STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE LESLIE FONVILLE,

Defendant-Appellant.

UNPUBLISHED
March 26, 1999

No. 205171
Washtenaw Circuit Court
LC No. 96-006698 FH

Before: Markman, P.J., and Hoekstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by jury for delivery 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 as an habitual offender, MCL 769.12; MSA 28.1084, to twelve- to forty-years' imprisonment on the delivery conviction, and three- to forty-years' imprisonment on the conspiracy conviction. Defendant argues that his conviction and sentence should be vacated, making four claims of error. We affirm.

I

Defendant first alleges error in the admission of testimony from an undercover police officer describing prior drug transactions involving the officer, defendant's alleged coconspirator, and defendant's brother. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582

NW2d 785 (1998). Defendant argues that because he was not a party to these other transactions, their introduction was irrelevant and prejudicial.

To be admissible, evidence of prior bad acts must meet three requirements. First, it must be proffered for a proper purpose under MRE 404(b). Second, it must be relevant, under MRE 402 as enforced through MRE 104(b), to an issue of fact or consequence. Third, it must pass the balancing test of MRE 403. *People v VanderVliet*, 444 Mich 52, 54; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Admission is only prohibited under Rule 404(b) when the sole purpose of the evidence is to show an individual's propensity for a particular action based on character inferred from the other acts. *Id.* at 65.

Defendant argues that Rule 404(b) only allows evidence of a defendant's prior bad acts, not the acts of a third party. However, in *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991), this Court held that MRE 404(b) applies to the admissibility of any person's acts, including a defendant, a victim, or a witness. In addition, this Court recently found that Rule 404(b) permits the introduction of a third party's prior bad acts. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). Both decisions note that the rule speaks of the acts of "a person," and *Rockwell* references a 1991 amendment that replaced the phrase "the crime charged" with the rule's current language, "the conduct at issue in the case." *Rockwell, supra*, 188 Mich 410. As both decisions relate, such language supports this Court's interpretation that the rule is not restricted only to acts of a particular defendant.

The 404(b) evidence in this case meets each requirement of the *VanderVliet* test. First, the evidence was proffered for a proper purpose. The prosecution anticipated that the coconspirator would testify that he approached defendant as a ruse, hoping that the undercover officer would believe defendant was a supplier. The prosecution introduced evidence of prior transactions to rebut this claim. The officer testified that a month before the incident involving defendant, he conducted an almost identical transaction using the coconspirator as his middleman. According to the officer, the coconspirator contacted a supplier, then the men waited in the officer's car for the supplier to arrive with the product. The officer's testimony demonstrates a common course of conduct wherein the coconspirator contacts a supplier when a purchaser approaches him to buy drugs.

This evidence could be considered a "scheme, plan, or system of doing an act" under the language of MRE 404(b), although the testimony need not fit under one of the pre-defined categories. Rule 404(b) is a rule of inclusion, not exclusion, and all that is required is that evidence not be used solely for characterization. *VanderVliet*, *supra*, 64-65. Because additional testimony explicitly proved his criminal responsibility, we agree with the trial court that this 404(b) evidence was not used to establish the coconspirator's character. We are also satisfied that the evidence was not introduced merely to impugn the character of defendant's brother. However, in light of the possibility that the jury might misconstrue the evidence, the trial court issued a Rule 105 limiting instruction prohibiting the jurors from considering the testimony as evidence that defendant is a bad person or that he is likely to commit crimes. Such an instruction is appropriate when other acts evidence is admitted. *Id.* at 75. We find that the evidence was appropriately presented to rebut the coconspirator's testimony and demonstrate a previous course of conduct.

The other acts evidence was also relevant to an issue of fact or consequence, meeting the second *VanderVliet* requirement. Under MRE 401, relevant evidence means:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [MRE 401.]

Plaintiff introduced the other acts evidence to show a common course of dealing, which in turn supported the officer's testimony that defendant was supplying his coconspirator with the cocaine the undercover officer had requested. Once the coconspirator testified that defendant's arrival was pure coincidence, claiming that defendant did not provide the cocaine purchased by the officer, the case essentially became a battle of credibility. Evidence of the prior transactions between defendant's brother, the coconspirator, and the undercover officer was relevant to show that the coconspirator's tale of coincidences was implausible.

The third *VanderVliet* requirement addresses the concern that the mention of defendant's brother's involvement in earlier transactions unfairly ascribed criminal propensity to defendant. The test requires application of the balancing test of MRE 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. [MRE 403.]

Because evidence presented by the prosecutor is always prejudicial, Rule 403 prohibits only evidence that is unfairly so. *People v Siler*, 171 Mich App 246, 253; 429 NW2d 865 (1988). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra,* 458 Mich 398.

In this case, the evidence of the coconspirator's prior methods in conducting earlier drug transactions was introduced to rebut testimony that defendant's appearance was coincidental. Therefore, this evidence was relevant and highly probative in disproving defendant's claim that he was not the supplier. The prosecution did not attach any significance to the fact that the earlier supplier was defendant's brother. As noted above, the trial court recognized that the jury might use this evidence to improperly infer that defendant shared his brother's propensity for drug related crime, and it issued the appropriate limiting instruction. Especially in light of this instruction, we find that the evidence was proffered for a proper and relevant purpose and was not unfairly prejudicial. *VanderVliet, supra,* 444 Mich 74-75.

II

Defendant next alleges that two statements admitted during the undercover officer's testimony constitute hearsay erroneously admitted under the coconspirator statement rule, MRE 801(D)(2)(E). He argues that the prosecution failed to establish a conspiracy on independent proof before introducing

the alleged hearsay testimony. We review a trial court's admission of evidence for abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Defendant's first allegation of error refers to the officer's testimony that defendant made a phone call and told the party on the other line that he had a buyer. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The officer's testimony referencing the phone call was offered not to prove the truth of the matter asserted, that the coconspirator had a buyer at his home, but only to show that he had placed and received such calls. Therefore, the statement was not hearsay, and there was no error in admitting the testimony.

Defendant also objects to the officer's testimony that the coconspirator stated that "the person that was coming was Dwayne and he was the brother of Bernard." Again, defendant asserts that admission of this statement was error because there was no independent proof of the conspiracy. Furthermore, he contends that the reference to his brother, and the connection made between him and his brother within the statement, were prejudicial.

MRE 801(d)(2)(E) provides that a statement is not hearsay if it 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." A conspiracy is an express or implied agreement to do that which is illegal. *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974). Direct proof of agreement is not required, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact. Furthermore, conspiracy may be established by circumstantial evidence and may be based on inference. *Id.* To admit a coconspirator's statement, the conspiracy must be shown by a preponderance of the evidence. *People v Vega*, 413 Mich 773, 782; 321 NW2d 675 (1982).

Defendant argues that the trial court erred in admitting the testimony because plaintiff had not introduced independent proof of a conspiracy before it introduced the contested statement. However, we find that Rule 801(d)(2)(E) focuses on ensuring that hearsay statements are not the only substantive evidence of a conspiracy, rather than the strict order of the proofs. Notwithstanding language in *Vega*, *supra*, that appears to endorse the view that evidence of the conspiracy should precede introduction of the relevant testimony, this Court's opinions have not required the strict order of proofs for which defendant argues. See *People v Cadle*, 204 Mich App 646, 654; 516 NW2d 520 (1994); *People v Moscara*, 140 Mich App 316, 320 n 1; 364 NW2d 318 (1985). Both opinions held that the decision to admit coconspirator statements pending later independent proof of a conspiracy was a proper exercise of the trial court's discretion. In the instant case, unlike in *Vega*, the hearsay statement was not the only proof of the conspiracy. During subsequent testimony defendant was conclusively identified by both the undercover officer and the coconspirator as the individual who later appeared to deliver the cocaine.

Furthermore, we find that the testimony of actions and events proved the existence of a conspiracy by a preponderance of the evidence. *Vega*, *supra*, 413 Mich 773, 782.

III

Defendant next argues that the prosecution failed to introduce sufficient evidence to convict him of the crimes charged. When reviewing a claim that the trial court erred in denying a motion for directed verdict because there was insufficient evidence to support a conviction in a jury trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of an offense. *Id.*

In his argument, defendant presumes this Court will decide the previous two issues in his favor, and his argument is less a claim that there was insufficient evidence without the contested proofs, and more an argument that their inclusion prejudiced him because the jury was given a basis for disbelief of the coconspirator's testimony. Having concluded there was no error in admission of the contested evidence, we find no merit in defendant's insufficiency argument.

IV

In his final claim of error, defendant alleges that his sentence was disproportionate. Although relating the correct authority under which such claims are analyzed, defendant makes no real argument as to why his circumstances justify a lesser sentence.

Habitual offender sentencing is reviewed for an abuse of discretion. *People v Cervantes,* 448 Mich 620, 627; 532 NW2d 831 (1995). An abuse of discretion will be found where the sentencing court violates the principle of proportionality, which requires sentences imposed by the court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant's prior record included nine misdemeanors and seven felonies. He was on active parole status at the time of arrest. Conviction of delivery of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), provides for a sentence of up to twenty years' imprisonment. Conviction of conspiracy, MCL 750.157a; MSA 28.354(1), permits an identical sentence. In light of the habitual offender provision, MCL 769.12; MSA 28.1084, defendant could have been sentenced to life imprisonment on both charges.

We find that defendant's sentences of twelve- to forty-years' imprisonment on the delivery conviction and three to forty years' imprisonment on the conspiracy conviction were not disproportionate to the seriousness of the circumstances surrounding the offense and the offender. There was no abuse of discretion.

Affirmed.

/s/ Stephen J. Markman
/s/ Joel P. Hoekstra
/s/ Brian K. Zahra