STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 3, 2010
v	No. 290884 Eaton Circuit Court
TYLER LYNN ROBINS, Defendant-Appellant.	LC No. 07-020305-FH

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of manufacturing methamphetamine, MCL 333.7401(2)(b)(i), for which he was sentenced as a third habitual offender, MCL 769.11, to five to 40 years in prison. We affirm.

The prosecution asserted that Daniel Cook, John Aspinall, and defendant were manufacturing methamphetamine outside an abandoned farmhouse. Cook, who testified pursuant to a plea agreement, stated that Aspinall called him for a ride, and he arrived to witness Aspinall and defendant mixing chemicals in containers. Cook explained that he believed that defendant and Aspinall were making methamphetamine because he could smell anhydrous ammonia. After approximately 20 minutes, Aspinall and defendant packed up their containers and left in two vehicles, a Cadillac and a Ford truck. Cook testified that defendant placed a filled "Kool-Aid" pitcher, which he believed contained a liquid form of the methamphetamine mixture, into the Cadillac. Cook and Aspinall left in the truck and defendant left in the Cadillac; the vehicles drove in opposite directions away from the property.

While the three men were at the property, a neighbor called the police to report the suspicious activity. As the men were leaving the property, a deputy sheriff pursued the truck into a cornfield. At some point during the pursuit Cook and Aspinall hit a fence and abandoned the truck to flee on foot. Cook testified that as he and Aspinall ran, Aspinall called defendant on a cell phone; Cook was unable to hear the conversation. According to Cook, after Aspinall ended the conversation, Aspinall explained that defendant allegedly told Aspinall that he had passed one of the responding officers and that defendant "had his monster with him." Cook clarified at trial that this was a reference to the methamphetamine. Cook, Apsinall, and defendant were arrested several days following this incident.

On appeal, defendant argues that the trial court erred by admitting Cook's testimony regarding the alleged phone call between Aspinall and himself because it was inadmissible hearsay, considering that Aspinall did not testify at their joint trial. Counsel for defendant did not object to this testimony; thus, we review this issue for plain error. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); see also *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). To prevail, "the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), citing *Grant*, 445 Mich at 548-549; *Carines*, 460 Mich at 763.

Generally, hearsay is inadmissible. MRE 802; *People v Stamper*, 480 Mich 1, 3-4; 742 NW2d 607 (2007). However, a statement is not hearsay if it is offered against a party and it is made "by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." MRE 801(d)(2)(E). To satisfy MRE 801(d)(2)(E), the proponent of the statement must show: 1) that the statement was made "during the course" of the conspiracy, 2) that the statement was "in furtherance" of the objective of the conspiracy, and 3) proof of the conspiracy independent of the statement itself. *Id*.; *People v Martin*, 271 Mich App 280, 316-317; 721 NW2d 815 (2006). Defendant argues that MRE 801(d)(2)(E) does not apply because the alleged manufacture of the methamphetamine was complete at the time the statement was made, and therefore, that the statement was not in furtherance of the conspiracy. We disagree.

A conspiracy "continues 'until the common enterprise has been fully completed, abandoned, or terminated.'" *Martin*, 271 Mich App at 317, quoting *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993). The arrest of a coconspirator or the failure of the objectives ends the conspiracy. See *People v Trilck*, 374 Mich 188, 124, 128; 132 NW2d 134 (1965); see also *Ayoub*, 150 Mich App at 153-154. Here, the conspiracy was the manufacture of methamphetamine. Before the statement was made, Cook, Aspinall, and defendant had already loaded up the vehicles and left the property. Cook testified that defendant placed a container filled with a liquid form of the methamphetamine mixture inside the Cadillac. Significantly, the prosecution's expert witness explained that separating the powdered end product from the intermediate liquid form could be completed at a later time from the initial step in mixing the starting ingredients with a catalyst. A reasonable inference could thus be made that the manufacture was not yet completed when the police began pursuing Cook and Aspinall. Therefore, we find that the statement was made during the course of the conspiracy because it was made before the termination or abandonment of the conspiracy.

Additionally, the statement must have been made in furtherance of the conspiracy. MRE 801(d)(2)(E). "Although idle chatter will not satisfy this requirement, statements that prompt the listener, who need not be one of the conspirators, to respond in a way that promotes or facilitates the accomplishment of the illegal objective will suffice." *Martin*, 271 Mich App at 317. The "in furtherance" requirement includes statements made to coconspirators to keep them apprised of the status of the conspiracy. *Bushard*, 444 Mich at 395 (Boyle, J.), citing *United States v Gibbs*, 739 F2d 838, 845 (CA 3, 1984). Here, the statement was made to inform both Aspinall and Cook that defendant still had his methamphetamine with him and that the objective of the conspiracy, the production of methamphetamine, had not yet been frustrated by the police pursuit. Thus, we find that this statement was in furtherance of the conspiracy, because it

apprised Aspinall and Cook about their collective stake in the success of the conspiracy. See *Martin*, 271 Mich App at 319. Contrary to defendant's assertion, then, the statement was made during the course of the conspiracy, and in furtherance of it, and consequently, there was no error in its admission.

Even were we to find the admission of the statement erroneous, however, we would conclude that defendant has failed to show that his substantial rights were affected. *Carines*, 460 Mich at 763-764. The jury could still consider Cook's testimony that defendant and Aspinall were mixing what he believed was methamphetamine, and the neighbor's testimony that he saw an anhydrous ammonia cloud during the course of the suspicious activities of the three men at the property. This evidence, coupled with the testimony concerning the ingredients and other evidence found in Cook's truck and at the farm, and the expert witness' testimony regarding the manufacturing of methamphetamine, provided the jury with ample evidence to convict defendant notwithstanding the statement. Because the evidence against defendant was strong, any error in the admission of statements made by defendant during his phone call with Aspinall was not outcome determinative. *Jones*, 468 Mich at 355, citing *Carines*, 460 Mich at 763.

Further, because Cook's testimony regarding the phone call was admissible under MRE 801(d)(2)(E) and not outcome determinative, defendant's concurrent claim of ineffective assistance of counsel based on counsel's failure to object to the introduction of this evidence also fails. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

We affirm.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis