STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2010
v	No. 290165 Saginaw Circuit Court
CAPRICE LASEAN MACK, Defendant-Appellant.	LC No. 08-030283-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, and one count of arson of a dwelling house, MCL 750.72. The trial court found defendant to be a habitual offender third offense, MCL 769.11. Defendant was sentenced to concurrent prison terms of life with the possibility of parole for conspiracy to commit first-degree premeditated murder, 18 to 40 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. 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. 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 (continued…)

defendant, Dquan Favorite, 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 defendant 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, Davis and Favorite 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, Favorite, Davis, 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, Favorite, Davis and Christopher made a second trip to the Farwell house. Defendant and Davis 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 Favorite 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 Favorite shot at the people as they left.

Defendant, Favorite, and Davis, 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)

dwelling house, and one count of possession of a firearm during the commission of a 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 first 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, Deontae Davis, and Dquan Favorite to kill the occupants of a house located on Farwell Street in Saginaw, MI. 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, Davis and Favorite 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 defendant, Davis, Arnell Johnson, and Jeremy Williamson brought the gasoline to be used to set the fire, and that he and Favorite 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, Favorite and defendant 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 Davis and Favorite, defendant, Davis, Hewitt, Favorite, and Deshawn Christopher agreed to make a second trip to the Farwell house. On the second trip, defendant and Davis were going to start the car on fire, Hewitt and Favorite were supposed to shoot people that came out of the house, and Christopher was the lookout.

Hewitt said that he watched defendant and Davis 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 Favorite 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 next 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.

To prove that a defendant attempted to commit the crime of murder, the prosecution is required to show that the defendant intended to bring about a death. *Id*. Because attempt is a specific intent crime, a showing that the defendant intended to bring about a death may not be

based on the defendant's negligent or reckless actions. *Id.*; *People v Hall*, 174 Mich App 686; 436 NW2d 446 (1989). However, the defendant's intent to kill may be inferred from his acts. *People v Ng*, 156 Mich App 779, 785; 402 NW2d 500 (1986).

The evidence was sufficient for a rational trier of fact to infer defendant's intent to kill from his acts. Defendant and his associates suspected that a man who resided at the Farwell house had burned Wilson's car. Hewitt testified that Davis and Favorite wanted to retaliate for the burning. According to Crowley, defendant 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. 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 the fire would spread to the attached house and kill those inside. Accordingly, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of attempted murder.

Defendant next argues that the trial court erred by omitting an element of attempted murder from the jury instructions. Because defense counsel expressed satisfaction with the instructions as given, he has waived any challenge to the jury instruction. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Defendant also argues, however, that defense counsel was ineffective for failing to raise this instructional issue. Our review of this unpreserved claim of ineffective assistance is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

To establish ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defense counsel's failure to challenge the jury instructions fell below an objective standard of reasonableness under prevailing professional norms because it allowed the jury to consider the shooting incident as a basis for finding defendant guilty of attempted murder. "Jury instructions must clearly present the case and the applicable law to the jury." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Thus, the jury instructions "must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *Id.* Here, error occurred because the instruction did not include all elements of the charged offense of attempted murder and thus did not fairly present the issues to be tried. Specifically, the attempted murder instructions in this case did not accurately explain that the jury's consideration must be premised solely on the setting of the fire.

However, there is not a reasonable probability that the result of the proceedings would have been different if the proper instruction had been given. Given that there was more than sufficient evidence to convict defendant of attempted murder based solely on the fire incident, it is improbable that defendant would have been acquitted of attempted murder.

Defendant next argues that the prosecutor committed misconduct by misstating the law. An unpreserved claim of prosecutorial misconduct is reviewed for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130

(1999); *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). The 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). Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court must examine the record and evaluate a prosecutor's remarks in context. *Id.* The remarks must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

In this case, as a result of Hewitt's testimony about his agreement with prosecutors, the jurors learned information about the possible sentences that defendant and his codefendants faced. They learned that a conviction of conspiracy to commit first-degree premeditated murder, the charge that would be dropped as a result of Hewitt's agreement, carried a mandatory sentence of life with the possibility of parole. They also learned that a conviction of attempted murder, a charge that Hewitt would plead guilty to, also carried the potential for a life sentence. During closing argument, the prosecutor attempted to summarize this information. He told the jury that a conspiracy to commit first-degree murder charge "carries life, but is subject to parole after 10 years." He also told the jury that Hewitt faced a life sentence for attempted murder, but that Hewitt "hopes it's less." Finally, the prosecutor told the jurors to try to forget the sentencing information and to follow the trial court's instruction that "Jurors are not to be concerned about the possible penalties."

Defendant is correct that the prosecutor misstated the law when he said that a person sentenced to life with the possibility of parole would be subject to parole after 10 years. MCL 791.234(7)(a) states that a prisoner may be placed on parole if "the prisoner has served . . . 15 calendar years of the sentence for a crime committed on or after October 1, 1992." However, reversal is not required because the prejudicial effects of the errant comment could have been cured by a timely jury instruction. *Unger*, 278 Mich App at 235. In any event, the trial court instructed the jury to disregard the potential sentence or penalties when reaching its verdict. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Moreover, the jury was clearly aware that parole was unlikely because codefense counsel pointed this out during Hewitt's cross-examination:

Co-defense counsel:	Before entering in this [plea] agreement you had the chance to discuss it with [your attorney]?
Witness:	Yes.
Co-defense counsel:	Did he talk to you about the opportunities for parole?
Witness:	Yes.
Co-defense counsel:	Did he explain to you that the Department of Corrections has a policy of life means life?
Witness:	Yes.

Co-defense counsel: So that even if parole is a possibility, you aren't likely to get it?

Witness: Yes.

Defendant also maintains that the prosecutor misstated the law when he said that Hewitt could face a life sentence because "[a]ttempted murder cannot be a life sentence if there is an agreement to a minimum sentence." Contrary to defendant's assertion, however, the prosecutor correctly reiterated that Hewitt, who would plead guilty to attempted murder, faced a statutorily authorized maximum penalty of life imprisonment. MCL 750.91.

As for defendant's related ineffective assistance claim, no error requiring reversal is shown. The prosecutor was correct that Hewitt faced a statutorily authorized maximum penalty of life imprisonment under MCL 750.91. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 438 Mich 448, 457; 475 NW2d 288 (1991). As to counsel's failure to object to the prosecutor's incorrect statement concerning eligibility for parole after 10 years, defendant has failed to show that there was a reasonable probability that the result of the proceeding would have been different had counsel objected.

We also reject defendant's final 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. 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).

Affirmed.

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