STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELIAS HERNANDEZ-FREIG,

Defendant-Appellant.

UNPUBLISHED
March 13, 1998

No. 192479
Jackson Circuit Court
LC No. 95-072823-FH

Before: Markey, P.J., and M.J. Kelly and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawful manufacture or delivery of 45 or more kilograms of marihuana, MCL 333.7401(2)(d)(i); MSA 14.15(7401)(2)(d)(i), and conspiracy to commit the same, MCL 750.157a; MSA 28.354(1). He was sentenced to two concurrent terms in prison of eight to fifteen years and appeals as of right. We affirm.

This case arises out of a drug transaction in Jackson between defendant, five coconspirators from Mexico and Arizona, and one undercover police officer. The drug transaction was accomplished after a series of telephone conversations between the undercover officer and one of the coconspirators about possible marihuana sources. At trial, the prosecution's theory was that defendant supplied 300 of the 539 pounds of marihuana confiscated in this case. In contrast, defendant maintained that he was at the scene of the transaction because he had accompanied one of the conspirators as an interpreter, not because he was personally conspiring to deliver marihuana.

I

Defendant first argues that his convictions should be reversed and his indictment dismissed because of police misconduct surrounding his post-arrest confession. Although the facts regarding this issue were not fully developed below, defendant argues that the police obtained lengthy statements from him and other suspects in violation of *Miranda*.[1]. The prosecution acknowledges, or at least does not contest, that these statements were taken in violation of *Miranda*. The trial court suppressed defendant's confession from being offered against him for any purpose. Neither were the other

confessions directly used as evidence against defendant. Defendant contends, however, that evidence derived from some or all of these confessions was used as substantive evidence of his guilt at trial.

In *Oregon v Elstad*, 470 US 298, 306-308; 105 S Ct 1285; 84 L Ed 2d 222 (1985), and *Michigan v Tucker*, 417 US 433, 443-446; 94 S Ct 2357; 41 L Ed 2d 182 (1974), the United States Supreme Court explained that the *Miranda* exclusionary rule is a preventive or prophylactic measure that provides broader protection than the Fifth Amendment. Thus, a statement taken in violation of *Miranda* is *not* necessarily taken in violation of the Fifth Amendment itself. *Elstad, supra* at 470 US 306-307.[2] Where statements are taken in violation of *Miranda* but are actually voluntary – and, thus, do not violate the Fifth Amendment protection against self-incrimination – the prosecutor may not use the statements as substantive evidence of guilt, but other evidence derived as "fruit" of the statements does *not* have to be suppressed. *Elstad, supra* at 470 US 308-309; *Tucker, supra* at 417 US 450-452. Accordingly, accepting defendant's argument that the police intentionally violated *Miranda*, this violation was not a ground for suppressing evidence derived from the statements defendant or his co-defendants gave to the police. Rather, the trial court properly suppressed defendant's confession from use as substantive evidence of his guilt and went even further than required by barring use of that confession as impeachment evidence.

To the extent that defendant is simply rearguing the timeliness of the prosecution's disclosure of evidence that the police may have violated *Miranda*, any error from untimely disclosure would be harmless because the trial court granted defendant the appropriate relief in refusing to permit the use of statements taken in violation of *Miranda* as substantive evidence at trial. Indeed, the trial court also disallowed the prosecution's use of the statements for impeachment purposes. Defendant was not entitled to have the indictment dismissed. Dismissal over prosecutorial objection is normally available as a remedy only when permitted by statute, when there is insufficient evidence or when constitutional guarantees require dismissal. *People v Sierb*, 219 Mich App 127, 133; 555 NW2d 728 (1996), lv gtd 454 Mich 872 (1997), citing *People v Morris*, 77 Mich App 561, 563; 258 NW2d 559 (1977). None of these justifications for dismissal is present in this case.

II

Defendant next argues that the trial court erred in denying his request to admit the foreign deposition of one of the coconspirators, a citizen of Mexico, who apparently would corroborate defendant's role as an interpreter. The trial court allowed defendant to use the deposition as an offer of proof but would not admit the deposition as evidence. Because defendant failed to provide the relevant portion of the transcript of the hearing on this issue,[3] as required by MCR 7.210(B)(1)(a), we are unable to determine whether the trial court abused its discretion in denying defendant's motion. See *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992). Consequently, defendant has waived this issue on appeal. *Id.*

III

Defendant next argues that the telephone conversations that took place before the marihuana transaction represent several separate conspiracies that did not involve him in any way. Accordingly,

the trial court should have either dismissed his indictment or, at the very least, read the jury an instruction on multiple conspiracies. We disagree.

As noted above, dismissal of an indictment over prosecutorial objection is normally available as a remedy only when permitted by statute, when there is an insufficiency of evidence, or when constitutional guarantees require dismissal. *Morris*, *supra* at 563. The trial court did not err in refusing dismissal because there was sufficient evidence that the alleged separate transactions constituted parts of a single, ongoing conspiracy to deliver over forty-five kilograms of marihuana to Michigan. See, e.g., *People v Porterfield*, 128 Mich App 35, 41; 339 NW2d 683 (1983).

Additionally, the trial court did not abuse its discretion in refusing to read the instruction defendant submitted on multiple conspiracies. Jury instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Conspiracy includes the mutual agreement among two or more persons to commit a criminal act. *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991). The essence of a conspiracy is the agreement itself, but direct proof of the agreement is not required, nor is it necessary to prove a formal agreement. *Id.* at 393. A conspiracy may be proven by circumstantial evidence or may be established from inference. *Id.* Because the crime of conspiracy is complete upon formation of the agreement, no overt act furthering the conspiracy must be proven. *Id.* The telephone conversations admitted into evidence in this case do not constitute evidence in support of defendant's multiple conspiracies theory because the undercover officer who spoke to defendant's coconspirators did not agree to any of the other proposed transactions. Therefore, the trial court did not abuse its discretion in refusing to give defendant's requested instruction because the events that occurred before the marihuana transaction did not constitute separate and distinct conspiracies. *Porterfield*, *supra*.

IV

We also reject defendant's argument that the trial court abused its discretion in admitting two categories of hearsay statements pursuant to MRE 801(d)(2)(E), the coconspirator exclusion from the hearsay rule: the taped telephone conversations and a piece of a torn brochure found in defendant's pocket upon which someone had written the number of the hotel room where the undercover officer and coconspirators discussed the details of the marihuana transaction. To admit evidence, the prosecution must first show that the hearsay statement was made by a coconspirator of the party-opponent, who is defendant in this case. Additionally, the hearsay statement must be made "during the course" and "in furtherance" of the conspiracy. *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993) (Boyle, J.). If either requirement is unmet, then the statement must be excluded. *Id.* Finally, the underlying conspiracy must be proven by a preponderance of evidence independent of the coconspirator's statement before the prosecutor may submit a coconspirator's statement to the trier of fact. *People v Vega*, 413 Mich 773, 780, 782; 321 NW2d 675 (1982); *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986).

Regarding the telephone conversations, defendant concedes the first two requirements but disputes the final requirement for applying the hearsay exception, i.e., whether the prosecution

established a conspiracy by a preponderance of independent evidence. The prosecution did not need direct proof of the conspirators' agreement, however, nor was it necessary that the prosecution prove a formal agreement. *Gay, supra*. Instead, it is sufficient if the prosecution shows that the circumstances, acts, and conduct of the parties establish an agreement in fact. *Id.* Our review of the testimony independent of the statements at issue indicates that the prosecution established an agreement in fact to commit a marihuana transaction. Therefore, the trial court did not abuse its discretion in admitting the telephone conversations as coconspirators' statements.

Regarding the piece of paper found in defendant's pocket, defendant disputes whether the prosecution established the first requirement for the hearsay exception, i.e., that the writing on the paper was a statement made by a coconspirator. Defendant accurately points out that the officer who removed defendant's personal belongings admitted that he could not identify the author of the writing on the flier. Here too, however, the prosecution presented sufficient evidence to support the inference that the author of the writing was a coconspirator. Indeed, the writing on the paper was the telephone number and room number for the Budgetel Motel, where the marihuana was kept until the financial transaction and unloading occurred. Discussions among the alleged coconspirators about the location of the truck, the exchange of money, the quantity of marihuana, and how and who would unload it supported the conclusion that the parties who were present at the scene had established an agreement in fact among them. *Gay, supra* at 471. Accordingly, the court properly could have inferred that a coconspirator wrote the notes. Thus, the decision to admit the piece of paper into evidence was not an abuse of discretion.

Even if this Court believes that it would not have drawn such an inference had it been in the place of the trial court, the trial court's decision to admit the evidence was a close evidentiary question which did not constitute an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Moreover, in light of the weight of properly admitted evidence against defendant, the court's admission into evidence of the piece of paper would not constitute an error requiring reversal even if its admission had been erroneous. *People v Huyser*, 221 Mich App 293, 299; 561 NW2d 481 (1997).

V

Finally, defendant argues that a misstatement by the prosecutor during closing argument requires reversal of his convictions. Our review of this issue is precluded because any prejudicial effect of the prosecutor's statement could have been cured by a timely instruction if defendant had objected, which he did not. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ William C. Whitbeck

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Accordingly, the Michigan Supreme Court has stated, "The warnings mandated by *Miranda* in themselves are not of constitutional dimensions." *People v Wright*, 431 Mich 282, 295 n 14; 430 NW2d 133 (1988). "[A] 'simple failure' to administer *Miranda* warnings is not itself a violation of the Fifth Amendment." *People v Ray*, 431 Mich 260, 272; 430 NW2d 626 (1988).

[3] One of defendant's coconspirators filed the motion to take the deposition at issue, and defendant joined the motion. Unfortunately, the court's statements on the record explaining its rationale for denying this motion were not reflected in the order denying the motion.