S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 28, 2001
V JOYCE MARIE WARD, Defendant-Appellant.	No. 225335 Berrien Circuit Court LC No. 99-403868-FC

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals by right from her conviction by a jury of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, and conspiracy to possess a firearm during the commission of a felony, MCL 750.157a and MCL 750.227b. The trial court sentenced her to thirty months to fifteen years' imprisonment for the conspiracy to commit armed robbery conviction and to a consecutive two years' imprisonment for the conspiracy to commit felony-firearm conviction. We affirm.

Defendant contends that the prosecutor presented insufficient evidence to support her convictions. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid,* 233 Mich App 457, 466; 592 NW2d 767 (1999).

MCL 750.157a states that "[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . ." The crux of the offense of conspiracy is an unlawful agreement between two or more persons to commit a crime. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). "Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective." *Id.* However, direct proof of the conspiracy is not required. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Instead, the circumstances, acts, and conduct of the parties may be used to establish the offense, *id.*, and a *formal* agreement need not be proven. *People v Taurianen*, 102 Mich App 17, 31; 300 NW2d 720 (1980).

Here, defendant was charged with conspiring to commit armed robbery. The armed robbery statute states, in relevant part:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon . . . shall be guilty of a felony. [MCL 750.529.]

Defendant was also charged with conspiring to commit-felony firearm. The felony-firearm statute states, in relevant part:

> A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years. [MCL 750.227b(1).]

Viewing the evidence in the light most favorable to the prosecutor, we conclude that a rational trier of fact could have found defendant guilty of conspiracy to commit armed robbery and conspiracy to commit felony-firearm. Indeed, Leroy Gulledge testified that he and defendant were driving in his truck when they decided to commit a robbery to obtain money to purchase drugs. Gulledge made it clear during his testimony that the drugs were for both him and defendant and that although he came up with the idea to commit the robbery, defendant agreed and thought it was a good idea. Gulledge explained that he returned to his apartment to obtain a gun. Gulledge emphasized that defendant knew (1) that he was returning to the apartment to retrieve the gun, and (2) that the gun was going to be used in the robbery.

Gulledge testified that after returning to the truck, he drove to a Ramada Inn parking lot. After several minutes, Gulledge started to leave to return to the apartment, at which time defendant pointed at two people getting out of a car and said, "what about them?" Gulledge detailed how he approached the victims, pointed the gun at them, and asked them for their money.

Gulledge's testimony indicated that defendant and Gulledge expressly agreed to commit some type of robbery to get money to purchase drugs. Moreover, given the sequence of events and the words exchanged between defendant and Gulledge, a reasonable jury could have found that defendant and Gulledge had an implied agreement to commit *armed* robbery, as well as felony-firearm. See *People v Batiste*, 173 Mich App 106, 117; 434 NW2d 138 (1988) (indicating that the agreement supporting a conspiracy conviction may be an implied agreement). As stated in *Taurianen, supra* at 31, "[a] conspiracy may be established by circumstantial evidence and may be based upon inference." The words and actions of defendant and Gulledge supported a fair inference that the two individuals conspired to commit armed robbery and felony-firearm. Reversal based on evidentiary insufficiency is unwarranted.[1]

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[1] Defendant additionally argues that the trial court should have granted her motion for a directed verdict. When ruling on a motion for a directed verdict, the court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the

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We recognize that this case essentially involved a credibility contest between defendant and Gulledge. However, to the extent that defendant asks this Court to find Gulledge's testimony unbelievable and incredible, we note that when reviewing an appeal based on the sufficiency of evidence, we will not interfere with the role of the jury. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

> [An appellate court] must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact . . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony. [*Id*. at 514-515, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).]

The jurors in the instant case heard conflicting testimony that required them to determine the credibility of each witness and the weight to afford each witness' testimony. The jury apparently found the testimony of Gulledge to be more credible, and we will not disturb this finding on appeal.

Next, defendant argues that the prosecutor committed misconduct requiring reversal by vouching for the credibility of a witness during her closing argument. However, defendant did not object to the prosecutor's allegedly improper statement. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 310 (2000). Accordingly, to warrant relief defendant must show (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

"Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A prosecutor may not intimate that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Defendant contends that the prosecutor vouched for Gulledge's credibility by stating the following during closing arguments:

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prosecutor and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Vincent,* 455 Mich 110, 121; 565 NW2d 629 (1997). "When reviewing a trial court's ruling on a motion for a directed verdict, this Court tests the validity of the motion by the same standard as the trial court." *People v Warren,* 228 Mich App 336, 345-346; 578 NW2d 692 (1998), reversed in part on other grounds 462 Mich 415 (2000). Here, Gulledge's testimony, which, as discussed *infra,* sufficiently supported defendant's convictions, occurred before defendant's directed verdict motion. Accordingly, the trial court did not err in denying the motion.

Her only involvement was to encourage him and he testified to that and she pointed out the people in the parking lot. Think about his statements to the police. When he was interviewed by Detective Lange, he told the police the same story, the same testimony that he gave in court yesterday. *I was sitting there*. She said, "Why don't you rob those people over there?" and he did. [Emphasis added.]

Defendant argues that the prosecutor's "I was sitting there" statement insinuated that the prosecutor was certain Gulledge told the police exactly what he testified to because the prosecutor was present when Gulledge was interviewed by police. However, when the challenged statement is read in context, it is clear that the prosecutor was simply paraphrasing the testimony of Gulledge. In other words, the prosecutor was telling the jury that Gulledge testified "I was sitting there" when defendant asked him "Why don't you rob these people over there?" Indeed, throughout the prosecutor's closing argument she paraphrased both Gulledge's testimony and defendant's testimony. Defendant has shown no error, plain or otherwise.

Finally, defendant argues that the prosecutor impermissibly bolstered Gulledge's testimony by highlighting for the jury that Gulledge was required by his plea agreement to give truthful testimony. In general, reference by a prosecutor to a plea agreement containing a promise to testify truthfully does not rise to the level of error requiring reversal. See, e.g., *Bahoda, supra* at 276-277. The situation in the instant case is slightly more complicated, however, because the plea agreement involved here did not explicitly mention truthfulness as a condition. We nevertheless find no basis for reversal, however, because the parties stipulated to the reading of the plea agreement to the jury, as follows:

Your Honor, in return for the defendant's plea of guilty to Unarmed Robbery the original charge of Armed Robbery, as well as Count II Felony Firearm, will be dismissed. In addition, the defendant agrees to testify, if necessary, against Joyce Ward.

Because the jury was specifically told the terms of the plea agreement, any misstatement of the terms of the agreement by the prosecutor did not reasonably affect the outcome of the proceedings.[2] See *Carines, supra* at 763. Reversal is unwarranted.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

[2] Moreover, it reasonably could be argued that the stated terms of the plea agreement implied a promise to testify truthfully. After all, if defendant were indeed to testify against Ward as mandated by the plea agreement, he would be sworn in at trial and required by law to testify truthfully.