

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR E. BACON,

Defendant-Appellant.

UNPUBLISHED

August 8, 1997

No. 191381

Jackson Circuit Court

LC No. 95072054-FH

Before: White, P.J., and Cavanagh and J.B. Bruff*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and three counts of conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a; MSA 28.354(1). The trial court sentenced him to five consecutive prison terms of two to twenty years for each conviction. Defendant appeals as of right, and we affirm.

I

Defendant first argues that there was insufficient evidence to support the convictions for delivery of cocaine. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

Defendant argues that the testimony of the accomplice, Troy Orban, was not credible. However, questions of the credibility of the witnesses are for the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

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

In the present case, the prosecutor presented evidence regarding defendant's two deliveries of cocaine through the testimony of two undercover police officers and the corroborating testimony of Orban. Both officers testified that defendant and defendant's car were at the scenes of the two transactions. One officer testified that during the first transaction, he saw Orban join defendant in defendant's car and return a minute later with the cocaine and without the money. Regarding the second transaction, the other officer testified that before Orban returned with the cocaine, he saw him in defendant's car outside the restaurant where defendant was sitting during the transaction. We conclude that this evidence was sufficient for a rational trier of fact to find that defendant was guilty of delivery of cocaine.

Defendant also argues that the prosecution did not prove a conspiracy between defendant and the accomplice to deliver cocaine on three occasions because the police officers were not party to any of the telephone calls that the accomplice made to his supplier. However, direct proof of an agreement is not required to establish the existence of a conspiracy; it is sufficient that the circumstances, acts, and conduct of the parties establish an agreement. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). Here, the supervising undercover officer's testimony and the corroborating testimony of another officer and Orban consistently established defendant as a vital link in the transportation of drugs to buyers. The supervising undercover officer testified that on each of the three occasions when he called Orban for cocaine, Orban first called his supplier to check on availability and prices. He further testified that when he and Orban arrived at the location for the first two drug transactions, Orban would leave to page his supplier, and shortly thereafter defendant would arrive. We conclude that this evidence is sufficient to support defendant's conviction of conspiracy to deliver cocaine.

In addition, defendant maintains that the verdict is against the great weight of the evidence. However, this issue is not preserved for appellate review because defendant did not move for a new trial. See *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991).

II

Defendant next claims that he was denied due process because his defense counsel misunderstood the effect of the plea bargain given to Orban, and the prosecutor deliberately did not clarify the issue. We find no error requiring reversal. Defense counsel specifically asked Orban to "forget what the law is" and to describe the difference "in your mind" that the plea bargain had meant to him. Thus, because Orban was testifying about his own perception, there was no error for the prosecutor to correct. Moreover, any error was harmless because the totality of the evidence presented at trial clearly described the terms of the plea bargain.

III

Defendant further argues that the trial court abused its discretion in failing to grant his motion for a mistrial. A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995).

Defendant objects to Orban's testimony that they had been involved in drug deals other than those at issue at the trial. To be admissible under MRE 404(b), evidence of bad acts must satisfy the following requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

In the instant case, the prosecutor's question was intended to show how Orban knew defendant and not to show that defendant acted in conformity with any prior bad acts. Indeed, the prosecution's question was proper in light of the relationship which the prosecution had to prove to establish the conspiracy charges against defendant. Evidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded. *Id.* at 73. The trial court therefore did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant contends that he is entitled to a new trial because the trial court did not give a cautionary instruction to the jury. However, defendant did not request a cautionary instruction at trial. This Court will not allow defendant to harbor error as an appellate parachute. *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996).

IV

A

Defendant next argues that the trial court erred in reading the standard instruction on conspiracy because the instruction stated that the jury only had to find a conspiracy between "defendant and someone else," and did not specify a conspiracy between defendant and Orban. However, defendant did not object to the instructions at trial. Therefore, our review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). As a general rule, this Court is hesitant to reverse a lower court because of an error in jury instructions where no objection was raised at trial. *People v Hess*, 214 Mich App 33; 543 NW2d 332 (1995).

Defendant relies on *People v Smith*, 85 Mich App 404, 413-414; 271 NW2d 252 (1978), rev'd on other grounds 406 Mich 945; 277 NW2d 642 (1979). However, unlike *Smith*, the evidence in this case could not lead the jury to be confused about the identity of the coconspirator. The prosecutor consistently attempted to establish the existence of a conspiracy between defendant and Orban, and the prosecutor's argument made it clear that the conspiracy alleged was with Orban and not with Reed¹ or Galloway. There was no evidence that defendant might have conspired with anyone other than Orban. Accordingly, we conclude that relief is not necessary to avoid manifest injustice. See *Haywood, supra*.

B

Defendant also claims that he was denied the effective assistance of counsel at trial because his counsel failed to object to the jury instructions. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

Because defendant failed to move for a *Ginther*¹ hearing or a new trial based on ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). We find that defendant is not entitled to relief. As previously discussed, there was no evidence that that defendant conspired with anyone other than Orban. Accordingly, there is no likelihood that the outcome would have been different had the trial court given a more specific instruction on conspiracy. See *Pickens, supra*.

V

Finally, defendant argues that the trial court abused its discretion in ordering that defendant's sentences for the three conspiracy convictions be served consecutively to each other as well as to the sentences for the delivery convictions. Defendant relies on *People v Denio*, 214 Mich App 647, 650-651; 543 NW2d 66 (1995), in which a panel of this Court held that conspiracy offenses were not included in the consecutive sentencing provisions of MCL 333.7403(3); MSA 14.15(7403)(3). However, the Supreme Court has recently held that the Legislature intended the consecutive sentencing provision of MCL 333.7403(3); MSA 14.15(7403)(3) to fall within the term "penalty" in the conspiracy statute. *People v Denio*, 454 Mich 691, 695; ___ NW2d ___ (1997). Thus, the trial court was *required* to impose consecutive sentences for the three conspiracy convictions. See *id.* at 703. Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).