

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
December 13, 2011

v

HAMIN LORENZO DIXON,  
Defendant-Appellant.

No. 300575  
St. Clair Circuit Court  
LC No. 09-001342-FC

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Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of one count of attempted murder, MCL 750.91, two counts of poisoning food, drink, medicine, or water supply, 750.436(2)(a), and one count of witness intimidation, 750.122(7)(c). We affirm.

On February 10, 2009, defendant was arrested on charges of home invasion and conspiracy to interfere with wireless communications following a domestic altercation between defendant and Rosemarie Lowery. After his arrest, defendant had a series of conversations with his girlfriend, Daycee Caughill, regarding how Lowery could be prevented from testifying at defendant's preliminary examination. On March 1, 2009, Caughill purchased a bottle of cognac and spiked it with a number of prescription painkillers (Darvocet) before leaving it on Lowery's front porch. Caughill was arrested and charged with attempted murder after an officer accidentally stumbled upon incriminating recordings of jail telephone calls between defendant and Caughill.

Defendant first alleges that the trial court violated his right of confrontation by precluding him from cross-examining a former cellmate, Tony Bennett, with regard to his pending federal sentencing and the possibility that his testimony in the instant case was influenced thereby. A defendant has the right, under both state and federal constitutions, to confront witnesses and to present a defense. Const 1963, art 1, §§ 13, 20; US Const, Ams VI, XIV; *People v Whitfield*, 425 Mich 116, 124 n 1; 388 NW2d 206 (1986). "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross examination.*" *Davis v Alaska*, 415 US 308, 315-316; 94 S Ct 1105, 39 L Ed 2d 347 (1974) (internal quotation marks and citation omitted; emphasis in original source). A "proper and important function of this constitutionally protected right of cross-examination" is "the exposure of a witness' motivation in testifying." *Delaware v Van Arsdall*, 475 US 673, 678-679; 106 S Ct 1431, 89 L Ed 2d 674

(1986). Despite these protections, the right of confrontation is not without limits. *Id.* at 679. “[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Id.* at 679 (emphasis in original).

Thirteen months before trial in the case at hand, Bennett had been informed of a potential downward departure from the federal sentencing guidelines pursuant to his guilty plea. It was established that the potential downward departure was granted to Bennett for his cooperation in his own case, and that Bennett had not been offered any additional leniency for his testimony in the instant case. During the defendant’s offer of proof, defense counsel was only able to establish that Bennett was facing federal sentencing, and that Bennett “was always hoping for the best.” While it could plausibly be argued that even speculative or unreasonable hope for additional leniency in an unrelated case could motivate a witness pending sentencing to fabricate testimony, without firm evidence of a deal for, or even potential for, such leniency, the trial court was well within its discretion in foreclosing the desired avenue of inquiry.

Defendant also raises myriad additional issues in his Standard 4 Brief in this case, all of which we find to be without merit.

Defendant argues that his conviction for aiding and abetting attempted murder must be vacated as a matter of law. While attempt to murder is a specific intent offense, the specific intent required is the intent to murder, not the intent to attempt to murder. *People v Graham*, 219 Mich App 707, 711; 558 NW2d 2 (1996). Accordingly, if defendant intended the death of Rosemarie Lowery by poisoning, then defendant possessed the requisite intent for a theory of aiding and abetting with regard to attempted murder. The crime was complete once the attempt was made.

Defendant also argues that his right to due process was violated by the prosecution’s failure to properly charge the offense of attempted murder. The test for sufficiency of the information is whether it notifies the defendant of the nature and character of the crime charged, so as to enable him to prepare his defense. *People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994). The information in the case at hand clearly states that defendant “did attempt to murder Rosemarie and/or Jerry Lowery; contrary to MCL 750.91.” Moreover, during defendant’s preliminary examination, the state laid out the evidence and theory of the case to be used at trial. As such, prior to trial, defendant was notified of the nature and character of the crimes charged and was able to prepare his defense.

Defendant’s argument that the trial court erred by denying defendant’s motion for a directed verdict with regard to the charge of attempted murder is without merit. In order to establish a defendant’s guilt with regard to attempted murder under an aiding and abetting theory, the prosecution must establish 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. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999). Furthermore, an aider and abettor’s state of mind may be inferred from facts and circumstances including “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." *Id.*

In this case, the prosecution submitted evidence that an attempted murder by poisoning had been committed, that defendant had encouraged (indeed directed) the commission of that crime, and that defendant had intended the commission of that crime at the time he supplied the aid and encouragement. It was not essential that the prosecution prove that Caughill committed and intended to commit the crime. In any event, Caughill's own testimony supported such a finding.

Defendant's argument that his convictions for attempted murder and poisoning constituted a violation of double jeopardy principles is without merit. Attempt to murder covers any "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." MCL 750.91. Poisoning covers an act to "[w]illfully mingle a poison or harmful substance with a . . . drink . . . knowing or having reason to know that the . . . drink . . . may be ingested or used by a person to his or her injury." MCL 750.436(1)(a). The clear import of these two statutes is that the Legislature intended to impose punishment for two distinct criminal acts. *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009). Clearly, a person could attempt to murder someone (and even succeed in that attempt) by willfully putting a poison in a beverage. But the act by which the attempt is made is a matter distinct from the attempt itself. Further, the fact that a person can poison another without attempting to murder the other (e.g., the intent to cause someone to be incapacitated by illness) makes poisoning a cognate offense of attempted murder. As such, defendant's convictions for both attempted murder and poisoning do not violate double jeopardy principles.

Defendant's argument that the charge of poisoning brought against him was improperly charged and insufficiently proved is without merit. The test for sufficiency of the information is whether it notifies the defendant of the nature and character of the crime charged, so as to enable him to prepare his defense. *Weathersby*, 204 Mich App at 101. The information here clearly alleges that defendant "did willfully mingle Darvocet, a poison or harmful substance, with a drink, while knowing or having reason to know that the drink may be ingested or used by a person to his or her injury." Further, at trial, the prosecution presented evidence with regard to the harmful nature of Darvocet, the amount of Darvocet placed in the cognac, and defendant's extensive involvement in the crime. As such, defendant was suitably notified of the nature and character of the crime charged, and a rational jury would be justified in finding that all of the elements of the charged offense had been proven beyond a reasonable doubt.

Defendant's argument that the charge of witness interference brought against him was improperly charged and insufficiently proved is without merit. A trial "court may at any time before, during, or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76. Such amendment is only improper if it results in "unfair surprise, inadequate notice, or insufficient opportunity to defend against the charges." *People v Fortson*, 202 Mich App 13, 15-16; 507 NW2d 763 (1993).

Given the similarity between witness interference and witness intimidation, defendant was not deprived of notice or the opportunity to defend. Moreover, defendant makes no showing as to how his defense would have varied had the original charge been witness interference rather than witness intimidation. And, contrary to defendant's assertion, because the amendment was not improper, defense counsel was not ineffective for failing to object to it. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also argues that the prosecutor engaged in a litany of prejudicial misconduct. We see no merit to any of these claims.

The prosecution presented evidence that defendant had urged Caughill to get his pistol and shells for him after the poisoned bottle of cognac had been delivered to the Lowery residence. Specifically, evidence was presented that defendant had several discussions with Caughill about potential alternatives in the event that the poisoning attempt was unsuccessful. The fact that one of these plans involved a deadly weapon was relevant evidence of defendant's intent at the time of the initial poisoning attempt. As such, the prosecutor did not act improperly by seeking to admit this evidence. Likewise, because the prosecution's use of this evidence was not improper, defense counsel was not ineffective for failing to object to its use. *Id.*

Defendant's argument that the prosecution engaged in misconduct by pursuing a different theory in defendant's case than in Caughill's case is without merit. To sustain an aiding and abetting charge, the guilt of the principal must be shown, but the prosecutor is not required to identify the principal nor does the principal need to be convicted. *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995), overruled in part on other grounds in *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001). Thus, an accessory can be convicted despite the acquittal of the principal, and he can be convicted of a greater offense than the principal. *People v Paige*, 131 Mich App 34, 39; 345 NW2d 639 (1983). The trial court instructed consistent with these legal principles. The prosecutor did not abuse her charging discretion.<sup>1</sup>

Defendant also fails to show that the prosecution engaged in misconduct by willfully disregarding an evidentiary ruling of the trial court. It is clear from the record that the prosecutor referenced the evidence at issue for the same purpose that the trial court had deemed it admissible, i.e., as evidence of defendant's intent.

Defendant's argument that the prosecution engaged in improper burden-shifting is without merit. During closing arguments, the prosecution noted that defendant, after being told that Caughill put 21 Darvocet pills into the bottle of cognac, remarked that he hoped that was enough. The prosecution contrasted that reaction with the one expected if the intent was only to incapacitate or carry out a practical joke, which would likely be concern that Caughill had used

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<sup>1</sup> Further, defendant's assertions of improper motivation on the part of the prosecutor are entirely speculative and premised on invalid reasoning. First, defendant was not improperly charged. Second, even if he were, it does not necessarily follow that the motivation for doing so was defendant's family, race, gender, and past history.

too much, not too little. This does not constitute impermissible burden-shifting, but rather constitutes a persuasive argument based on properly admitted piece of evidence.

Further, while the prosecution did comment on the veracity of a portion of Caughill's testimony, the jury was properly instructed at the conclusion of closing arguments that they were to be the final arbiters of witness credibility. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

While we agree that the prosecutor argued facts not in evidence during closing arguments, we disagree that reversal is a necessary remedy. It is true that Bennett never testified to being told that Caughill used gloves at any point and that the prosecutor arguing that he did was error. The reference, however, was fleeting and came in a summary of Bennett's testimony. Defendant also challenges the prosecutor's comment that Bennett "knew that it was Darvocet, . . . knew they used 21." What Bennett did say was that defendant told him "20, 20 something pills of Dar—Darvocile, Darvocet, or something like that" were used. The prosecutor's statement was close to the actual testimony, but it was nonetheless somewhat misleading. In none of these instances, however, can defendant show the requisite prejudice in light of the evidence adduced. Moreover, the jurors were instructed that it was their responsibility to determine the facts of the case, that the statements of counsel are not evidence, and that they "should only accept the things the lawyers say that are supported by the evidence." Again, juries are presumed to follow a court's clear instructions. *Id.*

Defendant also argues that Bennett did not acknowledge that he testified at the preliminary examination that defendant indicated he wanted to "kill" Rosemarie. Contrary to defendant's assertion, Bennett did testify that he believed he testified at the preliminary examination that defendant wanted to "take her out," and thus the prosecutor's reference to same was not in error. Further, the prosecutor's assertion that defendant told Caughill to steal the pills was a reasonable inference based on the evidence, even though there was no direct evidence to that effect.

Defendant's argument that the prosecution improperly instructed the jury on the applicable law and intentionally misstated the facts of the case to the jury is without merit. During closing argument, the prosecution did in fact read the elements of the various offenses to the jury, as part of an element-by-element review of the relevant evidence presented. This was a common sense organizational approach that did not mislead the jury into believing that anyone other than the judge would be reading the final and relevant law to the jury in this case. Moreover, the court instructed the jury to follow what it had to say about the law, which included a recitation of the elements of each crime charged. There is nothing in the record to overcome the presumption that the jury followed the court's instructions. *Id.*

Defendant's argument that the prosecution improperly bolstered Bennett's testimony is without merit. Defendant objects to the prosecution stating that Bennett testified that defendant asked him how to "take out" or "kill" Rosemarie. That is precisely what Bennett testified to at trial, and in those precise words.

Defendant additionally sees error in the admission into evidence of bullets found at defendant's sister's house. The trial court concluded that the bullets found at defendant's sister's

home were circumstantially tied to defendant's requests to Caughill to obtain his pistol and shells from his sister's house. Further, the trial court found defendant's request to obtain the weapon and shells, coupled with statements of his intent to arrange an alternative plan if the poisoned cognac plan were to fail, to be relevant to the issue of whether defendant's intent when arranging for the delivery of the poisoned cognac was to kill Rosemarie, and not merely incapacitate her. As such, the trial court found the bullets to be circumstantial evidence of defendant's intent to kill at the time of the charged offense, and thus relevant to the charges before the jury. This is a reasoned and principled decision. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant's argument that his trial counsel was ineffective for conceding defendant's guilt with regard to the lesser charges is also without merit. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that defendant was prejudiced thereby, i.e., that there was a reasonable probability that the outcome of the trial would have been different if not for counsel's deficiency. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defendant must overcome a presumption that the decisions were legitimate trial strategy. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

A lawyer does not render ineffective assistance by conceding certain points at trial, including conceding guilt of a lesser offense; only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994); *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). During closing arguments, defense counsel suggested that sufficient evidence may have been presented with regard to the three lesser charges defendant was faced with, but that the evidence was clearly insufficient to support a conviction for the greatest charged offense, attempted murder. This was legitimate trial strategy and a reasonable attempt to spare defendant from the most serious of the four crimes he was charged with.

Defendant's argument that the trial court denied him due process by amending the charges against him is without merit. "The court may at any time before, during, or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76. Such amendment is only improper if it results in "unfair surprise, inadequate notice, or insufficient opportunity to defend against the charges." *People v Fortson*, 202 Mich App 13, 15-16; 507 NW2d 763 (1993). In this case, the amendment from conspiracy to commit attempted murder by poisoning to conspiracy to commit poisoning did not constitute the sort of drastic change that would result in unfair surprise, inadequate notice, or insufficient opportunity to mount a defense.

We also reject defendant's argument that he was denied due process of law by being charged with a greater offense than Caughill. To sustain an aiding and abetting charge, the guilt of the principal must be shown, but the prosecutor is not required to identify the principal nor does the principal need to be convicted. *People v Turner*, 213 Mich App at 569. Thus, an accessory can be convicted despite the acquittal of the principal, and he can be convicted of a greater offense than the principal. *Paige*, 131 Mich App at 39. As such, it was not a violation of defendant's right of due process to bring a greater charge against defendant.

Affirmed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Donald S. Owens