STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN ALLEN ELLINGER,

Defendant-Appellee.

UNPUBLISHED
April 29, 1997

No. 167366
Oakland Circuit Court
LC Nos. 92-114514-FH;
92-114514-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ALLEN ELLINGER,

Defendant-Appellant.

No. 169536
Oakland Circuit Court
LC Nos. 92-111956-FH;
92-114513-FH;
92-114514-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ALLEN ELLINGER,

No. 170148
Oakland Circuit Court
LC No. 92-117634-FH

Defendant-Appellant.

Before: Jansen, P.J., and McDonald and D.C. Kolenda*, JJ.

PER CURIAM.

Following a jury trial in the Oakland Circuit Court, defendant was convicted of two counts of delivery of more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), one count of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), one count of conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a; MSA 28.354(1), and one count of conspiracy to possess with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c); MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant to five to twenty years' imprisonment for the convictions of delivery of more than 50 but less than 225 grams of cocaine, two to twenty years for the conviction of delivery of less than fifty grams of cocaine, two to twenty years for the conviction of conspiracy to deliver less than fifty grams of cocaine, and two to four years for the conviction of conspiracy to possess with intent to deliver marijuana. The sentences are to run consecutively; therefore, defendant's minimum sentence, when added together, totals sixteen years. Defendant appeals as of right from his convictions in Docket Nos. 169536 and 170148. The prosecutor appeals as of right from the trial court's decision to depart below the mandatory minimum sentence in Docket No. 167366. We affirm in all respects.

This case concerns several drug buys made by an undercover police officer. Ferndale police officer Kenneth Denmark was assigned to the Oakland County Narcotics Enforcement Team. Denmark was introduced to defendant by a confidential informant. The first drug buy occurred on August 7, 1991, in which Denmark bought a quarter ounce of cocaine from defendant. No arrest was made at that time. On August 21, 1991, Denmark contacted defendant and asked to purchase one ounce of cocaine. The deal was ultimately made, and Denmark purchased one ounce of cocaine from defendant for $1,200. On September 3, 1991, Denmark called defendant and asked to purchase two ounces of cocaine. The following day, Denmark went to defendant's residence and paid him $2,300 for the cocaine. Defendant gave Denmark two ounces of cocaine. On September 26, 1991, Denmark again contacted defendant and arranged to buy two ounces of cocaine for $2,400. Denmark met defendant, gave him the money, and defendant gave Denmark two ounces of cocaine.

During the September 26, 1991 transaction, Denmark told defendant that he would transport marijuana from Florida to Michigan. On October 3, 1991, Denmark began receiving pages from defendant. Defendant inquired if Denmark had retrieved the marijuana. Denmark replied that he had and said that the price was $1,700 per pound. Defendant indicated that he was interested in buying five pounds and that the purchase would involve his neighbor, William Lemiere. Denmark later contacted defendant on October 7, 1991, and arranged to go to defendant's residence to sell the marijuana. Defendant was initially alone at his house, and he called Lemiere to see the marijuana. Defendant had previously indicated to Denmark that he would sell the marijuana to Lemiere at a cost of $2,300 per

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

pound. Lemiere returned to defendant's house and gave Denmark the money for the marijuana. According to Denmark, defendant was arrested following the marijuana deal because the marijuana was police property that could not be lost.

At defendant's request, the charges were consolidated for trial. Defendant was convicted as charged by the jury. On appeal, defendant raises four issues relating to his convictions. He claims that he was denied the effective assistance of counsel, that the trial court erred in denying his motion to dismiss on the basis of entrapment, that prosecutorial misconduct denied him a fair trial, and that there was insufficient evidence to sustain his two conspiracy convictions. The prosecutor appeals from the trial court's decision to depart below the mandatory minimum sentences for the convictions of delivery of more than 50 but less than 225 grams of cocaine. We do not find any issue to require reversal.

Docket Nos. 169536; 170148

I

Defendant first contends that he was denied the effective assistance of counsel. Defendant did not move for an evidentiary hearing or new trial on this basis in the lower court, and his motion to remand for an evidentiary hearing filed in this Court was denied in an unpublished order dated March 1, 1994. Accordingly, our review of this issue is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

In order to prove a claim of ineffective assistance of counsel mandating reversal of a conviction, counsel's performance must fall below an objective standard of reasonableness, and the representation must prejudice the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). In order to prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*, p 314.

A

Defendant first contends that counsel was ineffective for failing to obtain certain information regarding the confidential informant. It is defendant's contention that this failure prevented counsel from being able to effectively cross-examine Denmark about the confidential informant.

Defendant acknowledges that the prosecution stated that everything in its file had been given to defense counsel. Further, it is unclear what history on the confidential informant existed, since there is no evidentiary record on this point. Denmark indicated that he kept certain notes, but that his reports contained the same information and the reports were given to defense counsel. Under these circumstances, defendant has not made a showing of prejudice; that is, there is no showing that the result of the trial would have been different had counsel obtained any additional information regarding the confidential informant.

B

Defendant next argues that counsel was ineffective for failing to give an opening statement. However, this is considered to be trial strategy, and this Court will not second-guess counsel on matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Calhoun*, 178 Mich App 517, 524; 444 NW2d 232 (1989). Further, there is no prejudice to defendant because counsel gave a closing statement and cross-examined the witnesses. Therefore, the prosecution's theory did not go unrebutted.

C

Defendant next contends that counsel was ineffective for failing to move in limine to exclude evidence of an uncharged sale on August 7, 1991. In this case, evidence of this first buy (not charged by the prosecutor) was introduced to demonstrate the workings of an undercover operation. Thus, evidence of this sale was offered for a proper purpose and was relevant. Further, we do not find the evidence to be more prejudicial than probative because there was ample evidence admitted regarding the subsequent offenses for which defendant was charged. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Defendant has not shown that the result of the proceeding would have been any different had the first sale not been admitted as evidence.

D

Defendant next argues that he received the ineffective assistance of counsel because a second attorney took over the case in mid-trial. However, a careful review of the record indicates that it does not support defendant's argument in this regard.

Before the jury was chosen, defendant's original counsel, Richard Wayne, introduced attorney Charles Novelli to the trial court as co-counsel on the case. On the second day of trial, Novelli proceeded with the case because Wayne explained that he was not feeling well. Defendant did not object to this, and Novelli had been present during all of the trial. This substitution, or change of counsel, does not, in and of itself, constitute the ineffective assistance of counsel. Contrary to defendant's claim, there was no last minute substitution of counsel. Moreover, a review of the trial indicates that Novelli vigorously and effectively cross-examined the witnesses and presented defendant's defense. Therefore, defendant is unable to show any actual prejudice on the record before us.

E

Defendant next argues that counsel was ineffective for failing to move for an entrapment hearing before trial. Although it would have been preferable for counsel to have raised such a motion either before or during trial, we find no prejudice because a review of the testimony indicates that an entrapment claim would not have been availing (see Issue II, *infra*). Further, counsel did move to dismiss the case on the basis of entrapment at the conclusion of the testimony. The trial court understood defendant's motion, and the facts for the motion were developed at trial. Therefore,

counsel's failure to move for an evidentiary hearing regarding the defense of entrapment either before or during trial was not ineffective because defendant is unable to show that the outcome of the proceeding would have been different.

F

Lastly, defendant argues that counsel was ineffective for failing to object to Denmark's comment about the "war on drugs." We find that this is sound trial strategy, because counsel may not have wanted to object and thereby emphasize the remark. *People v Barker*, 161 Mich App 296, 304; 409 NW2d 813 (1987). Further, the trial court instructed the jury that it was not to be concerned about the war on drugs when defense counsel objected to a similar comment made by the prosecutor during rebuttal argument. Therefore, we do not find that defense counsel was ineffective for failing to object on this basis below.

II

Defendant next argues that the trial court erred in denying his motion to dismiss on the basis of entrapment. A trial court's finding concerning entrapment is reviewed under the clearly erroneous standard of review. *People v Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992).

Entrapment exists when one of two prongs is met: (1) if the police conduct would induce a person similarly situated as the defendant not ready and willing to commit an offense to commit the offense; or (2) if the police engaged in conduct so reprehensible that it cannot be tolerated, regardless of whether the conduct caused the defendant to commit the crime. *People v Fabiano*, 192 Mich App 523, 531-532; 482 NW2d 467 (1992). The following factors are to be considered to determine whether the government activity would induce criminal conduct: (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any governmental pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any governmental procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over the informant; and (12) whether the investigation was targeted. *Williams, supra*, pp 661-662.

Defendant contends that the following factors preponderate in his favor for a finding of entrapment: the threat of arrest, governmental pressure, the escalation of criminal culpability, the informant was unsupervised and not under the control of the police, and defendant had never committed the offense with which he was charged. Here, defendant and the informant were acquainted because they had worked together and they became friends. There is no claim that appeals were made to the

defendant's sympathy as a friend. Further, defendant concedes that he was using narcotics in 1991, and that he had purchased narcotics from the informant on a number of occasions.

Although defendant claims that he had never committed the offense with which he was charged, he was previously buying illegal drugs, and the informant stated that defendant did sell drugs. With respect to the claim of governmental pressure, the police officer, Denmark, did contact defendant on several occasions and asked if defendant could supply him with cocaine. On each occasion, defendant stated that he could do so. This does not constitute governmental pressure because merely supplying a person with an opportunity to commit a crime does not constitute entrapment. See, e.g., *Williams, supra*, p 663. Also, with respect to the claim that the informant was not supervised or under the control of the police, the evidence was that, at least initially, Denmark controlled the informant's activities. Denmark then "cut out" the informant from further drug transactions, but, the informant continued to call defendant to pressure him to sell drugs to Denmark. Even if the informant involved himself in the drug transactions, the police had cut him out of further dealings. We cannot place fault with the police for the independent decision of an informant to continue contacting defendant. Moreover, we note that the informant told defendant that he (the informant) was working for the police. Therefore, we do not believe that these factors favor a finding of entrapment.

The factors of threat of arrest and escalation of criminal culpability are somewhat more problematic. Defendant claims that the informant threatened to turn him in to the police. However, there is no evidence that the police authorized or encouraged the informant to threaten defendant with arrest. Further, Denmark's actions of asking defendant for increasing amounts of cocaine did escalate defendant's culpability. However, the evidence showed that defendant was willing to sell larger amounts of cocaine. The evidence also showed that defendant had been involved in using and buying drugs before he began selling drugs to Denmark. Accordingly, we do not agree with defendant's contention that the police manufactured the offenses. We do not find the police conduct to be so reprehensible that it cannot be tolerated, nor did the police engage in impermissible conduct that would induce a law abiding person to commit a crime under similar circumstances.

The trial court did not clearly err in denying defendant's motion to dismiss at the close of the proofs on the basis of entrapment.

III

Defendant next argues that the prosecutor engaged in misconduct which denied him a fair trial. Specifically, defendant argues that the prosecutor failed to comply with a court order to provide counsel with several reports and Denmark's notes, and that the prosecutor made inflammatory comments during closing argument.

With respect to the notes and reports, the record indicates that when defense counsel questioned the absence of the reports and notes, the prosecutor copied them and provided them to counsel. Also, Denmark indicated that his notes had been incorporated into his reports, and counsel had been provided with the reports. Therefore, even though the reports were not timely given to

defense counsel, counsel was provided with the reports. Counsel stated on the record that he did not need to see the notes, and defendant has not shown that the lack of timely access to the reports or notes had any effect on the verdict. In fact, counsel never requested a continuance or any other type of remedy. Therefore, we cannot conclude that defendant was deprived of a fair trial in this regard.

Defendant also argues that the prosecutor engaged in misconduct when he made inflammatory remarks during closing argument. Specifically, defendant refers to the prosecutor's comments that defendant could gain access to large amounts of cocaine, and that defendant did not care where the drugs went that he sold. Defense counsel asked to approach the bench, and, after a conference, the trial court immediately instructed the jury that it was not to concern itself with the war on drugs, but only with the charges against defendant. During the jury instructions, the trial court instructed the jury that the attorneys' statements, arguments, and questions were not evidence. Under these circumstances, we find that the trial court's instructions to the jury sufficiently cured any prejudice. *People v Bahoda,* 448 Mich 261, 281; 531 NW2d 659 (1995).

Accordingly, defendant was not denied a fair trial due to any alleged prosecutorial misconduct.

IV

Lastly, defendant argues that there was insufficient evidence to sustain his two conspiracy convictions. When reviewing a challenge to 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).

A conspiracy is a mutual agreement or understanding between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. The agreement or understanding may be express or implied. Proof of a formal agreement is not required. Conspiracy is a specific intent crime which requires both the intent to combine with others and the intent to accomplish the illegal objective. Direct proof of an agreement is not required. The circumstances, acts, and conduct of the parties can establish the existence of an agreement. A conspiracy may be based on inference or proven by circumstantial evidence. No overt act in furtherance of the conspiracy is necessary. The formation of the agreement completes the crime of conspiracy. *People v Cotton,* 191 Mich App 377, 392-393; 478 NW2d 681 (1991).

The evidence in this case indicated that on August 21, 1991, Denmark went to defendant's residence to purchase cocaine. Shortly thereafter, Thomas Reed arrived at defendant's house with the cocaine. The evidence conflicted regarding whether Reed handed the bag of cocaine to defendant or directly to Denmark. However, there was evidence that Reed handed the bag to defendant who then gave it to Denmark. Denmark handed defendant the money and left with the cocaine.

The second conspiracy offense arose on October 7, 1991 when Denmark went to defendant's house with five pounds of marijuana. Before Denmark arrived, defendant contacted William Lemiere. Lemiere arrived at defendant's residence and inspected the marijuana. Lemiere left, and later returned

with the money to purchase the marijuana. Lemiere gave Denmark the money and Denmark signaled the surveillance officers.

This evidence, when taken in a light most favorable to the prosecution, and in drawing reasonable inferences from it, is sufficient to sustain defendant's two conspiracy convictions.

Docket No. 167366

In this appeal, the prosecutor appeals from the trial court's decision to depart below the mandatory minimum sentences with respect to the two convictions of delivery of more than 50 but less then 225 grams of cocaine. Defendant received prison terms of five to twenty years' imprisonment for both of those convictions, although the statutory minimum terms are ten years. The prosecutor argues that the trial court improperly considered the consecutive nature of the sentences, that there were no substantial and compelling reasons to depart below the mandatory minimum, and that the extent of the departure resulted in disproportionately lenient sentences.

At sentencing, the trial court stated the following:

> The Court believes a just sentence here would be in the vicinity of sixteen years and for substantial and compelling reasons on the record including the government's involvement in this offense and the fact that there are—they are consecutive sentences, sentence you, Mr. Ellinger, to the delivery of a controlled substance of 50 to 224 grams of five to twenty years with credit for seventy-five days.

We find no error with respect to the trial court's decision to account for the fact that the sentences in this case must run consecutively to each other in attempting to fashion proportionate sentences. *People v Davis*, 196 Mich App 597, 601-602; 493 NW2d 467 (1992).

We also find no error with respect to the trial court's decision to depart below the mandatory minimum term in sentencing defendant. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii) provides that an offender shall be imprisoned for not less than ten nor more than twenty years. However, trial courts are permitted to depart from the minimum term if the court finds that there are substantial and compelling reasons to do so on the record. MCL 333.7401(4); MSA 14.15(7401)(4).

Only those factors that are objective and verifiable may be used to judge whether substantial and compelling reasons exist to depart from the mandatory minimum term. *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995). In determining whether substantial and compelling reasons to depart exist, courts first are to place particular emphasis on mitigating circumstances surrounding the offense. *Id.*, p 76. Other factors to evaluate include: (1) the defendant's prior record, (2) the defendant's age, (3) the defendant's work history, (4) the defendant's cooperation with law enforcement officials, and (5) factors arising after the defendant's arrest. *Id.*, p 77.

The existence or nonexistence of a particular factor is a factual determination for the sentencing court that is reviewed under the clearly erroneous standard of review. *Id.* The determination that a

particular factor is objective and verifiable is to be reviewed as a matter of law. *Id.* A trial court's determination that the objective and verifiable factors present in the case constitute substantial and compelling reasons to depart below the statutory minimum sentence is to be reviewed for an abuse of discretion. *Id.*, p 78.

The trial court relied on factors such as no evidence of prior drug dealing by defendant, defendant's age (twenty-seven years old when he committed the offenses), defendant's steady employment history, defendant's strong family support, defendant's lack of a prior criminal record, defendant's strong potential for rehabilitation, and the government's escalation of the offenses. These factors are all objective and verifiable and are supported by record evidence. The trial court's finding that there were substantial and compelling reasons to depart below the mandatory minimum sentence of ten years is not clearly erroneous. Accordingly, the trial court did not abuse its discretion in fashioning a sentence of five to twenty years for the delivery of more than 50 but less than 225 grams of cocaine convictions.

Finally, the sentences in this case do not violate the principle of proportionality in considering the background of the offender and the circumstances surrounding the offenses. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Kathleen Jansen
/s/ Gary R. McDonald
/s/ Dennis C. Kolenda