STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 1999
v	No. 209022 Oakland Circuit Court
STEVEN E. GIBBS, Defendant-Appellant.	LC Nos. 96-144351 FH; 96-144352 FH; 96-144542 FH; 96-144543 FH

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of four counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We affirm.

The prosecution presented evidence that defendant sold cocaine to an undercover police officer, Brett Miles, on January 8, 11, and 18, and February 7, 1996. According to the evidence, a confidential informant introduced Miles and defendant in December 1995. Defendant gave Miles his pager number and told Miles to call him if he needed drugs. On each occasion when Miles purchased cocaine from defendant, the transaction began with a call to defendant's pager. Upon returning the page, defendant set the price for some cocaine and determined a meeting place to complete the transaction. Defendant conceded at trial, and concedes on appeal, that he sold cocaine on February 7, but maintained at trial that the charges concerning the three transactions in January resulted from mistaken identity. The jury convicted defendant as charged. The trial court sentenced defendant as a second-time controlled substance offender, MCL 333.7413(2); MSA 14.15(7413)(2), to four consecutive terms of two to forty years' imprisonment.

On appeal, defendant alleges, through appellate counsel, a violation of his right against double jeopardy, and several violations of his constitutional due process rights. In defendant's brief prepared in propria persona, defendant adds allegations of ineffective assistance of counsel and improper concealment of a res gestae witness.

I. Double Jeopardy

Defendant argues that his convictions must be reversed because they violate the double jeopardy protections of the federal and state constitutions. We disagree. This Court reviews constitutional issues de novo as a matter of law. *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

The Double Jeopardy Clauses of the federal and state constitutions prohibit placing a criminal defendant twice in jeopardy for a single crime. US Const, Ams V, XIV; Const 1963, art 1, § 15; *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994), citing *People v Dawson*, 431 Mich 234, 250; 427 NW2d 886 (1988). This is a guarantee against successive prosecutions, or multiple punishments, for the same offense. *People v Wilson*, 454 Mich 421, 427; 563 NW2d 44 (1997). Defendant's attempt to characterize the four drug transactions for which he was convicted as a single transaction is without merit. With each sale of cocaine to the undercover officer, defendant consummated one separate and complete violation of the statute prohibiting delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). See *People v Tobey*, 401 Mich 141, 149; 257 NW2d 537 (1977) ("While [the defendant]'s conduct in selling [an illegal drug] on different days to the same person is substantially similar conduct, it is not the same conduct or act. For double jeopardy . . . purposes each sale is separate conduct, a separate act and transaction, and . . . a separate and distinct criminal offense.") Accordingly, defendant's four convictions for four separate sales of cocaine do not run afoul of his federal and state double jeopardy prohibitions.

II. Entrapment

Defendant argues that the police entrapped him to commit the offenses for which he was convicted, or, alternatively, entrapped him to commit offenses of greater severity than those he was disposed to commit. We disagree. This Court reviews a trial court's findings concerning entrapment for clear error. *People v Connolly*, 232 Mich App 425, 428; ___ NW2d ___ (1998). "The trial court's findings are clearly erroneous if, after review of the record, this Court is left with a firm conviction that a mistake has been made." *Id.* at 429.

Entrapment exists where the police engage in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or where the police engage in conduct so reprehensible that it cannot be tolerated. *Id.*, citing *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Sentencing entrapment exists where the police engage in improper conduct to induce a person who is disposed to commit a minor crime to commit a more serious one. *Id.* at 510-511. In any event, entrapment does not exist where the police do nothing more than present the defendant with the opportunity to commit the crime in question. *Id.* at 510.

At defendant's entrapment hearing, the trial court concluded that the delay in arresting defendant was not attributable to the desire of law enforcement officers to increase the number or severity of defendant's offenses. This finding well comports with the evidence of record. There is scant evidence that the informant who introduced Miles to defendant played any further role in defendant's criminal activity. When Miles contacted defendant to buy cocaine, defendant was unequivocally prepared to supply Miles with the drug. Moreover, defendant told Miles after the second sale that Miles could call

him anytime if he needed more. Clearly, Miles did nothing to induce defendant to engage in drug transactions in excess of defendant's normal disposition toward such conduct, but instead merely presented defendant with the opportunity to commit the offenses for which he was convicted. Moreover, Miles explained that he conducted four separate buys from defendant to determine how much cocaine defendant was able to sell, and to attempt to ascertain the identity of defendant's supplier. Once Miles determined that defendant was a small-time dealer, he promptly had defendant arrested. This police conduct was entirely proper. See *Ealy, supra* at 511 ("Although defendant could have been arrested after any of the earlier transactions, the delay in his arrest was justified on the ground that an earlier arrest would have impaired the ability of the police to conduct an ongoing undercover narcotics investigation.").

Defendant also contends that the conduct of the police was reprehensible because they actually supplied the drugs that defendant sold to Miles through the confidential informant, whom defendant identified as "Scott Mann." Defendant testified that Mann was his supplier, and that defendant met Miles through Mann. Defendant is correct that an informant's actions are attributable to the police when the informant acts with official encouragement or assistance. *People v Chester Jones*, 165 Mich App 670, 674; 419 NW2d 47 (1988). However, although Miles acknowledged using an informant for the purpose of getting introduced to defendant, he explicitly denied that he was acquainted with anyone named Scott Mann. Further, standing in contrast to defendant's assertion that the informant supplied defendant with the cocaine that defendant sold to Miles is Miles' own testimony that he saw the informant buy drugs from defendant. Where a defendant alleges entrapment and divergent versions of events were presented to the trial court, this Court will defer to the trial court's credibility determination, in recognition of the trial court's superior position to judge credibility. *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993). To the extent that the resolution of this issue was reduced to a credibility determination, the trial court plainly believed Miles and disbelieved defendant. In any event, "a law enforcement officer may distribute controlled substances to another person as a means of detecting criminal activity." *Connolly, supra* at 430, citing MCL 333.7304(4); MSA 14.15(7304)(4).

Because there was no evidence that the police engaged in reprehensible conduct or induced defendant to commit the offenses for which he was convicted, the trial court did not clearly err in finding that defendant was not entrapped.

III. Evidence of Flight

Defendant argues that the trial court abused its discretion in admitting evidence of his flight from police. To preserve this issue for appellate review, defendant was required to interpose a timely, specific objection to admission of this evidence. MRE 103(a)(1); *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Because defendant raised no objection, we review this issue only for manifest injustice. *Id.* Having reviewed the record, we conclude that the trial court properly admitted the evidence of defendant's flight from police, and properly instructed the jury on its limited relevance. See *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). This issue does not warrant further review.

IV. Hearsay

Miles testified at trial, over objection, that he took possession of defendant's pager when defendant was arrested, upon which three unknown persons placed calls to it. Miles stated that when he returned the calls, the callers asked for "Black," which was the sobriquet under which defendant sold cocaine. According to Miles each caller then asked to purchase cocaine. Defendant argues that the trial court abused its discretion by admitting this evidence because it was hearsay, and because the prosecutor failed to comply with the notice requirements of MRE 803(24). Defendant's arguments are specious.

In fact, the trial court admitted the statements of the callers under the hearsay exception for statements against penal interest, MRE 804(b)(3).[1] Defendant's characterization of the hearsay exception at issue as the "catch-all" provision of MRE 803(24) is simply incorrect; because that was not the basis for admission at all, the notice requirements particular to that provision are not applicable in this instance. Defendant's argument is without merit.[2]

V. Prior Bad Acts

Defendant argues that the trial court abused its discretion in admitting a police officer's testimony that defendant sold cocaine to him in 1993. Defendant argues that this evidence was not admissible under MRE 404(b), because the prosecutor used it to prove defendant's guilt of the instant offenses by showing that he committed a similar offense in 1993. We disagree.

Michael Story testified that he worked as an undercover narcotics agent in 1993. According to Story, after being introduced to defendant, then called "Freeze," Story contacted defendant through the latter's pager and arranged to purchase cocaine in a parking lot. Story stated that he then met defendant at the appointed time and place, defendant instructed him to discover the cocaine hidden elsewhere in the lot. Story testified that he found the cocaine, returned to his car, paid defendant, then spoke with defendant about possible future dealing.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). However, such evidence may be admissible for another purpose, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." *Id.* Evidence of prior bad acts is admissible if it is offered for a proper purpose, if it is relevant, and if its probative value is not substantially outweighed by unfair prejudice. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *VanderVliet, supra* at 74. Evidence is relevant that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

We find no abuse of discretion here. The evidence was offered for a proper purpose, and was relevant. Defendant contended that, although he did sell cocaine to Miles on February 7, 1996, he did not sell cocaine to Miles on the three earlier occasions for which he was charged. Defendant argued

that if Miles purchased cocaine from someone on January 8, 11, and 18, 1996, that person was not defendant. Thus, defendant made issue of the question of identity. The prosecutor offered Story's testimony to establish defendant's common scheme or plan in selling cocaine, this supporting the theory that the person whom Miles paged and from whom he bought cocaine on the three January occasions was defendant. Defendant's sale to the undercover officer in 1993 went according to the pattern of the sale defendant admitted making to Miles in February 1996, as well as the three sales from the previous month for which defendant disclaimed responsibility. In 1993, as in 1996, defendant relied on a first-hand introduction to his customer before he offered his pager number. When there was to be a buy, the customer paged defendant, who then returned the call, took an order for cocaine, set a price, arranged to meet the customer in a parking lot, and conducted the sale while the buyer sat in his car. In both situations, defendant was known to the buyer by a nickname only. That defendant's method of transacting a drug sale in 1993 almost exactly matched the methodology employed in each of the sales in 1996 for which defendant was charged made it more likely that defendant was the supplier who sold drugs to Miles in January 1996, and more likely that the customers who called defendant's pager after his arrest and spoke with Miles about buying drugs were actually calling defendant for that purpose. Because Story's testimony was relevant to a material issue, and presented for a purpose other than to show defendant's propensity to sell drugs, Story's testimony was admissible to MRE 404(b)(1), unless the risk of unfair prejudice substantially outweighed its probative value under MRE 403.

Nearly all evidence presented by a prosecutor will be prejudicial, in that it is presented as part of a campaign to prove the defendant's guilt. See *People v Pickens*, 446 Mich App 298, 336; 521 NW2d 797 (1994). Thus, the proper inquiry is whether the evidence was unfairly prejudicial. *Id.*; MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. Because evidence of prior bad acts carries with it a high risk of confusion or misuse, there is a heightened need to consider whether the risk of unfair prejudice substantially outweighs probative value. *Id.* In this case, although Story's testimony was no doubt prejudicial to defendant, we conclude that it was not unfairly so. Identity was the key issue in this case. Evidence showing that defendant used a common pattern to conduct drug sales was highly probative of that question. Further, the trial court correctly instructed the jury on the limited use of other acts evidence. See *Crawford, supra* at 385. For these reasons, we conclude that Story's testimony was not substantially more prejudicial than probative. The trial court properly admitted the prior bad acts evidence in this case.

VI. Instruction on Unanimity

The trial court's instructions to the jury included the admonishment that each charged offense must be considered separately, and that a guilty verdict had to be unanimous. Defense counsel expressed satisfaction with the instructions as given. Defendant now argues that he was entitled to a special instruction that more precisely explained that a finding of guilty on each charge required unanimity with regard to that specific charge. Because defendant did not object to the instructions as given, defendant waived this issue on appeal unless relief is necessary to avoid manifest injustice. MCL 769.26; MSA 28.1096; *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149. "Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling

issue in the case." *Id*. Because defendant's argument consists of nothing more than insisting that points well covered in the instructions given should have been covered through a slightly different formulation, there is no manifest injustice here.

VII. Instruction on a Lesser Included Offense

Defendant argues that he was entitled to an instruction on the lesser offense of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Again, defendant did not request the instruction he now insists he should have had, and thus we review this issue only as necessary to avoid manifest injustice. MCL 769.26; MSA 28.1096; *Torres, supra* at 423.

We note that, pursuant to MCL 768.32(2); MSA 28.1055(2), the trial court was precluded from instructing the jury on possession of less than twenty-five grams of cocaine,[3] because that offense is not considered a "major controlled substance offense," see MCL 761.2(b); MSA 28.843(12)(b). In any event, had defendant been entitled to an instruction on possession, we would still conclude that he has failed to demonstrate manifest injustice. Whether defendant merely possessed cocaine was not a basic and controlling issue. It was not defendant's posture at trial that he merely possessed the cocaine but did not sell it to the undercover officer. Instead, defendant argued that although he did sell cocaine to Miles on February 7, 1996, he did not do so on the three other occasions. Because the omitted instruction did not pertain to a basic and controlling issue, defendant has suffered no manifest injustice for want of that instruction.

VIII. Effective Assistance of Counsel

Defendant asserts that he was denied effective assistance of counsel, alleging failures on counsel's part at both the entrapment hearing and at trial. The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The constitutional right to counsel is a right to *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). In this case, because defendant requested neither a *Ginther*[4] hearing nor a new trial on this ground in the proceedings below, this Court's review of this claim is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant argues that he was denied effective assistance of counsel at his entrapment hearing because his lawyer failed to argue that the police informant supplied the cocaine that defendant sold to Miles. This argument must fail, however, because there is no reasonable probability that, but for this alleged error, the trial court would have ruled in defendant's favor on the entrapment issue. As

discussed in part II above, the trial court was at liberty to believe Miles' testimony that he saw the informant obtain cocaine from defendant, not the other way around. Further, as also discussed above, even if the informant, acting on behalf of police, did provide cocaine to defendant as part of the investigation, that was proper police conduct. *Connolly, supra* at 430. Had defense counsel advanced this theory of entrapment, it would have made no difference to the outcome of the entrapment hearing.

Defendant also argues that his representation was inadequate because his lawyer failed to call Brad David Reese as a witness at the entrapment hearing or at trial to testify that Scott Mann, acting as an agent of the police, entrapped defendant to commit the crimes for which he was convicted. A defendant alleging ineffective assistance from counsel's failure to call witnesses must overcome a presumption that the decision whether to call witnesses was an exercise of sound trial strategy. See *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Here, there is no evidence in the record that Reese knew whether Mann supplied defendant with the cocaine he sold to Miles. Further, again, defendant's theory of Mann's role as supplier of cocaine in this matter nonetheless depicts proper police work.[5] Thus there is no indication from the record that defense counsel's failure to call Reese as a witness deprived defendant of a substantial defense.

Finally, defendant argues generally that his trial attorney failed to present a defense or call any witnesses on his behalf. In fact, a review of the record reveals that defense counsel did both. That counsel's trial strategy did not succeed does not mean that the representation was ineffective. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

For these reasons, we conclude that defendant was not denied the effective assistance of counsel.

IX. Res Gestae Witness

Defendant's final argument on appeal is that he was denied a fair trial because the prosecutor failed to produce a res gestae witness. To preserve this issue for appellate review a defendant must move for an evidentiary hearing or a new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Because defendant failed to preserve this issue, we deem it waived. Further, there is no merit in defendant's argument in any event. Commenting on the current res gestae witness statute, our Supreme Court observed that the prosecutor's "former obligation" to use diligence in attempting to produce any individual who might have any knowledge of the matter in question has been "replaced" by a duty to provide timely notice to the defense of all known res gestae witnesses, and of any witnesses expected to be called at trial. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995), citing MCL 767.40a; MSA 28.980(1). "The purpose of the 'listing' requirement is merely to notify the defendant of the witness' existence and res gestae status." *People v Lawton*, 196 Mich App 341, 347; 492 NW2d 810 (1992).[6] Because defendant cannot plausibly contend that he was unaware of Reese's existence or status, and because defendant made no effort to call Reese as a witness, defendant

cannot plausibly claim to have been prejudiced by the prosecutor's failure to list Reese as a res gestae witness.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Peter D. O'Connell

[1] See *People v Lucas*, 188 Mich App 554, 577-578; 470 NW2d 460 (1991).

[2] Although neither party raises the issue here, we note that in *People v Alphonzo Jones (On Rehearing After Remand)*, 228 Mich App 191; 579 NW2d 82 (1998), this Court held that statements of the sort here characterized as hearsay involved merely "implied assertions" and did not constitute "statements" for purposes of the definition of hearsay. *Id.* at 216-219, 225-226 (citations omitted). Judge O'Connell dissented in part, concluding that implied assertions offered to prove the matter impliedly asserted should be considered hearsay and accordingly inadmissible unless falling under one of the recognized hearsay exceptions. *Id.* at 227-229 (O'Connell, J., concurring in part and dissenting in part). However, if the statements at issue here were properly characterized as hearsay, Judge O'Connell would affirm the trial court's decision to admit them under MRE 804(b)(3).

[3] Defendant does not challenge the constitutionality of this statute. It is the prerogative of the Supreme Court to regulate all matters pertaining to legal practice and procedure in this state's courts, and the Legislature's enactments regarding these matters are valid only insofar as they do not conflict with the rules of the Supreme Court. Const 1963, art 6, § 5; *Mumaw v Mumaw*, 124 Mich App 114, 120; 333 NW2d 599 (1983). In *People v Binder (On Remand)*, 215 Mich App 30, 41-42; 544 NW2d 714 (1996), this Court concluded that the Legislature's attempt to limit the judiciary's inherent authority to establish appropriate jury instructions was unconstitutional under the separation of powers doctrine, and thus struck down MCL 768.32(2); MSA 28.1055(2). However, the Supreme Court vacated this portion of the *Binder* opinion as unnecessary in light of this Court's decision to affirm the defendant's conviction on grounds apart from the constitutional issue. *People v Binder*, 453 Mich 915, 915-916; 554 NW2d 906 (1996) (summary disposition).

[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[5] Defendant, in his supplemental brief prepared in propria persona, quotes from an affidavit that Reese allegedly supplied to defense counsel in which Reese stated that Mann begged defendant to sell cocaine to Miles because Mann owed someone money and feared for his well being. However, we found no such affidavit in the lower court files. Further, because according to defendant's assertions Reese was apparently involved in the January 11, 1996, sale of cocaine to Miles, Reese would probably have asserted his Fifth Amendment privilege against self-incrimination had counsel called him as a witness. Effective assistance of counsel does not include engaging in futile exercises. See *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989) ("Counsel is not obligated to make futile objections.").

[6] Further, defendant's implication that Reese was involved in the January 11, 1996 transaction suggests that the prosecutor was relieved of any duty with regard to that potential witness. "[T]he prosecutor's duty has never extended to calling or listing accomplices." *Lawton*, *supra* at 346.