

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ALAN HOPKINS,

Defendant-Appellant.

UNPUBLISHED

March 19, 2002

No. 224027

Oakland Circuit Court

LC No. 98-159567-FH

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of conspiracy to deliver prescription forms to persons for non-legitimate medical purposes, MCL 750.157a, fourteen counts of prescribing a controlled substance for other than legitimate or professionally recognized therapeutic purposes, MCL 333.7401(2)(f), and four counts of Medicaid fraud, MCL 400.607(1). Defendant was sentenced to thirty days in jail and two years' probation. He appeals as of right and we affirm.

The charges against defendant, a psychiatrist, stem from an undercover investigation of defendant and Barbara Tysell coordinated by the Drug Enforcement Administration (DEA). Jacqueline Honoway, a diversion investigator with the DEA, received a complaint about defendant and his clinic, the Hopkins Clinic, that someone other than defendant at the clinic was using his prescription pad and DEA licensing number to prescribe controlled substances. At all times during the investigation, defendant was licensed by the State of Michigan to prescribe medication and controlled substances. Defendant also had the requisite DEA licensing number to prescribe controlled substances. Tysell, defendant's employee and girlfriend, was not licensed in the State of Michigan to prescribe medications or controlled substances.

Honoway determined that the complaint needed to be investigated and approached Special Agent Dawn Ohanian of the DEA and Robert Kraft of the Health Care Fraud Division of the Attorney General's office and asked them to participate in an undercover role in the investigation of defendant and Tysell. Ohanian and Kraft separately posed as Vicodin addicts seeking to withdraw themselves from the addiction. The investigation consisted of weekly visits to the clinic between March 1997 and June 1997. Throughout that time, defendant and Tysell met with both agents numerous times and prescribed to the agents large dosages of Vicodin and other medications, including Valium and Talwin, at weekly counseling sessions. Defendant and Tysell informed both agents that they were in control of their detoxification plan and provided no

schedule to withdraw them from the alleged addiction. After several weeks, both agents were still taking large levels of Vicodin. Tysell wrote and signed several prescriptions for the agents, with defendant's knowledge. At the end of the investigation, Honoway and other DEA agents executed a search warrant at the Hopkins Clinic, and defendant was arrested.

At trial, the prosecution presented Dr. Norman S. Miller, a psychiatrist who was qualified as an expert witness in the field of psychiatry. Dr. Miller reviewed the transcripts of the undercover operation and was familiar with defendant's practice. Dr. Miller opined that defendant egregiously violated the standard of care. There were several major deviations from the standard of care, and his opinion was that defendant was not detoxifying or withdrawing people from Vicodin, but rather, was in fact maintaining their addictions.

Defendant's first issue is that there was insufficient evidence to prove beyond a reasonable doubt that he conspired to deliver prescription forms to persons for non-legitimate medical purposes. When reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether there was sufficient evidence to justify a rational trier of fact in finding that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). MCL 750.157a provides:

[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy[.]

Furthermore, a criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). The individuals must specifically intend to combine to pursue the criminal objective and the offense is complete upon the formation of the agreement. *Id.*, pp 345-346. The intent, including knowledge of the intent, must be shared by the individuals. *Id.*, p 346. Thus, there must be proof showing that the parties specifically intended to further, promote, advance, or pursue the unlawful objective. *Id.*, p 347. Direct proof of a conspiracy is not required; rather, proof may be derived from the circumstances, acts, and conduct of the parties. *Id.*

In order to be convicted of conspiracy to deliver a prescription for a controlled substance in violation of the controlled substances act, MCL 333.7401, the prosecution must show that the defendant physician acted in bad faith, or that he intended to prescribe medications for nonmedical purposes. Defendant's carelessness, bad judgment, or malpractice does not establish his intent to traffic in drugs for a nonmedical purpose. Further, even evidence that a physician made "simple departures" from accepted standards in the medical professions, and thus did not maintain professional standards of medical care, do not constitute evidence of intent to engage in drug trafficking, and distribution in bad faith for a nonmedical purpose. *People v Orzame*, 224 Mich App 551, 565-566; 570 NW2d 118 (1997); *People v Downes*, 168 Mich App 484, 488-489; 425 NW2d 102 (1987); *People v Sun*, 94 Mich App 740, 744; 290 NW2d 68 (1980).

In the present case, we find that there was sufficient evidence that defendant did not make an honest or good faith effort to treat and prescribe in compliance with an accepted standard of medical practice. The prosecution presented Dr. Miller, an expert in the field of psychiatry, who

has experience in detoxifying patients from Vicodin and testified at length about defendant's several egregious departures from the standard of care involved. Dr. Miller reviewed the transcripts of the undercover operation and was familiar with defendant's practice. In his expert opinion, Dr. Miller believed that defendant was not detoxifying or withdrawing people from Vicodin and, in fact, had a profit motive. Dr. Miller specifically pointed out that defendant's patients were given large doses of medication and the frequency to maintain their addictions for weeks and even months. The patients were not being detoxified during this period. Dr. Miller also commented about defendant's use of Talwin to detoxify Kraft. Dr. Miller remarked that, in general, the use of Talwin is acceptable, but not while continuing to prescribe Vicodin. Defendant continued prescribing Vicodin to Kraft while also directing him to take Talwin. Dr. Miller believed this was a significant departure from the standard of care. Dr. Miller stated that defendant's use of Tysell, an unlicensed person, to handle patient assessments, and determine their diagnosis was "mind-boggling."

Further, the record indicates that defendant knew Tysell was not licensed to prescribe medications or controlled substances. Yet, defendant provided his controlled substance license and prescription pad for Tysell to write and sign prescriptions both in and out of his presence on several occasions. On several occasions, defendant would not even see his patients, and instead, allowed Tysell to treat his patients and prescribe their medication. Indeed, the undercover agents were not given blood tests when they first presented to the clinic, and during the course of Ohanian and Kraft going to the clinic, no medical evaluation, urinalysis tests, or blood tests were ever performed. Defendant also allowed Tysell to write several prescriptions on one day for Vicodin for Ohanian when defendant and Tysell were going to be out of town on vacation and defendant knew the amount of medication that was being prescribed to Ohanian. Other times, with defendant's knowledge, Tysell suggested that patients simply stop in to the clinic to receive prescriptions for controlled substances between counseling appointments. Defendant's knowledge of Tysell's activities and voluntarily participating and encouraging those activities shows the existence of a conspiracy.

Taken in a light most favorable to the prosecution, there was sufficient evidence adduced at trial that there was a conspiracy between Tysell and defendant, and that defendant acted in bad faith, or that he intended to prescribe medications for nonmedical purposes in violation of the controlled substances act, MCL 333.7401. Defendant's acts were more than mere carelessness, bad judgment, or malpractice. Further, they were more than "simple departures" from accepted standards in the medical profession. As testified to by Dr. Miller, they were egregious and very serious deviations from the standard of care, thus establishing that defendant intended to conspire to traffic in drugs for nonmedical purposes. *Orzame, supra*, pp 565-566; *Downes, supra*, pp 488-489; *Sun, supra*, p 744.

Defendant next argues that there was insufficient evidence to prove beyond a reasonable doubt that defendant prescribed a controlled substance for other than legitimate or professionally recognized therapeutic purposes. MCL 333.7401(1) provides in pertinent part:

Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver . . . a prescription form, an official prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator [the Michigan Board of Pharmacy, MCL 333.7103] under this article shall not dispense, prescribe, or administer a

controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

Further, MCL 333.7306(5) clarifies the above and provides:

Licensure under subsection (1) does not authorize a licensee to dispense, manufacture, distribute, or prescribe a controlled substance if the dispensing, manufacture or prescribing is not for legitimate and professionally recognized therapeutic, scientific, or industrial purposes or not in the scope of practice of a practitioner-licensee.

A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. To establish aiding and abetting, a prosecutor must show: (1) that the crime charged was committed by the defendant or some other person, (2) that the defendant performed acts or gave encouragement which assisted in 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. MCL 767.39; *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001). Additionally, MCL 769.39 provides, in regard to aiding and abetting, that

[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Here, the prosecutor established that the crime charged was committed by Tysell. The parties stipulated that at all times during the investigation, Tysell was not licensed in the State of Michigan to prescribe medications or controlled substances. The prosecutor provided evidence showing that on fourteen occasions¹ during the investigation, despite knowing she was unlicensed, Tysell wrote out, signed, and delivered prescriptions for controlled substances to undercover agents. Defendant performed acts and gave encouragement that assisted Tysell in the commission of the crime of prescribing controlled substances without a license. The prosecutor provided evidence that defendant had provided his prescription pad and his controlled substance license for Tysell's use. Also, defendant allowed Tysell to write, sign, and deliver prescriptions for controlled substances to patients visiting his clinic; the clinic that he established, and bore his name. On several occasions, defendant suggested what drugs to prescribe to the agents to Tysell who then wrote, signed, and delivered the prescription to the agents. Therefore, the prosecution provided sufficient evidence to prove beyond a reasonable doubt that defendant aided and abetted an unlicensed person to deliver prescription forms for a controlled substance.

Defendant's last issue is that he was denied a fair trial because of the prosecutor's improper comments during closing argument. Defendant failed to preserve this issue for appeal

¹ March 18, 1997, March 25, 1997, three times on April 1, 1997, April 22, 1997, April 28, 1997, twice on May 7, 1997, May 14, 1997, May 15, 1997, May 21, 1997, May 29, 1997, and June 5, 1997.

because he did not object to the prosecutor's allegedly improper statements during closing argument. Appellate review of alleged prosecutorial misconduct is precluded unless a defendant makes a timely objection. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Absent an objection, this Court will review the defendant's claim for plain error. *Id.*

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear and obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings' independent of the defendant's innocence." [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).]

Defendant contends that the following comment made by the prosecutor during closing argument denied him a fair trial:

He says that he has to see every patient that receives a prescription. Well, if that were the case we wouldn't be here.

Defendant argues that this comment is a mischaracterization of the facts and the law. He argues that the facts were misstated because he did see each of the patients that were prescribed medication. He also argues that the law was misstated because the issue in this case was not whether defendant saw each patient that received prescription medication. In the context of the prosecutor's argument regarding Medicaid fraud, it is true that if defendant had seen the patient for the requisite time that he billed the state, defendant could not have been charged with Medicaid fraud. Once again, in regard to the fourteen counts of aiding and abetting an unlicensed person in distributing prescriptions, if defendant had actually been present at each and every patient's weekly counseling session, he may not have been charged because presumably he would have written the prescriptions himself. The only questionable area is in regard to the conspiracy count, because defendant could still have been charged as an actor in the conspiracy with Tysell even if he was not present.

After closing arguments, the trial court specifically instructed the jury as follows:

It is my duty, members of the jury, to instruct you on the law. You must take the law as I give it to you. If a lawyer said something different about the law, please follow what I say.

The trial court specifically instructed the jury to follow its recitation of the law and to disregard any statements made by the attorneys regarding the law. The trial court's instruction thus cured any confusion caused by the prosecutor's remark. See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Defendant also argues that he was denied a fair trial because the prosecutor unfairly

prejudiced the jury when he compared defendant's activities with that of a street drug dealer and likened his clinic to a crack house. Defendant contends that the following comments made by the prosecutor during closing arguments denied him a fair trial:

You see, this case is worse, worse than that if we had a case whereas you heard Vicodin is sold on the streets; where somebody went to some street dealer for Vicodin or went to some house and got Vicodin, like a crack house, but a Vicodin house. It's different than that, and it's worse than that.

It's worse than that because they went to the doctor for help. You see, those other cases, the people haven't realized their addiction, or they weren't willing to do something about it yet. In our case it's different. They go to the doctor who takes an oath for help.

The above argument was a proper inference to be drawn from the evidence presented at trial because Dr. Miller testified at trial as follows:

This is - - this is a clear case in my mind of drug pushing. I don't differentiate the way these two individuals were prescribed from a dope dealer who's on the street, who's - - who's trying to get people hooked on cocaine, who's trying to get people hooked on heroin; and then keeps them hooked on cocaine and keeps them hooked on heroin. I don't see any difference between these two cases and the way this physician prescribed and the way this - - whoever this other person was, I'm not clear what her role was there. She was an employee. The way she prescribed, I see no difference between that and a drug pusher anywhere in the United States.

The prosecutor argued facts that were supported by the evidence presented in testimony during trial, and presented a reasonable inference arising from the evidence as it related to his theory of the case. *Schutte, supra*, p 721.

Consequently, there is no showing that the prosecutor's allegedly improper comments were prejudicial to defendant, that is, they did not affect the outcome of the proceedings.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Patrick M. Meter