

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PURCELL L. PRYOR, a/k/a PERCELL PRYOR,

Defendant-Appellant.

UNPUBLISHED

February 21, 1997

No. 176577

Macomb Circuit Court

LC No. 93-0002442

Before: White, P.J., and Griffin and D.C. Kolenda,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of delivery of less than fifty grams of a controlled substance, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and conspiracy to deliver a controlled substance, MCL 750.157a; MSA 28.354(1). Defendant was sentenced to a two to twenty year prison term for delivery of a controlled substance and to a consecutive two to twenty year prison term for conspiracy to deliver a controlled substance. He now appeals as of right. We affirm.

Defendant's first argument is that the trial court improperly admitted hearsay testimony to bolster the credibility of James McChester. However, by failing to object to the testimony at trial, defendant failed to preserve the issue for review. Further, we find no manifest injustice.

Defendant's second argument is that the trial court abused its discretion by denying the jury's request to have James McChester's trial testimony read back to it. Defendant did not object to the trial court's handling of the situation and, therefore, this issue will only be reviewed if failure to consider the issue will result in manifest injustice. *People v Weatherspoon*, 171 Mich App 549, 557; 431 NW2d 75 (1988). We find no manifest injustice.

Defendant's third argument is that the trial court erroneously denied defendant's motion for directed verdict on the charge of conspiracy to deliver a controlled substance. We disagree. When reviewing a denial of a motion for directed verdict, this Court must consider the evidence presented by

* Circuit judge, sitting on the Court of Appeals by assignment.

the prosecution up to the time the motion was made in a light most favorable to the prosecution 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 McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994). Circumstantial evidence and the reasonable inferences therefrom may be sufficient to prove the elements of a crime. *McKenzie, supra*, 206 Mich 428.

A conspiracy is a 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. *People v Carter*, 415 Mich 558, 567; 330 NW2d 314 (1982). The crime of conspiracy is complete upon formation of the agreement and proof of an overt act in furtherance of the conspiracy is not required. *Carter, supra*, 415 Mich 568. However, to prove a conspiracy, the prosecution must prove that the defendant had the specific intent to combine with others, and the specific intent to accomplish the illegal objective. *Id.* For intent to exist, the defendant must know of the conspiracy, must know of the objective of the conspiracy, and must intend to cooperate to further that objective. *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993).

In the present case, defendant argued that the prosecution presented insufficient evidence of an agreement between defendant and Phillip Prude to deliver the heroin. The conspiracy may be proven by circumstantial evidence and it is not necessary that a formal agreement be proven. *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974). It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact. *Atley, supra*, 392 Mich 311.

In the present case, defendant's intent to deliver the heroin was shown by defendant's negotiations of the sale with McChester and by defendant's statement that "old boy is going to hook you up." Furthermore, the trial testimony indicated that Phillip Prude directed McChester to hand the money to defendant, and Prude then handed the heroin to McChester. An agreement between defendant and Prude may reasonably be inferred from these circumstances. See *People v Turner (On Remand)*, 100 Mich App 214, 216-217; 299 NW2d 721 (1980). Therefore, the trial court properly denied defendant's motion for directed verdict.

Defendant's fourth argument is that the trial court abused its discretion by denying his motion for mistrial based on juror misconduct and by failing to voir dire the remaining jurors as to possible jury taint. We disagree. The 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 before error requiring reversal is claimed. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or to amount to a miscarriage of justice. *McAlister, supra*, 203 Mich App 503.

In the present case, defendant has not shown any prejudice resulting from the trial court's failure to voir dire the remaining jurors after excusing juror Anthony Opisano. Upon questioning by the trial judge, Opisano indicated that he told the jurors that he wanted to be excused from the jury for economic reasons, but did not discuss with them his thoughts about altering his verdict in order to

expedite a decision. Under these circumstances, the trial court's refusal to declare a mistrial was not an abuse of discretion.

Defendant's fifth argument challenges the trial court's denial of defendant's motion for mistrial based on premature jury deliberations. Because defendant did not join in codefendant's motion for mistrial on this ground, defendant did not preserve this issue for review. Further, no manifest injustice will result from a failure to review this issue.

Defendant's sixth argument is that prosecutorial misconduct denied him a fair trial. Again, we disagree. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). Because defendant failed to object to the prosecutor's remarks at trial, this Court will not review the claim of error unless a cautionary instruction could not have cured the prejudicial effect of the prosecutor's remark or unless the remarks resulted in a miscarriage of justice. *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995).

In the present case, we conclude the the prosecution's statements and arguments were not so prejudicial that they could not have been cured by a cautionary instruction, and did not result in a miscarriage of justice.

Defendant's argument concerning the trial court's denial of a motion to dismiss based on entrapment was not preserved for review. There is no indication in the lower court file that defendant moved for dismissal based on entrapment. Further, defendant's entrapment argument is not persuasive.

Defendant's final argument is that defendant was improperly sentenced to consecutive prison terms for conspiracy to deliver a controlled substance and delivery of a controlled substance when both charges arose out of a single transaction. We disagree. In *People v Sammons*, 191 Mich App 351, 375; 478 NW2d 901 (1991), this Court held that consecutive sentences were properly imposed pursuant to MCL 33.7401(3); MSA 14.15(7403(3) for possession with intent to deliver a controlled substance and for conspiracy to deliver the same controlled substance. Therefore, the sentencing court did not err by imposing consecutive sentences for defendant's convictions for delivery of a controlled substance and conspiracy to deliver a controlled substance.

Affirmed.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda