STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL A. MOONEY,

Defendant-Appellant.

UNPUBLISHED
November 17, 1998

No. 200840
Iosco Circuit Court
LC No. 96-003241 FH

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv). We affirm.

Plaintiff first argues that the trial court erred in allowing the prosecution to present the audiotape recordings of conversations between defendant and Gregory Castonguay, maintaining that these recordings contained impermissible hearsay statements made by Castonguay,[1] offered to prove that defendant and Castonguay were conducting drug dealings. We disagree. Even if relevant, evidence must be excluded if it is hearsay and falls within none of the statutory exceptions. MRE 802. However, a statement which is offered only to show the state of mind of the hearer or reader of the statement is not improperly admitted as hearsay. *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986). Likewise, an utterance or a writing may be admitted to show the effect on the hearer when this is relevant. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995). In the instant case, the tape recorded statements were not used to prove the truth of anything Castonguay said -- that defendant was negotiating with Castonguay regarding a bulldozer or any other "matter asserted" by Castonguay. MRE 801(c). Instead, they were intended to prove that the taped conversations actually occurred, that Castonguay's statements had the effect of causing defendant to believe that he was negotiating for the purchase of cocaine or otherwise to provide context for defendant's actions. The trial court instructed the jurors that they should limit their consideration of Castonguay's statements to non-hearsay purposes, and the prosecutor reiterated that instruction. We hold, therefore, that the trial court did not err in allowing these conversations to be entered into evidence for the limited purpose of

showing defendant's state of mind and intent at the time of the conversations. *Eggleston*, *supra* at 504; *Fisher*, *supra* at 449-450. Similarly, the prosecutor's use of this evidence presented no ground for the trial court to grant defendant a mistrial.

Defendant next argues that the trial court should have granted defendant's motion for a mistrial in part due to the prosecution's failure to include the name of the state fingerprint expert on the witness list and its failure to disclose the existence of the fingerprint tests, which tended to support defendant's innocence. Because defendant's counsel accepted the trial court's proposed remedy for dealing with these failures, defendant is precluded from raising this issue on appeal. *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

Defendant also argues that the trial court should have granted defendant's motion for a mistrial due to the prosecution's misconduct in allowing testimony as to defendant's exercise of his right to silence. Defendant is mistaken. Looking at the circumstances surrounding the statement concerning defendant's silence, we conclude that it was improper since defendant did not claim to have made any prior statements to the police. *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990). However, it constituted harmless error. *Id.* The prosecutor's questions were certainly not offensive under the circumstances and the minimal testimony on this matter could reasonably be considered inadvertent. *Id.* Moreover, we conclude that the statement had no prejudicial impact with respect to the verdict. *Id.* The trial court immediately curtailed testimony by this officer concerning inculpatory statements made by defendant during his arrest, statements the court had previously ruled admissible. Thus, the brief reference to defendant's silence effectively deprived the prosecution of the chance to present possibly much more damaging evidence. Given the circumstances surrounding this statement, then, we conclude that the trial court did not abuse its discretion in refusing to grant defendant a mistrial as to this issue. *People v Robertson*, 87 Mich App 109, 111; 273 NW2d 501 (1978).

Defendant next argues that the trial court should have granted defendant's motion for a mistrial because the prosecutor made a reference to "O. J. Simpson" in his closing argument. Although we agree that this reference was improper and inappropriate, we conclude that the prosecutor's remark did not constitute error requiring the trial court to grant defendant's motion for a mistrial. In his closing argument, defense counsel attacked the differing accounts of the arresting officers and stated that the officers were lying on the stand. The prosecution mentioned the O.J. Simpson trial only in the context of rebutting this argument. The facts surrounding the alleged Simpson crimes are in no manner similar to those in the instant case and the prosecutor was not, therefore, inviting a comparison between Simpson and defendant. The prosecution's mention of the Simpson case did not require the trial court to declare a mistrial. *People v Sharbnow*, 174 Mich App 94, 101-102; 435 NW2d 772 (1989).

Finally, defendant argues that the trial court erred in exceeding the sentencing guidelines range when determining the length of defendant's sentence. We disagree. Seeking to impose a proportionate sentence, the trial court properly considered evidence of defendant's previous illegal drug usage, *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991), evidence of defendant's perjury on the witness stand, *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988), and evidence that the factual circumstances indicated that defendant's possession of

cocaine was part of a larger drug transaction, *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). The trial court did not abuse its discretion in determining defendant's sentence. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993).

We affirm.

/s/ Barbara B. MacKenzie
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] Defendant does not argue that his statements on the recordings are hearsay, apparently conceding that they were admissible under MCR 801(d)(2).