STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES E. HARDY, JR. a/k/a JAMES HARDY,

Defendant-Appellant.

UNPUBLISHED
March 14, 1997

No. 183535
Saginaw Circuit Court
LC No. 93-008280-FH

Before: Taylor, P.J., and McDonald and C. J. Sindt,* JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by 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 less than fifty grams of cocaine, MCL 750.157a; MSA 28.354(1) and MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant also pleaded guilty of being an habitual-offender, fourth offense, MCL 769.12; MSA 28.1084. The trial court sentenced defendant to enhanced consecutive terms of imprisonment of ten to twenty years for the conspiracy conviction and ten to twenty years for the delivery conviction. We reverse the delivery conviction and affirm the conspiracy conviction.

Defendant presents numerous arguments, one of which we find to have merit. Defendant argues that his right to a unanimous verdict was violated by the trial court's failure to instruct the jurors that they had to unanimously agree that one of two acts of delivery for which defendant potentially could be convicted had occurred.

Defendant approached an undercover police officer and showed him a bag allegedly containing a small amount of rock cocaine. When the officer said he was unwilling to pay the price defendant asked, defendant went and conferred with the coconspirator in this case. The coconspirator then approached the officer and delivered two-tenths of a gram of rock cocaine at the price the officer originally indicated to defendant he was willing to pay. Thereafter, defendant and his coconspirator

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

were both arrested and the prerecorded buy money that the officer had used to purchase the cocaine from the coconspirator was found in defendant's possession. However, no cocaine was found in defendant's possession. No evidence was admitted to show that the substance defendant initially showed the officer was actually cocaine, and the officer testified that the cocaine he ultimately purchased from the coconspirator did not appear to be the same substance that defendant had initially shown him.

The prosecution's theory of the case was that defendant could have been charged with two counts of delivery, once when he attempted to make his own delivery to the officer and again when he aided and abetted the coconspirator's actual delivery to the officer. The trial court instructed the jury that an attempt constituted a delivery and also gave an aiding and abetting instruction, but the trial court did not instruct the jury that it had to unanimously agree on guilt as to one or even both of the acts in order to convict.

In *People v Yarger*, 193 Mich App 532, 534-535; 485 NW2d 119 (1992), this Court reversed the defendant's conviction where the trial court had instructed the jury that the prosecution had to prove either of two sexual acts, vaginal penetration or fellatio, in order to convict the defendant of a single count of criminal sexual conduct. The jurors had not been polled regarding which act(s) they believed had been proven beyond a reasonable doubt. *Id.* at 535-536. Where the testimony would have supported two separate convictions but the jury instructions allowed the jury to convict on a single charge if it believed that evidence proved either act or both acts, it was impossible to tell for which act the defendant had been convicted. *Id*. at 536-537. The *Yarger* Court held that if the case was retried, the defendant should either be charged with two separate counts or an appropriate instruction should be given to the jury. *Id*. at 537.

Also relevant is *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994), where the Supreme Court reinstated the conviction of a defendant after this Court had reversed on the basis of the holding in *Yarger*. The defendant in *Cooks* had been charged with one count of first-degree criminal sexual conduct, but testimony indicated that there were three similar but separate acts of penetration that occurred over a several day period. *Id*. at 505-507. In finding that the conviction should stand, the Supreme Court relied on the fact that materially identical evidence was offered with respect to each of the alleged acts of penetration and there was no reason to believe the jury had been confused or had disagreed about the basis of the defendant's guilt. *Id*. at 506. The multiple acts were "tantamount to a continuous course of conduct." *Id*. at 528. Further, the Supreme Court noted that the defendant in *Yarger* had presented a separate defense for each alleged act, whereas the defendant in *Cooks* merely denied the existence of any inappropriate behavior. *Id*. The Supreme Court held that a specific unanimity instruction will only be required where "either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others." *Id*. at 512-513 (emphasis in original). The Supreme Court in *Cook* did, however, acknowledge that "in most cases, the evidence will be materially distinct regarding one of the multiple acts allegedly committed by the defendant." *Id*. at 530, n 34.

In the instant case, defendant's act of attempting to deliver his own cocaine was materially distinct from the act of aiding and abetting the coconspirator's sale of cocaine. Different evidence was

given to show each act and separate defenses were presented for each theory of guilt regarding the delivery charge. Thus, *Yarger* requires us to reverse and remand for a new trial on the delivery charge. If the delivery charge is retried, defendant should be charged with two separate counts of delivery or an appropriate unanimity instruction should be given to the jury. *Id.*[1]

We are satisfied, however, that the lack of a unanimity instruction regarding the conspiracy charge does not require reversal. The court instructed the jury that it could convict defendant of both charges, either of the charges, or neither of the charges. The prosecutor's theory regarding the conspiracy charge was that defendant conspired with the coconspirator after the initial sale fell through and ultimately benefited from the coconspirator's delivery of cocaine to the officer. The prosecutor never argued that there was a conspiracy with reference to the aborted first sale and the court did not instruct the jury that it could convict defendant of conspiracy if it believed defendant only made the initial offer to sell and was not involved in the coconspirator's subsequent successful sale to the officer. Thus, the lack of a unanimity instruction relating to the conspiracy charge was not error.

We have considered defendant's remaining arguments and find them to be moot or without merit.

Affirmed in part and reversed in part.

/s/ Clifford W. Taylor
/s/ Gary R. McDonald
/s/ Conrad J. Sindt

[1] *People v Quinn*, 219 Mich App 571, 576-577; ___ NW2d ___ (1996), does not bar a retrial because we are satisfied that there was sufficient evidence to convict regarding each theory.