

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHEILA ROSE MARKEY,

Defendant-Appellant.

UNPUBLISHED

March 15, 2007

No. 264005

Presque Isle Circuit Court

LC No. 04-092208-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions following a jury trial of conspiracy to possess 50 to 449 grams of cocaine, MCL 750.157a, MCL 333.7403(2)(a)(iii), aiding and abetting¹ possession with intent to deliver 50 to 224 grams of cocaine, MCL 333.7401(2)(a)(iii), and aiding and abetting possession with intent to deliver under 5 kilograms of marijuana, MCL 333.7401(2)(d)(iii). Defendant was sentenced to concurrent prison terms of 2 years and 6 months to 20 years for the conspiracy to possess cocaine charge, 4 years and 6 months to 20 years for the aiding and abetting possession with intent to deliver cocaine charge, and 1 year 6 months to 4 years for the aiding and abetting possession with intent to deliver marijuana charge. We affirm.

Defendant's convictions arose after a man named William Moran, driving north from Florida to Michigan, was caught by Georgia authorities with large quantities of marijuana and cocaine in his car. Moran made a deal with police whereby he promised to deliver the drugs to his contact in Michigan while under police surveillance. Moran's Michigan contact was defendant's boyfriend. After police witnessed the delivery, they arrested defendant's boyfriend on multiple drug charges. Defendant was subsequently charged on the basis that she had wired money to Moran, on behalf of her boyfriend, as part of the drug transactions, and that she aided and abetted at least one drug delivery by Moran to defendant's boyfriend.

Defendant first argues that Presque Isle County was an improper venue to try her for the aiding and abetting possession with intent to distribute 50 to 224 grams of cocaine and the aiding

¹ MCL 767.39.

and abetting possession with intent to distribute under 5 kilograms of marijuana charges. We disagree. A trial court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo. *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004). "Venue is part of every criminal prosecution and must be proved by the prosecutor beyond a reasonable doubt." *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996). "Due process requires that trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature." *Id.* "Whenever a felony consists or is the culmination of two or more acts done in the perpetration thereof, the felony may be prosecuted in any county in which any one of the acts was committed." MCL 762.8; see also *Webbs*, *supra* at 533.

One of the acts committed that culminated in the arrest of defendant's boyfriend for receiving cocaine on February 29, 2006 was the boyfriend's receipt of directions on where to meet Moran to pick up the drugs. Moran testified that he would call defendant's boyfriend to make such arrangements at the boyfriend's place of residence in Presque Isle County. Calling defendant's boyfriend was a necessary step to arrange the meeting, and therefore this call constitutes an act that was part of a culmination of acts, resulting in the delivery of the drugs and completing the felony of receiving cocaine with the intent to distribute it. Since that predicate act was in Presque Isle County, the resulting felony was eligible for prosecution in Presque Isle County. MCL 762.8; *Webbs*, *supra* at 533. Therefore, the trial court properly found Presque Isle County had venue to try the charges of receiving cocaine and marijuana with intent to distribute.

Defendant next argues that there was insufficient evidence to support her conviction of conspiracy to receive 50 to 449 grams of cocaine. We disagree. To determine whether there was sufficient evidence to support a conviction, this Court reviews the evidence de novo in the light most favorable to the prosecution, and decides whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant admitted to the police that she knew her boyfriend was obtaining some quantity of cocaine as part of his dealings with Moran and she admitted she sent money to Moran on her boyfriend's behalf to finance his purchases of drugs from Moran. Therefore, there is clearly evidence establishing her agreement with her boyfriend to arrange his possession of some quantity of cocaine. MCL 333.7403(2)(a). But a conspiracy to receive or deliver a given amount of drugs necessarily requires proving, as an element of that offense, that a defendant specifically intended to deliver or receive the amount required for the offense underlying the conspiracy. *People v Mass*, 464 Mich 615, 638-639; 628 NW2d 540 (2001). So, in order to sustain defendant's conviction of conspiracy to receive 50 to 449 grams of cocaine, there must be sufficient evidence to support a reasonable fact-finder's conclusion that it was established beyond a reasonable doubt that defendant specifically agreed to receive at least 50 grams of cocaine. *Id.*

There was no direct evidence that defendant ever had any conversation with anyone regarding specific quantities of cocaine. However, Moran testified that defendant was present during one of his first three deliveries to her boyfriend, sitting in the backseat of her boyfriend's car, while he and her boyfriend sat in the front. Moran testified that he delivered 3 ounces of cocaine (over 80 grams) on his second delivery. Moran testified that he normally pulled out at least one bag of each drug when he delivered to defendant's boyfriend. Viewing this evidence in

the light most favorable to the prosecutor, a reasonable fact-finder could conclude that defendant was present during the second delivery, that she could see from the backseat the 3 ounce bag of cocaine Moran pulled out, and that because there was at least one more cocaine delivery after that, defendant knew that a subsequent delivery would contain at least as much cocaine as the previous delivery.² Therefore, there was sufficient evidence to support a reasonable fact-finder's conclusion beyond a reasonable doubt that defendant conspired to receive 50 to 449 grams of cocaine.

Defendant last argues that there was insufficient evidence to support her conviction of aiding and abetting receiving with the intent to distribute 50 or more grams of cocaine. We disagree. Aiding and abetting is not a separate offense, but instead is a way to impose vicarious liability for accomplices to a substantive offense. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). Three elements are necessary to establish criminal liability under an aiding and abetting theory:

“(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.” [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).]

The elements of possession of 50 to 449 grams of cocaine with intent to deliver cocaine are:

(1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed [50 to 449 grams]. [*People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).]

However, “knowledge of the amount of a controlled substance is not an element of a delivery charge” because “delivery of a controlled substance is a general intent crime.” *Mass, supra* at 627. And so to convict on an aiding and abetting theory, it is “enough for the prosecution to show that [a defendant] . . . knowingly delivered or aided in the delivery of some amount of cocaine, as long as the jury later determined that . . . [at least as much as is required by the statute was] in fact delivered.” *Id.* at 628.

² While defendant could not know with any great precision, from her perspective in the backseat, how much was in the bag of cocaine, even if she was off by a significant amount in her estimate as to quantity (as much as 40 percent), that would still be an amount over the 50 grams as required under MCL 333.7403(2)(a)(iii). That there was, in fact, more than one delivery after that allows an even larger margin of error because the aggregate of those further deliveries would easily exceed 50 grams of cocaine.

Moran testified that defendant's boyfriend bought cocaine from him to sell in Michigan. Moran testified that the cocaine he brought up for defendant's boyfriend on this last occasion was in excess of 50 grams (totaling 9½ ounces at 28 grams per ounce). A police officer testified that the cocaine seized from defendant's boyfriend at his arrest exceeded 50 grams. Taken together in the light most favorable to the prosecutor, this is sufficient evidence that the crime charged was committed by defendant's boyfriend.

Moran testified that the last money transfer of approximately \$5,600 was, in part, payment in advance for the drugs he brought to defendant's boyfriend on this last occasion, and the police found a receipt for \$5,650 in the boyfriend's residence. This is sufficient evidence that defendant gave aid to her boyfriend in carrying out the underlying offense because, were it not for that advance payment, Moran would not have been able to purchase the drugs in Florida. Thus, taken in the light most favorable to the prosecutor, sufficient evidence was presented against defendant to establish all of the elements of aiding and abetting the offense of receiving 50 to 449 grams of cocaine with the intent to deliver.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder