STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2005
v	No. 256450 Alpena Circuit Court
MELISSA KAY BELANGER, Defendant-Appellant.	LC No. 03-005903-FC

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316(a), conspiracy to commit murder, MCL 750.157a, solicitation of murder, MCL 750.157b(2), and arson of a dwelling house, MCL 750.72. Defendant was sentenced to concurrent life sentences of life imprisonment without parole for first-degree murder, life imprisonment for conspiracy to commit murder and solicitation of murder, and eight to twenty years' imprisonment for arson in a dwelling house. We affirm.

This case stems from the stabbing death of James Orban by defendant's husband,[1] Jason Belanger, and the subsequent arson of Orban's home.

Defendant first argues the court abused its discretion in denying her motion for a mistrial after a prosecution witness testified that she was familiar with defendant because "her and her sister tried to rob him [the victim]" a "long time" ago. "[T]he grant or denial of a mistrial is within the sound discretion of the trial court, and there must be a showing of prejudice to the defendant's rights if error requiring reversal is claimed." *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992).

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228, 530 NW2d 497 (1995) (citations omitted). This Court recently concluded that a witness' reference to the defendant's previous incarceration was not grounds for a mistrial, holding that "not every instance of mention before a jury of some inappropriate subject matter warrants a

[1] Defendant and Jason married after the killing.

mistrial." *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Id*., citing *Gonzales, supra* at 266-267. This Court has also concluded that "an isolated or inadvertent reference to a defendant's prior criminal activities will not result in reversible prejudice," but "when there are deliberate and repeated efforts by the prosecutor to impress upon the jury that a defendant . . . has committed other crimes, reversible prejudice results and a new trial must be ordered." People *v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973).

Here, the court rejected defendant's request for a mistrial and swiftly gave a cautionary instruction to the jury. Assuming the witness' comments constituted an irregularity in the proceedings, defendant has failed to demonstrate prejudice impairing her right to a fair trial. The remarks were not elicited by the prosecutor but rather were volunteered by the witness in response to a general question. The prosecutor did not make "deliberate and repeated efforts" to inappropriately introduce bad acts evidence. *Wallen*, *supra* at 613. The situation is distinguishable from *People v Page*, 41 Mich App 99; 199 NW2d 669 (1972), on which defendant relies, where the witness was a police officer "who would normally command the respect of the jury." *Id*. at 102. Here, the witness was a layperson whose testimony was cut short after only six introductory questions. The most prejudicial aspect to this testimony is the fact that the witness referenced another act that defendant had apparently committed against the victim. However, any prejudicial effect was significantly lessened by the court's cautionary instruction. The instruction was given almost immediately and thoroughly discredited the comment as unreliable hearsay and an inadmissible reference to a prior bad act. Compare *Griffin*, *supra* at 36-37 (concluding that even in the absence of a cautionary instruction an isolated reference to prior incarceration was not cause for a mistrial). This "isolated" and "inadvertent reference to a defendant's prior criminal activities" did not result in reversible prejudice. *Wallen, supra* at 613.[2]

Next, defendant argues that there was insufficient evidence to convict her of first-degree murder on an aiding and abetting theory. We disagree. This Court reviews claims of insufficient evidence de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), and views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Aiding and abetting in the commission of a crime is prohibited by MCL 767.39, which provides as follows:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

[2] Although we do not condone the trial court's statement that it was denying defendant's motion "only for one reason; we have been here for three or four days trying this case," the trial court reached the correct result, albeit for the wrong reason.

"The general rule is that, to convict a defendant of aiding and abetting a crime, a prosecutor must establish 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 commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement." *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). "The phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *Id*. at 63. "In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime." *Id.* at 71. "First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). "Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Accordingly, to prove defendant was an aider and abetter, the prosecutor was required to show that at the time of the killing she either had the premeditated and deliberate intent to kill the victim or that she participated knowing that the principal possessed this specific intent. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988).

Here, there was sufficient evidence to establish that "the crime charged was committed by . . . some other person" *Moore*, *supra* at 67-68. Defendant's husband testified that he stabbed the decedent five times with the sole intent of killing him. Autopsy results indicated that the decedent died from stab wounds.

Next, taken in the light most favorable to the prosecution there is sufficient evidence establishing that defendant provided encouragement and counsel that assisted in the commission of the crime. Defendant's husband testified that when the decedent "cut off" defendant financially, defendant suggested the two could get a lot of money by killing the victim because she expected a two million dollar inheritance from him. Indeed, if defendant's husband's testimony is believed the sole reason he killed the victim was because defendant wanted him to. Defendant's husband's testified that he killed the victim "because [defendant] wanted me to . . . to get his inheritance" and that he had no other reason to kill him. Defendant's husband testified that defendant suggest that he kill the victim approximately ten times in a two week period prior to the murder. Additionally, the promise of a split inheritance is significant evidence to conclude that defendant encouraged the commission of the crime. Defendant's husband testified that he, defendant, and Steven Colorite came up with a plan for the murder that resulted in he and defendant taking seventy-five percent of the expected inheritance and Colorite taking twenty-five percent. Finally, testimony indicates that defendant participated in planning the details of the crime. Defendant's husband testified that defendant suggested that he use his parents' gun to kill the decedent and that he, defendant and Colorite decided the date that the murder would take place.

Defendant contends that the prosecution must prove an overt act on the part of the defendant to support her conviction of first-degree murder on an aiding and abetting theory. This argument is without merit. The plain language of MCL 767.39 indicates that a defendant is

guilty of aiding and abetting "whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission." Here, defendant's encouragement and words clearly constituted "counsel" as contemplated in MCL 767.39.

There is also sufficient evidence that defendant "intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement." *Moore*, *supra* at 67-68. Viewed in the light most favorable to the prosecution, the evidence supports the conclusion that defendant had the deliberate intent to kill the victim. There was evidence that defendant requested that another friend kill the decedent, requested that her husband kill the decedent on at least ten occasions, and participated in planning his murder.

Finally, in her supplemental brief defendant argues that her trial counsel was ineffective. We disagree.

Defendant has not fully preserved this issue because she did not move for a new trial or seek an evidentiary hearing. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Therefore, this Court must review this issue based on the existing record only. *Id.*

Defendant 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 her attorney's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313, 521 NW2d 797 (1994). Next, the defendant must show that this performance so prejudiced her that she was deprived of a fair trial. *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 309. To establish prejudice, defendant must show a reasonable probability that the outcome would have been different but for counsel's errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW3d 694 (2000).

Defendant argues that she provided her defense counsel with information that he refused to address at trial or during her husband's cross-examination. Defendant argues that she pointed out numerous instances where the prosecution solicited false testimony from witnesses and defense counsel refused to object. But defendant's argument in this regard relies solely on information that is not part of the existing record. Thus, this Court is unable to review these claims of error. *Thomas, supra* at 456.

Defendant also argues that defense counsel was ineffective for failing to object to numerous instances of hearsay. However, defendant fails to cite the record for any of the alleged instances of hearsay, fails to state how each statement was hearsay, fails to analyze any of the alleged statements in any detail, fails to discuss whether trial counsel was pursuing a legitimate trial strategy, and fails to explain how each statement prejudiced her. The only law cited by defendant, referencing the use of the confessions of non-testifying co-conspirators, is inapplicable. Defendant's cursory treatment of this issue warrants the conclusion that defendant has abandoned this issue on appeal. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Finally, defendant argues that counsel was ineffective for not objecting to the introduction of preliminary examination testimony from two witnesses allegedly in violation of defendant's rights under the Confrontation Clause. A defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, *supra*, 124 S Ct 1364-1365. Here, it is clear that the preliminary examination testimony of these witnesses was testimonial, *see id*. at 1364. Therefore, it could only be properly admitted against defendant if the witnesses were unavailable and defendant had the prior opportunity to cross-examine them. Defendant argues that this testimony violated her Confrontation Clause rights because defendant was denied the right to cross-examine the witnesses. However, our Supreme Court has held that the preliminary examination testimony of a witness is admissible at trial where the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony through cross-examination. *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998). Whether a defendant had a similar motive to develop the testimony through cross-examination depends on the similarity of the issues for which the testimony was presented at each proceeding. *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986). Here, the preliminary examination testimony was originally elicited by the prosecution to establish defendant's guilt and was introduced at trial for the same purpose. Defense counsel cross-examined both witnesses at the preliminary examination in an effort to prove that defendant did not commit the crimes for which she was charged. Accordingly, the introduction of the preliminary examination testimony does not violate defendant's rights under the Confrontation Clause and defense counsel was not ineffective for failing to object to its introduction.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly