STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMOND ALSTON,

Defendant-Appellant.

UNPUBLISHED
December 30, 1997

No. 186884
Muskegon Circuit Court
LC No. 94-037120-FC

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right his conviction by jury of conspiracy to possess with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). The trial court sentenced defendant as an habitual offender, MCL 769.10; MSA 28.1082, to mandatory life imprisonment without parole. We affirm.

I. Sufficiency of the Evidence

We reject defendant's initial argument that a conviction of conspiracy to possess with intent to deliver 650 grams or more of cocaine may not be predicated on the aggregation of smaller drug purchases. *People v Justice (After Remand),* 454 Mich 334, 350-358; 562 NW2d 652 (1997); *People v Porterfield*, 128 Mich App 35, 40-41; 339 NW2d 683 (1983). In any event, the prosecutor presented sufficient evidence to support a conviction without aggregating smaller purchases. Charles Hathorn, working in conjunction with defendant and Jakisa Hall, arranged to purchase almost 1,500 grams of cocaine from Anthony Woods on June 15, 1994. Defendant discussed the purchase with Hathorn and Hall, supplied Hall with a car to obtain the cocaine, and took possession of the drugs upon Hall's return to Muskegon. Hall testified that she could have delivered the drugs to either defendant or Hathorn. A reasonable jury could find from this evidence that defendant, Hall and Hathorn conspired to possess with intent to deliver 650 grams of more of cocaine. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992); *People v McCrady,* 213 Mich App 474, 484; 540 NW2d 718 (1995); *People v Catanzarite,* 211 Mich App 573, 577; 536 NW2d 570 (1995). The evidence, including Woods' testimony, testimony concerning police officers'

observations, and the tape recordings of the telephone conversations between Woods, Hathorn and defendant, overwhelmingly proved that defendant intended to combine with the others to possess with the intent to deliver the cocaine. *People v Meredith (On Remand),* 209 Mich App 403, 407-408; 514 NW2d 765 (1994); *People v White,* 147 Mich App 31; 383 NW2d 597 (1985). Moreover, defendant's coconspirators plainly intended to possess and deliver the cocaine. *Justice, supra* at 340.

II. Evidentiary Rulings

Defendant argues that the trial court abused its discretion in admitting under MRE 404(b) evidence of other acts by Idris Golden, Damien Martin, and Shay Thomas before the commencement of the charged conspiracy. This Court reviews the trial court's evidentiary rulings for an abuse of discretion. *People v Davis,* 199 Mich App 502, 516-517; 503 NW2d 457 (1993). Here, the trial court admitted evidence of defendant's and his coconspirators' activities before the dates of the charged conspiracy to show "the existence of the conspiracy and how it evolved." The court then instructed the jurors that they could not use the evidence to establish the elements of conspiracy, but only to determine defendant's and codefendants Hall and Hathorn's intent, motive, scheme, plan or design during the conspiracy.

The trial court did not abuse its discretion in admitting the evidence. The prosecutor sought to introduce the evidence to show defendant's intent and knowledge, as well as a common plan or scheme, not to show that Golden, Martin and Hathorn were bad men. MRE 404(b); *People v Gibson,* 219 Mich App 530, 532; 557 NW2d 141 (1996). The evidence rebutted defendant's claim that no conspiracy existed and also demonstrated how defendant and his coconspirators formed the charged conspiracy. The prejudicial effect of the evidence did not substantially outweigh its probative value. Further, even if the trial court erred, the error was harmless in light of the overwhelming evidence of defendant's guilt. MCR 2.613(A).

We likewise reject defendant's contention that the trial court abused its discretion in allowing Detective Mark Baker to testify regarding drug profiles because *People v Hubbard,* 209 Mich App 234; 530 NW2d 130 (1995), bars the use of drug profile evidence as substantive evidence of guilt. Detective Baker did not give drug profile testimony. Moreover, any error was harmless because no reasonable probability exists that the evidence affected the jury's verdict. *Hubbard, supra* at 243. The evidence was insignificant and the prosecutor never suggested that Detective Baker's testimony constituted substantive evidence of defendant's guilt.

Defendant next argues the trial court abused its discretion in admitting Tyrone Bisch's testimony from defendant's first trial[1] under MRE 804(b)(1) because the prosecutor did not exercise due diligence in locating Bisch for trial and defense counsel did not have an opportunity to fully cross-examine Bisch at defendant's first trial. We disagree. The trial court correctly determined that the prosecutor exercised due diligence in attempting to produce Bisch. *People v Wolford,* 189 Mich App 478, 483-484; 473 NW2d 767 (1991). Just before trial, police officers tried five times to contact and subpoena Bisch at his last known address. Bisch's mother claimed that she did not know where Bisch lived or how to contact him. Detective Baker then unsuccessfully sought to determine Bisch's whereabouts through the Muskegon County juvenile court because that court had once placed Bisch on probation.

Detective Baker also contacted the Muskegon County Jail, Muskegon County youth homes, and local hospitals in a further effort to locate Bisch. On this evidence, the trial court correctly found that the prosecutor exercised due diligence in attempting to produce the witness because the police made every reasonable effort to locate Bisch. *People v Gunnett*, 182 Mich App 61, 67; 451 NW2d 863 (1990).

The record does not support defendant's claim that his defense counsel did not have an opportunity to fully cross-examine Bisch at defendant's first trial. Defense counsel testified that counsel for codefendant Hathorn conducted the "bulk of the cross-examination" of Bisch and that he "just pick[ed] up whatever pieces [he] thought [Hathorn's counsel] didn't handle." The record, however, reflects that both attorneys fully cross-examined Bisch. Further, defendant does not specify what helpful information his trial counsel would have elicited if given an additional opportunity for cross-examination. Therefore, defendant has failed to show that trial counsel's alleged inability to fully cross-examine the missing witness prejudiced him.

III. Other Trial Issues

Defendant argues that repeated acts of prosecutorial misconduct denied him a fair trial. We disagree. The prosecutor's conduct did not deny defendant a fair and impartial trial. Defendant objected to only one of seven alleged instances of misconduct. Many of the challenged remarks were proper comments on the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, the prosecutor did not make an improper civic duty argument. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991); *People v Wright (On Remand)*, 99 Mich App 801, 809; 298 NW2d 857 (1980). Nor did the prosecutor attack defense counsel and suggest that he attempted to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). Lastly, the prosecutor did not improperly vouch for his case, nor did he ask the jury to convict on the basis of mere speculation. *Bahoda*, *supra* at 282; *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985).

Defendant also argues that the trial court improperly instructed the jury. We disagree. The court properly instructed the jury that it could aggregate smaller drug purchases to convict defendant of conspiracy. *Justice*, *supra* at 350-358. Further, defendant's assertion that the court erroneously instructed on the time frame of the alleged conspiracy is without merit. The court repeatedly instructed the jury that the period of the alleged conspiracy was October 1993 through June 15, 1994. Lastly, the court properly instructed on the elements of conspiracy. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993); *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989).

We reject defendant's contention that his conviction must be reversed because the trial judge questioned a sitting juror outside defendant's presence. *People v Woods*, 172 Mich App 476, 479-480; 432 NW2d 736 (1988). Defendant has not demonstrated a reasonable possibility that his absence during the questioning prejudiced him. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977). The trial judge briefly questioned a juror about her fear of possible retribution for jury service. The record does not reflect that the juror could not be fair and impartial or that she had already decided defendant's guilt. Further, defense counsel was present during the questioning to protect defendant's rights.

Defendant next argues that he was denied of the effective assistance of counsel. Because defendant did not raise this issue below, review is foreclosed unless the record contains sufficient detail to support the claim. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991). The existing record neither reflects that counsel's performance was deficient, nor that the representation prejudiced defendant. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *Barclay*, *supra* at 672.

Defendant additionally argues that the prosecutor excluded an African-American prospective juror from the jury because of his race, thus denying defendant his right to an impartial jury under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The record does not support defendant's assertion. The prosecutor proffered non-discriminatory reasons for exercising a peremptory challenge to exclude a African-American prospective juror. Those reasons include the juror's possible bias against the prosecution because of his past conviction of a cocaine-related offense in Muskegon County and belief that the prosecutor improperly charged him in that case. The juror also exhibited a possible bias in favor of defendant because the juror counseled jail inmates with drug problems. These possible biases certainly constitute adequate, non-discriminatory reasons to exercise a peremptory challenge. Accordingly, reversal is not required because the prosecutor did not exclude a juror because of his race. *Batson*, *supra*; *People v Barker*, 179 Mich App 702; 446 NW2d 549 (1989).

IV. Sentencing Issues

Defendant's mandatory life sentence for conspiracy to possess with intent to deliver 650 grams or more of cocaine is not unconstitutional. *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993). Moreover, because the mandatory sentence for defendant's offense is imprisonment for natural life, defendant is not entitled to parole. Further, defendant's claim that the trial court cannot sentence him as a second-felony offender is without merit. A defendant convicted of a major controlled substance offense who has no prior drug convictions, but has a prior conviction of another felony, may be sentenced as a habitual offender. *People v Primer*, 444 Mich 269; 506 NW2d 839 (1993).

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

[1] Defendant's first trial on the instant charge ended in a hung jury.