STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 20, 2000
v	No. 218898 Branch Circuit Court
FELIPE PEREZ GONZALEZ, Defendant-Appellant.	LC No. 97-116473-FC

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and sentenced to life imprisonment. He appeals as of right and we affirm.

Defendant first argues that the prosecutor improperly questioned his character witnesses during cross-examination. This issue is not preserved. Defendant did not object to the cross-examination of the character witnesses on the grounds that he now asserts on appeal.[1] "To preserve an evidentiary issue for appeal, the party opposing the admission of evidence must object at trial on the same ground that the party asserts on appeal. MRE 103(a)(1)." *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). We review unpreserved errors under the plain error rule discussed in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999):

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred; 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. . . The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.

[1] Defense counsel objected during the cross-examination of one witness because there was no evidence that the question contained a true fact; however, counsel did not object on the grounds asserted on appeal, namely, that cross-examination of character witnesses may not be conducted utilizing specific instances of misconduct and that inferences of other bad acts that are raised during cross-examination of character witnesses must conform to the dictates of MRE 404(b).

Contrary to defendant's argument on appeal, it was entirely proper for the prosecutor to cross-examine defendant's character witnesses using reports of specific instances of defendant's misconduct. MRE 405(a); *People v Whitfield*, 425 Mich 116, 129-131; 388 NW2d 206 (1986); *People v Champion*, 411 Mich 468; 307 NW2d 681 (1981). In addition, rumors, insinuations, and questions about other bad acts of a defendant do not have to conform to MRE 404(b) when being utilized to cross-examine character witnesses. See *Whitfield, supra* at 132, n 15. We also note that there is no authority to sustain defendant's position that there must be evidence on the record to support the acts of misconduct raised by the prosecutor when cross-examining character witnesses.

We do note, however, that a hearing should have been held before the cross-examination of the character witnesses to insure that the specific reports of misconduct, which were to be explored by the prosecutor, had some basis in fact. In *Whitfield, supra* at 132-133, n 16, the Court indicated that as "a precondition to cross-examination about other wrongs, the prosecutor should reveal, outside the hearing of the jury, what his basis is for believing in the rumors or incidents he proposes to ask about." In this case, no such hearing took place. We find, however, that any error in this regard does not warrant reversal because there has been no showing of prejudice to defendant. *Carines, supra* at 765. There is no indication that the outcome of trial was affected by the mere fact that a hearing was not held, especially considering the substantial and overwhelming evidence against defendant.

Defendant next claims that he was entrapped and that the trial court erred when it refused to dismiss the case on the basis of entrapment.

> In Michigan, entrapment is analyzed according to a two-pronged test, with entrapment existing if either prong is met. The court must consider whether (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. Entrapment will not be found where the police do nothing more than present the defendant with an opportunity to commit the crime of which he is convicted. [*People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997).]

Defendant was not entrapped under either prong of the test.

With regard to the first prong, "entrapment exists if the police conduct would induce a person not ready and willing to commit an offense to commit the offense; entrapment does not exist if the conduct would induce only those persons who are ready and willing to commit the offense to do so." *People v Fabiano*, 192 Mich App 523, 531; 482 NW2d 467 (1992). In this case, the evidence indicates that the police did nothing more than present defendant with an opportunity to sell a large quantity of cocaine. The opportunity was presented through the use of an informant, who was monitored by police with regard to the transaction. The evidence indicated that defendant never hesitated when presented with the opportunity to commit the crime. Nothing in the record supports defendant's claim that he was pressured or enticed into selling drugs or that he was an unwilling participant. Moreover, there is nothing in the record to indicate that the police informant or the police knew about defendant's alleged financial distress and played upon that to entice him to commit the

crime. The fact that defendant presented character witnesses and claimed to have financial troubles does not establish entrapment. The police conduct in this case was not the type of conduct that would induce an otherwise law-abiding person to commit the crime in similar circumstances. *Id.*

With regard to the second prong, entrapment exists "if the police conduct is so reprehensible that we cannot tolerate the conduct and will bar prosecution on the basis of that conduct alone," *id.* at 531-532, or "if the furnishing of the opportunity for a target to commit an offense 'requires the police to commit certain criminal, dangerous or immoral acts.'" *People v Connolly*, 232 Mich App 425, 429-430; 591 NW2d 340 (1998). In this case, there has been no showing that the police engaged in criminal, dangerous or immoral acts when they presented defendant with the opportunity to commit the crime. In addition, the use of a police informant to target a drug dealer and arrange a drug deal is not reprehensible conduct in and of itself. See e.g. *People v Hampton*, 237 Mich App 143, 156-158; 603 NW2d 270 (1999).

In sum, the trial court did not clearly err when it concluded that there was insufficient evidence to support a finding of entrapment. On the contrary, the evidence confirmed that defendant appeared to be a willing participant in the transaction and had no difficulty procuring a large amount of cocaine without any front money.

Next, defendant argues that he was improperly compelled to sit through trial wearing jail clothes. This issue is not preserved. Failure to timely object to wearing jail clothes at trial waives the issue. *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985), citing *People v Harris*, 80 Mich App 228, 230; 263 NW2d 40 (1977). The objection must be made before the jury is empanelled, *Turner*, *supra* at 109, and "the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion." *People v Porter*, 117 Mich App 422, 424; 324 NW2d 35 (1982), quoting *Estelle v Williams*, 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976). Thus, not only is the issue waived, but there is no indication in the record that defendant was compelled to wear his jail clothes.

Defendant also argues that he was deprived of the effective assistance of counsel because trial counsel did not object to his wearing jail clothes or explain to him that he had the right to wear civilian clothes. Review of claims of ineffective assistance of counsel are limited to errors apparent on the record where, as here, a defendant fails to raise the issue in a motion for new trial or request for an evidentiary hearing in the trial court. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Moreover, because our review is limited to the record, we will not consider the ex parte affidavits and other exhibit evidence submitted by defendant on appeal in support of his claims of ineffective assistance of counsel. See *People v Shively*, 230 Mich App 626, 628, n 1; 584 NW2d 740 (1998); MCR 7.210(A)(1).

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). Defendant has not satisfied his burden of demonstrating ineffective assistance of counsel. It is not apparent from the record what reason, if any, counsel had for allowing defendant to sit through trial dressed in jail clothing. Assuming,

however, that counsel's conduct was deficient in this regard, defendant has failed to argue, or demonstrate, that there is a reasonable probability that the result of the proceeding would have been different had counsel made a timely objection and civilian clothes were secured for defendant. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997).

Defendant raises several other claims of ineffective assistance of counsel. He claims that trial counsel should have called both the informant, Forensio Alvaron, and a person by the name of Cuban or Culberto Alvaron to testify at trial. Decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy. *Id.* at 163. Nothing in the record supports defendant's claim that either witness would have provided testimony that could have assisted defendant's case. Moreover, defendant admits on appeal that counsel told him that their testimony would be harmful. Thus, it appears that trial counsel did not call either witness as a matter of trial strategy, and defendant has not overcome the presumption that trial counsel's failure to call either witness was sound strategy.

Defendant also claims that he was deprived of the effective assistance of counsel because his counsel had a conflict of interest. Defendant claims that his counsel was also acting as retained counsel for Cuban Alvaron.[2] However, nothing in the record indicates that counsel also represented Cuban Alvaron or that counsel had a conflict of interest. Defendant's unsubstantiated allegations in support of this claim are insufficient to establish that counsel was ineffective.

Next, defendant argues that counsel was ineffective for failing to impeach the credibility of police officer Rivera, whom defendant claims lied on the witness stand. However, the record lacks sufficient detail for this Court to evaluate defendant's claim because it does not explain how the police officer's credibility could have been attacked. See *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Defendant also argues that counsel was ineffective for failing to question whether the prosecutor had any basis in fact for the insinuations that he raised when cross-examining defendant's character witnesses. Although counsel could have requested a hearing with regard to the underlying basis for the prosecutor's questions, *Whitfield, supra*, counsel's failure to do so does not constitute ineffective assistance. Defendant makes no showing that counsel's failure to pursue a hearing caused any prejudice, or that there is a reasonable probability that the result of the proceeding would have been different had counsel requested a hearing. On the contrary, the record suggests that it is highly likely that the prosecutor would have been able to demonstrate that there was a basis in fact for the questions asked on cross-examination.

Finally, we note that defendant argues that his counsel presented a "flimsy character defense" and that this, along with all of the other errors, shows that counsel was not prepared. Defendant, however, does not articulate any other reasonable defense that counsel could have or should have pursued. Moreover, we have found no errors requiring reversal in this case and, again, note that the

[2] Cuban Alvaron apparently lived with defendant and defendant claims that the cocaine belonged to Cuban Alvaron.

evidence against defendant, including recorded telephone conversations and a video tape of the actual drug transaction, was overwhelming. In sum, defendant has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness and, even if it had, that, but for the deficient conduct, there is a reasonable probability that the outcome of trial would have been different. *Mitchell, supra* at 157-158.

Affirmed.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck