STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2001
V	No. 225653 Berrien Circuit Court
RALPH LEO WASHINGTON, Defendant-Appellant.	LC No. 99-403234-FH

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver more than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), conspiracy to deliver cocaine, MCL 333.7401(2)(a)(ii), and possession of marijuana, MCL 333.7403(2)(d). He appeals of right. We affirm in part, reverse in part, and remand.

The evidence established that defendant participated in a three-car caravan from Chicago en route to Kalamazoo and the second car in the caravan contained 591 grams of cocaine. The evidence also established that, even though defendant neither drove nor rode in the second car, he knew there was cocaine hidden in its trunk.

I

Defendant first claims the trial court erred when it denied his motion to suppress his statement to the police because the statement was involuntary in that it was induced by a promise of leniency. We disagree.

A confession may not be introduced into evidence unless the prosecution proves by a preponderance of the evidence that the defendant's statements were voluntary. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). The determination whether a confession was voluntary is a question of law for the trial court. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). In reviewing the trial court's findings, this Court examines the entire record to make an independent determination of voluntariness. *Etheridge*, *supra* at 57. However, this Court will defer to the trial court's superior ability to assess the credibility of the witnesses and will reverse the trial court's factual findings only if they are clearly erroneous. *Id*.

In determining the voluntariness of a statement, a trial court should consider whether a promise of leniency induced the inculpatory statement. *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997). Defendant contended that the detective who interviewed him promised him he could go home if he confessed. The detective, however, testified that he told defendant he would talk to the prosecutor if defendant cooperated.

The trial court believed the interviewing detective's testimony over that of defendant. Deferring to the trial court's superior ability to make factual findings and credibility determinations, we accept the lower court's credibility determinations and conclude the trial court's factual findings were not clearly erroneous. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Furthermore, although defendant argues the detective's statement that he would "talk to the prosecutor" if defendant would "cooperate" amounts to a promise of leniency rendering defendant's confession involuntary, we have held that a promise to speak with the prosecutor concerning a defendant's willingness to cooperate does not amount to a "promise of leniency." *Givans, supra* at 120. Because the detective's promise to speak to the prosecutor was not a promise of leniency, it does not render defendant's confession involuntary. Therefore, we conclude that the trial court did not err when it denied defendant's motion to suppress his inculpatory statement.

II

Defendant next claims the evidence was insufficient to establish beyond a reasonable doubt the charges of possession with intent to deliver and conspiracy to possess with intent to deliver cocaine.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The standard of review is deferential – a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *Id*. The prosecutor is bound to prove the elements of the crime beyond a reasonable doubt; it need not negate every reasonable theory consistent with innocence to discharge its responsibility. *Id*.

A.

To establish the crime of possession with intent to deliver, a prosecutor must establish beyond a reasonable doubt that: (1) defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed the charged amount proscribed under the statute. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

Although defendant argues the prosecutor failed to establish the first element, that defendant knowingly possessed cocaine beyond a reasonable doubt, we find the prosecutor

established possession under an aiding and abetting theory. We have held that a defendant does not have to physically possess cocaine in order to be convicted of aiding and abetting possession with intent to deliver. *People v Steve Jones*, 201 Mich App 687, 688; 506 NW2d 599 (1993). Moreover, to establish aiding and abetting, a prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement which assisted in the commission of the crime, and (3) 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 Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001).

Here, the evidence established that defendant was helping those in the car containing the cocaine maintain possession of it because defendant participated in a caravan designed to protect the car carrying the cocaine from being pulled over by the police. Because, viewing the evidence in a light favorable to the prosecutor, the proffered evidence established that defendant helped his cousin and the driver of the second car in the caravan maintain possession of the cocaine, a reasonable jury could have found that the prosecutor established possession beyond a reasonable doubt. We therefore conclude there was sufficient evidence to sustain defendant's conviction of possession with intent to deliver more than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii). *Nowack, supra*.

B.

Defendant also challenges the sufficiency of the evidence presented in support of his conspiracy conviction, arguing the prosecutor failed to present evidence from which a reasonable jury could have found that defendant conspired to possess with intent to deliver cocaine between 225 and 649 grams. Defendant maintains that for purposes of the conspiracy charge, the prosecutor was required to establish that defendant knew the exact quantity or weight of the cocaine being transported and that the proofs are deficient in this regard.

To establish the statutory offense of criminal conspiracy, a prosecutor must show a combination or agreement, express or implied, between two or more persons, to commit an illegal act. MCL 750.157a; *People v Meredith (On Remand)*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995). Direct proof of the conspiracy is not essential; proof may be derived from the circumstances, acts, and conduct of the parties. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). However, any inferences drawn must be reasonable to ensure that it may accurately be ascertained what particular substantive offense was intended by the coconspirators. *Id*. at 348. With regard to the specific conspiracy charged herein, conspiracy to possess with intent to deliver a controlled substance, the prosecutor must establish that

> (1) [T]he 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. [*Id*. at 349 (emphasis added).]

In a recently released decision construing the above phrase, "the specific intent to deliver the statutory minimum as charged," our Supreme Court in *People v Mass*, 464 Mich 615, 630-

631; 628 NW2d 540 (2001), held that "[t]his Court's holding [in *Justice*] unambiguously calls for the prosecution to prove (in a conspiracy to possess with intent to deliver charge), *not just that the defendant conspired to possess with intent to deliver some or any amount of cocaine, but 'the statutory minimum as charged.'*"[1] [Emphasis added.] In reversing this Court's decision to the contrary, the *Mass* Court explained:

> The prosecution argues that *Justice* should not be applicable here because (1) the crime charged in *Justice* was the specific intent crime of possession with intent to deliver, whereas the crime herein was the general intent crime of delivery, and (2) *Justice* involved multiple small transactions that were aggregated, whereas the case at bar involved only one transaction. It has also been suggested that *Justice* was wrongly decided and that we should hold that knowledge of the amount of a controlled substance is not an element of a conspiracy offense. We find unpersuasive these criticisms of and efforts to distinguish *Justice*. We are satisfied that *Justice* properly concluded that knowledge of the amount of a controlled substance is an element of the crime of conspiracy to deliver a controlled substance, and that this holding is consistent with a correct interpretation of our controlled substance and conspiracy statutes. This is because our conspiracy statute, MCL 750.157a, makes it a crime to conspire with another to commit "an offense." And, as previously explained, there are four separate delivery offenses depending on the amount of contraband involved. The fact that *Justice* required the prosecution to establish the statutory charged amount is fully consistent with requiring the prosecution to prove which delivery offense a defendant conspired to violate and with the fact that conspiracy is a specific intent crime. [*Id*. at 632-634, (footnotes omitted).][2]

The *Mass* Court further noted that

> if one conspires to deliver an unspecified amount of cocaine one would, at a minimum, be guilty of conspiring to deliver less than fifty grams of cocaine. Thus, a defendant would not, as stated by the Court of Appeals, "avoid all criminal liability"; rather, he would be convicted of a felony and could face a twenty-year term of incarceration.
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> We further disagree with the Court of Appeals that

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[1] *Mass* was decided in the context of determining the propriety of jury instructions given by the trial court on the charges of delivery of cocaine and conspiracy to possess with intent to deliver between 225 and 649 grams of cocaine.

[2] The *Mass* Court, *supra* at 635-639, further held that pursuant to *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), knowledge of drug quantity is an element of a controlled substance conspiracy offense which must be submitted to the jury and proven beyond a reasonable doubt if the quantity increases the penalty for a crime beyond the prescribed statutory minimum.

> "a defendant could avoid conspiracy liability because, although he knew the rough extent of the amount of cocaine involved in a drug transaction, he did not know the exact measurement with scientific precision, i.e., whether 224 or 226 grams of cocaine were involved." *Id.* [*People v Mass*, 238 Mich App 333, 337; 605 NW2d 322 (1999).]
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> Once again, this analysis is flawed. If the prosecution proved to a jury that a defendant had conspired to deliver a significant amount of cocaine, but the jury was not sure if the defendant knew 224 grams or 226 grams were involved, the jury would properly convict such a defendant of conspiracy to deliver more than 50 grams but less than 225 grams of cocaine. Such a defendant would not avoid conspiracy liability. Rather, such a defendant would be properly convicted of a felony and would face at least a presumptive ten- to twenty-year term of incarceration.[20]
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> [20]To reiterate, the prosecution is not required to show the defendant knew the precise or specific amount. However, if the prosecution charges a defendant with conspiracy to deliver a controlled substance above the lowest amount of less than 50 grams, it must submit evidence showing the defendant agreed to commit the more serious offense. [*Id*. at 631-632.]

Thus, pursuant to *Mass* and *Justice*, *supra*, a defendant's knowledge of the amount of the controlled substance -- "the statutory minimum charged" -- is a necessary element of the offense of conspiracy to possess with intent to deliver. Accordingly, a defendant (such as defendant herein) charged with conspiracy to deliver 225 grams or more, but less than 650 grams, of cocaine may be found guilty of that specific charge "only if the prosecution has proved beyond a reasonable doubt that the defendant conspired to deliver, not just some amount of cocaine, but at least 225 grams of cocaine." *Mass, supra* at 645-646. See also *id*. at 630.

In the instant case, the only evidence of record introduced by the prosecution regarding defendant's knowledge of the quantity of cocaine being transported in the caravan consisted of the testimony of a state police detective sergeant who interviewed defendant after the caravan was stopped and he was arrested. The detective testified that during the interview, defendant, after initially denying any knowledge of the cocaine, admitted that the cocaine was being transported in the caravan. The caravan was instigated by defendant's cousin, who was characterized by defendant as a "street pharmacist." According to the detective, defendant told him that he saw his cousin give the cocaine to another participant, and he witnessed this individual, the driver of the second car, place the cocaine in the trunk of the vehicle. The detective testified that "All he [defendant] knew was that it [the cocaine] was in a white bag, white grocery type bag . . . a white Block Buster bag."[3] However, the record is devoid of any

[3] Defendant testified at trial and denied telling the detective that he was aware that cocaine was
(continued…)

further testimony which might indicate defendant's knowledge of the amount of cocaine contained in the white bag, and it would be unreasonable to infer such knowledge merely from the size or description of the bag. Thus, we conclude that proof of a requisite element of the conspiracy count -- defendant's knowledge of the "statutory minimum as charged" (225 grams) -- is lacking and the prosecution has failed to meet its burden of proof in this regard. *Mass, supra*; *Justice, supra*.

Nonetheless, defendant does not altogether avoid conspiracy liability. As the *Mass* Court held, "if one conspires to deliver an unspecified amount of cocaine one would, at a minimum, be guilty of conspiring to deliver less than fifty grams of cocaine." *Mass, supra* at 631. Thus, in the absence of any other deficiencies in the conspiracy proofs, see text *infra*, we reverse defendant's conviction of conspiracy to deliver at least 225 grams of cocaine and remand to allow the trial court to enter a conspiracy to deliver less than 50 grams of cocaine conviction and to sentence defendant on this count. *Id*. at 646.

Defendant's additional argument that the record is devoid of any evidence that defendant intentionally entered into an agreement with his coconspirators to deliver the cocaine is without merit. The prosecutor was not required to provide direct proof that defendant agreed with his coconspirators to deliver cocaine; where a person knows that others have conspired to break the law and cooperates knowingly to further the object of the conspiracy, that person becomes a party to the conspiracy. *Meredith, supra* at 412.

The evidence introduced at trial established that defendant agreed to drive a car to Kalamazoo for his cousin, whom he knew to be a drug dealer, and that his cousin would buy something for defendant in return. The evidence also established that defendant saw his cousin with the white plastic bag containing cocaine, witnessed his cousin hand the bag over to the driver of the second car in the caravan, and saw him place that bag in the trunk of the second car. Thus, when defendant agreed to take part in the caravan from Chicago to Kalamazoo, he knew the purpose of the trip was to transport the cocaine.

Because defendant knew that his cousin and the driver of the second car agreed to transport the cocaine to Kalamazoo, and because he agreed to help them accomplish this objective by participating in the caravan, defendant became a party to the conspiracy. Further, because the prosecutor presented sufficient evidence from which a rational jury could have concluded that defendant intended to "further, promote, advance, or pursue an unlawful objective," *Justice, supra* at 347, we hold that the evidence was sufficient to support defendant's conspiracy conviction.

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being transported or that he saw the cocaine being put into the trunk of the car. Although defendant acknowledged possession of marijuana, in his testimony he disavowed any knowledge that the caravan was transporting cocaine, stating that he was "just asked to drive a car."

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter