

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEBRA LYNN STARR,

Defendant-Appellant.

UNPUBLISHED

March 16, 2001

No. 219364

Oakland Circuit Court

LC No. 98-163569-FC

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, as a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant's conviction arose from the murder of Paul Lingnau, who was shot multiple times with a semi-automatic handgun. Defendant was sentenced to life imprisonment without parole. She appeals as of right. We affirm.

Defendant first contends that the trial court erroneously allowed the prosecutor to present evidence of her involvement in the attempted murder of Argil Dennis. It was the prosecutor's theory that defendant conspired to have Dennis killed because he could implicate defendant in Lingnau's murder. Defendant maintains that this evidence was unduly prejudicial and that it should have been excluded under MRE 404(b).

This Court reviews a trial court's admission of evidence under the abuse of discretion standard. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

MRE 404(b) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The court rule is a nonexhaustive list of situations in which the general rule excluding character evidence is not offended because the evidence is probative of some fact other than the defendant's criminal propensity. *People v Engelman*, 434 Mich 204, 212; 453 NW2d 656 (1990). Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a purpose other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994).

At trial, evidence indicated that defendant solicited Dennis' murder because he could connect defendant to the gun used to shoot Lingnau. The prosecutor argued that defendant's attempt to have Dennis killed showed her consciousness of guilt regarding Lingnau's murder. Consciousness of guilt is a proper noncharacter purpose under MRE 404(b). "A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt." *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996); *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Accordingly, we conclude that the trial court did not abuse its discretion in admitting the evidence.

Defendant next contends that the trial court erroneously denied her motion for a directed verdict because the evidence was insufficient to prove that she aided and abetted Lingnau's murder. We disagree. A directed verdict of acquittal should be granted when the evidence is insufficient to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). In considering a motion for a directed verdict, the court must view the evidence in the light most favorable to the prosecution. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The prosecutor charged defendant with first-degree premeditated murder, as an aider and abettor. In *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), this Court set forth the law concerning aiding and abetting:

One who procures, counsels, aids or abets in the commission of an offense may be convicted and punished as if he directly committed the offense. "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime.

A defendant may be charged as a principal but convicted as an aider and abettor. To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (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 he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that

may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime.

To sustain an aiding and abetting charge, the guilt of the principal must be shown. However, the principal need not be convicted. Rather, the prosecutor need only introduce sufficient evidence that the crime was committed and that the defendant committed it or aided and abetted it. [Citations omitted.]

The crime of first-degree premeditated murder requires proof that the principal intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Premeditation and deliberation require sufficient time to allow the defendant to take a "second look." *Id.* Premeditation and deliberation may be established by evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide. *Id.*

Shortly before Lingnau's murder, the prosecutor issued several felony warrants against defendant. Lingnau was listed as the complainant on those warrants. The prosecutor contacted defendant's attorney and advised him that defendant should surrender herself for arraignment. Lingnau was murdered later that day. This evidence suggested that defendant had a motive to arrange Lingnau's murder. After Lingnau was killed, defendant asked Marsha Weed-Becker to provide her with an alibi. Several other witnesses testified that they heard defendant admit her involvement in a killing. About a year after Lingnau's murder, defendant told her brother that she had Steiner, an ex-boyfriend, kill Lingnau for her. Two of defendant's former boyfriends also testified that defendant asked them to kill Dennis because she was afraid that he would testify against her and link her to the gun that was used to kill Lingnau. Defendant's statements to witnesses were admissible under MRE 801(d)(2)(A). Although defendant maintains that the witnesses were not credible, the credibility of the witnesses was for the jury to determine. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable the jury to find, as it did, that defendant aided and abetted in the premeditated and deliberate killing of Lingnau. Accordingly, the trial court properly denied defendant's motion for a directed verdict.

Finally, defendant contends that the trial court erred when it permitted Weed-Becker to testify about statements that she heard Steiner make during a conversation with defendant. The trial court admitted the evidence pursuant to MRE 801(d)(2)(E). Defendant argues that the evidence was not admissible under that rule, because the prosecutor did not establish a sufficient foundation for the admission of the evidence by proof, independent of the statements themselves, of the existence of an ongoing conspiracy at the time the statements were made. We disagree.

MRE 801(d)(2)(E) provides:

A statement is not hearsay if –

(2) the statement is offered against a party and is . . .

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.

“Thus, to qualify under the rule, the statement must be made ‘during the course’ *and* ‘in furtherance’ of the conspiracy. If either requirement is unmet, the statement must be excluded.” *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993) (emphasis in original). Also, before a trial court admits statements by a co-conspirator, made during the course and in furtherance of the conspiracy, there must be proof of the conspiracy by independent evidence. MRE 801(d)(2)(E); *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982). “Direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Before the challenged testimony was received, evidence was admitted identifying Steiner as the person who shot Lingnau. Defendant’s brother had testified that defendant and Steiner were living together at his mother’s house. Defendant’s brother also testified that he heard defendant tell Steiner that there was something they had to get rid of, and heard Steiner reply that he would take care of it. After the shooting, he heard defendant mention on the telephone that she had everything taken care of, that she had Lingnau murdered, and that she had Steiner do it for her. Thereafter, defendant’s brother heard defendant and Steiner talking and laughing about something they had dumped into the Detroit River. A year later, defendant told him that Steiner shot Lingnau for her. Thus, the record sufficiently establishes independent proof of a conspiracy at the time the challenged testimony was admitted into evidence. We conclude that the trial court did not abuse its discretion in admitting Weed-Becker’s testimony pursuant to MRE 801(d)(2)(E).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter