

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RODERICK LEE,

Defendant-Appellee.

UNPUBLISHED
December 17, 2002

No. 239229
Oakland Circuit Court
LC No. 99-166151-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SHEDRICK LEE,

Defendant-Appellee.

No. 239233
Oakland Circuit Court
LC No. 99-166152-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOE ABRAHAM,

Defendant-Appellee.

No. 239239
Oakland Circuit Court
LC No. 99-166150-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEMAR GARVIN,

No. 239243
Oakland Circuit Court
LC No. 99-166168-FC

Defendant-Appellee.

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

In these consolidated appeals, the prosecution appeals by leave granted from the trial court's opinion and order granting defendants' motion for a new trial. We reverse.

I. Procedural History

Following a lengthy trial in front of two juries,¹ defendants were convicted of conspiracy to possess with intent to deliver 650 or more grams of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(i). Defendants moved for a new trial or, in the alternative, for judgment notwithstanding the verdict, arguing that, in *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001), our Supreme Court held that knowledge of the amount of cocaine was an element of the crime and that the trial court did not properly instruct the jury regarding defendants' intent to deliver 650 or more grams of cocaine. The trial court agreed and granted defendants' motion for a new trial.

II. Standard of Review

A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal, or because it believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B); *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). A trial court's decision to grant a new trial is reviewed for an abuse of discretion. This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief. *Id.* A trial court's misapplication or misunderstanding of the law in reaching its decision may also constitute an abuse of discretion. *People v Cress*, 250 Mich App 110, 149; 645 NW2d 669, vacated in part on other grounds and remanded 466 Mich 882 (2002). "This Court reviews claims of instructional error de novo." *People v Kurr*, ___ Mich App ___; ___ NW2d ___ (Docket No. 228016, issued 10/4/02), slip op at 5, lv pending (Supreme Court Docket No. 122583).

III. Analysis

The prosecution argues that the trial court abused its discretion in granting defendants' motion for a new trial because the juries were properly instructed that the prosecution must prove that defendants each specifically knew that 650 or more grams of cocaine were involved in the conspiracy to deliver. The prosecution further argues that even if the juries were not properly instructed, the error was harmless beyond a reasonable doubt. We agree that, assuming the trial court's instructions were erroneous, the error was harmless beyond a reasonable doubt.

¹ Roderick Lee (R. Lee), Shedrick Lee (S. Lee), and Demar Garvin were all tried together before the same jury. Joe Abraham was tried in the same trial before a different jury.

In *Mass, supra* at 638-639, 645-646, our Supreme Court held that the jury must be instructed that the prosecution must prove the defendant had the specific intent to conspire to deliver the statutory minimum as charged. The Supreme Court held that “knowledge of the amount of a controlled substance is an element of a conspiracy to deliver charge.” *Id.* at 618. In reaching its conclusion, the Court relied on *People v Justice (After Remand)*, 454 Mich 334; 562 NW2d 652 (1997), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The Court pointed to the holding in *Justice*:

To be convicted of conspiracy to possess with intent to deliver a controlled substance, the people must prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver *the statutory minimum as charged*, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the *statutory minimum as charged* to a third person. [*Mass, supra* at 623-624, quoting *Justice, supra* at 349 (emphasis in *Mass*).]

In *Mass, supra* at 617, the defendant was charged as an aider and abettor of delivery of 225 grams or more, but less than 650 grams, of cocaine, MCL 333.7401(2)(a)(ii), and conspiracy to commit that offense, MCL 750.157a. In giving the jury instructions, the trial court did not instruct the jury that it had to find that defendant had conspired, not just to deliver some amount of cocaine, but at least 225 grams. *Mass, supra* at 639. The Supreme Court concluded that the instructions violated *Justice* and also violated *Apprendi* because “one can only be certain that the jury concluded that the conspiracy involved less than 50 grams.” *Mass, supra* at 639. The Court explained that the failure to have the jury determine that the conspiracy involved at least 225 grams of cocaine exposed the defendant to a thirty-year sentence, which was in excess of the prescribed maximum sentence applicable for a conspiracy to deliver less than fifty grams of cocaine. *Id.* at 639-640. The Court concluded that “[p]ursuant to *Justice* and *Apprendi*, a defendant charged with conspiracy to deliver 225 grams or more, but less than 650 grams, of cocaine is entitled to have the jury instructed that the defendant is guilty only if the prosecution has proven beyond a reasonable doubt that defendant conspired to deliver, not just some amount of cocaine, but at least 225 grams of cocaine.” *Mass, supra* at 645-646.

The prosecution in the present case argues that, when examining the jury instructions as a whole, the juries were properly instructed that the prosecution must show that each defendant had knowledge of the amount of cocaine involved in the transaction. The trial court in the present case instructed the juries on the elements of conspiracy to possess with intent to deliver 650 or more grams of cocaine, possession with intent to deliver 650 or more grams of cocaine, and unlawful delivery of a controlled substance. In the possession with intent to deliver 650 or more grams of cocaine and unlawful delivery of a controlled substance instructions, the trial court instructed the juries that the substances must have been in a mixture that weighed 650 grams or more. However, in the conspiracy instructions, the trial court did not include the amount of cocaine as an element of the offense. Furthermore, none of these instructions indicated that defendants had to specifically intend to deliver, not just any amount of cocaine, but 650 or more grams of cocaine. The trial court instructed the juries regarding the specific intent required to be found guilty of conspiracy to possess with intent to deliver 650 or more grams of cocaine as follows:

The crime of conspiracy to possess with intent to deliver and/or deliver 650 grams of a mixture containing the controlled substance cocaine and/or heroin requires proof of a specific intent, as does each of the lesser included offenses you will subsequently hear. This means that the prosecution must prove not only that the defendant did certain acts but that he did the acts with the intent to cause a particular result.

For the crime of conspiracy to possess with intent to deliver and/or to deliver 650 grams of a mixture containing the controlled substance cocaine and/or heroin, this means that the prosecution must prove that the defendant intended to agree to possess with intent to deliver or to deliver the cocaine and/or heroin. The defendant's intent may be proved by what he said, what he did, how he did it or by any other facts and circumstances in evidence.

The trial court also gave the following instruction regarding one of the key elements of conspiracy to possess with intent to deliver cocaine, which was explained in *Justice, supra* at 345-349:

To determine whether each defendant was a member of the alleged conspiracy, you must decide whether each individual defendant intentionally joined with anyone else to commit the crime of possession with intent to deliver 650 or more grams of a mixture containing the controlled substance cocaine and/or heroin.

Unlike the instructions in *Mass*, the instructions in the present case clearly described the charge against defendants as conspiracy to possess with intent to deliver 650 or more grams of cocaine. In this manner, the juries were instructed regarding the specific amount being charged. The present case is also distinguishable from *Mass* in that the defendant in *Mass* was charged with an underlying offense along with the conspiracy charge, while defendants in the present case were not charged with an underlying offense. Nonetheless, we need not determine whether the trial court properly instructed the juries in this case. Even if we were to conclude that the juries were not properly instructed that the prosecution had to prove that defendants specifically intended to deliver a specific amount of cocaine, that error would be harmless.

The prosecution argues that the alleged error was nonconstitutional in nature. However, for purposes of this appeal, we will accept defendants' argument and assume, without deciding, that the instructions to the jury were deficient in regard to one of the elements of conspiracy to possess with intent to deliver 650 or more grams of cocaine and that this amounted to constitutional error. Defendants raised the instructional issue before trial. Therefore, we will review this issue as preserved constitutional error.

Constitutional error must be classified as either structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). "If the error is structural, reversal is automatic. . . . If the constitutional error is not structural, it is subject to the harmless beyond a reasonable doubt test." *Id.* An instructional error regarding one element of a crime, whether by misdescription or omission, is a nonstructural constitutional error subject to a harmless error analysis. *Id.* at 54, citing *Neder v United States*, 527 US 1; 119 S Ct 1827; 144 L Ed 2d 35 (1999), on remand 197 F3d 1122 (CA 11, 1999), and *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). In *Mass, supra* at 640, the Supreme Court applied the nonstructural

constitutional error analysis where the trial court failed to instruct the jury on one of the elements of conspiracy to possess with intent to deliver 225 grams or more, but less than 650 grams, of cocaine. We conclude that the error in the instant case is similarly a nonstructural error.

Preserved, nonstructural constitutional error is reviewed to determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt. *Carines, supra* at 774. “A constitutional error is harmless if ‘[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’ ” *Mass, supra* at 640 n 29, quoting *Neder, supra* at 18. Preserved error is reviewed in terms of its effect on the factfinder. *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997). “Thus, ‘reversal is only required if the error was prejudicial. That inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.’ ” *Id.*, quoting *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

A. Roderick Lee

Applying the harmless error analysis to R. Lee, we note that the evidence submitted against him is overwhelming.² Helen Alexander and Ralph McMorris testified that they purchased cocaine from R. Lee on numerous occasions. On several occasions, R. Lee sold heroin to a police informant. Eric Lee (E. Lee) testified that he sold cocaine and heroin for R. Lee between 1989 and 1996. E. Lee testified that R. Lee supplied him with well over 650 grams of cocaine during those years. E. Lee testified that R. Lee sold cocaine to quite a few other people and that he and his brother, Nathaniel Lee, were the leaders of a drug organization. On one occasion, E. Lee went to R. Lee’s apartment and saw him converting over one thousand grams of cocaine into crack. Lamark Northern also testified that he purchased cocaine and heroin from R. Lee on numerous occasions and once purchased five hundred grams of cocaine from R. Lee. Northern testified that he purchased a total of well over 650 grams of cocaine from R. Lee. On one occasion, Northern, R. Lee, and Garvin went to Abraham’s house and purchased between eight thousand and ten thousand grams of cocaine. Abraham admitted to police that he sold cocaine to R. Lee and the he once sold R. Lee twenty thousand grams of cocaine for \$500,000. Abraham admitted that he sold multiple kilograms of cocaine to R. Lee and Garvin once or twice a week for two or three years.

B. Shedrick Lee

In regard to S. Lee, the evidence demonstrates that he sold cocaine to an undercover officer on two occasions. On both occasions, S. Lee indicated that he would be getting a large shipment of drugs and could sell larger amounts. S. Lee also sold cocaine to Alexander. E. Lee testified that S. Lee was going to other states to pick up shipments of cocaine for R. Lee. On one occasion, S. Lee offered E. Lee \$5,000 to drive to New York City with him. In 1994, S. Lee went to New York City to purchase cocaine and have a secret trap door installed on a car. A

² The record also establishes that the trial court viewed the evidence presented against R. Lee as overwhelming. During R. Lee’s bond hearing, the trial court granted the prosecution’s motion to raise the amount of bond to \$3,500,000 because “he [R. Lee] has heard the testimony, and that testimony convinces me that the likelihood of his conviction is great and therefore is great incentive to flee.”

state trooper stopped S. Lee, searched the car he was driving, and found 2,980 grams of cocaine and 6.6 grams of heroin in the trap door underneath the car. E. Lee testified that these drugs were meant to be delivered to R. Lee and Nathaniel Lee. E. Lee testified that R. Lee and Nathaniel Lee were angry that S. Lee had been caught with the drugs because they lost money.

C. Joe Abraham

There is similarly a great deal of evidence against Abraham. Antonio James, a drug runner for Joseph Stines, testified that he picked up cocaine from Abraham about twenty times in quantities of between one thousand and three thousand grams. James testified that he once saw a shipment of between 20,000 and 25,000 grams of cocaine delivered to Abraham's house. James testified that he heard Abraham once brag that his "Pontiac boys," R. Lee and Nathaniel Lee, were selling more drugs than Stines. Northern testified that he and Garvin also bought drugs from Abraham between five and ten times. They bought at least five hundred grams of cocaine each time and once bought one thousand grams of cocaine. On one occasion, Northern, R. Lee and Garvin went to Abraham's house and bought between eight thousand and ten thousand grams of cocaine. Abraham admitted to police that he had been selling cocaine for people in New York and West Virginia. He admitted that he received shipments of drugs two or three times a week for two or three years. Each shipment usually consisted of two thousand or three thousand grams of cocaine, but he once received a shipment of thirty thousand grams. Abraham confessed that he had sold a total of about 200,000 grams of cocaine. Abraham also told police that he had sold multiple kilograms of cocaine to R. Lee and Garvin once or twice a week for two or three years. He further stated that he had once sold R. Lee twenty thousand grams of cocaine.

D. Demar Garvin

In regard to Garvin, the evidence shows that police arrested Garvin multiple times with large amounts of cash and one time caught him throwing a bag of cocaine out of the window of a car. Marvin Smith, a cocaine addict and dealer, testified that he bought cocaine from Garvin several times. Northern testified that Garvin gave him and sold him cocaine multiple times. E. Lee testified that on one occasion, he went inside Garvin's house and saw him weighing about five hundred grams of cocaine on a triple beam scale. On another occasion, E. Lee went to Garvin's house and saw a scale and about seventy-eight grams of cocaine on the counter. On November 18, 1993, police executed a search warrant on a house Garvin lived in and found approximately .5 grams of cocaine in a plastic baggie, 1.5 grams of rock cocaine, over 28.7 grams of crack cocaine, a triple beam scale containing cocaine residue, some sandwich baggies with missing corners containing white powdery residue, cocaine residue on a plate in the microwave, two pistols, a box of bullets, \$19,645 in the drum of the dryer, and \$860. Sergeant Story testified that these items were commonly associated with the sale of cocaine. Police also found a piece of paper listing names, phone numbers, and amounts of money. Sergeant Story testified that he believed the list to be a tally sheet used to record drug transactions. The police did not find any paraphernalia for the ingestion of crack. Sergeant Story testified that he believed that the drugs found in the house were for sale purposes only. On June 11 or 12, 1998, police searched a house where Garvin lived and found a small electronic scale, a hand-held sifter, Chore Boy, box-cutter type razor blades, plastic baggies, several corner ties containing white residue, a plastic bag and two corners of plastic bags containing possible drug residue, half of a "kilo press," sheets of paper with numbers on them, a cutting agent, three-eighths of an

ounce of heroin, a very small amount of cocaine “shake,” small chips of crack cocaine, \$21,249 under a bed, and a loaded .22 revolver. An expert in narcotics trafficking testified that the items found in the house were consistent with drug possession with intent to distribute. This evidence shows that Garvin was involved in the sale of cocaine.

Along with the evidence that Garvin sold cocaine, there is evidence from various witnesses that he was involved in transactions involving over 650 grams. Northern testified that he and Garvin bought drugs from Abraham between five and ten times. They bought at least five hundred grams of cocaine each time and once bought one thousand grams of cocaine. On one occasion, Northern, R. Lee and Garvin went to Abraham’s house and bought between eight thousand and ten thousand grams of cocaine. After this transaction, Garvin talked about the amounts of cocaine that would go to different individuals. Abraham admitted that he sold multiple kilograms of cocaine to R. Lee and Garvin once or twice a week for two or three years.

IV. Conclusion

In light of this evidence, we conclude that the trial court’s alleged error in the jury instructions was harmless beyond a reasonable doubt. The instructions clearly described that the charge against defendants was conspiracy to possess with intent to deliver 650 or more grams of cocaine. The evidence shows that defendants knew that well over 650 grams of cocaine were involved in the conspiracy to deliver and that they all personally delivered well over 650 grams of cocaine. The testimony further shows that defendants conspired together to deliver this amount of cocaine. At trial, the issue in these cases was not whether defendants knew that 650 or more grams of cocaine were involved in the conspiracy, but whether the prosecution’s witnesses were credible and whether defendants were involved in the conspiracy to deliver cocaine at all. We conclude that the juries would not have acquitted any of the defendants even if they had been properly instructed that defendants must have specifically intended to conspire to deliver 650 or more grams of cocaine. In light of all of the evidence against them and the nature of the contested issues in these cases, we determine that, when viewing the jury instructions as a whole, the trial court’s errors were harmless beyond a reasonable doubt. Therefore, the trial court abused its discretion in granting a new trial for defendants.

Reversed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Patrick M. Meter