

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JOSEPH DZIURA,

Defendant-Appellant.

UNPUBLISHED
December 15, 2015

No. 323003
Clinton Circuit Court
LC No. 13-009166-FH

Before: GADOLA, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit first-degree home invasion, MCL 750.157a, MCL 750.110a(2), and first-degree home invasion, MCL 750.110a(2)(a), on a theory of aiding and abetting his coconspirators, Jason Ogden and Luke O'Brian. O'Brian testified that defendant told him and Ogden how to break into a house owned by defendant's cousin, and he left a door at the house unlocked for them. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 84 to 180 months for each offense. Defendant appeals as of right and we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecutor presented insufficient evidence to convict him of conspiracy to commit first-degree home invasion under MCL 750.110a(2)(a), which required evidence of an agreement to commit a home invasion while armed with a dangerous weapon. Specifically, defendant contends that although Ogden and O'Brian took a gun and sword from the home, there was no previous agreement to involve dangerous weapons in the home invasion.

We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In order to sustain a conviction, every element of a charged crime must be proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400-401; 614 NW2d 78 (2000). When reviewing a sufficiency claim, we consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010).

“Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective.” *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001) (quotation marks and citation omitted). A conspiracy may include an implied agreement between two or more persons to commit an unlawful or criminal act. *People v Justice*, 454 Mich 334, 345 n 19; 562 NW2d 652 (1997). Each defendant must have agreed to future conduct that included all of the elements of the substantive crime. *People v Mass*, 464 Mich 615, 629 n 19; 628 NW2d 540 (2001).

At trial, O’Brian testified that he and defendant met with Ogden at defendant’s apartment and decided to take “stuff” from the target home. Accordingly, there was evidence of a conspiracy to commit home invasion. When asked whether defendant told them to take any particular property, O’Brian stated the following:

Yes, he specifically told us to take his cousin’s computers He said he liked the computers a lot, and he wanted to get back at him for—for whatever reason. He also told us there was a gun in the house, a [samurai] sword, video game systems to take, TVs.

Defendant argues that the only specific agreement was to take computers, and that the other items were simply mentioned as being in the home. However, O’Brian said that the other items he listed were “to take.” Defendant offers no explanation for the intermingling of items merely present in the home with items intended for theft. Therefore, the evidence showed that there was at least an implied agreement to take the gun and sword. The theft of the gun itself, and the fact that it was later sold, provide further proof that defendant and his coconspirators agreed to possess the dangerous weapons during the home invasion. Accordingly, sufficient evidence supported defendant’s conspiracy conviction.

II. MOTION TO SUPPRESS

Defendant next argues that the trial court erred by denying his motion to suppress several statements he made during police questioning. Defendant argues that he was approached by two detectives at work then extensively questioned in the back of a police vehicle where he did not feel free to leave, and he was never apprised of his rights pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

We review de novo a trial court’s ruling on a motion to suppress. *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011). A trial court’s factual findings are reviewed for clear error. *People v Elliott*, 494 Mich 292, 300-301; 833 NW2d 284 (2013). A factual finding is clearly erroneous if it leaves the Court with a firm and definite conviction that a mistake was made. *Steele*, 292 Mich App at 313.

Both the United States and Michigan Constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. Pursuant to *Miranda*, 384 US 436, a person subject to custodial interrogation must be given a series of warnings to protect the constitutional privilege against self-incrimination. *People v Tanner*, 496 Mich 199, 207-208; 853 NW2d 653 (2014). Statements made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights.

People v Mayes (After Remand), 202 Mich App 181, 190; 508 NW2d 161 (1993). Courts consider the totality of the circumstances to determine whether a defendant was in custody at the time of questioning. *Id.* Whether a person is in custody is determined based on how a reasonable person in the accused's situation "would perceive his or her circumstances and whether the reasonable person would believe that he or she was free to leave." *People v Roberts*, 292 Mich App 492, 504; 808 NW2d 290 (2011).

A reasonable person in defendant's situation would have understood that he was free to leave. When the detectives approached defendant at work, he agreed to talk to them and sat in the air-conditioned backseat of an unlocked, unmarked police vehicle, which had no cages or special locks and had interior door handles. At the outset, the detectives made it clear that defendant was not under arrest and that they would leave at defendant's request. Although one of the officers stated that the investigation would continue and defendant could be arrested at a future time, this should have reinforced that defendant was not under arrest at that time and was free to leave. The trial court correctly found that "there were no restrictions, no restraints, no statements, no conduct, no force, no threat of force, no locks, no handcuffs, nothing that would have restricted the defendant to a point where a reasonable person would have believed he was not free to leave." Under the totality of the circumstances, defendant was not subjected to a custodial interrogation, and the trial court did not err by denying his motion to suppress.

III. TEXT MESSAGES

A. AUTHENTICATION

Defendant argues that the trial court erred by denying his objections to the admission of text messages defendant received from Ogden while a detective was surreptitiously texting Ogden from defendant's phone. Generally, a trial court's decision on an evidentiary issue will not be reversed unless it constituted a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). A trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant first argues that the text messages should have been excluded because they were not properly authenticated. MRE 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Proposed evidence need not be free of weakness or doubt, but must only meet the minimum requirements for admissibility. *People v McDade*, 301 Mich App 343, 353; 836 NW2d 266 (2013). Regarding written messages, courts may consider the content of the message, its distinctive characteristics, and the circumstances surrounding the writing to determine whether the message is sufficiently genuine. *People v Ford*, 262 Mich App 443, 461-462; 687 NW2d 119 (2004).

In this case, the detective sent text messages from a phone defendant identified as his own to Ogden. Defendant provided the information to contact Ogden and the messages were sent to the phone number identified as Ogden's. The messages contained details of the home invasion and instructions on how to respond to the police investigation, issues that were unique to defendant, Ogden, and O'Brian. The messages were continuous over a period of time, were

responsive to each other, and primarily addressed how to avoid detection as the perpetrators. At trial, the detective testified that during an interview, Ogden said he was the individual who was texting and that he thought the detective was defendant while they were texting. The trial court did not abuse its discretion by finding that the text messages were sufficiently authenticated.

B. HEARSAY

Defendant next argues that even if the text messages were properly authenticated, they were inadmissible hearsay. Defendant did not object to the text messages on this basis at trial, so “he must demonstrate plain error affecting his substantial rights, meaning that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence.” *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The trial court found that the text messages were admissible under MRE 801(d)(2)(E), which provides that a statement is not hearsay if it is offered against a party and is “a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.” A coconspirator’s statements “are hearsay and not properly admissible against a co-conspirator unless made before the conspiracy has ended.” *People v Scotts*, 80 Mich App 1, 5; 263 NW2d 272 (1977). A statement is made “during the course” of a conspiracy if it is made before “the common enterprise has been fully completed, abandoned, or terminated,” such as when the agreement is successful or fails in meeting its objectives. *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993). Financial dealings or other arrangements may be included in the course of the conspiracy if the objectives of the conspiracy included them beyond the agreed upon crime. *Id.* at 394-397. “However, subsequent acts taken to conceal the conspiracy’s crime do not show a continuation of the conspiracy.” *People v Centers*, 141 Mich App 364, 375; 367 NW2d 397 (1985), rev’d in part on other grounds, 453 Mich 882 (1996), citing *Grunewald v United States*, 353 US 391, 401-402; 77 S Ct 963; 1 L Ed 2d 931 (1957).

Ogden’s text messages were sent after the object of the conspiracy was completed. The home invasion took place 10 days before the text messages, and there is no evidence that financial arrangements, such as selling the items or dividing the proceeds, remained uncompleted. Rather, the text messages only involved concealing the conspirators’ involvement in the crime. Accordingly, Ogden’s statements were not made in the course of the conspiracy and the trial court erroneously admitted them.

Although the text messages were improperly admitted, defendant cannot show that he was actually innocent, or that the admission seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See *Carines*, 460 Mich at 763. O’Brian offered testimony about defendant’s direct involvement in the conspiracy, which was more compelling than the text messages sent by Ogden asking defendant to obscure the completed crime. O’Brian testified that defendant told his partners where, when, how, and what to steal, left a door unlocked at the home, and adjusted a security camera away from the path defendant told his partners to take. Some of O’Brian’s testimony was bolstered by the complainants’ testimony that defendant had broad knowledge of the contents of the home and their work schedules because he lived with them for three years. The complainants also provided a motive for defendant’s actions because

they detailed significant acrimony in their relationship with defendant in the months leading up to the home invasion. Considering the substantial evidence of defendant's guilt, defendant has not demonstrated plain error requiring reversal.

C. ILLEGAL SEARCH

Defendant next argues the text messages resulted from an illegal search of his phone. Although defendant agrees that he handed the detective his phone while he was being questioned in the police vehicle, he argues that the detective exceeded the scope of consent when he looked through the phone and sent text messages from the phone.

Both the United States and Michigan Constitutions protect individuals from unreasonable searches and seizures. US Const, Am 4, Am 14; Const 1963, art 1, § 11; *People v Slaughter*, 489 Mich 302, 310-311; 803 NW2d 171 (2011). "In general, searches conducted without both a warrant and probable cause to believe evidence of wrongdoing might be located at the place searched are unreasonable per se." *Lavigne v Forshee*, 307 Mich App 530, 537; 861 NW2d 635 (2014). However, an established exception to the general warrant and probable cause requirement is a search conducted pursuant to consent. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). The consent must be unequivocal, specific, and freely and intelligently given based on the totality of the circumstances. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). To measure the scope of consent, courts ask, "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* at 703 (quotation marks and citations omitted). The party granting consent to search may limit the scope of the search or even revoke the consent after granting it. *Id.*

In this case, the detective asked if he could see defendant's phone after they discussed whether defendant had contact information for O'Brian. There is no evidence that defendant limited the search while the detective was looking through the contents of the phone. The detective testified that defendant could clearly see him looking through the phone and typing text messages to Ogden, but he did not say anything. The detective said he talked with defendant about the text messages he was receiving from Ogden. When the detective asked defendant whether he had given the phone voluntarily, defendant agreed that he had. Defendant also agreed to let the detective keep the phone until the next day. The detective testified that he only used the phone while he was in the car with defendant. Under these circumstances, defendant has not shown that the detective exceeded the scope of his consent to search the phone.

D. RIGHT OF CONFRONTATION

Defendant next argues that admitting the text messages violated his constitutional right of confrontation with regard to Ogden, who did not testify at trial. We review de novo whether the admission of evidence violated a defendant's constitutional right of confrontation. *People v Nunley*, 491 Mich 686, 696-697; 821 NW2d 642 (2012). "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." US Const, Am VI. See also Const 1963, art 1, § 20. The Confrontation Clause prohibits the admission of testimonial hearsay against a criminal defendant unless the declarant was unavailable and the defendant had a previous opportunity for cross-examination. *People v*

Jordan, 275 Mich App 659, 662; 739 NW2d 706 (2007), citing *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

The issue here is whether Ogden’s text messages were testimonial in nature. Generally, a pretrial statement is testimonial if the statement was made “ ‘under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’ ” *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005), quoting *Crawford*, 541 US at 51-52. Testimony is typically “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 US at 51 (quotation marks and citation omitted). In *Crawford*, 541 US at 51, the Supreme Court distinguished between “[a]n accuser who makes a formal statement to government officers,” which is testimonial, and “a person who makes a casual remark to an acquaintance,” which is not testimonial.

Ogden sent the text messages to someone he thought was his acquaintance. Because the text messages were intended for a coconspirator, no reasonable person in Ogden’s shoes would have thought that they would be used at trial. Additionally, the text messages were not a declaration of fact or proof of a fact; they were requests to not speak to the police about the home invasion. Therefore, the text messages Ogden sent to defendant’s phone were not testimonial in nature and they did not invoke the protections of the Confrontation Clause.

IV. JURY INSTRUCTIONS

Defendant asserts that the trial court erred by failing to sua sponte provide a cautionary jury instruction concerning accomplice testimony. Such an instruction would have been appropriate because defendant was convicted of first-degree home invasion on an aiding and abetting theory, in which O’Brian was a participant, but defendant did not request an instruction at trial, so we review his claim for plain error affecting substantial rights. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

In *People v Jensen*, 162 Mich App 171, 188-189; 412 NW2d 681 (1987), citing *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), this Court held that omitting an unrequested accomplice instruction could constitute error requiring reversal if the case was a pure credibility contest between the defendant and an accomplice. In *Young*, 472 Mich at 143, however, the Michigan Supreme Court overruled *McCoy*, holding that “an unpreserved claim that the court failed to give a cautionary accomplice instruction may be reviewed *only* for plain error that affects substantial rights.”

This case was not simply a credibility contest between defendant and O’Brian because defendant did not testify and there was independent evidence of his motive, knowledge, and opportunity to commit the charged offense. Further, defendant cannot demonstrate that any error related to the omission of the jury instruction prejudiced him because the prosecutor and defense counsel both questioned O’Brian about the details of the plea deal he received in exchange for his testimony. Defense counsel argued in closing that O’Brian’s testimony was not credible because it was offered in exchange for a plea deal. The trial court also issued a standard jury instruction for evaluating the testimony of witnesses. Accordingly, the jury was well aware of defendant’s position that O’Brian’s testimony was not credible. Although a jury instruction on

accomplice testimony would have been appropriate, its omission did not constitute plain error affecting defendant's substantial rights.¹

V. RESTITUTION

Lastly, defendant argues that the trial court erred by denying his request for a hearing on the amount of restitution. To determine a restitution amount, "the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). At the sentencing hearing, defendant asked the court to clarify the amount of restitution ordered because the value of the stolen items was not disclosed at trial and defendant was unsure whether recovered items were factored into the total. Defendant's trial counsel stated that he calculated the value of the stolen items from the police report at \$17,970, but the trial court ordered restitution in the amount of \$16,208.69 based on the presentence investigation report. The trial court left it to "appellate counsel to file a post-judgment motion for modification of the restitution." At present, there is nothing in the record establishing that there was a mistake in the restitution order. A disagreement over the amount of restitution in the absence of contradictory evidence does not require a remand for resentencing. *People v Cross*, 281 Mich App 737, 739-740; 760 NW2d 314 (2008). Accordingly, we decline to grant relief on this issue.

Affirmed.

/s/ Michael F. Gadola
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

¹ Defendant also suggests that his trial counsel was ineffective for failing to request an accomplice jury instruction. This issue was not presented in defendant's statement of the questions presented, rendering it abandoned on appeal. *People v McMiller*, 202 Mich App 82, 83 n 1; 507 NW2d 812 (1993). Moreover, even if defense counsel's failure to request the instruction was objectively unreasonable, for the same reasons outlined above, defendant cannot demonstrate that he was prejudiced by defense counsel's performance.