

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEONDRE DEQWAINÉ GAINES,

Defendant-Appellant.

UNPUBLISHED

January 15, 2009

No. 274721

Saginaw Circuit Court

LC No. 06-027120-FJ

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals of right his convictions, following a jury trial, of conspiracy to commit first-degree premeditated murder, MCL 750.157a and MCL 750.316(1)(a), two counts of assault with intent to murder, MCL 750.83, first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to concurrent terms of life in prison on the conspiracy, assault, and murder counts, and to a concurrent term of 40 to 60 months on the concealed weapon count. These terms are to be served consecutively to a two-year term on the felony-firearm count. We affirm.

This case involves a cycle of gang violence between Saginaw’s rival North Side and South Side gangs. North Side gang member Jordan Cramton was shot in the face by Orlando Young. North Side gang members, including defendant, learned of this, and decided to retaliate. While defendant and fellow gang members were searching for Young to “get” him, defendant shot Patrick Price, who survived. Later defendant chased and shot Jimahle Donald in the back, killing him. After learning that police knew of the crimes, defendant and others arranged to dispose of the gun used to assault Price and kill Donald.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the conspiracy count and on the count of assault with intent to murder Orlando Young. Defendant asserts that the prosecution failed to present evidence of any agreement or shared intent to kill Young. We disagree. We review the trial court’s ruling de novo to determine whether a reasonable juror could find that the prosecutor established the elements of the charged crimes. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001). We consider the facts in the light most favorable to plaintiff, *id.*, and defer to the credibility determinations made by the trier of fact, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Although there were inconsistencies in the witnesses' testimony concerning the exact harm intended against Young, these discrepancies in the witnesses' testimony do not negate the jury's conclusion that defendant was guilty beyond a reasonable doubt on both of the challenged counts. There was testimony that defendant was with members of his gang on the evening in question and that the group sought to retaliate for the shooting of Cramton, allegedly by Young. There was also testimony that while they were driving, defendant indicated he saw a rival gang member and told his driver to stop, asked another of his companions for his gun, shot Price while Price stood inside his home, and later shot and killed Donald in the back as Donald fled for his life. In addition, defendant was among the group stalking Young in Sheridan Park. Despite testimony to the contrary, the evidence viewed in the light most favorable to the prosecution clearly established that defendant was part of a group intent on retaliation. While acting with this intent, defendant shot two people, killing one. From this evidence, the jury could conclude that despite denials by some gang members at trial, defendant and his coconspirators intended to kill Young.

Defendant also argues that the trial court should not have admitted certain testimony describing statements of coconspirators until after the prosecution had presented sufficient independent evidence establishing a conspiracy by a preponderance of the evidence. See *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982) (suggesting in dictum that a conspiracy should be established before admission of a coconspirator's hearsay). We disagree.

Defendant challenges the testimony of Devon Bishop, a fellow gang member who was with defendant when they set out to "get" Young, and when defendant shot Price and murdered Donald. When discussing the perceived proper procedure under the hearsay rules for admitting, considering, and ultimately ruling on the use that can be made of coconspirators out-of-court statements, defense counsel suggested "that the Court allow those statements initially, and then at the conclusion or whenever it's appropriate, if the Court can make the finding that there is independent evidence of a conspiracy then they could come in." Accordingly, defendant waived any order-of-proof challenge to the admission of the cited evidence. *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999). In addition, a party may not claim that an error requires reversal if the error is based on actions to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003), disapproved in part on other grounds 469 Mich 967 (2003). Accordingly, insofar as defendant's argument is one merely based on the order of proofs, it is waived.

Insofar as defendant's argument is that there was insufficient independent proof of a conspiracy, we also disagree. It is not necessary to offer direct proof of a conspiracy; it is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact, and circumstantial evidence may be used to establish the existence of the conspiracy. *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). Evidentiary rulings are discretionary; they are reviewed on appeal to determine if that discretion was abused. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005).

Some of the out-of-court statements, by declarants other than Bishop, are not hearsay because they were not offered for a substantive purpose, but instead to show their effect on the hearer (Bishop). *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987). For example, Bishop testified that he received several phone calls indicating that Cramton had been shot in the face. These out-of-court statements were not offered for their truth (i.e., were not

offered to prove that Cramton had been shot in the face), but to show the effect of the calls on Bishop, and Bishop's response to the calls.

As regards the testimony that was offered for a substantive purpose, the independent evidence of the conspiracy included testimony by Simon that defendant was at the hospital after Cramton was shot and left the hospital with him; testimony that Bishop grabbed his loaded 9-millimeter pistol after receiving a phone call from Simon; Bishop's testimony that after retrieving his loaded pistol, he went outside with Merrill and told him that the plan was to retaliate against the person who shot Cramton; testimony that after Bishop and Merrill went outside, defendant and Simon arrived with defendant as a passenger in Simon's truck; testimony that defendant asked Bishop about the gun when Bishop and Merrill got into Simon's truck; testimony that Crampton and all the occupants of Simon's truck were all associated with the "north Side" gang, and that there was an ongoing dispute between the "north Side" gang and the "South Side" gang; testimony that after riding together in Simon's truck to the south side, defendant shot two people using Bishop's gun; testimony that the occupants of Simon's truck, including defendant, drove to another location looking for Orlando and that Bishop, using his gun (the same gun used by defendant), shot six or seven times at a person he believed to be Orlando; and expert testimony that the shell casings found at the sites of the three south side shootings were all fired from the same gun.

In sum, the prosecution presented sufficient independent proof that defendant and others drove to various locations with the specific intent to "do a flight," which they understood to mean to find and shoot Young. Thus, evidence was presented at trial, independent of the inadmissible hearsay testimony, circumstantially establishing the existence of a conspiracy to kill Young.¹

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

¹ The trial court ruled that the evidence it received through various pretrial motions was sufficient to establish by a preponderance of the evidence that a conspiracy existed. The trial court did not indicate which hearing or hearings contained the evidence to support the conspiracy, and did not articulate the evidence that supported the finding that a conspiracy had been established. Because there was sufficient independent evidence presented at trial to support the conspiracy, we need not decide the question of whether evidence presented before trial may be used to satisfy MRE 801(d)(2)(E)'s requirement of independent proof of a conspiracy.