STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2008
v	No. 277855 Emmet Circuit Court
LEROY OTIS COLE, Defendant-Appellant.	LC No. 06-002629-FH

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of delivery of less than 50 grams of a controlled substance (oxycodone), MCL 333.7401(2)(a)(iv), conspiracy to deliver less than 50 grams of a controlled substance (oxycodone), MCL 750.157a, and maintaining a drug house, MCL 333.7405(1)(d). He was sentenced as a fourth habitual offender, MCL 769.12, to consecutive prison terms of seven to 40 years for delivery and conspiracy, and to 16 to 24 months for maintaining a drug house, to be served concurrently with the sentence for delivery. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from a controlled drug purchase at his home. The prosecution alleged that defendant delivered four 80 milligram (mg) pills of Oxycontin to his son, Joseph Grabowski, who then delivered them to Andrew Colbeck, on April 27, 2006. Defendant contended that Grabowski stole the pills from defendant and sold them to Colbeck without defendant's knowledge.

Colbeck testified that, at the time of the sale, he was a drug addict and had decided to cooperate with a narcotics team. On April 26, 2006, he made a controlled purchase of two Oxycontin pills from Chris Grabowski at Joseph and Chris' home. He then arranged to make another controlled purchase on April 27 from Joseph Grabowski. He met task force officers before the purchase. The officers searched Colbeck and his car, and provided $240 in marked money. The officers also placed a recording device in Colbeck's car. Colbeck drove to Grabowski's home. The two then drove to defendant's home, which Colbeck stated that they had done between ten to 20 times previously. On this occasion, as on the others, the two stopped approximately one-quarter mile from the home to switch places. Colbeck got into the back cargo area of his SUV and hid, while Grabowski drove the car to defendant's home. Colbeck said he gave Grabowski the $240 before hiding. When they arrived at defendant's home, Grabowski went inside. He was inside for a short time, and Colbeck could see him standing inside the front

door. Grabowski returned to the car and waited outside. Defendant, who was not initially at home, arrived approximately 15 minutes later. Two or three minutes after defendant arrived, Grabowski returned to the car and drove away. Grabowski pulled over, switched places with Colbeck, and told Colbeck that the pills were in the ashtray. Members of the task force then stopped them.

Defendant argues that the prosecution presented insufficient evidence to support his conviction for conspiracy to deliver the oxycodone to Colbeck. We disagree.

We review a defendant's allegations regarding insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*. But we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). Further, all conflicts in the evidence must be resolved in favor of the prosecution. *Id.*

To be convicted of conspiracy 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 coconspirator possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirator possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *People v Mass*, 464 Mich 615, 623-624; 628 NW2d 540 (2001), citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997). The prosecutor need only prove that the defendant cooperated in furthering the conspiracy's objective with knowledge that a conspiracy existed. *People v Meredith (On Remand)*, 209 Mich App 403, 412; 531 NW2d 749 (1995). Proof of a conspiracy may be derived from the circumstances, acts, and conduct of the parties during the crime, and inferences are permissible. *Justice*, *supra* at 347. Minimal circumstantial evidence is sufficient to prove intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

Defendant asserts that, at most, the prosecution presented sufficient evidence to show that defendant intended to deliver oxycodone to Grabowski. We disagree. The prosecutor presented circumstantial evidence of intent to form a conspiracy. Grabowski's attempt to hide Colbeck in the back of the car could be fairly seen as evidence of an agreement to keep Grabowski's customers from finding out who supplied Grabowski, which in turn supports an inference that defendant knew that Grabowski was furnishing the pills to others. We further agree with the trial court's observation that the fact that Grabowski waited for defendant to arrive indicated that defendant was involved in the sale, and that Grabowski did not steal the drugs from defendant. Colbeck's testimony that he and Grabowski had accomplished purchases in this same manner between ten to 20 times provides a legitimate inference of a common scheme for defendant to retain control of the supply. "What the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do." *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002) (citations omitted). The marked money from the sale was found in defendant's home, mixed with his personal funds. In addition, Grabowski's testimony concerning his alleged theft from defendant was refuted by testimony from Colbeck and an investigating officer who watched the transaction and who both maintained that Grabowski did not go into the home to the

extent necessary to support his claim that he searched for the pills. Grabowski's testimony about being unwelcome in defendant's home was refuted by the testimony that he waited for defendant to arrive before leaving the home.

The sheer number of pills involved also supports an inference that defendant was involved in a conspiracy to sell the oxycodone through one or both of his sons. Only four were sold in this transaction, which might be a reasonable amount for Grabowski's personal use. But the number of pills missing from defendant's home was far greater than could be accounted for either through Graboswki's alleged theft, or through defendant's stated amount of personal use of up to eight pills per day. The large number of pills that went "missing" between the time defendant filled his last prescription and the date of the sale leads to a reasonable inference that defendant was involved in sales to persons other than Grabowski.

In addition, the prosecution need not negate every reasonable theory consistent with the defendant's innocence. *Martin*, *supra* at 340. Hence, the prosecutor was not required to disprove defendant's theory that his son stole the pills from him, sold them without his knowledge, and then just happened to pay him for an unrelated debt with the funds used to purchase the oxycodone. Nor did the prosecutor have to disprove defendant's alternate theory that defendant was simply selling drugs to his son at retail prices. We conclude that the evidence, when taken as a whole and viewed in the light most favorable to the prosecution, was sufficient to support defendant's conspiracy conviction.

Defendant also argues that the trial court abused its discretion when it sentenced him to consecutive sentences for his delivery and conspiracy convictions. Defendant acknowledges that MCL 333.7401(3) authorizes a trial court to impose consecutive sentences, but asserts that the trial court abused its discretion given the amount of drugs involved, the fact that he had not been involved in any serious crimes since 1992, and that nothing suggests that concurrent sentences would have been inappropriate. We disagree.

A trial court abuses its discretion when its decision is not within the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269-270; 666 NW2d 231 (2003). The trial court found that a number of factors justified defendant's consecutive sentence. The court noted that the 45-year-old defendant had been involved in criminal conduct for 33 years: defendant had nine felony convictions, two misdemeanor convictions, and a juvenile record. The trial court also discussed at length defendant's decision to "expand the scope of his exploitation of others" by involving his sons in taking and trafficking in drugs, which had resulted in his sons becoming addicted to drugs and incarcerated. The trial court also noted that defendant compounded his crime by fleeing after his conviction, and hiding with other family members, which further exposed them to potential punishment. The trial court found that defendant took no responsibility for his actions, but continued to shift the blame to his children—an observation that is supported by defendant's statements before sentencing. In light of these factors, in particular defendant's use of his children to assist him in his illegal sales, we cannot conclude that the trial court's decision to impose a consecutive sentence fell outside the range of

principled outcomes. *Id.*

There were no errors warranting relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto