STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2001
v	No. 225943 Oakland Circuit Court
JEFFREY SCOTT PRITCHARD, Defendant-Appellant.	LC No. 97-151499-FH

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of conspiracy to deliver more than 50 but less than 225 grams of cocaine, contrary to MCL 333.7401(2)(a)(iii) and MCL 750.157a, and delivery of less than 50 grams of cocaine, contrary to MCL 333.7401(2)(a)(iv). We affirm.

I. Insufficient Evidence

Defendant argues that there was insufficient evidence to support his convictions. Specifically, he claims there was no evidence that he actively participated in the offenses. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution 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 Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

"Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective." *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001), quoting *People v Blume*, 443 Mich 476, 481, 505 NW2d 843 (1993). However, the essence of a conspiracy is the underlying agreement, and its actual purpose need not be accomplished. *People v Mass*, 464 Mich 615, 632; 628 NW2d 540 (2001). Direct proof of the conspiracy is not required, as its existence can be reasonably inferred from the circumstances, acts, and conduct of the parties. *People v Justice*, 454 Mich 334, 347; 562 NW2d 652 (1997). Additionally, a conspirator does not have to participate in all the objects of the conspiracy. *People v Grant*, 455 Mich 221, 236; 565 NW2d 389 (1997). Thus, the prosecution was required to prove that defendant and codefendants Chad Lavery or Charles Ryan had the specific intent to combine to deliver more than 50 but less than 225 grams of cocaine.

Our review of the record indicates that there was sufficient evidence to support defendant's conspiracy conviction. The evidence established that defendant conferred with codefendant Lavery regarding a price reduction on the cocaine. Moreover, during a telephone conversation with undercover police officer Allen, defendant discussed the "three" ounces that officer Allen had previously agreed to purchase and arranged a meeting place and time for the delivery. Defendant also accompanied codefendants Lavery and Ryan to conduct the transaction with officer Allen. During that meeting, defendant discussed the cocaine with officer Allen and inquired into his intentions. The fact that less than fifty grams of cocaine was delivered during this transaction is irrelevant because the purpose of the conspiracy need not be accomplished. *Mass, supra* at 632. Thus, we conclude that the evidence supported a finding that defendant actively and knowingly conspired to deliver more than fifty grams of cocaine.

Defendant's second conviction for delivery of less that fifty grams of cocaine was based on an aider and abettor theory. "The 'requisite intent' for conviction of a crime as an aider and abettor 'is that necessary to be convicted of the crime as a principal.'" *Mass, supra* at 628, quoting *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985).[1] An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal and the defendant's participation in the planning or execution of the crime. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). Delivery of a controlled substance requires "the actual, constructive, or attempted transfer" of the substance from one person to another. MCL 333.7105(1). Because delivery of a controlled substance is a general intent crime, a defendant's knowledge of the amount involved is not an element of the offense. See *Mass, supra* at 628. Therefore, it was enough for the prosecution to show that defendant, as with the principal offenders Lavery and Ryan, knowingly delivered or aided in the delivery of some amount of cocaine. See *id.*

In the instant case, the evidence established that codefendants Lavery and Ryan delivered cocaine to officer Allen. Additionally, the evidence supported the jury's conclusion that defendant encouraged and assisted in the commission of this crime. Defendant helped codefendant Lavery determine a price break on a larger quantity of cocaine and set up the initial meeting for the "three" ounces. Defendant also acknowledges on appeal that he knew codefendant Lavery intended to deliver cocaine to officer Allen.

II. Admission of Evidence

Defendant further contends that he was denied his constitutional right of confrontation and unfairly prejudiced by the admission of his codefendant's "post-conspiracy" hearsay

[1] According to *Izarraras-Placante*, *supra* at 495-496, quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), the following must be established to support a finding that a defendant aided and abetted a crime:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted 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.

statements. We disagree. A trial court's decision to admit evidence will not be disturbed on appeal, absent an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).[2]

According to MRE 801(d)(2)(E), a statement is not considered hearsay if it is made by "a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." In this regard, defendant asserts that codefendant Lavery's statements, made subsequent to February 25, 1997 were improperly admitted because they failed to further the conspiracy and were not made during the "course of" the conspiracy. We find this argument meritless because the conspiracy was complete upon formulation of the agreement and there was no evidence that the conspiracy ended at the time of these conversations. The conversations after February 25 still involved the sale of cocaine to officer Allen, a crime in which defendant had helped by establishing a meeting and engaging in price negotiations. A conspirator is not required to participate in all of the objects of the conspiracy because the crime is complete upon formation of the agreement. See *Mass, supra* at 632; *Izarraras-Placante, supra,* at 494.

We note that, contrary to defendant's argument, this case is factually distinct from *People v Ayoub*, 150 Mich App 150; 387 NW2d 848 (1985). In *Ayoub*, the Court held that statements of former coconspirators, attempting to cover up the evidence of the original conspiracy, were inadmissible hearsay. *Id*. at 153-154. In contrast, the conversations in the instant case between coconspirator Lavery and officer Allen on February 26 and 27 were part of the "common enterprise" and "advance[d] the common objective and criminal purpose" of selling cocaine to officer Allen.

Further, there was independent proof of an ongoing conspiracy. MRE 801(d)(2)(E); *People v Jenkins*, 244 Mich App 1, 22-23; 624 NW2d 457 (2001). A review of the record indicates that the conspiracy was established by officer Allen's testimony. Officer Allen testified to several drug transactions with codefendant Lavery. In relation to these transactions, officer Allen claimed that defendant set up a meeting to purchase drugs and that defendant was present at this transaction. Officer Allen also testified that codefendant Lavery consulted with defendant to negotiate a price break on a larger amount of cocaine. Because the evidence supported the conclusion that a conspiracy existed, the statements of coconspirator Lavery were admissible pursuant to MRE 801(d)(2)(E).

Defendant also claims that the probative value, if any, of officer Allen's testimony concerning codefendant Lavery and the taped conversations after February 25 was outweighed by its prejudicial effect. However, we believe that the conversations of February 26 and 27, in which coconspirator Lavery continued negotiations with officer Allen for the sale of cocaine, were relevant and made the existence of the conspiracy and delivery more probable than it would have been without the evidence. See MRE 401.

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[2] It is unimportant that the charges were "tied to February 25" as defendant contends. The information charging defendant asserted that the crimes occurred "on or about" February 25, 1997. An information is only required to specify the time of the offense "as near as may be." MCL 767.45(b).

Defendant suggests that codefendant Lavery's violent threats against the police, his offer to sell officer Allen a larger amount of cocaine, and officer Allen's use of profanity in the tapes were all more prejudicial than probative. However, we note that defendant was not mentioned at all during the conversations on February 26 and 27.

The trial court did not abuse its discretion by admitting the statements of coconspirator Lavery into evidence.

III. Jury Instructions

Defendant also maintains that he was unfairly prejudiced by the trial court's refusal to instruct the jury that plaintiff must show that defendant possessed the specific intent to deliver more than fifty grams of cocaine. We disagree with this characterization of the instructions and find that they complied with our Supreme Court's guidance in *Mass, supra* at 629. This Court reviews claims of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). "Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights." *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995).

At the time that this case went to trial, *People v Mass*, 238 Mich App 333, 337; 605 NW2d 322 (1999), rev'd in part 464 Mich 615 (2001) (*Mass I*), was controlling authority wherein this Court concluded that, "although proof of the specific intent to deliver a controlled substance is required in order to establish a conspiracy, the specific intent requirement does not apply to the quantity of the substance." Apparently, the prosecution relied on this Court's holding in *Mass I*. Ultimately, the trial court denied defense counsel's request for a specific intent jury instruction on the conspiracy charge.

However, our Supreme Court later reversed *Mass I, supra*, stating:

> that to be convicted of conspiracy to possess with intent to deliver a controlled substance, the prosecution had to 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. [*Mass, supra* at 629-630 (emphasis in original.]

Specifically, the Supreme Court in *Mass* found that the prosecution must establish that defendant had the specific intent to conspire to deliver the statutory minimum as charged, and that this element of knowledge must be part of the jury instructions. *Mass, supra* at 618, 638-639. We conclude that despite the trial court's refusal of defendant's request, the instructions in this case, when viewed in their entirety, complied with this rule.

When the trial court explained the elements of conspiracy, it clarified that the prosecutor had to prove that defendant knowingly agreed and intended to deliver "between 50 and 225 grams" of cocaine. Additionally, this element was highlighted by the trial court's contrasting instruction on the lesser-included offense of conspiracy to deliver less than fifty grams of

cocaine. Thus, unlike the inadequate instructions reviewed in *Mass*, *supra* at 639, the instructions in this case repeatedly alerted the jury that it had to find that defendant had conspired, not just to deliver "some amount" of cocaine, but at least fifty grams, to find him guilty of the charged offense. Thus, when the instructions are viewed as a whole, it is clear that they forced the jury to decide "the nature of the agreement" and did not omit an element of the charged offense.

IV. Prosecutorial Misconduct

Lastly, defendant argues that the case must be reversed due to numerous instances of prosecutorial misconduct. We disagree. Defendant failed to object at trial, therefore, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test of prosecutorial misconduct is whether defendant was denied a fair trial. *Id*.

Defendant argues that the prosecutor resorted to an improper civic duty argument by making the following comments in closing argument:

> You're dealing with narcotics, in the narcotic world, and everything that goes along with it. If you were sitting or when his case is over, when this case is completely over, and as the Judge said, you can talk to anybody you want to talk about this case, and you're telling different people you work with or family members the type of case you were on, and you tell them all the facts that you heard in this case, and all the evidence you heard, they're going to tell you that he's involved, and why are they going to do that? They're going to – because that's what makes sense, and that's my only burden.

A prosecutor's remarks must be read as a whole and considered in light of the evidence admitted at trial. *People v Bahoda*, 448 Mich 261, 267, n 7; 531 NW2d 659 (1995). Prosecutors are afforded great latitude in their arguments and are free to argue the evidence and all reasonable inferences, as it relates to their theory of the case. *Id.* at 282. However, prosecutor's are not permitted to "resort to civic duty arguments that appeal to the fears and prejudices of jury members. . . ." *Id*. We find that the prosecution's remarks in the instant case were intended as a comment on the strength of its case and not as an improper civic duty argument.

Defendant next avers that the prosecutor improperly vouched for the credibility of the evidence with the following comments during rebuttal argument:

> And he's [defense counsel] also tried to make it like big government versus his little client. Those are standard tactics. I'm not big government. I work for an elected official in this county. He's appointed me to a position. I have a job to do. I have certain ethics to follow, certain laws to follow. That's what I've got to do. The Judge is here to make sure I do it. And you can be assured if there's anything we're doing that's unfair or not right, we wouldn't be sitting here at this point. That's how the system works. That's why you have different processes to make sure that it works. Those are all things to steer you away from the evidence and the law that you're about to get regarding it.

However, defendant fails to indicate that these comments were made in response to defense counsel's argument that the jury is "a buffer between the government and the citizenry." A prosecutor's remarks do not amount to error necessitating reversal when made primarily in response to matters previously discussed by defense counsel. *People v Potra*, 191 Mich App 503, 513; 479 NW2d 707 (1991).

Defendant further claims that the prosecutor tried to mislead the jury by indicating that his aider and abettor theory was actual law:

> Now, the other count is delivery of cocaine over 50 grams. Told you before, stipulate to it again. He did not deliver the cocaine. His cousin, Chad Lavery, did. We know that from the evidence. There's no question about it. Mr. Ribitwer said it's my theory that he's an aider and an abettor. It's not my theory. That's the law. That's the law the judge is going to give you.

Defendant fails to explain the context of these particular comments. The prosecutor went on to explain at length the concept of aiding and abetting, giving various examples, and expanding on the meaning of "assistance" and "encouragement" of the commission of a crime. He then argued, based on the evidence presented, that defendant had in fact aided and abetted in the drug transaction. We fail to see anything improper about the prosecutor's remarks and conclude that defendant's argument is based on a strained interpretation of the prosecutor's comments taken out of context.

Defendant also suggests that the prosecution attempted to cloud the issues:

> [Defense counsel] did two, basic things which are kind of standard, operating procedure, which you may or may not know in defense work.
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> The first one is to minimize his client's involvement, and tell stories about that type of thing. And the second one is to steer you away from what things you're supposed to look at when you apply the evidence that you have to the law that the Judge is going to give you.
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> * * *
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> There's several things he's done throughout this trial which are good defense tactics to get you not to apply the evidence as it involves his client and his drug dealing activity. . . .
>
> . . . And he's also tried to make it like big government versus his little client. Those are standard tactics . . .Those are all things to steer you away from the evidence and the law that you're about to get regarding it.

Defendant characterizes such remarks as "denigration" and relies on *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), arguing that the prosecutor's comments were an attempt to intentionally mislead the jury. We disagree. The prosecutor's comments in this case do not even approach the level of impropriety evident in *Dalessandro*. Rather, we find that these

remarks were an attempt to get the jury to focus on the evidence, as opposed to the extraneous issues presented by defense counsel.

We find that defendant has failed to show how the prosecutor's comments constituted error and, hence, denied him a fair and impartial trial.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey