STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK MICHAEL FLANDERS,

Defendant-Appellant.

UNPUBLISHED
July 11, 1997

No. 182907
Kalkaska Circuit
LC No. 94-001397-FH

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of conspiracy to possess with intent to deliver more than 50 but less than 225 grams of cocaine (two counts), MCL 750.157a; MSA 28.354(1), MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and possession with intent to deliver more than 50 but less than 225 grams of cocaine (two counts), MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). We affirm defendant's convictions of two counts of possession with intent to deliver and one count of conspiracy, but reverse his conviction for the second count of conspiracy.

Defendant was introduced to a Detroit drug dealer, Philip Belanger, through a mutual acquaintance, Joseph Fortuna. Largely through Fortuna's continued facilitation, defendant thereafter obtained cocaine from Belanger on several occasions in order to sell it in Kalkaska County. These transactions included two specific occasions that occurred in September and November of 1993, and for which defendant was separately charged with one count each of conspiracy and possession. Fortuna was later given complete immunity from prosecution for his participation in these transactions, and his testimony was the primary direct evidence against defendant during the instant trial.

I

Defendant first contends that the trial court erred when it refused to sever the September and November transactions for separate trials. We disagree. The record reveals that defendant apparently acquired drugs from Belanger approximately six times, and that Belanger "fronted" drugs for money during those times. As such, individual purchases from Belanger by defendant were each connected to the next as part of a single scheme or plan: defendant would receive a quantity of drugs from Belanger,

sell them, and use all or part of the proceeds to pay off Belanger and in turn receive more drugs. The September and November transactions were thus not "unrelated" offenses, and their severance for separate trials was not required. MCR 6.120; *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1977).

II

Defendant next argues that the trial court abused its discretion when it admitted evidence of defendant's stop and arrest in Saginaw County several weeks after the instant transactions occurred, arguing that no permissible reason existed for introducing such evidence of "other acts" pursuant to MRE 404(b). We disagree.

When evaluating the admissibility of "other acts evidence under MRE 404(b), "[t]he question is not whether the evidence falls within an exception to a supposed rule of exclusion, but rather whether the evidence is in any way relevant . . . other than by showing mere propensity. Put simply, [MRE 404(b)] is *inclusionary* rather than exclusionary." *People v VanderVliet*, 444 Mich 52, 64-65, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). When defendant was arrested, he was transporting cocaine that he had obtained from Belanger. Such evidence tended to show that defendant did indeed traffic in cocaine obtained from Belanger, and that Fortuna's earlier testimony to that effect was credible. The evidence, therefore, was relevant to issues other than to show that defendant had a propensity to commit bad acts. As such, it was properly introduced pursuant to MRE 404(b).

We note and reject defendant's argument that it was impermissible to introduce such evidence for the purpose of bolstering Fortuna's credibility. Defendant fails to cite to any authority for such a proposition. Furthermore, to the extent defendant maintains that the evidence was obtained as a result of an unconstitutional search and seizure, we note that this Court has previously considered and rejected defendant's argument, finding that defendant voluntarily consented to the search of his automobile. See *People v Flanders*, unpublished opinion per curiam of the Court of Appeals, issued 12/28/95 (Docket No. 178624). Finally, we also reject defendant's brief argument that his attorney's failure to object to the admission of this evidence on constitutional grounds in the instant trial constituted ineffective assistance of counsel. Because the search and seizure was not unconstitutional, defendant cannot demonstrate that he was prejudiced by his counsel's failure to object on this ground. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

III

Defendant next contends that the trial court erred when it failed to dismiss the second of the two conspiracy charges.[1] He argues that the prosecution's de facto theory of the present case was that there was only one conspiracy, notwithstanding that the prosecution charged him separately for each of the September and November transactions. The prosecution concedes on appeal that the prosecutorial position at trial was that there was a single continuing conspiracy, and that conviction of a second count of conspiracy was "superfluous."

The essence of the offense of conspiracy is the agreement itself. *People v Meredith (On Remand)*, 209 Mich App 403, 408; 531 NW2d 749 (1995). We agree with the parties that the prosecution argued and established at trial that defendant, Fortuna, and Belanger formed "an agreement" over the Labor Day weekend to obtain and sell cocaine and that the evidence established a single, continuing conspiracy. We therefore vacate defendant's second conspiracy conviction.

IV

Defendant next contends that three separate instances of prosecutorial misconduct during closing arguments deprived him of a fair trial. We disagree.

A

Defendant first argues that during his rebuttal argument the prosecutor improperly called the jury's attention to the fact that defendant did not testify at trial. We note that self-incriminating statements given by defendant to authorities were properly introduced into evidence through the testimony of Michigan State Police Detective Lieutenant John C. Conn. In response to statements in defendant's closing argument that Fortuna, an admitted drug trafficker who had been granted immunity from prosecution, was not a credible witness, the prosecutor in his rebuttal discussed the jury's duty to determine the credibility of witnesses. In a reference to both Conn's and Fortuna's testimony, the prosecutor commented that the jury had an opportunity to see and evaluate both of these witnesses. The prosecutor also noted that defendant's statements were available to the jury through the testimony of Conn, but the jury did not have the opportunity to judge the credibility of the originator of the statements, i.e. defendant.

Evaluated in context to determine whether defendant was denied a fair and impartial trial, *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996), we find that the prosecutor's remarks were not improper. First, the remarks were properly directed toward the jury's obligation to evaluate the credibility of witnesses. In particular, the prosecution was asking the jury to believe Fortuna's testimony, which conflicted with defendant's statements presented to the jury through Detective Conn. The remarks were therefore not, in fact, a comment on defendant's failure to testify, as defendant argues. Second, the trial court clearly instructed the jury that it was to disregard the fact that defendant did not testify and that the lawyers' statements and arguments were not evidence. Third, with particular regard to defendant's alleged statement as introduced by Detective Conn, the trial court instructed the jury that it was required to determine whether defendant actually made the statement and whether the statement was true in whole or in part, thereby necessitating a credibility evaluation. Finally, in making the remarks during his rebuttal, the prosecutor was clearly responding to defendant's closing argument, which he was permitted to do. *People v King*, 210 Mich App 425, 434; 534 NW2d 534 (1995).

B

Defendant next argues that the prosecution improperly both vouched for Fortuna's credibility and appealed to the jurors' civic duty. We note that defendant did not object to these remarks below,

and we find that a curative instruction would easily have eliminated any prejudice arising from the remarks. We therefore do not consider defendant's arguments on appeal. *McElhaney*, *supra* at 284.

V

Finally, defendant contends that consecutive sentencing for his conspiracy conviction is improper. We disagree. In *People v Denio*, ___ Mich ___; ___ NW2d ___ (1997), our Supreme Court held that the Legislature intended the consecutive sentencing provisions of MCL 333.7401(3); MSA 14.15(7401)(3) to fall within the term "penalty" in the conspiracy statute, MCL 750.157a; MSA 28.354(1). Moreover, the Court held that consecutive sentences for an enumerated drug offense and for conspiracy to commit the enumerated offense do not violate double jeopardy because the Legislature intended multiple punishments. *Id.* Accordingly, we affirm defendant's consecutive sentence for his conspiracy conviction.

Defendant's convictions of two counts of possession with intent to deliver cocaine and one count of conspiracy are affirmed. We vacate his conviction of a second count of conspiracy and remand for entry of an order modifying the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] We note that, after making his motion for dismissal of the second conspiracy count, defendant immediately (i.e., before the trial court ruled) also moved for directed verdicts on *both* conspiracy counts based on insufficiency of the evidence regarding whether the alleged conspiracies had actually occurred in Kalkaska County. As an apparent result of the closeness of the motions, the trial court explicitly addressed defendant's arguments as having been made solely for directed verdicts. The trial court denied directed verdicts and no ruling was made on the motion for dismissal of the second conspiracy count.