STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2001
V	No. 222609 St. Clair Circuit Court
ANTONIO MARVETTA CARTER, Defendant-Appellant.	LC No. 99-000744-FH

Before: Fitzgerald, P.J., and Gage and C. H. Miel*. JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of conspiracy to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MCL 750.157a(a), entered after a jury trial. We affirm.

Defendant was charged with delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and conspiracy to commit that offense. The evidence produced at trial showed police officers established surveillance of a tavern parking lot where narcotics were known to be sold. Officers observed defendant in the parking lot on numerous occasions. On one occasion, an undercover officer drove to the parking lot to purchase cocaine. Defendant and a known drug dealer were present. The dealer ascertained that the officer wished to purchase cocaine, and then approached and spoke with defendant. Defendant handed the dealer an object. The dealer gave the object to the officer, received money in return, then gave the money to defendant. The object given to the officer was found to be crack cocaine. The officers testified that they recognized defendant because they had had prior contacts with him. The nature of the contacts was not discussed. Defense counsel did not object to questions concerning the officers' prior contacts with defendant. Defendant testified that he worked at the tavern, and that part of his job was to clear the parking lot on a periodic basis to curtail narcotics sales. On cross-examination, defendant replied in the negative when asked if he had documentation of his employment. The jury acquitted defendant of delivery of less than fifty grams of cocaine, but convicted him of conspiracy to commit that offense.

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

Defendant claimed an appeal and filed an initial brief. Subsequently, substitute counsel was appointed. We granted new counsel's motion to file a supplemental brief, but denied a motion to remand for a *Ginther*[1] hearing.

A new trial may be granted on some or all of the issues if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Failure to raise the issue by moving for a new trial before the trial court waives the issue on appeal. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). The issue may be considered if the failure to do so would result in a miscarriage of justice. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

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. 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. *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991).

Defendant argues that his conviction must be reversed because the verdict was against the great weight of the evidence. We disagree. Defendant did not move for a new trial in the trial court, and thus has waived appellate review of this issue. *Winters*, *supra*. Nevertheless, the verdict was not against the great weight of the evidence. The jury was entitled to determine the credibility of the witnesses. *Lemmon*, *supra*. The evidence showed that defendant and a dealer were present at a location at which narcotics were known to be sold. The dealer confirmed that an undercover officer wished to purchase cocaine. The dealer spoke with defendant, obtained an object from defendant and gave that object to the officer, and then surrendered the money received from the officer to defendant. The object given to the officer was cocaine. This evidence established a delivery of cocaine. From the evidence that defendant and the dealer interacted to enable the dealer to complete the transaction, the jury could infer that the two intended to act together to accomplish the illegal sale of cocaine. *Cotton*, *supra*. The fact that the jury acquitted defendant of delivery of less than fifty grams of cocaine while convicting him of conspiracy to commit that offense does not require reversal of defendant's conviction. A jury has the power to acquit as a matter of leniency, and can render inconsistent verdicts. *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000). Defendant is not entitled to reversal of his conviction or a new trial. *Gadomski*, *supra*.

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant argues that he was denied a fair trial by the introduction of unduly prejudicial other acts evidence, i.e., that he had had prior contacts with the police officers. To be admissible under MRE 404(b)(1), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show a propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

Defendant failed to object to the officers' testimony regarding prior contacts, and thus has not preserved this issue for appellate review. Therefore, he must show prejudice either because of the conviction of an innocent person, or because the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The testimony from the officers was brief and non-specific. At no time was defendant identified as a perpetrator of any other offense. No prejudice occurred. *Id*.

In addition, defendant argues that the prosecutor's question as to whether he could provide documentation of his employment at the tavern where the narcotics sales occurred impermissibly shifted the burden of proof onto him to establish his innocence. *People v Smith*, 143 Mich App 122, 135; 371 NW2d 496 (1985). We disagree. The prosecutor has the burden of proving beyond a reasonable doubt every element of the offense with which the accused is charged. CJI2d 1.9(2). The fact that defendant was employed at the tavern was not an element of the offenses with which he was charged, but rather was part of his own theory that he was a victim of mistaken identity. The prosecutor's questions did not impermissibly shift the burden of proof. See *People v Fields*, 450 Mich 94, 106-107; 538 NW2d 356 (1995).

Finally, defendant argues that he was denied the effective assistance of counsel at trial due to counsel's failure to object to the introduction of unduly prejudicial other acts evidence, to the prosecutor's attempt to shift the burden of proof, and to counsel's failure to produce documentation of his employment at the tavern. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's performance resulted in prejudice. To demonstrate prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Counsel's decision to not call further attention to testimony regarding defendant's prior contacts with police can be deemed sound trial strategy, which we decline to second-guess. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Counsel's failure to object to the prosecutor's questions regarding defendant's employment documentation did not constitute ineffective assistance because the questions were not improper. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Counsel's failure to produce documentation of defendant's employment did not deprive defendant of a substantial defense, and thus did not constitute ineffective assistance.

People v Stubli, 163 Mich App 376, 381; 413 NW2d 804 (1987). Defendant testified that he worked at the tavern. Even if the jury had been provided with documentation of that assertion, it could have returned the same verdict. Defendant has failed to overcome the presumption that counsel rendered effective assistance. *Rockey*, *supra*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage
/s/ Charles H. Miel