STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 19, 2002
v	No. 228915 Montcalm Circuit Court
ROBERT WILLIAM DAGGETT, Defendant-Appellant.	LC No. 99-000224-FC

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by jury of conspiracy to possess more than 650 grams of cocaine, MCL 750.157a; MCL 333.7403(2)(a)(i), and the trial court sentenced him to life imprisonment, as mandated by statute.[1] Because we find that the admissible evidence presented at trial is insufficient to support a finding that defendant and another person entered into an agreement to possess more than 650 grams of cocaine, we reverse.

The prosecution charged that defendant entered into an agreement with Kent Johns to buy a kilogram of cocaine from an undercover police officer (UCPO). At trial, the UCPO was the only witness to testify. The UCPO testified as follows.[2]

In late June or early July of 1999, a confidential informant (CI) told the UCPO about a large amount of marijuana that the CI had seen in Johns' trailer. On the basis of this information, the UCPO planned a preliminary investigation. On August 25, 1999, the UCPO and the CI went to Johns' trailer to purchase marijuana from Johns, to gain information, and to propose a sale of cocaine. Johns had no marijuana at the trailer, but he placed a phone call to defendant and, using code words, asked defendant to bring some over. While waiting for defendant to arrive with the marijuana, the UCPO told Johns that he had a kilogram of cocaine to sell. Johns inquired about

[1] Before trial, defendant pleaded no contest to delivery of marijuana, MCL 333.7401(2)(d)(iii), and conspiracy to deliver marijuana, MCL 750.157a; MCL 333.7401(2)(d)(iii). Those convictions are not at issue in this appeal.

[2] For purposes of clarity, we use "the UCPO" instead of a pronoun when summarizing the UCPO's testimony.

the price of the cocaine, and after the UCPO told him that it was $22,000, Johns stated that that was a "good deal" and "[t]hat way I can offer it to [defendant] for $23,000 and I can get my cut." The UCPO then told Johns, "'If you want I've got—I've got two kilos if you want sell [sic] it for $21,000.'. [Johns] said, 'At that price I think I'll take them both.'" However, after defendant arrived, no further discussion in the presence of the UCPO took place concerning the purchase of cocaine. The marijuana transaction was completed and the UCPO left Johns' trailer. The UCPO "left the trailer because [he] knew that they probably wanted to discuss the proposed sale of cocaine."

Days later, on August 28, the UCPO received three pages from Johns stating that his "lawnmowers" were ready to be picked up. The reference to lawnmowers was code, meant to refer to the potential cocaine sale. The UCPO had not given Johns a lawnmower to repair. The UCPO attempted to call Johns, but failed to connect with him.

On September 1, 1999, the UCPO and the CI returned to Johns' trailer. Present near a campfire there were Johns, defendant, and two other individuals who were unknown to the UCPO. At that time, the UCPO was wearing a device that recorded the conversation. The tape recording of the conversation was admitted into evidence and played to the jury.

The tape revealed that when the conversation turned to the subject of a cocaine deal, Johns confirmed the price and defendant asked if the UCPO was interested in marijuana as part payment. Also, there was discussion between Johns, the UCPO, and defendant about verifying that it was cocaine and about where the transaction would take place. Although the means for testing the cocaine was disputed, the main focus of the conversation became a disagreement between defendant and the UCPO about the location for making the exchange. The UCPO insisted that the exchange occur at a motel in Greenville, but defendant wanted to make the exchange in the field where they were speaking. Eventually, after further discussions regarding the transfer location, packaging of the cocaine, testing to verify that the substance was cocaine, and the amount of marijuana that the UCPO would accept from defendant in partial payment, defendant and Johns held a private conversation. Afterward, defendant informed the UCPO that he was not going to do the deal because the UCPO required that the transfer take place in a motel in Greenville.

Following the UCPO's testimony, including the playing of the pager messages and the tape recording, the prosecution rested. Immediately thereafter, the defense rested without offering any defense witnesses. After the trial court denied defendant's motion for a directed verdict of acquittal and his motion for mistrial, counsel delivered their closing arguments. The prosecution argued that Johns and defendant agreed to obtain possession of one kilogram of cocaine by attempting to purchase the cocaine that the UCPO offered to sell to Johns on August 25. The prosecution's theory of the case, as argued to the jury, relied heavily on Johns' statement at that first meeting that Johns would buy the cocaine from the UCPO and sell it to defendant. From this statement, the prosecutor maintained that it was reasonable to infer that Johns and defendant talked about the UCPO's offer and came to an agreement to make the purchase. Further, he argued that the August 28 pager messages left for the UCPO stating that the "lawnmowers" were ready and the September 1 campfire conversation confirm the existence of an agreement between Johns and defendant.

