

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE JOHN DLUGE,

Defendant-Appellant.

UNPUBLISHED

December 15, 2009

No. 286850

Macomb Circuit Court

LC No. 2007-005406-FH

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver ecstasy, MCL 333.7401(2)(b)(i), and conspiracy to possess with intent to deliver ecstasy, MCL 750.157a and MCL 333.7401(2)(b)(i). He was sentenced to concurrent prison terms of 72 to 240 months for each conviction. He appeals by right. We affirm.

I. Basic Facts

On November 2, 2007, the police conducted pre-raid surveillance at defendant's home because he was suspected of trafficking ecstasy. During the surveillance, cars briefly visited the house and were thought to be customers. A vehicle later identified as being driven by defendant's girlfriend, Amy Cupetelli, also arrived. She went inside defendant's house, left sometime later, and returned shortly after leaving. Cupetelli testified that she returned because defendant called and asked for a ride to the area of I-94 and Van Dyke. During the drive to that area, defendant talked on her cell phone, obtained directions, and directed her to the destination. Officers following the vehicle could see defendant talking on a cell phone. Cupetelli exited the freeway at Connor and drove to a gas station. Officers shadowing the vehicle testified that Cupetelli drove 15 miles, passing several gas stations before stopping, and that the Connor area is known for drug trafficking. When they arrived, defendant went into the gas station while Cupetelli waited in the car. A narcotics officer could see defendant interact with a male and, based on his experience, inferred that they engaged in a hand-to-hand transaction, although he could not see the exchange.

Cupetelli testified that defendant came out of the gas station with a bag of ecstasy pills, put the bag in her lap, and told her to "crotch it," meaning to hide the drugs inside her vagina. Cupetelli stuck the bag down her pants to hide the drugs. She then drove back to defendant's house. The police immediately converged on her vehicle, asked for the location of the drugs,

and Cupetelli turned over the bag, which contained 93 ecstasy pills. Cupetelli and defendant were arrested outside of defendant's house.

Officers testified that defendant and another male lived in the basement of the house.¹ In the basement, officers found 14 hypodermic needles, drug ledgers containing names, a crushed ecstasy pill, and a digital scale. In defendant's wallet, the police found a list of first names or street names and phone numbers. One phone number matched a number that had been called three times from the cell phone defendant used while en route to the gas station. An officer called the number while impersonating defendant, a male answered, the officer claimed that the bag of ecstasy was missing seven pills, and the officer and the person had a conversation about the missing pills.

The defense theory was that Cupetelli possessed the ecstasy pills when she came to defendant's house for a date, and that the drugs remained in her possession until she gave them to the police. The defense claimed that defendant had no knowledge of the ecstasy until he was arrested, and did not conspire with Cupetelli to possess or deliver them.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his convictions. 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 prosecution and determine whether a rational trier of fact could find that the essential 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. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Under MCL 333.7401(2)(b)(i), it is unlawful for a person to possess with intent to deliver ecstasy. A "person who conspires together with 1 or more persons to commit an offense prohibited by law . . . is guilty of the crime of conspiracy[.]" MCL 750.157a; *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Conspiracy is a specific intent crime, requiring the intent to combine with others and the intent to accomplish an illegal objective. *Id.* To prove the intent to combine with others, it must be shown that the intent, including knowledge, was possessed by more than one person. *People v Blume*, 443 Mich 476, 482, 485; 505 NW2d 843 (1993). For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective. *Id.* Direct proof of a conspiracy is not essential. Rather, a conspiracy may be proven by circumstantial evidence or by reasonable inference, and no formal agreement is required. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997); *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991).

¹ The male roommate was also arrested that evening.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant and Cupetelli conspired to possess and deliver ecstasy. Defendant relies on Cupetelli's testimony denying that she entered into an agreement with defendant to buy or distribute ecstasy.² The jury was not required, however, to accept Cupetelli's claim that she did not conspire with defendant, and there was sufficient evidence from which the jury could infer that defendant and Cupetelli conspired to possess the ecstasy. Cupetelli was defendant's longtime girlfriend, and had been at defendant's house on the day of the transaction. Pre-raid surveillance revealed that suspected drug trafficking was occurring at defendant's house while Cupetelli was there. Cupetelli drove defendant to the location of the drug transaction, and defendant used her cell phone en route to obtain directions. Once at the gas station, which was in a heavy drug-trafficking area, defendant went inside while Cupetelli waited for him in the car. There was testimony that defendant had contact with a male inside, and engaged in a transaction for 93 ecstasy pills. When defendant returned to Cupetelli's car, he gave her the pills and she hid them in her pants. Cupetelli then drove back to defendant's house where apparent drug trafficking had occurred earlier. Among the items found in defendant's house were a drug ledger and a digital scale.

This evidence established a basis for the jury to infer that defendant conspired with Cupetelli to possess and deliver ecstasy. Defendant's and Cupetelli's interactions and concordant behavior were evidence of their concert of action, which created an inference of conspiracy. See *Justice (After Remand)*, *supra*, and *Cotton*, *supra* at 393-394. Further, it is not remarkable that Cupetelli would deny any involvement in a conspiracy, and a jury could reasonably infer that her denial was to avoid being charged. The credibility of Cupetelli's testimony was for the jury to determine, *Wolfe*, *supra* at 514, and it was entitled to accept or reject any of part of it. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Viewed most favorably to the prosecution, the evidence was sufficient to sustain defendant's conviction of conspiracy to possess with intent to deliver ecstasy.

Defendant also asserts that there was insufficient evidence that he possessed the ecstasy with the intent to deliver. "The element of knowing possession with intent to deliver has two components: possession and intent." *People v Brown*, 279 Mich App 116, 136; 755 NW2d 664 (2008). Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe*, *supra* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 520. A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id.* Instead, some additional connection between the defendant and the contraband must be shown. *Id.* "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). To show intent to deliver, proof of actual delivery is not required. *Wolfe*, *supra* at 524. "Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Id.* Circumstantial evidence and reasonable inferences

² While Cupetelli denied the existence of an agreement, she admitted knowing that some type of drug transaction would occur.

arising from the evidence are sufficient to establish possession and intent to deliver. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Viewed in a light most favorable to the prosecution, the same evidence that enabled the jury to conclude that defendant conspired with Cupetelli to possess the ecstasy also established a basis for the jury to conclude beyond a reasonable doubt that defendant possessed the ecstasy pills with the intent to deliver them. A jury could reasonably infer from defendant's actions and from his presence and association with Cupetelli that he had dominion and control over the ecstasy pills, but temporarily entrusted them to Cupetelli for safekeeping while transporting them back to his house. The evidence was also sufficient to permit a rational trier of fact to reasonably infer that defendant intended to deliver the drugs. The bag contained 93 ecstasy pills, which according to police testimony was consistent with an intent to distribute. In addition, the police found drug ledgers and a digital scale inside defendant's house. The evidence was sufficient to sustain defendant's conviction of possession with intent to deliver ecstasy.

III. Mistrial

Defendant argues that the trial court abused its discretion by denying his motion for a mistrial after Cupetelli gave several nonresponsive answers that denigrated defendant's character. We disagree.

This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* (citation omitted).

During cross-examination, defense counsel asked Cupetelli about her and defendant living together and defendant moving out. Cupetelli testified that she "kicked defendant out." On redirect examination, the following exchange occurred:

Q. You indicated - - defense counsel asked you some questions about whether or not at some point you were living with the defendant and you indicated the defendant was living at your house; do you remember those questions?

A. Yes.

* * *

Q. And you indicated that you kicked him out?

A. Yes.

Q. Why?

A. *He was getting so coked out at my house . . .*

During defense counsel's recross examination of Cupetelli, the following exchanges occurred:

Q. So, this guy that is coked out all the time and you went over to his house and had sex with him in his basement?

A. He was my boyfriend at the time and I thought he was changing

* * *

Q. So you are saying that all of the time between the time when you kick him out of your house and the time you were arrested that he was dropping dirty?

A. He wasn't going at all. And he was calling and talking to *his probation officer*. And that is one of the reasons why *he went into rehab* because he was dropping dirty.

* * *

Q. So you would be surprised if we were able to establish that he was dropping and dropping clean?

A. He might have dropped clean a few times. But I know for sure there were times he didn't drop.

* * *

Q. And yet, you wanted to go out to dinner that night we establish your relationship with him; is that correct?

A. I loved him. I had been with him for 17 years. I would have died for [defendant]. I was stupid and he conned me. He played me like I was a puppet.

Q. You weren't really with him for 17 years?

A. On and off, yes we were, in between them being with his daughter's mother, we were together. In between a lot of time we were together on and off *except when he was in prison* (emphasis added).

