STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY ALLEN WILEY,

Defendant-Appellant.

UNPUBLISHED
March 24, 1998

No. 190489
Jackson Circuit
LC No. 95-072820

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant was convicted of delivery of forty-five kilograms or more of marijuana, MCL 333.7401(2)(d)(i); MSA 14.15(7401)(2)(d)(i), and conspiracy to deliver forty-five kilograms or more of marijuana, MCL 750.157a; MSA 28.354(1). He was sentenced to eight to fifteen years' imprisonment for each conviction, and appeals as of right. We affirm the conviction and sentence but remand to the trial court for completion of a sentence information report.

Larry Root, a confidential informant, agreed to provide information to Allan Reed, a detective sergeant with the Michigan state police. In return, a felony charge that was pending against Root was to be reduced to a misdemeanor[1]. Root thereafter provided Reed with defendant's name as a possible narcotics violator. An investigation took place and eventually Reed and Root arranged for the delivery of marijuana from Arizona to Jackson, Michigan. On June 25, 1995, defendant delivered 539 pounds of marijuana to Reed in Jackson.

I

Defendant claims that he was entrapped both by the conduct of Root and the conduct of Reed. We disagree.

> In Michigan, entrapment is analyzed according to a two-pronged test, with entrapment existing if either prong is met. The court must consider whether (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it

> cannot be tolerated. [*People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997).]

Regarding the first prong of the test, "entrapment exists if the police conduct would induce a person not ready and willing to commit an offense to commit the offense; entrapment does not exist if the conduct would induce only those persons who are ready and willing to commit the offense to do so." *People v Fabiano*, 192 Mich App 523, 531; 482 NW2d 467 (1992).

Neither Reed's actions nor Root's actions constitute illegal entrapment under the first prong of the test. Based on the record, it is clear that defendant was ready and willing to deliver a large quantity of marijuana. We find disingenuous defendant's argument that he was inexperienced and naïve about selling marijuana. There is nothing in the record that would lead us to find that Reed unduly pressured defendant to deliver the marijuana in Michigan or made unlawful appeals to defendant's sympathy as a friend. In addition, the record lacks evidence that would support a finding that Root "induced' defendant, who was not ready and willing to sell marijuana. This case is unlike *People v Rowell*, 153 Mich App 99, 101, 105; 395 NW2d 253 (1986) and *People v Duis*, 81 Mich App 698, 703-703; 265 NW2d 794 (1978) upon which defendant relies. In those cases, there was evidence that the defendants, who showed reluctance to participate, were aggressively pressured into engaging in the drug sales. Moreover, we find that even if Root had engaged in illegal entrapment when he sought out defendant and made the preliminary arrangements for the drug deal, he was not acting with official encouragement or assistance at that time. Thus, he was not a government agent for purposes of the entrapment defense. *People v Jones*, 165 Mich App 670, 674; 419 NW2d 47 (1988). The entire course of police conduct in this case was not sufficiently provocative to induce a normal law abiding citizen to commit this crime.

With regard to the second prong of the entrapment test, defendant does not point to any evidence that would lead to a conclusion that the police conduct in this case was so reprehensible it cannot be tolerated. Thus, defendant's claim that the trial court clearly erred in finding that there was no entrapment fails.

II

Next, defendant argues that the trial court erred in allowing the 539 pounds of marijuana at issue to be displayed in the courtroom during trial. Defendant admits that the evidence was relevant, but claims that the probative value of displaying the forty-three bales of marijuana was outweighed by the prejudicial effect. We disagree that there was error requiring reversal.

Relevant evidence is generally admissible unless the probative value of the evidence is substantially outweighed by unfair prejudice. MRE 401; MRE 403; *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995). "Unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). Any relevant evidence will be damaging to some extent. *Id*. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id*. at 75-76. Stated another way:

[U]nfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the

> merits of the lawsuit, e.g., the jury's bias, sympathy, anger or shock. [. *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995), citing *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).]

Further, a prosecutor need not use the least prejudicial evidence available to establish a fact at issue. *Id* at 452.

In this case, defendant offered to stipulate to the amount of marijuana so as to avoid having it brought into the courtroom. Notwithstanding that offer, the prosecutor was still required to prove the amount of marijuana that was involved in the crime. *Mills*, *supra* at 69-70. The prosecution was not required to accept the proposed stipulation or use the least prejudicial evidence to establish the fact at issue. *Fisher*, *supra* at 452. Further, the record does not demonstrate that the evidence was given undue weight or that the sight of the evidence amounted to unfair prejudice. Defendant has failed to show that the prejudicial nature of the evidence substantially outweighed its probative value. Moreover, even if we had found that the prejudicial effect outweighed its probative value, the admission and display of the marijuana would be harmless error given the overwhelming evidence of defendant's guilt. People *v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

III

Defendant next argues that it was error for the trial court not to use the sentencing guidelines; that his sentence was disproportionate; and that it was error for the trial court to fail to complete a sentence information report.

The statute under which defendant was convicted, MCL 333.7401(2)(d)(i); MSA 14.15(7401)(2)(d)(i), was amended in 1994 to add graduating penalties for felonies involving marijuana. 1994 PA 221. If the conduct being prosecuted involves forty-five kilograms or more of marijuana, as is the case here, the maximum sentence is fifteen years under the amended statute. Here, the crime at issue, a fifteen year felony, is not included in those listed in the Michigan Sentencing Guidelines (2d ed). Therefore, the guidelines do not apply, *People v Edgett*, 220 Mich App 686, 689; 560 NW2d 360 (1996), and the trial court did not err in failing to consider the guidelines.

Defendant's claim that his sentence was disproportionate because it departed from the guidelines range that would have applied to defendant if the statute not been amended is similarly without merit. Because the guidelines do not apply to the offense for which defendant was convicted, we cannot find that defendant's sentence was disproportionate simply because it failed to follow inapplicable guidelines. Moreover, we find that the sentence was proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Finally, we find that the trial court's failure to prepare a sentence information report (SIR) does not require resentencing. In habitual offender cases, the guidelines do not apply; yet, we routinely remand to the trial court to prepare a SIR where one was not prepared prior to sentencing. *People v Derbeck*, 202 Mich App 443, 446; 509 NW2d 534 (1993). The purpose is "to aid in the

development of guidelines for habitual offender sentencing, rather than to guide the sentencing court in determining the habitual offender's sentence." *Id.* Although this is not an habitual offender case, a completed SIR will presumably aid in the development of guidelines for the crime at issue. Therefore, we remand solely for the administrative preparation of a written SIR. *People v Zinn*, 217 Mich App 340, 350; 551 NW2d 704 (1996).

IV

Finally, in his supplemental brief, defendant argues that the trial judge who presided over his case should have been disqualified. Defendant claims that disqualification was required because the trial judge testified at the entrapment hearing and because he had previously ordered the felony charges against Root, the confidential informant, dismissed as part of a plea bargain. We disagree. The judge only testified in relation to defendant's motion to disqualify him. He never testified at trial. MRE 605. Further, review of the record reveals that the judge had no knowledge of any evidence relating to the guilt or innocence of defendant and had no preconceived notion as to defendant's guilt or innocence before trial. In addition, defendant makes no showing of actual prejudice or bias. Therefore, there was no abuse of discretion in the denial of defendant's motion to disqualify the trial judge. *People v Koss*, 86 Mich App 557, 560; 272 NW2d 724 (1978).

Affirmed. Remanded to trial court for the completion of an SIR. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer

[1] Apparently the charge was dismissed in its entirety instead of being reduced to a misdemeanor. However, there was testimony that the prosecutor planned to refile the case as a misdemeanor.