STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 18, 2000
v	No. 208739 Bay Circuit Court
LAWRENCE ANDREW KASKE, Defendant-Appellant.	LC No. 97-001298-FC

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of solicitation to commit murder, MCL 750.157b; MSA 28.354(2), and was sentenced to twenty-five to fifty years' imprisonment. Defendant appeals by right. We affirm defendant's conviction, but remand for correction of his judgment of sentence.

I

Defendant first argues that his conviction must be reversed because he was entrapped. We disagree. After a pretrial evidentiary hearing, the trial court denied defendant's motion to dismiss the charge based on entrapment. We review a trial court's ruling on a claim of entrapment for clear error. *People v D'Angelo*, 401 Mich 167, 183; 257 NW2d 655 (1977); *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998). A trial court's findings are clearly erroneous if, after review of the record, we are left with a firm conviction that a mistake was made. *Connolly*, *supra*. An objective test is used to determine if entrapment has occurred. The objective test focuses on the conduct of the police rather than whether the defendant was predisposed to commit the crime. *People v Juillet*, 439 Mich 34, 52-54; 475 NW2d 786 (1991); *D'Angelo, supra* at 178.

> Entrapment occurs when (1) the police engage in impermissible conduct that would induce a person situated similarly to the defendant and otherwise law abiding to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. [*People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999), citing *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997).]

In the present case, the evidence suggests defendant contacted his friend Michael Banaszak in search of a "hit man" to kill Robert Tanner, who was dating defendant's former girlfriend. Banaszak went to the police and the police arranged for an undercover officer to pose as a "hit man." On March 11, 1997, the police recorded two telephone conversations, during which Banaszak informed defendant that he had contacted a "hit man" that was available to meet with defendant at a local hotel. Banaszak told defendant that the "hit man" would need $100 "good faith money" as down payment and that his total fee would be approximately $1,500. Defendant spoke with the undercover officer posing as the "hit man" and arranged to meet him later that evening. Defendant did not show up for that initial meeting. The following day, defendant contacted Banaszak and explained that he missed the meeting because he had gone to the wrong hotel. During a tape recorded telephone conversation on March 12, 1997, Banaszak informed defendant that the "hit man" was still willing to work with defendant despite nervousness caused by defendant's failure to show up for the first meeting. Defendant told Banaszak that he desired to arrange another meeting. On March 13, 1997, the police recorded another conversation, during which Banaszak informed defendant the "hit man" was willing to meet that afternoon in a parking lot. Defendant arrived at the parking lot at the specified time and entered the supposed "hit man's" vehicle. According to the ensuing tape recorded conversation, defendant stated that he could not provide a "perfect description" of Tanner, but did say that Tanner was in his late thirties. Defendant also provided Tanner's address and described Tanner's vehicles and the times he suspected Tanner would be alone at home. Defendant requested that the "hit man" "dust," "waste," and "kill" Tanner and gave the undercover officer $133. Defendant was then arrested.

On appeal, defendant contends that he is a law abiding citizen, who was entrapped by the police through exploitation of his friendship with Banaszak, provision of attractive inducement to commit the crime, and continued pressure to commit the crime. Defendant also contends that Banaszak helped with the entrapment in order to receive personal favors from the police.

The record does not support defendant's contention that the police exploited defendant's and Banaszak's friendship. Banaszak did not play on defendant's sympathy as a friend or plead with defendant to meet with the undercover officer or to commit the crime. In fact, the record demonstrates Banaszak made several attempts during his conversations with defendant to discourage defendant from meeting with the "hit man" and from going through with the crime. It was defendant who approached Banaszak about contacting a "hit man" and who ultimately met the "hit man" and requested that Tanner be killed. Cf. *People v Duis*, 81 Mich App 698, 702-704; 265 NW2d 794 (1978) (holding that the defendant was entrapped where an informant cultivated a friendship with the defendant for the sole purpose of inducing the defendant to sell drugs after the police promised the informant freedom if he arranged for another drug arrest and the informant exploited the friendship for personal gain); *People v Soper*, 57 Mich App 677, 678-679; 226 NW2d 691 (1975) (holding that the defendant was entrapped where a police officer/childhood friend of the defendant impermissibly played on the defendant's friendship and sympathy by claiming desperate need of drugs after the defendant indicated he no longer had drug connections); see also *People v Mulkey*, 153 Mich App 737, 740; 396 NW2d 514 (1986).

Moreover, the police did not improperly induce defendant to commit the crime. Defendant claims that Banaszak originally informed him it would cost $25,000 to hire someone to kill Tanner, but later indicated it would cost $2,500. During a tape recorded conversation on March 11, 1997, Banaszak told defendant it was up to him to work out a deal with the "hit man," but estimated he would be charged $1,500 ($100 down payment with the balance due at some unspecified later date). Defendant argues that the lowered price and payment arrangements were "outrageously attractive" and constituted improper inducement to commit the crime. However, we find it unlikely that a law abiding person under similar circumstances would be induced to solicit for first-degree murder merely because the fee and payment arrangements made the crime affordable. *Juillet, supra* at 57.

