

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDMOND ZOICA,

Defendant-Appellant.

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UNPUBLISHED

March 20, 2008

No. 270881

Oakland Circuit Court

LC No. 2005-204361-FC

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of conspiracy to commit first-degree premeditated murder, MCL 750.316(1)(a), 750.157a. We affirm, but remand for the ministerial task of correcting the judgment of sentence.

The incident giving rise to defendant's convictions is apparently the culmination of a rivalry between two groups of Albanian men that resulted in codefendant Ketjol Manoku opening fire at a minivan holding five members of the rival group after the minivan drove into a parking lot in the late night hours of July 17, 2004, where defendant and his codefendants were standing. Four of the minivan passengers were stuck by bullets, one fatally, as the minivan was attempting to leave the parking lot. Over the preceding couple of days, defendant, his codefendants, and others had met together on several occasions to watch and follow members of this same group of men, as well as to discuss and plan violent action against them.

On appeal, defendant first argues that his motion for directed verdict should have been granted because the evidence was insufficient to establish that he had the requisite intent to murder. We disagree.

In ruling on a motion for directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made, in a light most favorable to the prosecutor, to determine whether a rational trier of fact could have found the essential elements of a crime proved beyond a reasonable doubt. See *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). The trial court may not determine the credibility of witnesses in deciding a motion for directed verdict. *Id.*, quoting *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). This Court applies the same standards in reviewing the trial court's ruling. *Schultz*, *supra*.

A conspiracy is a voluntary mutual agreement, express or implied, between two or more persons to commit a criminal act. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). The conspiracy statute provides punishment for the actual advance planning and agreement to perform the substantive criminal act. *People v Hammond*, 187 Mich App 105, 107-108; 466 NW2d 335 (1991), quoting *People v Gilbert*, 183 Mich App 741, 749-750; 455 NW2d 731 (1990). There must be the intent to combine with others for an unlawful purpose. *Blume, supra*. For that intent to exist, the defendant must know of the conspiracy, must know of its objective, and must intend to participate cooperatively to further that objective. *Id.* at 485. A conspiracy is complete upon formation of the agreement; no overt act in furtherance of the conspiracy must be shown to support a conviction. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). Proof of conspiracy may be derived from the circumstances, acts, and conduct of the parties during the crime, and inferences are permissible. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Minimal circumstantial evidence is sufficient to prove intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

The substantive criminal act in this case is first-degree premeditated murder, which is the intentional killing of a victim where the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Thus, to sustain a conviction for conspiracy to commit first-degree murder, the prosecution must prove that (1) the defendant possessed the specific intent to murder, (2) his coconspirators possessed the specific intent to murder, (3) defendant and his coconspirators possessed the specific intent to combine for the purpose of deliberating and planning the crime with the intent to kill. See *Blume, supra*; *Anderson, supra*; *People v Hamp*, 110 Mich App 92, 103; 312 NW2d 175 (1981). Defendant's specific intent may be inferred from all of the facts and circumstances surrounding the crime. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995).

Here, defendant claims that there is "no evidence to support the conclusion that [he] had the 'intent required for murder.'" In fact, defendant claims that "all of the evidence adduced at trial indicates that [he] did not want anyone to be killed." We disagree. In brief, considered in a light most favorable to the prosecution, the evidence revealed that defendant and his coconspirators met together on July 15, 2004, near a coffee shop in Royal Oak where members of the rival group were patronizing, for the purpose of shooting Markiol Jaku and Martin Vucaj, members of that rival group. Defendant did not want the shooting to occur, but only because the shop was too crowded with people. Instead, later that night or the next evening, defendant and his coconspirators proceeded to watch the coffee shop the rival group members were fixing up to open which was called Goodfellows. Defendant and his coconspirators were dressed in dark clothing and were in vehicles with tinted windows. When one of the members of the rival group left the shop, defendant and some of his friends followed in their vehicle. Defendant rolled his window down and had a handgun but did not shoot at the rival group member possibly because of heavy traffic or because they could not tail him close enough to get off a shot.

The day before the shooting, July 16, 2004, defendant and his coconspirators met at a coney island to discuss shooting members of the rival group at Goodfellows. Later that day, they also met at Manoku's apartment to discuss the shooting. They developed a plan to return to Goodfellows and "shoot up the people," meaning shoot members of the rival group. Defendant suggested that the shooter—Manoku—be on the back of a motorcycle just like he had seen in an action movie and defendant would follow behind to conceal the motorcycle, which was covered

in blue painters tape. The shooting would occur the next night, July 17, 2004, the night before coconspirator Oliger Merko's wedding.

The next day—the day of the planned shooting—one of the coconspirators, Florjon Carcani, expressed reservations about going through with the shooting. Defendant became angry and said “You’re going to go along with this.” Preparing for the shooting, defendant and his coconspirators retrieved weapons, including an AK-47 assault rifle that defendant had purchased a couple months before. The assault rifle was placed in Merko's vehicle, the vehicle in which defendant was riding. After the motorcycle was in position for the shooting, the plan was changed and defendant and his coconspirators went to an apartment complex. While in the parking lot, where defendant and his coconspirators were standing by their vehicle that held the AK-47, a minivan carrying rival group members pulled into the parking lot. Shortly thereafter, Manoku, pulled his nine millimeter handgun and opened fire, shooting four of the five people in the minivan as it was attempting to leave. After disposing of evidence and agreeing to an alibi, defendant and his coconspirators went to defendant's apartment and pretended to be having a party. During the police investigation of the shooting, defendant kept in close contact with Carcani, telling him to “keep the alibi and nothing's going to happen to you.”

Considering all of the facts and circumstances surrounding the crime, we conclude that the evidence at trial enabled the jury to find beyond a reasonable doubt that defendant and his coconspirators possessed the specific intent to murder and defendant and his coconspirators possessed the specific intent to combine for the purpose of deliberating and planning the murder with the intent to kill. Thus, the evidence was sufficient to support defendant's conviction and his motion for directed verdict was properly denied.

Next, defendant argues that evidence of other bad acts was improperly admitted as MRE 404(b) evidence. We disagree. We review the trial court's decision for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The evidence defendant claims was inadmissible was testimony related to purported actions before the shooting against Kutjim Karapici, a man who was friends with members of the rival group. In the first incident, which occurred in June of 2004, defendant and Manoku confronted Karapici after a fist fight between Karapici and defendant's friend Drini Brahimilari. Manoku was alleged to have called a meeting with Karapici at which meeting defendant pulled a knife and pointed it at Karapici. Manoku pulled a gun, pointed it at Karapici, and fired, but Karapici was not struck by a bullet. In early July of 2004, Manoku again called a meeting with Karapici, at which meeting Manoku and Merko led him past a table full of knives into a plastic-covered room and told him to kneel. Merko placed a pillow and gun to Karapici's head and threatened to kill him because of the disrespect he showed their friend Brahimilari. Karapici pleaded for his life and agreed to pay a sum of money in exchange for his release.

MRE 404(b) is inclusionary rather than exclusionary. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). “Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith.” *Id.* at 65. Therefore, to be admissible under MRE 404(b), generally bad acts evidence (1) must be offered for a proper

purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *VanderVliet*, *supra* at 74-75.

Defendant's argument on appeal is that "the evidence provided by Karapici was never linked to any 'proper purpose' under MCR 404(b)." But, the prosecution sought admission of the disputed testimony for the purpose of proving defendant's intent, preparation, knowledge, opportunity, or absence of mistake. MRE 404(b). Specifically, the prosecution argued that the evidence showed knowledge of the defendants working together to commit violent acts with handguns against other Albanians during the same time period as the shooting and knowledge of prior conspiracies. On appeal, the prosecution also argues that the disputed testimony was admissible to establish motive. See *People v Sabin (After Remand)*, 463 Mich 43, 59 n 6; 614 NW2d 888 (2000) ("The prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial court's decision to admit the evidence.") Nevertheless, defendant's argument on appeal fails because clearly the evidence was *offered* for a proper purpose. See *Knox*, *supra*.

And, to the extent that defendant is arguing that the testimony was not relevant, we disagree. Evidence is considered "relevant" if it makes the existence of any fact at issue more or less probable. *VanderVliet*, *supra* at 60, quoting MRE 401. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *VanderVliet*, *supra* at 75. Defendant was charged with conspiracy to commit first-degree murder. The evidence was relevant (1) to establish defendant's intent to kill members or friends of the rival group following his threats to kill using a deadly weapon—acts of the same general category, see *id.* at 80; (2) to establish defendant's coconspirators' intent to kill members or friends of the rival group following their threats to kill using a handgun; (3) to the conspiracy's existence arising from this escalating rivalry that involved prior agreements to act in a violent manner against members or friends of the rival group; and (4) to the issue of defendant's knowledge of the conspiracy, including the objective to kill members or friends of the rival group and defendant's intent to participate cooperatively to further that objective.

Finally, we reject defendant's claim that the probative value of the evidence regarding the July incident involving Karapici was substantially outweighed by the danger of unfair prejudice because defendant was not present. Even if the admissibility of the evidence presented a close question, we would not conclude that the trial court abused its discretion. See *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). But, if this particular evidence was improperly admitted, considering the strength of the untainted evidence, defendant cannot demonstrate that it is more probable than not that the error was outcome determinative. See *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Next, defendant argues that he was denied the effective assistance of counsel because "his attorney neither called witnesses on his behalf nor even contacted any of the potential witnesses that he identified for his attorney." Defendant raised his concerns regarding his counsel in the trial court and the matter was addressed by the court. On appeal, defendant

requested remand for a *Ginther*<sup>1</sup> hearing and submitted an affidavit in that regard on the grounds stated above, including that these unnamed witnesses would have testified that he was threatened by his codefendants and did not take part in some of the events discussed at trial. Pursuant to MCR 7.211(C)(1)(a)(ii), this Court denied the request.<sup>2</sup> Thus, our review is for mistakes apparent on the existing record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient and a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 659. In showing that counsel's representation was deficient, a defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 688; 521 NW2d 557 (1994).

Before the trial commenced and at his sentencing defendant raised his concerns regarding his counsel's representation of him. Defendant's claims included that his attorney (1) did not extensively discuss his case with him before trial, (2) did not investigate the witnesses defendant requested be interviewed, (3) did not call any witnesses on his behalf at trial, (4) failed to ask certain questions of testifying witnesses, and (5) failed to object during the prosecutor's questioning or presentation.

Defendant's counsel briefly addressed defendant's claims, stating that he had been to jail twice to see defendant, had read over 1200 pages of discovery materials, had represented defendant through a very lengthy preliminary examination, had seen defendant at a pretrial and was fully aware of the facts of the case. Counsel also indicated that with regard to the witnesses defendant references, defendant had neither given counsel the addresses nor the phone numbers of those alleged witnesses and those witnesses were not present during the conspiracy or the homicide. And, in fact, the witnesses to the charged crime were defendant's friends and a coconspirator, some of whom testified against defendant.

The trial court concluded that defendant was not deprived the effective assistance of counsel, as do we. On the record before us, it appears that defendant's counsel was thoroughly prepared to represent defendant at trial. Any lack of evidence in support of a defense to the charge cannot be attributed to any failure of defendant's counsel. With regard to decisions concerning the choice of witnesses and questions to ask witnesses, these are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not substitute our judgment for that of counsel's on such matters. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). In summary, defendant has failed to overcome the strong presumption that he received the effective assistance of counsel. See *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002) (citation omitted).

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 445; 212 NW2d 922 (1973).

<sup>2</sup> *People v Zoica*, unpublished order of the Court of Appeals, issued January 11, 2007 (Docket No. 270881).

Finally, defendant argues that his sentence of life without parole for the conspiracy to commit first-degree murder conviction constituted plain error because it is a parolable offense.<sup>3</sup> The prosecution has agreed that it is a parolable offense. See MCL 791.234(6); *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989). Therefore, the matter is remanded for correction of the judgment of sentence in this regard.

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra

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<sup>3</sup> We granted defendant's motion to join the legal argument presented by his codefendants in regard to this issue. *People v Zoica*, unpublished order of the Court of Appeals, issued February 26, 2008 (Docket No. 270881).