

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

JERMAINE VONSELL SANDERS,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

July 7, 2000

No. 219076

Jackson Circuit Court

LC No. 98-091267-FH

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and conspiracy to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court, applying a third-offense habitual offender enhancement under MCL 769.12; MSA 28.1084, sentenced defendant to concurrent prison terms of 120 to 240 months, to run consecutively to a prison term defendant was already serving. Plaintiff cross-appeals by leave granted, contending that defendant's sentences for his present convictions should have been made consecutive to one another. We affirm defendant's convictions, but remand for resentencing.

Defendant first argues that the prosecutor presented insufficient evidence to support his convictions. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor 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 Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

MCL 333.7105(1); MSA 14.15(7105)(1) defines delivery as the actual, constructive, or attempted transfer from one person to another of a controlled substance. This Court has recognized that "the act of transferring a controlled substance is sufficient to sustain a finding of an actual delivery." *People v Maleski*, 220 Mich App 518, 522; 560 NW2d 71 (1996). Delivery does not require a particular criminal intent beyond the act of delivering the controlled substance. *Id.* Here, viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could

have found that the elements of the delivery charge were proven beyond a reasonable doubt. Officer Jason Strebe testified that he saw defendant hand an object to a juvenile and that the juvenile then handed the object – later identified as cocaine – directly to Strebe. Strebe testified that the juvenile did not reach into any of his pockets at any time between receiving the object from defendant and handing the cocaine to Strebe. The reasonable inference from this evidence is that the object that defendant handed to the juvenile was the cocaine that the juvenile delivered to Strebe. Therefore, the jury could reasonably infer that defendant transferred a controlled substance from himself to another person, and thus the delivery charge was sufficiently supported.

We additionally conclude that there was sufficient evidence to support defendant's conspiracy conviction. "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 Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991). In defendant's case, defendant must have reached an agreement with the juvenile, expressly or impliedly, to deliver less than fifty grams of cocaine. This agreement may be proven by circumstantial evidence or by inference. *Id.* at 393. An examination of the evidence shows that there was sufficient evidence for the jury to convict defendant on the conspiracy count. Officer Strebe testified that after he asked to buy drugs from defendant, defendant told him to wait because defendant was waiting for "his boy." Officer Jeff Mazur, who worked undercover with Strebe and who accompanied Strebe during the drug transaction, testified that, from his experience, he understood defendant's reference to the juvenile as "his boy" to mean that the juvenile was selling drugs for defendant. Strebe testified that he then heard defendant yell to the juvenile and observed the juvenile approach and talk to defendant. According to Strebe, defendant and the juvenile then walked over to a vehicle, and defendant took an object from the vehicle and handed it to the juvenile, after which the juvenile walked over to Strebe and handed Strebe some cocaine. This evidence and the reasonable inferences based on this evidence were sufficient to show beyond a reasonable doubt that defendant and the juvenile had an understanding or agreement to deliver and sell cocaine to Strebe. Thus, the evidence was sufficient to support defendant's conspiracy conviction.

Next, defendant argues that the prosecutor committed misconduct requiring reversal during closing and rebuttal arguments. Defendant contends that the prosecutor improperly commented on statements that defendant did *not* make to Strebe or actions that defendant did *not* take to indicate that he was not a drug dealer during the transaction. Defendant argues that the prosecutor's comments violated his right to remain silent and his due process rights because the comments effectively shifted the burden of proof to defendant to show that he was not guilty. Defense counsel did not object at trial to the prosecutor's comments, and we therefore will not review this issue on appeal "unless the prejudicial effect could not have been cured by a jury instruction or failure to consider the issue would result in manifest injustice." *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

We conclude that even if defendant *had* objected to the prosecutor's comments at trial, reversal would not be warranted, because defendant's silence and inaction "did not occur during a custodial

interrogation, nor was it in reliance on the *Miranda*¹] warnings.” *People v Schollaert*, 194 Mich App 158, 166; 486 NW2d 312 (1992). Indeed, at the time of the transaction, defendant was not in a custodial interrogation situation where he was compelled to speak or to assert his right to remain silent. Defendant’s silence and inaction occurred before he even knew that Strebe was a police officer. Accordingly, defendant’s silence and inaction were admissible as substantive evidence, and the prosecutor therefore did not err in making the challenged comments.² *Id.* at 167.

The prosecutor argues that the trial court erred in sentencing defendant to concurrent sentences for his delivery and conspiracy convictions because MCL 333.7401(3); MSA 14.15(7401)(3) requires that the court sentence defendant to consecutive sentences for these convictions. Defendant argues, however, that, the trial court met the requirements of MCL 333.7401(3); MSA 14.15(7401)(3) by making his delivery and conspiracy sentences consecutive to the sentence he was already serving at the time he committed the instant offenses. This issue involves a question of statutory interpretation that we review de novo. See *People v Webb*, 458 Mich 265, 274-275; 580 NW2d 884 (1998).

In sentencing defendant, the trial court imposed concurrent sentences but, because defendant was on parole at the time he committed the instant offenses, the court made the concurrent sentences run consecutively to another sentence that defendant was already serving. The court did not take into consideration MCL 333.7401(3); MSA 14.15(7401)(3), which states:

A term of imprisonment imposed pursuant to subsection (2)(a) or subsection 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony.

In *People v Lee*, 233 Mich App 403, 406; 592 NW2d 779 (1999), quoting *People v Morris*, 450 Mich 316, 320; 537 NW2d 842 (1995), this Court stated that the term “another felony” includes “any felony for which the defendant has been sentenced either before or simultaneously with the controlled substance felony enumerated in § 7401(3) for which a defendant is currently being sentenced.”

This language leaves no discretion for the trial court to impose concurrent sentences. The term of imprisonment for the controlled substance felony must run consecutively to all other felony sentences, regardless of whether the other felony sentence was imposed before or simultaneous to the current sentence. See *Morris*, *supra* at 324, 338 (wherein the Supreme Court affirmed the trial court’s imposition of three consecutive sentences prison terms under MCL 333.7401(3); MSA 14.15(7401)(3) for three cocaine delivery counts). Thus, the sentences for the delivery and the conspiracy convictions must run consecutively to one another.

Because the court failed to impose mandatory consecutive sentences on all felonies, the court erred in its sentencing of defendant. As a result, a remand for a full resentencing is required. *People v*

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

² We further note that the prosecutor’s comments were proper because the evidence of defendant’s silence and inaction during the drug transaction was first elicited not by the prosecutor but by defense counsel.

Thomas, 223 Mich App 9, 14-15; 566 NW2d 13 (1997); *People v Mapp*, 224 Mich App 431, 432; 569 NW2d 523 (1997).

Given that resentencing is required, we need not address the remainder of defendant's arguments, which relate to the appropriateness of his sentences.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot