# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 13, 2011 |
| v | No. 294302<br>Ionia Circuit Court |
| KEVIN WASHINGTON,<br><br>Defendant-Appellant. | LC No. 08-014179-FC |

Before: MARKEY, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of solicitation of murder, MCL 750.157b(2). The trial court sentenced defendant to 25 to 40 years in prison. Because the prosecutor presented sufficient evidence on each element of the crime from which a rational trier of fact could conclude guilt beyond a reasonable doubt, defendant received effective assistance of counsel at trial, and the trial court properly scored the offense variables resulting in a valid sentence, we affirm.

Defendant first argues that the prosecutor presented insufficient evidence to convict him of solicitation of murder. Specifically, defendant asserts that the prosecution failed to establish that he intended to have anyone murdered. We review challenges to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). It is the factfinder's role to determine the weight of evidence and the credibility of witnesses, and we do not interfere with that role. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

The evidence established that while in prison, defendant asked his cellmate, Joe Abraham, if Abraham knew of anyone who could "take care of" some people involved in a case against defendant. Abraham informed a friend of defendant's plans, and this friend notified law enforcement. The Michigan State Police (MSP) met with Abraham and Abraham decided to work with them, and become involved in defendant's plan. An undercover officer, Antwan Bell, posed as a "hitman" known as Curtis Howard a/k/a Pit Bull.

Defendant communicated with Bell via letters and visits using slang terms. Defendant wanted Bell to "buy" two "dogs," a girl named "Big Bird" and a boy named "Tino." These were code names for defendant's intended victims, Tiawanna Lawrence and Tarnez Johnson, who were possible witnesses against defendant. Bell and Abraham testified that to "buy" meant to kill. In some of the letters from defendant and Abraham, Bell was asked to obtain affidavits from Lawrence and Johnson. Defendant never explicitly asked Bell to kill Lawrence and Johnson or told Bell not to kill them.

When viewed in a light most favorable to the prosecution, the evidence was sufficient to establish that defendant intended to have Bell kill Lawrence and Johnson. For a defendant to be convicted of solicitation to commit murder, the prosecutor must prove that "the defendant intended that a murder would in fact be committed." *People v Crawford*, 232 Mich App 608, 616; 591 NW2d 669 (1998); see also *People v Fyda*, ___ Mich App ___, ___; ___ NW2d ___ (2010). It is the factfinder's role to weigh the testimony given and decide its credibility, and by finding defendant guilty, the jury found Abraham and Bell to be credible, and rejected defendant's testimony. *Harrison*, 283 Mich App at 378; *Passage*, 277 Mich App at 177. We will not interfere with that determination. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

We reject defendant's assertion that there was insufficient evidence of solicitation because he did not give money or anything of value to Abraham or Bell. The applicable statute, MCL 750.157b(1), only requires that a defendant "offer to give" or "promise to give" something of value to another person. Bell testified that defendant promised to pay him for the job; therefore, the prosecution presented sufficient evidence to support defendant's conviction.

We also reject defendant's argument that it was error to allow Bell to use transcripts of his secretly recorded meetings with defendant to refresh his memory because those transcripts represented someone else's version of what was said. See *People v Dugan*, 29 Mich App 76, 78-80; 184 NW2d 758 (1970). *Dugan* is distinguishable from this case because in that case a recording was transcribed by an unidentified person based on notes an officer took while listening to the recording of a meeting between only the complainant and the defendant. *Id.* at 78-80. In this case, part of one of Bell's transcripts was transcribed by a secretary, but the unclear portions of the recording were transcribed by Bell himself and none of the transcripts were admitted into evidence. Therefore, the transcript Bell used to refresh his memory did not constitute "the presence in the record of another person's version of what was recorded . . . ." *Id.* at 80. Defendant has not shown error.

Defendant next argues that defense counsel's failure to request an instruction on renunciation deprived him of a fair trial and the effective assistance of counsel. "'Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel.'" *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). Defendant did not move for a new trial or an evidentiary hearing in the trial court;

therefore, our review is limited to mistakes apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

Defendant failed to establish that his trial counsel's "conduct fell below an objective standard of reasonableness" and deprived him of a fair trial. *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). In *Gonzalez*, our Supreme Court held that the defendant's trial counsel was not ineffective for not requesting a cautionary instruction regarding accomplice testimony because that instruction was inconsistent with the defendant's theory that he was not involved in the crime, it was not supported by the evidence, and the defendant did not overcome the presumption that not requesting it was sound trial strategy. *Id.* at 644-645.

In this case, requesting a renunciation instruction was inconsistent with defendant's theory at trial because he argued that he did not intend to kill anyone at any time. The instruction was also not supported by the evidence because defendant claimed that he never intended to kill anyone, and he never warned or cooperated with law enforcement to stop anyone from being murdered or made a substantial effort to stop Bell from committing murder. See MCL 750.157b(4). Had trial counsel requested a renunciation instruction, the request likely would have been denied because a trial court is not required to instruct a jury on a defense if the defendant does not "produce some evidence on all elements of the defense." *Crawford*, 232 Mich App at 620. Further, not requesting the cautionary instruction on renunciation was sound trial strategy, and "courts will not second-guess matters of trial strategy." *Gonzalez*, 468 Mich at 644-645; see also *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Trial counsel's conduct was not "below an objective standard of reasonableness" and did not prejudice defendant. *Gonzalez*, 468 Mich at 644.

Finally, defendant argues that the trial court incorrectly scored Offense Variables (OV), 9 and 19 and that therefore, he is entitled to resentencing. We review the trial court's findings on the existence of particular sentencing factors for clear error. *People v Witherspoon*, 257 Mich App 329, 334-335; 670 NW2d 434 (2003). There is no clear error if there is any evidence to support the trial court's finding. *Id.*; *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Where a scoring error occurs, resentencing is required if the sentencing guidelines would change under the corrected score. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

Defendant contends that OV 9 should be scored at zero points because no one was "placed in danger of physical injury or death[.]" MCL 777.39(1)(c). Defendant relies on the fact that Bell was an undercover police officer and would not have killed anyone. But the trial court correctly held that defendant placed at least two people in danger. Defendant intended to have Lawrence and Johnson killed, "hired" someone who he thought would carry out his intentions, and if Bell had not killed them, defendant would have found someone else. The trial court correctly scored OV 9 at ten points.

Defendant also maintains that the trial court should not have scored OV 19 should at 25 points because he did not threaten the security of a penal institution or court. MCL 777.49(a). However, there was some evidence to support the score of OV 19 at 25 points. Because defendant involved Abraham in his plan to have people killed, the Michigan Department of Correction's Inspector requested that Abraham be transferred to a different correctional facility and placed in protective custody. All correctional facilities were also notified that defendant and

Abraham were not to be housed in the same facility. Additionally, defendant wanted other inmates found and "taken care of." Therefore, OV 19 was correctly scored at 25 points.

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Pat M. Donofrio