

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

June 23, 2005

Plaintiff-Appellee,

v

KEVIN POTTER,

No. 253716
Wayne Circuit Court
LC No. 03-001961-01

Defendant-Appellant.

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant was convicted of conspiracy to commit first-degree murder, MCL 750.157a; MCL 750.316. He was sentenced to life in prison. He appeals as of right, and we affirm.

Defendant's first issue on appeal is that the trial court abused its discretion when it allowed defendant's extra-judicial incriminating statements into evidence because the corpus delicti of a conspiracy had not been established. We disagree.

When reviewing a trial court's decision to admit evidence in satisfaction of the corpus delicti requirement, this Court reviews for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Biggs*, 202 Mich App 450, 455; 509 NW2d 803 (1993). An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made. A trial court's decision on a close evidentiary question does not amount to an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004).

"The corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury [or loss] and criminal agency as the source of the injury before such statements may be admitted as evidence." *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002). The corpus delicti of murder and manslaughter is death caused by criminal agency. *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996). "The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995); *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). "'Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti.'" *Konrad*, *supra* at 270. It is sufficient to show that someone committed the crime. *Id.*

A defendant's extra-judicial statements cannot be used to establish the corpus delicti of a conspiracy. *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). However, the corpus delicti of a conspiracy can be proven by circumstantial evidence or may be based on inferences. *Id.* "Any person who conspires together with [one] or more persons to commit an offense prohibited by law" is guilty of the crime of conspiracy. MCL 750.157a; *People v Wilson*, 454 Mich 421, 429; 563 NW2d 44 (1997).

Here, without using any of defendant's statements, an agreement by two or more parties to commit murder can be inferred from the evidence presented, and thus, the corpus delicti of conspiracy has been established. Testimony established that a van was parked outside the victim's house and was seen being driven away after the gunshots were heard. A man dressed in all black, who was carrying a gun, was running away from the victim's home after the gunshots were heard and jumped into the back of a pick-up truck that was also seen driving away from where the gunshots were heard. Circumstantial evidence established that more than one person was involved in the shooting. One person drove the van, one person drove the pick-up truck and one person was the shooter who was seen jumping into the back of the pick-up truck. Thus, it could be inferred that two or more parties made an agreement to murder the victim. Therefore, the corpus delicti of conspiracy has been established, and thus, the trial judge did not abuse her discretion when she allowed defendant's statements into evidence. *Cotton, supra* at 392-393.

Defendant's second issue on appeal is that the trial court's conspiracy instruction denied him a fair trial by omitting the fact that conspiracy is a specific intent crime. We disagree.

This issue was not properly preserved. When reviewing an unpreserved claim of instructional error, this Court determines whether a plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96 (2002). A reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Hawthorne*, 265 Mich App 47, 57; 692 NW2d 879 (2005). A trial court must clearly present the case to the jurors and instruct them on the applicable law. *Id.* at 51. Jury instructions must therefore include all the elements of the charged offenses and any material issues, defenses, and theories which are supported by the evidence. *Id.* Jury instructions are reviewed in their entirety. There is no reversible error if the instructions sufficiently protected the rights of the defendant and fairly represented to the jury the issues to be tried. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994). However, the failure to instruct the jury on the necessary intent of an offense is error requiring reversal. *People v Nasir*, 255 Mich App 38, 46-47; 662 NW2d 29 (2003).

A conspiracy is a partnership in criminal purposes. *People v Whitney*, 228 Mich App 230, 257-258; 578 NW2d 329 (1998). The essence of the offense lies in an unlawful agreement between two or more persons. *Id.* Establishing a conspiracy requires evidence of a specific intent to combine with others to accomplish an illegal objective. *Id.* To prove a specific intent to combine with others to accomplish an illegal objective, it must be shown that the intent, including knowledge, was possessed by more than one person. *Id.* A defendant must know of the conspiracy, must know of the objective of the conspiracy, and must intend to participate

cooperatively to further that objective. *Id.* Thus, to prove conspiracy to commit murder, the prosecutor must demonstrate that each conspirator had the requisite intent to commit the murder, and that the conspirators deliberated and planned the crime with the intent to kill the victim. *People v Buck*, 197 Mich App 404, 412; 496 NW2d 321 (1992), rev'd on other grounds *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993).

Here, the trial judge instructed the jury that a conspiracy conviction requires, *inter alia*, the finding of a specific intent. The trial judge stated, “[s]econd, that the defendant specifically intended to commit or help commit that crime,” and later stated, “it must be shown beyond a reasonable doubt that the defendant agreed to commit the crime and intended to commit or help commit it.” Furthermore, the jury had previously been instructed on what was required to prove specific intent, when the trial judge stated, “requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that he did the acts with the intent to cause a particular result.” Therefore, viewing the instructions in their entirety, we conclude that the instructions sufficiently protected the rights of defendant and fairly represented to the jury the issues to be tried, and thus, the trial judge’s conspiracy instruction does not amount to plain error. *Holt, supra* at 116.

Defendant’s final issue on appeal is that the trial court’s identification instruction denied him a fair trial because the instruction improperly reduced the prosecution’s burden of proof. We disagree.

This issue was also not properly preserved, so this Court reviews for a plain error which affected defendant’s substantial rights. *Carines, supra* at 764; *Rodriguez, supra* at 24. A reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Defendant argues that the trial judge’s instruction, that the jury “may use the identification testimony alone to convict the defendant,” could have been misinterpreted by the jury to mean that it could convict defendant based on identification alone, and thus, in turn, effectively lessened the prosecution’s burden of proof to that of identification only. Defendant’s argument fails. When instructing the jury on what it should consider when determining identification, which was the main issue in the case, the trial judge stated:

You should examine the witnesses [sic] identification testimony carefully. You may consider whether other evidence supports the identification because then it may make the identification more reliable. However, you may use the identification alone to convict the defendant as long as you believe the testimony, and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the alleged crime.

Taken in context, we conclude that the trial judge instructed the jury that the identification testimony was sufficient to establish defendant’s identification and not that identification alone was enough to convict defendant of the charged crimes. When looking at the trial judge’s instructions as a whole, the jury was told each element of each charge that needed to be proven to convict defendant. Therefore, viewing the instructions in their entirety, we conclude that the instructions sufficiently protected the rights of defendant and fairly represented

to the jury the issues to be tried, and thus, the trial judge's identification instruction does not amount to plain error. *Holt, supra* at 116.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray