# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 18, 1997 |
| v | No. 185270<br>Huron County Court |
| MICHAEL LEE SOPER,<br><br>Defendant-Appellant. | LC No. 94-003686-FH<br><br>AMENDED |

Before: Saad, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant also pleaded guilty to conspiracy to posses 50 to 224 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). Defendant was sentenced to *consecutive* sentences of five to twenty years' imprisonment for the delivery conviction and twelve to twenty years for the conspiracy conviction. We affirm.

I

Defendant contends that the trial court erred in failing to instruct the jury sua sponte on the unreliability of accomplice testimony, and that his counsel's failure to request such an instruction denied him effective assistance of counsel. We disagree. If an issue is closely drawn, it may be error requiring reversal to fail to give a cautionary accomplice instruction even in the absence of a request. *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974). The issue of a defendant's guilt is "closely drawn" if the trial is essentially a credibility contest between the defendant and the accomplice." *People v Perry*, 218 Mich App 520, 529; 554 NW2d 362 (1996). This case was "closely drawn" because the issue of defendant's guilt depended entirely on whether the jury believed defendant's word or that of Brian Heilig and Tom Stephan, to whom defendant delivered the cocaine.

We find no error in failing to give or request the unreliability of accomplice instructions because Heilig and Stephan were not "accomplices." An accomplice is a "person who knowingly and willingly helps or cooperates with someone else in committing a crime." *People v Allen*, 201 Mich App 98,

105; 505 NW2d 869 (1993) (citing CJI2d 5.5). Although the crime of delivery of cocaine requires the transfer of cocaine from one person to another, *People v Bartlett*, 197 Mich App 15, 17-18; 494 NW2d 776 (1992), one who purchases the drug for personal consumption is not made an accomplice by virtue of the purchase. A contrary result would be absurd and inconsistent with the intent of the Court in *Allen*, which was to focus on the defendant's act (i.e., the delivery) and to charge as an accomplice one who actively helped or cooperated in the act of delivery, not one who passively helped or cooperated by acting as the recipient. An accomplice is one who "could be charged with the same offense as the accused is charged." *People v Connolly*, 79 Mich App 778; 262 NW2d 862 (1977). The prosecution's witnesses, as the recipients of the cocaine, could not have been charged with delivery. Accordingly, they were not accomplices, and defendant was not entitled to an accomplice instruction. Trial counsel's failure to request such an instruction did not deprive defendant of effective assistance of counsel.

II

Next, defendant argues that the prosecutor impermissibly bolstered the credibility of his witnesses on a number of occasions in his closing statement. Taken in context and reviewed in light of the evidence submitted at trial, we find that the prosecutor's remarks were not impermissible "vouching." Three of the prosecutor's allegedly impermissible comments were premised with the words "I submit." As defendant acknowledges, the term "I submit" sufficiently qualifies a statement to preclude it from being viewed as vouching. *United States Necoechea*, 986 F2d 1273 (CA 9, 1993); cf. *People v Jansson*, 116 Mich App 674, 692-694; 323 NW2d 508 (1982). Moreover, when taken in context, these comments were permissible arguments that the witnesses were worthy of belief and not personal guarantees of credibility. Indeed, the comments related to previous statements and testimony and were legitimate in light of defense counsel's cross-examination of Heilig and Stephan.

Defendant also objects to the prosecutor's statement that "[Heilig was] very straightforward with you . . ." and "Stephan also honestly answered all the questions that were put to him . . . ." However, it is clear that the prosecution was talking to the jury about Heilig's admissions of his prior convictions and history of being a drug user (which had been brought out by defense counsel). With respect to Stephan, the prosecutor was merely responding to defense counsel's cross-examination. It was reasonable for the prosecutor to imply that, because Heilig was being truthful about his past wrongs and Stephan was being truthful about what he had remembered, the jury could believe them about the alleged transaction with defendant.

Next, defendant argues that the prosecution's statement that the witnesses' deals "hinged upon them telling the truth, [that] they had to testify truthfully in front of the grand jury. . . [and that the prosecution] [d]idn't tell them what they had to say, but told them they had to go out there and tell the truth" was impermissible "vouching." However, the prosecution was merely emphasizing that no one told the witnesses what to say. This is evidenced by the prosecutor's subsequent emphasizing that "they [the police] didn't come in and have somebody suggest to them [Heilig and Stephan] this is exactly what we want you to say, we want you to concoct this story." Moreover, just like the statements discussed previously, the prosecutor was responding to defendant's cross-examination of the witnesses.

Defendant further argues that during rebuttal argument, the prosecution further vouched for its witnesses by stating: "Now Mr. Stephan is telling the truth . . ."; "It's time to tell the truth and that's exactly what he [Mr. Heilig] did in front of the grand jury," and; " Mr. Stephans [sic], who's telling the truth, . . ." However, all these statements were again relating to the deal the prosecution had struck with the witnesses. When read in context, it is clear that the prosecutor was trying to imply that when Heilig heard Stephan's testimony at the grand jury proceedings, he knew that he was "had" and that he should start telling the truth.

Next, defendant's claim that the prosecutor's remarks were uninvited by defense counsel's arguments is unsound. Defense counsel made a number of statements characterizing these witnesses' testimony as false, including: (1) "I'm going to tell you that we believe Mr. Heilig was lying"; (2) "our theory is that a deal with the prosecutor to tell the truth is completely and totally worthless as a means of determining whether the truth is being told" and; (3) "we do know that Brian Heilig is a person with a history of being dishonest, we do know that Brian Heilig is a person who got on this witness stand today and lied to each and every one of you when he said he didn't know Garth Langley, didn't talk to Garth Langley, Garth Langley wasn't there." Moreover, defense counsel made an extended statement regarding Heilig's plea agreement, including characterizations that (1) "the reality is [that Heilig's truth] is the prosecutor's truth"; (2) "[Heilig] was told by the Prosecutor what the truth was and then told to go in [to the grand jury proceeding] and back it up"; and that (3) "[s]aying that [defendant] didn't [deliver the cocaine] will break [Heilig's] deal without regard to whether it's the truth or not." It is appropriate for the prosecutor to respond in final argument to matters first raised by the defense in closing argument. *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992). Defense counsel was characterizing Heilig as a liar and claiming that the agreements that the prosecution had reached with the witnesses were a sham. Even if some of the prosecutor's comments were improper, defense counsel arguably brought them on himself.

Defendant further claims that the seriousness of the vouching in this case must be weighed against the potential effectiveness of any curative instruction and the closeness of the case. Defendant argues that if this balancing is done in light of the fact that the trial court failed to give the unreliability of accomplices instruction, it is clear that this Court should reverse defendant's conviction. However, as noted earlier, Heilig and Stephan were not accomplices; therefore, the unreliability of accomplices instruction was not needed. Furthermore, as discussed previously the prosecutor's comments were appropriate when taken in context and viewed in light of defense counsel's comments.

III

Finally, defendant argues that his twelve-year minimum term of imprisonment for conspiracy is disproportionate to the offense and the offender and a reversible abuse of sentencing discretion in that it represents a failure to individualize his sentence. We disagree. Given defendant's prior record score, the sentence for his delivery conviction was within the guidelines. Similarly, although conspiracy is not covered by the guidelines, his twelve-year sentence on the conspiracy charge was within the ten to twenty term mandated by the statute under which defendant pleaded guilty, MCL 333.7403(2)(a)(iii); MSA 14.15(7403).

We also reject defendant's arguments that: (1) the consecutive nature of his sentences renders them excessive (see *People v Denio*, ___Mich ___; ___NW2d___ (Mich Sup Ct No. 105328, issued 6/17/97), and (2) the trial court erred in failing to consider the sentence imposed on a defendant's co-participant (see *In re Dana Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991)). We see no abuse of discretion.

Affirmed.

/s/ Henry William Saad
/s/ Janet T. Neff
/s/ Kathleen Jansen