

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DAVID WARDLAW,

Defendant-Appellant.

UNPUBLISHED

March 6, 2001

No. 225842

Oakland Circuit Court

LC No. 95-138711-FH

Before: Meter, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based convictions of conspiracy to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and three counts of delivery of 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged as noted above, as well as with two other counts of delivery of 50-224 grams of cocaine, and one other count of delivery of less than 50 grams of cocaine. Similar charges were lodged against defendant's co-defendant and uncle, Roger Wardlaw (not involved in this appeal).

At the preliminary examination, an undercover officer for the Oakland County Narcotics Enforcement Team testified that he completed six transactions with defendant and/or Roger Wardlaw. On several occasions defendant and the officer negotiated the sale of two ounces of cocaine. Thereafter, Roger Wardlaw retrieved the cocaine from defendant and delivered it to the officer. On two other occasions, the officer received cocaine from Roger Wardlaw. The officer saw defendant during those transactions, but did not deal with him directly. These deliveries of forty-seven and fifty-seven grams of cocaine occurred on February 28, 1995 and March 20, 1995.

Defendant and Roger Wardlaw pleaded guilty over plaintiff's objections. In *People v Wardlaw*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 1998 (Docket Nos. 197568, 197570), we reversed the convictions and remanded for further proceedings.

On remand, defendant moved to quash the charge of conspiracy and the delivery charges arising out of the transactions on February 28, 1995 and March 20, 1995. He argued that insufficient evidence existed to charge him with aiding and abetting those deliveries; consequently, the charge of conspiracy to deliver 225-650 grams of cocaine, which was based on aggregated amounts delivered between defendant and Roger Wardlaw, was also not supported by the evidence. The trial court denied the motion to quash. Thereafter, defendant pleaded guilty to all charges, while preserving his right to appeal the denial of his motion to quash. On appeal, defendant challenges only the conspiracy conviction and the delivery convictions arising out of the transactions on February 28, 1995 and March 20, 1995.

The purpose of a preliminary examination is to determine if probable cause exists to believe that a crime was committed and that the defendant committed it. *People v Fiedler*, 194 Mich App 682, 689; 487 NW2d 831 (1992); MCL 766.13; MSA 28.931; MCR 6.110(E). During a preliminary examination, the prosecution must produce evidence of each element of the crime charged, or evidence from which the elements can be inferred. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). The decision to discharge or bind over a defendant is reviewed for an abuse of discretion. *People v Vasher*, 167 Mich App 452, 456; 423 NW2d 40 (1988). We review the trial court's decision that the district court abused or did not abuse its discretion on a de novo basis. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

A conspiracy is a mutual agreement or understanding 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). The agreement or understanding may be express or implied. Conspiracy is a specific intent crime, and requires both the intent to combine with others and the intent to accomplish the illegal objective. Direct proof of the agreement is not required. The circumstances, acts, and conduct of the parties can establish the existence of an agreement. A conspiracy may be based on inference or proven by circumstantial evidence. No overt act in furtherance of the conspiracy is necessary. The formation of the agreement completes the crime of conspiracy. *Id.* at 392-393.

To support a finding that a defendant aided and abetted a crime, the prosecution must show: (1) that defendant or some other person committed the crime; (2) that the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) that 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 Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors which may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 757-758.

Defendant argues that insufficient evidence was produced at the preliminary examination to support charging him with aiding and abetting the deliveries that occurred on February 28, 1995 and March 20, 1995, and that the district court abused its discretion by binding him over on those charges. We disagree and affirm those convictions. It is undisputed that on those dates a crime, i.e., delivery of cocaine, was committed by Roger Wardlaw. Regarding the February 28, 1995 delivery, the evidence showed that the officer spoke with defendant to arrange the

transaction, and was notified by defendant that the cocaine was enroute. Defendant performed acts, specifically arranging the transaction and transporting the cocaine, which assisted Roger Wardlaw in the commission of the crime. The nature of defendant's acts supported an inference that he intended that the crime be committed. Regarding the March 20, 1995 delivery, the officer testified that Roger Wardlaw told him that defendant had procured the cocaine for the transaction. Defendant's assertion that Roger Wardlaw's statement constituted inadmissible hearsay is without merit. A statement made by a co-conspirator during the course of and in furtherance of the conspiracy is not hearsay and is admissible if offered against a party and on independent proof of the conspiracy. MRE 801(d)(2)(E). We have reviewed the record and conclude that the prosecutor offered sufficient evidence of the conspiracy apart from Roger Wardlaw's statement. The district court did not abuse its discretion by binding defendant over on the delivery charge arising from the March 20, 1995 transaction.

To convict a defendant of conspiracy to deliver a controlled substance in an aggregated amount, the prosecution must prove: (1) that the defendant possessed the specific intent to deliver the statutory minimum as charged; (2) that the defendant's co-conspirators possessed the specific intent to combine to deliver the statutory minimum as charged; and (3) that the defendant and his co-conspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *People v Justice (After Remand)*, 454 Mich 334, 359; 562 NW2d 652 (1997). The quantity of cocaine delivered in the two challenged charges, when combined with the amounts delivered in the charges not contested, falls squarely within the 225-650 range. Our determination that defendant's bindover on the delivery charges arising from the February 28, 1995 and March 20, 1995 transactions was proper compels the conclusion that the charge of conspiracy to deliver 225-650 grams of cocaine was appropriate and supported by the requisite evidence.

Affirmed.

/s/ Patrick M. Meter
/s/ Janet T. Neff
/s/ Peter D. O'Connell