STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNIE RAY WHITE,

Defendant-Appellant.

UNPUBLISHED
December 13, 1996

No. 187484
Oakland County
LC No. 94-134425

Before: Jansen, P. J., and Reilly and E. Sosnick,* JJ

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of delivery of more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401) (2)(a)(iii), and conspiracy to deliver more than 50 but less than 225 grams of cocaine, MCL 750.157a; MSA 28.354(1). Thereafter, defendant pleaded guilty to being an habitual offender, fourth offense. MCL 769.12; MSA 28.1084. Defendant was sentenced to three consecutive prison terms of ten to twenty years for the delivery convictions and the habitual offender conviction. We affirm.

Defendant became acquainted with Officer Andrew Wurm, an undercover narcotics investigator, on July 18, 1994. Officer Wurm purchased approximately four ounces of cocaine from defendant; two ounces on July 21, 1994 and two ounces on July 24, 1994. Each of these cocaine sales involved defendant and his coconspirator, Terrall Foster. During some of his negotiations with both defendant and Foster, Officer Wurm expressed his intention to purchase a kilogram of cocaine. On July 27, 1994, defendant delivered to Officer Wurm a purported kilogram of cocaine. A chemical analysis revealed that the substance was not cocaine.

Defendant first argues that there was insufficient evidence to prove a conspiracy existed between defendant and Foster on July 26 and 27, 1994, as charged in the amended information. We disagree. In reviewing sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential

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

elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748 , modified 441 Mich 1201 (1992).

A conspiracy is a partnership in criminal purpose. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective. *Id.* The gist of the offense of conspiracy lies in the unlawful agreement between two or more persons. *Id.* The crime of conspiracy is complete upon formation of the agreement, and no overt act in furtherance of the conspiracy is necessary. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). Proof of the agreement may be established by circumstantial evidence or based on inference. *People v Barajas*, 198 Mich App 551, 554; 449 NW2d 396 (1993). Once formed, the conspiracy continues to exist until consummated, abandoned or otherwise terminated by some affirmative act. *People v Hintz*, 69 Mich App 207, 221; 244 NW2d 414 (1976). Moreover, the withdrawal from a conspiracy is ineffective because the heart of the offense is the participation in the unlawful agreement. *Cotton*, *supra*.

Clearly the circumstances indicated that there was an agreement between defendant and Foster. Foster was involved in both of Officer Wurm's two-ounce cocaine purchases from defendant on July 21 and 24, 1994. Defendant directed Officer Wurm to conduct business with Foster if defendant was unavailable to do business. In a telephone conversation between Officer Wurm and Foster on July 24, 2994, Foster indicated that he was aware that defendant and Officer Wurm were negotiating a deal for the purchase of a kilogram of cocaine. Foster told Officer Wurm that "they" could do it, but probably in four separate deliveries. A similar discussion occurred between Officer Wurm and Foster on July 25, 1994. Statements made by Foster and defendant indicate that Foster and defendant shared the profits from the cocaine deals with Officer Wurm. Moreover, there was no evidence to indicate that the on-going agreement for defendant and Foster to supply Officer Wurm with cocaine was consummated, abandoned or terminated by an affirmative act before July 27, 1994. Viewed in a light most favorable to the prosecution, sufficient evidence was presented to prove that a conspiracy continued until July 27, 1994, despite the evidence indicating that defendant was attempting to arrange the sale of the kilogram of cocaine deal without Foster's involvement.

Defendant next argues that the trial court improperly admitted evidence of "other crimes, wrongs or acts." We disagree. The admissibility of evidence is a question that rests within the sound discretion of the trial court. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.*

Defendant contends that the trial court abused its discretion in admitting evidence of the July 26 and 27, 1994, telephone conversations which occurred between defendant and Officer Wurm. Defendant's argument is without merit. Contrary to defendant's argument, the evidence that defendant sought to exclude is not "other acts evidence." Defendant was charged with conspiring with Foster to deliver over 50 but less than 225 grams of cocaine between July 21 and 25, 1994. The information was amended to allege that the conspiracy continued until July 27, 1994. Although defendant argues that the evidence was "other acts" evidence because the kilogram negotiations did not involve Foster

and it was a separate and distinct transaction, the record reveals that Foster discussed the possibility of the purchase of a kilogram of cocaine with Officer Wurm before the July 27, 1994, delivery. Moreover, during a conversation between Officer Wurm and defendant on July 26, 1994, Officer Wurm told defendant that he would continue to buy from Foster. There was no evidence that the conspiracy had been consummated, abandoned or otherwise terminated by some affirmative act before July 27, 1994. See *Hintz*, *supra* at 221. Because evidence regarding conversations that occurred after July 25, 1994, related to the charged crime of conspiracy to deliver over 50 but less than 225 grams of cocaine, which as amended continued until July 27, 1994, we find that it related to the charged conduct and was not evidence of "other crimes."

Defendant next argues that the prosecution failed to give pretrial notice of its intention to introduce evidence of the conversations which occurred on July 26 and 27, 1994, and thus, this evidence was erroneously admitted. We disagree. The prosecution must give pretrial notice of its intent to introduce "other acts" evidence at trial. *VanderVliet*, *supra* at 89. Because we conclude that the evidence that defendant sought to admit was not "other acts" evidence the prosecutor was under no obligation to give notice of its intention to introduce this evidence.

Defendant further contends that the trial court abused its discretion in admitting a statement made by defendant's nontestifying codefendant, Foster. We conclude that the error, if any was harmless.

For a nontestifying codefendant's statement to be admissible against a defendant, it must be admissible under the Michigan Rules of Evidence and it must not violate the defendant's constitutional right to confront his accuser. *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). A violation of the Confrontation Clause, like the erroneous admission of evidence, can be harmless if the appellate court can "confidently conclude, beyond any reasonable doubt that the error did not affect the jury's verdict." *Id.* An error is not harmless if the minds of an average jury would have found the prosecution's case significantly less persuasive had the statements of the accomplice been excluded. *Id.*

On July 21, 1994, and July 25, 1994, defendant delivered to Officer Wurm cocaine in the amounts 56.53 grams and 59.61 grams, respectively. Foster, defendant's coconspirator was present during the July 21, 1994, and the July 25, 1994, deliveries of cocaine. Additionally, defendant directed Officer Wurm to deal with Terrall Foster if defendant was unavailable for business. At one point, Foster also indicated that if Officer Wurm dealt with him, defendant would be compensated, which leads to the inference that both Foster and defendant had an agreement to sell cocaine and share the profits. Thus, in view of the fact that defendant delivered cocaine to Officer Wurm on two occasions, that Foster was present during both deliveries and that both defendant and Foster indicated that they had an agreement regarding the delivery of cocaine, we conclude that there was overwhelming evidence of defendant's guilt and that the prosecution's case would not have been significantly less persuasive in the absence of the statement. Therefore, any error in the admission of Foster's statement was harmless and does not require reversal.

Defendant's final claim of error is that the trial court abused its discretion in admitting the confiscated cocaine into evidence. If the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). A foundation for the latter sort of evidence will commonly entail, through witnesses' testimony, tracing the chain of custody of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. *Id.* However, the admission of real evidence does not require a perfect chain of custody. *Id.* Any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims. *Id.* at 130-131. Thus, a perfect chain of custody is not required for the admission of cocaine and other relatively indistinguishable items of real evidence. *Id.* at 133. Rather, such evidence may be admitted where the absence of a mistaken exchange, contamination, or tampering has been established to a reasonable degree of probability or certainty. *Id.*

In this case, defendant argues that a discrepancy regarding the weight of the cocaine and the fact that no evidence was offered to demonstrate that the cocaine was not tampered with should have resulted in its exclusion. However, the threshold question remains whether an adequate foundation for admission of the evidence has been laid under all the facts and circumstances of this case. *White, supra* at 133. Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility. *Id.*

Here, the chain of custody for the cocaine was complete. Moreover, reasonable precautions were taken to preserve the original condition of the evidence and to prevent its misidentification. *Id.* at 133. After the July 21, 1994, and the July 25, 1994, purchases of cocaine, Officer Wurm placed the cocaine in two heat sealed bags and tagged them for evidence. Officer Wurm took the evidence to the Michigan State Police Crime Laboratory on August 4, 1994, and placed the evidence in a slam locker at the crime laboratory. Christopher Flo, the crime laboratory scientist, removed the evidence from the slam locker and documented the date and time that the evidence was removed. The chain of custody was complete, and reasonable precautions were taken to preserve the original condition of the evidence. Under these circumstances, the trial court did not abuse its discretion in admitting the evidence at trial.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick