STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE MANUEL TOPETE,

Defendant-Appellant.

UNPUBLISHED
September 8, 1998

No. 201138
Berrien Circuit Court
LC No. 96-001006-FC

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of delivery of more than 650 grams of cocaine and conspiracy to deliver more than 50 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). He was sentenced to a mandatory term of life in prison, and appeals as of right.[1] We affirm.

Bernardo Munos and defendant came to Michigan from Chicago as a result of dealings with Antonio Ortiz, an informant for the Van Buren County Sheriff's Department and the Southwest Enforcement Team (SET), a multi-jurisdiction drug team. Ortiz promised to buy one kilogram of cocaine from Munos for $20,000. The deal was set up to be consummated on February 20, 1996, at the Ramada Inn in Benton Harbor. Munos indicated to Ortiz that he would be arriving there with a friend. Upon arriving at the parking lot, defendant and Munos stepped out of a car driven by defendant. Ortiz was accompanied in another car by Benjamin Escalante, an undercover police officer. The undercover officer testified that in response to his inquiry as to where the cocaine was, defendant walked around to the passenger side of his car and retrieved a square object which was later determined to be more than one kilogram of cocaine; defendant then handed the object to the undercover officer. In response to the undercover officer's inquiry as to the cocaine's quality, defendant responded that the "stuff" was really good. Immediately after the undercover officer checked the product, the "bust" signal was given. This resulted in the immediate appearance of police officers, who surrounded both cars. Munos and defendant were arrested after each had attempted to escape, Munos on foot and defendant by auto.[2]

Defendant first argues that the trial court erred in admitting irrelevant bad acts evidence, evidence of other cocaine, contrary to MRE 404(b), where the prosecution failed to show that the

evidence's probative value outweighed its inherently prejudicial effect. State trooper Michael Spring, who had been assigned to SET, stated that evidence of a small, unrelated quantity of cocaine was found in the rear of the defendant's car. Defendant objected at this point, but the prosecutor responded, correctly, that this evidence had already come in without objection during earlier testimony by detective Mark McCulfor. When this fact was pointed out to defense counsel, he conceded that the court could not strike the testimony and instruct the jury to disregard it if there was prior testimony. Therefore, this matter is not preserved. Our Supreme Court has held that "a plain, [nonconstitutional,] *unpreserved* error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic." *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994) (emphasis in original).

Failure to review this asserted claim of error would not be prejudicial, in light of the overwhelming evidence of defendant's guilt. The evidence adduced at trial showed that, in response to Escalante's general inquiry as to the cocaine, defendant retrieved over one kilogram of cocaine from a panel located next to the right rear seat. Defendant then handed the cocaine to Escalante. In response to Escalante's inquiry as to the cocaine's quality, defendant responded, "[t]his stuff is real good." Likewise, from the fact that defendant drove Munos, who had negotiated the details of the transaction with Ortiz, to the Ramada Inn in Benton Harbor, and coupled with defendant's apparent awareness of the purpose of the meeting and active involvement in the transaction, it may be reasonably inferred that defendant had conspired with Munos to deliver one kilogram of cocaine to Ortiz and Escalante. See *People v Meredith (On Remand)*, 209 Mich App 403, 411-412; 531 NW2d 749, lv den 450 Mich 852 (1995).

Defendant further argues that he was denied a fair trial when detective McCulfor was permitted to testify as both a fact and an expert witness. McCulfor testified regarding the "normal procedures" engaged in by drug dealers to process, dilute, cut, package and sell their cocaine. Defense Counsel did not object to that testimony. Subsequently, the prosecution asked McCulfor whether it was common for drug dealers to have things in other people's names. Defendant objected on the basis that the prosecution had failed to establish the foundation as to whether defendant had actually used people to hold property for him. Defendant's ground for challenge on appeal is therefore different from that raised in the trial court, and this issue is not properly preserved. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992).

Defendant was charged with both delivery and conspiracy to deliver cocaine. Therefore, McCulfor's testimony indicating that an individual possessing one kilogram of cocaine intends to sell it was helpful in letting the jury understand the significance of the amount of cocaine and the possible motive of defendant. See *United States v Romero*, 57 F3d 565, 571-572 (CA 7, 1995). Also, McCulfor's testimony in which he stated that it was common for drug dealers to allow others to hold their properties in order to escape civil forfeiture statutes was helpful to the prosecution in allowing it to counter defendant's suggestion that the actual registered-owner of the car had been the drug dealer. Therefore, the prosecution's elicitation of the testimony was relevant to assist in dispelling any doubt as to the motives of defendant. Because the trial court did not abuse its discretion in admitting into

evidence McCulfor's testimony involving explanations of the drug trade and drug dealers' behaviors, failure to review this unpreserved claim of error would not manifestly prejudice defendant.

Defendant next claims that the prosecution engaged in misconduct in disparaging defense counsel and making erroneous statements of law as to reasonable doubt. "Appellate review of alleged prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction, unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant or if manifest injustice would result from our failure to review the alleged misconduct." *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995), citing *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Defendant failed to object to either statement or remark.

In the case at bar, a curative instruction could have indicated to the jurors that the prosecution's statement that defense counsel would attempt to take away the jurors' common sense had been poorly phrased and that the jurors should instead focus their attention on the prosecution's subsequent statement that defense counsel was attempting to create a reasonable doubt. Likewise, a timely instruction would have cured any prejudice stemming from the prosecution's erroneous statement regarding reasonable doubt. Therefore, because curative instructions, if timely requested, would have removed any prejudice from the prosecution's statements or remarks, this issue is not preserved.

In addition, because overwhelming evidence of defendant's guilt had been presented and the court properly instructed on reasonable doubt, any prosecutorial misconduct during closing and rebuttal arguments was harmless. *People v Lansburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Finally, defendant argues that he was deprived of his constitutional right to effective assistance of counsel. We disagree. The *Strickland* test "places the burden on the defendant to show, with regard to counsel's performance, 'that [1] counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . . [and] that [2] the deficient performance prejudiced the defense.'" *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Here, defendant contends that his defense counsel rendered ineffective assistance by failing to object to the admission of the bad act evidence, McCulfor's testimony, and the prosecution's improper remarks or comments during closing and rebuttal arguments. As to the last claim, we note that defendant failed to argue its merits in his main brief. Therefore, this claim may be deemed abandoned on appeal. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992). Moreover, defendant has not shown prejudice resulting from any of defense counsel's failures to object. Therefore, this claim is without merit.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage

[1] Although defendant was charged and convicted of both delivery and conspiracy to deliver cocaine, the record of the sentence proceeding and the judgment of sentence both mention only the delivery charge. No explanation for the discrepancy is apparent from the record.

[2] Munos posted bail following his arrest and failed to appear at his next scheduled court date.