STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 245454 Oakland Circuit Court
LOUIS EDWARD LAWS, Defendant-Appellant.	LC No. 1999-166148-FH

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Defendant was charged with conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(i). Following a jury trial, he was convicted of the lesser offense of conspiracy to deliver or possess with intent to deliver at least 225 but less than 650 grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(ii). He was sentenced to a prison term of 20 to 60 years. He appeals as of right. We affirm.

Defendant engaged in a long-term conspiracy with Nathaniel Lee, Roderick Lee, and others to traffic controlled substances. Nathaniel and Roderick led and equally controlled the distribution, and Joe Abraham was the organization's primary supplier. Another Lee brother, Shedrick, also transported large quantities of drugs into the state for the organization. Nathaniel and Roderick, in turn, supplied numerous individuals, including defendant, who sold the illicit drugs to third parties.

Defendant first argues that the evidence was insufficient to sustain his conviction because there was no evidence that he was "engaged in any conspiracy to possess with intent to deliver cocaine" beyond 1991, but merely evidence that he was "involved in drug sales." We disagree.

When ascertaining whether the prosecutor presented sufficient evidence to support a conviction, we "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

> To be convicted of conspiracy to possess with intent to deliver a controlled substance, the people 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. [*People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).]

The evidence indicated that Roderick and Nathaniel Lee led a drug trafficking group that included defendant. Nathaniel and Roderick received several kilograms of cocaine or heroin, which they distributed to third parties, including defendant. Defendant admitted that in 1990 and 1991, he bought multiple ounces of cocaine from Nathaniel and Roderick. At that time, defendant stated that he could sell nine ounces, four to five times a day. There was also evidence from which the jury could reasonably infer that defendant's involvement in a conspiracy to deliver or possess with intent to deliver a controlled substance continued beyond 1991. Eric testified that, on one occasion between 1992 and 1994, he saw defendant give Roderick at least $10,000 for approximately five hundred grams of a powdery substance, which he believed was cocaine. In May 1993, law enforcement officers executed a traffic stop on defendant's car and found that he was carrying large amounts of unexplained money. Stanley, defendant's uncle, was also in the car. There was evidence that Stanley bought cocaine from Roderick and distributed it to third parties, and was at Roderick's house throughout the 1990s.

In October 1993, police discovered that defendant was selling drugs when an officer had contact with one of defendant's customers. Eric testified that, in 1994 or 1995, he saw defendant give Roderick between $5,000 and $10,000. Eric believed that Roderick gave defendant about fourteen grams of heroin, although he did not see the exchange. Eric testified that, later that day, defendant told him that heroin sold for $40 a pack in Chicago and invited Eric to Chicago. In 1995, defendant started working with law enforcement and named Roderick as one of his drug suppliers. Defendant then successfully engaged in two controlled buys from Roderick in January and February 1995. From this evidence, a jury could reasonably infer that, as of 1995, defendant and Roderick still had an agreement regarding the sale and distribution of a controlled substance. In 1996, after defendant was no longer working for law enforcement, he was discovered in a heavy drug trafficking area in Pontiac, carrying more than $6,000.

Additionally, defendant's friend, Helen Alexander, testified that she purchased cocaine from defendant intermittently "every day for about 10-15 years," and sometimes two to six times a day, some of which she sold to third parties. Defendant also sold cocaine to Alexander's cousin. According to Alexander, defendant was aware that she was selling the cocaine that she received from him to third parties. She delivered 3.5-gram quantities of cocaine for defendant about fifty times. Alexander was also with defendant when he sold cocaine in amounts of 28 and 125 grams to third parties. Finally, there was evidence that from 1987 through 1998, defendant, like other coconspirators, was not employed and did not file any tax returns.

A prosecutor "is not obligated to disprove every reasonable theory consistent with innocence," but only needs to prove his own theory beyond a reasonable doubt given the contrary evidence proffered by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Viewed in a light most favorable to the prosecution, the evidence presented in this case reflected a long-term conspiracy to traffic drugs and was sufficient to sustain defendant's

conviction for conspiracy to deliver or possess with intent to deliver 225 or more but less than 650 grams of a controlled substance.[1]

Defendant next argues that the trial court abused its discretion by admitting Eric Lee's preliminary examination testimony at trial under MRE 804(b)(1), because he was not "unavailable" under MRE 804(a). Defendant argues that the prosecution improperly revoked the witness's immunity before trial, forcing him to invoke his privilege against self-incrimination and enabling the prosecution to use his preliminary examination testimony rather than direct testimony. We disagree. We review for abuse of discretion a trial court's evidentiary rulings. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

Eric, who was involved in the drug trafficking conspiracy, testified before a grand jury in April 1998, and gave critical evidence against defendant and the Lee family organization. He also testified at defendant's December 1998, preliminary examination. When he testified at Nathaniel's preliminary examination in May 2000, however, he claimed he could not recall any details about the alleged drug trafficking conspiracy or his former testimony. Eric even denied any memory of ordinary facts, such as his previous address. Based on this claimed lack of memory, the prosecution declined to extend its grant of immunity to cover defendant's 2002 trial. Eric invoked his Fifth Amendment privilege not to testify at trial, and the court accepted it. As a result, the court concluded that Eric was "unavailable" under MRE 804(a). In response to defense counsel's objections, the court also concluded that defense counsel had an opportunity to cross-examine the witness, noting that he asked several questions and was present throughout the hearing. The court admitted Eric's preliminary examination testimony.

A trial court may admit a witness's prior testimony under MRE 804 if the witness is unavailable because he validly asserts a privilege from testifying. However, according to MRE 804(a),

> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing a witness from testifying.

If the prosecution intentionally causes a witness's failure to testify with either threats or actual prosecution the witness will not be deemed "unavailable" under MRE 804(a). *People v McIntosh*, 142 Mich App 314, 324; 370 NW2d 337 (1985). "[T]he burden is on the prosecution to establish that the witness whose prior recorded testimony is being offered is, in fact,

[1] Defendant suggests that the evidence was insufficient and the trial court's instructions were erroneous because his cocaine purchase from the Lee brothers in the early 1990's was outside the six-year statute of limitations period, noting that he was indicted in 1998. As defendant acknowledges, this Court previously rejected this claim in a prior appeal of this matter. See *People v Laws*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2001 (Docket No. 223377). Therefore, we will not revisit these issues as our prior decision is now the law of the case.

'unavailable' and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable." *Id*. at 327.

In this case, the prosecution did not revoke Eric's immunity merely to prevent him from testifying. Rather, the prosecution reasonably surmised that Eric would not provide testimony at trial, but would again feign a loss of memory. Because Eric had already indicated his unwillingness to testify according to the immunity agreement, the prosecutor's decision to revoke Eric's immunity was not unreasonable. Therefore, Eric could invoke his right to remain silent, and was not available. Because defendant had a prior opportunity to cross-examine Eric at the preliminary examination, the trial court did not abuse its discretion when it allowed the unavailable witness's testimony. *Crawford v Washington*, 541 US ___; 124 S Ct 1354, 1369; 158 L Ed 2d 177 (2004).

Defendant also claims that he was denied due process and equal protection of the law when the trial court failed to award him 907 days of credit against his new minimum sentence for the time he served in jail before his sentence for the instant crime, which he committed while on parole. Defendant concedes that the present offense occurred while he was on parole for another offense and acknowledges that no credit may be awarded for an offense committed while on parole. Nevertheless, he argues that the credit he seeks is constitutionally required as a matter of due process, equal protection, and the double jeopardy right to not be subjected to more punishment than the Legislature intended. We disagree. In *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994), we stated that, under MCL 791.238, the fact that parolees are precluded from receiving credit for time served while being held on parole detainer and, therefore, treated differently than persons in jail awaiting trial, is not unconstitutionally discriminatory. We held that the statute does not violate a defendant's right to equal protection or due process. *Stewart*, *supra*. The fact that a statute prevents us from providing defendant the requested credit demonstrates that the Legislature did not intend defendant to receive it. *People v Calloway*, 469 Mich 448, 453; 671 NW2d 733 (2003). Therefore, defendant's constitutional challenges to his jail credit fail.

Defendant raises several claims in propria persona. Defendant first claims that the trial court erred when it allowed evidence of his "prior run-ins-with the law." We disagree. The record demonstrates that the prosecutor did not offer the evidence to show that defendant had a bad character, but to prove defendant's common scheme, plan, and system for trafficking cocaine. Using the evidence, the prosecutor showed that defendant engaged in a long-term drug trafficking conspiracy with Nathaniel and Roderick of the purported Lee family organization, and others. Therefore, the challenged evidence was directly probative of defendant's continuing conspiracy, and the trial court did not abuse its discretion by admitting it.

Defendant next claims that the trial court erred when it instructed the jury on the lesser offense of conspiracy to deliver or possess with intent to deliver at least 225 but less than 650 grams of a controlled substance, the crime for which he was ultimately convicted. However, the record reflects that defense counsel acquiesced in the trial court's decision to give the lesser offense instruction and expressed satisfaction with the trial court's instruction. Because any error was waived, there is no error to review. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Likewise, defendant's claim that, in hindsight, the trial court should have instructed the jury on "the difference between a buyer-seller v. conspiracy" was waived.

Next, defendant confusingly argues that the trial court erred in "allowing [him] to be prejudiced by a variance in the facts presented to the jury." This argument appears to boil down to a claim that defendant was forced to defend on the lesser included offense of conspiracy to deliver or possess with intent to deliver at least 225 but less than 650 grams of a controlled substance without proper notice. Nevertheless, the charge of the greater offense put defendant on notice that the prosecutor might charge him with the lesser offense, so defendant's argument lacks merit. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial, because no cognizable errors exist. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage