

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS MALONE,

Defendant-Appellant.

UNPUBLISHED

April 1, 1997

No. 176472

Oakland Circuit Court

LC No. 93-128547

Before: Fitzgerald, P.J., and MacKenzie and A. P. Hathaway*, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and conspiracy to possess with intent to deliver more than 650 grams of cocaine, MCL 750.157a and 333.7401(2)(a)(i); MSA 28.354(1) and 14.15(7401)(2)(a)(i). He was sentenced to two life terms without the possibility of parole. Defendant now appeals as of right. We affirm.

Defendant raises five issues on appeal. He first argues that the decision to prosecute him in state courts, where he faced mandatory life imprisonment without the possibility of parole, as opposed to federal courts, where his more culpable coconspirators were subject to much less harsh penalties, was a denial of his right to equal protection under the law guaranteed in both the federal and state constitutions. When an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants. *United States v Batchelder*, 442 US 114, 124; 99 S Ct 2198, 2204; 60 L Ed 2d 755 (1979). “Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.” *Id.* at 125. We conclude that the multijurisdictional investigatory task force’s referral of defendant and other members of the Vallejo conspiracy to state authorities for prosecution did not violate defendant’s constitutional guarantee of equal protection under the law. See *United States v McCoy*, 802 F Supp

* Circuit judge, sitting on the Court of Appeals by assignment.

128 (WD Mich, 1992); *United States v Allen*, 954 F2d 1160 (CA 6, 1992); *United States v Smith*, 966 F2d 1045 (CA 6, 1992).

Defendant's argument that Michigan's constitution affords a criminal defendant with higher equal protection guarantees than that of the federal constitution ignores the clear statements of the Michigan Supreme Court to the contrary. *Doe v Dep't of Social Services*, 439 Mich 650, 671; 487 NW2d 166 (1992).

In his second issue, defendant argues that the trial court committed error requiring reversal in rejecting his request for the standard jury instruction on a witness's agreement for testimony, CJI 2d 5.13. A trial judge must instruct the jury on the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). However, failure to give a requested instruction is error requiring reversal only if the requested instruction is substantially correct, was not substantially covered in the charge given to the jury, and concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense. *People v Moldenhauer*, 210 Mich App 158, 160; 533 NW2d 9 (1995).

Although we believe that the trial court abused its discretion in not giving the requested instruction, the court did provide the jury with a cautionary instruction on considering the testimony of accomplices, CJI 2d 5.6, and did instruct the jury that they should consider the fact that the witnesses hoped for sentence reductions in exchange for their testimony in assessing the credibility of that testimony. Thus, the jury was instructed on defendant's view that the testimony of these witnesses was tainted by their agreements with the federal government, and the witnesses were therefore simply not credible. No miscarriage of justice occurred because of the trial court's failure to give the requested instruction.

Defendant next argues that there was insufficient evidence to convict him of conspiracy. In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). In order to establish a conspiracy, the prosecution must show a combination or agreement, express or implied, between two or more people, to commit an illegal act or to commit a legal act in an unlawful manner. MCL 750.157a; MSA 28.354(1); *People v Meredith (On Remand)*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995).

Defendant argues as an initial matter that there was insufficient evidence to convict him of conspiracy on the basis of Wharton's Rule. That rule provides that "when two people are necessary to perform a proscribed act, they may not be prosecuted for conspiracy to perform it, for their combination adds nothing to their intent to commit the crime." *People v Davis*, 408 Mich 255, 278; 290 NW2d 366 (1980). However, the evidence showed defendant interacting with two other members of the Vallejo drug organization and therefore established at a minimum a conspiracy of three individuals.

Defendant further contends that the evidence at best supports a buyer-seller relationship between himself and his coconspirators and was therefore insufficient to establish conspiracy. However, we rejected a similar argument in *Meredith, supra* at 412, noting that “a conspiracy could still exist where all the individuals shared the knowledge that the drugs involved were ultimately to be delivered for consumption by street users.” In this case, the prosecution established that defendant shared with his coconspirators the objective of distributing over 650 grams of cocaine. Viewed in a light most favorable to the prosecution, this evidence was sufficient from which a rational trier of fact could have concluded defendant participated in a conspiracy to possess with intent to deliver more than 650 grams of cocaine.

Defendant also argues that the trial court failed to instruct the jury that it was required to find that defendant agreed to possess cocaine with the intent to deliver it to third parties. According to defendant, this invited the jury to convict him in violation of Wharton’s Rule because there was no inference of involvement beyond defendant and his coconspirators. As noted above, we reject this argument.

For his fourth issue, defendant argues that the cumulative effect of erroneous evidentiary rulings deprived him of a fair trial. Defendant first contends that the trial court abused its discretion in allowing the prosecution to introduce into evidence the cocaine and photographs of the money seized from apartments controlled by the Vallejos. Defendant asserts that these items should not have been admitted because there was no evidence linking him to either the cocaine or the cash, and the display of twenty-two kilograms of cocaine was more prejudicial than probative and unnecessarily inflammatory. We disagree. The cocaine and the photographs were admissible against defendant as relevant evidence of the purpose or common goal of the conspiracy. See *United States v Peyro*, 786 F2d 826 (CA 8, 1986). “It is a general rule that each conspirator is criminally responsible for the acts of his associate committed in furtherance of the common design and before the accomplishment thereof, the act of one or more being in contemplation of law the act of all.” *People v Houseman*, 128 Mich App 17, 24; 339 NW 2d 666 (1983). Moreover, “[t]here is no rule requiring the prosecution to use only the least prejudicial evidence per se to establish facts at issue.” *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

Defendant also contends that the trial court abused its discretion in not allowing testimony that Rule 35 motions filed on behalf of individuals in the Vallejo organization other than the testifying coconspirators had been granted, and their sentences had been reduced. Although “a limitation on cross-examination which prevents a defendant from placing before the jury facts upon which an inference of bias, prejudice, or lack of credibility of a witness may be drawn amounts to an abuse of discretion and can constitute a denial of the right to confrontation,” the permissible scope of cross-examination is a matter best left to the discretion of the trial court. *People v Mechigian*, 168 Mich App 609, 614; 425 NW2d 199 (1988). Defendant was allowed to vigorously cross-examine the testifying coconspirators on the circumstances and terms of their agreements with the federal prosecutors, and the trial court allowed him to present the jury with facts upon which an inference of bias or lack of credibility could be drawn. Although the trial court abused its discretion in not allowing further testimony, no

miscarriage of justice will occur by this Court's refusal to overturn defendant's convictions on that ground. MCL 769.26; MSA 18.1096.

Defendant argues that improper hearsay was admitted into evidence. First, he argues that one of his coconspirators was allowed to testify that he had heard from his brother and fellow conspirator that defendant was making crack cocaine. The trial court allowed this testimony to be admitted under MRE 801(d)(2)(E) as the statement of a coconspirator made during the course of and in furtherance of the conspiracy. An inference can be drawn from the testimony that the statement was made during the course of the conspiracy and, because it concerned the sales activities of defendant, was made in furtherance of the conspiracy. Moreover, the error, if any, was harmless beyond a reasonable doubt because it is not reasonably possible that a juror would have voted to acquit without this testimony. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992).

Next, defendant argues that a federal agent was allowed to give impermissible testimony over defense objection about the "significance" of the evidence seized and the conspirators' use of several apartments. We have previously held such testimony by a law enforcement officer to be admissible to aid the jury in determining the defendant's intent and his guilt of the charged offense. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Defendant's contention that this testimony referred to others and thus was unfairly prejudicial ignores that conspirators are criminally responsible for the acts of their coconspirators made in furtherance of the conspiracy. *Houseman*, *supra* at 24. Defendant's argument that the cumulative effect of evidentiary errors violated his right to due process and deprived him of a fair trial is without merit, as there were no evidentiary errors that were not harmless beyond a reasonable doubt.

As his final issue, defendant argues that imposing life imprisonment without the possibility of parole upon a fifty-year-old first-time offender is cruel or unusual punishment. This argument has been rejected by both the United States Supreme Court, *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991), and the Michigan Supreme Court, *People v Fluker*, 442 Mich 891; 498 NW2d 431 (1993). Defendant's contention that the sentence is disproportionate is also without merit. *People v DiVietri*, 206 Mich App 61, 63; 520 NW2d 643 (1994).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Amy P. Hathaway