

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELIZABETH E. CHIAPPINI,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 213512

Grand Traverse Circuit Court

LC No. 98-007500-FH

Before: Talbot, P.J., and Hood and Smolenski, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and one count of conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a; MSA 28.354(1). Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to one year and six months to thirty years' imprisonment for each delivery conviction and one year to thirty years' imprisonment for the conspiracy conviction, with all sentences to be served consecutively. Defendant appeals as of right, and we affirm.

In October 1997, Robert Strong was arrested for fleeing and eluding and obstructing a police officer. At the time of his arrest, Strong also had an arrest warrant for a drug offense in Florida. Strong offered to cooperate in reaching upper level drug dealers. As a result of his cooperation as an informant, Strong pleaded guilty to reckless driving, and the Michigan charges against him were dismissed. Strong, with the assistance of his neighbor, Lorrie Ann Huffman, was able to purchase cocaine from defendant, her husband, and her son. Generally, the sales transactions were coordinated through Huffman. However, on one occasion, Strong purchased directly from defendant while she was staying at Huffman's apartment. The conversation that led to the purchase was preserved on audiotape. Huffman also testified pursuant to a plea agreement, not in an informant capacity. The plea agreement provided that Huffman would testify truthfully, as necessary, against all members of the conspiracy. Two of three charges were dropped in exchange for her testimony, although there was no plea agreement regarding any sentence to be imposed. Huffman testified that there was an agreement between herself, defendant, and defendant's family members to sell cocaine.

Defendant first argues that the prosecutor failed to produce sufficient evidence to support the convictions. We disagree. When reviewing a challenge to the sufficiency of the evidence,

we examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v Rodriguez*, 236 Mich App 568, 570; 601 NW2d 134 (1999). In order to prove unlawful delivery of a controlled substance, the prosecutor must prove each of the following elements beyond a reasonable doubt: (1) the defendant delivered a controlled substance; (2) the controlled substance was cocaine; (3) the defendant knew that she was delivering cocaine; and (4) the substance was in a mixture that weighed less than fifty grams. CJI2d 12.1; See also *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999); *People v Tate*, 134 Mich App 682, 694; 352 NW2d 297 (1984). The question of intent is for resolution by the trier of fact. *In re Forfeiture of \$25,505*, 220 Mich App 572, 581; 560 NW2d 341 (1996). The intent of an actor may be inferred from all the facts and circumstances. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Id.* at 518. Viewing the evidence in the light most favorable to the prosecution, the testimony of Strong and Huffman was sufficient to establish the elements of the two delivery convictions. *Rodriguez, supra*. Furthermore, there was sufficient evidence to establish a conspiracy to deliver drugs. A conspiracy is established when there is evidence of a specific intent to affiliate with others to achieve an illegal objective. *People v Whitney*, 228 Mich App 230, 258; 578 NW2d 329 (1998). "No overt act in furtherance of the conspiracy is necessary." *People v Moscara*, 140 Mich App 316, 320; 364 NW2d 318 (1985). Direct proof of the agreement or a formal agreement is not required. *Id.* An agreement in fact may be established by the circumstances, acts, and conduct of the conspiracy members. *Id.* Evidence of the conspiracy may be established through circumstantial evidence and inference. *Id.* Huffman testified that the members of the conspiracy, including defendant, had an agreement to sell and deliver cocaine. The testimony regarding the acts of the members of the conspiracy corroborated this testimony. Accordingly, there was sufficient evidence to support the conviction. *Rodriguez, supra*.

Defendant next argues that she was deprived a fair trial based on allegations of ineffective assistance of counsel. We disagree. This issue has not been preserved for review because defendant failed to move for a *Ginther*¹ hearing or a new trial based on ineffective assistance of counsel in the lower court. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). When a *Ginther* hearing is not held below, appellate review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). There is a presumption in favor of effective assistance, and a defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Id.* The alleged deficiency must be prejudicial to the defendant, and the defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Specifically, defendant contends that trial counsel was ineffective for failing to obtain expert testimony regarding defendant's medical condition and for failing to obtain a continuance, with both errors being apparent from the record. We disagree. Defense counsel expressly stated that the defense was not based on diminished capacity and there would be no expert testimony. It is entirely possible that defense counsel investigated defendant's medical condition and learned that doctors would not corroborate that her condition would negate the elements of the crimes. Therefore, the failure to provide expert testimony could be a matter of trial strategy, and defendant has failed to meet her burden of demonstrating otherwise. *Daniel, supra*. Additionally, defendant's contention that the defense of duress was available is without merit. The affirmative defense of duress is available where the crime committed avoids a greater harm. *People v Ramsdell*, 230 Mich App 386, 400-401; 585 NW2d 1 (1998). Defendant had the burden of producing evidence of duress, and any threatened danger must be present, imminent, and impending. *Id.* at 401. In the present case, defendant denied all knowledge of and participation in selling drugs and did not testify that her husband threatened her to coerce her to cooperate in the conspiracy. Therefore, this argument is without merit. Finally, we cannot conclude that the trial court abused its discretion in denying defense counsel's motion to withdraw and motion for a continuance. *People v Echavarría*, 233 Mich App 356, 368; 592 NW2d 737 (1999). While defendant had expressed concern regarding defense counsel's advice that she plead guilty, defendant addressed this letter to the wrong trial judge and did not expressly ask for removal of defense counsel. Defendant never expressed dissatisfaction with trial counsel until it was learned that the prosecutor would impeach her for presenting false testimony. We cannot conclude that the trial court's conclusion, that the assertion of the right was designed to cause a mistrial and was untimely, constituted an abuse of discretion. *Id.* at 369.

Defendant next argues that the prosecutor improperly elicited testimony from Huffman that she would testify truthfully, vouched for her truthfulness, and failed to disclose the benefits received by Strong. We disagree. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Where the defendant fails to preserve the issue of improper prosecutorial misconduct, our review of the issue is for plain error. *Id.* When an issue involves unpreserved, nonconstitutional error, defendant must demonstrate plain error to avoid forfeiture. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The circumstances surrounding Strong's plea were revealed on direct examination and further delved into during cross-examination. Defendant has failed to identify any details on appeal that were excluded at trial. Furthermore, Huffman's testimony regarding truthful testimony was not offered to bolster or vouch for her credibility, but rather, was a condition contained in her plea agreement. Review of the record reveals that defendant's claim of error is without merit. *Id.*

Defendant next argues that the trial court erred in admitting an audiotape of a telephone conversation between Strong and defendant where the proper foundation, MRE 901(b)(6), was not established. We disagree. The decision to admit evidence is within the trial court's discretion and will be reversed only where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An evidentiary issue is preserved for appellate review when a party timely objects at trial and specifies the same ground for objection that is asserted on appeal. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992); MRE 103(a)(1). Defendant did not object to the admission of the tape based on the failure to provide a foundation

in accordance with MRE 901(b)(6). Therefore, this issue is not preserved for appellate review. *Considine, supra*. In any event, MRE 901(b)(6) expressly provides that it illustrates a manner of authenticating evidence and identification is not limited to the requirements of the rule. Defendant acknowledged during her testimony that she was made aware of a tape recorded conversation between Strong and herself. She also acknowledged that the tape sounded like her voice. On the tape, Detective Fewins preserved the date, time, number dialed as Huffman's, and the attempt to reach defendant or her husband. Although defendant did not object to admission, the relevant information sufficient for authentication was presented. Accordingly, the trial court did not abuse its discretion in admitting the evidence. *Lukity, supra*.

Defendant next argues that she was denied a fair trial based on prosecutorial misconduct that included improperly vouching for the credibility of witnesses and denigrating defendant and trial counsel. We disagree. Review of the prosecutor's remarks in contexts reveals no error. *Schutte, supra*.

Defendant next argues that the trial court erred in failing to properly instruct the jury and give a cautionary instruction in response to the improper argument by the prosecutor. We disagree. Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Even somewhat imperfect instructions do not require reversal as long as they fairly presented the issues and the defendant's rights were sufficiently protected. *Id.* The trial court did not err in failing to give the addict informer instruction because the testimony of Strong was not the only evidence linking defendant to the crimes. *Griffin, supra*, at 40. The trial court also did not err in failing to give the mere presence instruction when defendant was not charged as an aider and abettor and denied any and all concerted drug transactions. *Brown, supra*. Finally, defendant failed to object to the trial court's curative instruction regarding the limitation on certain evidence for impeachment purposes and failed to meet the burden of demonstrating plain error. *Carines, supra*.

Lastly, defendant argues that her sentence was not individualized, was based on findings of guilt based on uncharged conduct, and violated the principle of proportionality. We disagree. Review of the record reveals that the trial court took into consideration defendant's background and the goals of sentencing before imposing the sentence. Furthermore, the trial court did not find defendant guilty of perjury and was entitled to take into consideration a flagrant false statement. *People v Houston*, 448 Mich 312, 324; 532 NW2d 508 (1995). The trial court did not abuse its discretion in sentencing defendant; the sentence was proportionate to the circumstances surrounding the offense and the offender. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

Affirmed.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Michael R. Smolenski