STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2008
v	No. 273269 Allegan Circuit Court
NATHAN PHILLIP DENNIS, Defendant-Appellant.	LC No. 06-014652-FH

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of witness interference, MCL 750.122(7)(a), and conspiracy to interfere with a witness, MCL 750.157a. Defendant was sentenced as an habitual offender, fourth offense, to concurrent sentences of 42 to 180 months' imprisonment. Defendant appeals as of right. We affirm.

On February 13, 2006, defendant was housed in the Allegan County Jail awaiting a preliminary examination on two charges of domestic assault. The victims of that alleged assault were defendant's brother, Ryan Dennis, and Stephanie Martineau. Defendant placed a telephone call to Ryan from the jail. During that call, which was recorded, Ryan noted that he would not be appearing to testify against defendant at the preliminary examination. Defendant and Ryan then discussed whether Martineau would appear. In pertinent part, their conversation was as follows:

> *Ryan*. How was court?
>
> *Defendant*. Fuck man they ain't offering me no deals. Man they're charging me with a fourth, a third and fourth habitual. Do you know what a fourth habitual carries?
>
> *Ryan*. What?
>
> *Defendant*. Life.
>
> *Ryan*. Jesus.
>
> *Defendant*. Life. No fucking joke.

Ryan. What's her name didn't show up, did she?

Defendant. No, it's Wednesday, man. It's Wednesday when I go to my prelim.

Ryan. And that depends on if she goes or not?

Defendant. Yeah.

Ryan. Then obviously if I don't go, you're not going to get charged for that, right?

Defendant. Right.

* * *

Defendant. They're charging me with a third habitual which makes it a 7-15 year felony, the first domestic. And the other domestic is a fourth habitual, which makes it a max of life.

Ryan. Jesus.

Defendant: And they ain't even fucking dropping no – they're not even going to drop a habitual offender. So I go to court Wednesday. Fuck it, I know Stephanie has fucked Juan plenty of times on this shit

* * *

Ryan. I will head up to her place tonight.

Defendant. Make sure you do, dude. Fucking just because Wednesday is the only fucking, that's the only time if she don't fucking show up Wednesday then I'm going home in March. Otherwise I'm looking at fucking, fucking 7 to 15 and life under my habitual.

Ryan. All right.

Defendant. And if you do talk to her, you know, tell her, tell her fucking that a--just find out if she's going to court or not and just be like, just actually trick her fucking ass. Be like hey I was wondering if you're going to court on Thursday, you know instead of Wednesday, which it actually is. Just like I was wondering if you were going to court on Wednesday or not--or Thursday or not. Can you hear me?

Ryan. Yeah.

Defendant. Say Thursday, that way just in case she was planning on going maybe she'll fuck up and not show up.

Ryan. I will offer her some money. I get paid Friday and I just won't pay her ass. Can you hear me?

* * *

Defendant. I can't--what?

Ryan. I said I will just offer her like $200.00 not to go because I get paid Friday and then I just won't pay her ass.

Defendant. Yeah just tell her that will work too. Well I'm going to quit talking about it because if they're listening in then that's another charge.

Neither Ryan nor Martineau appeared at the preliminary exam and the domestic assault charges against defendant were dismissed.

On appeal, defendant first claims that the trial court abused its discretion when it admitted a recording of the telephone call between him and Ryan into evidence. Defendant asserts that the recording of the telephone call violated his Fourth Amendment right against unreasonable searches and seizures. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). There can be no Fourth Amendment violation unless the area into which the state intruded was an area in which the defendant had a "constitutionally protected reasonable expectation of privacy." *New York v Class*, 475 US 106, 113; 106 S Ct 960; 89 L Ed 2d 81 (1986) (quotation omitted). A "constitutionally protected reasonable expectation of privacy" exists if (1) the defendant had an actual, subjective expectation of privacy and (2) society is objectively prepared to recognize that expectation. *United States v Poyck*, 77 F3d 285, 290 (CA 9, 1996). In the present case, defendant did not have an actual, subjective expectation of privacy because he was advised, and knew, that his telephone call might be recorded. Specifically, an SBC recording played at the beginning of the telephone call informed defendant that his telephone call might be recorded, and defendant told Ryan that he needed to quit talking because if jail personnel were monitoring the telephone call, he could be charged with committing another crime. Because defendant had no actual, subjective expectation of privacy, the jail's recording and monitoring of his telephone call did not violate his Fourth Amendment rights. *Poyck, supra.* Therefore, the trial court did not abuse its discretion in denying defendant's motion to suppress. *Snider, supra*.

Defendant next argues that his convictions for witness intimidation and conspiracy to intimidate a witness were not supported by sufficient evidence. We disagree.

When reviewing the sufficiency of the evidence to sustain a criminal conviction, we view the evidence in a light most favorable to the prosecution to 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 Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Questions of

credibility and intent are for the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Queenan*, 158 Mich App 38, 55; 404 NW2d 693 (1987).

The witness intimidation statute, MCL 750.122, "identif[ies] and criminalize[s] the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding." *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003). Conduct prohibited by the witness intimidation statute includes "giv[ing], offer[ing] to give or promis[ing] anything of value to an individual" to discourage that individual from attending, testifying or giving information, or to encourage that individual to withhold testimony or testify falsely, at an official proceeding, MCL 750.122(1), or "willfully imped[ing], interfere[ing] with, prevent[ing] or obstruct[ing] or attempt[ing] to willfully impede, interfere with, prevent or obstruct the ability of a witness to attend, testify, or provide information" in or for an official proceeding. MCL 750.122(6). MCL 750.122 punishes both completed and attempted acts of witness interference. *Greene, supra* at 440. An attempt consists of two elements: "(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993) (quotation omitted).

Defendant argues that there was no evidence that he intended to interfere with Martineau's appearance at the preliminary examination, but rather, that he "was merely talking to his brother in a hypothetical and joking manner." Defendant testified that he was frustrated when he was speaking with Ryan, because he was charged with crimes he did not commit and that "it was just a bunch of emotions that came out" during the telephone call. Defendant explained that he knew that Ryan, who had never been in trouble before this, would not attempt to trick Martineau about the date of the preliminary examination or offer her money not to appear. Defendant explained further that he did not intend for Ryan to act on their conversation and that he told Ryan, in a subsequent telephone call that was not recorded, that he did not mean what he had said.

However, as noted above, the recording of defendant's telephone conversation with Ryan was played for the jury at trial. Thus, the jury was afforded the opportunity to hear not only defendant's words, but also his tone and inflection, in order to determine his intent. Additionally, Ryan acknowledged at trial that he had agreed with defendant to attempt to trick Martineau about the date of defendant's preliminary examination and to pay her $200 to not appear. Ryan advised defendant that he would go to Martineau's house for this purpose, and defendant implored him to "make sure you do, dude." The night before defendant's preliminary examination, Ryan went to Martineau's house, where he stayed until 3:00 a.m. Officer Ryan Maki testified that, during a telephone conversation on February 22, 2006, after she failed to appear, Martineau commented to him that Ryan was "keeping an eye on her," and that she suspected that Ryan stayed at her house so late the night before the preliminary examination to keep her from testifying.

Certainly, there was evidence from which the jury could have determined that defendant was not guilty of the charged offenses. Ryan and Martineau each testified that Ryan did not speak to Martineau about the preliminary examination and did not offer her anything not to attend. Martineau denied making the comments attributed to her by Maki and testified that she never intended to attend defendant's preliminary examination. However, the jury was free to

judge the credibility of the witnesses, and to determine defendant's intent, from the evidence presented – including the recording of the telephone conversation between defendant and Ryan. *Avant, supra*; *Queenan, supra*. Defendant, by initiating that telephone conversation and by seeking and securing an agreement with Ryan to bribe Martineau not to attend the preliminary examination, or to trick her into not attending, went beyond "mere preparation." That defendant stated that he was going "to quit talking about it because if they're listening in then that's another charge," clearly indicates that defendant thought that he and Ryan had agreed that Ryan would try to secure Martineau's non-appearance by offering her money or tricking her. Therefore, viewed in a light most favorable to the prosecution, there was sufficient evidence to permit the jury to conclude that defendant was guilty of attempting to bribe, intimidate or interfere with a witness.

Likewise, there was sufficient evidence to convict defendant of conspiring, with Ryan, to bribe, intimidate or interfere with a witness. A conspiracy is a partnership in criminal purposes. *People v Atley*, 392 Mich 298, 310; 220 NW2d 465 (1974), overruled in part on other grounds *People v Hardiman*, 466 Mich 417 (2002). Under such a partnership, two or more persons agree to commit an illegal act or to accomplish a legal act by unlawful means. *People v Meredith (On Remand)*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995). To be a member of a conspiracy, a defendant must specifically intend to combine with others to accomplish an illegal objective. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). The essence of a conspiracy is the agreement itself. Therefore, a conspiracy is complete upon formation of the agreement; no overt act in furtherance of the conspiracy must be shown to support a conviction. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991).

Here, the jury was able to hear the conversation between defendant and Ryan, and it was within the jury's purview to determine whether defendant intended to agree with Ryan to bribe or interfere with the witness. Defendant and Ryan spoke about the importance to defendant of Martineau's non-appearance at the preliminary examination, as well as about specific ways to ensure that non-appearance. Ryan acknowledged that he and defendant specifically agreed that Ryan would attempt to trick or bribe Martineau to keep her from attending the preliminary examination. Therefore, viewed in a light most favorable to the prosecution, there was sufficient evidence to permit the jury to conclude that defendant was guilty of conspiracy to bribe, intimidate or interfere with a witness.

In addition, defendant argues on appeal that his convictions for both witness interference and conspiracy to interfere with a witness violated the constitutional prohibition against double jeopardy. We disagree.

The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a singe offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). However, a conspiracy to commit a crime is a separate offense from the substantive offense. *United States v Felix*, 503 US 378, 391; 112 S Ct 1377; 118 L Ed 2d 25 (1992). Further, this Court applies the same-elements test to determine whether two offenses constitute the "same offense." *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007). Under that test, two offenses are not the "same offense" if each requires proof of an element that the other does not. *Id.* at 300, 307. Conspiracy, MCL 750.157a, and witness interference, MCL 750.122, each require an element that the other does not. Witness interference requires a willful act that interferes with or attempts to interfere with a witness's

ability to attend, testify at, or provide information at an official proceeding. Conspiracy requires an agreement between two persons and is complete upon the agreement; it requires no overt act. Undoubtedly, then, conspiracy and witness interference are separate offenses and, as such, defendant's convictions do not violate his protection against double jeopardy. *Smith*, *supra*.

Defendant also argues that his sentences are disproportionate and constitute an abuse of the trial court's sentencing discretion, despite that the sentences are within the appropriate guidelines range. We disagree.

Defendant's minimum sentence of 42 months' imprisonment fell within the appropriate guidelines sentence range of 12 to 48 months' imprisonment. MCL 769.34(10) provides in pertinent part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Therefore, because defendant's "minimum sentence [for each count] is within the appropriate guidelines sentence range," this Court must affirm defendant's sentences. MCL 769.34(10); *McLaughlin*, *supra*, 258 Mich App 670.

Defendant argues further that MCL 769.34(10) is unconstitutional because it violates his constitutional right to appeal, the separation of powers, and due process. However, our Supreme Court has unanimously determined that MCL 769.34(10) does not violate the constitutional principle of separation of powers and is not forbidden by any provision of the Michigan or United States constitutions. *People v Garza*, 469 Mich 431, 432-435; 670 NW2d 662 (2003). Therefore, defendant's argument lacks merit.

We affirm.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering