STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAX ROY BARBOZA,

Defendant-Appellant.

UNPUBLISHED
February 27, 1998

No. 198125
Monroe Circuit Court
LC No. 96-027374-FH

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

This case arises out of an incident that occurred on January 19, 1996, in which a police informant purchased cocaine from Darrell Jennings in room 153 of the Cross Country Inn in Monroe County. Defendant was present for the transaction and charged as an aider and abettor. Defendant admitted that he was present and that he realized at some point that a drug deal was taking place but denied any previous knowledge of the transaction and denied aiding in the sale.

Defendant was convicted by a jury of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced as an habitual offender, second offense, to four to thirty years' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that the evidence was insufficient to sustain his conviction, specifically, that the prosecution at most proved that defendant was present at the scene and that his mere presence was not enough to establish criminal culpability. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to justify a reasonable trier of fact in finding that the elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997).

In this case, the informant testified that defendant was monitoring the door throughout the transaction. This Court has held that where someone acts as a "doorman" or "lookout," it is

sufficient to show that he actively participated in the crime as an aider and abettor. *People v Lyons*, 70 Mich App 615, 617-618; 245 NW2d 314 (1976); *People v Davenport*, 122 Mich App 159, 162; 332 NW2d 443 (1982). Therefore, the evidence presented, when viewed in the light most favorable to the prosecution, was sufficient to support the jury's verdict that defendant aided in the commission of the crime.

Defendant also argues that the verdict was against the great weight of the evidence. In determining whether a verdict is against the great weight of the evidence, the trial court cannot substitute its judgment for that of the factfinder. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990). In this case, the trial court denied defendant's motion for a new trial. The court relied heavily on the videotape of the drug transaction, and stated that, although defendant did not say anything throughout the transaction, the video indicated that defendant was not an innocent bystander: he pushed his way into the room after Jennings had started to close the door, he positioned himself next to the door, he showed no reaction to the obvious drug sale that was taking place, he turned from side to side and paced in front of the door, as if acting as a lookout, and when the money was exchanged, defendant noticed the door was slightly ajar and closed it.

This Court reviews the trial court's denial of the motion for a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). The test is whether the verdict is against the overwhelming weight of the evidence and this Court should give deference to the trial court's ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). In this case, the trial court was particularly at an advantage to assess the witnesses' credibility because it had the opportunity to view the videotape of the entire drug transaction. Given the trial court's viewing of the videotape and the witnesses' demeanor in court, as well as the evidence in the record sufficient to show that defendant acted as a lookout, there is no miscarriage of justice which would require this Court to disturb the trial court's ruling.

II

Next, defendant argues that he was a denied a fair trial because the trial court abused its discretion in admitting into evidence the informant's statement that he knew defendant from "numerous other drug purchases." Defendant's argument is based on the erroneous factual premise that the statement was admitted into evidence. However, the record indicates that the trial court sustained defendant's objection to the statement and instructed the jury to disregard it. Therefore, there is no merit in defendant's argument that the trial court abused its discretion in admitting it under MRE 404(b). *People v Griffis*, 218 Mich App 95, 99; 553 NW2d 642 (1996). Further, we have reviewed the court's instructions to the jury to disregard the statement and we disagree with defendant's argument that the court's instruction was inadequate to cure any possibility of prejudice.

Defendant also argues that his trial counsel was ineffective for failing to move for a mistrial as a result of the same statement. In order to prevail on an ineffective assistance of counsel claim, defendant must show that his trial counsel's performance was deficient and that the deficiency resulted in prejudice

to defendant in the outcome of the case. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Further, to show such a deficiency, defendant must overcome a strong presumption that counsel's assistance amounted to sound trial strategy. *Id*., 687. Counsel's performance is measured against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Had defense counsel requested a mistrial, the trial court would have been obliged to grant it only if there was an irregularity that was prejudicial to defendant's rights and which impaired defendant's rights to get a fair trial. *Griffis, supra*, at 100. Defendant has failed to show that such prejudice resulted from the witness' statement. The court properly cautioned the jury to disregard the witness' statement that he knew defendant through previous drug purchases. Defendant argues that although the jury was instructed to disregard the statement, the jury nevertheless heard it and, absent that statement, the jury would not have convicted defendant. We disagree. As discussed above, sufficient evidence was presented to sustain the jury's verdict. Particularly revealing was the videotape of the drug transaction in this case which, as stated by the trial court, indicated "from the time that the two defendants walked into the room together that there was a drug transaction going on" and it was reasonable for the jury to infer that defendant was aware of the transaction and intended to take part in it. It was not necessary for the jury to hear the witness' statement regarding previous drug transactions to conclude that defendant was involved in the transaction for which he was tried. Because defendant has failed to show that any prejudice resulted from trial counsel's decision to request a cautionary instruction instead of a mistrial, we need not address whether such a decision constituted a sound strategy. Defendant was not denied the effective assistance of counsel.

III

Defendant next argues that he was denied a fair trial as the result of prosecutorial misconduct. Defendant failed to object below to the alleged instances of misconduct; therefore, review is waived on appeal unless an objection and instruction could not have cured the error or failure to review would result in a miscarriage of justice. *Stanaway, supra*, at 687.

Defendant's entire argument consists of citing eight pages of the transcript and stating the rules of law regarding vouching for witnesses, denigrating the defendant, shifting the burden of proof, and making "civic duty" arguments. Nowhere does defendant specifically state which of the prosecutor's statements apply to which of defendant's arguments of prosecutorial misconduct and neither does defendant present any argument as to how the prosecutor's remarks went beyond the scope of evidence presented or resulted in prejudice to defendant.

Upon review of the portion of the transcript cited, we find no merit in defendant's arguments, with the exception of prosecutorial appeal to the civic duty of jurors. It has been held that prosecutors may not urge the jurors to convict the defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

We believe that the prosecutor's statements that the jury's verdict was "the most important thing in this case" and that returning a guilty verdict "would be appropriate, and it is the fair, and it is the

just, and it is the right thing to do" could be construed as improper appeals to the jurors to do their civic duty in convicting defendant. However, because defendant failed to object and there was substantial evidence of defendant's guilt, no miscarriage of justice resulted requiring reversal. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991); *People v Swartz*, 171 Mich App 364, 373-374; 429 NW2d 905 (1988).

IV

Finally, defendant argues that the trial court erred at sentencing by failing to consider proper factors, failing to articulate the reasons for the sentence imposed, and violating the concept of proportionality in imposing defendant's sentence. We disagree.

The trial court indicated that it considered the reports containing defendant's personal and criminal history; it also indicated that it specifically considered defendant's felony record, his probationary status, his school and work record, and the factors of punishment and deterrence. The court also recognized that defendant's involvement in the crime was less significant than the codefendant's, but that the law of aiding and abetting attributes equal guilt to both parties. Finally, the court stated that it considered the seriousness of the offense in conjunction with defendant's history. All of these factors are proper considerations for the sentence imposed. *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985); *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972); *People v Khoury*, 181 Mich App 320, 328-329; 448 NW2d 836 (1989), rev'd in part on other grounds 437 Mich 954; 467 NW2d 810 (1991). Further, the court's statements were sufficient to satisfy the articulation requirement. *People v Triplett*, 432 Mich 568, 570-573; 442 NW2d 622 (1989).

Nevertheless, we must also address defendant's claim that the sentence imposed violated the proportionality requirement. The trial court's discretion in imposing sentences is broad, to tailor each sentence to the circumstances of the case and the offender. *People v Van Etten*, 163 Mich App 593, 595; 415 NW2d 215 (1987). Appellate review is limited to whether the sentencing court abused its discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentencing court abuses its discretion when it violates the principle of proportionality; a sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

Defendant states that the trial court failed to consider the information contained in the presentence investigation report and that it wrongfully considered defendant's conduct to be the "most serious conduct on the continuum of criminal behavior." Based on the record, we disagree. The court indicated at the sentencing hearing that it considered both the probation report and the presentence investigation report. Defendant also argues that, although the court need not have followed the guidelines in sentencing defendant as an habitual offender, it erroneously failed to consider the guidelines in the concept of proportionality. Again, the record indicates otherwise. The court, acknowledging that the guidelines were not applicable, nevertheless stated on the record its consideration of the guidelines in its determination of an appropriate sentence. After hearing the parties' additions or corrections to the reports and stating its additional consideration of additional factors discussed above, including

defendant's personal and criminal history, punishment, and deterrence, the court proceeded to impose sentence. Given these and other factors discussed above, the trial court did not abuse its discretion in sentencing defendant to a four-year minimum sentence for his second felony offense.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ William B. Murphy