STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2010
v	No. 290380 Saginaw Circuit Court
DQUAN FAVORITE, Defendant-Appellant.	LC No. 08-030284-FJ

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of one count of conspiracy to commit first-degree premeditated murder, MCL 750.157a; MCL 750.316, seven counts of attempted murder, MCL 750.91, one count of placing offensive or injurious substances in or near real or personal property, MCL 750.209(1)(b), one count of conspiracy to commit arson of a dwelling house, MCL 750.157a; MCL 750.72, one count of arson of a dwelling house, MCL 750.72, and one count of possession of a firearm during the commission of a felony (felony-firearm), 750.227b. Defendant was sentenced to concurrent prison terms of life with the possibility of parole for conspiracy to commit first-degree premeditated murder, 20 to 80 years for each of the seven counts of attempted murder, 10 to 20 years for placing offensive or injurious substances in or near real or personal property, 10 to 20 years for conspiracy to commit arson of a dwelling house, and 10 to 20 years for arson of a dwelling house. He was also sentenced to a consecutive 2 years' imprisonment for felony-firearm. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

This case arises from events that occurred on December 10, 2007, in Saginaw, Michigan. According to the testimony of witnesses, including that of Darell Hewitt, who agreed to testify "truthfully and completely . . . about the events that occurred December 10th, 2007,"[1] he,

[1] In return for his testimony, the prosecutor's office would dismiss the charge of conspiracy to commit first-degree murder and allow him to plead guilty to the remaining charges. Hewitt was charged with one count of conspiracy to commit first-degree premeditated murder, seven counts of attempted murder, one count of placing offensive or injurious substances in or near real or personal property, one count of conspiracy to commit arson of a dwelling house, one count of arson of a dwelling house, and one count of possession of a firearm during the commission of a

(continued…)

defendant, Caprice Mack, Deontae Davis, Arnell Johnson, Jeremy Williamson, and Deshawn Christopher were drinking and playing games at a house on Sanford Street when Tonya Wilson's car was burned. Travis Crowley[2] testified that his girlfriend, April Johnson, called him and told him that her mom's car "got blew up." Crowley said that Mack got on the phone and told him that "some boys had blew up Tonya['s] car, so . . . they said that they was gonna take care of it."

According to Hewitt, after Wilson's car burned, defendant and Davis discussed retaliating against persons at a duplex located at 1622 Farwell Street in Saginaw because they thought Ronell Hinley had burned the car. Hewitt said that the group planned "to set the [Farwell] car on fire" and "to shoot anybody that come [sic] out of the house." Hewitt testified, however, that there was no agreement to set fire to the house or to kill anyone.

The evidence indicated that defendant, Hewitt, Davis, Mack, Johnson and Williamson went to the house at Farwell to set the car on fire, but they failed to successfully do so. The men returned to the house on Sanford and then defendant, Hewitt, Davis Mack and Christopher made a second trip to the Farwell house. Davis and Mack went into the garage with containers of gasoline and then ran out. This time, the car in the Farwell house garage was set on fire. There was evidence that Hewitt and defendant had guns and that as the fire at the Farwell house spread from the garage to the house, people began to leave the house, and Hewitt and defendant shot at the people as they left.

Defendant, Davis and Mack, who were all tried together, moved for a directed verdict on all counts. Defendant argued that Hewitt's testimony, in a light most favorable to the prosecutor, showed that there was a plan to burn a car in the Farwell house's garage. Defendant argued that this was insufficient to support a charge of attempted murder or conspiracy to commit first-degree murder. The trial court, concluding that the combination of starting a house on fire at 2:00 a.m. and shooting at people as they exited the house "establish[ed] evidence of attempt to murder," denied the motion for directed verdict as to all three defendants. On July 2, 2009, defendant moved for a new trial on the basis of newly discovered evidence, such evidence being an affidavit, purportedly from Hewitt, wherein Hewitt claims that he lied at trial to save himself, and that defendant "is innocent of all charges." The trial court denied the motion without an evidentiary hearing, and this appeal ensued.

(…continued)

felony (felony-firearm). Hewitt's delayed application for leave to appeal was denied. *People v Hewitt*, unpublished order of the Court of Appeals, entered July 8, 2009 (Docket No. 292322).

[2] Travis Crowley, who was incarcerated for carjacking and unarmed robbery at the time of trial, said that he was at a duplex located at 1624 Sanford Street in Saginaw, MI, at the time of the fire but ultimately refused to testify. He denied being threatened or intimidated. As a result of Crowley's refusal to testify, his preliminary examination testimony was read to the jury.

Defendant argues that there was insufficient evidence to support his conviction of conspiracy to commit first-degree premeditated murder. When reviewing a sufficiency challenge, "this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

"[C]onspiracy is a crime separate and distinct from the substantive offense" the parties have conspired to achieve. *People v Hamp*, 110 Mich App 92, 102; 312 NW2d 175 (1981). Conspiracy requires the specific intent to combine with others and the specific intent to accomplish the illegal objective of the conspiracy. *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). It is often stated in case law that "the gist" of the crime is the agreement between the conspirators to commit the substantive offense. See, e.g., *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). An agreement cannot exist where the parties have not manifested a shared intent, which necessarily requires knowledge of the intent of the other conspirators. So while the agreement to conspire may be express or implied, *People v Barajas*, 198 Mich App 551, 553-554; 499 NW2d 396 (1993), it must nevertheless be born of a unity of will that results from an agreement.

Nonetheless, because it is the nature of a conspiracy to be covert, proof of the agreement can be drawn from inferences arising from the conduct of the individual conspirators. *People v Justice* (*After Remand*), 454 Mich 334, 347; 562 NW2d 652 (1997); LaFave, Criminal Law (2d ed, Hornbook Series), § 6.4(d), p 532. Similarly, intent "may be proven directly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Lawton*, 196 Mich App 341, 349; 482 NW2d 810 (1992) (citations omitted). As such, minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). A conspiracy is complete upon the formation of the agreement. *Justice*, 454 Mich at 393.

The illegal objective of the conspiracy in this case was first-degree premeditated murder, which is the intentional killing of a victim where the killing was premeditated and deliberate. *People v Unger*, 278 Mich App 210, 223, 229; 749 NW2d 272 (2008); see also MCL 750.316(1). "To prove a conspiracy to commit murder, it must be established that each of the conspirators have the intent required for murder and, to establish that intent, there must be foreknowledge of that intent." *Hamp*, 110 Mich App at 103.

Viewing the evidence in a light most favorable to the prosecution, the evidence supports the prosecution's theory that defendant conspired with Darell Hewitt, Caprice Mack, and Deontae Davis to kill the occupants of a house located on Farwell Street in Saginaw. Hewitt testified that after Tonya Wilson's car was burned, the group discussed retaliating and picked out the target of the retaliation. According to Hewitt, defendant and Davis stated that the Farwell house was to be the focus of the retaliation. Hewitt testified that the group planned to set a car on fire located at the residence and "to shoot anybody that come [sic] out of the house" to escape the fire. Hewitt said that Davis, Mack, Arnell Johnson, and Jeremy Williamson brought the gasoline to be used to set the fire, and that he and defendant brought handguns to shoot at those exiting the house. Hewitt said that when the group got to the Farwell house, he and Davis went to the house's driveway, defendant and Mack went across the street, and Johnson and Williamson went into the garage. Failing to set the car on fire, the six men returned to the house

where they had been playing games and drinking. At the suggestion of defendant and Davis, defendant, Mack, Hewitt, Davis, and Deshawn Christopher agreed to make a second trip to the Farwell house. On the second trip, Davis and Mack were going to start the car on fire, Hewitt and defendant were supposed to shoot people that came out of the house, and Christopher was the lookout.

Hewitt said that he watched Davis and Mack go into the garage with the containers of gasoline and then come running out. Hewitt said that he ran across the street, looked back, and saw that the car parked in the Farwell house's garage was on fire. Travis Crowley said that after a few minutes, the fire spread from the garage to the house, and after about ten or 15 minutes, people began to leave the house. Hewitt said that from across the street, he and defendant started shooting at the people when they came out of the house. Crowley recalled that Davis said later, "That's how you set a fire."

Hewitt did testify on cross-examination that there had been no agreement to set the house on fire or to kill its occupants. As instructed, however, the jury was free to believe or disbelieve, in whole or in part, the testimony presented at trial. *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976). We will not engage in second-guessing the jury's determination of witness credibility and reweigh the evidence. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

Viewing the evidence in a light most favorable to the prosecution, and deferring to the jury on matters of witness credibility, sufficient evidence was presented at trial to support defendant's conviction of conspiracy to commit first-degree murder. Defendant's actions and the inferences arriving from them were sufficient to show the existence of a unity of intent born of the conspiratorial agreement.

Defendant also argues that there was insufficient evidence to support his conviction of attempted murder. Attempted murder and assault with intent to murder are mutually exclusive crimes. *People v Long*, 246 Mich App 582, 589; 633 NW2d 843 (2001). The attempted murder statute, MCL 750.91, is intended to proscribe those attempts at murder that are beyond the assault with intent to murder statute. *People v Smith*, 89 Mich App 478; 280 NW2d 862 (1979). MCL 750.91 provides:

> Any person who shall attempt to commit the crime of murder by poisoning, drowning, or strangling another person, *or by any means not constituting the crime of assault with intent to murder*, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years. [Emphasis added.]

Thus, to convict a defendant of attempted murder, the prosecution must prove: (1) that the defendant attempted to commit the crime of murder; and (2) that the attempt at murder did not involve an assault. *Long*, 246 Mich App at 589.

Defendant attempts to characterize his actions as assaultive. Defendant argues that shooting at the occupants as they fled with the intent to kill them would support a charge of assault with intent to murder, not attempted murder. Defendant is correct that his conduct in

shooting at the homeowners involved an assault,[3] and thus cannot be the basis of an attempted murder charges. MCL 750.91. However, like in *Long*, there are two distinct events that took place in this case: the fire and the shooting.

Because defendant did not start the fire, his attempted murder conviction must be based on an aiding and abetting theory. The aiding and abetting instruction was read to the jury. The aiding and abetting statute, MCL 767.39, provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

The elements of aiding and abetting are: (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 that the defendant gave aid and encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). A person's mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider and abettor. *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983).

To prove that Mack or Davis attempted to commit the crime of murder when setting the fire, the prosecution is required to show that they intended to bring about a death. *Long*, 246 Mich App at 589. Because attempt is a specific intent crime, a showing that they intended to bring about a death may not be based on negligent or reckless actions. *Id.*; *People v Hall*, 174 Mich App 686; 436 NW2d 446 (1989). Intent to kill may be inferred from act. *People v Ng*, 156 Mich App 779, 785; 402 NW2d 500 (1986).

The evidence presented at trial was more than legally sufficient for a rational trier of fact to infer their intent to kill from their acts. *Id*. The group of conspirators suspected that Hinley, who resided at the Farwell house, had burned Wilson's car. Hewitt testified that defendant and Davis wanted to retaliate for the burning. According to Crowley, Mack told him, "Man, Bro, some n**** done blew up mom's car, but yeah, we got these bombs, they gonna get 'em back, we gonna take care of it." The actions taken in furtherance of the plan are set forth above. Viewing the evidence in the light most favorable to the prosecution, the jury was free to disbelieve Hewitt's testimony that the group only intended to burn the car. *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976). Further, given that the fire was started at a time when people are typically home and sleeping, and that the group planned to shoot at anyone who exited the house, a rational jury could conclude that defendant and his codefendants intended that

[3] An assault may be established by showing "that one has attempted an intentional, unconsented, and harmful or offensive touching of a person." *People v Starks*, 473 Mich 227, 229; 701 NW2d 136 (2005). Here, shooting at the occupants was an attempted, intentional, unconsented, harmful touching of the occupants.

the fire would spread to the attached house and kill those inside. From this evidence, a rational jury could infer that the house did not catch fire and nearly kill the occupants because of negligent or reckless actions, but that this was their intent. *Long*, 246 Mich App at 589. Thus, Mack and Davis committed the crime of attempted murder.

Additionally, viewed in the light most favorable to the prosecution, a fact finder could have reasonably concluded that defendant aided and encouraged Davis and Mack to commit attempted murder by traveling to the Farwell house with Davis and Mack on two occasions, and suggesting that the group return to the Farwell house after the first failed attempt. Evidence was also presented that defendant provided aid and encouragement by shooting at the occupants of the Farwell house as they fled the fire.

In sum, based on the evidence, a reasonable jury could have concluded that defendant aided and abetted Mack and Davis in attempting to kill the occupants of the Farwell house by setting the fire.

We also reject defendant's argument that admission of Crowley's preliminary examination testimony violated his right to confrontation because he did not have an opportunity to fully and adequately cross-examine Crowley at the preliminary examination. The trial court admitted Crowley's preliminary examination testimony under MRE 804(b)(1). MRE 804 provides exceptions to the hearsay rule when the declarant is unavailable as a witness. According to the rule, unavailability includes when a declarant "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." MRE 804(a)(2). If the declarant is unavailable, MRE 804(b)(1) provides that "former testimony" is not excluded by the hearsay rule:

> Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

In this case, Crowley was physically present at trial, but refused to testify. After first testifying to a lack of memory on a number of the circumstances of the incident, Crowley abruptly ended his testimony:

Witness: I ain't got nothin' to say, man. I ain't got nothin' to say.

Prosecutor: What does that mean, you don't want to testify?

Witness: I ain't talkin', that's what I'm sayin'.

* * *

The Court: Mr. Crowley, you're required to answer the questions. Are you refusing to answer questions?

Witness: I'm done man.

The trial court did not err in finding Crowley "unavailable." It is clear from the above testimony that Crowley was adamantly refusing to testify. When a witness "adamant[ly] refus[es] to testify at trial," the trial court is justified in finding that the witness is unavailable without threatening contempt charges. *People v Burgess*, 96 Mich App 390, 401; 292 NW2d 209 (1980).

There is no dispute that defendant had the opportunity to cross-examine Crowley at the preliminary examination. The issue is whether defendant had a similar motive to cross-examine Crowley as he would have at trial. Whether a defendant "had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony is presented at each proceeding." *People v Farquharson*, 274 Mich App 268, 275; 731 NW2d 797 (2007). In *Farquharson*, this Court adopted three "nonexhaustive" factors to use in determining whether the party had a similar motive to examine a witness at a prior proceeding:

> (1) whether the party opposing the testimony "had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue"; (2) the nature of the two proceedings-both what is at stake and the applicable burden of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and available but forgone opportunities). [*Id.* at 278.]

Defendant's interest and motive for cross-examining Crowley during the preliminary examination were sufficiently similar to those existing at trial so as to permit the admission of Crowley's preliminary examination testimony. The purpose of a preliminary examination is to establish probable cause that a crime has been committed and probable cause that the defendant committed the crime. *People v Johnson*, 427 Mich 98, 104, 398 NW2d 219 (1986). At trial, Crowley's preliminary examination testimony was introduced for the same purpose, albeit with a differing standard of proof. Defendant's interest and motive in discrediting Crowley's testimony was identical at both proceedings even given the differing burdens of proof at the preliminary examination and trial. See *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009).

Furthermore, because MRE 804(b)(1) is a firmly rooted hearsay exception, evidence admitted under the exception does not violate defendant's constitutional right to confrontation. *People v Meredith*, 459 Mich 62, 69-71, 586 NW2d 538 (1998).

We also reject defendant's argument that the trial court violated his rights under the Confrontation Clause by admitting hearsay evidence through the preliminary examination testimony of Crowley. At the preliminary examination, Crowley testified that he was on the phone with his girlfriend when Mack got on the line. According to Crowley, Mack told him that "they was gonna take care of it," referring to his belief that Hinley had burned Wilson's car. Crowley also testified that Mack said, "Man, Bro, some n**** done blew up mom's car, but yeah, we got these bombs, they gonna get 'em back, we gonna take care of it." Defendant argues that the conversation should have been excluded based on MRE 801(d)(2)(E) (statements in furtherance of conspiracy) because the statements were not made in furtherance of the conspiracy.

Defendant is correct that the statements were inadmissible under MRE 801(d)(2)(E). However, the statements Mack were clearly admissible under the hearsay exception in MRE 803(3). MRE 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is not excluded by the hearsay rule. Here, Mack's statement that the conspirators' had bombs and that they were going to retaliate against Hinley clearly reflected Mack's then existing state of mind as to intent, plan, and motive. From his statement it is clear that his intent was to retaliate against Hinley, his plan was to use gasoline bombs, and his motive was revenge. Therefore, the trial court did not err in admitting this evidence.

As to defendant's argument that admission of this evidence violated his rights under the Confrontation Clause, this Court has recognized that statements admissible under MRE 803(3) do not violate the Confrontation Clause. See *People v Coy*, 258 Mich App 1, 16; 669 NW2 831 (2003).

Moreover, because this issue is unpreserved defendant bears the burden of establishing that the error affected the outcome of the lower court proceedings. *People v Borgne*, 483 Mich 178, 196-197; 768 NW2d 290 (2009). Here, even if admission of the statements Mack made to Crowley was improper, such admission was harmless beyond a reasonable doubt in light of the abundance of incriminating evidence presented against defendant, including eyewitness testimony that defendant started shooting at the occupants as they tried to escape the house.

Defendant's final argument is that the trial court abused its discretion in denying his motion for a new trial or evidentiary hearing based on a recanting affidavit purportedly from Hewitt. Defendant did not establish either to the trial court or on appeal that a different result was probable on retrial. Accordingly, the trial court did not abuse its discretion in denying defendant's motion, which was based on a highly suspect affidavit from Hewitt in which he recanted his trial testimony. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens