STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 1, 2002
v	No. 227045 Branch Circuit Court
MIGUEL DIAZ, Defendant-Appellant.	LC No. 98-066617-FH

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Defendant was convicted of conspiracy to deliver between 225 and 650 grams of a mixture containing cocaine, MCL 750.157a and MCL 333.7401(2)(a)(ii). The trial court sentenced defendant to a term of twenty to thirty years' imprisonment. He appeals as of right. We affirm.

Just after midnight on June 15, 1997, the Branch County Sheriff's Department and several other law enforcement agencies executed simultaneous search warrants on two homes in Branch County. They also made twenty-two arrests. The search and arrest warrants were the culmination of an eighteen-month investigation. The main target of that investigation was Christopher Smith. He and his wife Brenda were arrested during the raid on his home. Janet Palmateer and Wendy Smith, Christopher's sister, were arrested at the raid on Janet's home. Christopher, Brenda and Janet were arrested for delivery of cocaine. Wendy was arrested for disorderly conduct.

After Wendy posted bond and obtained release from jail, she contacted Sergeant Dennis Gatke, who was in charge of the narcotics investigations. She wanted to assist her family and friends in getting out of jail. Janet, who was still in jail, also contacted Gatke. After speaking with the women separately, Gatke set up telephone surveillance at Janet's home. Wendy, who agreed to cooperate with police, planned to handle recorded telephone calls from Janet's home. Three telephone calls between Wendy and defendant were recorded between June 18 and June 20, 1997.[1] During the calls, talking in slang, Wendy and defendant arranged a transaction of

[1] Gatke testified that he knew of defendant's existence before speaking with Wendy and Janet. Christopher's home was in close proximity to the jail and Gatke drove by it several times a day. During his investigation, he "ran" the license plate of a car that he saw outside of Christopher's

(continued…)

cash for "shit," "junks," "product," or "stuff." Wendy testified that they were discussing the sale of cocaine. Defendant testified that they were discussing the sale of cheap cars.[2] Calls between Wendy and Carlos Reyes, as well as calls between Wendy and Luis Soto, were also recorded. The tapes were transcribed and played for the jury.

Wendy testified that she had known defendant for six or eight months before her arrest. Wendy also testified that she had previously acted as a courier for Christopher, and that she had met defendant twenty or thirty times in Chicago. Wendy would take money from Christopher and bring it to defendant. She was usually not privy to the amount of money she was carrying, but she knew that she once transported $30,000. In exchange for the cash, defendant gave cocaine directly to Wendy to bring back to Christopher. Defendant once gave Wendy a brick of cocaine, the size of two real bricks, to carry from Chicago back to Michigan. However, Wendy testified that she never saw defendant in Michigan.

On March 15, 1997, Wendy went to Chicago with Janet and her husband. Wendy wanted to buy Janet an ounce of cocaine for a birthday present. Wendy contacted defendant and he met them at a gas station in Chicago. Wendy and Janet entered defendant's car. Wendy gave defendant $1,000 and obtained the ounce of cocaine. At that time, defendant asked Wendy and Janet if they were interested in doing business with him because Christopher was using increasing amounts of cocaine and was unreliable. Wendy and Janet informed defendant that they would discuss the matter. The following day, they agreed to get involved.

Wendy testified that, thereafter, Janet was responsible for making the arrangements with defendant to obtain the cocaine. Reyes and Soto would deliver the cocaine to various places, including Janet's home, an area behind an abandoned storage facility in Coldwater, or different freeway exits in Indiana just across the Michigan state line. The deliveries occurred approximately once a week. Wendy testified that she and Janet usually obtained one to three ounces at a time. They used some of the cocaine and sold the rest to buyers in Coldwater and Lansing. In particular, they sold cocaine to two men in Lansing. Defendant knew about these two buyers because he asked Wendy to contact them.

Janet confirmed Wendy's testimony. Janet testified that she first met defendant when she and Wendy picked up a car from his house in Chicago. No cocaine transaction took place at that time. On March 15, 1997, Janet, her husband and Wendy went to Chicago. Wendy paid defendant $1,000 for an ounce of cocaine. During the transaction, defendant asked them to go into business. They thought about it and later agreed. They met defendant in La Porte, Indiana, and gave him $1,100. The following day, he gave them three ounces of cocaine. This type of dealing continued between that time and the June 1997 arrests. Janet and Wendy obtained cocaine one to three times per week in amounts varying from one to six ounces. Janet testified that she would page defendant and he would return her call. She would then make arrangements

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(…continued)

house. It was registered to defendant.

[2] Defendant's testimony in this regard was lacking. He could not innocently explain all of the statements and language heard on the tapes. For example, he could not explain the discussion about the price per "OZ." He admitted that he did not sell cars by the OZ.

with him. Usually, she would also specify a place to meet Reyes and Soto, who were defendant's delivery boys. Sometimes, however, they would call her directly to make delivery arrangements. Janet testified that she received the cocaine directly from defendant on only two occasions. The cocaine money was either given to Reyes and Soto, or was sent through Western Union. According to Janet, defendant was aware that she and Wendy were dealing to the men in Lansing. Defendant asked Janet to encourage the "boys in Lansing" to buy more. Janet testified that she never saw defendant with Reyes or Soto.

At trial, Wendy testified that defendant told her and the others that if they ever needed help, he would get them out of jail. When Wendy contacted defendant after the arrests, he told her that if she collected more money, he would send more cocaine to sell. She could use the money to get the others out of jail. Wendy did not do so. Instead, she contacted Gatke and the telephone surveillance began. Wendy admitted that she was disappointed that defendant refused to help. She also testified that defendant owed her $3,000 for a prepaid drug sale that was set to take place the day after the arrests. It never took place and defendant did not give back the money.

On June 20, 1997, after the last recorded conversation between defendant and Wendy, Gatke prepared Wendy to make a controlled buy of cocaine at an exit off the toll road in Elkhart, Indiana. Gatke and a reserve police officer, Chip Gerber, drove Wendy to the meeting point in Janet's vehicle. The group met with members of the Elkhart County narcotic task force, who were on surveillance ready to make arrests after the deal transpired.

After waiting some time, Wendy indicated that the delivery men had arrived. She exited Janet's vehicle and approached the contact vehicle. Gatke and Gerber, posing as the buyers from Lansing, waited in the car. They watched Wendy enter the suspect vehicle. Approximately four minutes later, she exited. She tipped her hat to indicate that the deal was consummated. When she emerged from the suspect vehicle, she had a bulge in the front of her pants. Wendy testified that Luis was on a pay telephone outside of the car when she approached his vehicle. She entered on the back passenger side behind Reyes. She gave Reyes the money and obtained a black bag containing nine separate baggies of a white, powdery substance. Soto entered the car just as she finished the deal. Wendy stuffed the black bag into the front of her pants and exited the car.

The Elkhart task force arrested Soto and Reyes. They also pretended to arrest Gatke, Gerber, and Wendy. The black bag was seized from the front of Wendy's pants. A large amount of money was seized from the suspect vehicle. It matched the money Gatke gave to Wendy to buy the cocaine. The money and white powder were turned over to Gatke. The seized substance contained cocaine weighing 238.04 grams, or approximately 8.4 ounces.

Luis Soto testified pursuant to a plea agreement. He testified that, between March and June 1997, he saw Wendy and Janet regularly to bring cocaine. Soto testified that the amount of cocaine and money was prearranged and he simply delivered the cocaine from defendant to Janet and Wendy. Sometimes Soto went alone and sometimes Reyes went with him. The deliveries occurred in Indiana and Michigan. At the time of delivery, Soto usually received $100 in cash and a sealed envelope containing cash. He never opened the sealed envelopes, which were delivered back to defendant. Soto testified that he changed cars frequently, getting a new one whenever defendant instructed him to do so. Soto also testified that he occasionally went to the

home of a man named Cuba in Melrose Park, Illinois, and picked up cocaine to replenish defendant's supply. He did this at defendant's instructions.

Brenda Smith, Christopher's wife, also testified. She was convicted of conspiracy to deliver cocaine after entering a guilty plea, and she testified that she received no bargain in exchange for her testimony. Brenda testified that Christopher was a cocaine dealer and that defendant dealt to Christopher. Brenda met defendant in July 1996, when Christopher brought her to defendant's house in Chicago when he picked up nine ounces of cocaine. Defendant thereafter came to their house in Coldwater. According to Brenda, defendant gave Christopher cars to sell as a legitimate business cover. No money changed hands for the cars. Brenda met defendant in Chicago eight or ten times between July 1996 and early 1997. Almost every time, Christopher would give defendant money and defendant would give Christopher cocaine. Sometimes, however, they just dropped off money or picked up a car. Brenda testified that after they stopped going to Chicago, Reyes and Soto brought the cocaine to a meeting point in Indiana or directly to their house in Coldwater. Brenda was positive that Reyes and Soto were connected with defendant because they called defendant from her house to report when they arrived. Occasionally, if they were running late, defendant would call and ask Brenda if they had made it there, yet. Brenda spoke with defendant on the telephone between March and June 1997. She admitted that she never saw defendant with Reyes or Soto.

Defendant maintained that he never dealt cocaine. He called several character witnesses to testify that he had a steady job managing janitorial accounts for a large company, had a lot of responsibility, and never showed any signs of drug use or drug dealing. Three of these witnesses, however, met defendant after he was arrested for the crimes in this case.

Defendant's sister, Maria Rivera, testified that she bought a home in Michigan for investment purposes. Defendant picked out the home for her to purchase. It was located far from any city or town. She planned to restore it and resell it. Rivera could not describe the home and did not know the address or even the street on which it was located. She testified that shortly after closing on the house, defendant told her that Christopher was leaving his wife and would live in the home and pay rent. Christopher was always late with the rent and thus, defendant had to go to the house to pick it up for her. Rivera also testified that, in addition to his maintenance job, defendant sold cars.

Defendant testified that he was a married man and had several children. He was employed full-time overseeing janitorial accounts for a company in Knox, Indiana. He previously worked for several other companies in the same type of capacity. He moved from Chicago to Knox after June 1997, because he was hired by Omni Facility Resources.[3] Defendant also testified that when he was in Chicago, he bought cheap cars for resale, as a side job. He bought eight or ten cars at a time and a friend helped fix them. Defendant was not good about keeping receipts and could only produce a few to support that he engaged in such an occupation. Defendant testified that he met Christopher through a car deal and, thereafter, they decided that Christopher could get "rid" of a lot of cars for defendant in Michigan. They subsequently met once or twice a week in the 1996 and 1997 time frame. Defendant claimed that he sold

[3] Defendant was on bond pending trial and apparently moved during this period of time.

approximately thirty cars to Christopher. At some point, Christopher stopped paying defendant for the cars. Christopher, who had moved into the investment home of defendant's sister, was also late with his rent payments. Eventually, defendant sent "one of the guys" down to get the payments. Defendant testified that he sent Soto and Reyes to Michigan one or two times per week because of the outstanding money owed. He could not leave work to try and collect the money himself.

Defendant further testified that, at some point, he called Janet, who took care of Christopher's bookkeeping. Defendant talked to her on the telephone about the money Christopher owed. Defendant later met Janet on her birthday, when Wendy brought her to Chicago. According to defendant, Wendy called him to get directions after arriving in Chicago. He met them at a gas station. He had no drugs to sell and did not engage in such a transaction. He later called Janet because he was interested in her. They continued a relationship and they once had sexual relations in a hotel room.

Defendant claimed that when Christopher was arrested, Wendy called and asked defendant to pay back some money that he owed Christopher. Defendant indicated that Christopher lent him $5,000 for a building investment. Defendant still owed $3,000 on the loan. Defendant explained that, although Christopher owed defendant approximately $13,000 in money for the car deals, the building loan was an entirely separate transaction. Defendant did not pay Wendy the money owed to Christopher. Wendy, however, was insistent that defendant help with money. She told him that she could get rid of cars quickly to some men from Lansing. Defendant agreed to try and get some cheap cars for Wendy to sell for bail money. Defendant attempted to explain the language from the recorded telephone calls, claiming that it related to the sale of vehicles and not drugs. As previously noted, defendant could not explain the reference to price per "OZ" in the conversation. Defendant also maintained that each of the prosecution witnesses lied about his involvement with cocaine.

Like Brenda, Wendy testified that the car sales were a front. Defendant did not send Luis to pick up money for cars and she was not a part of any automobile dealing with defendant. The only association she and Janet had with defendant related to drugs. Wendy admitted that defendant sold cars as a sideline to his employment with a building maintenance company. She also admitted that defendant sold numerous cars to Christopher. Wendy testified, however, that the car sales were designed to give her brother a legitimate business income. Janet testified that Christopher never paid defendant cash for the cars but only paid after the cars were resold. Soto denied ever delivering cars for defendant or ever being sent to Michigan to pick up money for cars or rent.

I

Defendant first argues that he was improperly tried on the conspiracy charge. In a pretrial motion, defendant challenged Michigan's jurisdiction to try the charge. The trial court denied the jurisdictional challenge.[4] Defendant challenges that ruling, arguing that the

[4] Originally, defendant was charged with one count of conspiracy and one count of delivery. The delivery charge was dismissed on jurisdictional grounds after being challenged in the pretrial motion.

conspiracy was to deliver cocaine to Indiana, not Michigan, and that acts committed outside of the state cannot be tried within the state even if the acts are intended to, and do have, detrimental effects within the state.

Whether the trial court had jurisdiction to try the conspiracy charge presents a question of law that we review de novo. *People v Laws*, 218 Mich App 447, 451; 554 NW2d 586 (1996).

> [T]o 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. [*People v Mass*, 464 Mich 615, 629-630; 628 NW2d 540 (2001), citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997) (emphasis omitted).]

The defendant must know of the conspiracy, must know of the objective of the conspiracy, and must intend to cooperate to further the objective of the conspiracy. *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993). "The gist of a conspiracy is the unlawful agreement." *Mass*, *supra* at 632. The purpose of the conspiracy need not be accomplished and, in fact, the conspiracy is separate and distinct from the substantive crime that is its object. *Id.*

We conclude that Michigan had jurisdiction over the conspiracy charge in this case. In *Blume*, *supra* at 486, the Court held that where jurisdiction is an issue, the prosecutor must establish the defendant's "intent to combine with others for the unlawful purpose of possessing cocaine or possessing with the intent to deliver the cocaine in *Michigan.*" The Court indicated that "if 'it is clear that the intended distribution would occur within' the jurisdiction attempting to punish the defendant, then 'jurisdiction may be maintained. . . .'" *Id.*, citing *United States v Baker*, 609 F2d 134 (CA 5, 1980).

In *Blume*, the Court found that Michigan did not have jurisdiction to try the conspiracy charge. The entire transaction occurred in Florida, where the defendant sold cocaine to Randall Hoyt. Hoyt subsequently brought the cocaine back to Michigan, where he was arrested. *Blume*, *supra* at 478-479. Hoyt told the police that he went to Florida to buy cocaine from a prearranged supplier. When he was unable to find the supplier, he met with the defendant and they made arrangements. Hoyt had no contact with the defendant while in Michigan. *Id.* The trial court found that if any conspiracy occurred, it took place in Florida. *Id.* Our Supreme Court agreed:

> A thorough review of the testimony fails to disclose evidence sufficient to support exercising jurisdiction over this defendant. The prosecutor did not present evidence that defendant acted with the intent to have a detrimental effect in Michigan. Conversely, defense counsel introduced testimony that negated the existence of such intent. Similarly, the prosecutor did not present sufficient evidence that defendant knew of or cooperated knowingly to further the objectives of a conspiracy.

> This case involves defendant's sale of cocaine to Randy Hoyt. Hoyt traveled to Florida, intending to purchase cocaine from someone other than defendant, and defendant's only prior contact with Hoyt was through a gym. Although defendant knew that Hoyt was from Michigan and that Hoyt eventually would return to Michigan, defendant only was involved in the initial delivery of cocaine to Hoyt. The transaction was completed in Florida as evidenced by the fact that delivery was complete and the financial aspects of the sale were concluded.
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> Although we may infer from the amount of the cocaine purchased that the buyer intended to possess or sell the cocaine somewhere, *the prosecution's only witness, Officer Palenick, was unable to testify that Hoyt told defendant that the drugs would be distributed in Michigan.* The officer did testify that Hoyt could have disposed of the cocaine in any manner and no agreement would have been breached. For that to be true, there must not have been an agreement regarding what Hoyt would do with the cocaine.
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> Also relevant is that the defendant did not have an interest in the cocaine beyond the initial sale. Defendant was not concerned with Hoyt's use of the cocaine, and was not concerned with where Hoyt took the cocaine. More importantly, defendant did not intend that the cocaine go to Michigan, and did not intend that the drugs be sold in Michigan. Mere knowledge that Hoyt would return to Michigan sometime after completing the transaction with defendant is insufficient to support finding that defendant specifically intended to have a detrimental effect in this state.
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> *Although an inference may be drawn, and in some cases knowledge and the surrounding circumstances may be sufficient to support a finding of intent, . . .* [an] inference is not to be created upon inference to support a conspiracy charge. The inference upon inference the dissent built includes an inference that defendant knew Hoyt was going to sell the drugs, an inference that Hoyt had a plan to sell the drugs, an inference that the plan involved another person so as to create a conspiracy, an inference that Hoyt's plan or conspiracy was to sell the drugs in Michigan, and an inference that defendant, by the mere delivery of the cocaine to Hoyt and knowledge that Hoyt was *from* Michigan, knew of and cooperated *knowingly* with these inferred states of mind.
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> But the prosecutor failed to introduce evidence that defendant and Hoyt agreed, or even discussed, that the cocaine would be distributed in Michigan. The prosecutor also failed to introduce evidence that defendant was aware that Hoyt was involved in a conspiracy. There is no evidence that defendant knew Hoyt had a plan. It is questionable whether Hoyt knew he had a plan. There is no evidence that defendant knew Hoyt was going to sell the cocaine in Michigan. [*Id.* at 487-493 (footnotes and citations omitted, some emphasis added).]

In this case, there was evidence that defendant was acting with Janet and Wendy, as well as Christopher and Brenda, for the unlawful purpose of distributing cocaine in Michigan, between March and June 1997. In fact, defendant approached Wendy and Janet in March after

his Michigan connection, Christopher, became unreliable. While many deliveries took place in Indiana, some occurred in Michigan. Moreover, the evidence was unrefuted that the resale of the cocaine occurred in Michigan, to customers in Coldwater and Lansing. Defendant was specifically aware that Wendy and Janet were reselling the cocaine in Michigan. In particular, the evidence indicated that he was well aware of the customers in Lansing. He specifically asked Janet to encourage the Lansing buyers to purchase more.

We acknowledge that Janet testified that defendant did not specifically dictate who they should sell the cocaine to or how much they should buy. They could do what they wanted with the cocaine after getting it from him. We find, however, that these facts are not outcome determinative under the circumstances. Defendant asked Janet and Wendy to do business with him. The business was the purchase of cocaine for resale to buyers in Michigan. If Wendy and Janet did not resell the cocaine they obtained from defendant, they could not pay for more. Further, Wendy and Janet's contacts with defendant were via telephone from Michigan. They called defendant directly to arrange the transactions and delivery places. Defendant's delivery men sometimes delivered the cocaine directly to Michigan. This case is unlike *Blume*, where there was only one transaction, where the evidence indicated that the defendant did not know of the buyer's plans, and where the only contacts occurred in Florida, i.e., the meeting, sale and delivery.

Under the circumstances, there was more than a sufficient factual basis to assert jurisdiction over defendant on the conspiracy charge.

II

Defendant next argues that the trial court's ruling, denying him a mistrial, requires reversal. Defendant moved for a mistrial on the ground that evidence of a conspiracy, other than the one for which he was charged, was presented to the jury. Specifically, defendant takes issue with Brenda's testimony about her and Christopher's cocaine transactions with defendant, which began in July 1996. Defendant argues that the conspiracy for which he was charged involved Wendy and Janet after March 15, 1997. He claims that this was an entirely separate conspiracy than any alleged conspiracy between himself, Christopher and Brenda. Defendant objected to Brenda's testimony about events occurring outside of the time frame charged, arguing that the evidence was irrelevant. He further argued that the taint from the evidence was so great, a mistrial was warranted. The trial court disagreed, ruling in pertinent part:

> [R]elevant evidence, as defined in MRE 401 means, as both counsel recognize, any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. And certainly as to Rule 404, the Michigan Rules of Evidence, to the extent that it may be shown that this might evidence a proof of motive, opportunity, intent, preparation, scheme plan or system, but particularly if this witness in fact, as Mr. Livesay has suggested, may be able to tie into the other alleged confederates by Mr. Reyes and Mr. Soto, the Court feels that it would fall within that definition of relevant evidence. The court would deny the motion for the mistrial and permit the testimony. Again, with the assumption that it can be tied in with those other individuals.

Brenda thereafter testified about the connection between defendant and Reyes and Soto. She also testified that after she and Christopher stopped going to Chicago to obtain cocaine from defendant, Reyes and Soto began bringing the cocaine to them in Michigan.

We review a trial court's decision to deny a mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). Further, we review the admission of evidence for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). We find no abuse of discretion in this case.

The felony complaint charged:

> Count I [] [Miguel Diaz] CONSPIRACY . . . did on or about March 1997 through June 20, 1997, unlawfully conspire, combine, confederate and agree together with Luis Soto, Carlos Reyes, and/or other unnamed individuals to commit an offense prohibited by law, to wit: deliver 225 grams or more but less than 650 grams of a mixture containing . . . cocaine. . .

The conspiracy was not limited to actions between defendant, Wendy and Janet, but encompassed all conspirators involved between March and June 1997. Thus, defendant's argument that he was charged with conspiring only with Wendy, Janet and her husband is skewed in its inception.

We also agree with the prosecutor that there was one, continuing conspiracy in this case. The single charge of conspiracy encompassed the continuing conspiracy, although the time frame was limited to the time after Janet and Wendy directly joined. A person may join an already existing conspiracy. *Blume, supra* at 483-484. In *People v Meredith (On Remand)*, 209 Mich App 403, 412; 531 NW2d 749 (1995), this Court stated:

> "A person may be a party to a continuing conspiracy by knowingly co-operating to further the object thereof. It is not necessary to a conviction for conspiracy that each defendant have knowledge of all of its ramifications. Nor is it necessary that one conspirator should know all of the conspirators or participate in all of the objects of the conspiracy."
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> Even if some conspirators are not members from the inception of the conspiracy, all are nonetheless bound by the acts done in furtherance of the conspiracy. [Citations omitted, emphasis added.]

"The crime of conspiracy is a continuing offense; it 'is presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the object of the conspiracy." *People v Denio*, 454 Mich 691, 710; 564 NW2d 13 (1997).

In this case, defendant was engaged in narcotics trafficking with Christopher and Brenda Smith. During that time, Wendy was also a part of the conspiracy, acting as a courier for Christopher. Janet obtained her cocaine from Christopher before March 1997. When Christopher became unreliable, defendant looked to Wendy and Janet to further the objective of trafficking drugs from Chicago to Michigan for resale. According to Brenda, defendant also continued doing business with her and Christopher, after Janet joined the conspiracy in March

1997. The conspiracy was never abandoned or disavowed. The evidence indicated that it continued, although additional participants were added. We therefore disagree that there were two separate conspiracies in this case. In this regard, we decline to apply the rules of law set forth by defendant in his brief on appeal. Defendant cites several cases which discuss how to determine whether more than one conspiracy exists for purposes of double jeopardy. In the present case, we are not confronted with a double jeopardy issue.

More importantly, Brenda's testimony, including testimony about conduct occurring outside the charged time frame, was relevant to the crucial element of intent in this case. The prosecution was required to prove that defendant knew of the conspiracy, knew of its objective, and intended to cooperate to further that objective, which was the resale of cocaine in Michigan. *Blume, supra* at 485. Defendant defended the conspiracy charge by accusing all of the prosecution witnesses of lying. He argued that he never dealt cocaine and was a respectable business man. He denied being associated with Soto and Reyes in relation to cocaine trafficking. He claimed that Soto obtained cocaine from another source and that Soto and Reyes dealt to the others in the conspiracy. Defendant offered testimony about his character, testimony that most of the coconspirators never saw him in Michigan, and testimony that nobody ever saw him with Reyes and Soto. He maintained that he and Christopher dealt only with used cars. Brenda's background testimony about events before March 1997 was relevant to proving that defendant was actively involved in the objective of the conspiracy, i.e., cocaine delivery in Michigan. Defendant personally delivered the cocaine to Brenda and Christopher in Chicago, and he also personally came to their house in Michigan. When they stopped going to Chicago to meet defendant, he had Soto and Reyes deliver the cocaine to them in Michigan and Indiana. Further, Brenda's testimony was relevant to refute that the car business was legitimate. The evidence was admissible pursuant to MRE 404(b), which provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Because the relevance of Brenda's testimony was direct where it demonstrated intent, knowledge and a common scheme with respect to the conspiracy and its object, it was properly admitted.[5] See, e.g., *People v Williams,* 240 Mich App 316, 322-324; 614 NW2d 647 (2000).

We further note that even if Brenda's testimony involved uncharged misconduct, it was not irrelevant. In *People v Iaconnelli,* 112 Mich App 725, 754-755; 317 NW2d 540 (1982), vacated in part on other gds 116 Mich App 176 (1982), one of the several defendants to the conspiracy, Rudy Davis, made a substantially similar argument to that made in this case. Davis

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[5] On appeal, defendant argues that the evidence was not properly admitted under MRE 404(b). His argument, however, is simply that the evidence was not relevant to anything other than propensity. As discussed, this argument has no merit.

objected to the admission of testimony from certain witnesses who were not charged coconspirators. *Id.* at 755. He argued that the testimony was highly prejudicial and involved misconduct not charged in the indictment. The witnesses testified as follows:

> Prosecution witness Carolyn Boyd testified that she and Harold Chapman made $100,000 from narcotics supplied to them by defendant Rudy Davis during 1971, the first year in which he supplied them. Chapman also testified that Rudy Davis supplied him with narcotics, describing his arrangement with Rudy Davis whereby Rudy Davis supplied him with narcotics which he sold on a regular basis, giving Rudy Davis half of the profit. Rudy Davis contended in response to this that Chapman merely worked for him as an informer. [*Id.* at 754-755.]

This Court determined that the evidence was not improperly admitted:

> The evidence first was admitted by the trial court as probative of guilt on both counts in the indictment. The court later instructed the jury that this testimony was not evidence of direct participation in the charged conspiracy but was evidence of similar acts admitted for the limited purpose of showing that defendant Rudy Davis acted purposefully and that it showed that his actions were the result of a characteristic scheme, plan, or system and would tend to show his intent to enter into the illegal agreement charged in the indictment.
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> As the parties agree, this evidence was admissible only under the similar-acts statute in effect at the time of trial, MCL 768.27, now embodied in MRE 404(b).
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> In [*People* v] *McCrea*, [303 Mich 213, 250; 6 NW2d 489 (1942)], the defendant made a similar claim, contending that it was improper to admit evidence showing a separate and distinct offense from that of the charged conspiracy. There, as in the instant case, the testimony concerned transactions between the defendant and individuals who were not codefendants or alleged coconspirators. The trial court in *McCrea* admitted the evidence as having a bearing on the defendant's intent and as being probative of a general plan or scheme.
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> We find that *McCrea* controls the issue in the instant case. The evidence of the Chapman conspiracy was properly admitted, and the jury was properly instructed as to its use. [*Id.* at 755-756 (citations omitted).]

Both *Iaconnelli, supra,* and *McCrea, supra,* support the admission of Brenda's testimony.

Defendant also argues that the requisite notice was lacking pursuant to MRE 404(b). This issue is unpreserved because it was neither raised before nor decided by the trial court. This Court reviews unpreserved issues for plain error. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

MRE 404(b)(2) requires the prosecution to provide reasonable notice in advance of trial, or during trial if the trial court excuses notice on good cause shown. The purpose behind the

advance notice requirement is to give the trial court and defense an "opportunity to test the genuine value of the evidence and limits a prosecutor's ability to articulate the relevant grounds for admission." *People v Hawkins,* 245 Mich App 439, 454; 628 NW2d 105 (2001). In *Hawkins,* as in this case, the prosecution did not attempt to justify the lack of notice and made no argument with respect to notice on appeal. *Id.* at 453. The *Hawkins* Court found that the failure to provide notice under MRE 404(b)(2) was plain error, but error that did not require reversal because the evidence was properly admitted pursuant to MRE 404(b) and the defendant did not suggest how he would have reacted differently to the evidence if proper notice was given. *Id.* at 455. The *Hawkins* Court could not conclude that the lack of notice had any effect whatsoever on the verdict. *Id.* Here, the evidence was properly admitted pursuant to MRE 404(b). Moreover, defendant does not explain how the lack of pretrial notice affected his case. Thus, we cannot conclude that the error affected the fairness, integrity or public reputation of judicial proceedings. *Carines, supra* at 763-764. Further, the evidence against defendant was so overwhelming that it cannot be said that defendant was an actually innocent person. *Id.*

III

Defendant next argues that Brenda's testimony led to a "duplicitous" verdict because he could have been convicted of either conspiracy. He argues that it is legally impossible to know which conspiracy formed the basis of his conviction. Further, he argues that the trial court's failure to give a specific unanimity instruction, requiring that the jury be unanimous as to which conspiracy was proved beyond a reasonable doubt, resulted in manifest injustice. Neither argument has merit.[6] The jury was not faced with two separate conspiracies. Rather, it was instructed that the prosecutor needed to prove that defendant and someone else agreed to commit the crime of delivery of the controlled substance, that defendant specifically intended to commit or help commit the crime, and that this agreement took place or continued during the period from March to June 20, 1997. As previously discussed, there was one continuing conspiracy in this case. The jury could convict only if it found that the conspiracy took place or continued between the period of March to June 20, 1997. Because there was only one crime presented to the jury for consideration, a special unanimity instruction was unnecessary.

IV

Defendant next argues that the trial court abused its discretion by failing to give a missing witness instruction after the prosecution failed to produce Reyes at trial.[7]

We review the trial court's decision with respect to a missing witness instruction for an abuse of discretion. *People v Snider,* 239 Mich App 393, 422; 608 NW2d 502 (2000). MCL 767.40a(1) requires the prosecutor to attach to the information a list of known witnesses who might be called at trial and a list of all known res gestae witnesses. MCL 767.40a(2) requires the

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[6] We note that the prosecution does not respond to this argument in its brief on appeal.

[7] Defendant makes no argument with respect to the prosecutor's failure to produce Reyes, i.e., that such a failure denied him a fair trial. He simply argues that the trial court erred in refusing to give the missing witness instruction.

prosecutor to further disclose res gestae witnesses as they become known. MCL 767.40a also provides:

> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

In *People v Burwick*, 450 Mich 281, 290-291; 537 NW2d 813 (1995), the Court stated:

> As amended, the statute [MCL 767.40a] contemplates that the prosecutor will give advance notice of all known res gestae witnesses and specify before trial which known witnesses it intends to call. *Having advised the defendant of all known witnesses and who among that list the prosecutor will produce at trial, the defense determines which known witnesses the prosecutor will not call and, upon request, the government must provide reasonable assistance "as may be necessary to locate and serve process...."* MCL 767.40a(5).
>
> Having thus fully addressed all known witnesses and provided for notice of their existence and a designation of who will be produced, the statute contemplates that the defense will seek production of the witnesses it desires and allows the prosecutor to delete from or add to the list of witnesses it will produce "at any time" as long as the good cause requirement . . . is satisfied. [Emphasis added.]

In this case, the prosecution filed the requisite notice of witnesses it *intended* to produce at trial. During trial, the prosecutor did not produce all of the witnesses on its witness list and he never moved to delete the witnesses who were not produced. Defendant did not object to the prosecutor's failure to produce all of the witnesses or his failure to move to delete them from the witness list. During discussions about jury instructions, however, defendant requested a missing witness instruction because of the prosecutor's failure to produce Reyes. Without explanation, the trial court refused to give the instruction. The prosecutor never indicated why Reyes was not produced.

Once the prosecution indicated that it was going to produce Reyes, it was required either to do so or to amend its witness list to delete Reyes. See *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991), where this Court indicated that unless a prosecutor seeks to delete a witness from its witness list, he is obliged to exercise due diligence to produce that witness.[8]

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[8] We are mindful that whether "due diligence" is the standard has been called into question. *People v Bean*, 457 Mich 677, 691-694; 580 NW2d 390 (1998) (Boyle, J. concurring). Justice Boyle indicated that the due diligence standard was not correct and that the prosecution only needed to show good cause. *Id.* at 693. Regardless of the standard, it appears clear that once the prosecutor lists a witness on the list of witnesses he intends to call, he may not simply fail to call

(continued…)

Here, the prosecutor apparently was unaware of his obligations once he listed the witnesses on his list. Defendant, who relied on the fact that the prosecutor planned on calling Reyes, took no steps to produce him and was surprised when the prosecutor did not call him as a witness. Under the circumstances, we believe that a missing witness instruction was proper and that the trial court abused its discretion by failing to give the instruction. We find, however, that reversal is not required on this ground.

In *People v Rodriguez*, 463 Mich 466; 620 NW2d 13 (2000), the trial court erred by failing to give a requested instruction that was crucial to the defendant's defense. Specifically, it failed to instruct on an exemption to the use tax. The Supreme Court analyzed the instructional error applying a harmless error analysis. *Id.* at 473. It quoted *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000), for the following rule of law:

> In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. *People v Lukity*, 460 Mich. 484, 495-496, 596 NW2d 607 (1999). An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. See *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), citing *Lukity*, *supra* at 495-496. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. See *Lukity*, *supra* at 495; *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

In this case, defendant cannot demonstrate that it was more probable than not that the error was outcome determinative, especially where there has been no showing as to what Reyes may have said if called to the witness stand. The untainted evidence in this case was overwhelming against defendant, including his statements on audiotape, which were highly incriminatory despite his weak attempts to innocently explain them. In the face of the overwhelming evidence, the instructional error was harmless.

V

Defendant next argues that he was denied his right of confrontation and his right to adequately cross-examine when the trial court refused to allow him to question Brenda about the sentence she received for her conspiracy conviction. We disagree.

Brenda testified on direct examination that she pleaded guilty to the crime of conspiracy to deliver cocaine. Brenda was asked by the prosecutor whether there was any agreement with the prosecutor's office for her testimony as part of the plea. She replied, "No, sir, there wasn't." She also stated that she appeared for trial because she was subpoenaed. On cross-examination, defense counsel attempted to inquire about the sentence Brenda received. The prosecutor immediately objected. Defense counsel argued that the issue was relevant to explore what

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(…continued)

the witness without moving to delete the witness from the list.

benefits Brenda received and whether she had been sentenced. The following colloquy then took place:

> THE COURT: She indicated she had been sentenced. She had indicated earlier that there had been no agreement regarding any sentence or recommendation, is that correct?
>
> WITNESS: Correct.
>
> DEFENSE COUNSEL: Okay. But you have already been sentenced, is that right?
>
> WITNESS: Yes.

Defendant asked no further questions about any dealings Brenda may have had with the prosecutor's office.

"Our Supreme Court has held that the scope of cross-examination on matters of credibility is left to the sound discretion of the trial court." *People v VonEverett*, 156 Mich App 615, 623; 402 NW2d 773 (1986), quoting *People v Bouchee*, 400 Mich 253, 267; 253 NW2d 626 (1977).

> Neither the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject. Cross-examination may be denied with respect to collateral matters bearing only on general credibility . . . as well as on irrelevant issues. [*People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992) (citations omitted).]

On appeal, defendant argues that the trial court prevented him from adequately cross-examining Brenda about her motives for testifying. This argument is disingenuous. Brenda testified that she received nothing in exchange for her testimony and that she only appeared at trial pursuant to a subpoena. Defendant thereafter asked about the specifics of her sentence. The nature of her sentence was irrelevant where she testified, in response to the trial court's question, that there was no agreement regarding sentencing. Defendant's counsel was not precluded from cross-examining Brenda on other matters related to her credibility or motives for testifying. He did not attempt to question her about other aspects of her dealings with the prosecutor's office. We find no denial of the right of confrontation or cross-examination.[9]

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[9] We note that defendant argues in the body of his discussion that he was denied his right to present a defense. This issue is not properly before this Court where it was not raised in the statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Further, defendant fails to discuss or explain his argument. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

VI

Finally, defendant argues that he was denied his due process right to a fair trial because he was required to disclose the names of defense witnesses to the jury before trial. Defendant does not object to the disclosure of witness names during voir dire. Rather, he complains about the trial court's requirement that his counsel disclose the names of his prospective witnesses, thereby identifying them as defense witnesses. Although unclear, defendant's argument seems to suggest that the requirement shifted the burden of proof. He cites non-binding authority from New York to suggest that the names of all of the witnesses should have been read by the trial court and that the witnesses should not have been attributed to either party.

We review unpreserved issues, constitutional and nonconstitutional, under the plain error rule. *Carines, supra* at 763. We find no plain error requiring reversal. The trial court asked the prosecution to state the names of its potential witnesses for the jury panel. It then asked defendant to do the same, stating, "Mr. Wilkinson, could you indicate for the prospective jurors, recognizing that Mr. Diaz is under no obligation to call any witnesses whatsoever, if he chooses to call any, who they might be?" Defense counsel subsequently identified the potential defense witnesses. The trial court then inquired whether any of the potential jurors knew the identified witnesses. During trial, after the prosecution rested its case, defendant called all but one of the witnesses he identified during voir dire.

We find no plain error in the trial court's request that defendant identify his potential witnesses. The trial court did not shift the burden of proof. It clearly informed the prospective jurors that defendant was under no obligation to call any witnesses. Further, defendant eventually called all but one of these witnesses. Thus, they were identified at that point as being defendant's witnesses. Clearly there was no taint from having defendant identify his potential witnesses. Moreover, even if we found an error, defendant cannot make the requisite showing of prejudice to warrant consideration of reversal. *Carines, supra* at 763. Defendant cannot demonstrate that the outcome of his trial was affected because he identified his potential witnesses during jury voir dire. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder