

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY DALE KEYES,

Defendant-Appellant.

---

UNPUBLISHED

May 28, 1996

No. 169447

LC No. 93-035819-FH

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver more than 225 grams but less than 650 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). He was sentenced to twenty to thirty years' imprisonment. Defendant now appeals as of right. We affirm.

I

Defendant first argues that insufficient evidence was presented to support his conviction. We disagree.

In reviewing a sufficiency of the evidence claim in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact would have found the essential elements of the crime proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). In order to establish a conspiracy the prosecutor must show a combination or an agreement, either express or implied, between two or more persons, to commit either a legal act in an illegal manner or an illegal act. *People v Meredith (On Remand)*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995). There need not be direct proof of an agreement; instead, the conspiracy may be proven by circumstantial evidence and may be based on reasonable inferences drawn from the facts. *People v Sutherlin*, 116 Mich App 494, 498; 323 NW2d 456 (1982).

Defendant argues that there was insufficient evidence presented to support his conviction because his link to a broad conspiracy was not convincingly established and because insufficient evidence of intent was presented. However, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant, along with his coconspirators, purchased more than 225 grams of cocaine in Detroit on numerous occasions, and then brought the cocaine to Muskegon where they divided it up into smaller portions to sell. Additionally, there was evidence presented that while selling cocaine, the members of the conspiracy, including defendant, would watch each others “back end” by looking out for the police. This evidence was sufficient to justify defendant’s conviction.

Defendant also argues that it was improper to aggregate the individual deliveries of cocaine to prove the conspiracy. However, we find that it was not necessary to aggregate the deliveries. The evidence showed that approximately half of a kilogram of cocaine was delivered each week by the conspiracy. The evidence further showed that defendant participated in the delivery of half of a kilogram of cocaine on a number of occasions. Therefore, defendant’s argument lacks merit.

## II

Defendant next argues that the trial court erred in admitting evidence of cocaine and lab reports analyzing cocaine that was not seized from defendant because this evidence was irrelevant and more prejudicial than probative. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice.” MRE 403. Because defendant specifically stated that he had no objection to the admission of this evidence, we review for plain error only. MRE 103. Plain error occurs when the error could have been outcome decisive or where the error falls under the category of cases where prejudice is presumed or reversal is automatic. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). We find that most of this evidence was relevant and not more prejudicial than probative because it tended to establish the conspiracy. With respect to the remaining evidence, we have reviewed defendant’s claims and conclude that in light of the evidence tending to prove defendant’s guilt, the admission of this evidence was not outcome decisive.

Defendant also contends that the admission of two taped telephone calls was improper. Defendant argues that this evidence was irrelevant. However, the taped telephone calls tended to establish that a conspiracy existed and that defendant was a part of the conspiracy. Accordingly, this evidence was relevant. MRE 401. Defendant also argues that the taped telephone calls should not have been admitted due to their prejudicial impact. Specifically, defendant argues that this evidence was prejudicial because it tended to prove guilt. However, evidence of guilt is always prejudicial. *People v Siler*, 171 Mich App 246, 253; 429 Mich 865 (1988). The question is whether the evidence is unfairly prejudicial. *Id.* Here, the evidence was offered to show the existence of a conspiracy and to link defendant to the conspiracy. There was nothing unfairly prejudicial in this evidence.

### III

Defendant next argues that numerous instances of prosecutorial misconduct denied him a fair trial. Questions of prosecutorial misconduct are decided on a case by case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). In reviewing such claims, this Court examines the remarks in context to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Legrone, supra* at 82-83.

Defendant first argues that the prosecutor improperly asked him to comment on Officer Jordan's credibility. It is improper for the prosecutor to ask a defendant to comment on the credibility of a prosecution witness because such testimony is not probative. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). The prosecutor did ask defendant improper questions that sought comment on the credibility of Officer Jordan, a prosecution witness. However, these improper questions did not result in error because defense counsel immediately objected to the questions. Thus, the improper questioning was precluded. See *id.* at 18. The prosecutor then rephrased the questions and asked defendant whether Officer Jordan's version of what had occurred was "wrong." In asking defendant whether Officer Jordan's version of the events was wrong, the prosecutor did not ask defendant to comment on the credibility of witnesses. Rather, the questions inquired whether Officer Jordan had correctly recalled what had happened. Thus, after defense counsel's objections, the prosecutor did not improperly ask defendant to comment on the credibility of witnesses. Accordingly, defendant was not denied a fair trial.

Defendant's remaining claims of prosecutorial misconduct were not objected to below. Accordingly, appellate review is precluded unless the failure to consider the issues would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We conclude that a miscarriage of justice will not result from our failure to review these issues.

### IV

Finally, defendant argues that he received ineffective assistance of counsel because counsel failed to object to the errors claimed on appeal. Having found no error requiring reversal, we conclude that defendant has failed to sustain his burden of showing that counsel's performance fell below an objective standard of reasonableness, and that the representation prejudiced the defendant to the point of depriving him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald