STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD ROBERT LEWIS,

Defendant-Appellant.

UNPUBLISHED
August 21, 2001

No. 222705
Macomb Circuit Court
LC No. 98-000602-FH

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivering more than fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and conspiracy to commit that offense, MCL 750.157a. The trial court sentenced defendant to separate terms of ten to twenty years' imprisonment on each of these convictions. The court ordered that the sentence for the delivery conviction was to be served consecutively to a previously imposed federal prison sentence, and that the sentence for the conspiracy conviction was to be served consecutively to both the federal sentence and the sentence for the delivery conviction. Defendant appeals as of right. We affirm.

Defendant first contends that there was insufficient evidence presented at trial to support his conspiracy conviction. Defendant specifically argues that there was insufficient evidence that he intended to combine with another person to deliver drugs to a third person, because the intent to combine requires more than mere knowledge and, at most, the evidence in this case showed that he agreed to deliver cocaine to a man named Leon Dabney and perhaps had knowledge that Dabney intended to resell the cocaine to another buyer. In reviewing the sufficiency of the evidence supporting a criminal conviction, this Court must view the evidence in a light most favorable to the prosecution and decide whether a rational trier of fact could find guilt beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

An agreement to commit a crime may not be charged as a conspiracy unless the number of parties to the agreement exceeds the number of parties necessary to commit the underlying offense.[1] Hence:

[1] See *People v Davis*, 408 Mich 255, 272-273 (COLEMAN, C.J.); 290 NW2d 366 (1980), quoting
(continued…)

> To be convicted of conspiracy to possess with intent to deliver a controlled substance, the people must prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators 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, 349; 562 NW2d 652 (1997).]

The scope of a conspiracy is determined by the scope of the knowledge on the part of each of the coconspirators "regarding the conspiracy's goal, scope and criminal objective." *Id.* at 352. A participant who lacks knowledge of the overall objective is not a member of the conspiracy. *Id.* at 347. Further,

> [t]he term "combine" means that all the participants formed an agreement, express or implied, to accomplish the objective of the conspiracy. That is, all parties shared knowledge that the narcotics are ultimately to be delivered to a third party for consumption and all agreed to meet this objective of delivery by fulfilling their agreements. [*Id.* at 345 n 19; citations omitted.]

"[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *Id.* at 347.

Here, there was police testimony that defendant gave a statement after he had been arrested in which he admitted that he agreed to sell to Dabney an eighth of a kilo of cocaine. Initially, Dabney testified only to the fact that he told defendant "that I had a need for that . . . I had a need for the cocaine." Later, however, after Dabney testified that defendant did not know that the cocaine was intended for delivery to another, Dabney was impeached with a letter he had written. He subsequently admitted that during his initial negotiations with defendant he conveyed to defendant that he (Dabney) "had a sale for the eighth," meaning that he had a customer lined up. Moreover, Dabney testified that after defendant confirmed that he could get Dabney an eighth of a kilo at a price of $3100, and Dabney accepted, Dabney arranged to "page [defendant] when he had the money." The circumstances, acts, and conduct of the parties to the transaction support an inference that defendant was aware that Dabney's need for the cocaine arose from his role as a middleman in the transaction. Thus, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant and Dabney each shared knowledge that the cocaine at issue was ultimately to be delivered to a third party for consumption, and that defendant and Dabney agreed to meet the objective of delivery to the third person by fulfilling their agreed upon roles in the enterprise. *Justice, supra* at 345 n 19.

Next, defendant contends that the trial court erroneously instructed the jury that it could convict him of delivering more than 50 but less than 225 grams of cocaine on the basis of either of two theories of delivery: (1) defendant's delivery to Dabney; or (2) defendant's and Dabney's

(…continued)

2 Wharton, Criminal Law (12th Ed), § 1604, p 1862 ("Wharton's Rule").

delivery, as coconspirators, to the police informant. Defendant asserts that the court's instruction had the effect of denying him adequate notice of the charge against which he was expected to defend. Because defendant did not object to the court's instruction at trial, this issue is unpreserved and defendant can only avoid forfeiture, under the plain error rule, by establishing that this was plain error that prejudiced his substantial rights and warrants reversal. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant supports his argument for this claim of error with two cases where the drug transactions were similar to the one that occurred here, and the juries were permitted to consider the same two alternate theories of delivery. However, in *People v Vega*, 413 Mich 773, 782-783; 321 NW2d 675 (1982), one of the two theories of delivery was supported only by evidence that the Court had just found inadmissible, and since the jury could have convicted on the basis of the unsupported theory of delivery, reversal was required. In *People v Rosen*, 136 Mich App 745, 759-762; 358 NW2d 584 (1984), the defendant had moved for, and had been denied, a bill of particulars, yet the prosecutor argued the alternate theories of delivery to the jury. This Court determined that reversal was warranted on other grounds, and ordered the prosecutor, on remand, to provide the defendant with a bill of particulars.

Here, defendant advanced a venue defense to the delivery charge, arguing that defendant's act of delivering cocaine to Dabney took place entirely outside of Macomb County. See CJI2d 3.10. See also *People v Lee*, 334 Mich 217, 226; 54 NW2d 305 (1952). Hence, it was defendant who was advancing the theory that the delivery at issue was the one from himself to Dabney, and defendant was well aware that the prosecutor's position was that defendant's acts were part of a larger transaction that began with the exchange of money between the police informant and Dabney in Macomb County, and culminated in the delivery of cocaine to the police informant. If the court had limited the jury instruction to the prosecution's expressed theory in this case, as defendant now claims it should have, defendant's theory of the case would have been diminished. Consequently, defendant has not established plain error that prejudiced his substantial rights.

Finally, defendant contends that the conspiracy statute provided no authority for the trial court to order his sentence for conspiracy to run consecutively with his federal sentence. However, this very issue was decided contrary to defendant's position by the Supreme Court in *People v Denio*, 454 Mich 691; 564 NW2d 13 (1997). The conspiracy statute[2] requires that defendant receive the same penalty for conspiring to deliver more than 50 but less than 225 grams of cocaine as could be imposed for delivering more than 50 but less than 225 grams of cocaine. This "penalty" includes the consecutive sentencing that attends a conviction for

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[2] MCL 750.157a(a) provides, in pertinent part:

> [I]f commission of the offense prohibited by law is punishable by imprisonment for 1 year or more, the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit and in the discretion of the court an additional penalty of a fine of $10,000.00 may be imposed.

delivering more than 50 but less than 225 grams of cocaine.[3] Consequently, not only is there statutory authorization for ordering defendant's conspiracy sentence to run consecutively with his federal sentence, such sentencing was required. *Denio, supra* at 701, 704.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper

[3] MCL 333.7401(3) provides that the sentence for the conviction under § 7401(2)(a)(iii) "shall be imposed to run consecutively with any other term of imprisonment imposed for the commission of another felony."