STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WINSTON MOORE,

Defendant-Appellant.

UNPUBLISHED
July 19, 2002

No. 225863
Wayne Circuit Court
Criminal Division
LC No. 99-001952

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to deliver 225 or more but less than 650 grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(ii), and two counts of delivery of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). He was sentenced to prison terms of five to thirty years for the conspiracy conviction, and five to twenty years for each of the delivery convictions, all sentences to be served consecutively. He appeals as of right, and we affirm.

Defendant first argues that there was insufficient evidence of a conspiracy and that the proofs showed only the involvement of a buyer and a seller. In reviewing a sufficiency claim, this Court determines whether, when viewed in the light most favorable to the prosecutor, the evidence was sufficient to allow a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Defendant was charged with conspiracy to deliver 225 or more but less than 650 grams of cocaine. The evidence at trial showed that there were two sales at issue.[1] The first sale (June 27, 1998) involved 180.95 grams. The second sale (August 1998) involved 124.27 grams. Thus, defendant was directly involved in sales amounting to 305.22 grams of cocaine even if he later abandoned the conspiracy, as he argues on appeal.

[1] The information covers the period from March 1998 through February 8, 1999. The informant testified that the cocaine found in his residence in March 1998 was bought from defendant at co-defendant Davis' house. However, although this March transaction is included in the period covered by the information, it was not presented as a predicate for the conspiracy count at trial or on appeal.

There was evidence from which the jury could reasonably conclude that Davis was involved in both sales. There was evidence that the June sale was initially planned to take place at Davis' residence on Winthrop. Although the evidence was conflicting, there was testimony that the informant, Morgan, and defendant traveled to Davis' house, that a call was made, and that defendant then took Morgan to the French Quarters Apartments where the purchase took place. In the August sale, codefendant Davis delivered the drugs to defendant's house. Further, there was evidence that both defendant and Davis confronted Morgan with the fact that Yabo claimed he owed $100 on the August sale. This was sufficient to support the inference that Davis knew that the cocaine procured for Moore was going to Morgan. Thus, the evidence, viewed most favorably to the prosecution, was sufficient to enable a rational factfinder to find the elements of conspiracy to deliver 225 or more but less than 650 grams of cocaine beyond a reasonable doubt.

Defendant next argues that he was entrapped by repeated telephone calls from Morgan. After a post-trial entrapment hearing, the trial court ruled that defendant had not been entrapped. We review the trial court's findings for clear error. *People v Connolly*, 232 Mich App 425, 428-429; 591 NW2d 340 (1998).

The trial court found that "[m]uch of what I heard from Mr. Moore today I do not find to be believable," and concluded that the police conduct through Morgan was not reprehensible, and that the phone calls would not have induced a similarly situated, law-abiding person to engage in the sales of cocaine. *People v Fabiano*, 192 Mich App 523; 482 NW2d 467 (1992). We cannot conclude that the trial court's findings are clearly erroneous. The trial court appropriately noted that if defendant wanted to be excluded from any future deals, he should have refrained from returning Morgan's telephone calls.

Defendant next argues that defense counsel was ineffective because he did not obtain and review all available discovery. Defendant speculates that if counsel had properly reviewed the tapes and properly filed the entrapment motion prior to trial, and the motion had been granted, the charge of conspiracy would have been dismissed.

To establish ineffective assistance of counsel, a defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, and that counsel's errors were so serious that there is a reasonable probability that, but for the errors, the result would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Counsel explained to the court what the tapes revealed, and there is no reason to believe that the court would have ruled differently had the motion been made before trial.

Defendant next argues that the trial court erred by permitting the prosecutor to amend the information during trial to allege that codefendant Davis was also part of the conspiracy alleged against defendant.

> An information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime. MCL 767.76; MSA 28.1016; *People v Stricklin*, 162 Mich App 623, 633; 413

NW2d 457 (1987). [*People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001).]

When trial started, the information alleged in Count I a conspiracy between defendant and Harris. The location of the conspiracy was alleged to be the addresses on Brace Street (the French Quarters Apartments), defendant's home on Algonquin, and codefendant Davis' home on Winthrop, and it was alleged that the conspiracy occurred from March 1998 to February 8, 1999. At the close of its proofs, the prosecution moved to amend the information to allege that Moore acted with Harris "and others." The trial court granted the motion. Defendant objected that he was surprised by the amendment, which now added codefendant Davis to the allegation of conspiracy.

We are not persuaded that defendant was "surprised" by allegations that he conspired with Davis. Count I, as originally drafted, alleged a conspiracy taking place at Davis' house. The three defendants had a single arraignment on the information, and a single preliminary examination, arraignment at circuit court, and trial. The officer in charge testified at the preliminary examination that Davis was involved in the August 1998 sale at Moore's house.

Although defendant argued that he had sought to show during trial that he did not even know Harris, thus potentially negating the existence of a conspiracy as originally charged, the trial court correctly observed that the law does not require that all the conspirators know each other or know all the details of the crime. *People v Garska*, 303 Mich 313; 6 NW2d 527 (1942); *People v DeLano*, 318 Mich 557, 567; 28 NW2d 909 (1947). We conclude that defendant has not shown that he was prejudiced by the amendment of the information, and the court did not abuse its discretion in allowing the amendment. *People v Weathersby*, 204 Mich App 98, 104; 514 NW2d 493 (1994).

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper