STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 1, 2010
v	No. 290123 Wayne Circuit Court
JOEL DAVID STRONG, Defendant-Appellant.	LC No. 2008-010204

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, and two counts of conspiracy to commit an illegal activity, MCL 750.157a. Defendant was sentenced, as a third habitual offender, MCL 769.11, to concurrent terms of 20-40 years' imprisonment on each charge. Because defendant was not denied a fair trial, but there was sufficient evidence to convict defendant of only one count of conspiracy, we reverse one of defendant's convictions for conspiracy, but affirm in all other respects.

Defendant's convictions are the result of the robbery of an Autozone store on July 16, 2008. On the afternoon prior to July 16th, defendant met Maurice Curtis on the street and Curtis asked defendant if he would help him commit a robbery. Defendant indicated that he could use some money, so agreed to drive Curtis to an Autozone the next day so Curtis could rob the store. Defendant, driving his girlfriend's red Malibu, took Curtis to the Autozone and waited in the alley while Curtis entered the store. At the time, a manager and two other employees were inside the store. Curtis, armed with a revolver, forced the manager and one of the employees to the back of store, then made the manager empty the store safe and the cash registers. After collecting the money, which included rolled coins and a substantial number of one-dollar bills, Curtis exited the store and he and defendant drove away in the red Malibu. Curtis gave defendant some of the money he had stolen, and defendant dropped Curtis off at his home. Several hours later, while defendant was again driving the red Malibu, he was pulled over by police. He was ultimately arrested and charged with two counts of armed robbery and two counts of conspiracy to commit armed robbery.

On appeal, defendant first contends that the admission of evidence of a prior robbery at the Autozone and evidence of other possible robberies, which was discovered during execution of a search warrant at Curtis's residence, was irrelevant and denied him a fair trial. While we

agree that some of the challenged evidence was irrelevant and thus should not have been admitted, we disagree that defendant was denied a fair trial due to the erroneous admission.

The admission of evidence is generally reviewed for an abuse of discretion. *People v Hine,* 467 Mich 242, 250; 650 NW2d 659 (2002). However, because there was no objection to the admission of the evidence at issue, the issue was not preserved and we review it for plain error affecting substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). A plain error affecting substantial rights generally requires a showing of prejudice; i.e., that the error affected the outcome of the lower court proceedings. *Id.* Even if a defendant satisfies this requirement, however, reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 764-767.

MRE 402 allows the admission of relevant evidence at trial. *People v Fletcher,* 260 Mich App 531, 552; 679 NW2d 127 (2004). Relevant evidence is that which tends to make a material fact more or less probable. MRE 401; *People v Sabin,* 463 Mich 43, 56-57; 614 NW2d 888 (2000). "A material fact is a fact that is significant or essential to the issue or matter at hand." *People v Katt,* 468 Mich 272, 292; 662 NW2d 12 (2003)(internal quotations omitted).

Defendant challenges the admission of two categories of evidence as irrelevant: testimony concerning Curtis's robbery of the same Autozone ten days prior to the robbery at issue, and testimony concerning evidence seized at Curtis's residence. With respect to the prior robbery, the Autozone manager testified at trial that he recognized the person who robbed his store on July 16th as the same person who robbed the store on July 6th. The manager also testified that the person who robbed the store was, at both times, wearing a bandana covering the lower part of his face, was carrying a revolver, and ordered him to first empty the safes, then the cash registers. Because defendant identified Curtis as the individual who robbed the Autozone on the 16th, evidence concerning the robbery on the 6th was relevant in corroborating defendant's statement and the manager's identification of Curtis as the robber. The evidence was therefore essential to the matter at hand, and it was not plain error to admit such evidence.

Evidence was also presented during trial that after defendant identified Curtis as the individual who robbed the Autozone on the 16th, he directed the police to where he thought Curtis resided. During a later search of the identified residence, police discovered coin wrappers and a .38 caliber revolver. Because these two items were directly related to the robbery at issue, testimony about the items was relevant and it was not error to admit the same.

There was also testimony at trial concerning other items found at Curtis's residence, including identification and credit cards in various people's names, (though not in defendant's or Curtis's names), and various articles of clothing which did not match those worn by the robber on either July 6th or July 16th. This evidence had nothing to do with either robbery, had no connection to defendant, did not tie him to any crime, and made no fact material to defendant's charges more or less probable. The evidence was not relevant and it was error to admit it. However, as previously indicated, an error will only warrant a new trial if it prejudiced the defendant, i.e., it affected the outcome of the trial. *Carines*, 460 Mich at 763-764. Moreover:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. MCL 769.26.

A review of the evidence and the record in the instant matter demonstrates that the error did not result in a miscarriage of justice.

Officer Roland Brown testified at trial that he interviewed defendant after his arrest on the date of the robbery. According to Officer Brown, when questioned about his involvement in the robbery, defendant indicated that Curtis had asked defendant if he wanted to rob the Autozone with him on July 16, 2008 and that defendant told Curtis he did. Officer Brown testified that defendant told him he picked Curtis up at his house that morning and dropped Curtis, who was armed with a revolver, off in the alley by the Autozone. He then waited for Curtis. Defendant told Officer Brown that Curtis came out of the store a few minutes later with a lot of singles and rolled coins. Curtis gave defendant approximately one hundred dollars in singles, and defendant dropped Curtis off at his home.

Officer William Niarhos testified that he conducted an inventory of the red Malibu defendant was driving at the time of his arrest. Officer Niarhos testified that located in the vehicle was, among other things, approximately 149 single dollar bills.

Given the testimony concerning defendant's confession and the evidence found in the red Malibu tying him to the robbery, and taking into consideration that there was no affirmative statement or implication that defendant was at all associated with the irrelevant clothing, identifications, or credit cards, it cannot be said that the erroneous admission of the challenged evidence affected the outcome of the trial. Defendant's substantial rights were not affected, and he is not entitled to a new trial.

Defendant next contends that there was insufficient evidence to convict him of one of the two counts of conspiracy to commit an illegal activity. We agree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). In reviewing such a claim, we view all of the evidence presented at trial in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Notably, appellate review of a challenge to the sufficiency of the evidence is deferential, meaning that the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences and we defer to the fact-finder's credibility choices and its reasonable inferences drawn from the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *Nowack*, 462 Mich at 400.

Under MCL 750.157a, "[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy. . ." Conspiracy is a specific intent crime, requiring both the intent to combine with others and the intent to accomplish an illegal objective. See *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Conviction of conspiracy requires proof of an unlawful agreement between two or more persons with a specific intent to combine with the other(s) to accomplish an illegal objective. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Direct proof of a conspiracy is not essential. Rather, a conspiracy may be proven by circumstantial evidence or by reasonable inference, and no formal agreement is required. *People v Justice*, 454 Mich 334, 347; 562 NW2d 652 (1997).

In the present matter, defendant does not dispute that the evidence supported a conviction of one count of conspiracy. His argument is based upon a claim that because the evidence supported a conspiracy to commit a single robbery, only a single charge of conspiracy was warranted. Defendant contends that in order to properly convict defendant of two counts of conspiracy, it must be shown that there were two separate and specific agreements, each with a separate object–an agreement to rob each person that was robbed—and that there was no such showing. We agree.

"Since the nature and extent of a conspiracy is determined by reference to the agreement between the participants, the agreement will determine whether single or multiple conspiracies exist between the parties. A single conspiratorial agreement will constitute a single criminal conspiracy, even though it contemplates more than one unlawful object, while multiple agreements to commit separate crimes will constitute multiple conspiracies." 16 Am Jur 2d, Conspiracy, § 11, page 207. If the misconduct charged is all germane to one course of wrongdoing there is only one conspiracy. *People v Tenerowicz*, 266 Mich 276, 282; 253 NW 296 (1934); See also, *People v Chambers*, 279 Mich 73, 77; 271 NW 556 (1937)("There was one conspiracy, no matter if it did have a multiplicity of objects").

In *People v Mezy*, 453 Mich 269; 551 NW2d 389 (1996), our Supreme Court, in attempting to resolve whether there was a single or multiple conspiracies under the facts before it, indicated:

> The gist of the crime of conspiracy is the agreement of the conspirators to commit one or more unlawful acts, where one or more of the conspirators do "any act to effect the object of the conspiracy." In order to determine what the extent of the agreement is, so that we may determine whether there are two conspiracies or only one, we will use the same "totality of the circumstances" test used in constitutional double jeopardy analysis. This test includes the following factors: 1) time, 2) persons acting as coconspirators, 3) the statutory offenses charged in the indictments, 4) the overt acts charged by the government or any other description of the offenses charged that indicate the nature and scope of the activity that the government sought to punish in each case, and 5) places where the events alleged as part of the conspiracy took place. The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement each with a separate object. *Mezy*, 453 Mich at 284-285 (internal citations omitted).

At trial, the evidence established that defendant met with Curtis on one occasion and at that time, they agreed to rob the Autozone store. Defendant picked Curtis up the next day to accomplish the singular goal of robbing a specific Autozone store. There is no indication that defendant and Curtis discussed the robbery on more than one occasion, discussed how many employees could be in the store or, if there was more than one, how the employees would be handled during the robbery. In essence, there was a single agreement that resulted in two robberies based solely upon the number of employees that were held at gunpoint to accomplish the robbery. The charged misconduct of two robberies was germane to one course of wrongdoing and one overall plan with one objective—to rob the Autozone. There was only one conspiracy. *Tenerowicz*, 266 Mich at 282.

While the prosecution contends that because there were two victims, there was sufficient evidence to charge and convict of two counts of conspiracy, charges involving several victims have long been found to constitute a single conspiracy, so long as the conspirators shared a single common objective. For example, in *People v Ryckman*, 307 Mich 631; 12 NW2d 487 (1943), several officers were charged and convicted of conspiracy to obstruct justice. The officers apparently demanded and received monies from various citizens and/or businesses for "police protection." Though there were multiple victims, our Supreme Court stated, " . . .there was one basic conspiracy, and its common design and purpose was to obstruct justice." *Id* at 642.

Similarly, in *People v Porterfield*, 128 Mich App 35, 41; 339 NW2d 683 (1983), a panel of this Court determined that where a defendant, along with other co-defendants, delivered heroin on an almost daily basis for a period of time to different customers, he and his co-defendants were appropriately charged with a single count of conspiracy. Defendant contended that it was error to charge him with an ongoing conspiracy to deliver over 50 grams of a mixture containing heroin rather than multiple separate conspiracies to deliver amounts under 50 grams. This Court disagreed, opining:

> The alleged separate transactions are smaller conspiracies constituting parts of a "single scheme or plan". The overall conspiracy to deliver over 50 grams of a substance containing heroin included the mixing, packaging, delivery and sale of narcotics on almost a daily basis which contributed to the promotion of a continuing conspiracy to deliver more than 50 grams and these actions were not separate transactions. The multiple transactions were part of the ongoing conspiracy to deliver over 50 grams of a mixture containing heroin. *Id.* at 41.

Viewed in a light most favorable to the prosecution, the evidence in this matter was insufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant and Curtis entered into more than one conspiracy to commit armed robbery. Defendant's conviction for a second count of conspiracy is therefore reversed.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto