STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 220898 Calhoun Circuit Court
MONTRELL DEPREE EMBRY, Defendant-Appellant.	LC No. 98-004978-FH

Before: O'Connell, P.J., and Zahra and B.B. MacKenzie*, JJ.

PER CURIAM.

Defendant was convicted 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). He was sentenced to 5 to 20 years' imprisonment. Defendant filed a post trial motion for new trial challenging the admission of bad acts and hearsay evidence. He also filed a supplement to his motion challenging the proportionality of his sentence. The trial court denied defendant's motion and supplement. He appeals as of right. We affirm.

I

Defendant sold crack cocaine to an undercover police officer. At trial, the prosecution sought to introduce the undercover officer's testimony on the issue of defendant's identity. In particular, the officer testified that he was familiar with defendant because the two had been introduced by an informant. In addition, the officer testified that he previously had conversations with defendant. In this appeal, defendant challenges the admission of this evidence as inadmissible bad acts evidence.

Other evidence introduced at trial included the officer's testimony concerning statements made by a woman who helped to facilitate the sale. These statements included quoting the officer a price of $65 for one-sixteenth ounce of crack cocaine, as well as the statement that the woman had many sources and that "one of her boys was getting it for her, and that they'd be up there shortly." Defendant contests the admission of this evidence as inadmissible hearsay.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The admissibility of evidence is within the trial court's discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). We review a trial court's decision to admit or deny evidence for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The trial court did not abuse its discretion in admitting the officer's statements that he was familiar with defendant. This testimony is not bad acts evidence. In order for the challenged testimony to qualify as bad acts evidence it has to amount to "other crimes, wrongs, or acts." MRE 404(b)(1). The undercover officer's testimony suggested that he was familiar with defendant because they were introduced through an informant. This statement is not a reference to a specific prior bad act.

In addition, the officer testified that he was familiar with defendant because he had spoken with him on previous occasions. On the day of the drug transaction, the undercover officer met with and spoke to defendant four times. These meetings were brief contacts leading up to the drug transaction later that evening. Because the conversations with defendant occurred the same day as the delivery and were part of the events leading to the delivery, these events were not prior bad acts. The trial court did not abuse its discretion when it admitted the challenged testimony into evidence, because the testimony is not bad acts evidence.

II

Defendant next contends that the trial court erred in admitting the officer's testimony of a woman's statement that "one of her boys" would be getting the cocaine. At trial, defendant objected to the officer's testimony as inadmissible hearsay. The prosecution argued that the statements were admissible because they were statements by a coconspirator. The court admitted the officer's testimony.

In order for a statement to qualify as a coconspirator statement under MRE 801(d)(2)(E), three requirements must be met. First, there must be independent proof beyond a preponderance of the evidence that a conspiracy in fact occurred. *People v Vega*, 413 Mich 773, 780-782; 321 NW2d 675 (1982). Second, the statement must be made during the course of a conspiracy. *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993). Finally, the statement must be made in furtherance of a conspiracy. *Id*. at 395.

Here, independent proof was sufficient to prove by a preponderance of the evidence that a conspiracy existed. The jury could infer a conspiracy from the facts surrounding the transaction. Although the undercover officer only communicated his desire to purchase drugs to the woman, defendant arrived at the location and tendered drugs without ever having arranged a sale. This alone suggests an agreement must have existed between the woman and defendant. Thus, even ignoring the content of the officer's challenged testimony, sufficient independent proof existed at trial from which a jury could infer a conspiracy to deliver crack cocaine.

Second, the challenged statements must have been made during the course of a conspiracy. A statement is made during the course of a conspiracy if the conspiracy is extant when the statement is elicited. *Bushard, supra* at 394. The content of the challenged testimony strongly indicates a preexisting relationship between the woman and defendant. The woman's reference to defendant as "one of my boys" indicates that she had a prior understanding with defendant regarding the supply of cocaine. Because the statements were made during a time when the woman and defendant had an ongoing relationship, the statements were made during the course of a conspiracy.

Third, the statements must have been made in furtherance of a conspiracy. A statement is made in furtherance of a conspiracy when the statement invites the listener to respond in a way that facilitates criminal activity. *Bushard, supra* at 395. When the woman told the undercover officer the price for the cocaine and advised that one of her boys would arrive there shortly, these statements were made for the purpose of encouraging the officer to enter into a drug transaction. Because the statement encouraged the officer to buy drugs from defendant, the statement was made in furtherance of a conspiracy. We conclude that the trial court did not abuse its discretion when it admitted the testimony into evidence because it fell within the class of statements protected by the coconspirator statement exception. MRE 801(d)(2)(E).

III

Defendant next argues that the trial court erred in sentencing defendant to 5 to 20 years' imprisonment. This Court reviews this issue for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998).

The trial court did not abuse its discretion. The Supreme Court's sentencing guidelines apply to offenses committed before January 1, 1999. MCL 769.34(1); MSA 28.1097(3.4)(1). The present offense occurred on April 1, 1998. Therefore, the judicial sentencing guidelines apply.

Sentences which fall within the guideline range are presumed to be neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). The judicial sentencing guidelines suggest a minimum sentence between 2 to 8 years' imprisonment. The trial court directed that defendant be imprisoned for not less than five years. This five-year minimum is well within the guideline range. Therefore, the sentence is presumptively valid. Defendant has offered nothing to rebut that presumption. We conclude that the trial court did not abuse its discretion when it sentenced defendant to a minimum sentence of five years' imprisonment, because the sentence is neither disproportionate nor excessive.

Affirmed.

/s/ Peter D. O'Connell
/s/ Brian K. Zahra
/s/ Barbara B. MacKenzie