We also conclude that the police did not impermissibly pressure defendant to commit the offense. Defendant cites the several contacts Banaszak had with him leading up to his meeting with the undercover officer as proof that he was pressured into commission of the crime. Defendant originally approached Banaszak concerning his desire to have Tanner killed. During each of the four tape recorded conversations with Banaszak, defendant indicated a willingness to meet and hire the "hit man." Defendant explained that he had intended to meet with the "hit man" as planned on March 11, but inadvertently went to the wrong hotel. Defendant contacted Banaszak after that failed meeting and communicated his desire to arrange another meeting with the "hit man." Given defendant's continued discussion of details of the scheme with Banaszak and his desire for Banaszak to arrange meetings with the "hit man," we do not consider the number of contacts Banaszak had with defendant compelling evidence that defendant was impermissibly pressured to commit the offense. Cf. *People v Rowell*, 153 Mich App 99, 102; 395 NW2d 253 (1986) (holding that the defendant was entrapped where the evidence suggested police informants kept "buggin'" the defendant to purchase drugs two to three times per week for a period of three months despite defendant's repeated refusals).

Defendant further claims that he was pressured to arrange a second meeting and pressured into committing to the deal with the "hit man" by insinuations during conversations with Banaszak and the "hit man" that he would be harmed if he refused to go forward with the deal. After defendant did not attend the first meeting, Banaszak informed him the "hit man" was still willing to work with him, stating:

> He's a professional. He's not, he's not Joe Shit, the rag man here, he's, the guy's a professional. He knows what he's doing but I think he'll work with you. But again, that's, that's going to be up to you to talk with him. That's what you need to sit down and talk with him. This guy, this guy, you know, you didn't show last and he's, he's, he's, I mean he's just, he's more nervous than you cause he's skipped.

During defendant's subsequent meeting with the supposed "hit man," the undercover officer told defendant he was "real hinked" by defendant's failure to show up at the first meeting. After defendant apologized, the officer stated: "Well, one mistake - that's it." We conclude those statements, which defendant claims were threats that caused defendant to go forward with the plan, can be reasonably interpreted as merely communicating the "hit man's" nervousness to deal with defendant after defendant's failure to attend the first meeting. The statements are not clear threats and, consequently, we conclude that the circumstances are not sufficiently compelling to find that the trial court clearly erred in finding the police did not pressure defendant to commit the crime.

Furthermore, there is no evidence to support defendant's claim that Banaszak was inclined to help the police entrap defendant to gain personal favors from the police. Banaszak was not charged with any crime and, therefore, was not cooperating under any promise of leniency. Cf. *Duis, supra*. While it appears Banaszak was acquainted with police officers as a result of a prior incident that involved his niece and stepson, there is no evidence to suggest Banaszak or his family members were promised or, in fact, received preferential treatment by the police as a result of Banaszak's cooperation in defendant's arrest.

Overall, the evidence suggests defendant contacted Banaszak and was involved in setting up two meetings with the supposed "hit man." Defendant ultimately met the "hit man," provided him personal information regarding Tanner, requested that he "dust," "waste," and "kill" Tanner, and paid him $133 as a down payment for the murder. Notwithstanding defendant's lack of a prior criminal record, the evidence demonstrates that defendant initiated and committed the serious offense of solicitation for murder and that the police did not act impermissibly during the investigation. Accordingly, the trial court did not clearly err in ruling defendant was not entrapped by the police. *D'Angelo, supra* at 429; *Connolly, supra*.

II

Defendant next argues that the trial court abused its discretion in permitting jurors to use transcripts of the tape recorded conversations as aids when listening to the tapes during trial because the transcripts were never authenticated and constituted inadmissible hearsay. We disagree. The decision whether to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Transcripts of recorded conversations should be excluded from trial where there is no determination of their accuracy. *People v Lester*, 172 Mich App 769, 774-776; 432 NW2d 433 (1988). In the present case, prior to trial, there was some question as to the accuracy of limited portions of the transcripts due to background noise on the tapes. The trial court allowed the parties the opportunity to review the tapes and transcripts and to make agreed-upon revisions to the transcripts. Thereafter, defendant's counsel conceded that the transcripts of the March 11, 1997, conversations between defendant and Banaszak were accurate. He also stated that, to the extent any inaccuracies remained in the transcript of defendant's and Banaszak's conversation on March 12, 1997, he would challenge the inaccuracies during cross-examination of the witnesses. Defendant's counsel indicated that some revision was to be made to the transcript of the March 13, 1997, conversation between defendant and the undercover officer and did not, thereafter, claim any inaccuracy remained in that transcript. The trial court analyzed the tapes and transcripts when considering defendant's motion to dismiss based on entrapment. The trial court stated that it found the transcripts helpful and believed the jury would as well. Consequently, the jury was allowed to read along with copies of the transcripts while the tapes were played at trial. Under such circumstances, where the parties and the trial court had the opportunity to evaluate and revise the transcripts to ensure their accuracy before giving them to the jury, we conclude it was not error to allow the jury limited use of the transcripts.[1] Cf. *Lester, supra*

[1] The trial court indicated that the tapes were decipherable, but were hard to hear at times. The trial

(the accuracy of the transcripts that were given to the jury was not established with any degree of certainty).

At no time has defendant specifically pointed to alleged inaccuracies in the transcripts. Moreover, any prejudice that resulted from the jury's use of the transcripts was removed by the trial court's clear instruction that the tapes of the conversations were evidence, not the transcripts. The trial court properly made only the tapes available to the jury for review during deliberations.

III

Defendant also argues that the trial court erred in instructing the jury regarding a renunciation defense over defendant's objection to such an instruction. We disagree. We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Even if somewhat imperfect, jury instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). "Jury instructions must include all the elements of the charged offense and must not exclude material issue, defenses, and theories that are supported by the evidence." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998), citing *Piper, supra*. An instruction on a defense may be given even when it is not requested by the defendant where defense counsel emphasized the defense during trial. See *People v Glover*, 154 Mich App 22, 35; 397 NW2d 199 (1986); *People v Morris*, 99 Mich App 98, 100; 297 NW2d 623 (1980). In the present case, the defense theory was that defendant acted under duress when he contacted the "hit man" and that he never intended that Tanner actually be killed. The evidence at trial suggests defendant spoke with Banaszak regarding his intent to have Tanner killed and the price the "hit man" would charge. Defendant spoke directly to the undercover officer posing as the "hit man" and arranged a meeting. Defendant testified that his reason for not showing up for the meeting was that "reality was really startin' to kick in." Defendant claimed he subsequently met and dealt with the "hit man" out of fear, not an intention that Tanner be killed. That evidence supports a renunciation instruction and the instruction given by the trial court was appropriate. *Crawford, supra*; *Glover, supra*. Furthermore, defendant's claim that the renunciation defense instruction was error because it confused the jury regarding the burden of proof lacks merit. The jury was properly instructed regarding the prosecution's burden of proving defendant's guilt and the renunciation instruction merely provided that defendant must show renunciation by a preponderance of the evidence in order for the defense to apply. We generally presume that jurors follow their instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

IV

Defendant next argues that manifest injustice occurred when the jury was allowed to hear the portion of a tape recorded conversation between Banaszak and a police officer in which the officer stated the penalty for defendant's offense was five years because the jury was incorrectly informed of

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court believed reading along with the transcript would avoid backing up and replaying portions of the tape during trial.

defendant's sentence. We disagree. A jury must confine its deliberations to guilt or innocence and, thus, should not consider post-verdict consequences. *People v Goad*, 421 Mich 20, 25, 26-27; 364 NW2d 584 (1984), citing *People v Warner*, 289 Mich 516, 521; 286 NW 811 (1939). Here, the trial court instructed the jury that any penalty referred to in the recorded conversation must not influence its decision. We conclude that instruction was sufficient to remove any prejudice caused by the complained-of portion of the recording.

V

Defendant further argues that the trial court abused its discretion by imposing a twenty-five to fifty year sentence. We disagree. Matters of sentencing are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 635-636; *Rice, supra*. Defendant contends his sentence is disproportionate given his lack of a prior criminal record and given that the offense did not pose a real threat of harm because the "hit man" was actually a police officer.[2]

Despite defendant's lack of a prior criminal record, we cannot conclude that the trial court abused its discretion in imposing sentence. We do not find compelling defendant's argument that his crime did not present any real threat because the "hit man" was actually a police officer. Defendant hired an individual he believed was an experienced, professional "hit man" to kill Tanner, telling the supposed "hit man" to "[d]ust him. Waste him. Kill him." Such calculated conduct was apparently motivated by defendant's selfish need to once again associate himself with his former girlfriend and exhibited a complete disrespect for human life. As indicated by the trial court at sentencing, even after defendant was convicted, he attempted to excuse and justify his conduct. Under these circumstances, we conclude that the trial court's sentence is proportionate to the offense and the offender.[3]

Defendant also claims that his sentence constitutes cruel and unusual punishment. However, given our conclusion that defendant's sentence is proportionate, the sentence also is not cruel and unusual. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993), citing *People v Bullock*, 440 Mich 15, 40-41; 485 NW2d 866 (1992).

VI

Finally, defendant argues that his judgment of sentence must be corrected because it erroneously states he was convicted of first-degree murder. We agree. A nondiscretionary or ministerial error in a judgment of sentence, may be corrected by an order nunc pro tunc. *People v Maxson*, 163 Mich App 467, 471; 415 NW2d 247 (1987). Where a judgment of sentence misstates

[2] There is no sentencing guideline range for the crime of solicitation.

[3] To the extent defendant argues that the fact he was fifty-nine years old at the time of sentencing supports a less harsh sentence, we note that a sentencing court is not required to tailor a defendant's sentence to account for his age. *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997).

the crime for which the defendant was convicted, the proper remedy is to remand for correction. *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999). Here, defendant's judgment of sentence states that he was convicted of "Homicide Murder 1st Deg-Premeditated." Because defendant was actually convicted of solicitation to commit murder, we remand for the limited purpose of correcting defendant's judgment of sentence.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra