STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOREN REGELIN,

Defendant-Appellant.

UNPUBLISHED
January 29, 1999

No. 203689
Muskegon Circuit Court
LC No. 96-139927 FH

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for conspiracy to deliver 225 grams or more, but less than 650 grams of cocaine, MCL 750.157a; MSA 28.354(1); MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and his enhanced sentences of twenty to forty-five years' imprisonment as a second habitual offender under MCL 769.10; MSA 28.1082, and of life imprisonment without parole as a repeat drug offender under MCL 333.7413(1); MSA 14.15(7413)(1). We vacate defendant's twenty to forty-five year sentence, but affirm his conviction and life sentence.

We have viewed the evidence in a light most favorable to the prosecutor and conclude that a rational trier of fact could find beyond a reasonable doubt that defendant was part of a "chain" conspiracy, with defendant's supplier, defendant, David Love, and John Workman sharing knowledge that the cocaine was being delivered for ultimate consumption by street users and agreeing to provide cocaine at various links along the chain to further this goal. *People v Justice (After Remand)*, 454 Mich 334, 345-347, 355; 562 NW2d 652 (1997); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992); *People v Porterfield*, 128 Mich App 35, 41; 339 NW2d 683 (1983); *People v Missouri*, 100 Mich App 310, 343; 299 NW2d 346 (1980). Additionally, because the evidence supports an inference that the multiple deliveries of lesser amounts of cocaine were part of an ongoing criminal enterprise designed to distribute a significant amount of cocaine to street users for profit, these multiple transactions could be aggregated to establish the existence of the charged conspiracy. *Porterfield, supra*.

Defendant failed to preserve his claims of prosecutorial misconduct for appellate review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Messenger*, 221 Mich

App 171, 179; 561 NW2d 463 (1997). Accordingly, we will reverse only if a curative instruction could not have eliminated the prejudicial effect of the alleged misconduct or where a miscarriage of justice will result from our failure to grant the relief requested. *Messenger*, *supra* at 179-180.

Defendant correctly points out that the prosecutor made remarks during his opening statement that were not substantiated at trial by the evidence presented. When a prosecutor makes statements in his opening statement that are not substantiated at trial by evidence, we will not reverse for that fact alone in the absence of a showing of bad faith or prejudice to the defendant. *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997). In the instant case, the record does not suggest that the prosecutor did not believe that his statements would be proven at trial. Thus, the prosecutor did not act in bad faith when he made the subsequent unproved statements. Moreover, defendant suffered no prejudice from the statements where they were briefly made as part of a lengthy opening statement on the first day of a four-day trial and where the identity of defendant's source need not have been known to Love to convict defendant of the charged conspiracy. *People v Meredith (On Remand)*, 209 Mich App 403, 412, 415; 531 NW2d 749 (1995).

Contrary to defendant's argument, the prosecutor did not inject into evidence the fact that defendant met his supplier while both were imprisoned. Instead, Love volunteered this information with a non-responsive answer to an otherwise proper question posed by the prosecutor. The non-responsive answer does not justify reversal, see, e.g., *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992); *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988), especially where the prosecutor quickly refocused Love's attention away from the imprisonment reference and any prejudice arising from the mention of defendant's former imprisonment could have been cured by a timely objection and instruction by the judge, *Messenger*, *supra*.

Defendant also failed to preserve for appellate review his challenge to the instructions to the jury. *People v Maleski*, 220 Mich App 518, 520-521; 560 NW2d 71 (1996). Consequently, we will reverse only if manifest injustice will result from our failure to grant the requested relief. *Id*. at 521. In the instant case, because the instructions concerning the aggregation of amounts of cocaine delivered in multiple transactions were legally accurate, *Justice*, *supra* at 355; *People v Atley*, 392 Mich 298, 311-312; 220 NW2d 465 (1974); *Porterfield*, *supra* at 41, and, therefore, sufficient to protect defendant's interests, *People v Zak*, 184 Mich App 1, 15; 457 NW2d 59 (1990), manifest injustice will not result from our failure to grant the requested relief.

We decline appellate review of defendant's claim that the trial court should have sua sponte instructed the jury in accordance with CJI2d 5.6. Defendant may not now complain where he specifically asked that this instruction not be given. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

We reject defendant's challenge to the constitutionality of the provision in MCL 333.7413(1); MSA 14.15(7413)(1), which authorizes the imposition of a sentence of mandatory life without parole. *People v Poole*, 218 Mich App 702, 715-717; 555 NW2d 485 (1996).

We also reject defendant's claim that the trial court had the discretion to sentence him under the habitual offender statutes where the prosecutor sought sentence enhancement pursuant to MCL 333.7413(1); MSA 14.15(7413)(1). The Legislature vested with the prosecutor the discretion to proceed under the statute that would impose the greatest punishment. *People v Sears*, 124 Mich App 735, 742; 336 NW2d 210 (1983). When the trial court sentenced defendant as an habitual offender, in the face of the prosecutor's request to sentence defendant pursuant to § 7413(1), the court usurped the prosecutor's discretion to choose the statutory provision under which defendant's sentence was to be enhanced. *Sears, supra*. Accordingly, we vacate defendant's twenty to forty-five year sentence and remand for entry of an amended judgment of sentence.

Defendant argues that the Muskegon County courts lacked subject matter and personal jurisdiction to issue an arrest warrant in this case and to try, convict, and sentence him. Defendant has confused the concept of jurisdiction with the concept of venue. For example, defendant asserts that the Muskegon County courts lacked subject matter jurisdiction because no criminal act was committed in Muskegon County. Subject matter jurisdiction is the right of the court to exercise jurisdiction over a particular class of cases, such as criminal cases, and not the particular case before it. *People v Goecke*, 457 Mich 442, 458 & n 15; 579 NW2d 868 (1998). A challenge to the right of a court to try a particular case before it based on the assertion that no criminal act occurred within the prosecuting jurisdiction is a challenge to venue. *Meredith, supra* at 407-409. Accordingly, the issue raised by defendant is not whether the Muskegon County courts had jurisdiction, but whether venue was properly laid in Muskegon County.

Defendant failed to preserve his venue challenge for appellate review. *People v Williams*, 1 Mich App 441, 443; 136 NW2d 774 (1965). Nevertheless, we conclude that the Muskegon County courts had venue in this matter. A conspiracy charge can be prosecuted in any jurisdiction in which an overt act occurred in furtherance of the conspiracy. *Meredith, supra* at 408. On the instant record, several overt acts occurred in Muskegon County. Specifically, defendant first asked Love to become involved in the cocaine "business" at a bar in Muskegon County. Love agreed to become involved in the "business" at that same bar. Additionally, some of the cocaine was delivered by defendant to Love and by Love to third parties in Muskegon County. Other overt acts include arranging for Love to drive defendant to Grand Rapids to secure cocaine from defendant's supplier and Love paying defendant for the cocaine defendant fronted Love. Because numerous overt acts in furtherance of the conspiracy occurred in Muskegon County, the conspiracy charge was properly prosecuted in Muskegon County.

The trial court did not abuse its discretion when it permitted the prosecutor to amend the information. *People v Coles*, 28 Mich App 300, 302; 184 NW2d 214 (1970). With regard to the amendment including within the scope of the conspiracy the events of July 29, 1996, defendant correctly points out that Love could not be a coconspirator as of July 29, 1996, because he was a police informant feigning participation in the criminal enterprise. *Atley, supra* at 311-312. This does not mean, however, as defendant asserts, that Love could not testify about the events transpiring on July 29, or that such testimony could not be used to show that defendant and his supplier were engaged in an ongoing conspiracy to deliver cocaine to third parties for ultimate distribution to street users. *Id*. at 312 n 1. Love's preliminary examination testimony regarding the events of July 29, which substantially

parallels his trial testimony, established not just a mere buyer-seller relationship between defendant and his supplier, but established that the July 29th transaction between defendant and his supplier was part of the ongoing agreement between defendant and his supplier to supply third parties in a distribution chain with significant amounts of cocaine for delivery to street users – a conspiracy in which Love was involved from December 1995 to March 1996. Under these circumstances, amending the information merely brought the information into conformity with the evidence offered at the preliminary examination and reiterated what was already known to defendant. MCL 767.76; MSA 28.1016; *People v Weathersby*, 204 Mich App 98, 103-104; 514 NW2d 493 (1994); *People v Fortson*, 202 Mich App 13, 15-16; 507 NW2d 763 (1993).

With regard to amending the information to identify John Workman as a coconspirator, defendant correctly points out that no mention of Workman appears in the preliminary examination record. The trial testimony established, however, that Workman acted in furtherance of the conspiracy by receiving cocaine from defendant, which defendant received from his supplier, in amounts sufficient to infer that Workman was purchasing the cocaine for the ultimate goal of consumption by street users. Under such circumstances, the amendment did not result in the charging of a new conspiracy offense, but merely resulted in the information charging the offense with greater specificity. *Weathersby, supra* at 104.

Moreover, neither amendment subjected defendant to surprise or prejudice where evidence of the conspiracy between defendant and his supplier to deliver cocaine to third persons for the ultimate consumption of street users was presented at the preliminary examination, where the prosecutor was ordered to supply defendant with all police and surveillance reports concerning the charged conspiracy, and where trial did not take place until April 8, 1997, some 2-1/2 months after the information was amended, thereby permitting defendant ample time to prepare his defense. *Fortson*, *supra*. Further, because the amendments did not result in the charging of new offenses for which no support was offered at the preliminary examination, defendant was not entitled to a second preliminary examination before the information could be amended. *Weathersby, supra*.

In the absence of an evidentiary hearing, the record fails to demonstrate either that defense counsel rendered constitutionally deficient assistance during trial or that defendant suffered the requisite prejudice to sustain his ineffective assistance of counsel claims. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *Messenger, supra* at 181-182; *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Defendant's conviction and life sentence are both affirmed, the twenty to forty-five year habitual offender sentence is vacated, and the case is remanded for entry of a corrected judgment of sentence. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra