

COLORADO COURT OF APPEALS

Court of Appeals No.: 03CA1663
Otero County District Court No. 01CR36
Honorable M. Jon Kolomitz, Judge

The People of the State of Colorado,
Plaintiff-Appellant and Cross Appellee,

v.

Keith L. Sheel,
Defendant-Appellee and Cross-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by: JUDGE NIETO
Roy and Dailey, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: June 16, 2005

John W. Suthers, Attorney General, Paul Koehler, Assistant Attorney General, Denver, Colorado; Jeanne M. Smith, El Paso County District Attorney and Special Prosecutor, David J. Webster, Gordon R. Denison, and Doyle Baker, El Paso County Deputy District Attorneys and Special Prosecutors, Colorado Springs, Colorado, for Plaintiff-Appellant and Cross-Appellee

Thomas K. Carberry, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

In this appeal, the People challenge the legality of the sentence imposed on defendant, Keith L. Sheel. Defendant cross-appeals the judgment of conviction entered upon jury verdicts finding him guilty of conspiracy to manufacture a schedule II controlled substance (methamphetamine) and the trial court's judgment adjudicating him an habitual criminal. We reverse the judgment of conviction, and remand the case with directions.

I.

Defendant contends there was insufficient evidence to support his conviction for conspiracy to manufacture methamphetamine. Specifically, he argues that the prosecution failed to establish a real agreement to commit the offense. We agree.

When considering the sufficiency of evidence to support a charge, the court is guided by five well established principles of law.

First, the court must give the prosecution the benefit of every reasonable inference, which might be fairly drawn from the evidence. Second, the determination of the credibility of witnesses is solely within the province of the jury. Third, the trial court may not serve as a thirteenth juror and determine what specific weight should be accorded to various pieces of evidence or by resolving conflicts in the evidence. Fourth, a modicum of relevant evidence will not rationally support a conviction beyond a reasonable doubt. Finally, verdicts in criminal cases may not be based on guessing, speculation, or conjecture.

People v. Sprouse, 983 P.2d 771, 778 (Colo. 1999) (citations omitted).

In considering a challenge to the sufficiency of the

evidence, a reviewing court must determine whether the evidence, viewed as a whole and in a light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the offense charged beyond a reasonable doubt. The evidence, whether direct or circumstantial, must be both substantial and sufficient to support the determination of guilt. People v. Christian, 632 P.2d 1031 (Colo. 1981); People v. Valdez, 56 P.3d 1148 (Colo. App. 2002).

A conspiracy may be shown by circumstantial evidence. People v. Williams, 707 P.2d 1023 (Colo. App. 1985). A conspiracy may be found even if the identity of the co-conspirators cannot be determined. People v. Holter, 185 Colo. 47, 521 P.2d 765 (1974). "The circumstances necessary to support a conviction for conspiracy are those which show that the alleged conspirators pursued by their acts the same objective, one performing one part, and the other another part, with a view to completing the acts and attaining the commons objective." People v. Wilkinson, 38 Colo. App. 365, 368, 561 P.2d 347, 350 (1976).

A person commits the offense of conspiracy to manufacture a schedule II controlled substance if, with the intent to promote or facilitate the commission of manufacturing a controlled substance, he or she agrees with another person that they, or one or more of them, will engage in conduct that constitutes the crime of manufacturing a controlled substance, and the defendant

or the co-conspirator performs an overt act in furtherance of the conspiracy. See § 18-2-201, C.R.S. 2004; People v. Hood, 878 P.2d 89 (Colo. App. 1994).

The elements necessary to constitute the crime of conspiracy are: (1) a combination of two or more persons; (2) the existence of an unlawful purpose which amounts to a crime; and (3) "a real agreement, combination, or confederation with a common design. (Mere passive cognizance of the crime to be committed or mere negative acquiescence is not sufficient.)" Bates v. People, 179 Colo. 81, 85, 498 P.2d 1136, 1138 (1972); Salazar v. People, 166 Colo 508, 445 P.2d 60 (1968).

Here, the prosecution presented evidence that, at the time of his arrest, defendant had in his possession more than 350 over the counter cold remedy pills containing pseudoephedrine. The pills had been removed from their original packaging and were carried in defendant's pockets in plastic baggies. These pills contained a chemical precursor sufficient to manufacture over twelve grams of methamphetamine with a street value of about \$1200.

When questioned by the investigating officer about the pills, defendant answered that "he was gonna give them to another person to make methamphetamine." Although defendant claimed he did not remember the name of the person to whom he was delivering the pills, he did identify the other person by gender. On cross examination, the arresting officer admitted that he knew nothing

about the alleged other person's identity, relationship with defendant, his or her actions or intentions concerning the manufacture of methamphetamine, or whether he or she had agreed with defendant to manufacture methamphetamine.

Viewing this evidence in a light most favorable to the prosecution, we conclude that it was insufficient to establish the existence of an agreement with another person to manufacture methamphetamine, an essential element of the crime. We have considered whether an inference that an agreement existed can be fairly drawn from defendant's statement, and we conclude that it cannot.

Defendant's statement shows his intent, but it reveals nothing of the intent of the alleged co-conspirator. Defendant merely said he was planning to give the pills to another person to make methamphetamine; he did not say he had a prior agreement with that person to make methamphetamine or provide an ingredient. It requires speculation to infer that the alleged other person had previously agreed with defendant to convert the pills to methamphetamine. While there is a clear inference of defendant's intent, the absence of a reasonable inference that defendant had an agreement with another person defeats the charge of conspiracy. "The gravamen of the crime of conspiracy is the illicit agreement to commit a [crime]." DeBose v. People, 175 Colo. 356, 358, 488 P.2d 69, 70 (1971). "[T]he essence of the crime of conspiracy is an illegal agreement or combination . . .

.” People v. Hood, supra, 878 P.2d at 92.

Accordingly, we conclude the prosecution failed to prove all the elements of the conspiracy charge, and the conviction cannot stand.

Because of our resolution of defendant’s cross-appeal we need not consider the prosecution’s appeal.

The judgment of conviction is reversed, and the case is remanded with direction to vacate the conviction and enter a judgment of acquittal.

JUDGE ROY and JUDGE DAILEY, concur.