STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JOHNSON, a/k/a MARK JOHNSON, a/k/a ROBERT ANTHONY JOHNSON,

Defendant-Appellant.

UNPUBLISHED
June 16, 1998

No. 188681
Oakland Circuit Court
LC No. 91-106749 FC

Before: Gribbs, P.J., McDonald and Talbot, JJ.

PER CURIAM.

This case is before us for consideration as on leave granted pursuant to a remand order from the Michigan Supreme Court. *People v Johnson*, 449 Mich 901; 536 NW2d 781 (1995). Defendant appeals from his jury trial conviction of conspiracy to possess with intent to deliver more than 650 grams of cocaine, MCL 750.157a; MSA 28.354(1); MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and from his sentence of a mandatory life term without the possibility of parole. We affirm.

The charges arose out of a series of incidents involving defendant, his codefendants (Aaron Banks, Gerald Hill, Amir Wilson, and Terrence Moore), and certain other individuals. The jury found that these incidents established a conspiracy to process crack cocaine in Oakland County and transport it to Muskegon and elsewhere for sale. According to the testimony at trial, most of the sales took place in an area in Muskegon called "the zone" or "the projects." The activities undertaken in the furtherance of this criminal agreement centered around an individual named Ricky Franklin, who would obtain the cocaine, process it into crack, package it, and then give it to defendant and his codefendants to sell in exchange for a portion of the proceeds.

Defendant first contends that his conviction violates his constitutional right to avoid being twice placed in jeopardy for the same offense. In early 1991, defendant was convicted in Muskegon Circuit Court of delivery of less than fifty grams of cocaine after one of the sellers who worked for him contacted the police.[1] Defendant now argues (1) that the conduct forming the basis of his conspiracy

conviction was part of the same transaction as the conduct forming the basis of his prior delivery conviction and (2) that the instant prosecution must therefore be barred under the Double Jeopardy Clause of the Michigan Constitution[2] as a second prosecution for the same offense. We disagree. Double jeopardy issues are reviewed de novo on appeal. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

The guarantee against being twice placed in jeopardy protects against both multiple prosecutions and multiple punishments for the "same offense." *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). Under the Michigan Constitution, the general rule applicable in multiple prosecution cases appears to be the "same transaction" test adopted in *People v White*, 390 Mich 245; 212 NW2d 222 (1973).[3] Under the "same transaction" test, two offenses involving criminal intent are considered the "same offense" if they occurred in a continuous time sequence and displayed a single intent and goal.[4] *Crampton v 54-A Dist Judge*, 397 Mich 489, 501-502; 245 NW2d 28 (1976); *White*, *supra* at 259; see also *People v Wilson*, 454 Mich 421, 461; 563 NW2d 44 (1997) (Boyle, J.). But see *People v Ainsworth*, 197 Mich App 321, 323; 495 NW2d 177 (1992) and *People v Hunt (After Remand)*, 214 Mich App 313, 316; 542 NW2d 609 (1995) (limiting application of this part of the *White* "same transaction" test to situations involving a series of crimes involving *specific* criminal intent.)[5] Despite the apparent confusion, our resolution of the specific question involved in this case is dictated by a recent decision of the Michigan Supreme Court in which four Justices held that a substantive crime and a conspiracy to commit that crime are not the same offense for double jeopardy purposes. See *People v Mezy*, 453 Mich 269, 276 (Weaver, J.), 286 (Brickley, C.J.); 551 NW2d 389 (1996), citing *United States v Felix*, 503 US 378, 388-389; 112 S Ct 1377; 118 L Ed 2d 25 (1992). Like the instant case, *Mezy* involved multiple prosecutions. *Mezy*, *supra* at 276. Therefore, even if the cocaine was in fact delivered in furtherance of the conspiracy,[6] reversal is not required on double jeopardy grounds.

Defendant next argues that the evidence presented at trial was not sufficient to support his conviction of conspiracy to possess with intent to deliver more than 650 grams of cocaine. We disagree. In reviewing a claim of insufficient evidence, this Court views the evidence presented in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

A criminal conspiracy is a mutual understanding or agreement between two or more persons, expressed or implied, to do or accomplish a criminal or unlawful act. It is a crime separate and apart from the substantive offense. The elements of a conspiracy are satisfied immediately upon entry by the parties into a mutual agreement; no overt acts need be established. *People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988). In order to convict a defendant of the offense of conspiracy to possess with intent to deliver a controlled substance, the prosecution must prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *People v Justice*, 454 Mich 334, 349; 562 NW2d 652 (1997).

Defendant first contends that the evidence was insufficient because there was no testimony conclusively connecting him with the group's activities in Southfield or Detroit. While we agree that the evidence was slight with regard to defendant's conduct in the Detroit metropolitan area, the testimony of the witnesses with regard to defendant's activities in Muskegon, describing defendant's transactions with Franklin, Banks, and others who sold cocaine for defendant or for Franklin, was more than sufficient to establish defendant's knowledge of and participation in the conspiracy. Defendant's role in the conspiracy was illustrated by the testimony of Betty Louise Day, who testified that she saw defendant remove what appeared to be bagged crack cocaine from an outside cooking vent and give the bags to some boys, who then walked toward "the zone." When Day accosted defendant about dealing drugs, defendant told her that he was too smart to go to jail. Defendant introduced Day to Franklin. According to this witness, people frequently came to give defendant money, which Day hid for him. Day saw defendant with $4,000 or $5,000 on several occasions, and stated that she overheard defendant call Franklin from her home to tell him to come and get his money. When Franklin arrived, defendant left the house with money and returned without it. Both defendant and Banks frequently stayed at Day's house during their trips to Muskegon.

Marktwon Banks testified that he had purchased crack cocaine from defendant and sold crack cocaine for defendant in "the zone" and that defendant told him he was "rolling for a man named Rick." Theoffilis Houston also engaged in cocaine transactions with persons he claimed were defendant's workers. Houston gave the proceeds from the sale to defendant's worker, who gave the money to defendant in Houston's presence. The witnesses also testified regarding the relationships between defendant, some of his codefendants, and other drug dealers in the area. Finally, Vicky Diggs-Hill testified that she held about $6,000 worth of crack cocaine for defendant; she stated that she took the money from the people who sold the cocaine and gave it to defendant. According to Diggs-Hill, before she became involved, the sellers gave defendant the money directly. Each of these witnesses testified that defendant had numerous people working for him selling crack. Thus, we find that there was sufficient evidence to support the jury's finding that defendant was a participant in a large-scale "chain" conspiracy. See *People v Meredith (On Remand)*, 209 Mich App 403, 412-413; 531 NW2d 749 (1995).

Defendant next contends that the evidence was insufficient because the total amount of over 650 grams of cocaine was reached by aggregating smaller amounts of cocaine. This contention is without merit as smaller amounts may be aggregated to charge a defendant with possession and delivery of the statutory amount. *Justice*, *supra* at 355.

Defendant also asserts in connection with this issue that the proofs were inadequate because the prosecution was required to show that he personally possessed and intended to deliver more than 650 grams of cocaine, and that the evidence at trial established that, at most, defendant possessed less than fifteen grams, which was the cocaine recovered from Diggs-Hill. In *Justice*, *supra*, the Michigan Supreme Court acknowledged the proof problems presented in establishing the scope of a conspiracy, and noted that circumstantial evidence or reasonable inferences drawn from the evidence are frequently the means used to establish the particular substantive offense intended by the coconspirators. *Id*. at 348. In this case, defendant argues that there was a lack of proof regarding his own specific intent to

deliver the statutory minimum. However, given the volume of defendant's operations, as demonstrated by the testimony at trial regarding the number of people who were selling for him, the length of time in which defendant engaged in this activity, and defendant's transactions with Franklin, we hold that there was sufficient circumstantial evidence from which the jury could have reasonably inferred defendant's specific intent to commit the charged offense. The fact that there was more than one third person involved to whom the drugs were delivered does not compel a different result. Consequently, defendant's arguments in this regard are without merit.

Defendant also suggests that the trial court erred when it failed to adequately instruct the jury on the issue of aggregation. However, the record reveals that defendant did not request a special aggregation instruction at trial or object to its omission. Because defendant failed to object to the instructions given at trial or to request further instructions, we would review this issue only to determine if manifest injustice resulted. *People v Maleski*, 220 Mich App 518, 521 (1996). On appeal, defendant has failed to adequately apprise this Court of the sort of instruction that should have been given by the trial court. Accordingly, we deem this issue to have been waived. A defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990); *People v Heard*, 31 Mich App 439, 446-447; 188 NW2d 24 (1971), rev'd on other grounds 388 Mich 182 (1972).

Next, defendant argues that the trial court committed error requiring reversal when it admitted the hearsay statements of his coconspirators before the prosecutor had proven the existence of a conspiracy. Although defendant's brief on appeal phrases the question in general terms, the only testimony specifically mentioned in his argument is a statement made by Wilson to the police while in custody indicating that he had once made a drug run from the Detroit area to Muskegon with a "Robby" or Robert Johnson.[7] We need not determine whether the trial court erred in allowing Wilson's statement into evidence before proving the existence of a conspiracy, because Wilson's statement was made after his arrest. As such, it was inadmissible hearsay because it was not made in the course of, or in furtherance of, the conspiracy. See *People v Cadle*, 204 Mich App 646, 653; 516 NW2d 520, remanded on other grounds 447 Mich 1009 (1994), citing *People v Trilck*, 374 Mich 118, 124, 128; 132 NW2d 134 (1965). However, a preserved nonconstitutional error is harmless if it is highly probable that the error did not contribute to the verdict. *People v Gearns*, ___ Mich ___; ___ NW2d ___ (1998) (5/5/98 slip op p 36-39); *People v Mateo*, 453 Mich 203, 218-221; 551 NW2d 891 (1996). In this case, considering the weight and strength of the untainted evidence presented at trial, we conclude that the error was harmless.[8]

Defendant also contends that reversal of his conviction is required due to the prosecutor's misconduct by referring in his opening statement to an allegation in the indictment that defendant assaulted another person upon Franklin's orders. Because defendant did not object to these remarks below, appellate review is precluded unless a curative instruction could not have removed any prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Lee*, 212 Mich App 228, 253; 537 NW2d 233 (1995). Although no evidence was presented at trial with regard to the allegation and defendant was not charged in connection with assault, reversal is not

required on the basis of this issue because a curative instruction could have eliminated any prejudice to defendant that may have occurred as a result of the prosecutor's statement.

Defendant next argues, in cursory fashion, that the trial court erred when it allowed into evidence the preliminary examination testimony of Al Vanhemert, a sheriff's deputy who died shortly after the preliminary examination was conducted. Specifically, defendant asserts that the testimony was inadmissible as hearsay not within the "former testimony" exception because defendant did not have an opportunity to cross-examine the witness with regard to certain allegations of misconduct on the part of the witness. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and that decision will not be disturbed on appeal absent an abuse of discretion. *People v Brooks*, 453 Mich 511, 516-517; 557 NW2d 106 (1996). In this case, there was no error because the preliminary examination transcript reveals that defendant had the opportunity to cross-examine Vanhemert and exercised the opportunity to do so. See *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). That defendant subsequently discovered some information that he may have been able to use to impeach Vanhemert's credibility does not change our conclusion. See *United States v Monaco*, 702 F2d 860, 870 (CA 11, 1983).[9]

Defendant also contends, for the first time on appeal, that Vanhemert's preliminary examination testimony should have been excluded because its probative value was substantially outweighed by the potential for confusion and unfair prejudice. Because defendant failed to object on this ground at trial, this argument has not been preserved for appeal. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Defendant is not entitled to relief on appeal, because the admission of Vanhemert's testimony was not plain error in this respect. See MRE 103(d).

Next, defendant argues that his mandatory life sentence violates constitutional protections against cruel or unusual punishment. Although defendant failed to raise this issue below, this Court may consider it because it involves a constitutional issue. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). Constitutional issues are reviewed de novo on appeal. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). A mandatory life sentence for simple possession of 650 grams or more of cocaine violates the constitutional ban against "cruel or unusual" punishments. See *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). However, the Michigan Supreme Court has refused to extend this holding to cases involving drug offenses more serious than simple possession. *People v Fluker*, 442 Mich 891; 498 NW2d 431 (1993); see also *People v Stewart*, 442 Mich 890; 498 NW2d 430 (1993); *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993); *People v Loy-Rafuls*, 442 Mich 915; 503 NW2d 453 (1993); *People v Poole*, 218 Mich App 702, 715-716; 555 NW2d 485 (1996). Thus, we hold that defendant's sentence was not unconstitutionally harsh.

Finally, defendant claims he should be eligible for parole. The Legislature has expressly provided, in MCL 333.7401(3); MSA 14.15(7401)(3), that an individual subject to a mandatory term of imprisonment under MCL 333.7401(2)(a); MSA 14.15(7401)(2)(a) shall not be eligible for parole. Accordingly, defendant's arguments in this regard are without merit.

Affirmed.

/s/ Roman S. Gribbs
/s/ Gary R. McDonald
/s/ Michael J. Talbot

[1] Defendant was sentenced to eight to twenty years' imprisonment on the delivery conviction. His conviction and sentence were affirmed by this Court in an unpublished per curiam opinion. *People v Mark Johnson*, unpublished opinion of the Court of Appeals, issued October 1, 1993 (Docket No. 138441).

[2] Const 1963, art 1, § 15 provides in pertinent part, "No person shall be subject for the same offense to be twice put in jeopardy." Defendant does not argue that the instant prosecution ran afoul of the double jeopardy protections afforded by the federal constitution.

[3] When the Michigan Supreme Court adopted the "same transaction" test in 1973, it noted that the United States Supreme Court had not yet passed on the constitutional necessity of the "same transaction" test for purposes of the federal constitution. See *White*, *supra* at 255. However, in 1985, the United States Supreme Court made it clear that it rejected the "single transaction" view of the Double Jeopardy Clause in multiple prosecution cases. See *Garrett v United States*, 471 US 773, 790; 105 S Ct 2407; 85 L Ed 2d 764 (1985); see also *United States v Dixon*, 509 US 688, 710 n 15; 113 S Ct 2849; 125 L Ed 2d 556 (1993). Under the federal "same elements" test, two offenses are considered the "same offense" for double jeopardy purposes whenever either of the two offenses lacks a unique element. *Dixon*, *supra* at 696. After *Garrett*, the Michigan Supreme Court has suggested in dicta that it would retain the "same transaction" view of Michigan's Double Jeopardy Clause in multiple prosecution cases despite the United States Supreme Court's rejection of the test. See *People v Sturgis*, 427 Mich 392, 401-402; 397 NW2d 783 (1986); *People v Bullock*, 440 Mich 15, 28 n 9; 485 NW2d 866 (1992). In no case since *Garrett*, however, has the Michigan Supreme Court relied on the "same transaction" test in a holding. Moreover, at least two Justices have questioned the propriety of the Michigan Supreme Court's apparent continued adherence to *White*. See *People v Dahle*, 450 Mich 870, 871; 539 NW2d 380 (1995) (Boyle, J., dissenting from denial of leave to appeal); *People v Harding*, 443 Mich 693, 726-727 n 16; 506 NW2d 482 (Riley, J.); *People v Delafuente*, 438 Mich 868, 868-869; 474 NW2d 292 (1991) (Riley, J., joined by Boyle, J., dissenting from denial of leave to appeal). Finally, in *Wilson*, *supra*, a recent multiple prosecution case involving two of defendant's codefendants charged with conspiracy in both Muskegon County and Oakland County, a majority of three of the five participating Justices found a double jeopardy violation under the rule of *Brown v Ohio*, 432 US 161, 169; 97 S Ct 2221; 53 L Ed 2d 187 (1977) ("The same offense includes prosecution for a greater crime after conviction of the lesser included offense."), without addressing *White*, *supra*, or the "same transaction" test.

[4] Where one or both of the offenses do not involve criminal intent, they are considered the "same offense" if they are "part of the same criminal episode" and if they "involve laws intended to prevent the same or similar harm or evil, not a substantially different, or very different kind of harm or evil." See *Crampton*, *supra* at 502.

[5] Although the crime of delivery of narcotics involves criminal intent, it is not a crime of specific criminal intent. *People v Maleski*, 220 Mich App 518, 521-522; 560 NW2d 71.

[6] It was never conclusively established at trial whether the particular batch of cocaine that formed the basis of the Muskegon County conviction was obtained from Franklin pursuant to the Oakland County conspiracy.

[7] Wilson's statement was admitted into evidence by way of the preliminary examination testimony of Al Vanhemert, a sheriff's deputy who died shortly after the preliminary examination. See *infra*. His preliminary examination testimony was read into the record at trial. Objections were made to the admission of Wilson's statement during the preliminary examination. Defendant preserved this claim of error by bringing these objections to the attention of the trial court.

[8] We also note that defendant concedes in his brief on appeal that Vanhemert's testimony (including Wilson's statement) "added little to the prosecution's case."

[9] Although not binding on this Court, federal precedent may provide persuasive authority. See *Ward v Parole Board*, 35 Mich App 456, 461; 192 NW2d 537 (1971).