

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTO D'AVANZO,

Defendant-Appellant.

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UNPUBLISHED

November 22, 2005

No. 256438

Kalamazoo Circuit Court

LC No. 03-000465-FC

Before: Bandstra, PJ, and Neff and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316, for the death of Patricia Lang. We affirm.

Lang's body was found on October 17, 1980, in her car, in a parking lot on the campus of Western Michigan University (WMU); she had been shot once in the head from a close range, with a small-caliber weapon. Because of statements he made to WMU police in 1981, defendant was charged with Lang's murder. Defendant challenged the admissibility of the statements, and the trial court ordered that four of the five incriminating statements be suppressed. This Court held that all five statements were inadmissible, and the case was subsequently dismissed. See *People v D'Avanzo*, 125 Mich App 129; 336 NW2d 238 (1983). The case was reopened in 2002, and defendant was again charged with first-degree murder. The prosecutor's theory at trial was that defendant, who was imprisoned at the time of Lang's murder, aided and abetted in her murder by arranging for someone that he knew to kill her. Defendant was sentenced to life imprisonment. Defendant appeals by right.

Defendant first argues that the trial court erred when it instructed the jury on the intent required for first-degree premeditated murder, "that the defendant intended to kill Patricia Lang or to have someone else kill her for him." We disagree. We review claims of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). We review the instructions in their entirety to determine whether the instructions fairly presented the issues and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

A trial court has a duty to instruct the jury on the applicable law. MCL 768.29. The prosecutor theorized at trial that defendant aided and abetted in Lang's murder by procuring

someone to commit it for him. Defendant argues that the instruction “that the defendant intended to kill Patricia Lang or to have someone else kill her for him” departs from what is required to convict a person under an aiding or abetting theory, which requires proof that a defendant intended the commission of the crime, or knew that the principal intended it at the time aid or encouragement was given. Defendant contends that the instruction would allow the jury to convict him even if he did not intend that Lang be killed at the time he gave assistance or encouragement.

We find defendant’s argument speculative and unsupported by the evidence presented at trial. Clearly defendant could not kill Lang himself because he was incarcerated at the time of her murder. Therefore, the only way defendant could have participated in Lang’s murder was by arranging for someone else to kill her. The prosecution must prove the following elements to establish guilt under an aiding and abetting theory: “(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 he gave aid and encouragement.” *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 566, 540 NW2d 728 (1995). The aiding and abetting instruction included a statement that “[a]nyone who . . . intentionally procures someone else to commit a crime for them is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.”

To give a particular instruction to the jury, there must be evidence to support it. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). The prosecutor presented evidence at trial that defendant procured a shooter to kill Lang. We believe that an instruction stating that defendant intended to kill Lang was sufficient for first-degree premeditated murder because under an aiding and abetting theory, it would mean that the aiding and abetting by procuring someone to kill Lang, was done with the intent that Lang be killed. But, the instruction as given did not constitute error because it merely reiterates the necessary intent; therefore, the instructions fairly presented to the jury the issues to be tried and sufficiently protected the defendant’s rights.

Defendant next argues that the trial court abused its discretion when it admitted evidence that defendant committed several armed robberies two years before Lang’s death. We disagree.

The three factors necessary for MRE 404(b) bad acts evidence to be admissible are: (1) the evidence must be offered for the proper purpose of proving something other than character; (2) the evidence must be relevant under MRE 402; and (3) its probative value must not be substantially outweighed by the risk of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The trial court did not abuse its discretion in admitting this evidence because it was offered for the proper purpose of demonstrating defendant’s motive to kill Lang to prevent her from acting on her knowledge that defendant had committed robberies other than those for which he was imprisoned. Given the prosecutor’s theory of the case that defendant arranged Lang’s killing while in prison, it would be reasonable for the jury to want to know defendant’s motive for the killing and how it was procured. In addition, this evidence is relevant and probative of

defendant's intent to have Lang killed. It supports the testimony of several witnesses who testified that defendant had Lang killed in part because of her knowledge of other crimes that defendant had committed. It also corroborates one witness' testimony that defendant told him that he had a great deal of money from the robberies, and stated that it was important in the context of their conversation because defendant could pay to have Lang killed. Moreover, the trial court instructed the jury that it was only to consider whether this evidence tended to show that defendant had a reason to commit the crime, or had the financial resources to pay someone to commit the crime. We find no abuse of discretion.

Defendant next argues that certain testimony by Detective Dedow of the cold case team denied him a fair trial. We disagree. We review an unpreserved claim that evidence was improperly admitted for plain error affecting defendant's substantial rights, which means that "he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *Knox, supra* at 508.

At trial, WMU Police Detective Carol Dedow testified that she received materials from defendant's mail that indicated that defendant attempted to communicate with others by using another prisoner's address. She also read statements from a portion of a letter that stated, "I have sent this package of information through a person I know out there in the world," and "I had all this stuff sent to you from a free world address." The prosecutor then asked about the significance of those statements, to which Dedow replied, "[t]hat he can arrange things on the outside independent of any contacts within the inside of the institution—corresponding with, contacting people to arrange—May I continue?—arrange the death of Patti."

Defendant argues that this testimony was inadmissible under both MRE 701 and 702. We note that MRE 702 is inapplicable to this issue because Dedow did not testify as an expert witness at trial. MRE 701 provides,

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

In general, police officers may provide lay opinions about matters that are not overly dependent on scientific, technical, or specialized knowledge. *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989).

Although defendant argues that Dedow's testimony was speculative and "pure argument based on extremely weak inferences," her testimony was in fact, rationally based on her perception and familiarity with defendant and the present case. Her opinion that defendant was capable of arranging things using contacts outside of the prison system was reasonable considering the evidence adduced. We find no plain error.

Defendant also argues that he is entitled to 288 days' credit toward his sentence. Defendant's argument is moot because his sentence of life imprisonment without the possibility of parole makes it impossible for this Court to fashion a remedy. *People v Greenberg*, 176 Mich

App 296, 302; 439 NW2d 336 (1989).

We affirm.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Jane E. Markey