

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS EDWARD BROOKS,

Defendant-Appellant.

UNPUBLISHED

April 20, 2004

No. 245252

Oakland Circuit Court

LC No. 02-182258-FH

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Thomas Edward Brooks appeals as of right from his jury convictions for possession with intent to deliver between 50 and 225 grams of cocaine¹ and conspiracy to deliver less than fifty grams of cocaine.² Defendant was tried jointly with his alleged coconspirators, Antonio Dean, Daniel Lee, and Darryl Ervin.³ Defendant was sentenced to consecutive terms of ten to forty years' imprisonment for possession, and one to forty years' imprisonment for conspiracy. We affirm.

I. Background Facts

On November 13, 2001, Royal Oak police officer Martin Lavin arranged to meet Mr. Dean at an Oakland County Kentucky Fried Chicken to purchase two ounces of cocaine. Mr. Dean arrived at the meeting with his codefendants in a black Lincoln. With several surveillance officers listening over a radio transmission, defendant, along with his codefendants, encouraged Officer Lavin to meet them at a Wendy's within the city of Detroit to complete the transaction. At the subsequent meeting, Mr. Dean attempted to sell Officer Lavin approximately fifty-five grams of cocaine contained in two clear plastic bags. The officers immediately arrested all four

¹ MCL 333.7401(2)(a)(iii).

² MCL 333.7401(2)(a)(iv)

³ All four codefendants were convicted of delivery and conspiracy. Mr. Dean has not appealed his convictions or sentences. Our opinions in *People v Lee* (Docket No. 243964) and *People v Ervin* (Docket No. 243965) are being released with this opinion.

codefendants. During the arrest and booking procedure, the officers seized \$415 and a cellular telephone from defendant and \$228 from Mr. Ervin.

II. Coconspirator Statements

Defendant first claims that the trial court erred in permitting the prosecution to present the hearsay statements of codefendants. Specifically, defendant complains that statements made by codefendants to Officer Lavin were hearsay and their admission violated his constitutional right to confront the witnesses against him. We disagree. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.⁴ However, when a trial court's decision regarding the admission of evidence involves a preliminary question of law, this court reviews the issue de novo.⁵

On direct examination, Officer Lavin testified regarding his prior arrangement to purchase cocaine from Mr. Dean. Officer Lavin further testified to various statements made by defendant and his codefendants during the initial meeting at Kentucky Fried Chicken. Mr. Dean indicated that the cocaine belonged to the other men and that they were not comfortable with the location of the transaction. Mr. Dean encouraged Officer Lavin to follow them to another location in the city of Detroit. Mr. Ervin also approached Officer Lavin's vehicle to encourage him to follow the men down the street to purchase the cocaine. Mr. Ervin later returned to Officer Lavin's vehicle offering to allow him to hold onto \$2000 as security for his safety. Defendant approached Officer Lavin and stated, "Man, if you want this shit follow us."⁶ The codefendants reentered the Lincoln and drove up next to Officer Lavin's vehicle. From the driver's seat, Mr. Lee arranged to meet Officer Lavin at the Wendy's location later that evening. Mr. Lee indicated that they needed to pick up the cocaine before the meeting.⁷

A statement is not hearsay under MRE 801 if made by a coconspirator of the party against whom the statement was offered and if made during the course of and in furtherance of a conspiracy.⁸ The independent proof must establish a conspiracy's existence by a preponderance of the evidence.⁹ Neither direct proof of the agreement, nor a formal agreement, need be shown to prove the conspiracy.¹⁰ Circumstances, acts, and conduct of the parties can sufficiently

⁴ *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

⁵ *Id.*

⁶ [Trial Transcript July 2, 2002, p 67.]

⁷ Officer Lavin's testimony regarding the substance of these conversations was corroborated by the testimony of three surveillance officers.

⁸ MRE 801(d)(2)(E).

⁹ *People v Vega*, 413 Mich 773, 780-782; 321 NW2d 675 (1982).

¹⁰ *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986).

demonstrate an agreement in fact.¹¹ Furthermore, circumstantial evidence and inference may be used to establish a conspiracy.¹²

We first note that the coconspirators' statements were made during the course of and in furtherance of the conspiracy. The statements were made in the course of arranging the actual transaction. However, the trial court improperly admitted the statements of defendant's coconspirators without first determining that a conspiracy existed. A trial judge must determine preliminary questions regarding the admissibility of evidence rather than leaving the decision to the jury.¹³ The trial court must resolve preliminary questions of fact, including the existence of a conspiracy, before admitting the evidence.¹⁴ The trial court erred as it failed to determine whether the prosecution had proven the existence of a conspiracy by a preponderance of the evidence before admitting the statements of defendant's coconspirators.

However, the trial court's error did not amount to prejudicial error, and therefore, we decline to reverse defendant's convictions.¹⁵ The prosecution presented sufficient independent evidence to prove the existence of a conspiracy. Evidence of the coconspirators' concerted actions, independent of their statements, demonstrates a common goal. Defendant's own statement requesting Officer Lavin to "follow *us*" in order to complete the transaction is evidence of a combined action. Furthermore, Officer Lavin received several calls from Mr. Dean placed from defendant's cell phone before the codefendants arrived at the Wendy's location. Therefore, a conspiracy can be shown by evidence independent of codefendants' statements.

III. Severance

Defendant also alleges that the trial court abused its discretion by denying his motion to sever his trial. We review a trial court's decision to join or sever codefendants' trials for abuse of discretion.¹⁶ Severance is mandatory "only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that . . . demonstrates that his substantial rights will be prejudices and that severance is the necessary means to rectifying the potential prejudice."¹⁷ As defendant failed to present such proof or affidavit, defendant must show that he

¹¹ *Id.*

¹² *Id.*

¹³ MRE 104(a); *Vega, supra* at 780.

¹⁴ *Bourjaily v United States*, 483 US 171, 175; 107 S Ct 2775; 97 L Ed 2d 144 (1987) (construing FRE 104(a), which is identical to the Michigan rule); *Vega, supra* at 779-780.

¹⁵ *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

¹⁶ MCL 768.5; *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994).

¹⁷ MCR 6.121(C); *Hana, supra* at 346-347.

suffered actual prejudice at trial to warrant reversal of the trial court's determination regarding joinder.¹⁸

Defendant asserts that he was actually prejudiced as he was unable to present the defense that he was only present during the transactions to purchase marijuana while his codefendants conspired to deliver cocaine. However, defense counsel actually presented this defense in closing argument. The defenses presented by codefendants did not require the jury to disbelieve any defendant in favor of another. Furthermore, as discussed *supra*, the statements made by codefendants were properly admitted into evidence, so their use against defendant was not a result of the joined trial. Defendant suffered no actual prejudice at trial, and reversal of the trial court's joinder decision is unwarranted.

IV. Sufficiency of the Evidence

Defendant next alleges that the trial court abused its discretion by denying his motion for a new trial as insufficient evidence was presented to support his conviction for conspiracy. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.¹⁹ “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”²⁰

To support a conviction for conspiracy to deliver a controlled substance, the prosecution must 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.^[21]

The prosecutor need only prove that the defendant cooperated to further the conspiracy's object with the knowledge that a conspiracy existed.²²

Defendant was charged with conspiring to deliver less than fifty grams of cocaine, a charge for which there is no statutory minimum amount. Therefore, a rational trier of fact must

¹⁸ *Hana, supra* at 346-347.

¹⁹ *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

²⁰ *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

²¹ *People v Mass*, 464 Mich 615, 629-630, 633; 628 NW2d 540 (2001), citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).

²² *People v Meredith*, 209 Mich App 403, 411-412; 531 NW2d 749 (1995), remanded on other grounds 459 Mich 62 (1998).

find beyond a reasonable doubt that defendant possessed the specific intent to deliver and to combine with others to deliver some amount of cocaine.²³ Mr. Dean, defendant's coconspirator, actually attempted to deliver approximately fifty-five grams of cocaine to Officer Lavin. Defendant used the same language as his codefendants to refer to the cocaine. The requests of defendant and his codefendants to Officer Lavin to follow the group suggest an intent to combine to deliver the cocaine. It is reasonable to infer from the evidence presented that defendant was cooperating with the others to bring about the delivery of cocaine. Therefore, sufficient evidence was presented to support defendant's conspiracy conviction.

V. Jury Instructions

Defendant further argues that the trial court erred in refusing to instruct the jury that knowledge of the amount of cocaine was a necessary element of conspiracy. Claims of instructional error are reviewed de novo on appeal.²⁴ As a general rule, "[w]e review jury instructions in their entirety to determine if error requiring reversal occurred."²⁵ The trial court must clearly present the case to the jury and instruct them on the applicable law.²⁶ "[I]nstructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence."²⁷ Even if somewhat imperfect, reversal is not required where the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights.²⁸

As noted *supra*, for the charge of conspiracy with intent to deliver a controlled substance, the prosecution must prove that the defendant had the "specific intent to deliver *the statutory minimum as charged*" and "the specific intent to combine to deliver the *statutory minimum as charged* to a third person."²⁹ Therefore, a defendant is entitled to a jury instruction requiring the jury to find that the defendant conspired to deliver at least the statutory minimum as charged. However, conspiracy to deliver less than fifty grams of cocaine does not include a statutory minimum. Therefore, the jury must be instructed that defendant must have conspired to deliver some amount of cocaine less than fifty grams in order to convict.

²³ See *Mass, supra* at 631 ("[I]f one conspires to deliver an unspecified amount of cocaine one would, at a minimum, be guilty of conspiring to deliver less than fifty grams of cocaine.")

²⁴ *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

²⁵ *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

²⁶ *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

²⁷ *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

²⁸ *Aldrich, supra* at 224.

²⁹ *Mass, supra* at 629-630, 633 (emphasis in original).

In *People v Mass*, our Supreme Court found that evidence sufficient to prove delivery of a controlled substance was sufficient to prove a defendant's knowledge for a conspiracy charge.³⁰ Specifically, the *Mass* Court reasoned:

[I]f a conspiracy to deliver and a delivery charge are coupled (and the proofs for the delivery demonstrate the weight of the substance delivered) such proofs may suffice to demonstrate defendant's knowledge of the amount for the conspiracy charge. This is because a prosecutor is free to argue, and the jury would be free to find, if it was persuaded, given all the circumstances, that defendant had knowingly conspired to deliver the same amount that was actually delivered.^[31]

In *Mass*, the trial court correctly instructed the jury regarding the elements of the delivery charge. In order to prove delivery of 225 to 650 grams of a controlled substance, the jury was instructed that the prosecutor must prove beyond a reasonable doubt that "the substance delivered was in a mixture that weighed 225 or more grams, but less than 650 grams."³²

We find, based upon *Mass*, that the trial court properly instructed the jury with regard to conspiracy to deliver less than fifty grams of cocaine. Although defendant was not charged separately with the underlying delivery offense, the trial court properly instructed the jury that it must find that "the substance was a mixture weighing less than fifty grams."³³ The jury could infer from the evidence that defendant conspired to deliver the amount that was actually delivered.

As we have found no error on review, defendant's claim of cumulative error must also fail.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello

³⁰ *Id.* at 634.

³¹ *Id.*

³² *Id.* at 638.

³³ [Trial Transcript July 2, 2002, p 230.]