information regarding any intent on defendant's behalf to kill Flowers and that she only indicated otherwise because the police had pressured her, Trice's previous statements to the contrary were properly admitted to show her prior knowledge of defendant's intent.

Defendant argues that the disputed evidence was hearsay and that the conspiracy exception to the hearsay rule was inapplicable because no conspiracy had been proven. Defendant's argument ignores the basis upon which the trial court admitted the evidence. The court properly admitted the evidence under MRE 613(b) for impeachment purposes only. Thus, the conspiracy exception to the hearsay rule was not implicated.

Defendant also argues that the trial court's ruling denied him his right of confrontation and cites *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In that case, the United States Supreme Court held that testimonial evidence is barred when the declarant is unavailable, and the defendant did not have a prior opportunity for cross-examination. *Id.* at 53. The prosecutor correctly notes that because the declarant in this case was available and testified at trial, *Crawford* is inapplicable.

Defendant next argues that defense counsel was ineffective for opening the door to the admission of the above evidence. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Westman*, 262 Mich App 184, 191; 685 NW2d 423 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462

Mich 281, 302-303; 613 NW2d 694 (2000). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma, supra* at 302.

Defendant has not overcome the strong presumption that counsel's actions constituted sound trial strategy. Defense counsel was faced with several damaging statements to which Trice testified on direct examination, including defendant's statement that "the order had been taken care of" in reference to Flowers. In addition, Trice testified that when she told defendant not to bother Flowers, defendant responded that he "already paid the nigger." Further, Trice testified that when she asked defendant if he had anything to do with Flowers' death, he responded, "What you thought." Because of the nature of the above statements, defense counsel would have been remiss not to address the statements on cross-examination and attempt to explain them. Counsel's strategy was clearly to try to show that Trice did not know what defendant meant by the statements. Given counsel's limited options, this strategy was not unsound. Accordingly, defense counsel's performance did not fall below an objective standard of reasonableness, and counsel's representation did not prejudice defendant such that it deprived him of a fair trial. *Pickens, supra* at 302-303.

Defendant next argues that the prosecutor injected non-record evidence into the case by arguing in closing that defendant had threatened Flowers with a gun. Defendant also contends that counsel was ineffective for failing to object to the prosecutor's argument. Because defendant failed to preserve this issue for appellate review by timely objecting to the alleged misconduct, this Court's review is limited to plain error affecting defendant's substantial rights. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured with a timely jury instruction. *Leshaj, supra* at 419.

During closing argument, the prosecutor twice stated that defendant had threatened Flowers with a gun. The prosecutor was "free to argue all reasonable inferences from the evidence relating to the prosecution's theory of the case." *People v Matuszak*, 263 Mich App 42, 53; 687 NW2d 342 (2004). The prosecutor's remarks constituted a reasonable inference from the evidence that the prosecutor presented at trial. Adams testified that Flowers ran out of the liquor store stating that he had "got into it" with Trice and defendant, that he had punched defendant in the face, and that defendant had a gun. Flowers wanted to leave in a hurry. It can reasonably be inferred from this evidence that defendant threatened Flowers with the gun, which was why Flowers wanted to quickly leave the area. Therefore, the prosecutor's argument was proper. Counsel was not obligated to object to the prosecutor's remarks and advocate a meritless position. *Westman, supra* at 192. Thus, defense counsel was not ineffective for failing to object to the prosecutor's argument.

Defendant next contends that reversal is required because the jury returned an inconsistent verdict on the murder and conspiracy charges. We initially note that defendant waived this issue because defense counsel admitted at sentencing that juries are legally permitted to render inconsistent verdicts. One who waives his rights may not thereafter seek appellate review of a claimed deprivation of those rights. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). The waiver extinguishes any error. *Id.* We further note that defense counsel's admission was accurate because juries may return inconsistent verdicts. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980).

Defendant next contends that the trial court erred by failing to instruct the jury on solicitation to commit second-degree murder. Because defense counsel did not request such an instruction and expressly approved of the jury instructions at trial, defendant waived any claim of error regarding the instructions. *Matuszak, supra* at 57.

Defendant next argues that his convictions violate his federal and state protections against double jeopardy. We disagree. Issues of double jeopardy are questions of law which this Court reviews de novo. *People v Pena*, 224 Mich App 650, 657; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885 (1998).

The double jeopardy provisions of the Michigan and federal constitutions protect against multiple punishments for the same offense and against successive prosecutions for the same offense. US Const, Am V; Const 1963, art 1, § 15; *Pena, supra* at 657. In this case, defendant argues that his convictions of second-degree murder, solicitation, and conspiracy violate the multiple punishment aspect of double jeopardy. Whether two or more convictions involve the same offense for purposes of the double jeopardy protection against multiple punishments is one of legislative intent. *Id.* at 657. Statutes prohibiting conduct violative of distinct social norms are generally viewed as separate and amenable to permitting multiple punishments. *Id.*

Defendant's convictions do not violate his double jeopardy protections because the statutes prohibiting second-degree murder, solicitation, and conspiracy are aimed at different social norms. The purpose of the statutes prohibiting murder is to protect human life and prohibit wrongful slayings. *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999). On the other hand, the purpose of the conspiracy statute is to protect society from the increased danger presented by group activity as opposed to individual activity. *People v Sammons*, 191 Mich App 351, 374; 478 NW2d 901 (1991); *People v Burgess*, 153 Mich App 715, 733; 396 NW2d 814 (1986). Finally, the purpose of the solicitation statute is to prescribe the inducement of another to commit an offense. MCL 750.157b; see *Burgess, supra* at 732-733. Because the statutes are aimed at distinct social norms, defendant's convictions under each statute do not offend double jeopardy principles. *Peña, supra* at 657.

Defendant argues that his convictions are nevertheless contrary to his protections against double jeopardy because they are based on the same evidence. The Michigan Supreme Court has rejected the "actual evidence" test upon which defendant relies. The "actual evidence" test focuses on whether the same evidence was used at trial to establish the elements of each offense. *People v Sturgis*, 427 Mich 392, 404; 397 NW2d 783 (1986). In *Sturgis*, the Michigan Supreme Court stated that it has clearly rejected the actual evidence test in favor of the more flexible and traditional means of determining the Legislature's intent. *Id.* at 404-405.

Finally, defendant argues that the prosecutor failed to present sufficient evidence to support his convictions. We again disagree. When determining whether sufficient evidence exists to support a conviction, we must view the evidence in the light most favorable to the prosecution and determine whether a rational factfinder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury verdict. *Id.* at 400. Circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense. *Id.*

With respect to his conspiracy conviction, defendant argues that the jury had to infer from his statement that he “already paid the nigger” that an agreement to kill Flowers existed. He also argues that the jury had to infer from that inference that defendant intended to kill Flowers. Defendant contends that it is impermissible to prove an element of an offense by building one inference upon another based on the same evidence. Defendant fails to acknowledge, however, that in *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002), the Michigan Supreme Court overruled the “inference upon an inference” rule of *People v Atley*, 392 Mich 298, 315-317; 220 NW2d 465 (1974).

A conspiracy is a mutual agreement or understanding between two or more people to commit an unlawful act or to perform a lawful act by unlawful means. *People v Carter*, 415 Mich 558, 567; 330 NW2d 314 (1982), overruled in part on other grounds in *People v Robideau*, 419 Mich 458; 359 NW2d 592 (1984). A conspiracy is complete upon the formation of the agreement. *Carter, supra* at 568. No overt act in furtherance of the conspiracy is necessary. *Id.* To be convicted of conspiracy, the prosecutor must establish both the intent to combine with others and the intent to accomplish the illegal objective. *Id.*

Sufficient evidence existed to support defendant’s conspiracy conviction. Trice testified that when she talked to defendant at approximately 4:00 p.m. on the day of the shooting, defendant told her that “the order had been taken care of.” When Trice told defendant not to bother Flowers, defendant responded that “he already paid the nigger.” Trice admitted in her statement to the police that she knew that defendant’s response meant that he intended to harm Flowers, although she denied knowing that defendant intended to have Flowers shot. Later on the same day, an unknown man approached Flowers’ brother and asked if he was Flowers. When Flowers arrived, the unknown man approached him and started shooting at him. That the shooter did not know Flowers and was not able to recognize him supports an inference that someone had hired the shooter to kill him. Moreover, defendant’s admissions tend to show that defendant was the person who hired the shooter. The evidence was sufficient to show that defendant conspired with another individual to kill Flowers and that he possessed the requisite intent to kill necessary for first-degree premeditated murder. MCL 750.316(1)(a); *Bowman, supra* at 151.

Defendant also challenges his second-degree murder conviction. Second-degree murder requires “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice includes the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Goecke, supra* at 464. “Malice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm.” *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). Second-degree murder, however, is a general intent crime. *Goecke, supra* at 464. In addition, aiding and abetting the commission of an offense requires proof that “(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that 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 that he gave aid and encouragement.” *Carines, supra* at 757.

Sufficient evidence was presented to support defendant's conviction for second-degree murder on an aiding and abetting theory. Although defendant himself did not shoot Flowers, the evidence established that defendant paid someone to do so. On the day of the shooting, defendant told Trice that "the order had been taken care of" and told her that "he already paid the nigger" when she told him not to bother Flowers. Thus, it can be inferred that defendant assisted in the commission of the crime by paying an unknown individual to shoot Flowers. The fact that the shooter did not know Flowers supports the notion that defendant hired an unknown person to shoot Flowers. In addition, Trice admitted in her statement to the police that she knew that defendant intended to harm Flowers when he told her that he "already paid the nigger."

The above evidence was sufficient to show that defendant assisted in the commission of the crime and that he intended its commission. *Carines, supra* at 757. Further, the evidence shows that defendant possessed an intent to kill thereby satisfying the malice element of second-degree murder. *Goecke, supra* at 464. Malice could be inferred from the evidence that defendant intentionally set in motion a force likely to cause death or great bodily harm. *Djordjevic, supra* at 462.

Defendant further challenges his conviction of solicitation to commit murder. This offense is committed when (1) the solicitor seeks to have someone killed and (2) tries to engage another to commit the killing. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). The crime is complete when the solicitation is made, and neither imminence nor actual incitement of the offense is necessary for conviction. *Id.*

The evidence summarized above also supports defendant's solicitation conviction. Defendant told Trice that "the order had been taken care of" and that "he already paid the nigger" when she told him not to bother Flowers. The person who shot Flowers was unknown to the people who knew Flowers and lived in the neighborhood, and the shooter himself was not able to identify Flowers. Thus, the evidence established that defendant sought to have Flowers killed and that he hired an unknown individual to commit the killing. Contrary to defendant's contentions, neither imminence nor actual incitement of the offense was necessary. *Id.* Accordingly, drawing all reasonable inferences in favor of the jury's verdict, sufficient evidence was presented to support defendant's solicitation conviction.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White