After Cupetelli's testimony concluded, defense counsel moved for a mistrial arguing that she gave nonresponsive testimony when she referred to defendant's drug use and rehabilitation, as well as him being on probation and having been in prison. The trial court agreed with defense counsel that Cupetelli sometimes continued talking and gave answers that were not responsive to the questions. It indicated, however, that the challenged testimony was elicited on cross-examination, and ruled that it was relevant to Cupetelli's bias and motive for testifying against defendant. The court noted that in discussing defendant's rehabilitation, Cupetelli freely mentioned her own cocaine habit and her stints in rehabilitation as recently as 2007. The court granted defense counsel's request for a cautionary instruction on the proper use of the evidence.

Defendant correctly notes that a prosecutor may not indiscriminately introduce prior bad acts of a defendant. See MRE 404(b)(1). But here, the challenged testimony cannot be characterized as other acts evidence presented by the prosecution. As aptly noted by the trial court, the emphasized testimony was elicited by defense counsel. The testimony that referenced defendant's probation officer was given in response to defense counsel asking Cupetelli about defendant's drug use. The reference to defendant being in prison was given in response to defense counsel challenging Cupetelli's testimony that she and defendant had been together for 17 years. A defendant cannot complain of testimony that he invited or instigated in an effort to support his defense. See, generally, *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988). Further, although the testimony that defendant was "coked out" was given on redirect examination, it was responsive to defense counsel's cross-examination about defendant and Cupetelli's relationship and her kicking him out of the house.

To the extent that some of Cupetelli's explanations were nonresponsive narratives that contained superfluous information, defendant is not entitled to appellate relief. "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Haywood, supra* at 228. Moreover, defendant's right to a fair trial was protected by the trial court's cautionary instruction to the jury concerning the limited use of the evidence, thereby limiting the potential for unfair prejudice. The trial court stated:

You have also heard evidence that the defendant was in rehab. Or that he was on probation. You must not decide that this evidence shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is or was guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty.

"Jurors are presumed to follow their instructions." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

In a separate issue, defendant argues that he was also entitled to a mistrial because Cupetelli was allowed to testify that he threatened her even though he was not charged with witness intimidation. Again, we disagree.

During the prosecutor's direct examination of Cupetelli, the following exchange occurred:

Q. Before you decided to cooperate, did anybody threaten you or call you to tell you not to cooperate?

A. I've had people show up at my work. The reason I am not at Centerfold anymore is because there have been several people that I know most of his friends and I know a lot of the people that he knows. Numerous people started stopping by my work and driving by my house numerous times. I've had numerous problems.

Q. Any phone calls?

A. I've had phone calls. A friend of mine which was a mutual friend of ours, called me from jail to tell me I that I better watch - -

* * *

(Defense counsel objected and, following a sidebar, the trial court overruled the objection.)

Q. I think you said you had a mutual friend. Is that Keith Parrish?

A. Yes. I had met him through Larry and rehab. Me and him became cool. He started staying with me. We were good friends. I ended up knowing his father and he called me from jail to tell me that I better watch myself, I better be careful when I was picking my son up from the bus station and that [defendant] had something for me and this was not over that something is going to happen.

Q. And as a result of getting these phone calls and seeing these people show up at your work and the cars driving by, you still decided on your own volition to testify; is that correct?

A. Yes . . .

Initially, defendant has not provided any support for his contention that a charge of witness intimidation is a prerequisite for testimony that a defendant threatened a witness. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Further, although defendant contends that testimony that he threatened Cupetelli is improper "character assassination" evidence prohibited by MRE 404(b), testimony involving a defendant's prior statement, as opposed to a prior bad act, does not implicate MRE 404(b). See *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989). Moreover, the questions were not offered to show defendant's character, but rather were relevant to Cupetelli's credibility. MRE 402. Defendant has not demonstrated that he was entitled to a mistrial on this basis.

IV. Instruction on Conspiracy

We reject defendant's argument that the trial court abused its discretion when it instructed the jury on the offense of conspiracy. Although this Court reviews questions of law pertaining to jury instructions de novo, a trial court's decision whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006); *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005). Here, defendant relies on his argument that there was insufficient evidence to support the offense of conspiracy. As discussed previously, there was sufficient evidence at trial to support a conviction of conspiracy to possess with intent to deliver ecstasy. It therefore follows that the trial court did not abuse its discretion by providing that instruction to the jury.

V. Cumulative Error

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under a cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia D. Stephens