

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEX MORGAN,

Defendant-Appellant.

UNPUBLISHED

February 17, 1998

No. 183557

Oakland Circuit Court

LC No. 93-128548-FC

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver in excess of 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.14(7401)(2)(a)(i). Defendant was sentenced to life imprisonment and now appeals. We affirm.

Defendant first argues that he was denied a fair trial due to prosecutorial misconduct. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Because defendant failed to object below, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not occur if we do not fully review the issue since we find that none of the comments were improper and any prejudice could have been eliminated by a timely curative instruction.

Defendant next argues that the trial court erred in denying his motion for a directed verdict because the evidence only showed that a buyer-seller relationship existed between himself and the Vallejo brothers, with whom he allegedly conspired to deliver cocaine. When reviewing a trial court's ruling with regard to a motion for a directed verdict, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crimes were proved beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993); *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d

1 (1996). A trier of fact may make reasonable inferences from the facts, if the inferences are supported by direct or circumstantial evidence. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). This Court reviews the record de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

Conspiracy is a mutual agreement, express or implied, between two or more persons, to commit a criminal act or accomplish a legal act by unlawful means. *People v Carter*, 415 Mich 558, 567; 330 NW2d 314 (1982), overruled in part on other grounds *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984); *People v Moscara*, 140 Mich App 316, 319; 364 NW2d 318 (1985). It must be shown that the respective conspirators intended to further, promote, or cooperate in the unlawful enterprise. *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974). The gist of the offense of conspiracy lies in the unlawful agreement between two or more persons. *Id.* In order to establish a conspiracy to commit a crime, the prosecution must prove that the intent to commit the crime was possessed by more than one individual. *Id.* at 310. Direct proof of an agreement is not required, nor is it necessary that a formal agreement be proven. *Id.* at 311. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact. Conspiracy may be proven by circumstantial evidence and based on inference. *Id.*

Considering the evidence presented in the light most favorable to the prosecution, a rational factfinder could find that an agreement existed between the Vallejo brothers and defendant. The evidence showed that defendant regularly met two of the brothers to either obtain cocaine or deliver money. The brothers were also able to identify the cars defendant drove to their meeting places. Moreover, telephone logs from the Vallejos' telephones showed that over a five-month period, almost three hundred telephone calls were made to telephones connected in one way or another to defendant and twenty-five telephone calls were made to the Vallejos' beepers for a week after they were arrested from a telephone associated with defendant. Thus, a trier of fact could infer from this evidence that an agreement existed between defendant and the Vallejos to deliver cocaine. Accordingly, we find that the trial court did not err in denying defendant's motion for a directed verdict.

Next, defendant argues that the trial court erred in admitting the testimony elicited on cross-examination regarding uncharged matters. Specifically, defendant was asked on cross-examination about an incident that occurred in the mid-1980s when the DEA seized \$17,000 from him at O'Hare International Airport. Defendant now claims the questions were irrelevant and prejudicial. However, at trial, defendant objected that the questions were improper because the prosecutor asked about uncharged matters. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Regardless, although the incident seems irrelevant because it was not linked to the alleged conspiracy, we find that the questions were harmless given defendant's testimony about his lottery winnings and his continuous possession of large sums of money. Therefore, reversal is not warranted. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). Moreover, we reject defendant's argument that he was denied effective assistance of counsel based on trial counsel's failure to object. The record establishes that counsel did object to the questions, albeit on different grounds.

Defendant also argues that the trial court erred in admitting into evidence coconspirator hearsay pursuant to MRE 801(d)(2)(E). The decision to admit evidence will not be reversed absent an abuse of discretion. *McElhane*, *supra* at 280. Pursuant to MRE 801(d)(2)(E), a statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy. When the prosecution asked George Vallejo what his brother said to defendant, the prosecution had not yet established that a conspiracy existed. Therefore, the trial court abused its discretion in admitting the testimony. Nonetheless, although the admission was improper, the error was harmless because the witness' response did not establish any existence of a conspiracy involving defendant. Moreover, the response did not divert the jury's attention from an objective appraisal of defendant's guilt or innocence for the crime charged. *Ullah*, *supra*.

Finally, defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to request a bill of particulars, failed to object to the admission of cocaine taken when the Vallejos were arrested and failed to corroborate defendant's testimony by giving other readily available evidence. Because defendant did not move for a *Ginther*¹ hearing or a new trial on the basis of ineffective assistance of counsel, appellate review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

To prove ineffective assistance of counsel, defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *Stanaway*, *supra* at 687-688. Trial counsel is presumed competent, and defendant has the burden of proving that the complained of conduct does not constitute sound trial strategy. *Id.*

In regard to trial counsel's failure to request a bill of particulars, defendant has failed to refer this Court to any authority supporting his position. Thus, he has effectively abandoned this issue. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Furthermore, with respect to defendant's claim that counsel failed to object to the admission of the cocaine, the record shows that trial counsel objected to the questioning in regard to the admission of the cocaine. Even if trial counsel did not object initially, the questioning was technical in nature and was brief. Thus, there is no evidence on the record that if counsel had objected initially that the outcome would have been different.

Defendant also argues that trial counsel failed to corroborate his testimony. To establish inadequate preparation, defendant must show, among other things, that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Defendant contends that his counsel should have confirmed that Diego Vallejo had gone to the hospital. However, since there was no disagreement that Diego had been shot and defendant took him to the hospital, defendant was not deprived of a substantial defense. He also argues that counsel should have obtained a police report in regard to the incident. However, defendant testified that he did not call the police.

Defendant also argues that counsel should have investigated testimony that a witness gave on the first day of trial. It is unclear from the record whether this information was available to counsel before trial and whether a video tape from a hotel security camera would exist four to five years after the fact. Moreover, we do not find that this alleged video tape would have substantially benefited defendant.

Defendant also argues that his counsel ignored transcripts from a federal proceeding. However, defendant is unclear as to which transcripts he is referring and the records reflect that his trial counsel asked the witness specifically about certain testimony from previous proceedings. Finally, defendant argues that trial counsel never reviewed the box of discovery materials, but handed it to defendant two days before trial. There is no evidence on the record that this deficiency in counsel's performance occurred, what the items were, or how they would have changed the outcome of the trial. Accordingly, defendant has not overcome his burden that counsel's performance was ineffective. *Stanaway, supra*.

Finally, defendant argues in his supplemental brief that he was denied a fair trial by the prosecutor's comments in closing argument or, in the alternative, that he was denied effective assistance of counsel by defense counsel's failure to object to the comments. The prosecutor's argument was that defendant's testimony was not truthful. It is not objectionable for the prosecutor to argue that the defendant has lied in his testimony. *People v Charles*, 58 Mich App 371, 388; 227 NW2d 348 (1975).

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).