STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2007
v	No. 270443 St. Clair Circuit Court
MICHAEL JAMES BOWMAN, Defendant-Appellant.	LC No. 05-001856-FC

Before: Wilder, P.J., and Cavanagh and Hood, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), kidnapping, MCL 750.349, and conspiracy to commit kidnapping, MCL 750.157a. The trial court sentenced defendant as a fourth-felony habitual offender, MCL 769.12, to life imprisonment for the murder conviction, and concurrent terms of 30 to 50 years' imprisonment for the kidnapping and conspiracy convictions. He appeals as of right, and we affirm.

Defendant's convictions arise from the kidnapping and beating death of Ryan Rich at the hands of defendant and five codefendants, Michael Hills, Robert Hills, Stewart Ginnetti, Nicholas Dobson, and James Cunningham.

I

Defendant first argues that the trial court erred in denying his motion for a change of venue. We disagree.

In areas with relatively small jury pools, a defendant is entitled to a change of venue if there is such "unrelenting prejudicial pretrial publicity [that] the entire community will be presumed both exposed to the publicity and prejudiced by it." *People v Jendrzejewski*, 455 Mich 495, 501; 566 NW2d 530 (1997), quoting *Mu'Min v Virginia*, 500 US 415, 442 n 3; 111 S Ct 1899; 114 L Ed 2d 493 (1991).

In this case, defendant did not submit any exhibits in support of his motion for change of venue, and the trial court observed that media coverage had not been unusually intense. On this record, the trial court did not abuse its discretion in determining that a change of venue was not justified. *Jendrzejewski*, *supra* at 500.

Moreover, the trial court denied defendant's motion without prejudice, stating that defendant could renew the motion at trial if jury voir dire revealed that a fair and impartial jury could not be seated. As our Supreme Court observed in *Jendrzejewski*, *id.* at 511, "[a]s an alternative method of determining whether community prejudice resulting from publicity may have unconsciously infected jurors who were seated, the Court has sometimes noted how many non-seated members of the venire admitted to disqualifying prejudice." (Internal quotations and citations omitted). Because defendant did not renew his motion for a change of venue at trial, however, any claim that a change of venue was warranted based on the outcome of jury voir dire is unpreserved. This Court reviews unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

During voir dire, only 11 of the 25 prospective jurors admitted to having heard media coverage about the case, and only four of those jurors admitted to a disqualifying prejudice. this is far less than the percentage of jurors in *Jendrzejewski*, in which the Court found that the defendant failed to show a community sentiment so poisoned against the defendant that a change of venue was required. *Jendrzejewski*, *supra* at 511. Further, defense counsel in this case exercised only five of his twelve peremptory challenges, and expressed that he was "very satisfied" with the jury chosen. On this record, there is no basis for concluding that a change of venue was required.

II

Defendant next argues that defense counsel was ineffective for failing to object to the prosecutor's improper vouching for the credibility of a witness. We disagree.

We begin, naturally, with the text of the constitutional provisions in question. The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." US Const, Am VI. Similarly, the Michigan Constitution provides: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." Const 1963, art 1, § 20. It is too well established to require citation of authority that these provisions not only protect the right of an accused to hire counsel, but affirmatively require the government to provide counsel for the defense of an indigent accused. In addition, these provisions have been interpreted, under the common law of the constitution, to require that the attorney provided by the government must provide "effective" assistance. E.g., *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984); *Schriro v Landrigan*, ____ US ____; 127 S Ct 1933, 1939; 167 L Ed 2d 836 (2007).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland*, which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a

claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza*, *supra*, at 255.

Defendant argues that the prosecutor improperly vouched for the credibility of codefendant Dobson, by eliciting that Dobson had pleaded guilty pursuant to a plea agreement that required him to provide truthful testimony. "A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). However, mere reference to a plea agreement containing a promise of truthfulness is not improper, "unless it is used by the prosecution to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995) (citation omitted). In this case, the prosecutor simply elicited the terms of Dobson's plea agreement. She never intimated that she had some special information, not disclosed to the jury, that the witness was testifying truthfully. Because there was no misconduct, defense counsel was not ineffective for failing to make a futile objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

III

Defendant next argues that the trial court erred when it denied the jury's request to rehear testimony and instructed the jurors to rely on their collective memories. Defendant also argues that the trial court's instruction erroneously foreclosed the possibility that the testimony could be read back later.

Initially, we conclude that defendant waived any claim based on the trial court's decision not to provide the requested testimony. Upon receiving the jury's request to rehear testimony, defense counsel expressly agreed with the trial court's decision to instruct the jurors to rely on their collective memories. Counsel's express agreement to the trial court's proposed course of action waived any error. *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000). Therefore, any error has been extinguished, and this claim is not susceptible to review on appeal. *Id.*; *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

Defendant also argues that the substance of the trial court's instruction was erroneous because it improperly foreclosed the possibility that the requested testimony could be reviewed at a later time. Although this issue is not waived (because defendant did not affirmatively approve the substance of the court's instruction), defendant failed to object to the instruction, so we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764. A trial court has discretion to deny a jury's request to review certain testimony, but it may not foreclose the possibility of having the testimony reviewed at a later time. See MCR 6.414(J) (formerly MCR 6.414(H)). In this case, the trial court instructed the jury that the requested testimony was not available "at this point" and "*at this point* we are going

to have you rely upon your collective memories." The trial court's instruction did not convey that all future requests would be denied, nor foreclose the possibility that testimony could be reviewed later, if necessary. Accordingly, there was no plain error.

Defendant alternatively argues that defense counsel was ineffective for waiving any claim related to the trial court's decision to instruct the jurors to rely on their collective memories, and for not objecting to the substance of the trial court's instruction. We disagree.

With the exception of Angela Stockwell's testimony, all of the requested testimony was actively damaging to defendant, some more so than others. Although Stockwell's testimony was somewhat favorable to defendant, it was not particularly credible, was not relevant to any of the elements of the crime, and was unlikely to influence the outcome. Defendant has not overcome the presumption that counsel made a reasonable strategy decision to have the jurors rely on their collective memories rather than rehear unfavorable testimony. *LaVearn*, *supra* at 216. Further, because there was no plain error in the substance of the trial court's instruction, counsel was not ineffective for failing to object to the instruction. *Kulpinski*, *supra* at 8.

IV

Defendant next argues that there was insufficient evidence to support his convictions. We disagree.

A sufficiency of the evidence claim is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The resolution of credibility disputes is within the exclusive province of the trier of fact, which may also draw reasonable inferences from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

A. Premeditated Murder

Defendant argues that there was insufficient evidence of premeditation to support a conviction of first-degree premeditated murder. We disagree.

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant acted with premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Premeditation and deliberation "characterize a thought process undisturbed by hot blood." *Id*.

According to witnesses at trial, defendant believed that the victim stole money and drugs from him and was cooperating with the police. Shortly before defendant left to meet his codefendants and the victim, a witness heard defendant remark that he was "going to kill that mother f--ker." Defendant thereafter left his valuables behind and told a witness that he had to take care of something. Defendant subsequently arrived at the garage where the victim was being held and participated in beating the victim for approximately 90 minutes, once pausing to

remark that the victim was difficult to kill. The victim's body was discovered in the truck of a burning car, and was burned beyond recognition. The body had been hogtied and there was a two-inch hole in the skull, which would have taken a lot of force to inflict.

There was ample time for reconsideration between the time when defendant initially announced his intention to kill the victim, and the act of killing. There was also sufficient time for a second look between the time when defendant remarked that the victim would not die, and the eventual killing. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant killed the victim with premeditation and deliberation.

B. Kidnapping

Defendant was convicted of the secret-confinement form of kidnapping. MCL 750.349 provides that a person is guilty of "secret confinement" kidnapping if he "wilfully, maliciously, and without lawful authority shall . . . secretly confine or imprison any other person within this state against his will." This form of kidnapping does not require proof of specific intent, or proof of asportation. *People v Jaffray*, 445 Mich 287, 297-299; 519 NW2d 108 (1994). Our Supreme Court observed in *Jaffray, supra* at 306:

> Secret confinement . . . does not require proof of total concealment and complete isolation whereby the victim is rendered invisible to the entire world. It is sufficient to show that the person kidnapped has been effectively confined against his will in such a manner that he is prevented from communicating his situation to others and [the] accused's intention to keep the victim's predicament secret is made manifest. [Citations omitted.]

Here, the victim was tied up and held in a garage, thus being deprived of his ability to communicate his plight to others. While the victim's location was known to several people, the evidence showed that the fact of his confinement was kept secret. Music was used to conceal the noise while the codefendants stood watch in the driveway and made sure that no one came out of the house. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant was guilty of secret-confinement kidnapping.

C. Conspiracy to Kidnap

"A conspiracy is a partnership in criminal purposes." *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993) (internal quotations and citations omitted). To create a conspiracy, "two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense." *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). The gist of the offense of conspiracy lies in the unlawful agreement. *Blume, supra* at 481. Therefore, it is critical to show that the accused had the specific intent to "combine to pursue the criminal objective of their agreement." *Justice, supra* at 345. The crime is complete upon formation of the agreement. *Id*. at 345-346.

"[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *Justice, supra* at 347. Reasonable inferences

may be drawn from the evidence to establish the coconspirators' intentions. *Id*. at 347-348. Contrary to what defendant argues, our Supreme Court has discarded the rule that "an inference can not (sic) be built upon an inference to establish an element of the offense." *People v Hardiman*, 466 Mich 417, 424, 428; 646 NW2d 158 (2002), overruling *People v Atley*, 392 Mich 298; 220 NW2d 465 (1974).

Viewed in a light most favorable to the prosecution, the evidence at trial enabled the jury to find beyond a reasonable doubt that defendant orchestrated a plan with his codefendants, to lure the victim to the Hills' garage, for the purpose of tying him up, putting him inside the trunk of a car, and driving him out to the country.[1] Thus, the evidence was sufficient to support defendant's conspiracy conviction.

V

Lastly, defendant argues that the cumulative effect of many errors deprived him of a fair trial. Because none of defendant's claims of error has merit, defendant is not entitled to a new trial on this basis. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[1] The crime of conspiracy is complete when the unlawful agreement is made. *Justice*, *supra* at 345-346. Therefore, it is irrelevant that the crime that was eventually committed (secret-confinement kidnapping and murder) may have been different from the crime that was originally intended. See *Jaffray*, *supra* at 297-298.