

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH ERIC ZYSK,

Defendant-Appellant.

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UNPUBLISHED

March 28, 2006

No. 252550

Macomb Circuit Court

LC No. 2003-000181-FC

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of an explosive device causing injury, MCL 750.211a, conspiracy to assault with intent to rob and steal while armed, MCL 750.157a, and conspiracy to assault with intent to murder, MCL 750.157a. He was sentenced to concurrent terms of 15 to 25 years' imprisonment for the possession conviction and 13 to 20 years' imprisonment for each of the conspiracy convictions. He appeals as of right, and we affirm.

Defendant first argues that the prosecution introduced insufficient evidence to support his possession and conspiracy to assault with intent to commit murder convictions. We disagree. In reviewing a challenge to the sufficiency of the evidence, we view the evidence *de novo* in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Questions of credibility and intent are left to the trier of fact to resolve and will not be revisited anew on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

At the time of the incident giving rise to this prosecution, MCL 750.211a read in pertinent part as follows:

(1) A person shall not manufacture, buy, sell, furnish, or have in his or her possession any device that is designed to explode or that will explode upon impact or with the application of heat or a flame, or that is highly incendiary, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person . . . .

(2) A person who violates this subsection is guilty of a crime as follows:

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(c) If the violation causes physical injury to another individual, other than serious impairment of a body function, the person is guilty of a felony punishable by imprisonment for not more than 25 years or a fine of not more than \$20,000.00, or both.

In the present case, defendant challenges the sufficiency of the evidence only as to the causation requirement of this crime. Defendant concedes that the prosecution presented evidence that defendant threw a burning bottle into the complainant's car and that the complainant was burned when he picked the bottle up and threw it out of his car. Defendant asserts, however, that the evidence is insufficient because the complainant himself caused his injury by picking the bottle up and throwing it out of his car. This argument is without merit.

In the criminal law context, the term "cause" has acquired a unique, technical meaning. *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005). Accordingly, the term must be construed "'according to [its] peculiar and appropriate meaning' in the law." *Id.*, quoting MCL 8.3a.

In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause. The concept of factual causation is relatively straightforward. In determining whether a defendant's conduct is a factual cause of the result, one must ask, "but for" the defendant's conduct, would the result have occurred? If the result would not have occurred absent the defendant's conduct, then factual causation exists.

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For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a "direct and natural result" of the defendant's actions. In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken. . . .

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The linchpin in the superseding cause analysis . . . is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable . . . then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death. [*Id.* at 435-438 (Footnotes omitted).]

Here, the prosecution presented sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant's conduct was the factual and proximate cause of the complainant's injury. *Johnson, supra*. As conceded by defendant, the prosecution presented evidence that defendant threw a burning bottle into the complainant's car, and that the complainant was burned when he threw the bottle back out of his car. Absent defendant's conduct, the complainant would not have been injured. It was reasonably foreseeable that the complainant would remove the burning object thrown into his car to prevent the car from exploding. Thus, the causation element of the crime was sufficiently established.

We also reject defendant's sufficiency challenge to his conspiracy to assault with intent to murder conviction based on the intent element of the crime.

A conspiracy is mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. . . . The essence of a conspiracy is the agreement itself. Nevertheless, direct proof of agreement is not required, nor is proof of a formal agreement necessary. It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement. . . . A conspiracy may be proven by circumstantial evidence or may be based on inference. The crime of conspiracy is complete upon formation of the agreement. No overt act in furtherance of the conspiracy is necessary. [*People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1992) (Citations omitted).]

The prosecution presented evidence that defendant suggested getting revenge on the complainant for an allegedly improper drug transaction, constructed a Molotov cocktail, entered the complainant's phone number into a cell phone so that his co-conspirator could call the complainant, and encouraged his co-conspirator when he said he wanted to kill the complainant. In light of this evidence, and mindful that minimal circumstantial evidence is sufficient to prove intent, *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004), we conclude that sufficient evidence of the requisite intent was adduced.

Defendant next asserts that the trial court committed plain error affecting defendant's substantial rights when it failed to sua sponte instruct the jury on the elements of conspiracy to assault with intent to do great bodily harm or some lesser assault. See *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999). However, defendant acceded to the jury instructions without objection. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). Our Supreme Court has held that "[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 214, 215; 612 NW2d 144 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).<sup>1</sup>

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<sup>1</sup> Alternatively, we note that jury instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). However, defendant did not testify that he held a lesser intent, but rather, he denied any role in the incident and alleged that

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As for defendant's assertion that counsel was ineffective for failing to request such instructions, he bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland, supra* at 687-688; *Pickens, supra* at 309, such that there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

A trial judge must instruct the jury regarding the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Again, the prosecution presented evidence that defendant suggested getting revenge on the complainant for an allegedly improper drug transaction, constructed a Molotov cocktail, entered the complainant's phone number into a cell phone in order that his co-conspirator could call the complainant, and encouraged his co-conspirator when he said he wanted to kill the complainant. Defendant introduced testimony that defendant never explicitly stated that he wanted to kill the complainant. Defendant additionally testified that the complainant threw the Molotov cocktail at him first and pulled a gun on him. In rebuttal, the prosecution presented evidence that no weapon was found in connection with this case. We conclude that an instruction on conspiracy to assault with intent to commit great bodily harm was not supported by a rational view of the evidence. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987), overruled in part on other grounds *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). Therefore, defense counsel was not deficient for failing to request such an instruction.

Defendant also argues that trial counsel was ineffective in several other ways. Specifically, defendant argues that counsel was ineffective for (1) failing to work diligently on the case, (2) failing to contact defendant to discuss his defense, (3) failing to obtain a copy of the 911 call defendant made on the night of the incident in issue, (4) failing to obtain laboratory results on the explosive devices, (5) failing to obtain a copy of his co-conspirator's prison visitation records, (6) failing to follow up on a discovery motion, and (7) failing to move to suppress an unspecified confession made by defendant.

The record does not support each of the assertions of error. The record clearly shows that defense counsel did work diligently on the case throughout the proceedings below. Further, the only evidence of record indicates that it was defendant who refused to discuss the case with counsel. The record is also devoid of any evidence that counsel did not seek to obtain a copy of the 911 call, the cited lab results, and the visitation records. As for the discovery motion, the trial transcript indicates that the criminal records were obtained and examined. Finally, there is no indication that any confession was ever presented to the jury. Given that defendant fails to

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the complainant was the aggressor. Therefore, a lesser instruction was not consistent with the evidence presented and the defense raised.

establish that counsel was ineffective in any of the ways cited, his assertion of cumulative error necessarily fails as well.

We also reject defendant's argument that the trial court abused its discretion when it denied defendant's motion to dismiss his appointed counsel. See *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Appointment of substitute counsel is warranted only on a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *Traylor, supra*. Here, defendant failed to make a showing of good cause for dismissal of assigned counsel. The basis cited by defendant in support of his motion was that that he had requested transcripts and motions for discovery and had not received them. Although a difference of opinion existed regarding trial tactics, defendant failed to show or make an offer of proof that provision of these materials to defendant would have significantly helped the defense or would have affected trial strategy. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion.

Finally, we reject defendant's assertion that the prosecution knowingly permitted the introduction of perjurious testimony by the complainant at both the preliminary examination and at trial. Defendant's argument is based on testimony by the complainant that he had not sold drugs to defendant's co-conspirator. Because defendant has not preserved this issue for appellate review, we review it for plain error affecting substantial rights. *Carines, supra* at 763.

We first note that defendant has failed to provide this court with a copy of the preliminary examination transcript as required. MCR 7.210(B)(1)(a); *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). With regard to defendant's argument as to the complainant's trial testimony, defendant has quoted a statement in his supplemental brief on appeal, allegedly made by the prosecutor during her closing argument, which is not found in the record. We assume that defendant's quotation is simply a paraphrase of other similar statements made during the prosecutor's closing and rebuttal closing arguments.

Pursuant to the Due Process Clause of the Fourteenth Amendment,<sup>2</sup> prosecutors "have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Further, prosecutors have a duty to correct false evidence. *Id.* at 277. However, the prosecution is not required to disbelieve its own witness merely because testimony from another witness contradicts him. *Id.* at 278-279.

The record clearly shows that it was defendant who introduced and pursued the matter in issue through cross-examination of the complainant. The prosecutor never asked the complainant if he had sold drugs to anyone either during her direct or redirect examination.<sup>3</sup> Indeed, on redirect the prosecutor asked the complainant a series of almost rhetorical questions

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<sup>2</sup> US Const, Am XIV, § 1.

<sup>3</sup> The complainant's testimony during redirect that he had not sold "him" any drugs was nonresponsive. See *People v Williams*, 114 Mich App 186, 198-199; 318 NW2d 671 (1982).

in an exchange that seems to have been intended to explain to the jury why the complainant would lie about the subject. Thus, instead of attempting to perpetuate what she might have believed to be untrue testimony, the prosecutor in essence acknowledged her doubts about this testimony before the jury.

As for the prosecutor's duty to correct false evidence, the prosecutor did present defendant's testimony that he had witnessed co-conspirator purchasing drugs from the complainant, as well as the testimony of another individual about what she had heard defendant and co-conspirator say about drug deals with the complainant. There is no indication that the prosecutor possessed any other evidence that she could have disclosed that would have shown the complainant's testimony to be false. In this context, it is clear that the prosecutor was attempting in her closing arguments to reduce the negative impact on the complaint's credibility caused by his denials. Under these circumstances, the prosecutor did not violate defendant's due process rights.

Affirmed.

/s/ Donald S. Owens  
/s/ Kirsten Frank Kelly  
/s/ Karen M. Fort Hood