STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 9, 2001
v	No. 217709 Oakland Circuit Court
MONTY LEDREW CUNNINGHAM, Defendant-Appellant.	LC No. 98-157334-FH

Before: Talbot, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for conspiracy to possess with intent to deliver less than fifty grams of cocaine, MCL 750.157a(a); MSA 28.354(1)(a); MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced, as an habitual offender,[1] to consecutive terms of five to twenty years in prison for each conviction. We affirm.

Defendant first argues that the trial court erred in permitting the prosecution to present hearsay statements of an alleged coconspirator without a prior determination of the existence of a conspiracy. Generally, a trial court's decision to admit evidence will be reversed only if there was an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, when a trial court's decision regarding the admission of evidence involves a preliminary question of law, this Court reviews the issue de novo. *Id.*

During the prosecution's direct examination, witness Damon Burton testified that he was receiving cocaine on credit from codefendant Reuben Riley.[2] Burton told police that Riley was

[1] The lower court record was unclear as to whether defendant was sentenced as a third or fourth habitual offender. Although the Judgment of Sentence states defendant was sentenced pursuant to MCL 769.11; MSA 28.1083, the sentencing record states that defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084.

[2] Riley, codefendant in defendant's trial, was also charged with conspiracy to possess and possession with intent to deliver less than fifty grams of cocaine.

"holding"[3] cocaine and selling it. The prosecution then asked Burton whether Riley had said that he would give Burton the cocaine on credit, but that it was not his (Riley's) to give. Defense counsel objected on the grounds that Burton's answer was inadmissible hearsay because there had not been an independent showing of a conspiracy to admit the non-testifying codefendant's statement. The trial judge overruled the objection and stated that he would allow the jury to decide if a conspiracy existed. Burton further testified that Riley could give him the cocaine on credit if Riley approved the agreement with defendant.

Rule 801 of the Michigan Rules of Evidence provides that:

> A statement is not hearsay if…[t]he statement 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. [MRE 801(d)(2)(E).]

The independent proof must establish a conspiracy's existence by a preponderance of the evidence. *People v Vega*, 413 Mich 773, 782; 321 NW2d 675 (1982). Neither direct proof of the agreement, nor a formal agreement, need be shown to prove the conspiracy. *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986). Circumstances, acts, and conduct of the parties can sufficiently demonstrate an agreement in fact. *Id.* Furthermore, circumstantial evidence and inference may be used to establish a conspiracy. *Id.*

Defendant asserts that the trial court should not have admitted the hearsay statement of a coconspirator without first determining that a conspiracy existed. We agree. It is incumbent upon the trial judge to determine preliminary questions of the admissibility of evidence rather than leaving the decision to the jury. MRE 104(a); *Vega, supra* at 780. The United States Supreme Court has construed FRE 104(a), which is identical to MRE 104(a), to require court's to resolve preliminary questions of fact before admitting the evidence. *Bourjaily v United States*, 483 US 171, 175; 107 S Ct 2775; 97 L Ed 2d 144, 152 (1987). *Bourjaily* further stated that "the existence of a conspiracy…[is a] preliminary question[] of fact that, under Rule 104, must be resolved by the court." *Id.* *Vega* agreed with the federal court's analysis that the existence of a conspiracy, in the face of a coconspirator's declarations, was a preliminary question of fact for the trial judge to decide. *Vega, supra* at 779-780. Thus, the trial court erred by admitting the coconspirator's statement without first determining that the prosecution had proven a conspiracy by a preponderance of the evidence.

We now examine whether the trial court's error in admitting this evidence requires reversal of defendant's conviction. An error in the admission of evidence is not grounds for disturbing a judgment or order unless refusal to take such action appears inconsistent with substantial justice. MCR 2.613(A). Reversal of a conviction is only required for prejudicial error. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). To determine if an error was prejudicial, this Court focuses "on the nature of the error and assesses its effect in light of the weight and strength of untainted evidence." *Id.* When an error is presumed harmless, the

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[3] Burton testified that "holding" meant "holding it for someone else because he never—it wasn't his or whatever."

defendant bears the burden of showing that the error resulted in a miscarriage of justice. *Lukity, supra* at 494-495. A preserved, nonconstitutional error justifies reversal of a conviction if a defendant shows that it is more probable than not that the error affected the outcome of the case. *Id.*

Defendant argues that the trial court's erroneous admission of the coconspirator's statement, without first establishing the conspiracy's existence, resulted in prejudice. We disagree. The trial court's failure to determine the existence of a conspiracy, before the admission of the coconspirator's statement, was harmless error. There was sufficient independent evidence of a conspiracy for the trial court to find that a conspiracy had been proven by a preponderance of the evidence. Craig Cloutier[4] testified that he had an agreement with defendant that allowed defendant to deal cocaine out of Cloutier's house. Burton testified that Cloutier told him about this arrangement. Defendant did not live at Cloutier's house, but was there three or four times a week. Defendant never paid for using Cloutier's house, but sometimes gave Cloutier cocaine as payment. Cloutier assisted in the sale of drugs by taking telephone calls and informing callers of the availability of drugs at his home. Riley subsequently moved into Cloutier's house to sell defendant's drugs. Cloutier testified that he observed Riley and defendant preparing and packaging the cocaine in baggies for sale. Cloutier then stated that he saw defendant give Riley drugs and saw Riley sell the drugs. Although Cloutier claimed he never saw Riley give defendant money, he testified that defendant received the money from Riley's drug sales. This independent evidence was sufficient to show the existence of an agreement between defendant and Riley. Therefore, the trial court's admission of Burton's testimony was harmless error.

Additionally, defendant argues that he was prejudiced because the jury was present for the parties' arguments and the trial court's ruling on the admission of the coconspirator's statement. However, counsel failed to voice this objection during trial. Appellate courts are not required to review issues that were not properly preserved. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995). Furthermore, there is no indication that the court's actions were inconsistent with substantial justice as the coconspirator's statement was harmless error and the jury received instructions that the attorney's arguments were not evidence. MCR 2.613(A).

Next, defendant claims that the trial court's error deprived him of his rights to due process and a fair trial. Although not raised before the trial court, defendant's argument may be considered on appeal where a serious due process violation is alleged. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). Questions of law are reviewed de novo on appeal. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). "Minor irregularities in a trial usually do not amount to reversible error and due process is not violated, unless the weight of the irregularities makes the trial inconsistent 'with the fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions.'" *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987) (quoting *Hebert v Louisiana*, 272 US 312, 316; 47 S Ct

[4] Cloutier plead guilty to conspiracy to possess and possession with intent to deliver less than fifty grams of cocaine.

103; 71 L Ed 270 (1926)). However, while due process may not require perfect trials, it does mandate fair ones. *Id.* In the instant case, the trial court's error was harmless and not of such magnitude that defendant was denied his rights to due process and a fair trial.

Next, defendant argues that his sentences are disproportionate in relation to his criminal history and the circumstances surrounding the instant offenses. A sentence imposed on an habitual offender is reviewed for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997); *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). In sentencing an habitual offender, the trial court does not abuse its discretion by imposing a sentence within the statutory limits when, in the context of previous felonies, the defendant's underlying felony shows his inability to conform to the laws of society. *Hansford, supra* at 326. Moreover, the sentencing guidelines are inapplicable when sentencing habitual offenders. *Id.* at 323.

The trial court did not abuse its discretion in imposing defendant's sentences. First, defendant's sentences fell within the statutory limits.[5] MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Furthermore, since defendant was found to be an habitual offender, his sentences may be enhanced.[6] The term of imprisonment for a possession with intent to deliver cocaine conviction must be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. MCL 333.7401(3); MSA 14.15(7401)(3); *People v Denio*, 454 Mich 691, 701; 564 NW2d 13 (1997). Therefore, defendant's consecutive sentences of five to twenty years in prison fall within the statutory limits.[7]

Second, defendant's present convictions, along with his prior criminal record, show his inability to conform to the laws of society. Defendant's prior record includes three juvenile offenses and numerous adult offenses.[8] He committed the instant offenses while on probation and approximately one month after a warrant was issued for his violation of probation in an unrelated case. Defendant has been given several chances for rehabilitation but has repeatedly shown an inability to respect society's laws. Therefore, the trial court did not abuse its discretion in imposing defendant's sentences.

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[5] Conspiracy to possess and possession with intent to deliver less than fifty grams of cocaine are both punishable by imprisonment for not less than one year and not more than twenty years and a fine of not more than $25,000, or probation for life. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv).

[6] If defendant was sentenced as a third habitual offender, his sentences may be enhanced to twice the longest terms of imprisonment prescribed by law. MCL 769.11(1)(a); MSA 28.1083(1)(a). If defendant was sentenced as a fourth habitual offender, his sentences may be enhanced to a term of imprisonment for life or for a lesser term. MCL 769.12(1)(a); MSA 28.1084(1)(a).

[7] These sentences fall within the statutory limits, regardless of defendant's status as a third or fourth habitual offender.

[8] As an adult, defendant was convicted of possession of a firearm, receiving stolen property, several instances of possession of less than twenty-five grams of a controlled substance, and other offenses.

Finally, defendant argues that this Court should review and revise its policies regarding scoring and departures from the sentencing guidelines. Defendant cites several cases that he claims create judicially determined policies that impose virtually mandatory restraints on his ability to gain serious appellate review of his sentence. However, it is the obligation of the Michigan Supreme Court to overrule or modify case law if it becomes obsolete, and until such time, this Court and all lower courts are bound by that authority. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Additionally, this Court must follow the rules of law established by published decisions of this Court issued on or after November 1, 1990, that have not been reversed or modified by the Supreme Court, or by a special panel of this Court. MCR 7.215(H)(1). Therefore, we refuse to review and revise the rules of law established in prior decisions of this Court.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper