2016 IL App (2d) 150261-U
No. 2-15-0261
Order filed May 3, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JOHN J. CICHY, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 13-CF-84 Honorable Liam C. Brennan, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly excluded certain statements as not satisfying the requirements for the admission of conspirator statements: as the statements pertained to defendant's conspirators' separate scheme, which would have excluded defendant, the statements did not further the goals of the conspiracy among all of them.

¶ 2 The State appeals from an order of the circuit court of Du Page County that denied, in part, the State's motion *in limine*, seeking to have admitted under Illinois Rule of Evidence 801(d)(2)(E) (eff. Jan. 1, 2011) certain statements made by defendant John C. Cichy's coconspirators. Because the statements did not further the charged conspiracy between

defendant and his coconspirators, they were not admissible under Rule 801(d)(2)(E), and thus we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on two counts of the unlawful delivery of a controlled substance (cocaine) (720 ILCS 570/401(a) (West 2012)), four counts of official misconduct (720 ILCS 5/33-3(b) (West 2012)), four counts of burglary (720 ILCS 5/19-1(a) (West 2012)), one count of theft (720 ILCS 5/16-1(a)(1)(A), (b)(5.1) (West 2012)), three counts of armed violence (720 ILCS 5/33A-2(a) (West 2012)), two counts of criminal drug conspiracy (720 ILCS 570/405.1, 401(a)(2)(B) (West 2012)), and one count of calculated criminal drug conspiracy (720 ILCS 570/405 (West 2012)).

¶ 5 In support of its motion *in limine*, the State proffered the following pertinent facts. Defendant was a Schaumburg police officer assigned to investigate drug crimes. In that capacity, he worked with fellow Schaumburg police officers Matthew Hudak and Terrence O'Brien.

¶ 6 In 2012, defendant, Hudak, and O'Brien executed a search warrant. In doing so, they seized $1,000. Instead of placing the money into evidence, they divided it among themselves.

¶ 7 In July 2012, Hudak and O'Brien seized a package containing 10 pounds of cannabis. Hudak and O'Brien placed one pound into evidence and kept the remainder. When they seized higher-grade cannabis, defendant, Hudak, and O'Brien would replace it with the lower-grade cannabis and sell the higher-grade cannabis.

¶ 8 Defendant introduced Nicholas Navarroli to Hudak and O'Brien. The trio supplied Navarroli with cannabis and cocaine to sell. The foursome would split the proceeds.

¶ 9 Michael Duran worked as an informant for Hudak during 2011 and 2012. In July or August of 2012, Hudak contacted Duran about selling drugs for him, defendant, and O'Brien. Duran completed several such transactions.

¶ 10 On January 7, 2013, defendant, Hudak, and O'Brien seized cocaine pursuant to the execution of a search warrant. Consistent with their past practice, they removed 120 grams of cocaine to sell. Defendant knew that the 120 grams was not placed into evidence.

¶ 11 On January 8, 2013, Hudak and O'Brien met with Duran and gave him the 120 grams of cocaine to sell. During that meeting, Hudak and O'Brien discussed how they planned to sell the cocaine and keep the profits without telling defendant.

¶ 12 On January 16, 2013, defendant, Hudak, and O'Brien were arrested.

¶ 13 In ruling on the State's motion *in limine*, the trial court found that the January 8, 2013, statements pertaining to the scheme to exclude defendant from the sale of the 120 grams of cocaine were not admissible as coconspirator statements under Rule 801(d)(2)(E). In that regard, the trial court found that the agreement between Hudak and O'Brien "constituted a separate conspiracy" of which defendant was not a member. Therefore, the court ruled that the January 8 statements concerning that transaction were not in furtherance of the charged conspiracy involving defendant, Hudak, and O'Brien and, as to those statements, it denied the State's motion.

¶ 14 The State filed a motion to reconsider. In ruling on that motion, the trial court found that the challenged statements clearly established that defendant had been secretly excluded from the sale of the 120 grams of cocaine. Thus, the court reiterated its ruling that the statements were not in furtherance of the charged conspiracy.

¶ 15 The State filed a certificate of impairment under Illinois Supreme Court Rule 604(a)(1) (eff. Feb. 6, 2013) and a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, the State contends that: (1) *de novo* review applies, because the partial denial of its motion *in limine*, similar to a ruling on a motion to suppress evidence, involved a legal question as to whether the January 8 statements were made in furtherance of the conspiracy; and (2) the January 8 statements are admissible under Rule 801(d)(2)(E), because they related to the sale of drugs for profit and therefore furthered the charged conspiracy.

¶ 18 Defendant responds that: (1) the applicable standard of review for a ruling on a motion *in limine* is abuse of discretion; and (2) the January 8 statements did not further the charged conspiracy, as they were made in the context of a separate conspiracy that did not include defendant.

¶ 19 We begin with the issue of the proper standard of review. Generally, evidentiary rulings are within the discretion of the trial court and will not be reversed unless the court abused its discretion. *People v. Purcell*, 364 Ill. App. 3d 283, 293 (2006). Acknowledging that evidentiary rulings are sometimes reviewed *de novo*, our supreme court has stated that such an exception to the general rule of deferential review applies only in cases where a trial court's exercise of its discretion has been frustrated by an erroneous legal ruling. *Purcell*, 364 Ill. App. 3d at 293 (citing *People v. Caffey*, 205 Ill. 2d 52, 89 (2001)).

¶ 20 In this case, the trial court's evidentiary ruling was purely discretionary. It was not called upon to make any legal ruling when deciding whether the January 8 statements were admissible under Rule 801(d)(2)(E). Accordingly, its discretionary decision was not affected by any legal ruling. We are not persuaded otherwise by *People v. Drum*, 321 Ill. App. 3d 1005 (2001). In

Drum, the court was called upon to construe the meaning of a statutory provision. *Drum*, 321 Ill App. 3d at 1009. Here, the court did not construe the meaning of the terms of, but was merely required to assess the admissibility of evidence under Rule 801(d)(2)(E). Finally, we do not agree with the State that, because the court's ruling effectively suppressed evidence, the two-part standard of review applicable to rulings on motions to suppress should apply. See, *e.g.*, *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). The State does not cite, and we are unaware of, any authority supporting that proposition. Thus, we apply an abuse-of-discretion standard.[1]

¶ 21 We turn next to the merits of the State's appeal. An out-of-court statement of a conspirator is not hearsay if it is offered against a party who was part of the conspiracy and was made in the course of, and furthered, the conspiracy. *People v. Denson*, 2013 IL App (2d) 110652, ¶ 5 (citing Ill. R. Evid. 801(d)(2)(E) (eff. Jan. 1, 2011)), *aff'd*, 2014 IL 116231. Statements made in furtherance of a conspiracy include those that effectively advise, encourage, aid, or abet the conspiracy. *People v. Kliner*, 185 Ill. 2d 81, 141 (1998). For such statements to be admissible, the State must establish a *prima facie* showing of a conspiracy. *People v. Batrez*, 334 Ill. App. 3d 772, 783 (2002). To establish a *prima facie* showing of a conspiracy, the State must prove by a preponderance of the evidence that: (1) two or more persons intended to commit a crime; (2) by engaging in a common plan to accomplish the criminal goal; and (3) committed an act in furtherance of the conspiracy. *People v. Leak*, 398 Ill. App. 3d 798, 825 (2010).

¶ 22 In this case, the State clearly made a *prima facie* showing of a conspiracy between defendant, Hudak, and O'Brien. Therefore, we need decide only whether the January 8

[1] We note that, even were we to review *de novo* the court's ruling, we would reach the same result.

statements regarding the scheme to exclude defendant from the sale of the 120 grams of cocaine were made during the course of, and furthered, the conspiracy.

¶ 23 As for the question of whether the statements were made during the course of the conspiracy, it was shown that the conspiracy existed at least from July 2012 to January 16, 2013. Even if Hudak and O'Brien had formed a separate conspiracy related to the sale of the cocaine, the conspiracy between defendant, Hudak, and O'Brien continued. Therefore, the January 8 statements were made during the course of the charged conspiracy.

¶ 24 The dispositive question then is whether those statements furthered the charged conspiracy. To answer that question, we must identify the criminal goal of the conspiracy between defendant, Hudak, and O'Brien. Undoubtedly, the criminal goal of the conspirators was to unlawfully obtain drugs, sell them, and share in the proceeds. Therefore, we must decide whether the January 8 statements regarding the scheme of Hudak and O'Brien to exclude defendant from the sale of the 120 grams of cocaine furthered that conspiratorial goal.

¶ 25 As noted, to further a conspiracy, the statements must have advised, encouraged, aided, or abetted the conspiracy. See *Kliner*, 185 Ill. 2d at 141. The January 8 statements did none of the foregoing. Rather than further the goal of the charged conspiracy, the statements were antithetical to it. When Hudak and O'Brien crafted their plan to exclude defendant from the cocaine sale, they were no longer serving the goals of conspiracy. Rather, they were promoting their own ends by increasing their share of the proceeds at the cost of defendant's share.[2]

[2] The United States Court of Appeals for the Seventh Circuit has stated, in interpreting the term "in furtherance" under Federal Rule of Evidence 801(d)(2)(E), that to be admissible a conspiratorial statement must be part of an information flow between conspirators intended to help each perform his role. *Garlington v. O'Leary*, 879 F. 2d 277, 283 (7th Cir. 1989). Here, the

Indeed, although defendant participated in obtaining the cocaine, he neither sold it nor received any of the benefit. Therefore, the statements relating to that separate scheme in no way furthered the charged conspiracy. Thus, the trial court did not abuse its discretion in denying the motion *in limine* as to those statements.

¶ 26 The State contends, however, that, because the charged conspiracy existed on January 8 and defendant continued to be a member, the statements furthered the conspiracy. Although, as discussed, the conspiracy continued to exist, that only invites the question of whether the January 8 statements furthered the conspiracy.

¶ 27 We disagree with the State that, because the statements identified defendant as a member of the conspiracy, indicated the roles of the members, and reflected the common design, the statements furthered the conspiracy. To the extent that the statements show those things, that bears on their relevance. Their mere relevance, however, does not show that the statements furthered the conspiracy.

¶ 28 In support of its position, the State relies on several state and federal cases. For the following reasons, that reliance is misplaced.

¶ 29 In *People v. Miller*, 128 Ill. App. 3d 574, 586 (1984), the court held that the conspirator statements furthered the conspiracy, because they referred to current, as opposed to past, events. Here, there is no issue as to whether the statements involved ongoing events. But even so, they did not further the conspiracy, for the reasons already stated. The *Miller* decision does not stand for the proposition that merely because statements involve ongoing events they necessarily further a conspiracy.

January 8 statements, related to the plan to exclude defendant from the cocaine sale, hardly were intended to help defendant perform his role in the conspiracy.

¶ 30 The State's reliance on *United States v. Maliszewski*, 161 F.3d 992 (6th Cir. 1998), is also misplaced. There, the court of appeals held that conversations about eliminating a "middleman supplier" of the conspiracy were admissible as statements in furtherance of the conspiracy, because eliminating the middleman would further the conspiracy's objective of profiting from drug sales. *Maliszewski*, 161 F.3d at 1008. In our case, however, the conversations were not about eliminating defendant from the conspiracy but instead were limited to excluding him from an isolated drug sale. Eliminating defendant from one drug sale, although benefitting Hudak and O'Brien in terms of their profit, did not further the goal of the continuing conspiracy between Hudak, O'Brien, and defendant that all three profit from drug sales. Moreover, even if Hudak and O'Brien had discussed removing defendant from the conspiracy, that would not make *Maliszewski* applicable, as removing a core member of the conspiracy is different from eliminating a supplier for the conspiracy. Obviously, the removal of defendant could not have furthered the goal that Hudak, O'Brien, and defendant all profit from drug sales.

¶ 31 Finally, the decision in *United States v. Goff*, No. 08-4296, 2010 WL 3736261 (6th Cir. Sept. 17, 2010), does not support the State's position. In that case, the issue was whether, because one conspirator cut another conspirator out of the latter's share of the conspiracy's profits, the jilted conspirator's role in the conspiracy had been terminated. *Goff*, 2010 WL 3736261, at *13. That is simply a different issue than the one before us.

¶ 32 For the foregoing reasons, we hold that the trial court correctly ruled that the January 8 statements did not, as required by Rule 801(d)(2)(E), further the charged conspiracy. Thus, the court did not abuse its discretion in denying the State's motion *in limine*.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the order of the circuit court of Du Page County denying the State's motion *in limine* as to the January 8, 2013, statements.

¶ 35 Affirmed.