

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

June 25, 1996

Plaintiff-Appellee,

v

No. 179687

LC No. 93-062873-FH

ROLAND LEE ANDERSON, II,

Defendant-Appellant.

Before: Marilyn Kelly, P.J., and Neff and J. Stempien.,* JJ.

PER CURIAM.

Defendant was convicted by a jury of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and conspiracy to deliver cocaine, MCL 333.7401(2)(a)(iv)(c); MSA 14.15(7401)(2)(a)(iv)(c). He was sentenced to terms of two to twenty years' imprisonment for each conviction, to be served consecutively to each other and to a sentence in a separate case. He appeals as of right. We affirm.

On May 25, 1993, Glenn Watson, an undercover narcotics investigator in the vice unit of the Grand Rapids Police Department, went undercover to a bar on Division Avenue to try to purchase cocaine. Derrick Jones came up to his car to see if he needed drugs and Watson asked for a half-ounce of powder cocaine. Jones took Watson to a residence on Pleasant Street to get it. At Pleasant Street, Charles Davis told them that he did not have the cocaine, but could take them somewhere to get it. They then drove to a residence on Madison Avenue. Davis went in alone, then came back out and told Watson to come in. Davis pointed to a man in the living room and told Watson that he could "hook you up." At trial, Watson identified the man as defendant. Watson paid for the cocaine and left with Davis and Jones, while defendant remained at the residence.

We first consider defendant's claim that there was insufficient evidence to support a conviction for conspiracy. In determining whether the evidence was sufficient, 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

* Circuit judge, sitting on the Court of Appeals by assignment.

essential elements of the crime were proven beyond a reasonable doubt. *People v Barajas*, 198 Mich App 551, 553; 499 NW2d 396 (1993), aff'd 444 Mich 556; 513 NW2d 772 (1994). We find that the evidence was sufficient.

Defendant contends that statements made by Davis were improperly admitted, but that even with Davis' statements, the record was insufficient to show conspiracy. We disagree. Plaintiff presented sufficient evidence for a rational trier of fact to have found conspiracy beyond a reasonable doubt. Conspiracy is an unlawful agreement between two or more persons to accomplish an illegal objective. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). The unlawful agreement can be express or implied. *Barajas supra*.

To prove conspiracy, contrary to defendant's argument, plaintiff did not need to show that Davis was compensated. In any event, Davis testified he was compensated "in the long run." Nor, as defendant contends, did Davis need to identify a specific person ("someone") rather than a location ("somewhere"), or prove that Davis was involved in the discussion about the transaction. Circumstantial evidence is sufficient to show conspiracy. *People v Cadle*, 204 Mich App 646, 654; 516 NW2d 520 (1994), rev'd on other grounds 209 Mich App 467; 531 NW2d 761 (1995). Officer Watson's testimony alone was sufficient for a trier of fact to find a conspiracy beyond a reasonable doubt, even without Watson reiterating Davis' statements. Also, because Watson's testimony constituted independent proof of the conspiracy, Davis' statements were admissible nonhearsay under MRE 801(d)(2)(E).

We now turn to defendant's claim that trial counsel was ineffective. To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because defendant did not move for a hearing or a new trial based on ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

We have reviewed the record and conclude that it does not support defendant's claim. Defendant's contention that counsel was ineffective in failing to challenge the foundation for admission of coconspirators' statements is without merit. The statements were admissible because there was independent proof of the conspiracy through Watson's testimony. *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982). Any objection by counsel would therefore have been futile and counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475, lv den 439 Mich 891; 478 NW2d 184 (1991). Similarly, counsel was not required to move for a directed verdict after plaintiff's case because such a motion would have been meritless when the evidence was sufficient to find a conspiracy.

Defendant also contends that counsel was ineffective in presenting Davis as a witness because Davis supported the plaintiff's case. We will not use the benefit of hindsight to find that counsel's action

could not have been sound trial strategy. *People v Lavearn*, 448 Mich 207, 216;

528 NW2d 721 (1995). Davis' testimony, had it been believed by the jury, would have exonerated defendant.

Affirmed.

/s/ Marilyn Kelly

/s/ Janet T. Neff

/s/ Jeanne Stempien