STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN BERISHAJ,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 205700
Recorder's Court
LC No. 90-010184

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for conspiracy to possess 50 to 224 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii); MCL 750.157a; MSA 28.354(1). He was sentenced to four years, six months to twenty years in prison. This appeal is being heard with the appeal of codefendant, Kola Dedvukaj, in Docket No. 204754. We affirm.

Defendant's first argument on appeal is that insufficient evidence was admitted at trial to support his conviction. We disagree. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded that all of the elements of the offense were proven beyond a reasonable doubt. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). A conspiracy conviction requires proof of two specific intents: the intent to agree and the intent to accomplish the underlying offense. *People v Missouri*, 100 Mich App 310, 340; 299 NW2d 346 (1980). Direct proof of a conspiracy is not required. Rather, "proof may be derived from the circumstances, acts, and conduct of the parties." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Here, the evidence admitted at trial was sufficient to establish a conspiracy to possess 50 to 224 grams of cocaine. Defendant and Dedvukaj met with undercover Alcohol, Tobacco and Firearms agent Joseph Secretti to discuss the purchase of cocaine from Secretti. Defendant and Dedvukaj were concerned about whether Secretti was a police officer. On a later occasion, defendant and Secretti haggled over price. At the next meeting, Dedvukaj had large quantities of cash in his pocket, thus

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

suggesting that defendant and Dedvukaj were working together. Defendant and Dedvukaj arrived together at the meetings with Secretti. This evidence establishes that defendant and Dedvukaj intended to agree and intended to perpetrate the underlying offense, i.e., to possess cocaine. It is clear from the evidence that defendant was not convicted for merely associating with Dedvukaj, but rather was an active participant in the conspiracy. We conclude that sufficient evidence was presented to support defendant's conviction.

Defendant also contends that the verdict was inconsistent with the facts in the case. Defendant specifically challenges the court's finding that there was an intent to purchase 50 to 224 grams of cocaine. The evidence at trial indicated that defendant and Dedvukaj wanted to purchase an amount of cocaine greater than 224 grams. However, defendant and Dedvukaj brought less cash than the agreed-upon price of $16,000 to the meeting with Secretti in which defendant and Dedvukaj were to show Secretti that they had the money for the transaction. It was thus reasonable for the trial court to find that defendant intended to purchase an amount less than what may have previously been discussed and/or agreed to. We conclude that the trial court's finding was not clearly erroneous. MCR 2.613(C).

Defendant has also failed to argue the merits of the great weight of the evidence issue in his brief. *Sean Jones, supra* at 456-457. In any event, our review of the record indicates that the verdict is not manifestly against the clear weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Defendant's next argument on appeal is that the trial court abused its discretion by permitting Secretti to use written transcripts of taped conversations with defendant and Dedvukaj to refresh his recollection. We disagree. A witness may use a writing to refresh his recollection as long as the writing is produced at trial for the adverse party. MRE 612(a). The transcripts here were available to defendant at trial. Defendant cites *People v Rappuhn*, 78 Mich App 348, 359; 260 NW2d 90 (1977), for the proposition that "[n]ecessity is a prerequisite to use of a writing either to refresh memory or as past recollection recorded; the witness's [sic] memory must need refreshing." Our review of the record indicates that Secretti's memory needed refreshing when he used the transcripts to refresh his recollection. Finally, we note that the fact that the trial court ruled that the transcripts were inadmissible as an exhibit has no bearing on the issue before this Court, i.e., whether the transcripts were properly used to refresh Secretti's recollection. We reject defendant's effort to confuse the two issues.

Defendant next contends that his right to due process was violated because of the loss or destruction of evidence, including audio tapes of defendant's and Dedvukaj's conversations with Secretti. Defendant's argument is without merit because he has not shown that the missing evidence was exculpatory or that the police acted in bad faith. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993); *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Testimony at trial indicated that the tapes may have been destroyed by flooding in the basement-level evidence room. Also, Dedvukaj's counsel admitted that he once had possession of the tapes and that he did not know whether he had returned them to the police or prosecutor. These facts do not establish that the police acted in bad faith. Moreover, defendant has adduced no evidence to establish that the tapes were exculpatory. Defendant's due process rights were not violated.[1]

Defendant's final argument on appeal is that the case should have been dismissed because defendant was entrapped. Consideration of this issue is barred by the law of the case doctrine. The trial court originally dismissed this case on the grounds of entrapment. This Court then reversed and remanded, finding that there was no entrapment. *People v Dedvukaj*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 1996 (Docket Nos. 169723 and 169759). Defendant then sought to raise this issue again during trial. The trial court stated that the issue should not even be before the court in light of this Court's prior opinion. We agree with the trial court.

"Under the law of the case doctrine, an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). Here, the entrapment issue was already decided by this Court in a prior appeal in the same case. The facts have remained materially the same. Defendant contends that we should revisit this issue in light of additional evidence at trial. Our review of the evidence admitted at trial indicates that it does not materially change the facts that are relevant to the entrapment issue. We therefore conclude that consideration of the entrapment issue is barred by the law of the case doctrine.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Robert J. Danhof

[1] Even if the authority cited by defendant, including *People v Wallace*, 102 Mich App 386, 390; 301 NW2d 540 (1980), is controlling, defendant's right to due process still was not violated because there is no evidence that the tapes were favorable to the defense.