STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON CHANDLER,

Defendant-Appellant.

UNPUBLISHED
November 14, 1997

No. 196726
Recorder's Court
LC No. 95-011069

Before: Saad, P.J., and O'Connell and Matuzak,* JJ.

PER CURIAM.

Defendant appeals from his jury trial convictions for delivery of less than fifty grams of heroin, delivery of less than fifty grams of cocaine, possession with intent to deliver less than fifty grams of heroin, and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The jury also convicted him of being a habitual felony offender, fourth conviction, MCL 769.12; MSA 28.1084. He was sentenced as a habitual offender to seven to forty years' imprisonment. We now vacate his conviction for delivery of less than fifty grams of cocaine, and affirm his remaining convictions and sentence.

Defendant argues that insufficient evidence was presented to sustain his conviction for delivery of cocaine. We agree.

Delivery of cocaine means that the defendant transferred or attempted to transfer the substance to another person, knowing that it was cocaine and intending to transfer it to that person. *People v Delgado*, 404 Mich 76, 86, n 6; 273 NW2d 395 (1978). In this case the prosecutor did not present evidence from which a rational jury could conclude beyond a reasonable doubt that defendant knowingly delivered under 50 grams of cocaine.

According to Forrest, the surveillance officer, he observed Alvin Williams approach defendant and hand him money in exchange for "a small white envelope." Officer Forrest could not see from his place of observation what the envelope contained, but assumed that it was heroin. Shortly thereafter,

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

the "takedown" crew of Officers Cronin, Clemons and Bates entered the parking lot. Officer Bates saw Williams drop something on the ground. Bates recovered these items, which were two small white packets and one small "ziploc" bag. The white packets contained heroin, while the "ziploc" bag contained cocaine.

According to Officer Forrest's own testimony, he saw defendant give Williams only one small white packet, which he believed contained heroin. Nobody testified regarding any other exchanges between defendant and Williams. There is no indication on the record that the single rock of crack cocaine Williams dropped was obtained from defendant. Other than a possible similarity in packaging, a comparison which was not developed on the record by the prosecution, there is no other evidence from which to infer that defendant transferred or attempted to transfer cocaine to Williams. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not have found that the essential elements of delivery of cocaine were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 465-466; 502 NW2d 177 (1993).

Defendant also argues that his convictions must be reversed due to the repeated introduction of hearsay statements attributed to Officer Forrest. Defendant did not object to this testimony at trial, so we will not review this issue on appeal. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992).

Defendant argues that the prosecutor's opening statements denied him a fair trial. Defendant did not object to these statements at trial. Any prejudicial effect caused by these statements could have been cured by a timely cautionary instruction. Failure to consider this issue will not result in a miscarriage of justice. Therefore defendant's failure to object precludes our review of these remarks. *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989).

Finally, defendant argues that his convictions must be reversed because he was denied the effective assistance of trial counsel. We disagree. Defendant claims that his trial counsel's failure to object to both the admission of purported hearsay and the prosecutor's mischaracterization of the evidence in her opening statement were serious errors which denied him effective assistance of counsel. Defendant did not identify the purported hearsay statements, so he has abandoned this issue on appeal. Defendant has failed to show that the actions of his trial attorney were not sound trial strategy, nor has he shown that the alleged errors prejudiced the defense. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 LEd2d 674 (1984); *People v* Reed, 453 Mich 685, 694-695; 556 NW2d 858 (1996).

Defendant's conviction for delivery of less than fifty grams of cocaine is reversed and vacated. Defendant's remaining convictions and sentence are affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak