STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DOUGLAS POISSON,

Defendant-Appellant.

UNPUBLISHED
December 28, 2001

No. 224304
Monroe Circuit Court
LC No. 98-029389-FH

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

PER CURIAM.

A jury convicted defendant of delivering less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and conspiring to deliver less than fifty grams of cocaine, MCL 750.157(a); MCL 333.7401(2)(a)(iv). The trial court sentenced defendant, as a second habitual offender, to consecutive terms of three to thirty years' imprisonment on each conviction. Defendant appeals as of right. We affirm.

I. Delivery of Cocaine

Defendant first argues that the prosecutor presented insufficient evidence to sustain his conviction of delivering less than fifty grams of cocaine. When reviewing a sufficiency claim, we must view the evidence in the light most favorable to the prosecution, to 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, 514-515, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

In order to sustain a conviction on an aiding and abetting theory, the prosecutor must show the following: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Thus, the "'requisite intent' for conviction of a crime as an aider and abettor 'is that necessary to be convicted of the crime as a principal.'" *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001), quoting *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). Delivery of a controlled substance is a general intent crime. *Mass*, *supra* at 627. While the amount and nature of the controlled substance are elements of a

delivery offense, knowledge of the amount of the controlled substance is not. *Id.* at 626-627. Therefore, in order to sustain defendant's delivery conviction in the present case, the prosecution needed to show that defendant encouraged or assisted Jesse Daniels in his delivery of cocaine to the undercover police officer, and that defendant either intended for the cocaine to be delivered or knew that Daniels intended to deliver cocaine.[1]

At trial, the prosecution introduced evidence that before the undercover officer purchased $100 worth of crack cocaine, co-conspirator Jesse Daniels first walked toward defendant, who was in the parking lot of the Star Motel, and then walked back with defendant and introduced him to the officer. While Daniels went back to the motel room, defendant chatted with the officer and told him that Daniels was a "good man" and "would take care of him." Several minutes later, Daniels walked out of the room with the cocaine and approached the officer and defendant, saying "here you go," and telling the officer to "slide his money out." The officer handed $100 to Daniels, who, in turn, gave the money to defendant, saying "count it." After defendant counted the money and handed it back to Daniels, he said, "it's good." Daniels then handed the cocaine to the officer. Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational jury could have found defendant guilty of delivering cocaine, as an aider and abettor.

II. Conspiracy to Deliver Cocaine

Defendant next argues that the prosecutor presented insufficient evidence to sustain his conviction of conspiracy to deliver less than fifty grams of cocaine. In *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993), our Supreme Court explained the nature of the crime of conspiracy:

> A conspiracy is a partnership in criminal purposes. The gist of the offense of conspiracy lies in the unlawful agreement between two or more persons. Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective. [Internal quotations and citations omitted.]

While the essence of a conspiracy is the agreement itself, "[d]irect proof of agreement is not required, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact." *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974). Further, the conspiracy may be proven by circumstantial evidence or based on inference. *People v Justice (After Remand)*, 454 Mich 334, 347-348; 562 NW2d 652 (1997). "Conspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *Mass*, *supra* at 629. Thus, knowledge of the amount of the controlled substance to be delivered is an element of the conspiracy offense, even though it is not an element of the underlying delivery offense. *Id.* at 618. Nevertheless, "if one conspires to deliver an unspecified amount of cocaine one would, at a minimum, be guilty of conspiring to deliver less than fifty grams of cocaine." *Id.* at

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[1] Defendant does not dispute that the substance delivered was cocaine or that the statutory amount of cocaine was delivered.

631. Furthermore, when a conspiracy to deliver and a delivery charge are coupled, and the proofs on the delivery charge demonstrate the weight of the substance delivered, such proofs are sufficient to demonstrate the defendant's knowledge of the amount of the controlled substance for purposes of the conspiracy charge. *Id*. at 634.

In addition to the evidence described above, the prosecutor presented evidence regarding several other drug transactions involving defendant and Daniels. Later on the same night that the first drug transaction occurred, the undercover officer returned to the Star Motel to purchase more cocaine from Daniels. During that transaction and again on May 22, 1998, defendant told the officer to use the code word "driver" to signal that he wanted to make future cocaine purchases. In addition, defendant accompanied Daniels and the officer on their trip to Toledo on May 23, 1998, in search of an ounce of cocaine. During that trip, defendant explained to the officer that he and Daniels planned to open a "parts store" as a drug front. While Daniels was outside the car looking to buy an ounce of cocaine for the officer, defendant reassured the officer that he and Daniels would "take care of" him. Finally, when the officer purchased cocaine from Daniels on June 15, 1998, defendant reminded the officer that he and Daniels would "take care of you, we'll treat you right." Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational jury could have found defendant guilty of conspiring to deliver less than fifty grams of cocaine.

III. Admission of Evidence

Defendant next contends that the trial court erroneously admitted irrelevant evidence at trial. Specifically, defendant challenges: (1) the officer's testimony that Tina Frye and Rhonda Braswell were present in the motel room with defendant and Daniels during a drug purchase, and (2) admission of a photograph showing Frye and Braswell standing next to Daniels' car, in front of the Star Motel.[2] Defendant argues that the challenged evidence led the jury to believe that he was "surrounded by crack dealers, users and prostitutes." The decision whether to admit evidence is within the sound discretion of the trial court, and we will not disturb that decision on appeal absent an abuse of discretion. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989).

The officer's testimony that he found defendant in the motel room with Frye and Braswell was relevant under MRE 401 because it linked defendant to other cocaine purchases that were relevant to the conspiracy charge. Further, the trial court properly allowed the photo into evidence because of the testimony linking defendant to the car, used when defendant, Daniels and the undercover officer drove to Toledo in search of drugs. There is nothing to indicate that the probative value of the challenged testimony was substantially outweighed by the danger of unfair prejudice under MRE 403. Therefore, we cannot say that the trial court abused its discretion in admitting the challenged evidence.

Defendant also contends that the trial court erroneously admitted evidence regarding drug tally sheets. Defendant objected to the admission of this evidence at trial, under MRE 901, alleging a lack of foundation establishing the authenticity of the documents. On appeal,

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[2] The trial court admitted the photograph as the prosecutor's Exhibit 16.

defendant argues that the drug tally sheets were inadmissible under MRE 403, due to unfair prejudice. In order to preserve an issue for appeal, an objection to evidence must specify the same ground for challenge as the party seeks to assert on appeal. *Tringali v Lal*, 164 Mich App 299, 306; 416 NW2d 117 (1987); *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Because defendant failed to preserve this matter, we review it for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Here, defendant has failed to show plain error because the drug tally sheets were indicative of the drug trafficking that occurred at the Star Motel and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.

IV. Statements of a Co-Conspirator

Defendant next contends that the trial court erroneously admitted hearsay statements under the co-conspirator exception, MRE 801(d)(2)(E). However, defendant does not identify the specific statements at issue. Rather, defendant apparently refers to the officer's testimony regarding co-conspirator Daniels' *actions*.[3] We disagree with defendant's apparent contention that Daniels' actions constitute nonverbal hearsay under MRE 801(a). Without specific statements made by his co-conspirator, defendant cannot demonstrate a violation of MRE 801(d)(2)(E).

V. Constitutional Right of Confrontation

Defendant next argues that the officer's testimony regarding his observations of co-defendant Daniels violated defendant's constitutional rights to confront witnesses against him. Again, defendant does not identify specific statements made by Daniels, but refers to Daniels' *actions*.[4] We conclude that testimony regarding a co-defendant's actions simply do not implicate a defendant's constitutional rights under *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

VI. Entrapment

Next, defendant claims that he was subject to sentence entrapment because the officer did not arrest him immediately, upon the first sale of cocaine. Defendant argues that the officer therefore entrapped him into delivering more cocaine than he otherwise would have done. Defendant's argument is without merit. The officer merely furnished defendant with the opportunities to commit the crimes of which he was found guilty. *People v Ealy*, 222 Mich App 508, 510-511; 564 NW2d 168 (1997). Furthermore, a defendant has no constitutional right to be arrested. *Hoffa v United States*, 385 US 293, 310; 87 S Ct 408; 17 L Ed 2d 374 (1966); *People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979).

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[3] Defendant argues that "recitation of the *actions* of Daniels are as much statements as his actual words." [Emphasis added.]

[4] Defendant argues that, "the statements [actions] [sic] of co-perpetrator Daniels were, *in effect*, statements by a non-testifying co-defendant." [Emphasis added.]

VII. Invalid Charge

Finally, there is no merit to defendant's claim that he was charged under an invalid count of conspiracy. *People v Baugh*, 243 Mich App 1, 4-6; 620 NW2d 653 (2000), remanded 465 Mich 863 (2001). In the original felony complaint, defendant was charged with one count of delivering less than fifty grams of cocaine. At the initial preliminary examination hearing, the prosecutor moved to add a second count charging defendant with conspiracy to deliver less than fifty grams of cocaine. Following the continuation of the preliminary examination hearing, the district court bound defendant over to circuit court on the delivery count, granted the prosecutor's motion to add the conspiracy count, and continued the preliminary examination. Following the continued preliminary examination hearing, the district court found sufficient evidence to bind defendant over to the circuit court on the conspiracy charge. Defendant was then arraigned before the trial court on the delivery and conspiracy charges, which were set forth in the original and supplemental information. There is no record support for defendant's claim that he was improperly charged.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot