

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNIE RAY WHITE,

Defendant-Appellant.

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UNPUBLISHED

December 20, 1996

No. 185316

Oakland County

LC No. 94-134424

Before: McDonald, P.J., and Murphy and J.D. Payant,\* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401(2)(a)(iv), conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a; MSA 28.354(1), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to two terms of two to twenty years in prison to be served consecutively. Defendant now appeals as of right. We affirm.

The convictions arose out of a July 19, 1994, transaction between Andrew Wurm, an undercover officer with the Oakland County Narcotics Enforcement Team, and Roseanne Loren. Wurm had purchased cocaine from Loren on July 18, 1994, and then called her at 3:00 p.m. the next day to arrange for another sale. He called again at 5:30 p.m. to confirm the sale, and spoke with defendant. Defendant knew of Wurm's order and assured him that the package would be there when he arrived. When Wurm informed defendant that the cocaine he received from Loren the night before was a gram short, defendant assured Wurm that he would make it right. The transaction between Loren and Wurm took place later that evening at a residence on Stahalin Street in Southfield with defendant present. After defendant stated that he had seen an unmarked police car, Loren panicked and ran into the house. Wurm then told defendant that he only wanted to deal with him and not with Loren, and defendant told Wurm to call him the next day.

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

Defendant was acquitted of any involvement in the July 18 transaction but was convicted of one count of delivery of cocaine and one count of conspiracy to deliver cocaine arising out of the July 19 transaction.

First, defendant argues that there was insufficient evidence of an agreement to support his conspiracy conviction. We disagree.

In reviewing the sufficiency of the evidence from a bench trial, this Court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the elements of the crime were established beyond a reasonable doubt. *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996). A trier of fact may make reasonable inferences from the facts, if the inferences are supported by direct or circumstantial evidence. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

Conspiracy is a mutual agreement, express or implied, between two or more persons, to commit a criminal act or accomplish a legal act by unlawful means. *People v Carter*, 415 Mich 558, 567; 330 NW2d 314 (1982); *People v Moscara*, 140 Mich App 316, 319; 364 NW2d 318 (1985). In order to establish a conspiracy to commit a crime, the prosecution must prove that the intent to commit the crime was possessed by more than one individual. *People v Atley*, 392 Mich 298, 310; 220 NW2d 465 (1974). Direct proof of an agreement is not required, and conspiracy may be proven by circumstantial evidence and based on inference. *Id.* at 311.

Viewed in a light most favorable to the prosecution, the evidence was sufficient from which a rational trier of fact could reasonably have concluded beyond a reasonable doubt that an agreement to deliver the cocaine to Officer Wurm existed between Loren and defendant. Defendant was present at the house on July 19 when the transaction between Loren and Wurm occurred. In addition, the July 19 telephone call between defendant and Wurm demonstrated that defendant knew of the proposed order made by Wurm to Loren. In that same telephone conversation, defendant assured Wurm that he would make sure that the cocaine delivered was the proper weight. A trier of fact could reasonably infer from this evidence that an agreement existed between Loren and defendant to deliver cocaine to Officer Wurm. Therefore, defendant's conspiracy conviction was supported by the evidence.

Defendant further claims that his conspiracy conviction must be overturned because there was no evidence of an agreement that began on July 18 and continued until July 19 as alleged in the information, as the trial court found that the evidence only supported defendant's involvement on July 19. We disagree. Although the indictment or information must contain the time of the offense "no variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b); MSA 28.985. Because time is not an essential element of the crime of conspiracy, defendant's argument is without merit. See *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

Finally, defendant contends that the cocaine was improperly admitted at trial because the chain of custody was not sufficiently established. However, defendant did not object below and, as the cocaine in question was seized from the July 18 transaction of which defendant was acquitted,

defendant has not demonstrated that a substantial right has been affected. Therefore, the issue is not preserved. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994).

Affirmed.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ John D. Payant