Order

Michigan Supreme Court
Lansing, Michigan

January 31, 2023

163756

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163756
COA: 351911
Oakland CC: 2018-267977-FC

ADONTE MARQUIS BOUIE,
Defendant-Appellant.

_____/

By order of September 6, 2022, the application for leave to appeal the September 23, 2021 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Welsh* (Docket No. 162777). On order of the Court, the case having been decided on October 28, 2022, ___ Mich ___ (2022), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of *Welsh*.

We do not retain jurisdiction.

p0123

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 31, 2023

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADONTE MARQUIS BOUIE,

Defendant-Appellant.

UNPUBLISHED
September 23, 2021

No. 351911
Oakland Circuit Court
LC No. 2018-267977-FC

Before: CAVANAGH, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of conspiracy to commit first-degree premeditated murder, MCL 750.157a; MCL 750.316(1)(a). He was sentenced to life imprisonment without the possibility of parole for his conviction of conspiracy to commit first-degree premeditated murder. We affirm.

Defendant was charged with conspiracy to commit first-degree premeditated murder; the charging document indicated that he committed the offense in Oakland County during the period from July 2016 to December 2016. In the same charging document, defendant was also charged with first-degree premeditated murder, MCL 750.316(1)(a), and three counts of assault with intent to commit murder, MCL 750.83, all pertaining to a shooting incident that occurred on August 5, 2016. There were also five charges of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, i.e., one charge of felony-firearm associated with each of the other charges described earlier in this paragraph. The charging document indicated that the murder victim was Aniya Edwards (Aniya) and that the victims of the three assaults with intent to commit murder were, respectively, Tyrell Rush, Jameel Tanzil, and Ki-Jana Morgan. In the same charging document, codefendant, Ashton Kevon Greenhouse, was charged with the same offenses as defendant.

At defendant's trial, Greenhouse testified that he had entered into a plea agreement with the prosecutor; as part of the plea agreement, Greenhouse was required to testify truthfully at defendant's trial. In particular, on April 11, 2018, Greenhouse pleaded guilty to second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, and three counts of

felony-firearm. The plea agreement called for Greenhouse to receive a minimum sentence of 25 years' imprisonment. Among other evidence presented at defendant's trial, Greenhouse provided testimony implicating defendant in the charged crimes.

The jury found defendant guilty of conspiracy to commit first-degree premeditated murder but not guilty of the other charges. As noted, he was sentenced to life imprisonment without the possibility of parole for his conviction of conspiracy to commit first-degree premeditated murder. This appeal ensued.

Defendant first argues on appeal that there was insufficient evidence to support his conviction. We disagree.

A defendant's argument regarding the sufficiency of the evidence is reviewed de novo. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). "When reviewing a defendant's challenge to the sufficiency of the evidence, [this Court] review[s] the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Williams*, 294 Mich App 461, 471; 811 NW2d 88 (2011) (quotation marks and citation omitted). Direct evidence of guilt is not required. *Id.* "Rather, circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id.* (quotation marks, brackets, and citation omitted). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Kanaan*, 278 Mich App at 619. "All conflicts in the evidence must be resolved in favor of the prosecution." *Id.*

MCL 750.157a provides, "Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . ." "A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). "Conspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). "The gist of conspiracy lies in the illegal agreement; once the agreement is formed, the crime is complete." *People v Seewald*, 499 Mich 111, 117; 879 NW2d 237 (2016) (quotation marks and citations omitted). "Direct proof of a conspiracy is not required; rather, proof may be derived from the circumstances, acts, and conduct of the parties." *Jackson*, 292 Mich App at 588 (quotation marks and citation omitted).

The illegal objective of the conspiracy in this case was first-degree premeditated murder. "The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "Premeditation and deliberation, for purposes of a first-degree murder conviction, require sufficient time to allow the defendant to take a second look." *People v Orr*, 275 Mich App 587, 591; 739 NW2d 385 (2007) (quotation marks and citation omitted). For there to be a conspiracy to commit first-degree premeditated murder, each conspirator must have the intent required for that offense. *People v Hammond*, 187 Mich App 105, 108; 466 NW2d 335 (1991). An intent to kill may be inferred from the use of a dangerous weapon. *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993).

Defendant argues that there was insufficient evidence to support his conviction of conspiracy to commit first-degree premeditated murder because there was no conspiracy to kill Aniya, i.e., the person who was actually killed during the August 5, 2016 shooting incident. But there is no requirement to prove a conspiracy to kill a person who was *actually* killed. Rather, "[t]he gist of conspiracy lies in the illegal agreement; once the agreement is formed, the crime is complete." *Seewald*, 499 Mich at 117. And contrary to defendant's assertion, the identity of the person who was the intended target of the conspiracy is not an element of conspiracy to commit first-degree murder.[1]

Greenhouse's testimony indicated that he and defendant were the persons who fired shots at a group of people on Thorpe Street in Pontiac on August 5, 2016, in retaliation for an earlier attempt to rob Greenhouse. There was ample testimony that defendant and Greenhouse were close associates and were angry about the attempted robbery of Greenhouse. Defendant and Greenhouse obtained assault rifles and drove to the Thorpe area, where Tanzil, Rush, and Morgan, who were members of a rival gang allegedly involved in the effort to rob Greenhouse, were among a group of people at a social gathering. Greenhouse and defendant fired their assault weapons at the group of people. Aniya, Tanzil, Rush, and Morgan were struck by bullets; Aniya died, and the other three were injured. Greenhouse further testified that, after he and defendant fired their assault rifles, they fled the scene and hid their weapons, which indicates their consciousness of guilt. See *People v Dixon-Bey*, 321 Mich App 490, 510; 909 NW2d 458 (2017) (efforts to hide evidence may indicate consciousness of guilt); *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995) (fleeing may indicate consciousness of guilt). Later in 2016, defendant, Edward Thompson, and Greenhouse armed themselves with firearms, discussed using their weapons, and tried unsuccessfully to locate the men allegedly involved in the attempted robbery of Greenhouse. Other witnesses testified regarding incriminating statements defendant made about his involvement in the shooting on Thorpe. There was sufficient evidence for a rational trier of fact to find that defendant intended to combine with Greenhouse to accomplish first-degree premeditated murder.

Defendant next argues that he was denied his constitutional right to due process because he was not given notice of whom he allegedly conspired to murder. Defendant's argument is unavailing.

To preserve a due-process argument for appellate review, a defendant must raise an objection on that ground in the trial court. *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007). As defendant concedes on appeal, he did not preserve his due-process argument by raising an objection on that ground below. Therefore, the due-process issue is not preserved.

A preserved due-process claim is reviewed de novo, *Jackson*, 292 Mich App at 590, but unpreserved constitutional issues are reviewed for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under the plain-error test, a defendant

[1] Under defendant's theory, an agreement to plant a bomb, fly an airplane into a building, or fire an assault weapon into a crowd would not constitute a conspiracy to commit first-degree premeditated murder merely because the conspirators never identified a particular person who was the intended target of the conspiracy. Defendant cites no authority to support his untenable position.

must show that (1) an error occurred, (2) the error was clear or obvious, and (3) the error prejudiced the defendant, i.e., it affected the outcome of the proceedings. *Id*. at 763. If a defendant satisfies those requirements, reversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings. *Id*. at 763-764.

"No person may be deprived of life, liberty, or property without due process of law." *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003), citing US Const, Am V, and Const 1963, art 1, § 17. "In a criminal case, due process generally requires reasonable notice of the charge and an opportunity to be heard." *McGee*, 258 Mich App at 699. "[T]o establish a due process violation, a defendant must prove prejudice to his defense." *Id*. at 700. "Whether an accused is accorded due process depends on the facts of each case." *Id*.

Defendant asserts that the felony information failed to afford notice of the person(s) whom defendant allegedly conspired to murder. It is true that the count charging defendant and Greenhouse with conspiracy to commit first-degree premeditated murder did not identify a specific person who was the target of the conspiracy. But as explained earlier, the identity of the person who was the target of the conspiracy is not an element of conspiracy to commit first-degree premeditated murder. In any event, the felony information also charged defendant and Greenhouse each with three counts of assault with intent to commit murder; Tanzil, Rush, and Morgan were identified in the felony information as the respective victims of the three assaults with intent to commit murder. Defendant was thus provided notice that he was being charged in connection with efforts to kill Tanzil, Rush, and Morgan. Further, defendant has not demonstrated prejudice arising from any deficiency in the felony information. He has not explained what different defense would have been presented if Tanzil, Rush, and Morgan had been specifically named in the conspiracy count in addition to the counts in which they were already named. See *McGee*, 258 Mich App at 702 (the defendant did not establish actual prejudice because she did not explain "what different defense would have been presented[]"). Overall, defendant's due-process claim fails because he has not established that he was denied adequate notice and thus deprived of an adequate opportunity to prepare his defense.

Defendant further contends that he was denied the effective assistance of counsel because defense counsel did not request a bill of particulars. This argument is likewise unsuccessful.

To preserve a claim of ineffective assistance of counsel, a defendant must raise the issue in a motion for a new trial or a *Ginther*[2] hearing filed below, *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012), or in a motion to remand for a *Ginther* hearing filed in this Court, *People v Abcumby-Blair*, ___ Mich App ___, ___: ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8, lv pending. Defendant did not raise this claim of ineffective assistance of counsel below by filing a motion for a new trial or a *Ginther* hearing, or in this Court by filing a motion to remand for a *Ginther* hearing. Hence, the issue is unpreserved. Because no *Ginther* hearing was held, this Court's review is limited to the existing record. *Id*.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *Heft*, 299 Mich App at 80. Findings of fact are reviewed for clear error, and questions of law are reviewed de novo. *Id.*

"To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant." *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446 (2014). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018) (quotation marks, brackets, and citation omitted). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). To establish prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018) (quotation marks and citation omitted). A "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

MCR 6.112(E) provides, "The court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense." A preliminary examination obviates the need for a bill of particulars by informing the defendant of the nature of the charges against him. *People v Harbour*, 76 Mich App 552, 557; 257 NW2d 165 (1977); *People v Jones*, 75 Mich App 261, 270; 254 NW2d 863 (1977). A preliminary examination was held in this case on August 17, 2018. Defendant fails to address this point or to explain why the preliminary examination would not have provided adequate notice of the nature of the charges against him. Therefore, defendant has not established that a bill of particulars was needed or that defense counsel was ineffective for failing to request one. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant next argues that the trial court erred in instructing the jury on conspiracy to commit first-degree premeditated murder because the jury was never instructed that the identity of the person who was the intended target of the conspiracy was an element of the offense. This issue is waived because defendant affirmatively approved the instruction below. Before the final instructions were read to the jury, defense counsel approved of the instructions during exchanges with the trial court outside the presence of the jury. Also, after the trial court provided its final instructions to the jury, including the instruction challenged on appeal, the trial court asked, "Any objection to the instructions as read?" Defense counsel responded, "None." By expressly approving the jury instructions, defendant waived review of the alleged instructional error. See *People v Kowalski*, 489 Mich 488, 503-505; 803 NW2d 200 (2011). Waiver extinguishes any error, meaning that there is no error to review. *Id.*

Defendant further argues that defense counsel was ineffective for failing to object to the instruction and for waiving the alleged instructional error. Defendant's argument on this point is unavailing.

Defendant did not raise this claim of ineffective assistance of counsel below by filing a motion for a new trial or a *Ginther* hearing, or in this Court by filing a motion to remand for a *Ginther* hearing. Hence, the issue is unpreserved. Because no *Ginther* hearing was held, this Court's review is limited to the existing record. *Abcumby-Blair*, ___ Mich App at ___; slip op at 8.

Jury instructions are considered "as a whole, rather than piecemeal, to determine whether any error occurred." *Kowalski*, 489 Mich at 501. "A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense. A defendant is thus entitled to have all the elements of the crime submitted to the jury in a charge which is neither erroneous nor misleading." *Id*. (quotation marks, brackets, ellipsis, and citations omitted). "Instructional errors that omit an element of an offense, or otherwise misinform the jury of an offense's elements, do 'not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' " *Id*., quoting *Neder v United States*, 527 US 1, 9; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Hence, "an imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Kowalski*, 489 Mich at 501-502.

The trial court instructed the jury as follows regarding the elements of conspiracy to commit first-degree premeditated murder:

> The Defendant is charged with the crime of conspiracy to commit first[-]degree, premeditated murder. Anyone who knowingly agrees with someone else to commit murder is guilty of conspiracy.
>
> To prove the Defendant's guilt, the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the Defendant and someone else knowingly agreed to commit first[-]degree, premeditated murder.
>
> Second, that the Defendant specifically intended to commit or help commit that crime.
>
> Third, that this agreement took place or continued during the period from July 2016 through December 2016.

The trial court also instructed the jury regarding the elements of first-degree premeditated murder, including regarding the meaning of both premeditation and deliberation, when instructing the jury on the separate charge of first-degree premeditated murder. The trial court further instructed the jury on the concept of transferred intent as follows: "If the Defendant or anyone he aided and abetted intended to kill one person but by mistake or accident killed another person, the crime is the same as if the first person had actually been killed."

The trial court's instructions, when read as a whole, fairly presented the issues to be tried and adequately protected defendant's rights. The instruction on conspiracy to commit first-degree premeditated murder conformed with applicable legal principles set forth earlier in this opinion. That is, the court correctly informed the jury that defendant and someone else must have knowingly

agreed to commit first-degree premeditated murder and that defendant must have specifically intended to commit or help commit that crime. See *Jackson*, 292 Mich App at 588 ("A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense."). Again, "[t]he gist of conspiracy lies in the illegal agreement; once the agreement is formed, the crime is complete." *Seewald*, 499 Mich at 117 (quotation marks and citations omitted). The instructions, when read as a whole, also informed the jury regarding the elements of first-degree premeditated murder, including regarding the mental state required for that crime. Contrary to defendant's assertion, the identity of the person who was the intended target of the conspiracy is not an element of conspiracy to commit first-degree murder, and the court did not err in failing to include such an element in its instructions. Defense counsel was not ineffective for failing to make a meritless argument or raise a futile objection to the jury instructions. *Ericksen*, 288 Mich App at 201.

Defendant next argues that defense counsel was ineffective for failing to request a specific unanimity instruction. We disagree.

Defendant did not raise this claim of ineffective assistance of counsel below by filing a motion for a new trial or a *Ginther* hearing, or in this Court by filing a motion to remand for a *Ginther* hearing. Hence, the issue is unpreserved. Because no *Ginther* hearing was held, this Court's review is limited to the existing record. *Abcumby-Blair*, ___ Mich App at ___; slip op at 8.

The trial court provided a general instruction on unanimity to the jury. The trial court instructed: "A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict." Defendant nonetheless argues that defense counsel was ineffective for failing to request a specific unanimity instruction regarding the identity of the person who was the intended target of the conspiracy. Defendant's argument is unavailing.

Criminal defendants are entitled to a unanimous jury verdict. *People v Chelmicki*, 305 Mich App 58, 67; 850 NW2d 612 (2014), citing MCR 6.410(B). The trial court must properly instruct the jury regarding the unanimity requirement. *Chelmicki*, 305 Mich App at 67-68. A general instruction on unanimity is ordinarily sufficient, but "a specific unanimity instruction may be required in cases in which more than one act is presented as evidence of the actus reus of a single criminal offense and each act is established through materially distinguishable evidence that would lead to juror confusion." *Id*. at 68 (quotation marks and citation omitted). In the present case, there was no risk of juror confusion. This case does not involve multiple acts presented as evidence of the actus reus of a single offense with each act established through materially distinguishable evidence. The prosecution theory was not that complicated: defendant agreed with Greenhouse to commit premeditated murder. The illegal agreement is the gist of the conspiracy, *Seewald*, 499 Mich at 117, and the illegal agreement comprised a single criminal act. Defendant suggests that there could have been juror confusion or disagreement regarding who was the intended victim or target of the conspiracy, but again, this is not an element of the offense. A specific unanimity instruction was not required, and defense counsel was not ineffective for failing to make a futile request. *Chelmicki*, 305 Mich App at 69.

Defendant next argues that the trial court lacked authority to sentence him to life imprisonment without parole for his conviction of conspiracy to commit first-degree premeditated murder. Defendant's argument fails.

"To preserve a sentencing issue for appeal, a defendant must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." *People v Anderson*, 322 Mich App 622, 634; 912 NW2d 607 (2018) (quotation marks and citations omitted). Defendant did not raise this issue at sentencing, in a proper motion or resentencing, or in a proper motion to remand filed in this Court. Therefore, the issue is unpreserved.

"[T]his Court's review is limited to plain error affecting substantial rights because the issue was not preserved." *People v Clark*, 315 Mich App 219, 224; 888 NW2d 309 (2016).

> Relief is available only when (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected substantial rights, meaning it affected the outcome of the proceedings. Additionally, reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. [*Id*. (citation omitted).]

The conspiracy statute, MCL 750.157a(a), provides that a person convicted of conspiracy to commit an offense punishable by imprisonment for one year or more "shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit . . . ." Defendant was convicted of conspiracy to commit first-degree premeditated murder. The first-degree murder statute provides that a person convicted of that offense "shall be punished by imprisonment for life without eligibility for parole." MCL 750.316. The trial court was thus bound to sentence defendant to life imprisonment without parole for his conviction of conspiracy to commit first-degree premeditated murder.

In *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989), our Supreme Court held that "a person sentenced to life imprisonment for conspiracy to commit first-degree murder is eligible for parole consideration . . . ." But *Jahner* was decided before MCL 750.316 was amended in 2014 to add language requiring that persons convicted of first-degree murder be sentenced to life imprisonment *without parole*. See 2014 PA 23. *Jahner* thus did not address the language in the current version of MCL 750.316. The trial court did not plainly err in imposing a sentence of life imprisonment without parole.

Defendant next argues that a mandatory sentence of life imprisonment without the possibility of parole for a conviction of conspiracy to commit first-degree premediated murder constitutes cruel or unusual punishment in violation of the Michigan Constitution. We disagree.

"To preserve a claim that the defendant's sentence[] [was] unconstitutionally cruel or unusual, the defendant must raise the claim in the trial court." *People v Burkett*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351882); slip op at 2. Defendant did not raise this issue below. Therefore, the issue is unpreserved.

This Court has explained:

> This Court generally reviews constitutional questions de novo. However, we review unpreserved constitutional issues for plain error affecting substantial rights. To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights. An error affects substantial rights when it impacts the outcome of the lower court proceedings. Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independently of the defendant's innocence. [*Burkett*, ___ Mich App at ___; slip op at 2 (quotation marks and citations omitted).]

Const 1963, art 1, § 16 prohibits cruel or unusual punishment. *Burkett*, ___ Mich App at ___; slip op at 3. This constitutional proscription includes a prohibition of grossly disproportionate sentences. *Id*.

> This Court employs the following three-part test in determining whether a punishment is cruel or unusual: (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states. Legislatively mandated sentences are presumptively proportional and presumptively valid. In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate. Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. [*Id*. (quotation marks and citations omitted).]

In *People v Fernandez*, 427 Mich 321, 335; 398 NW2d 311 (1986), our Supreme Court held that "a mandatory life sentence, even if nonparolable, imposed for conspiracy to commit first-degree murder is not so excessive as to constitute cruel and unusual punishment."[3] The Court noted that "[c]onspiracy to commit first-degree murder is an extremely serious offense, perhaps exceeded only by first-degree murder itself." *Id*. at 336. "Conspiracy can be as dangerous as a completed offense because it may give rise to a cooperation among criminals that is a special hazard." *Id*. The Court further observed that, "[i]n enacting MCL 750.157a, the Legislature decided that conspiracy to commit a given offense was as serious as the actual commission, or that the conspiracy was sufficiently serious to merit the same punishment." *Fernandez*, 427 Mich at 337. Further, when comparing the offense to other crimes in Michigan that carry a mandatory life sentence, our Supreme Court could not "say that a conspiracy to commit first-degree murder such as occurred in this case is so much less culpable than these offenses as to constitutionally invalidate

[3] Although our Supreme Court in *Fernandez* used the phrase "cruel and unusual punishment" rather than "cruel or unusual punishment," the Supreme Court's analysis made clear that it was rejecting the defendant's challenge under both the state and federal constitutions. See *Fernandez*, 427 Mich at 333-334, 339.

a mandatory life sentence." *Id*. Nor did a consideration of the sentences imposed by other states for the same offense require a finding of disproportionality. *Id*. at 337-338. Lastly, although a nonparolable life sentence does not advance a goal of rehabilitation,

> [o]ther policies, such as deterrence of others, deterrence of the offender, or punishment of the offender, may suffice to deflect a cruel and unusual punishment challenge. In the instant case, the fact that a conspiracy conviction requires the same punishment as the substantive target offense carries the message to potential wrongdoers that conspiratorial agreements involve substantial risks and dangers. This is a rational deterrence effort. Where a crime involves advance planning, such as premeditated murder and conspiracy, the possibility of deterring the potential wrongdoer from engaging in the illicit activity by a stringent penalty is more realistic than in crimes committed on impulse. Furthermore, a life sentence certainly protects society at large from an offender during the time of imprisonment. Finally, the retributive punishment factor is a valid consideration in cases such as this, where the potential harm to society is great. [*Id*. at 339.]

Accordingly, our Supreme Court in *Fernandez* held that

> the punishment of life imprisonment, even if nonparolable, is not cruel and unusual punishment under the federal or Michigan Constitutions. The punishment, while strong, is not disproportionate to the crime when viewed in light of the gravity of the offense, sentences for other crimes in Michigan, sentences for the same crime in other states, and policies behind punishment. [*Id*.]

In light of our Supreme Court's holding in *Fernandez*, defendant's argument fails. He has not established that a mandatory sentence of life imprisonment without parole for conspiracy to commit first-degree murder is cruel or unusual punishment. Nor has defendant "presented this Court with any unusual circumstances that would render the presumptively proportionate legislatively mandated sentence disproportionate." *Burkett*, ___ Mich App at ___; slip op at 6.[4] The trial court did not plainly err in imposing the sentence of life imprisonment without parole.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ James Robert Redford

[4] Defendant notes that he "was just 20 years old in August 2016" when the shooting on Thorpe occurred, but he provides no elaboration or argument explaining whether or how he thinks his age at that time would constitute an unusual circumstance that renders his presumptively proportionate legislatively mandated sentence disproportionate.