STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD DEMETRIUS ALFORD,

Defendant-Appellant.

UNPUBLISHED
March 26, 1999

No. 205429
Monroe Circuit Court
LC No. 96-027675 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGELITA MALINDA ABLE,

Defendant-Appellant.

No. 205431
Monroe Circuit Court
LC No. 96-027676 FH

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendants were convicted, following a jury trial, of delivery of 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and conspiracy to deliver 225 grams or more but less than 650 grams of cocaine, MCL 750.157a; MSA 28.354(1). Defendant Alford was sentenced to consecutive terms of fifteen to thirty years' imprisonment for each count. Defendant Able was sentenced to consecutive terms of ten to thirty years' imprisonment for each count. Both defendants appeal as of right. We affirm.

Defendants, who lived in Detroit, were convicted for their alleged roles in a cocaine distribution scheme involving a Monroe County cocaine dealer named Blackstone, who in turn sold cocaine to an undercover police officer, Detective Hill, in Monroe County.

I

Defendants present several arguments regarding the sufficiency of the evidence against them. They first contend that a prejudicial variance existed between their charged offenses and the proofs at trial. A variance occurs in a criminal prosecution when the proofs introduced at trial differ materially from the facts alleged in the indictment. *United States v Beeler*, 587 F2d 340, 342 (CA 6, 1978). Variances may be subject to a harmless error analysis unless they "create 'a substantial likelihood' that a defendant may have been 'convicted of an offense other than that charged. . . .'" *Id.*

Defendants contend that, even if the evidence was sufficient to establish that Blackstone acquired cocaine from either defendant, at most what was shown was either a single buy-sell transaction or a conspiracy to sell cocaine to Blackstone, both of which occurred in Detroit. We disagree. The informations charged that each defendant "did unlawfully conspire, combine, confederate and agree together" with Blackstone and another conspirator to "deliver 225 grams or more but less than 650 grams of a mixture containing the controlled substance, cocaine." Although some evidence was presented at trial of defendants' Detroit operations, the proofs centered on the Monroe County investigation and detailed how defendants came to the attention of the investigators. The informations sufficiently describe the offenses of which defendants were charged, and no variance between the charged offenses and the proofs at trial existed.

Defendants next contend that there was insufficient evidence to convict them of conspiring with Blackstone to deliver cocaine in Monroe County. When reviewing a challenge to the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

To establish a criminal conspiracy, the prosecution must prove the existence of a combination or agreement, express or implied, between two or more persons, to commit an illegal act or to commit a legal act in an illegal manner. MCL 750.157a; MSA 28.354(1); *People v Meredith (On Remand)*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995). An overt act by the defendant is not required to convict a defendant of conspiracy because the essence of the offense is the agreement itself. *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974); *Meredith (On Remand)*, *supra* at 408. Direct proof of the agreement underlying the conspiracy is not required. "It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement." *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). The agreement may be established by circumstantial evidence or proof may be based upon inference. *Id.* When deciding the extent of the agreement, the "essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement each with a separate object." *People v Mezy*, 453 Mich 269, 285; 551 NW2d 389 (1996).

The evidence presented at trial was sufficient to establish a conspiracy involving the delivery of the cocaine in Monroe County. The investigators chose not to arrest Blackstone when he supplied the

undercover officer with smaller quantities of cocaine because they wanted to find and arrest his source as well. Defendants correctly point out that the evidence tends to establish that Blackstone had other sources of cocaine within Monroe County. However, the course of the investigation clearly led the investigative team to suspect defendants as being Blackstone's source of larger quantities of cocaine. Telephone pin registers established initially at Blackstone's residence led the investigators to Detroit and ultimately to defendants. Pin registers installed for telephone numbers at defendants' residences in Detroit and all of the conspirators' pagers recorded the telephone numbers each dialed, specifically as Detective Hill attempted to purchase larger quantities of cocaine from Blackstone and overheard Blackstone talking to "Red," "Reggie," or "Angelita." The investigative team followed Blackstone to Detroit and observed him make contact with defendants, after which he returned to Monroe County and delivered cocaine to Detective Hill.

The officers' observations, along with the large quantities of cocaine and cash found at defendants' residences, provided sufficient proof of a single conspiracy to deliver cocaine in Monroe County. "'A person may be a party to a continuing conspiracy by knowingly co-operating to further the object thereof.'" *Meredith (On Remand)*, *supra* at 412, quoting *People v Cooper*, 326 Mich 514, 521; 40 NW2d 708 (1950). Smugglers, middlemen, and retailers in a narcotics "chain" can all be convicted of a single conspiracy where they "shared the knowledge that the narcotics were to be ultimately delivered for consumption by street users." *Id.* at 412-413.

Defendants also argue that the prosecution did not establish that venue was appropriate in Monroe County. Venue is not an essential element of a crime but must be proven by the prosecutor in every criminal case. *Meredith (On Remand)*, *supra* at 408. In a conspiracy case, venue is appropriate in any jurisdiction in which an overt act in furtherance of the conspiracy occurred. *Id.* In the present case, the sale of cocaine to Detective Hill was an object of the conspiracy. This overt act occurred in Monroe County and, therefore, venue in Monroe County was appropriate for all of the coconspirators.

Defendants attempt to distinguish *Meredith (On Remand)*, *supra*, which involved a conspiracy among individuals located in Saginaw and Detroit and a prosecution of the conspiracy in Oakland County. Defendants argue that *Meredith* involved multiple sales between conspirators in Saginaw and Detroit and multiple trips to transport drugs through Oakland County. However, one of the Detroit defendants in *Meredith*, who apparently committed no act in furtherance of the conspiracy in Oakland County, argued the existence of multiple conspiracies rather than a single multi-county conspiracy. This Court disagreed and affirmed the existence of a single multi-county conspiracy, all of whose members could be prosecuted in any jurisdiction in which an overt act in furtherance of the conspiracy occurred. *Id.* at 408. Similarly, in the present case, the prosecution presented sufficient evidence to establish that the transaction involving defendants in Detroit was a link in the distribution of the cocaine sold to Detective Hill in Monroe County.

Defendants also argue that the evidence was insufficient to support their convictions of delivery of cocaine. Again, we disagree.

Defendants were charged with delivery of cocaine under the theory that they aided and abetted Blackstone in delivering the cocaine to Detective Hill. To support a finding that a defendants aided and abetted a crime, the prosecution must show that: (1) the crime charged was committed by 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 he gave aid and encouragement. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). To prove delivery of a controlled substance, the prosecution must show: "(1) that the defendant transferred the substance to another; (2) that the defendant intended to transfer the substance to another; and (3) that the defendant knew the substance was [cocaine]." *People v Steele*, 429 Mich 13, 25; 412 NW2d 206 (1987).

At trial, the prosecution demonstrated that ten ounces of cocaine, which is between 225 and 649 grams, was delivered to Detective Hill and that defendants knowingly assisted in the commission of this offense by providing cocaine to Blackstone. Their intent that Blackstone deliver the cocaine to a willing buyer can be inferred from the facts and circumstances. See *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Facts from which defendants' intent can be inferred include the number of telephone calls between their residences and pagers and Blackstone's apartment, their rendezvous with Blackstone just before the sale to Detective Hill, the large amounts of cocaine and cash found in their residences, and the evidence that they were manufacturing crack cocaine at the Kentfield residence.

Moreover, defendants could properly be convicted for the delivery of cocaine to Detective Hill because the delivery was an object of their conspiracy. "[E]ach conspirator is held criminally responsible for the acts of his associates committed in furtherance of the common design, and, in the eyes of the law, the acts of one or more are the acts of all the conspirators." *People v Grant*, 455 Mich 221, 236; 565 NW2d 389 (1997).

II

Defendants argue that the trial court erred when it denied their request to instruct the jury on the lesser offenses of delivery and conspiracy to deliver cocaine in quantities less than 225 grams. We review a trial court's refusal to give a requested jury instruction on a lesser included offense for clear error and will consider whether any error that is found was nonetheless harmless. See *People v Mosko*, 190 Mich App 204, 208-209; 475 NW2d 866 (1991), aff'd 441 Mich 496; 495 NW2d 534 (1992); MCL 769.26; MSA 28.1096.

