

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 20, 2012

v

DARNELL WEAVERLY COOLEY,
Defendant-Appellant.

No. 304071
Oakland Circuit Court
LC No. 2010-230841-FC

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Following remand by our Supreme Court, defendant appeals by leave granted¹ his March 11, 2011, conviction of attempted manslaughter, MCL 750.321, by a conditional no contest plea.² Defendant was sentenced, pursuant to his sentencing agreement, to three to five years' imprisonment for his attempted manslaughter conviction. We affirm.

Before we turn to the merits, we must first determine the issues properly before us. MCR 6.301(C) is very specific about how to preserve issues for appeal under a conditional plea. That court rules provides, in the relevant part:

A conditional plea preserves for appeal a *specified pretrial ruling* or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. *The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record* or in a writing made a part of the record. [MCR 6.301(C)(2).]

¹ *People v Cooley*, 491 Mich 889; 810 NW2d 33 (2012).

² Defendant, along with codefendants Eiland Johnson and Deandre Woolfolk, were originally charged with, and bound over for, second-degree murder, MCL 750.317, manslaughter, MCL 750.321, assault with intent to do great bodily harm, MCL 750.84, and felonious assault, MCL 750.82.

At the plea hearing the parties followed the commands of MCR 6.301(C) by specifying the exact, singular issue upon which defendant was conditioning his plea:

The Court: Now my understanding, now that you've heard what the instruction would be, actually, with language changed from what we had discussed in chambers, and perhaps in the hearing; how does [defendant] wish to proceed?

Mr. Cyril Hall [Defense counsel]: Your Honor, at this time we respectfully ask the Court to permit us to take a conditional plea. Um, I think that the Court is aware of--I'm sure the Court is aware that Mr. [Jeffrey] Hall for the prosecution, would have to agree and this Court would have to agree to *a conditional plea so we can challenge the Court's ruling.*

The Court: Now explain to me, *would it be just the ruling that I gave; the proposed instruction--preliminary instruction to the jury?*

Mr. Cyril Hall: *Right.* That's your order.

The Court: Okay. I--I mean, there--*the conditional part only relates to what I just said.*

Mr. Cyril Hall: *That's correct.* [Emphasis added.]

The record therefore established that defendant conditioned his plea of no contest solely on the court's ruling that it would be giving a preliminary instruction to the jury to explain why certain witnesses' testimonies were coming into evidence, including witness Anthony Alls's testimony, without the witness testifying. The prosecution and the trial court stipulated that defendant's plea would be conditional regarding that exact trial court ruling. Therefore, defendant's issue regarding the court's preliminary instruction is preserved for review. However, his arguments that the trial court abused its discretion by (1) granting the prosecution's motion in limine to allow Officer Darrel Palmer to testify regarding the reason for Alls's unavailability, and (2) ruling that Alls's testimonial statements to police were admissible pursuant to the doctrine of forfeiture by wrongdoing, are not preserved for review. MCR 6.301(C)(2).

This Court reviews claims of instructional error de novo. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). "This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id.* Furthermore, a jury is presumed to follow jury instructions. *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011).

The trial court ruled that Alls's testimonial statements to police regarding this crime were admissible pursuant to forfeiture by wrongdoing. MRE 804(b)(6).³ The trial court found by a preponderance of the evidence that defendant procured the unavailability of Alls. Defendant conditioned his plea of no contest to attempted manslaughter on the court's ruling to give a preliminary instruction to the jury to explain why Alls's testimony was coming into evidence, despite his being unavailable.

The court's proposed instruction regarding Alls's unavailability was as follows:

Two witnesses for the prosecution are unavailable for trial. Anthony [A]lls was the victim of a homicide and the [c]ourt has ruled that his statements are admissible through . . . other evidence.

You may not speculate as to the circumstances surrounding his death or consider it any way [sic] or any purpose in rendering your verdict.

Defendant has failed to show that the trial court erred in deciding to give a jury instruction that Alls's unavailability was due to his homicide. The prosecution was permitted to give an explanation to the trier of fact regarding why Alls was unavailable. See *People v Johnson (On Rehearing)*, 208 Mich App 137, 139-142; 526 NW2d 617 (1994). Additionally, the jury instruction directed the jurors not to speculate regarding the circumstances surrounding his death or consider it for the purpose of rendering a verdict. Thus, that instruction would have cured any possible prejudice toward defendant, as jurors are presumed to follow the court's instructions. *Meissner*, 294 Mich App at 457.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Donald S. Owens

/s/ Christopher M. Murray

³ Pursuant to MRE 804(b)(6), "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," serves as an exception to the hearsay rule when the declarant is unavailable for trial.