STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 245455 Oakland Circuit Court
NATHANIEL LEE, JR., Defendant-Appellant.	LC No. 2000-172582-FC

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(i). He was sentenced to a prison term of 30 to 60 years. He appeals as of right. We affirm.

From 1987 through 1998, defendant, his brothers Roderick Lee and Shedrick Lee, and other family members and associates, primarily from Pontiac, engaged in a long-term, widespread cocaine and heroin trafficking conspiracy in Michigan. Defendant and Roderick led and equally controlled the Lee family organization. Codefendant Joe Abraham supplied the organization which, in turn, supplied numerous individuals for "street" sale or use. Shedrick also allegedly smuggled kilograms of cocaine into the state. The lengthy trial included numerous witnesses who testified regarding their dealings with the Lee family organization.

Helen Alexander testified that she purchased cocaine from defendant and Roderick for several years. In 1987, she allowed defendant to use her house to "cook up" and sell drugs, in exchange for drugs and money.[1] Two to three times a week for four or five months, defendant brought between a quarter to one kilogram of cocaine to Alexander's house. Their arrangement ended in 1987 or 1988. Thereafter, for a few months in 1989, Alexander bought from two to six ounces of cocaine from defendant several times each week, which she sold to a third party.

[1] Defendant called Mary Willis, the owner of the house, who testified that she never leased or sold her house to Alexander. The prosecution recalled Alexander, who showed pictures of herself at the house. A police witness also testified that, when he arrested Willis' grandson at the house in 1986, Alexander was there.

Alexander also purchased cocaine from Willie Adams, who was one of defendant's associates, while defendant was present. On one occasion, she observed Adams, defendant and other individuals seated around a table of four or five kilograms of cocaine. According to Alexander, she participated in several drug transactions at various houses owned by the Lee brothers.

Ralph McMorris testified that, from the mid-1980's until the mid-1990's he bought cocaine from defendant and Roderick in Pontiac. He bought several smaller quantities from street sellers, but if he wanted larger quantities, the street sellers went to defendant or Roderick. In 1989, he first bought a quarter of a kilogram directly from defendant for $8,500. Sometime after February 1994, he again bought a quarter of a kilogram directly from defendant. He also once bought three ounces from defendant and, on several additional occasions, gave defendant stolen clothing in exchange for cocaine.

Eric Lee, who is the nephew of defendant and Roderick, began working for Roderick in 1989, and continued selling cocaine and heroin for his uncles until 1996.[2] Eric testified that defendant and Roderick led the Lee organization and were equally in control. In 1989, defendant lived with Eric's mother and kept more than a kilogram of cocaine in their apartment. Eric, then fifteen years old, began stealing portions of the cocaine to sell. After Eric's activities were discovered, Roderick began supplying Eric weekly with cocaine to sell. Eric initially began with half-ounce amounts, which eventually grew to over a half kilogram. In 1993 or 1994, Roderick sent Eric to Muskegon to oversee the operation there because there were payment problems. Other Lee relatives were selling drugs for Roderick in Muskegon at the time. Eric remained for two years and was given a quarter to half-kilogram of cocaine on thirty to forty occasions.

Over the years, Eric observed large quantities of drugs being delivered to defendant and Roderick, every three to four days. Eric believed that the delivery individuals were "running" for Abraham. Shedrick also obtained cocaine for the organization from California and New York. Eric, himself, was supplied with more than 650 grams of cocaine, and observed Roderick sell cocaine to several other people. On one occasion, Eric went to Roderick's apartment and saw him converting two or three kilograms of cocaine into crack. Defendant was also present.

In a statement made to police, Abraham admitted that he received large quantities of cocaine from out of state, which he brokered to different drug organizations, including the Lee brothers and Joseph Steins. Abraham admitted that, on one occasion, he sold twenty kilograms of cocaine to Roderick for $500,000. Antonio James, a drug runner for Joseph Steins, testified that he picked up cocaine from Abraham once or twice a week in quantities of between one and three kilograms for a couple of years. In 1996, James saw a shipment of between twenty and twenty-five kilograms of cocaine delivered to Abraham's house. James testified that, in 1996 or 1997, he heard Abraham brag to Steins that his "Pontiac boys," defendant and Roderick, were selling more drugs than the Steins organization.

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[2] Because Eric was unavailable for trial, his May 2000 preliminary examination testimony was admitted at trial. During the preliminary examination, Eric's grand jury testimony was substantially integrated into the record through the prosecutor's direct examination. At the preliminary examination, Eric Lee claimed that he did not remember his grand jury testimony or its factual basis.

LaMark Northern, who began selling drugs in Pontiac in the late 1980s, testified that, on one occasion, he, Roderick, and DeMar Garvin went to Abraham's house and purchased between eight and ten kilograms of cocaine for $200,000. In discussing the intended allocation of the cocaine, Garvin indicated that he was to receive one kilogram, defendant was to receive two kilograms, Northern was to receive less than one kilogram, and Adams was to receive more than one kilogram.

Northern testified that he first received cocaine from Roderick in 1987 or 1988. In 1988 or 1989, he bought a half-kilogram of cocaine from Roderick for $14,500. Northern routinely received cocaine from Roderick, which he, in turn, often broke down into smaller quantities and sold. Northern testified that, on one occasion when he was having financial problems, defendant refused his request to "front" him a quarter of a kilogram of cocaine, indicating that he would work with him if he "could come up with some money." Northern purchased more than 650 grams of cocaine from Roderick or Garvin, who also purchased his cocaine from Roderick and others. In the mid-1990s, Northern was receiving cocaine and heroin from Garvin and Roderick every two to three days, which he broke down and sold in the Pontiac area. Roderick or Garvin supplied Northern until he was arrested in March 1996.

Northern testified that he twice received cocaine from Larry McGee, who had also sold cocaine to defendant. Northern testified that, in 1994, he overheard a conversation between Garvin and McGee, who was upset with defendant because he surcharged him for a cocaine delivery. McGee stated that, when he served as a middleman and delivered cocaine to defendant, he did not surcharge him.[3] According to Northern, in 1997, Menion Stimage indicated that Roderick was supplying him. Also, one of Northern's family members, Jermaine Cohen, was receiving cocaine from Johnnie Stanley, who was being supplied by Roderick.

In September 1994, the Pontiac police executed a search warrant at a suspected drug house, and confiscated cocaine and various drug-weighing and packaging materials. While there, Adams called and, in response to an officer's request to buy cocaine, said that he could obtain two ounces from "Big Nate's" house. The police were aware that "Big Nate" referred to defendant. After receiving directions to defendant's house from Adams, the police secured the house and obtained a search warrant. During the execution of the warrant, some individuals fled from the police. Although defendant was not present, various items of identification and receipts belonging to him were found inside one of the bedrooms. Inside the house, police found numerous weapons and ammunition, a large amount of money, a digital scale, and more than 116 grams of cocaine. There was no clothing, food, or toiletries in the home.

Eric Lee testified before the grand jury that, on the day of the execution of the warrant, he was recently at the house but had been sent to the store to purchase beer. Eric testified that, when he left, defendant and others were sitting around gambling, and drugs and several guns

[3] In September 1998, police executed a search warrant at McGee's house and confiscated, inter alia, a digital scale, drug tally sheets, more than four hundred grams of cocaine, and nearly five grams of heroin.

were in the house. When he returned, the police were searching the house. Two individuals told him that defendant "was all right" and had escaped through a window.

In October 1994, Pennsylvania police stopped a car for erratic driving. The driver, Shedrick, falsely identified himself as "Nathaniel Lee" and produced an application for a driver's license in defendant's name. A subsequent search of the vehicle revealed nearly three kilograms of cocaine and more than six grams of heroin hidden in a secret compartment underneath the vehicle. A drug enforcement special agent opined that, based on Shedrick's explanation of the transaction, Shedrick was a courier for a larger drug organization, and had a previous relationship with his out-of-state source.

In July 1998, Shedrick had shared a jail cell with Ricky Buchanan for nearly a year. According to Buchanan, Shedrick told him that he was being charged with additional drug-related crimes that had continued after he was jailed in federal prison for bringing cocaine to Michigan. Shedrick told Buchanan that he was in the drug business with his brothers, defendant and Roderick, and that, even after being incarcerated, he "still had his part in the business . . . because he paid his dues." Shedrick indicated that he was supposed to receive approximately a million dollars because defendant and Roderick had a fifteen-kilogram shipment being delivered to Michigan from out of state. Buchanan indicated that Shedrick offered him a job as a driver when he "got out," because he had seen Buchanan's police chase on the television show, "Cops." According to Buchanan, Shedrick was very upset with his nephew, Eric, and said that he "wanted him dead" before he could testify against him.

In September 1998, search warrants were executed for ten homes in the Pontiac area connected to the Lee family organization. At one of the homes, police found numerous letters to defendant, ammunition, a weapon, a medicine bottle bearing defendant's name, a digital scale, and a cell phone. One letter written to defendant stated, "I must be a d*** fool to have honestly thought you was [sic] down with me and not the product." The letter also referred to doing business with defendant, and contained the terms, "candy" and "kibbles and bits," which are common names for cocaine.

Numerous individuals purportedly involved in the Lee family organization, including defendant, were arrested. Defendant was not employed during the duration of the drug trafficking conspiracy, and he did not file any tax returns from 1987 though 1998.

Defendant first argues that the evidence was insufficient to sustain his conviction because there was no evidence of a specific intent or agreement to deliver or possess with intent to deliver 650 or more grams of a controlled substance. We disagree. When ascertaining whether the prosecutor presented sufficient evidence to support a conviction, we "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

> To be convicted of conspiracy to possess with intent to deliver a controlled substance, the people must prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators

> possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. [*People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).]

A prosecutor does not need to present direct proof of a conspiracy, but rather, the jury may reasonably infer its existence "from the circumstances, acts, and conduct of the parties." *Id.* at 347.

The evidence indicated that defendant, as a co-leader of the Lee family organization, knowingly cooperated with others to further a drug trafficking scheme to possess and deliver multiple kilograms of cocaine. There was testimony that defendant and his brother, Roderick, led and equally controlled the Lee family organization. Testimony revealed that, as early as 1987, defendant used the house of a friend, Alexander, to "cook up" and sell a quarter to a kilogram of cocaine each week for four or five months. There was also evidence that defendant and Roderick received numerous kilograms of cocaine from Abraham, an admitted drug supplier, and disbursed them to numerous individuals for sale or use. Defendant's nephew, Eric, routinely saw Abraham's "runners" delivering large quantities of cocaine to defendant and Roderick every three to four days. On one occasion, Abraham sold eight to ten kilograms of cocaine to Roderick for $200,000, two of which were earmarked for defendant. Abraham stated that the Lee organization, specifically referring to defendant and Roderick, sold more cocaine than another drug organization, which obtained one to two kilograms a week for years. Alexander observed defendant seated around a table of four to five kilograms of cocaine. A jury could reasonably infer from this evidence that defendant did not intend to personally use these vast amounts of cocaine, but intended to distribute them to third parties.

Although defendant asserts that the testimony of certain witnesses was self-serving or incredible, the jury was entitled to accept or reject any of the evidence presented. *People v Jackson*, 390 Mich 621, 625 n 2; 212 NW2d 918 (1973). Moreover, a prosecutor "is not obligated to disprove every reasonable theory consistent with innocence," but only needs to prove his own theory beyond a reasonable doubt given the contrary evidence proffered by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Viewed in a light most favorable to the prosecution, the evidence presented in this case reflected a long-term conspiracy to traffic drugs and was sufficient to sustain defendant's conviction for conspiracy to deliver or possess with intent to deliver 650 grams or more of a controlled substance. We similarly reject defendant's contention that he is entitled to a new trial because his conviction was against the great weight of the evidence. The direct evidence against defendant was overwhelming, and defendant substantially failed to counter it.

Defendant next argues that the trial court abused its discretion by admitting Eric Lee's preliminary examination and grand jury testimony at trial, because he was not "unavailable" under MRE 804(a). Defendant first argues that the prosecution improperly revoked the witness' immunity before trial, forcing him to invoke his privilege against self-incrimination and enabling the prosecution to use his preliminary examination testimony rather than direct testimony. We disagree. We review for abuse of discretion a trial court's evidentiary rulings. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

Eric, who was involved in the drug trafficking conspiracy, testified before a grand jury in April 1998, and gave critical evidence against defendant and the Lee family organization. He also testified at defendant's May 2000 preliminary examination, but he claimed he could not recall any details about the alleged drug trafficking conspiracy or his inculpating testimony before the grand jury. Eric even denied any memory of ordinary facts, such as his previous address. Based on this claimed lack of memory, the prosecution declined to extend its grant of immunity to cover defendant's 2002 trial. Eric invoked his Fifth Amendment privilege not to testify at trial, and the court accepted it. As a result, the court properly concluded that Eric was "unavailable" under MRE 804(a). The court allowed the prosecutor to read into the record Eric's testimony at the grand jury and preliminary examination.

A trial court may admit a witness's prior testimony under MRE 804 if the witness is unavailable because he validly asserts a privilege from testifying. However, according to MRE 804(a),

> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing a witness from testifying.

If the prosecution intentionally causes a witness's failure to testify with either threats or actual prosecution, the witness will not be deemed "unavailable" under MRE 804(a). *People v McIntosh*, 142 Mich App 314, 324; 370 NW2d 337 (1985). "[T]he burden is on the prosecution to establish that the witness whose prior recorded testimony is being offered is, in fact, 'unavailable' and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable." *Id*. at 327.

In this case, the prosecution did not revoke Eric's immunity merely to prevent him from testifying. Rather, the prosecution reasonably surmised that Eric would not provide testimony at trial, but would again feign a loss of memory. Because Eric had already indicated his unwillingness to testify according to the immunity agreement he had with the prosecution, the prosecutor's decision to revoke Eric's immunity was not unreasonable. Therefore, Eric could properly invoke his right to remain silent, and was "unavailable" at trial for MRE 804 purposes.

Defendant next argues that the trial court violated defendant's right to confront the witnesses against him when it allowed the prosecutor to introduce Eric's grand jury and subsequent preliminary examination testimony. We disagree. At the preliminary examination, defendant conceded that the grand jury testimony was admissible in that proceeding according to MRE 801(d)(1)(A) and our holding in *People v Chavies*, 234 Mich App 274, 283-284; (1999). In *Chavies*, we ruled that the prosecutor could introduce a pair of witnesses' grand jury testimony at trial because the witnesses suddenly failed to remember their earlier testimony or the facts supporting it. *Chavies, supra* at 282. We held that the sudden lack of memory was inconsistent with the earlier testimony, so MRE 801(d)(1)(A) allowed the admission of the testimony. *Chavies, supra* at 282-283. The testimony did not violate the Confrontation Clause, because defendant had an opportunity to confront the witness, despite the witness's failure to remember the events at issue. *Id*. at 284.

Because of *Chavies's* clear applicability, defendant did not object to the admission of the grand jury transcript as an exhibit at the preliminary examination. Because Eric's grand jury testimony was part of the record and Eric was "available" for cross-examination at the preliminary examination, defendant had "an opportunity and similar motive to develop" the grand jury testimony at the preliminary examination. MRE 804; but see *Chavies*, *supra*.[4] Because the preliminary examination afforded defendant the opportunity to cross-examine Eric about the facts supporting his testimony and the prior testimony he provided, and because he was unavailable at trial, MRE 804 allowed the prosecutor to present both transcripts to the jury, and the Confrontation Clause did not prohibit it. See *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1369; 158 L Ed 2d 177 (2004); see also *United States v Owens*, 484 US 554, 559-560; 108 S Ct 838; 98 L Ed 2d 951 (1988).[5]

We reject defendant's claim that he is entitled to a new trial because the trial court failed to properly instruct the jury that the prosecution must prove that he specifically intended to conspire to deliver 650 or more grams of cocaine. Because defendant failed to raise this instructional claim below, this Court reviews this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130, reh den 461 Mich 1205 (1999).

"We review jury instructions in their entirety to determine if error requiring reversal occurred." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "The instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence." *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Aldrich*, *supra*. Here, the trial court did not include the amount of cocaine as an element of the offense in its initial jury instructions. Nevertheless, the trial court corrected this omission before the jury began deliberating and properly instructed the jury with regard to

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[4] In *Chavies*, *supra*, we held that the testimony could not come in under MRE 804 because defendant did not have the opportunity to cross-examine the witness at the grand jury proceedings. While we find this issue moot for purposes of the Confrontation Clause because defendant subjected Eric to cross-examination at the preliminary examination, we also find that any error of the trial court in admitting the grand jury testimony under MRE 804 was necessarily harmless. The prosecutor read straight from Eric's grand jury testimony throughout the entire preliminary examination proceeding, repeatedly asking him if he remembered the factual underpinnings of his testimony, or even the fact that he had testified at all. Therefore, the preliminary examination transcript, which contained defendant's cross-examination and was clearly admissible at trial under MRE 804, substantially mirrored the grand jury testimony, and its repetition as uninterrupted grand jury testimony did not prejudice defendant in any cognizable way. MRE 103.

[5] We also note that even if the later-equivocated grand jury testimony of this one witness were introduced into evidence contrary to the Confrontation Clause, the other overwhelming evidence of defendant's guilt would lead us to find the error harmless beyond a reasonable doubt. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004); see also *California v Green*, 399 US 149, 170; 90 S Ct 1930; 26 L Ed 2d 489 (1970).

conspiracy to deliver or possess with intent to deliver 650 or more grams of cocaine. Viewed in their entirety, the instructions clearly expressed that the prosecution must prove that defendant had knowledge that the object of the conspiracy was to deliver or possess with intent to deliver 650 or more grams of cocaine. Therefore, this issue does not warrant reversal.

We reject defendant's final claim that resentencing is required because the trial court failed to consider the presentence investigation report (PSIR), consider all relevant sentencing factors, articulate reasons for the sentence imposed, individualize the sentence, and impose a proportionate sentence. Because the offense in this case occurred before January 1, 1999, the statutory sentencing guidelines do not apply. *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). Furthermore, the former judicial sentencing guidelines do not apply in this case because, at the time, the offense was subject to a mandatory minimum sentence, MCL 333.7401(2)(a)(i). *People v Edgett*, 220 Mich App 686, 690; 560 NW2d 360 (1996). We review a defendant's sentence for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997).

At the time of defendant's sentencing, before the statute's recent amendment, the mandatory minimum sentence for defendant's offense was twenty years' imprisonment, with a maximum of life imprisonment. MCL 333.7401(2)(a)(i). Defendant was sentenced to a prison term of 30 to 60 years. As such, defendant's sentence was within the court's statutory authority and, under the circumstances, it was appropriate. There is no claim that the court was not provided with the PSIR and, apart from defendant's conjecture, there is no indication in the record that the court failed to consider the report or any other relevant factor.

Although a sentencing court "must articulate on the record the criteria considered and the reasons supporting its sentencing decision," it need not "expressly mention every goal of sentencing when imposing sentence." *People v Rice (On Remand)*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999). Here, when imposing defendant's sentence, the trial court noted, inter alia, the large amount of drugs brought into the community because of defendant's actions, and the detrimental ramifications that defendant's drug trafficking had on the community. Although the trial court directed its findings at defendant and his two codefendants, such an approach should be expected in conspiracy cases. In any case, the court plainly addressed defendant and his particular actions, and we are satisfied that the trial court took full account of defendant's individual role in the conspiracy when it sentenced defendant. Finally, given defendant's co-leadership of a large drug-trafficking organization that purchased and imported numerous kilograms of drugs for more than a decade, defendant's sentence to imprisonment for 30 to 60 years is proportionate to the grave nature of his offense.

Affirmed.

/s/ Peter D. O'Connell

I concur in the result only.

/s/ William B. Murphy