STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2003
v DONNA KAY TRAPANI, Defendant-Appellant.	No. 232330 Oakland Circuit Court LC No. 2000-171279-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v SYBIL ANN PADGETT, Defendant-Appellant.	No. 232331 Oakland Circuit Court LC No. 2000-171281-FC

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Defendants Donna Kay Trapani and Sybil Ann Padgett were tried jointly, before separate juries. Each defendant was convicted of first-degree murder, MCL 750.316, and conspiracy to commit murder, MCL 750.157a, and each was sentenced to concurrent terms of life imprisonment without parole for the murder conviction and life imprisonment for the conspiracy conviction. Defendants appeal as of right. We affirm.

Defendants' conviction arise from the shooting death of Martha Gail Fulton ("the victim") who was shot as part of an alleged killing for hire scheme as she left her job as a library aide at the Orion Township Public Library. Defendant Trapani had been involved in an affair with the victim's husband, George Fulton, who was employed by Trapani in her Florida home health care business. Defendant Padgett was one of Trapani's full-time employees. The evidence at trial indicated that Trapani hired Padgett and codefendants Patrick Alexander and

Kevin Ouellette[1] to kill the victim. Padgett allegedly purchased the gun that was used in the killing and helped plan the crime.

I. Docket No. 232330

A. The Admissibility of Coconspirator Statements

Defendant Trapani claims that the trial court erred in admitting coconspirator statements. The decision whether to admit evidence will not be reversed on appeal absent an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

Here, the prosecutor presented two statements made by Ouellette to his fiancé, Stephanie Bowden. The first was that he was going to go to Michigan to beat up a lady upon Trapani's request. The second statement, made a few weeks later, indicated that Ouellette had shot the victim. The prosecutor also presented statements made by Padgett to her friend Brian Miller in which she described the events of the crime and sought advice on how to evade the police.

A coconspirator statement is not hearsay if it is "offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." MRE 801(d)(2)(E). It is well settled in Michigan that, in order for a statement to qualify as a coconspirator statement under MRE 801(d)(2)(E), three requirements must be met. First, there must be independent proof by a preponderance of the evidence that a conspiracy in fact occurred. *People v Vega*, 413 Mich 773, 780-782; 321 NW2d 675 (1982).[2] Second, the statement must be made during the course of a conspiracy. *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993). To satisfy the "during the course" aspect of the exception, the conspiracy must be extant at the time the statement is made. *Id*. Finally, the statement must be made in furtherance of a conspiracy. *Id*. at 395. The statements must be such as to prompt the listener, who need not be a coconspirator, to respond in a way that promotes or facilitates the carrying out of a criminal activity. *Id*. Identifying the objectives and even the participants of an unlawful agreement is often difficult because of the clandestine nature of criminal conspiracies. *People v Justice*, 454 Mich 334, 347; 562 NW2d 652 (1997). Thus, proof may be derived from the circumstances, acts, and conduct of the parties. *Id*.

We note that defendant fails to articulate exactly what her legal issues are on appeal. It appears that defendant first argues that coconspirator statements can only be introduced by a coconspirator. Trapani argues that, because these two witnesses were not coconspirators, their

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[1] Codefendants Alexander and Oullette pleaded guilty before the trial.

[2] We note that the prosecution relies on this Court's decision in *People v Hall*, 102 Mich App 483, 490; 301 NW2d 903 (1980), in support of its claim that testimony concerning a conspirator's statement may be admitted "subject to later independent proof of the conspiracy." We disagree. The Michigan Supreme Court's opinion in *Vega*, decided after *Hall*, controls. Independent proof of the conspiracy must be presented *before* coconspirator statements are admissible. *Vega*, *supra* at 780. However, there is nothing in defendant's brief on appeal to indicate that defendant argues that the statements were admitted absent independent evidence that she was involved in the conspiracy.

testimony was inadmissible. We disagree. The listener of coconspirator statements need not be a coconspirator. *Bushard, supra*, at 395.

It also appears that defendant argues that the statements were not made in the course of the conspiracy. We conclude that the first statement by Ouellette to Bowden, that he was going to Michigan to beat up a lady upon Trapani's request, was admissible. It was made in the course and furtherance of the conspiracy as Ouellette explained to his fiancé his departure to Michigan. As to the second statement, we conclude that it was inadmissible. Ouellette's statement to Bowden that he had shot the victim was made after the crime was committed and had no purpose for furthering the conspiracy. See *People v Ayoub*, 150 Mich App 150, 153; 387 NW2d 848 (1985). However, Ouellette subsequently testified at trial and admitted that he had shot the victim. Therefore, the second statement was cumulative to Ouellette's testimony. Although the claim of error has been preserved, any error "is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (quotation omitted). Trapani has not shown the error to be outcome determinative.

Similarly, we conclude that the statements made by Padgett to Miller were inadmissible as coconspirator statements because they were made after the crime was committed. However, we agree with the prosecution's claim that the statements were admissible as statements against penal interest pursuant to MRE 804(b)(3). *People v Beasley*, 239 Mich App 548, 553-554; 609 NW2d 581 (2000). Therefore, defendant's claim is without merit.

B. The Effective Assistance of Counsel

Trapani next argues that trial counsel was ineffective. Because a *Ginther*[3] hearing was not held below, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on the defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive the defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999), nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a strategy does not work does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Trapani first asserts that counsel was ineffective for failing to move for a change of venue. The decision whether or not to move for a change of venue constitutes a matter of trial strategy. *People v Anderson*, 112 Mich App 640, 646; 317 NW2d 205 (1981). Here, the prospective jurors who had learned of the case from media coverage were taken into chambers and questioned separately by the trial court to uncover any possible bias. Three prospective

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

jurors were excused for cause, while the remaining jurors indicated that they would be fair and impartial. The record does not show that a change of venue was justified.

Trapani next argues that her counsel was ineffective for failing to object when the trial court deviated from the directives of MCR 2.511(F) for the replacement of eight challenged jurors. MCR 2.511(F) provides for replacement of each juror as soon as one is excused. However, MCR 2.511(A) no longer requires automatic reversal where deviations from the standard jury process did not implicate the "struck jury method" or affect a defendant's right to exercise peremptory challenges pursuant to MCR 2.511(F). *People v Green*, 241 Mich App 40, 46; 613 NW2d 744 (2000). Trapani fails to show prejudice from the deviation from the jury selection procedure prescribed by MCR 2.511(A)(4), particularly when her right to exercise peremptory challenges pursuant to MCR 2.511(F) was not impeded. See *Green, supra* at 47.

Trapani next argues that her counsel was ineffective for failing to sever the trial. MCR 6.121 allows severance when a defendant provides the court with a supporting affidavit or makes an offer of proof that clearly demonstrates that her substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." *Id*. at 349. The tension between defenses must be so great that the jury would have to believe one defendant at the expense of the other. *Id*.

Trapanai argues that, although there were separate juries, the joint trial allowed codefendant Padgett's counsel to ask codefendants Alexander and Ouellette certain questions that pitted one defendant against the other. We conclude that the testimony of these two codefendants was admissible as part of the res gestae of the crime regardless of whether the trial was joint or separate. See *People v Robinson*, 99 Mich App 794, 799-800; 299 NW2d 32 (1980).

Further, it is evident that counsel's decision not to request a separate trial was a matter of trial strategy. Trapani's trial counsel reasonably may have preferred a joint trial because the evidence supported Trapani's theory that Padgett and the two other conspirators were mistaken in their belief that Trapani wanted the victim killed and that she was willing to pay them for the crime. Counsel also may have believed that it would be helpful to Trapani's case for the jury to see Padgett in the courtroom and hear the evidence directed against her. Moreover, any risk of prejudice arising from inconsistent defenses is allayed by the use of separate juries. *Hana, supra* at 351. The fact that the trial strategy did not work does not constitute ineffective assistance of counsel. *Stewart (On Remand), supra.*

C. The Custodial Interrogation

Trapani claims that her due process rights were violated because the police continued to question her after she requested counsel at a custodial interrogation. When an accused invokes the right to have counsel present during a custodial interrogation, the accused is not subject to further interrogation by the police until counsel has been made available, unless the accused initiates further communication, exchanges, or conversations with the police. *People v Adams*, 245 Mich App 226, 237; 627 NW2d 623 (2001). Whether a person was in custody is a mixed question of fact and law, which must be answered independently by this Court after review de novo of the record. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

We conclude from our review of the record that the questioning did not involve a custodial interrogation subject to *Miranda*.[4] *Coomer, supra.* Trapani was questioned in her own home, was repeatedly advised that she was not under arrest and was repeatedly advised that she could stop the interview at any time. Moreover, even when a suspect is in custody, a request for counsel must be unambiguous. *Adams, supra.* Here, the trial court did not err in finding that Trapani's statement that she would "like to be able to call" her attorney, considered in context, was not an unambiguous invocation of the right to counsel. *Id.* As the court noted, Trapani initiated the additional statements at issue after the questioning had stopped. Accordingly, the court properly denied Trapani's motion to suppress her statements.

II. Docket No. 232331

A. Sufficiency of the Evidence

Defendant Padgett argues that the evidence was insufficient to support her convictions. We review the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To convict a defendant of first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if she committed the offense directly. MCL 767.39; *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999). To establish that a defendant aided and abetted a crime, the prosecutor must prove 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 principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement. *Id.* Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime. *Id*. at 419-420. To prove a conspiracy to commit murder,

> it must be established that each of the conspirators have [sic] the intent required for murder and, to establish that intent, there must be foreknowledge of that intent. Foreknowledge and plan are compatible with the substantive crime of first-degree murder as both the crime of conspiracy and the crime of first-degree murder share elements of deliberation and premeditation. Prior planning denotes premeditation and deliberation. [*People v Hammond*, 187 Mich App 105, 108; 466 NW2d 335 (1991) (citation omitted).]

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[4] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

At trial, the prosecutor presented evidence sufficient to enable a rationale jury to find beyond a reasonable doubt that Padgett introduced Ouellette to Trapani, who hired him to commit the murder, Padgett helped plan and carry out the tasks necessary to complete the crime, and she was hired by Trapani to assist Ouellette in the commission of the crime. Thus, we conclude that the evidence was sufficient to support Padgett's convictions.

B. Padgett's Custodial Statements

Padgett next argues that her statements to the police at the custodial interrogation were made involuntarily and unknowingly.

Whether a person was in custody is a "mixed question of fact and law, which must be answered independently by the reviewing court after review de novo of the record." *Coomer, supra*. "Findings concerning the circumstances surrounding the giving of a statement are factual findings that are reviewed for clear error." *Id.* Here, the officers told defendant Padgett at the beginning of the interrogation that she was not under arrest. However, it is undisputed that the officers took Padgett to a location sixty miles away from her home and she did not have transportation to return. We conclude from our review of the totality of the circumstances in this case that Padgett was "deprived of [her] freedom in [a] significant way," and *Miranda* protections were applicable. *Miranda, supra*, 384 US 467, 478-479.

The test of voluntariness is whether "considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired.'" *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997) (citations omitted). In determining the voluntariness of the statements, we consider the factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

In the video-taped interrogation, Padgett told the officers that she was thirty-eight years old. She had a GED and earned a nursing degree in junior college and was a licensed practical nurse. She had not been in custody prior to the questioning, but she was familiar with television police shows. She was questioned for over an hour before she waived her *Miranda* rights, and the interview continued for about three hours. From our review of the record, there is no indication that Padgett's statement was not voluntarily given. The video recording of the interview establishes that Padgett was repeatedly advised of her *Miranda* rights, which were explained to her in considerable detail. The officers repeatedly informed her that she was free to end the interview and free not to answer any question. They told her that she was free to leave at any time and free to ask for an attorney at any time. Further, the officers repeatedly advised Padgett to take her time in deciding whether to continue the interrogation. Padgett asked the officers several questions related to the nature of her rights and the waiver provisions in the documents before her. Padgett repeatedly stated that she was participating in the interview voluntarily. She never asked for an attorney after waiving her *Miranda* rights. Additionally, she was offered food and beverage, and was not abused or threatened. Moreover, there is no allegation that she was injured, intoxicated, drugged or in ill health, deprived of sleep, food or medical attention, or threatened or abused. There is nothing to suggest that Padgett was coerced in any manner. The totality of the circumstances demonstrate that Padgett's statements were voluntary.

C. The Right to Present a Defense

Padgett next claims that she was precluded from presenting a defense by the exclusion from evidence of a portion of Patrick Alexander's criminal record that Padgett intended to use to show Alexander's bias.

A defendant's "constitutional right to present exculpatory evidence in his defense and the rationale and purpose underlying MRE 804(b)(3) of ensuring the admission of reliable evidence must reach a balance." *People v Barrera*, 451 Mich 261, 279; 547 NW2d 280 (1996). The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Id*. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Neither Alexander nor the public record that was produced provided information on the sentences for Alexander's Florida convictions or adjudications. However, as our Supreme Court recently decided

> evidence of bias arising from past arrest without conviction is admissible if relevant, as long as its probative value is not substantially outweighed by the danger of unfair prejudice. MRE 403. Because prejudicial inferences may also be drawn from evidence of past arrests, "we instruct the bench and bar to employ the evidentiary safeguards already present" in the Michigan Rules of Evidence in determining the admissibility of a past arrest that did not result in conviction. [*People v Layher*, 464 Mich 756, 768-769; 631 NW2d 281 (2001).

Here, the trial court did not determine the admissibility of the evidence in light of the decision in *Layher*. However, we conclude that the error was harmless. *Lukity, supra* at 495-496. The trial court admitted evidence of Alexander's convictions for larceny and for uttering and publishing. Padgett established through extensive cross-examination that Alexander implicated Padgett only after he was offered a favorable plea agreement.[5] Thus, Alexander's potential bias and motive to lie about Padgett's involvement was fully explored and presented to the jury. Padgett was not deprived of her right to present a defense.

D. Relevant Evidence

Padgett next argues that the testimony regarding Mike Sumaluka's spider web tattoo was irrelevant and inadmissible into evidence. We disagree.

The admission of evidence is reviewed for an abuse of discretion. *Snider, supra.* Here, Miller testified that Sumaluka told him that a person had to "take someone out" to get the spider

[5] In exchange for his testimony against Padgett, codefendant Alexander was allowed to plead guilty to a reduced charge of second-degree murder and thereby avoid a sentence of life imprisonment without the possibility of parole.

web tattoo that Sumaluka had on his arm. It was against this backdrop that Miller later told Padgett about Sumaluka when she asked Miller if he knew anyone who could be hired to commit murder. The evidence was relevant to Padgett's intent to meet the elements of first-degree murder and conspiracy. MRE 401. The evidence was admissible.

E. Jury Instruction

Finally, Padgett argues that reversal is required because the trial court erred in denying her request to instruct the jury on the lesser offense of solicitation to commit murder, MCL 750.157b. We review jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). The trial court is obligated to instruct the jury as to the law applicable to the case, but preserved nonconstitutional error is not ground for reversal unless it is more probable than not that the error was outcome determinative. *People v Rodriquez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000); *Lukity, supra*.

We disagree with Padgett's characterization of solicitation to commit murder as a necessarily included lesser offense of conspiracy to commit murder. "[E]very solicitation is an *attempted* conspiracy," *People v Rehkoff,* 422 Mich 198, 213; 370 NW2d 296 (1995) (emphasis in original), and an attempt to commit a crime is cognate to the completed crime. *People v Adams*, 416 Mich 53, 56-57; 330 NW2d 634 (1982). "A defendant's request to instruct the jury that it may find the defendant guilty of the cognate offense of attempt to commit the charged offense or of one of the necessarily included offenses of the charged offense must therefore be granted only where there is evidence, or on jury view a lack of evidence, tending to establish the elements of the cognate offense of attempt." *Id*. at 57. Solicitation of murder consists of (1) the solicitor purposely seeking to have someone killed and (2) trying to engage someone to do the killing. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). Padgett does not assert that the evidence established the elements of solicitation to commit murder. The evidence fails to show that Padgett would have met the second element. While Padgett purposely sought to have the victim killed when she asked Miller to refer her to a hired killer, she did not "engage someone to do the killing." Rather, the evidence showed that Trapani revealed the plan to Ouellette. Therefore, the trial court did not err in refusing to instruct the jury on solicitation to commit murder.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Michael J. Talbot