

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE EDWARD ABRAHAM,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 248457

Oakland Circuit Court

LC No. 1999-166150-FC

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant was convicted of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(i),¹ and sentenced to a prison term of thirty to sixty years. He appeals as of right. We affirm.

I. Underlying Facts

Defendant's conviction arises from allegations that he engaged in a long-term drug trafficking conspiracy with Roderick Lee and Nathaniel Lee, who allegedly led and equally controlled the purported Lee family organization, and others. Defendant allegedly was the primary supplier for the organization. Roderick and others, in turn, allegedly supplied numerous individuals, who sold to third parties.

Eric Lee, who is the nephew of Roderick and Nathaniel, began working for Roderick in 1989, and continued selling cocaine and heroin for his uncles until 1996. Eric testified² that Roderick and Nathaniel led the Lee organization and were equally in control. In 1989, Nathaniel lived with Eric's mother and kept more than a kilogram of cocaine in their apartment. Eric, then fourteen years old, began stealing portions of the cocaine to sell. After Eric's activities were discovered, Roderick began supplying Eric weekly with cocaine to sell. Eric initially began with half-ounce amounts, which eventually grew to over half a kilogram. Eric testified that, on one

¹ MCL 333.7401(2)(a)(i) was amended by 2002 PA 665 by increasing the statutory minimum from 650 grams to 1,000 grams.

² Eric was unavailable for trial, so the court admitted his preliminary examination testimony.

occasion, he observed over a kilogram of powder cocaine and over a kilogram of crack cocaine at Roderick's apartment. Roderick was in the process of converting the powder into crack cocaine.

Over the years, Eric observed large quantities of drugs being delivered to Roderick and Nathaniel. Eric observed defendant and Roderick together, and believed that the delivery individuals were "running" for defendant. In 1995, Eric heard defendant tell Roderick that he "had to pay." Later that day, Eric saw defendant at Roderick's house, and Roderick gave Eric some heroin to get tested. Eric testified that, in total, Roderick supplied him with more than 650 grams of cocaine for sale and distribution to third parties. Eric indicated that Roderick also supplied drugs to several other people, including Demar Garvin, Louis Laws, John Stanley, and LaMark Northern.

Northern testified that he first received cocaine from Roderick in 1987 or 1988, and also received cocaine from Garvin, who purchased his cocaine from defendant and Roderick. For years, beginning in approximately 1993, Northern routinely received cocaine and heroin from Roderick and Garvin, totaling more than 650 grams, which he broke down into smaller quantities and sold to third parties in the Pontiac area. In 1995, Northern and Garvin were at defendant's house when defendant offered to "front" them drugs to sell in exchange for sharing the profits, but Northern opted to purchase the drugs from defendant. Subsequently, Northern bought at least a half-kilogram of drugs directly from defendant between five and ten times. Northern typically pooled his money with Rashad Anthony and Marvin Smith to buy the drugs. At least twice, Northern and Garvin pooled their money to buy drugs from defendant and once bought a full kilogram. On one occasion, Northern, Roderick, and Garvin went to defendant's house and purchased between eight and ten kilograms of cocaine for \$200,000. Northern stopped buying drugs from defendant because he owed defendant money.

Antonio James, a drug runner for Joseph Steins, testified that, from 1994 to 1997, he picked up cocaine from defendant in quantities of between one and three kilograms about twenty times over the course of a couple of years. In 1996, James saw a shipment of between twenty and twenty-five kilograms of cocaine delivered to defendant's house. James testified that, in 1996 or 1997, he heard defendant brag to Steins that his "Pontiac boys," Roderick and Nathaniel, were selling more drugs than the Steins organization.

In December 1996, the police observed defendant carry a gray box into a Romulus Fairfield Inn room, and leave empty-handed minutes later. Two days later, the police observed three men leave the room. The police stopped their van and confiscated a total of \$57,800. A drug-sniffing canine alerted the police of drug residue on the money. In the motel room, the police found a gray box in the garbage, along with paper that matched paper that was used to bundle \$46,000 of the confiscated money.

On December 11, 1997, someone from New York made three calls to defendant's Belleville residence. On the same day, someone at defendant's house called a Belleville Red Roof Inn. On the next day, someone at the Red Roof Inn twice called defendant's house. On that same day, the police observed two men enter the same Red Roof Inn room. Shortly thereafter, defendant and another man entered the room. Minutes later, the four men left the room, one carrying a brown paper bag, and ultimately went to defendant's house. Defendant and a woman subsequently left, rented a van, and returned to defendant's house. Another car arrived

and, at 1:20 a.m., the car and the van left the house. When the police stopped and searched the van, which carried defendant, several other men, and a woman, the police confiscated \$1,642 from defendant, and \$2,900 from another man. A drug-sniffing canine alerted the police of drug residue on the money. Inside the car, which was being driven by Steins, the police found \$4,100 in the center console, which also indicated positive for drug residue.

In September 1998, search warrants were executed for ten homes purportedly connected to the Lee family organization, and numerous individuals allegedly involved in the conspiracy were arrested. Defendant was among those arrested. In a statement made to the police, defendant admitted that he received large quantities of cocaine from out of state, including New York, which he brokered to different drug organizations, including the Lee brothers and Steins. Defendant stated that he had received shipments a couple times a week for two or three years. The shipments were usually for two or three kilograms of cocaine, but he once received a shipment of thirty kilograms. Defendant indicated that he supplied “the Pontiac group” with drugs once or twice a week for two or three years, and that Roderick and Garvin came to his area to purchase drugs. Defendant admitted that, on one occasion, he sold twenty kilograms of cocaine to Roderick for \$500,000. Abraham explained that their drug transactions added up to between fifteen and twenty multi-kilogram drug deals. Defendant stated that, in total, he had sold about two hundred kilograms of cocaine in his life.

Inside defendant’s Belleville residence, the police found a loaded semi-automatic gun, a thirty-caliber gun, three cell phones, and an address book that contained phone numbers for Roderick and two New York individuals. The police confiscated phone records that showed several calls between defendant’s residence and Roderick’s residence. They also showed numerous calls between defendant’s residence and two New York individuals whom defendant identified as his drug sources.

II. Double Jeopardy

Defendant first argues that the trial court abused its discretion by finding that manifest necessity existed to declare a mistrial at his first trial and, therefore, his second trial and subsequent conviction is prohibited by the Double Jeopardy Clauses of the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. We disagree.

On May 4, 2000, at approximately 5:00 p.m., the jury began deliberations in defendant’s first trial. Approximately fifteen minutes later, the jurors were dismissed for the day. On May 5, at 9:00 a.m., the jurors resumed deliberations until they were dismissed for the day. On May 8, 2000, the jury resumed deliberations. At 11:53 a.m., the jury sent a note indicating that it was “deadlocked and cannot reach a unanimous decision.” Without objection, the court read the “deadlocked jury” instruction, CJI2d 3.12, and ordered the jury to continue deliberating. The jury resumed deliberating at 1:47 p.m., and, at 2:19 p.m., sent out another note indicating:

We have tried several ways to come to a unanimous decision since Friday morning and have remained deadlocked. Your charge to continue deliberations has resulted in the same deadlock. We feel that no further deliberations will result in a verdict.

After reading the note to counsel, the court indicated that, given the jury's two unequivocal expressions that it was deadlocked, the court had no choice other than to declare a mistrial. In response to defendant's objection, the court noted that, over the course of deliberations, the jury had the opportunity to revisit the testimony and examine the exhibits as it requested, and that, after the first indication of deadlock, it read the deadlocked jury instruction. The court found that, under those circumstances, it "would be a miscarriage of justice, when there's been such an open and clear case, to send these people back and say, you stay there until you come up with a verdict[.]" The court noted the danger of coercing a verdict, and the unfairness to the parties to "coerce 12 citizens to sit there until they satisfy [the court] and come up with a result when they told [the court] they can't."

The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple prosecutions for the same offense. *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002); *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Because jeopardy attaches when a jury is selected and sworn, a defendant's interest in avoiding multiple prosecutions is protected even when there has been no prior determination of guilt or innocence. *Lett, supra* at 215. "However, the general rule permitting the prosecution only one opportunity to obtain a conviction must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* (internal quotation omitted). If a trial is concluded prematurely, "a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity." *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997), citing *People v Dawson*, 431 Mich 234, 251-253; 427 NW2d 886 (1988).

In *Lett, supra*, our Supreme Court stated the applicable standard of review as follows:

A constitutional double jeopardy challenge presents a question of law that we review de novo. Necessarily intertwined with the constitutional issue in this case is the threshold issue whether the trial court properly declared a mistrial. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court. "At most, . . . the inquiry . . . turns upon determination whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict." [*Lett, supra* at 212-213 (citations omitted; emphasis supplied).]

The Court noted that the trial judge's decision to declare a mistrial on the basis of juror deadlock is reviewed for an abuse of discretion, which "involves far more than a difference in judicial opinion." *Id.* at 220-221 n 12.

In discussing the "the concept of manifest necessity," the Court stated:

The constitutional concept of manifest necessity does not require that a mistrial be "*necessary*" in the strictest sense of the word. Rather, what is required is a "high degree" of necessity. Furthermore, differing levels of appellate scrutiny are applied to the trial court's decision to declare a mistrial, depending on the nature of the circumstances leading to the mistrial declaration At the other end of the spectrum is the mistrial premised on jury deadlock, "long considered

the classic basis for a proper mistrial.” [*Id.* at 218-219 (citations omitted; emphasis supplied).]

The Court further explained:

Consistent with the special respect accorded to the court’s declaration of a mistrial on the basis of jury deadlock, this Court has never required an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock; nor have we ever required that the judge conduct a “manifest necessity” hearing or make findings on the record. In fact, we long ago stated that, “[a]t most, . . . the inquiry in [such a case] turns upon determination *whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict.*” Moreover . . . where the basis for a mistrial order is adequately disclosed by the record, the ruling will be upheld. [*Id.* at 221-222 (citations omitted; emphasis supplied in original).]

Here, the jury was discharged after deliberating for more than ten hours. Over the course of its deliberations, it was allowed to review certain testimony and exhibits that it requested. Despite this, it twice unambiguously communicated that it was unable to reach a verdict. After the first note, the court gave the deadlocked jury instruction, CJI2d 3.12, and sent the jurors back for further deliberations. Subsequently, after an additional half-hour of deliberations, the jurors sent a second note indicating that they “have remained deadlocked.” The second note plainly expressed that the jury was not going to reach a verdict, and that further deliberations would be fruitless. Our Supreme Court in *Lett, supra* at 223 n 17, observed that it had “long ago indicated that ‘the [trial] court is justified in accepting [the jury’s] statement that [it] cannot agree as proper evidence in determining the question.’” (Citation omitted.) Contrary to defendant’s assertion, “an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock” is not required. *Id.* at 221. Moreover, as the trial court recognized, there was surely a risk that a jury forced to continue to deliberate after twice reporting that it was deadlocked may compromise too easily, which might well have worked to defendant’s detriment rather than his benefit.

In sum, under these circumstances, the trial court did not abuse its discretion in finding that manifest necessity required a mistrial. Therefore, defendant’s retrial, following the declaration of a mistrial, did not violate the double jeopardy protections against successive prosecutions. *Lett, supra* at 219 n 11.

III. Sufficiency of the Evidence

Next, defendant argues that the evidence was insufficient to sustain his conviction because there was no evidence that he was engaged in a conspiracy to possess with intent to deliver cocaine, but merely evidence of a buyer-seller relationship. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact’s role of

determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To support a conviction for conspiracy to deliver a controlled substance, the prosecution 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. [*People v Mass*, 464 Mich 615, 629-630, 633; 628 NW2d 540 (2001), citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).]

A conspiracy is an express or implied mutual agreement or understanding “between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means.” *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). To prove the intent to combine with others for an unlawful purpose, it must be shown that the intent, including knowledge, was possessed by more than one person. *People v Blume*, 443 Mich 476, 482; 505 NW2d 843 (1993). For intent to exist, the defendant must know about the conspiracy, know the conspiracy’s objective, and intend to participate cooperatively to further the objective. *Id.* at 485. Direct proof of a conspiracy is not essential; rather, the coconspirators’ intentions may be inferred from the circumstances and their acts and conduct. *Justice (After Remand)*, *supra* at 347. In other words, “[w]hat the conspirators actually did in furtherance of the conspiracy is evidence of what they agreed to do.” *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude that a conspiracy was proven beyond a reasonable doubt. The evidence, if believed, indicated that defendant knowingly cooperated with the Lee family organization to further a drug trafficking scheme to possess and deliver numerous kilograms of cocaine. In a statement to the police, defendant admitted receiving large quantities of cocaine from out of state, which he brokered to different drug organizations, including the Lee brothers. Defendant admitted that he received shipments of two or three kilograms of cocaine a couple times a week for two or three years. Defendant admitted that he supplied the Lee brothers with drugs once or twice a week for two or three years, totaling between fifteen and twenty multi-kilogram drug deals between them. Defendant also admitted that, on one occasion, he sold Roderick twenty kilograms of cocaine. A jury could reasonably infer that the amount of cocaine at issue was not for personal use, but intended for distribution to third parties.

In addition to defendant’s own statements, phone records showed several calls between defendant’s residence and Roderick’s residence, and numerous calls between defendant’s residence and two New York individuals whom defendant identified as his drug sources. Also, Northern testified that he regularly bought drugs from defendant and, on one occasion, accompanied Roderick and Garvin to defendant’s house and purchased between eight and ten kilograms of cocaine. Additionally, James, a drug runner for Steins, testified that, from 1994 to

1997, he picked up cocaine from defendant in quantities of between one and three kilograms about twenty times over the course of a couple of years. In 1996, James saw a shipment of between twenty and twenty-five kilograms of cocaine delivered to defendant's house. James testified that, in 1996 or 1997, he heard defendant brag to Steins that his "Pontiac boys," Roderick and Nathaniel, were selling more drugs than the Steins organization.

Although defendant asserts that the evidence was insufficient to establish his participation in a conspiracy, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). As previously indicated, this Court will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *Wolfe, supra* at 514-515. Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove her own theory beyond a reasonable doubt in the face of the contradictory evidence provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance.

IV. Prosecutorial Misconduct

Defendant argues that the prosecution improperly revoked Eric Lee's immunity before trial, thereby forcing Eric to invoke his Fifth Amendment privilege, and enabling the prosecution to use his preliminary examination testimony at trial. We disagree.

Eric, who was involved in the drug trafficking conspiracy, testified before a grand jury in April 1998, and gave critical evidence against the Lee family organization. In December 1998, Eric testified at the preliminary examinations for defendant and other coconspirators. At Nathaniel's May 2000, preliminary examination, Eric claimed that he could not recall any details about the alleged drug trafficking conspiracy or his former testimony. Eric claimed that the prosecution threatened certain acts if he did not "cooperate with the grand jury," and that someone from the prosecution's office "went over several things" with him before he testified at the grand jury. Eric also indicated that his "life was in danger." Subsequently, based on Eric's claimed lack of memory, the prosecution declined to extend its grant of immunity to trial. Eric, who was represented by counsel, invoked his Fifth Amendment privilege not to testify,³ which the court accepted. The court thereafter concluded that Eric was "unavailable" under MRE 804(a), and admitted his preliminary examination testimony under MRE 804(b)(1).⁴

Defendant did not timely object to the prosecution's alleged misconduct or the admission of Eric's preliminary examination. Therefore, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

³ US Const, Am V; see also Const 1963, art 1, § 17.

⁴ Defendant does not dispute that a witness who asserts a valid Fifth Amendment privilege as justification for not testifying is "unavailable" for purposes of MRE 804(b)(1).

A witness is not unavailable if the failure to testify “is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing a witness from . . . testifying.” MRE 804(a). If the prosecution causes a witness’ failure to testify with either threats or actual prosecution, with the intent of preventing the witness’ testimony, the witness will not be deemed “unavailable” under MRE 804(a). *People v McIntosh*, 142 Mich App 314, 324; 370 NW2d 337 (1985). But, a prosecutor has broad discretion to determine which charges to bring and when to bring them, and the judiciary may not usurp that authority. *People v Farmer*, 193 Mich App 400, 402; 484 NW2d 407 (1992). The “burden is on the prosecution to establish that the witness whose prior recorded testimony is being offered is, in fact, ‘unavailable’ and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable.” *McIntosh*, *supra* at 327.

There is no basis to conclude that the prosecutor revoked Eric’s immunity merely to prevent him from testifying. Rather, the record reveals that the prosecutor reasonably surmised that Eric had contravened the terms of immunity conferred by MCL 780.701, i.e., to provide testimony concerning a crime. As previously indicated, after providing detailed grand jury testimony regarding a drug trafficking conspiracy, Eric claimed a complete lack of memory at Nathaniel’s preliminary examination. Eric testified that he did not recall any incidents related to drug trafficking, nor did he recall any of his grand jury testimony. Eric even denied any memory of ordinary facts, such as his previous address. Considering that there was no indication that Eric planned to testify regarding the alleged crime, the prosecutor’s decision to revoke Eric’s immunity was not unreasonable or improper. *Farmer*, *supra*.

Also, there is no indication in the record that the prosecutor’s case benefited from the absence of Eric’s trial testimony. Eric would have either testified consistently with his preliminary examination testimony, wherein he claimed a lack of memory, or consistent with his grand jury testimony, wherein he detailed acts of drug trafficking. Conversely, there is no basis to conclude that the prosecutor’s refusal to grant immunity resulted in the suppression of exculpatory testimony. Additionally, as noted by plaintiff, Eric offered very little inculpatory evidence against defendant. Eric’s testimony was of comparatively minor importance considering the totality of the evidence the prosecution presented against defendant. As discussed in part III, there was substantial other evidence supporting defendant’s conviction. In sum, there is no evidence suggesting that the prosecutor intentionally, or even negligently, contributed to Eric’s unavailability. Reversal is not warranted regarding this unpreserved issue.⁵

⁵ We reject defendant’s passing contention that the admission of Eric’s preliminary examination testimony improperly deprived the jury of the opportunity to view Eric’s body language, which was essential to judging his credibility. If a declarant is determined to be unavailable, MRE 804(b)(1) permits the declarant’s “[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” See also *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Although defendant argues that the jury was denied the opportunity to judge the witness’ demeanor, MRE 804(b)(1) only requires that there be a prior opportunity for cross-examination under a similar motive. Defendant does not argue that he was denied an opportunity for cross-

(continued...)

V. Sentence

Defendant's final argument is that he is entitled to resentencing because the sentencing judge was not the same judge who presided at his trial. We disagree.

Because defendant failed to timely object to the second judge imposing sentence or move to remand for a hearing regarding the visiting judge's availability, this issue is unpreserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*.

"Generally, a defendant should be sentenced by the same judge who presided over the defendant's trial, provided that the judge is reasonably available." *People v Pierce*, 158 Mich App 113, 115-116; 404 NW2d 230 (1987), citing *People v Clemons*, 407 Mich 939; 291 NW2d 927 (1979). Here, a visiting judge was assigned to, and presided over, defendant's trial. The visiting judge was assigned to a different county at the time defendant was sentenced in February 2003. The visiting judge was not reasonably available to sentence defendant because he was no longer assigned to the court and, therefore, no longer had authority to act as a judge of the 6th Circuit Court at the time of sentencing. See *People v Van Auker (After Remand)*, 132 Mich App 394, 399; 347 NW2d 466 (1984), rev'd in part on other grounds 419 Mich 918 (1984). Resentencing is not required.⁶

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens

(...continued)

examination under a similar motive.

⁶ We note that the circuit court judge who imposed defendant's sentence was familiar with the facts of this case because he presided over the trials of alleged coconspirators, Nathaniel Lee, Johnny Stanley, and Louis Laws.