STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUIS A. ROSADO,

Defendant-Appellant.

UNPUBLISHED
November 10, 1998

No. 196765
Oakland Circuit Court
LC No. 95-139251 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAUL A. DAVID,

Defendant-Appellant.

No. 196876
Oakland Circuit Court
LC No. 95-139250 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL C. RODRIGUEZ,

Defendant-Appellant.

No. 197584
Oakland Circuit Court
LC No. 95-139252 FC

Before: Young, P.J., and White and Wahls, JJ.

PER CURIAM.

Following a trial before separate juries, defendants were each convicted of possession with intent to deliver at least 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and conspiracy to deliver at least 650 grams of cocaine, MCL 750.157a; MSA 28.354(1) and MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). They appeal as of right, and we affirm.

I

We first address Rosado's and Rodriguez' claims of error asserting the erroneous admission of expert and profile evidence. We review the admission of evidence for an abuse of discretion. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996).

Profile evidence has been defined as "an informal compilation of characteristics often displayed by those trafficking in drugs." *United States v McDonald*, 933 F2d 1519, 1521 (CA 10, 1991), quoted in *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995), or "a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity." *Id.* This Court has proscribed the use of drug profile evidence as substantive evidence of guilt because its probative value is substantially outweighed by the danger of unfair prejudice. *Hubbard, supra* at 241, citing MRE 403.

In the instant case, the prosecutor questioned a police sergeant regarding a previous investigation of Puerto Rican drug rings operating in the City of Pontiac. Rosado's counsel objected on the basis that the testimony was immaterial and irrelevant, and Rodriguez' counsel joined in the objection. The trial court sustained the objection, ordered the jury to ignore the testimony given as irrelevant, and instructed the prosecutor to proceed with relevant testimony. The prosecutor then questioned the sergeant regarding his general knowledge pertaining to groups or persons who deal in kilograms of cocaine. The sergeant answered with the same answer he had given to the question regarding the Puerto Rican drug rings.

The sergeant testified that persons who deal in kilograms of cocaine operate secretively, within a tightly knit group of individuals. Some of these individuals provide a holding house, where kilograms of cocaine are stored. The cocaine is seldom left in any one place for a period of time. The sergeant also testified regarding quantities of cocaine, quality, pricing, packaging, distribution, and different levels of drug dealers.

We first note that defendants did not object to the testimony on the basis that it was impermissible profile evidence, but rather on the basis that evidence concerning prior investigations of Puerto Rican drug rings was irrelevant to the instant case because there was no evidence connecting the instant case to that investigation. This objection was sustained, and the sergeant continued his testimony without further objection.[1] Generally, an objection at trial based on one ground is insufficient to preserve an appellate challenge to the evidence based on a different ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Because the issue is not properly preserved, we will not consider it "unless the error could have been decisive of the outcome or it falls under the category of

cases . . . where prejudice is presumed or reversal is automatic." *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

We conclude that most of the sergeant's testimony is not properly characterized as impermissible profile evidence, and was properly admitted expert testimony. We further conclude that the limited profile testimony was harmless, and not decisive of the outcome of the case. There was substantial direct evidence of defendants' guilt, independent of the profile evidence. We conclude that defendants were not found guilty based on profile evidence, and we find no error requiring reversal.

II

Rosado next argues that his conspiracy conviction was not supported by sufficient evidence. He argues that the facts of this case establish several separate delivery transactions, rather than a conspiracy. As a result, Rosado asserts, a conviction of conspiracy cannot survive Wharton's rule because each transaction involved two people, the number required for delivery. We disagree.

Wharton's rule limits the scope of the crime of conspiracy by providing that "[a]n agreement to commit a particular crime cannot be prosecuted as a conspiracy where the number of alleged conspirators do not exceed the minimum number of persons logically necessary to complete the substantive offense." *People v Blume*, 443 Mich 476, 482 n 11; 505 NW2d 843 (1993). Because delivery of a controlled substance necessarily requires a minimum of two persons, there can be no prosecution for conspiracy where only the buyer and seller are involved.[2] *Id*; *People v Davis*, 408 Mich 255, 280; 290 NW2d 366 (1980) (opinion by Levin, J.).

To determine whether the prosecution presented sufficient evidence of guilt to sustain a conviction, we must consider the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all the elements of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended on other grounds, 441 Mich 1201 (1992). To establish the existence of a conspiracy, the prosecution must establish that two or more persons voluntarily agreed to commit a criminal offense. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). There must be evidence that the persons "specifically intended to combine to pursue the criminal objective of their agreement." *Id*. Thus, there must be proof that the individuals "specifically intended to further, promote, advance or pursue an unlawful objective." *Id*. at 347. Proof of a conspiracy can be drawn from the circumstances, acts and conduct of those involved, and inferences are permissible. *Id.* at 347. The scope of the conspiracy must be determined through examining circumstantial evidence, but any inferences that are drawn must be reasonable. *Id.* at 348. "A defendant may become a member of an existing conspiracy if he cooperates knowingly to further the object of the conspiracy, although mere knowledge that someone proposes unlawful action is alone not enough. For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective." *Turner*, *supra* at 570, citation omitted.

We conclude there was sufficient evidence to convict Rosado of conspiracy to deliver over 650 grams of cocaine, and that Wharton's rule does not apply because the intended transferee in the conspiracy was the informant and the conspirators were not solely in a seller/buyer relationship.

The informant testified that he contacted Rodriguez, asking Rodriguez if he could get him a kilogram of cocaine. The informant told Rodriguez he had a buyer willing to pay $28,000, and the informant would pay Rodriguez $26,000. Rodriguez told the informant that he would have to contact someone and get back with the informant. Eventually, Rodriguez told the informant that he was able to get him a kilogram from some people who would be coming in from Detroit. Following Rodriguez' instructions, the informant picked Rodriguez up at his house and Rodriguez gave him directions to Rosado's house. Rodriguez introduced the informant to Rosado. They went to the basement where Rosado presented a brick of cocaine, offering it to Rodriguez. Rodriguez would not take it, so Rosado handed it to the informant. The informant checked the cocaine. There was a knock on the door, and Rosado went upstairs. When Rodriguez and the informant went upstairs, leaving the cocaine behind, Raul David was in the house. The informant asked Rodriguez if David was the man from Detroit. Rodriguez told him he was.

Rosado gave a statement to police at the scene. He told police that Rodriguez had come to his house the night before and had asked Rosado if he could get him a kilogram of cocaine. Rosado called a friend in Detroit, Papito, the next morning and asked if he could find him a kilogram of cocaine. He said he could. The price was $22,000. Rosado was planning to sell the kilogram to Rodriguez for $23,000, and Rodriguez told him he was going to sell the cocaine to someone else for $25,000. Papito's brother (Raul David) brought the cocaine to Rosado's home at 1:30 p.m. on the day of the raid, arriving in a car. Rosado brought the cocaine into the house and then put it in his basement. David then waited for the money. After David brought the kilogram, Rodriguez and "a black guy" (the informant) came to Rosado's house. Rosado showed them the cocaine, and the "black guy" tried it, said they would be back with the money, and left with Rodriquez.

From this evidence, a rational finder of fact could conclude that Rosado entered into an agreement to obtain a kilogram of cocaine from Papito, through David, for delivery to Rodriguez' purchaser (the informant), who would come up with the money to pay Rosado's supplier and provide a profit for Rodriquez and Rosado. Although different amounts of money were arranged to be exchanged between Rosado and Papito, Rodriguez and Rosado, and the informant and Rodriguez, a rational trier of fact could conclude that these were not a series of separate transactions and that the conspirators shared a common goal of delivery of the cocaine to the informant.

Further, Wharton's rule is inapplicable because the conspiracy here involved more than just the delivery by one of two conspirators to the other. The agreement that is essential to the crime of delivery of a controlled substance, and which therefore cannot support a conspiracy charge under Wharton's rule, is the agreement between the seller and buyer, or transferor and transferee, to transfer the substance. But this agreement is not the basis of the instant conspiracy. Here there were more than two persons involved in the transaction that was the basis of the conspiracy, *People v Weathersby,* 204 Mich App 98, 107; 514 NW2d 493 (1994), and the delivery was to be to a third party.

III

Rosado's final argument is that the mandatory life sentence for his conspiracy conviction is contrary to MCL 791.234(6); MSA 28.2304(6). We disagree. This issue presents a question of law, which we review de novo. *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996).[3]

Resolution of this issue requires an examination of the interplay between several statutes. Our primary goal in statutory interpretation is to ascertain and advance the Legislature's intent. *People v St. Andre*, 225 Mich App 187, 192; 570 NW2d 154 (1997). In determining the intent of the Legislature, we must first examine the specific language of the statute. *People v Gould*, 225 Mich App 79, 83; 570 NW2d 140 (1997). We presume that the Legislature intended the meaning plainly expressed in the statute. Where the statutory language is clear, there is no room for judicial interpretation and we must apply the statute as written. *Id.* Where a statute provides definitions of terms, those definitions must be applied. *People v Chupp*, 200 Mich App 45, 49; 503 NW2d 698 (1993).

MCL 791.234; MSA 28.2304 provides that "[a] prisoner under sentence for life or for a term of years, other than a prisoner sentenced to life for murder in the first degree or sentenced for life or for a minimum term of imprisonment for a major controlled substance offense," is eligible for parole consideration. The term "major controlled substance offense" is defined for purposes of MCL 791.234; MSA 28.2304 to include conspiracy to commit a violation of MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), delivery of at least 650 grams of a controlled substance. MCL 791.233b[1]; MSA 28.2303(2). Thus, the plain language of the "lifer law," MCL 791.234(6); MSA 28.2304(6), excludes from parole consideration a person convicted of conspiracy to deliver at least 650 grams of cocaine.

Rosado argues, however, that in light of *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989), this Court should invoke the rule of statutory construction that justifies a departure from the literal construction of a statute when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act. In *Jahner*, our Supreme Court concluded that persons sentenced to life imprisonment for conspiracy to commit first-degree murder are eligible for parole consideration because "the parole prohibition in the Lifer Law which expressly applies to first degree murder does not apply to the separate and distinct crime of conspiracy to commit that offense." *Id.* at 498. Rosado argues that a literal construction of the lifer law is absurd and unjust because such a construction punishes persons who conspire to deliver 650 grams or more of a controlled substance more severely that those who conspire to commit the most severe crime of first-degree murder, by allowing the parole of the latter but not the former.

We are not persuaded, however, that the Legislature did not intend the result occasioned by the literal application of the statute, including its definition of "controlled substance offense." It is clear that the Legislature intended to deny parole consideration to those convicted of the enumerated controlled substance offenses, including conspiracy to deliver 650 grams or more of cocaine. Therefore, Rosado's argument that his sentence to nonparolable life in prison is contrary to the "lifer law" must fail.

IV

David first argues that his motion to quash the information was erroneously denied because the exchange between the informant and Rodriguez, indicating that David was the person from Detroit who had brought the cocaine to the house, was not made in furtherance of the conspiracy, and was therefore wrongly admitted in support of the bindover. We disagree.

At the preliminary examination, the informant testified that he arranged a purchase of a kilogram of cocaine through Rodriguez, who told the informant that the cocaine was coming from a person in Detroit to a person in Pontiac. They went to the Pontiac location and met Rosado. The three men went into the basement of the house and the informant examined a brick of cocaine. While they were in the basement, there was a knock at the door, and Rosado left the basement. The informant testified that after a few seconds he became uncomfortable because he did not know who was at the door. He went upstairs, with Rodriguez following, and saw David. The informant was not introduced to David. The informant asked Rodriguez whether David was the man from Detroit who had brought the kilogram of cocaine. Rodriguez answered, "yes."

MCR 801(d)(2)(E) provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy" is not hearsay and is admissible. Both requirements—that the statement be made during the conspiracy and in furtherance of the conspiracy—must be met. David asserts that the comment by Rodriguez, in response to the informant's question, was not made in furtherance of the conspiracy. We disagree.

A statement that advances or promotes an object of the conspiracy is considered made in furtherance of the conspiracy. *People v Centers*, 141 Mich App 364, 376; 367 NW2d 397 (1985), rev'd on other grounds 453 Mich 882 (1996). Statements made in furtherance of a conspiracy have been characterized as those that "prompt the listener . . . to respond in a way that promotes or facilitates the carrying out of a criminal activity" and may include "statements that provide reassurance, or seek to induce a coconspirator's assistance or serve to foster trust and cohesiveness . . . ." *People v Bushard*, 444 Mich 384, 395-396; 508 NW2d 745 (1993) (Boyle, J). As explained in *United States v Monus*, 128 F3d 376, 392-393 (CA 6, 1997):

> "A statement is 'in furtherance of' a conspiracy if it is intended to promote the objectives of the conspiracy." We have recognized that "statements which prompt a listener to act in a manner that facilitates the carrying out of the conspiracy are admissible under [FRE 801](d)(2)(E)." Statements that "identify participants and their roles in the conspiracy" also qualify as statements made in furtherance of the conspiracy. [Citations omitted.]

Thus, the court properly concluded that Rodriguez' statement confirming the identity of David and that he was a participant in the transaction was made in furtherance of the conspiracy. The informant was seeking reassurance that David was "okay," and the statement was made in that context.

V

David next asserts that his statement to the police was inadmissible because it was involuntary and not understandingly made. A trial court's determination as to the voluntariness of a statement is reviewed by examining the entire record and, based on the totality of the circumstances, making an independent determination whether the statement is "'the product of an essentially free and unconstrained choice by its maker' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired.'" *Gould*, *supra* at 88; *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). We must "defer to the trial court's superior ability to view the evidence and witnesses" and may not disturb the trial court's findings absent clear error. *Peerenboom*, *supra*; *Gould*, *supra*.

At his *Walker*[4] hearing, David testified that he requested an attorney and indicated that he did not wish to make a statement. He claimed that his request for an attorney was denied. According to David, the officers told him that he faced life in prison without parole and that he would never see his family again. If he cooperated, however, he would go home that day. The interviewing officer, on the other hand, testified that David simply waived his rights and indicated that he wanted to cooperate. The officer stated that he never threatened or promised anything to David, and denied ever telling David that it would be in his best interest to make a statement.

At the beginning of David's statement, after he acknowledged that he understood his rights, the following exchange took place:

> *BP (interviewing officer):* Do you wanna talk to a lawyer before answering questions, or do you want to cooperate like we've been speaking, uh, like you said, uh, you wanted to cooperate and speak to us?
>
> *RD (defendant David):* If it [sic] be better.
>
> *BP:* You have to answer. Would you rather, do you want to cooperate and speak to us like you've indicated?
>
> *RD:* Yes.

The circuit court concluded that David's request for counsel was at best ambiguous. We agree. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). Further, the court did not find credible David's claims regarding his understanding of his rights, his assertion of his right to counsel before the tape was started, and the alleged threats and promises. We will not disturb the circuit court's credibility determination, *Peerenboom*, *supra*, and affirm the court's finding that David's statement was made voluntarily and understandingly.

VI

Next, David argues that the trial court erred in admitting the informant's testimony regarding Rodriquez' statement that defendant was the one who had brought the cocaine from Detroit. We reject

this argument for the reasons discussed in section IV, *supra*. The testimony was properly admitted as regarding a statement made in furtherance of the conspiracy.

VII

David further asserts that the court erred in admitting his statement because the corpus delicti rule had not been satisfied. He asserts that his confession should not have been admitted because there was no evidence to demonstrate a nexus between him and either possession of the cocaine or the conspiracy. We disagree.

The corpus delicti rule prevents the use of a defendant's confession to convict the defendant of a crime that did not occur. *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). The rule prohibits the admission of a defendant's confession in the absence of "direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury." *Id.* Significantly, the identity of the offender is not part of the corpus delicti; "[i]t is sufficient to show that the crime was committed *by someone*." *Id*.

There was evidence in this case, independent of David's statement, establishing the existence of the cocaine and that it was possessed by someone with an intent to deliver and that there was a conspiracy to deliver it. Therefore, the corpus delicti of the offense was established without David's statement, and the trial court did not err in admitting the statement.

VIII

David next argues that the trial court erred in denying his motion for directed verdict based on the insufficiency of the evidence to establish that he possessed cocaine or was involved in a conspiracy to deliver cocaine. We disagree. Similar to a review of the evidence supporting a conviction, *Wolfe, supra*, this Court reviews a trial court's ruling on a motion for directed verdict by considering the evidence admitted by the prosecution up to the time the motion is made in a light most favorable to the prosecution to determine whether a rational factfinder could find the essential elements of the offense proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997), *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

We first examine David's argument as to the possession with intent to deliver conviction. The elements of possession with intent to deliver 650 grams or more of cocaine require proof that (1) the recovered substance is cocaine; (2) the cocaine is in a mixture weighing 650 grams or more; (3) the defendant was not authorized to possess the substance; and (4) the defendant knowingly possessed the cocaine with the intent to deliver. *See Wolfe, supra* at 516-517; MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). There is no dispute that the evidence supported a finding of the first three elements of the offense. David argues that he did not possess the cocaine and thus did not possess it with intent to deliver.

In establishing the possession element, the prosecution need not prove actual physical possession; proof of constructive possession is sufficient. *Konrad, supra* at 271. Furthermore, the

defendant may share actual or constructive possession with another. *Id.* The critical element is that the defendant have dominion or control over the substance, which requires that he have the right to possess it. *Id.* To prove constructive possession, however, there must be more evidence than that the defendant was present at the location where the substance was found. *Wolfe*, *supra* at 520. There must be an additional connection between the defendant and the substance. *Id.* "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband," and the finding that the defendant exercised dominion and control over the substance may be established through inferences drawn from direct or circumstantial evidence. *Id.* at 521.

David was also charged on an aiding and abetting theory. An aider and abettor may be convicted and punished as if he were a principal. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Aiding and abetting encompasses all forms of assistance a defendant may give the principal and includes all words or conduct that might support, encourage or incite the commission of a crime. *Turner*, *supra*. To support a conviction of a defendant as an aider and abettor, the prosecution must prove that (1) the defendant or another person committed the offense; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant either intended the commission of the crime or knew that the principal intended to commit the crime at the time the defendant gave the aid and encouragement. *Id.* An aider and abettor must possess the same requisite intent as is required by the principal, *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996), but the factfinder may infer the aider and abettor's state of mind from the facts and circumstances. *Turner*, *supra*. Although the principal's guilt must be proven, he need not be convicted. *Id.* at 569. The prosecutor must present sufficient evidence to demonstrate that the crime was committed and that the defendant either committed it or aided and abetted the principal. *Id.*

The prosecution presented evidence that the cocaine was brought from Detroit to Rosado's house. The informant testified that Rodriguez told him that David was "the guy from Detroit." Although he denied bringing the cocaine to Rosado, David admitted through his statement that he was at Rosado's to collect the money for the cocaine at the request of the person who supplied Rosado with the cocaine, and that he knew the money was in payment for the cocaine. David told police that Rosado asked him if he wanted to take the cocaine back because Rosado thought that the buyer was not going to go through with the deal. Further, David admitted that his fingerprints might be found on the cocaine. Additionally, as the prosecutor argued, consideration of David's statement in light of all the evidence in the case could support a reasonable inference that David was at the house twice that day, once before Rodriquez and the informant arrived, and a second time while they were there and the house was under surveillance. From this evidence, which we must view in favor of the prosecution, the jury could have concluded that David brought the cocaine to Rosado, thereby possessing it with intent to deliver, or that he had constructive possession of the cocaine while he waited for the money, or that he aided and abetted others in the possession with intent to deliver, by collecting the payment for the cocaine, which was a prerequisite of the transaction. Therefore, the trial court did not err in denying defendant's motion for directed verdict on this count.

We now turn to the evidence regarding the conspiracy conviction. David told police that a man, whose name he did not want to divulge, called him the morning of the drug raid and asked him to pick up $23,000 from "Salo," who was identified as Rosado. Although the unidentified man did not tell David that the money was from a cocaine deal, David admitted that he knew that to be the case. David had been to Rosado's house before. When he arrived at Rosado's house, Rosado told him that he was waiting for someone to bring the money. David stated that he did not know that the kilogram was at Rosado's house when he got there, but that he figured out that it was at Rosado's when Rosado told him that he was waiting for another person. Rosado asked David if he wanted to take the cocaine back to Detroit because Rosado suspected that the deal was not going to go through. According to David, the person Rosado was waiting for pulled up when David and Rosado were on the porch. There was sufficient evidence to support a finding that David was part of a conspiracy to deliver the cocaine in exchange for money. The trial court did not err in denying David's motion for directed verdict.

IX

David's final argument is based on the trial court's failure to instruct the jury on accessory after the fact. Before closing arguments, David requested an instruction on accessory after the fact. The court stated that it would give the instruction if supported by the facts.[5] In closing argument, defendant argued that the informant was lying when he testified that he asked Rodriguez if David was the "guy" from Detroit and that Rodriguez said "yes." He also argued that there was no evidence that David brought the cocaine to Rosado's house, and he neither possessed the cocaine nor intended to deliver it. Counsel argued that according to David's statement, David was at Rosado's only as a favor, to pick up the money. Counsel further argued that because the offense was complete when David arrived to pick up the money, he was merely an accessory after the fact. The prosecutor argued on rebuttal that David was not an accessory after the fact because he was aware of, and participated in, the actual offense, and did not simply arrive after the offense was completed and help cover-up.

After argument, there was further discussion regarding the instruction:

> MR. SEIKALY [defense counsel]: The only thing I've got, your Honor, is that I want the accessory after the fact instruction, read to the jury. I don't have a secretary to type it up.
>
> * * *
>
> I have no problem with you just reading it out of the book, if you want.
>
> THE COURT: If I was reading it out of the book, it gives no consequences of what happens if they wanted to find him as an accessory after the fact.
>
> MR. SEIKALY: Well, we'd have to give them another jury verdict. They could find him—
>
> THE COURT: He's not charged with anything but possession and conspiracy.
>
> MS. GUCCIARDO [prosecutor]: Right.

THE COURT: So the question is, if they find him as an accessory, I presume they have to find him not guilty, wouldn't they?

MR. SEIKALY: Mm-hmm.

THE COURT: Would you agree with that?

MS. GUCCIARDO: Yes.

THE COURT: Okay.

MR. SEIKALY: Then I'd want an instruction to that.

MS. GUCCIARDO: Is that what you're saying, that you – well, actually, let me think about that before I—

THE COURT: We'll discuss that. But if he's entitled to the—and there is evidence—if they disbelieve the evidence—

MR. SEIKALY: Then he's just—

THE COURT: --then he is possibly—they could find his [sic] an accessory after the fact.

MS. GUCCIARDO: Your Honor, I don't—

THE COURT: If they disbelieve the evidence. Now don't argue with the strength of the evidence. No sense going into that now.

MS. GUCCIARDO: No, I understand, but I want to say one thing in relation to that. I believe that the accessory after the fact instructions when you give it, when the crime is completed and they do something like to hide it or something like that, that's not—

THE COURT: It's customarily given in this matter. I agree. Maybe the better position would be that if they find that they don't believe any of this testimony, then he's not guilty. That's what you're saying. That's what you're really saying.

MR. SEIKALY: After arguing that he might be guilty as an accessory after the fact. That's why I want the instructions.

THE COURT: Let's look at that a little closer before we go in.

MS. GUCCIARDO: Yes, I don't think—

(At 12:07 p.m., Court recessed)

Arguments were then presented to Rosado's jury and then Rodriquez' jury. The instructions were then read to the jury without further record discussion of the accessory instruction. After the instructions were read, the issue was again addressed:

MR. SEIKALY: Well, your Honor, I'm not satisfied with the instructions. I think that an instruction as to accessory after the fact should have been given.

There was certainly enough evidence to show that something should have been said about that, that at the minimum, that there should have been an instruction indicating that if there [sic] was the jury's belief that Mr. David was guilty of being an accessory after the fact, that they would have to find Mr. David not guilty of the charges of possession of over 650 grams with intent to deliver and the conspiracy count.

THE COURT: I'm satisfied, sir, that the jury was appropriate [sic] instructed. I did indicate to the jury that if they didn't find any of the elements on any of the charges as listed, then that charge must be a not guilty verdict. I did so instruct them and I think that covers that matter appropriately and I will not add to the instructions.

All right. Anything else, sir?

MR. SEIKALY: No.

David argues that the trial court's failure to give the instruction compromised his position and constitutes error requiring reversal because he had tailored his argument to the instruction.

In *People v Clark*, 453 Mich 572; 556 NW2d 820 (1996), our Supreme Court addressed a similar, although distinguishable, situation. In three separate opinions, four justices concluded that a new trial was required where the trial court, after the prosecutor's argument, and with the prosecutor's acquiescence, erroneously agreed to the defendant's request for a modification in the involuntary manslaughter instruction; defense counsel argued based on the modified instruction; and the court later determined that the instruction as modified should not be given and gave the unmodified instruction. The lead opinion explained that not all such errors require reversal, and reversal is required only if the error was prejudicial. *Clark*, *supra* at 587 (Mallett, J.). Prejudice is determined by the effect of the error on substantial rights or its effect on the verdict. *Id*. at 588. Thus, we must determine whether David was prejudiced by the failure to instruct on accessory after the fact.

As explained in *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996), lv gtd 457 Mich 869 (1998):

> Those who are only accessories after the fact by definition did not participate in the . . . principal offense and did nothing in furtherance of it before or while it occurred. An accessory after the fact is a person who with knowledge of another's guilt gives assistance to that felon in an effort to hinder the felon's detection, arrest, trial or punishment. An accessory after the fact aids a perpetrator in the concealment of evidence of the crime or in the flight or concealment of the perpetrator. [*Perry*, *supra* at 534.]

In determining whether the instruction would have been proper, we will look at the evidence as David would have had the jury view it. There was no evidence that David merely assisted one of the other participants to hinder his arrest, trial or punishment, or merely aided in the concealment of the evidence. The person whose job it is to pickup the payment for the cocaine is not an accessory after

the fact. David was either guilty of the principal offenses or not guilty. While David accurately observes that upon his arrest he concealed the identity of the supplier of the cocaine for whom he admitted he was picking up the money, this does not make him an accessory after the fact with regard to his participation in the principal offense. Further, he did not present this argument in support of his request for the instruction below. We conclude that David was not entitled to the accessory instruction.

We turn then to the question whether he was nevertheless prejudiced by the court's failure to give the instruction because counsel's argument assumed that the instruction would be given, as in *Clark, supra*. We find *Clark* distinguishable in two respects. First, in *Clark* the trial court unequivocally stated that it would give the modified instruction. Here, the trial court stated that the instruction would be given if supported by the evidence. While the court should have been mindful of the court rule requiring that instructions be settled before argument, MCR 2.516, and should have resolved the issue finally before argument, counsel was apparently content with a ruling that was conditioned on the propriety of giving the instruction in light of the evidence. That condition was not met, as we have concluded that there was no evidence that David was an accessory after the fact. Further, in *Clark*, the instruction at issue pertained to a crucial element of the charged offense. "There was reliance on a mischaracterization of a critical issue that directly affected the theories argued by defense counsel that resulted in prejudice to the defense," *id.* at 587, and "the effectiveness of defense counsel's argument and the totality of the defense was impaired by counsel's reliance on inaccurate information regarding the jury instructions. *Id*. at 605. Here, the accessory argument was ancillary to counsel's argument that the informant was not credible and that the prosecution had not established David's guilt of the offenses. The argument was clearly intended to provide the jury with an alternative guilty verdict, but the failure to give the instruction did not undermine counsel's argument that David was not guilty of the charged offenses.

Moreover, the jury found, contrary to David's argument, that he both agreed with others to deliver the cocaine (conspiracy), and that he possessed it, or aided and abetted the possession of it, with the intent to deliver, thereby rejecting the theory that he did not participate in the principal offense. Had the jury believed that David did not bring the cocaine and did not exercise control over the cocaine, it could have found him guilty of the conspiracy count alone, on the theory that he only agreed to pick up the drug money. Thus, we conclude that David was not prejudiced by the trial court's instructional error, and the trial court's failure to instruct the jury as to accessory after the fact was not reversible error.

X

Rodriguez first argues that there was insufficient evidence to convict him of conspiracy. We disagree. The informant testified that he asked Rodriguez if he knew where he could get a kilo of cocaine, and told him that he had a buyer willing to pay $26,000 and that the informant wanted to make $2000. According to the informant's testimony, Rodriguez apparently tried one source, who never got back to him, and then later told the informant that he had gotten in touch with some people and the cocaine was being brought from Detroit at about 1 p.m. Rodriguez later urged the informant to "hurry up because they said they might leave." Rodriguez took the informant to Rosado's house. After Rodriguez and the informant were shown the cocaine and announced they were leaving to get the

money, Rodriguez responded affirmatively to the informant's inquiry whether David was the person who brought the cocaine from Detroit. Rodriguez acknowledged to police that David was there to pick up the money, and that he had contacted Rosado to obtain a kilo of cocaine. Viewed in a light most favorable to the prosecution, there was sufficient evidence to support a finding that Rodriguez entered into an agreement to have a kilogram of cocaine brought from Detroit to Rosado's house for delivery to Rodriguez and the informant.

Rodriguez also argues that the trial court erred in denying his motion for directed verdict as to possession with intent to deliver because there was insufficient evidence to establish that he possessed the cocaine. We note that the jury was instructed as to an aiding and abetting theory. The evidence presented was sufficient to support a finding that Rodriguez aided and abetted the possession with intent to deliver. Rosado clearly possessed the cocaine and there was clearly an intent to deliver it to the informant. Rodriguez took part in this plan by arranging the connection between the informant and Rosado. He directed the informant to Rosado's house and accompanied him inside. Rodriguez told police that he did not intend to buy the cocaine but was "just doing a favor," "finding someone with a connect." Rodriguez admitted that the informant might have had a buyer, and that Rodriguez had the source and expected to make some money. More was involved than a sale from Rosado to Rodriguez, and the evidence was sufficient to support Rodriguez' conviction of possession with intent to deliver.

XI

Next, Rodriguez argues that the trial court erroneously admitted evidence of prior bad acts. We disagree.

We review a trial court's admission of other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Evidence of an individual's other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts. *Id.*, MRE 404(b). Such evidence may be admissible, however, for other purposes under MRE 404(b)(1), such as opportunity, intent or knowledge. The following formulation guides admission of other acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Crawford, supra*, at 385, quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994).]

Rodriguez argues that the trial court's refusal to excise from his statement to the police various remarks to the effect that he was thinking about, or wanting to, get "back in the business" resulted in manifest injustice because the remarks were more prejudicial than probative. Rodriguez also challenges the admission of testimony of the informant that the reason the informant contacted Rodriguez to buy cocaine was that he had previously bought a kilo of cocaine from him. We find no error.

At trial, Rodriguez contended that both he and the informant were mere purchasers of the kilo of cocaine, that he was not the seller, that he did not enter into a conspiracy to deliver the cocaine to the informant, and that he was merely doing the informant a favor. The challenged evidence tended to undermine Rodriguez' claim that he was merely a buyer with the informant, as a favor to him. We conclude defendant has not established manifest injustice because the evidence was more than marginally probative and, when considered in the context of the entire trial, was unlikely to have been given undue or preemptive weight by the jury, and thus was not unfairly prejudicial. *Crawford, supra* at 397-398. Further, the trial court gave a limiting instruction immediately before the testimony regarding the prior sale was elicited. We conclude the probative value of the evidence was not substantially outweighed by unfair prejudice and find no abuse of discretion.

Because the prosecution elicited this testimony at the preliminary examination and Rodriguez thus had notice of the statement, we find no reversible error in the court's waiving a more formal pretrial notice.

XII

Rodriguez' arguments regarding expert and profile testimony are addressed in part I, *supra*.

XIII

Rodriguez next asserts that the trial court failed to instruct the jury on his theory of the case. However, he acknowledges that no objection was raised in the trial court, and fails to identify his theory of the case and how the facts supported that theory. A party may not merely announce a position and leave it to the Court to discover and rationalize the basis for the claim. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). This issue is not preserved for appellate review.

XIV

Next, Rodriguez argues that the trial court's refusal to instruct on Wharton's Rule denied him a fair trial. We disagree.

The trial court has the discretion to determine whether a jury instruction is accurate and applicable in view of all the factors of the case, *Perry*, *supra* at 526, and we review jury instructions as a whole to determine whether there is error requiring reversal. *McFall*, *supra* at 412. Imperfect instructions do not necessarily require reversal, providing they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Wharton's Rule is inapplicable where the number of alleged coconspirators exceeds the number required to commit the target crime. *Weathersby*, 204 Mich App at 107. The trial court instructed the jury on conspiracy:

> The Defendants are charged with the crime of conspiracy to deliver 650 or more grams of cocaine. Anyone who knowingly agrees with someone else to deliver 650 or more grams of cocaine is guilty of conspiracy.

To prove the Defendants are guilty, the Prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that the Defendants knowingly agreed to deliver cocaine; [and] second, that the Defendants specifically intended to commit or help commit that crime . . . .

Now an agreement is the coming together or meeting of the minds of two or more people, each person intending and expressing the same purpose.

* * *

To find the Defendants guilty of conspiracy, you must be satisfied beyond a reasonable doubt that there was an agreement to deliver cocaine.

* * *

A finding that each Defendant was merely with other people who were members of a conspiracy is not enough by itself to prove that each Defendant was also a member.

In addition, the fact that a person did an act that furthered the purpose of an alleged conspiracy is not enough by itself to prove that the person was a member of the conspiracy.

It is not necessary for all the members to know each other or know all the details of how the crime will be committed. But it must be shown beyond a reasonable doubt that each Defendant agreed to commit the crime and intended to commit or help commit it.

* * *

You may consider evidence of what the other members of the alleged conspiracy did or said before each Defendant became a member, but only in order to determine the nature and purpose of the conspiracy after each Defendant joined.

* * *

Ladies and gentlemen, Defendant Rodriguez is not charged with being in a conspiracy with [the informant]. You cannot find that Defendant Rodriguez conspired with [the informant] and use that to convict him of the conspiracy count, because it is a legal impossibility for the Defendant Rodriguez to be in a conspiracy with the informant . . . .

* * *

> Each Defendant in this case is entitled to have his guilt or innocence decided individually. Each jury must decide whether their particular Defendant was a member of the alleged conspiracy, just as if he were being tried separately.
>
> To determine whether each Defendant was a member of the alleged conspiracy, you must decide whether each individual Defendant intentionally joined with anyone else to deliver cocaine.

Although not perfectly articulated, the instructions to the jury indicate that defendant had to have agreed with at least one other conspirator, who could not be the informant, to deliver cocaine. The court instructed the jury to examine the evidence as to their particular defendant to determine whether he was in a conspiracy involving the other defendants. The prosecutor never argued that a simple agreement between Rosado and Rodriguez for Rosado to sell cocaine to Rodriquez would constitute a conspiracy to deliver cocaine. We conclude Rodriguez was not denied a fair trial by the court's refusal to give the requested instruction.

XV

Next, Rodriguez argues that his statement was involuntary and should not have been admitted. At the *Walker* hearing, the trial court assessed Rodriguez' credibility and rejected his claim that he had been promised leniency and was tricked and deceived into making the statement. We defer to the ability of the trial court to assess the witnesses' credibility and do not find its conclusion on credibility to be clearly erroneous. *Peerenboom*, *supra*. For similar reasons, we reject Rodriguez' argument that his confession should have been excluded as untrustworthy.

XVI

Rodriguez argues that the court erred in rejecting his argument that he was entrapped as a matter of law. We disagree. We review the trial court's ruling following an evidentiary hearing on entrapment for clear error. *People v Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992).

Entrapment exists if either of the following is established "(1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances; and [or] (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). It is not entrapment for the police to present the defendant with an opportunity to commit the crime. *Id*. In analyzing the first prong of the test, courts must consider:

> (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee

> that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted." [*Williams, supra* at 661-662, citing *People v Juillet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991).]

The trial court found that the circumstances of this case did not indicate that Rodriguez was entrapped. The only witness at the entrapment hearing was the informant. The trial court noted that after first being contacted by the informant, Rodriguez indicated that he would look into finding the informant a kilogram of cocaine. The informant, although a friend of Rodriguez, had engaged in drug deals with Rodriguez in the past, and Rodriguez had previously supplied the informant with a kilogram of cocaine. The informant did not maintain constant contact with Rodriguez after asking Rodriguez if he could get a kilogram. The two casually contacted one another relative to the transaction. Furthermore, the informant merely told Rodriguez that he wanted to make $2,000 to buy something; he did not appeal to Rodriguez' sympathy and did not use their friendship to persuade Rodriguez to facilitate the transaction.

The trial court concluded that Rodriguez was not an unwilling participant, but was a person who was likely to be involved in such a transaction. It also found that the conduct of the police was not so reprehensible that it could not be tolerated. The court's factual findings and its conclusion that Rodriguez was not entrapped were based on the informant's testimony and were not clearly erroneous.

XVII

Rodriguez argues that the failure of the prosecution to divulge, in response to a discovery order, that the informant was compensated for cooperation with the federal drug enforcement agency constituted error requiring reversal. We disagree. This court reviews the "trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion." *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). During cross-examination, the informant testified that he began working with the federal drug enforcement agency in March 1996, shortly after the incident leading to these proceedings occurred. He admitted that he was paid $10,000 cash by the federal agency. The informant confirmed that the federal agents indicated that they would tell the informant's judge that he had been cooperative. Following the informant's testimony, Rosado's counsel told the court that he did not know that the informant was working for the federal agency or had been paid for his cooperation. He stated that he wanted this information on the record because the prosecution should have divulged the information because it related to the informant's credibility. Rodriguez' counsel stated that he concurred in the statement. The court indicated that it was not going to fault the prosecution.

Rodriguez' counsel was permitted full cross-examination as far as the testimony related to the informant's credibility. He offers no other basis for which this information should have been used.

There is no apparent prejudice to Rodriguez. The trial court did not abuse its discretion in refusing to take further action in response to the prosecution's failure to divulge the challenged information.

XVIII

We reject Rodriguez' argument that he was denied a fair trial by the court's imposition of a time limitation on his closing argument. "The court may impose reasonable limits on the closing arguments." MCR 6.414(E). The court limited Rodriguez' closing argument, as well as those of his codefendants and the prosecution, to twenty minutes. While the court might have been more generous in its time allowance, we do not find this limitation unreasonable, and are unable to conclude that Rodriguez was deprived of a fair trial.

XIX

Next, we reject Rodriquez' contention that the trial court's refusal to excise references in his statement to his "getting back into the business" resulted in manifest injustice. Rodriguez' statement was relevant in determining the facts. The probative value was not outweighed by the prejudicial impact.

XX

Rodriguez has failed to provide support for his assertion that manifest injustice was caused by all jurors having a copy of his statement. This issue is therefore unpreserved. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

XXI

Rodriguez argues that his sentences of life imprisonment without parole are unconstitutional as cruel and/or unusual punishment. This argument has been rejected by our Supreme Court. *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993); *People v Stewart*, 442 Mich 890; 498 NW2d 430 (1993); *People v Fluker*, 442 Mich 891; 498 NW2d 431 (1993); and *People v Loy-Rafuls*, 442 Mich 915; 503 NW2d 453 (1993).

XXII

Finally, Rodriguez argues that the cumulative effect of the errors resulted in manifest injustice. Because we find no errors, there was no manifest injustice.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Myron H. Wahls
/s/ Helene N. White

[1] Defendants objected again only at a later point when the sergeant was asked to address the question whether the cocaine was for distribution or possession.

[2] The prosecutor argues that *People v Betancourt*, 120 Mich App 58; 327 NW2d 390 (1982), rejected the application in *People v Clifton*, 70 Mich App 65; 245 NW2d 175 (1976), of Wharton's rule to a charge of conspiracy to deliver, concluding that delivery does not require an agreement. Our Supreme Court impliedly rejected that view, however, in *People v Blume*, 443 Mich 476, 482 n 11; 505 NW2d 843 (1993).

[3] *Medlyn* was criticized on other grounds in *People v Carlin*, 225 Mich App 480; 571 NW2d 742 (1997).

[4] *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965).

[5] Immediately after argument on David's motion for directed verdict, the prosecutor asked for two minutes to prepare the black board for closing argument and defense counsel asked to look at the extra jury instructions prepared by the prosecutor. The court allowed a short recess. When the court reconvened, the following colloquy transpired:

> THE COURT: Please be seated. Are we now ready for closing?
>
> MR. GUCCIARDO: Your Honor, it has come to my attention that Defense Counsel has asked for – asking for an instruction accessory after the fact. I'm objecting to that instruction. He's not being charged with being an accessory after the fact.
>
> THE COURT: Accessory is a principle [sic].
>
> MR. GUCCIARDO: Pardon?
>
> THE COURT: Under the law, an accessory is a principle. If the facts disclose a possibility of accessory, it would be given.
>
> COURT CLERK: All rise for the jury please.
>
> MR. SEIKALY: I'm going to argue that, that's all he is.
>
> (At 11:02 a.m., jury enters)