STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAULA KUCHIAK,

Defendant-Appellant.

UNPUBLISHED
December 28, 2001

No. 224296
Oakland Circuit Court
LC No. 99-164349-FH

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction, following a jury trial, of solicitation of murder, MCL 750.157b(2). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to a term of twenty to sixty years' imprisonment. We affirm.

Defendant's conviction arises from her attempt to engage an individual to kill Michael D'Anniballe, her ex-boyfriend and the father of her young son. On appeal, defendant initially argues that the prosecution proffered insufficient evidence to support her conviction of solicitation of murder. We disagree.

When reviewing a challenge to the sufficiency of the evidence, we adhere to the following well-established principles of law.

> "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." [*People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1202 (1992).]

In *People v Crawford*, 232 Mich App 608, 616; 591 NW2d 669 (1998), this Court articulated the requisite elements of the offense of solicitation of murder.

> Pursuant to MCL 750.157b(1) " 'solicit' means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation." Solicitation to commit murder is a specific intent

> crime that requires proof that the defendant intended that a murder would in fact be committed. *People v Vandelinder*, 192 Mich App 447, 450; 481 NW2d 787 (1992). Solicitation to commit murder occurs when (1) the solicitor purposely seeks to have someone killed and (2) tries to engage someone to do the killing. *Id.* Solicitation is complete when the solicitation is made. *Id.* A contingency in the plan may affect whether the victim will be murdered, but does not change the solicitor's intent that the victim be murdered. *Id.* at 450-451. Actual incitement is not necessary for conviction. *People v Salazar*, 140 Mich App 137, 143; 362 NW2d 913 (1985).

After reviewing the record evidence in the light most favorable to the prosecution, we are satisfied that a rational trier of fact could conclude that the prosecution proved the elements of solicitation of murder beyond a reasonable doubt. Testimony at trial established that defendant was angry with D'Anniballe after he gained custody of their son, and thereafter discussed ways with her then-boyfriend, Edward Yoder, to have D'Anniballe murdered. According to the record, Yoder arranged contact between defendant and an undercover police officer posing as a "hit man" by the name of "Ice." After "Ice" called defendant's residence and left his pager number, she returned the page that same evening, met him the next day in person, and told him in clear and unequivocal terms that she wanted D'Anniballe killed and his body disposed of in a manner that would avoid detection. Defendant further provided "Ice" with details about D'Anniballe[1] to facilitate the murder, and agreed to pay "Ice" $3,000 for his services. Viewing the evidence in a light most favorable to the prosecution, we are satisfied that a rational trier of fact could conclude beyond a reasonable doubt that defendant specifically intended to have D'Anniballe killed, and attempted to engage the undercover police officer to carry out this endeavor. *Crawford, supra* at 616.

Defendant next argues that the trial court erred in denying her motion to dismiss the charge of solicitation of murder on the basis of entrapment. We disagree.

"A trial court's finding following an entrapment hearing will be upheld unless clearly erroneous." *People v Kent*, 194 Mich App 206, 211; 486 NW2d 110 (1992). The rationale underlying the entrapment defense is "to deter the corruptive use of governmental authority by invalidating convictions that result from law enforcement efforts that have as their effect the instigation or manufacture of a new crime by one who would not otherwise have been so disposed." *People v Juillet*, 439 Mich 34, 52; 475 NW2d 786 (1991) (Brickley, J.). Michigan courts utilize an objective test to determine whether a defendant was entrapped. *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999).

> The objective test focuses on the propriety of the government's conduct that resulted in charges against the defendant rather than on the defendant's predisposition to commit the crime. *People v Patrick*, 178 Mich App 152, 153-154; 443 NW2d 499 (1989). The question is whether the actions of the police were so reprehensible under the circumstances that the court should refuse, as a

---

[1] Specifically, defendant told "Ice" where D'Anniballe worked, his home address, the type of vehicle he drove, his license plate number, and D'Anniballe's physical description.

> matter of public policy, to permit the conviction to stand. *People v Rezendes*, 164 Mich App 332, 334; 416 NW2d 436 (1987). Entrapment occurs when (1) the police engage in impermissible conduct that would induce a person similarly situated 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 Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). [*Hampton, supra* at 156.]

We reject defendant's claim that the trial court's finding that she was not entrapped was clearly erroneous. While defendant testified that she was coerced into a situation where she had to meet with the undercover officer, the objective evidence adduced at the entrapment hearing belies her claim. Rather, the evidence demonstrated that defendant took the initiative in responding to "Ice's" phone call, setting up the subsequent meeting with "Ice," and plotting D'Anniballe's murder. Accordingly, the trial court did not clearly err in finding that the police did not engage in conduct that would induce an otherwise law abiding person in defendant's situation to solicit murder, nor was their conduct so reprehensible or intolerable to the extent that defendant's conviction should not stand. *Id.*

Likewise, we reject defendant's claim that the trial court abused its discretion when imposing sentence. Considered against the backdrop of the premeditated and vicious nature of this crime, defendant's previous criminal history, and her status as a third habitual offender, we are satisfied that her sentence of twenty to sixty years' imprisonment does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). To the extent that defendant maintains that her sentence was grossly disproportionate in comparison to the current legislative sentencing guidelines, we note that the legislative sentencing guidelines are not applicable to the instant case because defendant committed this crime before January 1, 1999. *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

Defendant also argues that the trial court erred in denying her request to reopen the proofs to present documentary evidence in the form of a telephone bill.[2] We disagree.

Whether to allow the admission of evidence is a decision we review for an abuse of discretion. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). A trial court's decision regarding whether to reopen proofs is likewise reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001).

> "Relevant in ruling on a motion to reopen proofs is whether any undue advantage would be taken by the moving party and whether there is any showing of surprise or prejudice to the nonmoving party." [*Id.*, quoting *People v Collier*, 168 Mich App 687, 694-695; 425 NW2d 118 (1988) (footnote omitted).]

---

[2] During her trial testimony, the jurors were provided the opportunity to question defendant. During her direct testimony, defendant testified that she attempted to contact the police by telephone after she met with "Ice." One of the jurors subsequently asked defendant if she had proof in the way of a telephone bill that she attempted to call the police. Defendant responded in the affirmative, indicating that such proof was in her jail cell. The next day, defendant sought to introduce the telephone bill into evidence.

In the instant case, the trial court declined to admit the evidence after it found that its admission would have required additional testimony to authenticate the contents of the bill and the identity of the phone numbers it contained, and because there was no indication that defense counsel was ready to present the necessary witnesses. Moreover, the prosecutor had not received this document in advance, and it appears from the record that the prosecutor was surprised by defendant's attempt to admit it on the last day of trial. On this record, we are unable to conclude that the trial court's decision to foreclose admission of this evidence was an abuse of discretion.

Similarly, we share the trial court's view that the proposed evidence had minimal probative value. The mere fact that defendant called the police does not necessarily substantiate her assertion that she called the police to warn them about the plot to kill D'Anniballe. Similarly, a review of the transcript of the entrapment hearing, as well as defendant's trial testimony, reveals that she had earlier testified about her attempts to telephone the police after meeting with "Ice" as part of her defense. Consequently, we are not persuaded that the phone bill was newly discovered evidence warranting admission on the last day of trial. See *People v Solak*, 146 Mich App 659, 675; 382 NW2d 495 (1985). Under the circumstances, we are not persuaded that the trial court abused its discretion in declining to reopen proofs on the last day of trial.

Finally, the judgment of sentence erroneously reflects that defendant was convicted of first-degree murder, MCL 750.316, rather than solicitation of murder, MCL 750.157b(2). We therefore remand for the limited purpose of correcting the judgment of sentence. *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999).

Defendant's conviction and sentence is affirmed. However, we remand for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell