

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WANDA SUE COSTNER,

Defendant-Appellant.

UNPUBLISHED

March 13, 1998

No. 192005

Berrien Circuit Court

LC No. 89-001011 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY LEE COSTNER,

Defendant-Appellant.

No. 193202

Berrien Circuit Court

LC No. 89-001010 FH

Before: Markman, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Following a joint jury trial, defendants Wanda and Randy Costner were convicted of burning a dwelling house, MCL 750.72; MSA 28.267, and conspiracy to burn a dwelling house, MCL 750.157a; MSA 28.354(1). Defendant Wanda Costner was sentenced to forty-two months to twenty years' imprisonment, and defendant Randy Costner was sentenced to forty months to twenty years' imprisonment. Defendants appeal their convictions and sentences as of right. We affirm.

I

Defendant Wanda Costner argues that the evidence presented by the prosecution was insufficient to support her convictions. Her argument is premised on the contention that the witnesses

called by the prosecution to establish her participation in the crimes, namely Dwight Hall and William Johnson, should not have been believed because each testified pursuant to plea agreements. We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the prosecution and asking whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992). In doing so, however, we recognize that “juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.” *Id.*, 514-515, citing *People v Palmer*, 392 Mich 370, 375-376, 220 NW2d 393 (1974). Consequently, we decline defendant’s invitation to reevaluate the credibility of the witnesses who implicated defendant and find that defendant’s convictions are supported by sufficient evidence.

II

Defendant Wanda Costner next argues that she should be granted a new trial because the prosecution elicited testimony from a prosecution witness that defendant’s monthly expenses exceeded her income by \$500. However, because defense counsel failed to preserve this issue at trial, our review is limited to whether the admission of the evidence constituted plain error that could have been decisive of the outcome of the trial. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). The law respecting the admission of the poor financial condition of a party as evidence of motive for a crime was discussed by our Supreme Court in *People v Henderson*, 408 Mich 56; 289 NW2d 376 (1980). In *Henderson*, our Supreme Court drew a distinction between evidence that a person is chronically short of funds and evidence that a person is experiencing a financial hardship that is atypical to that person’s normal financial condition. *Id.*, 66. The latter is admissible to show motive for a crime; the former is not. *Id.* In the case at bar, however, the evidence respecting defendant’s financial troubles plainly demonstrates that defendant was experiencing financial distress, not merely that she was chronically short of funds. Further, defendant attempted to portray herself as well-to-do at the time of the fire, asserting that she owned a successful business and that she had recently received the proceeds from a large personal-injury settlement. The evidence respecting defendant’s financial distress was admissible to show that this was not the case. Finally, as indicated above, because defense counsel failed to tender an objection to the admission of the evidence at trial, our review is limited to whether there is plain error that could have been decisive of the outcome of the trial. *Grant, supra*. We conclude that there is not.

III

Defendant Wanda Costner next argues that the trial court erred in admitting, over defense counsel’s objection, the testimony of William Johnson describing statements made by Larry Simpson, an alleged coconspirator. The challenged statements concerned a discussion between defendant Randy Costner and Simpson, which transpired a few days after the fire, and a conversation between defendant Wanda Costner and Simpson, which occurred shortly before the fire. The trial court admitted the testimony pursuant to MRE 801(d)(2)(E), which excludes from the definition of hearsay the statement of a coconspirator made “during the course and in furtherance of the conspiracy on independent proof of the conspiracy.” We review a trial court’s decision to admit evidence for abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Defendant first contends that the statements are hearsay and should not have been admitted under MRE 801(d)(2)(E) because the prosecution failed to present independent proof of a conspiracy between defendant and Simpson. We disagree. Johnson testified that he was present at numerous meetings with defendants, Simpson, and others, where the plan to burn defendants' home was discussed and Simpson's role in the crime was explained. This testimony was sufficient to independently establish a conspiracy between defendant and Simpson. Defendant also contends that Simpson's post-fire statements should not have been admitted under MRE 801(d)(2)(E) because Simpson did not make the statements "during the course" of the conspiracy. However, because defendant failed to object on this specific ground at trial, this contention is not preserved. MRE 103(a)(1); *Grant, supra*, 545, 553. Nonetheless, defendant's contention is without merit because "even after the primary objective of the crime is complete, the conspiracy may continue if its objectives contemplated the completion of financial or other arrangements." *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993). In the case at bar, the record reveals that when Simpson made the challenged statements, payment had not yet been made to those hired to burn defendants' home. Therefore, because the conspiracy was still alive, the admission of the statements was proper.

IV

Defendant Wanda Costner next argues that the manner in which the trial court instructed the jury respecting the offense of conspiracy to burn a dwelling house constituted error. However, because defendant failed to preserve this issue at trial, appellate review is precluded absent manifest injustice. *People v Cross*, 202 Mich App 138, 148; 508 NW2d 144 (1993). After reviewing the jury instructions in their entirety, we conclude that the trial court adequately instructed the jury respecting the offense of conspiracy to burn a dwelling house, and therefore, we decline to review this contention further. Defendant also argues that the trial court erred in failing to instruct the jury to consider evidence concerning defendant's prior bad acts only for the purposes for which the evidence was admitted. Defendant, however, failed to seek such an instruction at trial and has neglected to indicate where in the record the alleged prior bad acts evidence was admitted. After reviewing the record in this case, we find that manifest injustice will not result if we decline to review this contention.

V

Both defendants argue that the prosecutor impermissibly vouched for the credibility of prosecution witnesses. Specifically, defendant Wanda Costner contends that the prosecutor engaged in misconduct when he questioned two prosecution witnesses whether they were testifying truthfully, and when he elicited testimony from one witness that his plea agreement contained a promise to give truthful testimony. Defendant Randy Costner contends that the prosecutor engaged in misconduct when he remarked, in closing argument, that a prosecution witness had been truthful. Neither defendant, however, tendered timely objections to the questions and remarks posed by the prosecutor, and thus, our review is foreclosed unless we find error which could not have been cured by a timely objection, or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Although a prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully, mere reference to a plea agreement containing a promise of truthfulness is not, without more, a sufficient

ground for reversal. *People v Bahoda*, 448 Mich 261, 273-282; 531 NW2d 659 (1995). Accordingly, we find no error in the prosecutor's questions respecting the plea agreement. As to the prosecutor's comments and questions respecting the truthfulness of prosecution witnesses, we also find no error because the prosecutor neither expressed nor implied that he had some special knowledge that the witnesses had testified truthfully.

VI

Defendant Wanda Costner next argues that the prosecutor engaged in several instances of misconduct during closing argument. Again, however, defendant failed to object to any of the alleged improper prosecutorial remarks. Consequently, our review is precluded unless a timely objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice. *Stanaway, supra*. Alleged improper prosecutorial comments are reviewed as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). After reviewing the record in its entirety, we find that the prosecutor's comments did not deny defendant a fair and impartial trial.

VII

Defendant Wanda Costner next argues that the sentencing court erred in imposing a valid sentence, then modifying that sentence without complying with the law respecting sentence modification. We disagree. During defendant's sentencing hearing, the sentencing court stated that defendant would serve concurrent terms of three to twenty years' imprisonment for each conviction. However, immediately following this pronouncement, the prosecutor alerted the sentencing court to a possible guidelines scoring error. Following a short recess, the sentencing court agreed with the prosecutor that the guidelines had been scored incorrectly, and then proceeded to sentence defendant to serve concurrent terms of three and one-half years to twenty years' imprisonment for each conviction.

MCR 6.429(A) provides that the sentencing court "may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed as provided by law." This court rule serves to codify the principle that a sentencing court lacks authority to set aside a valid sentence once a defendant begins serving the sentence. *People v Wybrecht*, 222 Mich App 160, 166; 564 NW2d 903 (1997). In the case at bar, however, the sentencing court neither modified nor set aside a valid sentence. Rather, after recognizing that it had orally pronounced a sentence that did not conform with the proper guidelines scoring range, the sentencing court merely rearticulated the appropriate sentence for the record. The mere oral pronouncement of a sentence does not terminate the sentencing court's authority to correct that pronouncement before issuing its sentencing order or before remanding a defendant to jail to await execution of that sentence. *People v Bingaman*, 144 Mich App 152, 158-159; 375 NW2d 370 (1984). Defendant's claim is without merit.

VIII

Defendant Randy Costner argues that an approximate six-year delay between his conviction and sentence deprived the sentencing court of the authority to sentence him. We disagree. Defendant's claim implicates the right to a speedy trial, which is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute, and which extends to the sentencing portion of a criminal proceeding. US Const, Am VI; Const 1963, art 1, sec 20, MCL 768.1; MSA 28.1024; *People v Garvin*, 159 Mich App 38, 46; 406 NW2d 469 (1987). However, in determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Garvin, supra*. In the instant case, defendant concedes that the delay in his sentencing resulted primarily from his post-conviction flight from Michigan to Arkansas, and his failure to attend his original sentencing. Because defendant's own actions caused the delay in his sentencing, we conclude that defendant was not denied his right to a speedy trial. Further, although defendant was briefly incarcerated in Arkansas before his extradition to Michigan, defendant was not prejudiced by this incarceration because the sentencing court gave defendant credit for the time that he served in Arkansas.

IX

Defendant Wanda Costner finally argues that her trial counsel was ineffective for failing to preserve several of the allegations of error discussed above. To establish ineffective assistance of counsel, however, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Because we have concluded that defendant's claims of error are either without merit or were not outcome determinative, we reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Stephen J. Markman

/s/ William B. Murphy

/s/ Janet T. Neff