The duty of the trial court to instruct the jury on lesser included offenses is determined by the evidence. *People v Hendricks*, 446 Mich 435, 442; 521 NW2d 546 (1994); *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997). If evidence has been presented that would support a conviction of a lesser included offense, refusal to give a requested instruction on the lesser included offense is error requiring reversal. *Hendricks*, *supra* at 442; *Torres*, *supra* at 416. There are two types of lesser offenses—necessarily included offenses and cognate offenses. If a lesser

offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *Torres*, *supra* at 416. A cognate lesser offense is one that: (1) is of the same class as the greater offense; and (2) shares some common elements with the greater offense but also has elements not found in the greater offense. *Hendricks*, *supra* at 443. A court must not instruct a jury on a cognate lesser offense unless the court finds that the proofs presented at trial could support such a conviction. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

In *People v Marji*, 180 Mich App 525, 531; 447 NW2d 835 (1989), this Court found that, while delivery of smaller quantities of cocaine shared some elements with delivery of more than 225 grams of cocaine, the offenses "contain essential elements not present in the greater offense, namely proof of lesser quantities of controlled substances." Thus, delivery of the lesser amounts were deemed cognate offenses of delivery of larger amounts. *Id.* Because the evidence in that case did not support a finding that the defendants delivered less than 225 grams, the *Marji* panel concluded that the trial court did not err in failing to instruct on the requested lesser offenses. *Id.*

The evidence presented at trial established that Blackstone transferred 246.28 grams of cocaine to Detective Hill. There was no evidence upon which a jury could find defendants guilty of delivering a lesser amount, and the trial court did not err in failing to instruct on the lesser offenses.

Defendants argue that the opinion in *People v Wilson*, 454 Mich 421, 431; 563 NW2d 44 (1997), a double jeopardy case, impliedly overruled our opinion in *Marji.* We disagree. As discussed above, in *Marji*, a case in which instructional errors were raised, this Court held that *delivery* of lesser amounts of cocaine was a cognate lesser included offense, as opposed to a necessarily included lesser offense of the charged crime arising out of *delivery* of larger quantities of cocaine. The majority in *Wilson* expanded upon this holding when it cited to *Marji* and stated that *conspiracy* to possess with intent to deliver 50 to 224 grams of cocaine is a lesser-included offense of conspiracy to possess with intent to deliver over 650 grams. *Id.* at 428. The Court in *Wilson* did not distinguish between whether the offenses were cognate or necessarily included lesser offenses nor did it address this Court's holding in *Marji* that *delivery* of lesser amounts of cocaine constituted a cognate lesser included offense as opposed to a necessarily included lesser offense of the greater offense. Thus, we reject defendants' argument that the opinion in *Wilson* impliedly overruled this Court's opinion in *Marji*.

III

Defendants argue that the trial court erroneously allowed the prosecutor to elicit hearsay statements made by Blackstone through the testimony of Detective Hill. Defendants did not object at trial to the admission of Blackstone's statements. In the absence of an objection, we review the issue only for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

Defendants contend that Blackstone's statements were inadmissible hearsay and should not have been admitted. Pursuant to MRE 801(d)(2)(E), a statement made "by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy" is not

hearsay. Defendants argue that this rule is not applicable because there was no independent proof of the conspiracy presented before the statements were admitted into evidence.

In *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982), the Supreme Court noted that MRE 801(d)(2)(E) differs from its federal equivalent in that Michigan requires proof of the conspiracy independent of the co-conspirator's statements. *Id.* The trial court must be satisfied by a preponderance of the evidence that such proof exists. *Id.* at 782.

In this case, independent proof of the conspiracy was not presented *prior* to the admission of the statements. However, independent proof of the conspiracy was eventually presented at trial. Blackstone's sale of cocaine to Detective Hill, the pin registers depicting the telephone calls made among the conspirators on dates Detective Hill attempted to purchase cocaine, the Detroit transaction involving these defendants, and the drugs and cash discovered in defendants' residence are facts independent of Blackstone's statement from which the trial court could have found a conspiracy by a preponderance of the evidence.

MCL 769.26; MSA 28.1096 provides that no verdict shall be reversed on the ground of improper admission of evidence "unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." Because sufficient and properly admitted independent evidence was presented at trial establishing defendants' participation in the conspiracy to deliver cocaine in Monroe County, no miscarriage of justice occurred as a result of the trial court's admission of Blackstone's statements.

Defendants also argue that the failure of their trial attorneys to object to this testimony amounted to ineffective assistance of counsel. This argument fails because, as we have noted, defendants cannot show a reasonable probability that, but for counsels' alleged errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996).

IV

Defendant Able challenges the trial court's denial of her motion to suppress statements that she made to the police during the search of her Detroit residence.[1] This Court reviews a trial court's ruling on a suppression motion under the clearly erroneous standard. *People v Truong (After Remand)*, 218 Mich App 325, 334; 553 NW2d 692 (1996). However, all questions of law and mixed questions of law and fact regarding a trial court's decision regarding a motion to suppress are reviewed de novo. *People v Goforth*, 222 Mich App 306, 310, n 4; 564 NW2d 526 (1997).

Defendant now argues that her statements, given without the benefit of *Miranda* warnings, must be suppressed because they were the result of custodial interrogation. *Miranda v Arizona*, 384 US 436, 478-479; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The failure to give *Miranda* warnings in a situation involving custodial interrogation requires suppression of the defendant's statements. *People v Anderson*, 209 Mich App 527, 531; 531 NW2d 780 (1995). However, *Miranda* is not a right that attaches to every interrogation. The critical issue is whether defendant actually was subjected to custodial interrogation. See *Anderson*, *supra* at 532. Custodial interrogation means questioning

initiated by law enforcement officers after a person has been taken into custody. *Id.* Interrogation requires "'a measure of compulsion above and beyond that inherent in custody itself.'" *Id.*, quoting *Rhode Island v Innis*, 446 US 291, 300; 100 S Ct 1682; 64 L Ed 2d 297 (1980). To determine whether a defendant was "in custody," courts must "look at the totality of the circumstances, with the key question being whether the defendant reasonably believed that he was not free to leave." *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997).

The circumstances here do not indicate that defendant was in custody or subject to custodial interrogation when she made the statements in question. At a pretrial hearing, two police officers who participated in the execution of the search warrant both testified that defendant was not under arrest and was not in police custody during the search, which is when she made the statements. Defendant was asked to sit in the living room with the other adult residents while the police secured the house. Her mother and three children were present, and the two women took care of the children in the living room while the officers were searching the house. Defendant appeared to be very calm, did not ask for food or drink, and did not appear to be intoxicated. Indeed, although a large amount of cocaine, other drug paraphernalia, and some cash were discovered during the search, defendant was not arrested that day.

Under these circumstances, we find that defendant was not in police custody when she made the statements, and the trial court did not err in ruling the statements admissible.

V

Defendant Alford argues that he should be resentenced because the trial court considered inaccurate information in imposing a disparate sentence from that of his codefendant, and his counsel was ineffective for failing to object. Provided that only permissible factors are considered, this Court's review of sentencing determinations is limited to whether the sentencing court abused its discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998).

Defendants, having been convicted of delivery of a controlled substance, were subject to statutorily-imposed mandatory minimum prison terms. MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii); *People v Northrop*, 213 Mich App 494, 498; 541 NW2d 275 (1995). The statutory minimum sentences are presumed to be proportionate and valid. *People v Poppa*, 193 Mich App 184, 188-189; 483 NW2d 667 (1992). However, pursuant to MCL 333.7401(4); MSA 14.15(7401)(4), the sentencing court had discretion to depart from the statutory minimum terms "'if the court finds on the record that there are substantial and compelling reasons to do so.'" *Id.* at 188.

The prosecution and the parties agreed that there were substantial and compelling reasons for a downward departure for each defendant and the trial court accepted the parties' agreement. Although each of the defendants' sentences carried statutory minimum terms of twenty years, the trial court sentenced defendant Alford to consecutive terms of fifteen to thirty years' imprisonment for each count and sentenced codefendant Able to consecutive terms of ten to thirty years for each count.

Defendant Alford now argues that the disparate sentencing was caused by the court's mistaken recollection of the testimony at trial, and that both defendants should have received the same sentences.

This contention is inaccurate. Alford received a longer sentence than Able because of the circumstances surrounding his arrest. The trial court had before it information, which stood uncontested, that defendant was found with more than $4,000 cash in his possession. The court's consideration of the circumstances surrounding defendant's arrest was appropriate, and there were valid reasons for the disparate sentences. A sentencing court may consider the defendant's conduct before and after an arrest. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995).

Finally, the fact that defendant's attorney failed to object did not prejudice defendant. There were valid reasons for the disparate sentences, and defendant cannot show that, but for counsel's failure to object, the result of the proceeding might have been different. See *Johnson*, *supra* at 122.

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Brian K. Zahra

[1] The statements defendant sought to suppress were made in response to the questions of two officers. Officer Meyette asked who slept in the upstairs bedroom and defendant responded that it was hers, and codefendant Alford also slept there. Officer Peterson asked about the red Cadillac parked in the driveway, which he knew to be connected to the drug investigation. She stated that the vehicle was leased in her name and allowed the officer to retrieve the lease papers from the car.