On appeal, defendant argues, among other things, that statements that Johns, the alleged co-conspirator, made to the UCPO were improperly admitted into evidence, and without those statements, there was insufficient evidence to convict defendant of conspiracy. We agree. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v McCray*, 245 Mich App 631, 641; 630 NW2d 633 (2001). When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998).

Defendant is correct that the August 25 conversation between Johns and the UCPO regarding a possible cocaine sale constituted inadmissible hearsay. Contrary to the prosecution's argument, the challenged testimony was offered to prove the truth of the matter asserted, as plainly evidenced by the prosecution's closing argument. Without a doubt, the prosecutor, in closing, was relying on the truth of the matter asserted in this conversation as substantive evidence of conspiracy. Because the statements were offered to prove the truth of the matter asserted, they constitute hearsay. *People v Poole*, 444 Mich 151, 158-159; 506 NW2d 505 (1994); *People v Washington*, __ Mich App __, __; __ NW2d __ (2002) [Docket No. 221851, decided 5/31/02]. "Hearsay is inadmissible unless there is a specific exception allowing for its introduction." *Washington, supra*. The prosecution does not set forth on appeal, nor are we aware of, a specific hearsay exception allowing introduction of this evidence, and thus the trial court erred in admitting this evidence.[3]

Additionally, the August 25 conversation between Johns and the UCPO regarding a possible cocaine sale is not admissible under MRE 801(d)(2)(E). That subsection provides that a statement is not 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." No independent proof of a conspiracy existed at the time the statements were admitted into evidence, *People v Vega*, 413 Mich 773, 780-782; 321 NW2d 675 (1982); *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986), nor were the statements made during or in furtherance of a conspiracy, MRE 801(d)(2)(E). Nothing said by Johns to the UCPO could have been during or in furtherance of any conspiracy for the obvious reason that this conversation between Johns and the UCPO commenced the process whereby the UCPO hoped to make the sale of cocaine, i.e., initiate a reverse buy, and defendant was not present, nor could he, or did he, have any awareness of the offer made to Johns during that meeting. Consequently, no conspiracy existed at that moment in time.

[3] To the extent that the prosecution suggests that the statements were offered as "verbal acts" that were indicative of concerted action between Johns and defendant, its argument is without merit. Other than making this claim in a conclusory statement contained in a single sentence of its brief on appeal without any citation to authority or further explanation of the basis for this claim, the prosecution does not offer any support for this assertion. The prosecution's suggestion that conversations between coconspirators are "verbal acts" is in no way relevant to the conversation at issue here between the UCPO and an alleged coconspirator before defendant even knew of the UCPO's offer to sell cocaine.

Having thoroughly reviewed the remaining evidence presented in this case, and excluding the inadmissible hearsay statements, we conclude that there was insufficient evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that an agreement between defendant and Johns existed to possess more than 650 grams of cocaine. A conspiracy is a voluntary agreement between two or more individuals to commit a criminal offense. *People v Mass*, 464 Mich 615, 629, 632; 628 NW2d 540 (2001); *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997); *People v Meredith (On Remand)*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995). It is a specific-intent crime. *Mass, supra*. Direct proof of the conspiracy is not necessary; a conspiracy may be proven by the circumstances, acts, and conduct of the parties involved. *Jackson, supra* at 347. Here, in this reverse buy situation, the prosecution relied on inadmissible hearsay and speculation, rather than evidence of an agreement to possess greater than 650 grams of cocaine. The record only reveals that defendant discussed with the UCPO a possible purchase of cocaine and that Johns would get his "cut," but fatally deficient in this case is the lack of evidence that Johns and defendant, previously or during this conversation, had reached an agreement to purchase this cocaine.

Having determined that the prosecution failed to present sufficient evidence to support defendant's conviction, reversal is required, and thus we need not address defendant's other issues on appeal.

Reversed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra