

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 15, 2011

v

GREGORY MICHAEL ASHWORTH,

Defendant-Appellant.

No. 299887
Saginaw Circuit Court
LC No. 09-033076-FC-5

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Gregory Michael Ashworth appeals his jury trial convictions of conspiracy to commit armed robbery,¹ armed robbery,² three counts of use of a firearm during the commission of a felony (“felony-firearm”),³ conspiracy to commit assault with the intent to murder,⁴ assault with the intent to murder,⁵ and felon in possession of a firearm.⁶ Ashworth was sentenced as a habitual offender⁷ to serve concurrent prison sentences of 39 to 75 years for the conspiracy, armed robbery and assault with the intent to murder convictions, and three years 11 months to seven years six months imprisonment for the felon in possession of a firearm conviction. Ashworth was also sentenced to serve three concurrent sentences of two years in prison for the felony-firearm convictions that were to be served before and consecutive to the other sentences, and for which he received 363 days credit. We affirm Ashworth’s convictions and sentences, but remand to the trial court solely for the ministerial purpose of amending the judgment of sentence.

¹ MCL 750.157a; MCL 750.529.

² MCL 750.529.

³ MCL 750.227b.

⁴ MCL 750.157a; MCL 750.83.

⁵ MCL 750.83.

⁶ MCL 750.224f.

⁷ MCL 769.10.

Ashworth's convictions stem from the robbery and non-fatal shooting of Harry Taylor, which he perpetrated with Jason Thomas Tarver. Ashworth first argues that there was insufficient evidence to support his convictions of conspiracy to commit armed robbery and conspiracy to commit assault with the intent to murder, as there was no evidence of an explicit agreement between Ashworth and Tarver to commit the crimes.⁸ We disagree. "We review de novo a challenge on appeal to the sufficiency of the evidence."⁹ "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, [this Court] is required to take the evidence in the light most favorable to the prosecutor" to determine "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt."¹⁰

"A conspiracy is an agreement, expressed or implied, between two or more persons to commit an unlawful or criminal act."¹¹ "Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective."¹² Because it is difficult to prove an actor's state of mind, "[c]ircumstantial evidence and the reasonable inferences it permits are sufficient to support a conviction"¹³ "[K]nowledge that someone proposes unlawful action alone is not enough to find involvement in a conspiracy"¹⁴ "[T]here must be proof demonstrating that the parties specifically intended to further, promote, advance, or pursue the unlawful objective."¹⁵ "[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties."¹⁶ "What the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do."¹⁷

The actions of Ashworth and Tarver are evidence of their agreement to commit the crimes. While Tarver held Taylor at gunpoint Ashworth searched Taylor's car. Both Ashworth and Tarver then took Taylor's possessions. Ashworth told Tarver to kill Taylor, and both Tarver and Ashworth instructed Taylor to go to the backyard of the house. Tarver then handed the gun

⁸ Ashworth does not challenge the sufficiency of the evidence to convict him of the underlying substantive offenses.

⁹ *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010).

¹⁰ *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010).

¹¹ *People v Barajas*, 198 Mich App 551, 553-554; 499 NW2d 396 (1993).

¹² *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001) (citation omitted).

¹³ *Ericksen*, 288 Mich App at 196.

¹⁴ *People v Blume*, 443 Mich 476, 484; 505 NW2d 843 (1993).

¹⁵ *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997).

¹⁶ *People v Lowery*, 274 Mich App 684, 693; 736 NW2d 586 (2007), quoting *Justice*, 454 Mich at 347.

¹⁷ *Id.*

to Ashworth and shot Taylor multiple times when Taylor attempted to escape. As such, there is sufficient evidence to support Ashworth's conspiracy convictions.

Ashworth next asserts that convicting him of armed robbery and assault with the intent to commit murder, as well as conspiracy to commit both of those crimes violated double jeopardy. We disagree. Ashworth did not raise this or the remaining claims in the trial court so we review them for plain error affecting Ashworth's substantial rights, unless otherwise specified.¹⁸ "[R]eversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial."¹⁹

The federal and state constitutions "prohibit a defendant from being placed twice in jeopardy" for the same offense.²⁰ "[C]onspiracy is a crime that is separate and distinct from the substantive crime that is its object."²¹ "[T]he crime of conspiracy does not merge into the offense committed in furtherance of the conspiracy."²² Therefore, consistent with our Supreme Court's holding,²³ Ashworth's double jeopardy rights were not violated.

Ashworth also contends that the prosecutor committed misconduct by eliciting testimony that he had been incarcerated as a juvenile. We agree, but find that the misconduct was harmless. "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial."²⁴ "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context."²⁵ "A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence."²⁶ Reversal is not warranted if defendant was "neither denied a fair trial nor prejudiced."²⁷

At trial the prosecutor asked Taylor how he knew Ashworth and Tarver. Taylor responded that he knew Ashworth and Tarver from the "neighborhood" but he first met them in jail when Ashworth and Tarver were juveniles. The prosecutor then asked Taylor questions regarding the extent of their relationship while they were incarcerated. While the initial

¹⁸ *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

¹⁹ *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

²⁰ *People v Booker*, 208 Mich App 163, 172; 527 NW2d 42 (1994).

²¹ *People v Denio*, 454 Mich 691, 712; 564 NW2d 13 (1997).

²² *Id.*

²³ *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

²⁴ *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

²⁵ *Id.* at 64.

²⁶ *Id.* at 63-64.

²⁷ *Id.* at 66.

testimony that Taylor met Ashworth and Tarver while in jail was unsolicited by the prosecutor, the additional questions regarding the nature of their relationship while incarcerated were improper. That notwithstanding, the testimony was not unduly prejudicial and did not deny Ashworth of a fair trial. The jury was already aware that Ashworth had a prior felony conviction and there was significant evidence supporting his convictions. Therefore, there was no prosecutorial misconduct.

Next, Ashworth contends that his counsel was ineffective for failing to object to the prosecutor's questions regarding his juvenile incarceration. We disagree. Because Ashworth did not raise this issue in the trial court, "our review is limited to mistakes apparent on the record."²⁸

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different.²⁹

As determined above, the testimony elicited by the prosecutor was not unduly prejudicial. As such, the result of the trial would not have been different had defense counsel objected and Ashworth's counsel was effective.

Ashworth also argues that his right to a public trial was violated when his family members were excluded from voir dire and trial. We disagree.

A criminal defendant has a constitutional right to a public trial.³⁰ The right to a public trial extends to jury selection.³¹ "Although the right to an open trial is not absolute, that right will only rarely give way to other interests."³² At the start of the second day of trial, Ashworth asked the trial court why his relatives had been asked to leave the courtroom the day before. In response the court advised that it did not know why Ashworth's family had been removed, but that the deputies had the responsibility of ensuring that the courtroom was safe. While there is nothing other than Ashworth's assertions to support that the courtroom was closed, even if it had been closed, Ashworth failed to object to its closure. Ashworth also advised the trial court that he did not care who was able to observe the trial. "The right to complain about an order of exclusion may be waived either expressly or by an accused's failure to object."³³ Because

²⁸ *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

²⁹ *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

³⁰ US Const, Am VI; Const 1963, art 1, § 20.

³¹ *Presley v Georgia*, 558 US ___, ___; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010).

³² *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992).

³³ *People v Gratton*, 107 Mich App 478, 481; 309 NW2d 609 (1981).

Ashworth both expressly waived his right to and failed to object, his right to a public trial was not violated.

Ashworth also asserts that his trial counsel was ineffective due to his failure to object to Ashworth's family being removed from the courtroom. We disagree. Because there is no evidence on the record that the closure occurred, it is not possible to determine whether defense counsel's performance fell below an objective standard of professional reasonableness as is required.³⁴ As such, Ashworth's trial counsel was effective.

Ashworth further contends that he was denied his constitutional right to select appointed appellate counsel. We disagree. "[T]here is a federal constitutional right to appointed counsel in pursuing a first appeal of right."³⁵ A defendant, however, is not entitled to choose his appointed counsel, as Ashworth claims.³⁶ The court rules provide procedures for the trial court to inform a defendant of his right to appellate counsel, which state in pertinent part:

- (1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that
 - (a) the defendant is entitled to appellate review of the conviction and sentence,
 - (b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and
 - (c) the request for a lawyer must be made within 42 days after sentencing.³⁷

At the sentencing hearing, Ashworth was provided with notice of his right to appellate review, which advised that a request for the appointment of an attorney must be made in writing and sent directly to the court within 42 days. Ashworth signed the request for appointment and affidavit of indigency and appellate counsel was appointed. The trial court complied with the applicable rules, so Ashworth was not denied his constitutional right to appellate counsel.

Finally, Ashworth argues, and the prosecutor concurs, that his sentence for conspiracy to commit assault with the intent to murder (count four) should run concurrently with the felony-firearm sentences. We agree.

At sentencing, the trial court ordered that Ashworth's felony-firearm sentences run consecutive to not only the sentences for the underlying felonies, but also the sentence for conspiracy to commit assault with the intent to murder. Since conspiracy to commit assault with

³⁴ *Jordan*, 275 Mich App at 667.

³⁵ *People v Najar*, 229 Mich App 393, 401; 581 NW2d 302 (1998).

³⁶ *People v Ackerman*, 257 Mich App 434, 456; 669 NW2d 818 (2003).

³⁷ MCR 6.425(F).

the intent to murder was not the specific underlying felony for any of Ashworth's felony-firearm convictions, the trial court erred.³⁸

We affirm Ashworth's convictions and sentences, but we remand solely for the ministerial purpose of amending the judgment of sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

³⁸ *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000).