STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR S. MANN,

Defendant-Appellant.

UNPUBLISHED
October 27, 2000

No. 209711
Macomb Circuit Court
LC No. 96-000144-FC

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1), MCL 750.316; MSA 28.548, and solicitation of first-degree murder, MCL 750.157b; MSA 28.354(2), MCL 750.316; MSA 28.548. He was sentenced to concurrent terms of mandatory life and life in prison, respectively. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court abused its discretion in admitting evidence of the victim's murder. We disagree. We review a trial court's admission of evidence for an abuse of discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). Here, the evidence of the murder itself was highly probative of defendant's guilt. Defendant's coconspirator, Eric Masters, testified with regard to defendant's instructions on how he wanted the murder committed. The details of the murder were relevant because the manner in which the murder ultimately was carried out closely matched defendant's instructions and because it corroborated the testimony of Masters and those he solicited to commit the murder. The evidence, although prejudicial, was not unfairly prejudicial. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995), citing *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). Moreover, any potential prejudice was cured by the trial court's repeated instructions regarding the limited purpose for which the evidence was admitted. We find no abuse of discretion.

Defendant argues next that the trial court erred in admitting evidence that he had defrauded his workers' compensation insurance carrier. Again, we disagree. "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person to show action in conformity therewith." MRE 404(b)(1). Thus, if the sole purpose in offering the evidence is to show the defendant's propensity for

particular conduct based on his character as inferred from other wrongful conduct, it is not admissible. *People v VanderVliet*, 444 Mich 52, 63, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). It may be admissible, however, for another purpose, such as proof of motive, if that purpose is material. MRE 404(b)(1); *VanderVliet, supra* at 64, 74.

Here, defendant's accountant testified that defendant stated the victim had spoken of exposing the insurance fraud and that defendant remarked, "our problems were solved," after the victim died. Accordingly, the evidence regarding defendant's alleged participation in insurance fraud was highly probative of defendant's motive to have the victim, his own brother-in-law, murdered. It also lent credence to Masters' testimony about the conspiracy and solicitation. Further, as with the evidence of the victim's murder, the evidence of the insurance fraud was not unfairly prejudicial, *Mills, supra,* and the trial court's limiting instructions effectively eliminated any potential prejudice.

Likewise, we find no error in the trial court's decision to admit evidence that defendant attempted to obtain a silencer and that he possessed an unregistered revolver. The evidence was relevant to prove that defendant intended that the victim be murdered, such intent being an element of solicitation. *People v Crawford*, 232 Mich App 608, 616; 591 NW2d 669 (1998). It was also admissible as part of the res gestae, or complete story, of the offense. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). According to trial testimony, it was Masters' inability to obtain a reasonably-priced silencer for defendant's revolver that led, at least in part, to defendant soliciting Masters to kill the victim. Again, we find that the probative value of the evidence was not outweighed by the danger of unfair prejudice. *Mills, supra*.

Defendant argues next that he was deprived of a fair trial due to prosecutorial and police misconduct. Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant contends that the prosecutor engaged in misconduct by expressing a personal belief in defendant's guilt. We disagree. When the prosecutor's remarks are viewed in context, it is clear that he was conveying to the jury that it was the evidence that led him to believe that defendant was guilty. Because the prosecutor tied his belief to the evidence presented at trial, his remarks were not improper. *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). Defendant's claim that the prosecutor engaged in misconduct by addressing two jurors by name is deemed abandoned due to the absence of citation to supporting authority. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, the trial court's instruction that the lawyers' statements and arguments were not evidence was sufficient to dispel any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

We find no misconduct with respect to the investigating officer's testimony. His inadvertent and mistaken use of the word "tax" when defining the acronym ATF was not prejudicial and, therefore, does not warrant reversal. *People v Van Dorsten*, 96 Mich App 356, 363; 292 NW2d 134 (1979), rev'd on other grounds 409 Mich 942 (1980). Likewise, the officer's inadvertent reference to the fact

that a potential suspect had taken a polygraph examination does not constitute prejudicial error, *People v Murry*, 108 Mich App 679, 684; 310 NW2d 836 (1981); the results of the examination were never disclosed and the person who was tested did not testify as a witness at trial. Any prejudice resulting from the officer's statement that the FBI was interested in prosecuting defendant federally for insurance fraud could have been eliminated by a timely request for a curative instruction. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). We also find that the officer's testimony regarding an incident involving him and defendant's daughter was not such as to deprive defendant of a fair trial, and the court's instruction that the jury was to disregard the statement was sufficient to dispel any potential prejudice. Finally, we reject defendant's claim of error predicated on the officer's alleged conflict of interest. The officer was competent to be a witness, MRE 601, and defendant properly cross-examined him to test the truthfulness of his testimony by eliciting evidence of any fact influencing his testimony. *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). It was up to the jury to decide how such evidence affected the officer's credibility and how much of his testimony to accept. *People v LaPorte*, 103 Mich App 444, 447; 303 NW2d 222 (1981).

Defendant next contends that the trial court erred in denying his motion to suppress evidence because the affidavit in support of the search warrant contained stale information and failed to establish probable cause to believe that evidence of a crime would be found in defendant's home. When reviewing a magistrate's conclusion that probable cause to search existed, this Court does not review the matter de novo or apply an abuse of discretion standard. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). Rather, affording deference to the magistrate's determination that probable cause did exist, this Court considers only whether the actual facts and circumstances presented to the magistrate would permit a reasonably cautious person to conclude that there was a substantial basis for the finding of probable cause. *People v Sloan*, 450 Mich 160, 168-169; 538 NW2d 380 (1995); *Russo, supra*. Probable cause to search must exist at the time the warrant is issued. *Id.* at 606.

> Time as a factor in the determination of probable cause to search is weighed and balanced in light of other variables in the equation, such as whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense. [*Id.* at 605-606.]

The "search warrant and underlying affidavit are to be read in a common-sense and realistic manner." *Id.* at 604.

Here, the facts and circumstances described in the affidavit, including the ongoing negotiations between defendant and Masters to have the victim murdered, defendant's ongoing participation in insurance fraud, the proceeds of which are generally accounted for in separate records, and the reasonable inference that one would need to have those records at hand in order to reconcile them with bank statements received and reviewed at home, were sufficient to provide a substantial basis for the magistrate's determination of probable cause. Further, because the records sought were of a type normally kept for long periods of time, the information was not stale. *United States v McManus*, 719 F2d 1395, 1401 (CA 6, 1983).

Defendant argues next that the cumulative effect of errors in his trial denied him a fair trial. As discussed above, however, any arguable errors during defendant's trial were of little consequence. Accordingly, reversal of defendant's conviction on the basis of cumulative error is not warranted. *People v Cooper*, 236 Mich App 643, 660; 601 NW2d 409 (1999).

Lastly, defendant claims that his convictions for both conspiracy to commit murder and solicitation of murder violate the constitutional prohibition against double jeopardy. We disagree. *People v Burgess*, 153 Mich App 715, 732-733; 396 NW2d 814 (1986).

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Brian K. Zahra