STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 3, 1999
v	No. 209232 Jackson Circuit Court
JULIO LORENZO ROBINSON, Defendant-Appellant.	LC No. 97-81617 FH

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald*, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), to a police informant while defendant was on parole status with the Michigan Department of Corrections. Defendant was sentenced as an habitual offender under MCL 769.11; MSA 28.1083, to imprisonment of 6 to 40 years. Defendant appeals as of right. We affirm.

Defendant first contends that he received an unfair trial due to unfairly prejudicial testimony during the prosecutor's case in chief, in which one of the police officers testified, without objection from the defense counsel, that defendant told him that he was on parole for delivery of cocaine.

The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998). Unless manifest injustice would result, there can be no abuse of discretion if the trial court's discretion was not invoked by timely objection. *Id.* Manifest injustice will be found only when: (1) the evidence under review is found to be unduly prejudicial to defendant's case; and (2) it appears that the jury's verdict would have been different but for the prejudice resulting from the evidence in question.

In this case we shall assume without deciding that the testimony relating to defendant's admission that he was on parole for delivering cocaine was unduly prejudicial to defendant's case.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Nonetheless, we do not find that manifest injustice results from defendant's conviction because

the evidence against defendant was simply too strong. *People v Holly*, 129 Mich App 405, 416; 341 NW2d 823 (1983). Defendant admitted to being present at the apartment that evening; he admitted that the police informant came to his apartment; the police informant testified that defendant sold him the cocaine and described what defendant was wearing at the time of the sale; and defendant had the marked money on him in his pocket an hour after the sale took place. Defendant also gave inconsistent statements as to why he had the marked money on his person: he told police he did not know why he had the marked money on him; he told his parole officer that the police informant owed him the money for some cassette tapes; at trial defendant testified that the police informant was paying defendant the money he owed him for some fishing rods that defendant sold to him last summer, but then defendant stated that he did not give the fishing rods to the police informant and defendant did not have them at his apartment.

In light of this evidence, it is not reasonably possible that, absent any error of admission of defendant's prior cocaine offense, a jury would have acquitted defendant. Therefore, defendant is not entitled to a new trial because the admission without objection of the testimony under review did not result in manifest injustice. Simply put, defendant would not have been acquitted even if the testimony did not come in as evidence.

Next, defendant contends that he was deprived of a fair trial by questions of the prosecutor as to defendant's prior drug activities and prior prison record and questions of defense counsel regarding the police informant's prior drug purchases from defendant, because these unobjected-to questions and the testimony related to them resulted in manifest injustice to defendant and violated defendant's due process rights. Once again, even assuming that this testimony resulted in undue prejudice to defendant's case, defendant's conviction should be affirmed because, as stated above, the evidence against him was too strong. *Id*. It is not reasonably possible that absent the error of admission of this testimony any jury would have acquitted defendant.

Next, defendant contends that defense counsel's failure to object to the testimony of defendant's prior drug sales and defendant's parole status; and defense counsel's failure to move to exclude or redact defendant's statements to police relating to defendant's parole status constituted ineffective assistance of counsel. In order to prove ineffective assistance of counsel, defendant must prove that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 156.

Assuming without deciding that a reasonable attorney would have objected to this evidence, defendant's claim of ineffective counsel fails. Defendant simply cannot demonstrate that due to the alleged errors by counsel, the jury's conclusion of guilt beyond a reasonable doubt is unreliable. *People v Reed*, 449 Mich 375, 401; 535 NW2d 496 (1995). In this case there are no circumstances that undermine confidence in the reliability of the jury's determination of guilt. Even if this testimony had not come into evidence, the result of the proceeding would not have been different. As discussed above,

there was other evidence that proved defendant was guilty beyond a reasonable doubt. Therefore, defendant was not denied a trial whose result is reliable.

Next, defendant contends that he was deprived of a fair trial because the prosecutor made a statement, unsupported by the evidence, that defendant could be a "big dealer" and that there may have been more drugs at the apartment earlier.

We have reviewed the prosecutor's statements and find no prejudicial error. It was actually defense counsel, rather than the prosecution, who brought up that defendant could not be a big dealer. The prosecution then commented on the evidence at trial but did not use statements of fact. Rather, the prosecution used an analogy to make the point that just because police could not find much other evidence at the time of the search, that did not mean that defendant is not a big dealer; defendant could have sold the last of his goods to the police informant. Moreover, any prejudice could have been eliminated by a timely objection and an instruction to the jury that closing arguments are not evidence. We find that the statements by the prosecution were justifiable in response to the closing arguments of defense counsel and no error can be found.

Finally, defendant contends that he is entitled to resentencing because the court abused its discretion by giving defendant an unwarranted and severe sentence based upon a criminal record of two prior felonies, two misdemeanors, and no juvenile record. "[W]ith regard to the judicial selection of an individual sentence within the statutory minimum and maximum for a given offense, the Legislature . . . intended more serious commissions of a given crime by persons with a history of criminal behavior to receive harsher sentences than relatively less serious breaches of the same penal statute by first-time offenders." *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). To justify its six- to forty-year sentence, the trial court stated that: defendant was on parole for a delivery conviction at the time this occurred, so he certainly knew what he was getting into by selling three rocks to the informant; society's need to be protected from drug trafficking, especially crack cocaine; and the fact that rehabilitation is questionable given a record of two felonies and three misdemeanor convictions. These considerations justify the sentence imposed. We find that the trial court did not abuse its discretion in setting defendant's minimum sentence at six years and maximum at forty years. *People v Kennebrew*, 220 Mich App 601, 613; 560 NW2d 354 (1997).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ John W. Fitzgerald