

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT K. BURKOWSKI,

Defendant-Appellant.

UNPUBLISHED

July 30, 2009

Nos. 282011

Macomb Circuit Court

LC Nos. 07-002435-FC

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of conspiracy to commit first-degree murder, MCL 750.316(1)(a); MCL 750.157a, solicitation of murder, MCL 750.157b(2), and witness intimidation, MCL 750.122(7)(c). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to serve life in prison for conspiracy to commit first-degree murder, 552 to 900 months' imprisonment for solicitation of murder, and 240 to 360 months' imprisonment for witness intimidation. We affirm.

Defendant's conviction in the instant case arose following his incarceration in the Macomb County jail awaiting trial for a shooting involving Curt Campagna, the ex-husband of the woman with whom defendant was romantically involved.¹ At trial evidence was presented that defendant approached multiple fellow inmates in an attempt to have Campagna killed to prevent his testimony at trial. One of the inmates defendant attempted to hire, Christopher Spilos, eventually cooperated with police, leading to the charges involved in this appeal. Following his release from jail, Spilos met with a friend of defendant, Vincent Varacalli,² who was supposed to assist him in carrying out the killing.³

¹ See *People v Burkowski*, Court of Appeals Docket No. 282013.

² Varacalli was a codefendant, but agreed to testify against defendant.

³ Before trial in this case, defendant was convicted of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b, in the prosecution stemming from the shooting. (Court of Appeals Docket No. 282013.)

Defendant first argues on appeal that he is entitled to have his convictions overturned based on several instances of prosecutorial misconduct. “[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). To preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Defendant objected to a question by the prosecutor related to defendant’s prior conviction, but failed to object to the other instances of alleged prosecutorial misconduct asserted in this appeal.

Defendant first claims prosecutorial misconduct occurred when the prosecutor violated an agreement to refrain from referring to defendant’s prior conviction. Defendant asserts that an off-the-record agreement existed between the parties and the trial court that defendant’s prior conviction would not be referenced during the proceedings.

On cross-examination, defendant stated that he never previously engaged in any violent behavior and his only prior convictions were for drunk driving and drug possession. The prosecutor then questioned defendant about the prior shooting. In spite of the agreement not to reference the conviction, the prosecutor did infer that defendant had been convicted in the prior case when he asked about the jury’s verdict. Defense counsel immediately objected to the inquiry precluding defendant’s response to the question and the trial court sustained the objection and instructed the jury as follows: “Ladies and gentlemen, I’m ordering the testimony stricken. You’re not to consider it for any purpose whatsoever.”

Although an agreement existed to refrain from introducing defendant’s prior conviction, the prosecutor’s question was clearly in response to defendant’s false testimony regarding the absence of any violent behavior in his past and misrepresentation regarding the nature of his prior convictions. Consequently, the prosecutor’s question did not comprise an intentional violation of the agreement but rather an attempt to address defendant’s mischaracterization of his criminal past, and did not constitute prosecutorial misconduct that denied a fair and impartial trial. *Dobek, supra* at 63. Further, even if the prosecutor’s inquiry constituted misconduct, defendant was not prejudiced because the trial court provided a comprehensive limiting instruction by directing the jurors to disregard the complained of exchange for any purpose. “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

As further evidence of an alleged pattern of prosecutorial misconduct, defendant cites to an inquiry by the prosecutor during cross-examination that defendant was physically abusive to his girlfriend. The trial court sustained defense counsel’s objection to this inquiry. Again, this inquiry appears to have been in response to defendant’s assertion regarding the absence of any violent behavior in his past. Subsequent instructions to the jury were sufficient to cure any possible prejudice. *Id.*

Defendant also asserts that a remark made by the prosecutor, which defendant characterizes as sarcastic, could be construed as improperly implying special knowledge or personal opinion regarding defendant’s guilt. Even if the prosecutor’s remark is construed as an opinion regarding defendant’s credibility or suggests special knowledge of facts not before the jury, *People v Ignofo*, 315 Mich 626, 631-636; 24 NW2d 514 (1946), any possible prejudicial impact stemming from the remark was not so great that it could not have been cured by an

appropriate instruction had an objection been raised. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005). Further, the court instructed the jurors before the presentation of proofs that they “should not think something is true just because one of the lawyers ask a question that assumes or suggests that it is true.” Again, we assume the jury followed their instructions. See *Abraham*, *supra* at 279.

Defendant also contends that prosecutorial misconduct occurred during the questioning of a witness, Daniel Bizovi. Bizovi testified that defendant approached him while both were incarcerated and propositioned him to kill Campagna. Bizovi indicated that defendant proposed paying Bizovi with money collected on his mother’s life insurance policy. Defendant’s argument does not focus on Bizovi’s testimony that defendant approached him to kill Campagna, but on the portion of his testimony that related to collecting insurance proceeds on defendant’s mother.

MRE 404(b) permits the introduction of other bad acts so long as it does not “risk impermissible inferences of character to conduct.” *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001) (internal citations omitted). Defendant had notice of the prosecutor’s intent to question Bizovi pursuant to MRE 404(b) because the prosecutor’s timely notice specifically stated that Bizovi would be called to testify regarding “[d]efendant’s attempts to solicit [him] to complete the murder of [Campagna], and others, if Mr. Spilos did not complete the task.” This is a proper purpose under 404(b), and is relevant to the issue of defendant’s intent to kill Campagna. See *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Indeed, the fact that defendant was trying to arrange an alternative in case Spilos was unsuccessful in completing the task serves to establish defendant’s intent and knowledge of the plan, despite his denial of any involvement. The challenged testimony was also admissible independent of MRE 404(b) because it was connected to the charged crimes in such a way that its admission is required in order to give the jury the “complete story” of these crimes. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). In addition, the trial court instructed the jury that evidence regarding possible crimes and improper acts for which defendant was not on trial could only be considered for certain limited purposes and must not be used to determine that defendant is a bad person likely to commit crimes. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

Defendant also contends that the prosecutor mischaracterized Bizovi’s testimony during closing argument. Specifically, defendant argues that the prosecutor wrongly claimed defendant interjected the testimony in an attempt to confuse the jury. Defendant further argues that in characterizing the testimony as a defense tactic, the prosecutor was improperly inserting his own opinion into the case. Defendant’s assertions are based on the following statement made in the prosecutor’s rebuttal closing:

There is no agreement to commit first-degree murder between [defendant and Spilos] and we’re not arguing that there is. There had to be an agreement between the defendant and Vincent Varacalli, whose [sic] already plead guilty to one count. That’s the agreement we’re worried about. Bizovi, all these guys, let’s just throw as much at you as I can and hope you get confused. That’s the theory I hear from defense.

Defense counsel's closing argument focused on the "interesting cast of characters that have all testified." Defense counsel particularly attacked the credibility of Spilos, Varacalli, and Bizovi, and argued that no agreement to murder Campagna existed between defendant and any of the three witnesses. It is in this context that the prosecutor commented referencing Bizovi and "all these guys." It is clear that the jury would have understood the prosecutor's reference as characterizing defense counsel's closing argument. In other words, the prosecutor was indicating that defense counsel was accusing the prosecutor of trying to confuse the jury with a plethora of testimony about alleged agreements to murder Campagna. Such an argument was properly responsive to defendant's closing. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Accordingly, defendant's assertion that the prosecutor committed misconduct in his closing argument is without merit.

Defendant next contends that he was denied a fair trial when the trial court denied his motion for a mistrial. Defendant's motion for mistrial was solely based on the alleged misconduct that occurred when the prosecutor referred to defendant's prior conviction when cross-examining defendant. Given the trial court's curative instructions to the jury and our determination that the question did not constitute misconduct, the court did not abuse its discretion in denying the motion for mistrial, *People v Babcock*, 469 Mich 247, 265-266; 666 NW2d 231 (2003).

Defendant also argues that there was insufficient evidence to support his convictions. Although defendant's question presented asserts insufficient evidence with respect to all three convictions, his argument on appeal is solely centered on the conspiracy charge. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Accordingly, we only review the sufficiency of the evidence with respect to defendant's conspiracy conviction.

Considering the evidence in a light most favorable to the prosecution, we determine that a rational trier of fact could find that the essential elements of the crimes were proven beyond reasonable doubt. See *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). To sustain a conviction for conspiracy to commit first-degree murder, the prosecutor must prove that the conspirators deliberated and planned the crime with the intent to kill the victim. Premeditation and deliberation may be inferred from all of the facts and circumstances. *People v Hammond*, 187 Mich App 105, 107-108; 466 NW2d 335 (1991). At trial, the evidence established that defendant and Varacalli were in contact and acted in concert to bring about the death of Campagna. Defendant engaged the services of Spilos and secured the assistance of Varacalli to execute the plan. Varacalli agreed to provide assistance, and in fact met with Spilos and drove him to Campagna's home.

Defendant argues that because Spilos' testimony regarding the amount he was to be paid was inconsistent, the conspiracy charge could not succeed. However, the amount that Spilos was to be paid has no bearing on the charge of conspiracy. Spilos was not part of the conspiracy because he never intended to carry out the murder. Similarly, the fact that Spilos lied to defendant about why he did not try to contact Varacalli when Spilos was initially released from jail has no impact on the conspiracy charge because Spilos was not a member of the conspiracy. Accordingly, the felony information was amended to exclude Spilos as a co-conspirator. Defendant cites amendment of the felony information as support for his argument that there was

a lack of substance to this charge. In point of fact, the amendment was necessary because Spilos' lack of intent to follow through on the murder precluded his being charged as a conspirator. *Id.*

Defendant also implies that there was insufficient evidence to support the conspiracy conviction because Varacalli testified that he did not believe Spilos would go through with the murder. This is a mischaracterization of Varacalli's testimony. Although defendant cites several transcript passages, these citations are either taken out of context or omit testimony that gives the quoted passage a different meaning. For example, while Varacalli did state that he thought Spilos was merely going to physically assault Campagna, he clarified that he changed his opinion after meeting with Spilos. Hence, while initially Varacalli may have harbored some level of skepticism regarding Spilos' intent, all doubt was erased once he met and conversed with Spilos.

Finally, defendant argues he was denied effective assistance of counsel. Because this issue was not properly preserved below, our review is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Defendant first contends counsel was ineffective for failing to seek an interlocutory appeal of the trial court's denial of his motion for a mistrial. Because the trial court did not err in denying defendant's motion for a mistrial, defendant cannot establish that a different result would have been obtained had defense counsel sought an interlocutory appeal and, therefore, was not denied effective assistance of counsel. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant also asserts that counsel was ineffective for errors relating to Bizovi's testimony. While Bizovi's testimony was admittedly prejudicial to defendant, only unfairly prejudicial evidence should be excluded. MRE 403; *People v McGhee (After Remand)*, 268 Mich App 600, 609; 709 NW2d 595 (2005). Defendant argues that the suggestion he was involved with a plot to have his mother killed for money is, per se, unfairly prejudicial. However, defendant has failed to provide any supporting authority for this blanket assertion. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *Mackle, supra* at 604 n 4. In addition, the testimony was properly admitted pursuant to MRE 404(b). Similarly, counsel cannot be faulted for failing to raise a futile objection to the prosecutor's rebuttal closing argument. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra