STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMITRIUS TITUS,

Defendant-Appellant.

UNPUBLISHED
July 28, 2000

No. 196549
Oakland Circuit Court
LC No. 91-110422 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE LEWIS POWELL, JR.,

Defendant-Appellant.

No. 196550
Oakland Circuit Court
LC No. 91-110424 FC

Before: Jansen, P.J., and Hood and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right from their jury convictions of two counts of delivery between 50 to 224 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and one count of conspiracy to deliver between 50 and 224 grams of cocaine, MCL 750.157a; MSA 28.354(1). The trial court originally sentenced defendants to mandatory life sentences without parole; however, on remand by order of this Court, defendants were resentenced to ten to twenty years in prison for each conviction. We affirm.

Defendants argue that the trial court erred by denying their motion to dismiss on the grounds of entrapment. We disagree. The question of entrapment is a legal issue for the trial court to decide. *People v Jones*, 203 Mich App 384, 386; 513 NW2d 175 (1994). A trial court's findings concerning

entrapment are reviewed on appeal for clear error. *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998); *People v Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992).

Michigan courts use the objective test of entrapment. *People v Juillet*, 439 Mich 34, 53; 475 NW2d 786 (1991); *People v Hampton*, 237 Mich App 143, 156; ___ NW2d ___ (1999). The objective tests focuses on the propriety of the government's conduct that resulted in the charges against the defendant rather than on the defendant's predisposition to commit the crime. *Hampton, supra*. Entrapment occurs when (1) the police engage in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engage in conduct so reprehensible that it cannot be tolerated. *Id.*; *Connolly, supra* at 429; *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997).

Here, defendants argue that they were entrapped under the second prong of the test, that is, that the police engaged in reprehensible conduct. Under the second prong of the test, entrapment exists where "the police conduct is so reprehensible that we cannot tolerate the conduct and will bar prosecution on the basis of that conduct alone." *Connolly, supra* at 429, quoting *Williams, supra* at 663. Entrapment could also occur under the second prong of the entrapment test if the furnishing of the opportunity for a target to commit an offense "requires the police to commit certain criminal, dangerous, or immoral acts." *Connolly, supra* at 429-430, quoting *People v Jamieson*, 436 Mich 61, 95-96; 461 NW2d 884 (1990) (Cavanagh, J., concurring). However, entrapment will not be found where the police do nothing more than present the defendant with an opportunity to commit the offense of which he was convicted. See *People v Butler*, 444 Mich 965, 966; 512 NW2d 583 (1994). Moreover, undercover drugs sales conducted by the police do not constitute entrapment per se. See *id.*; *Connolly, supra* at 430.

Defendants claim that the police engaged in reprehensible conduct by failing to supervise and control the informant's activities. However, after reviewing the record, we agree with the trial court's finding that the police, with the assistance of an undercover informant, did nothing more than present defendants with the opportunity to commit the crimes of which they were convicted. The informant voluntarily contacted Agent Connolly of the DEA and told him that defendants were selling substantial amounts of cocaine, and that he would be willing to assist the police in securing defendants' arrest. Although the drug buys were scheduled by the informant, defendants showed no hesitation in conducting the drug transactions and they were not at all reluctant to engage in the second transaction with the informant after selling cocaine to him the first time. In addition, although defendants could have been arrested after the first transaction, the police were justified in delaying the arrest until after the second transaction so they could probe the depth and extent of the criminal conduct. See *Ealy, supra* at 511-512.

We are also not persuaded by defendants' argument that the police failed to exercise adequate control and supervision over the informant such that their conduct was intolerable and reprehensible. Nor do we find that, under these facts, the police intended "to commit certain criminal, dangerous, or immoral acts," which could not be tolerated. The evidence shows that Agent Connolly was present when the informant arranged the drug buys and that Connolly and other federal agents followed the informant to the location where the transactions occurred to confirm the alleged criminal activity.

Connolly searched the informant's person and car prior to the transaction to insure that he did not possess drugs or money prior to meeting with defendants. On this record, we find no evidence that the police engaged in reprehensible conduct. The trial court did not err in denying defendants' motion to dismiss.

Defendants next contend that they were denied their right to be tried by a jury of their peers when the prosecutor excused the only black juror on the panel and the trial court denied their *Batson*[1] challenge. Defendants have failed to provide this Court with the voir dire transcript containing the challenged conduct. Failure to provide this Court with the relevant transcript, as required by MCR 7.210(B)(1)(a), constitutes a waiver of the issue. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). An appellate court is unable to review a party's objection or challenge to certain conduct and the trial court's reason for its ruling without the relevant transcript. *Id.*

In any event, a review of the record containing defendants' objection after the jury was impaneled demonstrates that the trial court did not abuse its discretion in rejecting defendant's claim of discrimination in jury selection. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). In response to defendants' objection to the prosecutor's use of a peremptory challenge to remove an African-American juror from the panel, the prosecutor explained that the juror was removed because he stated that he just started a new job and had no desire to be on the jury, and because the juror expressed suspicion and disagreement with the undercover police investigation conducted in this case. The prosecutor unequivocally stated that removal of the potential juror "ha[d] nothing to do with what color the person may or may not be." The prosecutor offered a race-neutral reason for challenging the juror, and the reason was directly related to the circumstances of the case. Under these facts, the trial court did not abuse its discretion in rejecting defendants' claim.

Defendants next argue that the trial court's instructions on the elements of conspiracy were deficient such that their conspiracy convictions such be vacated. Specifically, defendants claim that when giving the conspiracy instruction, the trial court did not inform the jury that the agreement must have been to deliver 50 to 224 grams of cocaine, an essential element of the offense, and did not advise the jury that the agreement must have been between defendant and another individual, not a government agent. We disagree.

Defendants did not object to the trial court's conspiracy instruction as read to the jury and did not request an additional or alternate conspiracy instruction. In the absence of a timely objection to the instructions given by the trial court, this Court reviews alleged instructional error only to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-546; 494 NW2d 737 (1993); *People v Morey*, 230 Mich App 152, 159; 583 NW2d 907 (1998), lv granted 459 Mich 949; 590 NW2d 569 (1999). Manifest injustice occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

Jury instructions are reviewed in their entirety to determine if there was error requiring reversal. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997); *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions were imperfect, there is no error requiring reversal

if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Daniel, supra.*

The trial court instructed the jury on the conspiracy charge as follows:

> Now the defendants are charged with the crime of conspiracy to deliver 50 to 224 grams of cocaine. Anyone who knowingly agrees with somebody else to deliver cocaine is guilty of conspiracy.
>
> To prove the defendants' guilt, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendants and someone else knowingly agreed to deliver cocaine to someone else.
>
> First [sic], that the defendant specifically intended to commit or help commit that crime.
>
> Third, that this agreement took place or continued through the periods of December 1, 1990 to June 13, 1991.
>
> An agreement is the coming together or meeting of the minds of two or more people, each person intending and expressing the same purpose. It is not necessary for the people involved to have made a formal agreement to commit the crime or to have written down how they were going to do it.
>
> In deciding whether there was an agreement to commit a crime, you should think about all of the members of the alleged conspiracy about how the members of the alleged conspiracy acted, and what they said as well as all of the other evidence.
>
> If you find the defendant is guilty of conspiracy, you must be satisfied beyond a reasonable doubt that there was an agreement to deliver cocaine.
>
> However, you may infer that there was an agreement from the circumstances, such as how the members of the alleged conspiracy acted. But only if there is no other reasonable exp – no other reasonable explanation for those circumstances.
>
> Each defendant in this case is entitled to have his guilt or innocence decided individually. You must decide whether each defendant was a member of the alleged conspiracy as if they were being tried separately.
>
> To determine whether each defendant was a member of the alleged conspiracy, you must decide whether each individual defendant intentionally joined with anyone else to deliver cocaine.

> In conspiracy cases, it is often difficult to decide each defendant's case on its own because of the amount of evidence that is admitted against the other defendants. If any evidence is limited to one defendant, you should not consider it as to the other defendant.
>
> It is not enough to find that there was a criminal agreement to deliver cocaine. Even if you do find that there was a conspiracy, you must still determine whether each defendant separately was a member of that conspiracy.
>
> Now the crime of conspiracy to deliver 50 to 224 grams of cocaine requires proof of a specific intent. This means that the prosecution must prove not only that the defendants did certain acts, but that they did these acts with the intent to cause a particular result.
>
> For the crime of conspiracy to deliver 50 to 224 grams of cocaine, this means that the prosecution must prove that the defendants intended to deliver cocaine to someone else. The defendants' intent may be proved by what they said, what they did, how they did it, or by any other facts and circumstances in evidence.

Although the trial court did not specify the quantity involved in the conspiracy, such omission does not require reversal of defendants' conspiracy convictions where the conspiracy instruction was preceded by an instruction on delivery of over 50 grams of cocaine which explicitly required proof that the cocaine weighed between 50 and 224 grams. See *People v Marji*, 180 Mich App 525, 536; 447 NW2d 835 (1989). Moreover, the conspiracy instruction referenced the offense of delivery between 50 and 224 grams of cocaine several times such that the jury was adequately informed of that element of the crime. Further, the uncontroverted evidence was that defendants delivered over 50 grams of cocaine to the informant, thereby establishing the requisite element of the offense. Under these circumstances, the trial court's omission of the amount of cocaine involved in the conspiracy from the instruction was harmless and does not warrant reversal. *Marji, supra*.

We also reject defendants' claim that the trial court failed to instruct the jury that defendants had to conspire with one another, not a governmental agent. The record shows that the trial court specifically instructed the jury that defendants were charged with conspiring " . . . together with one another to deliver cocaine, 50 grams or more." There was no instruction suggesting that defendants had to conspire with a governmental agent, and there was no evidence presented to that effect. Indeed, the uncontroverted evidence was that defendants, together, delivered over 50 grams of cocaine to the informant on two separate occasions. The jury was properly informed that defendants had to conspire with one another, not a governmental agent, to deliver cocaine. Reading the instructions as a whole, we find that they adequately protected defendants' rights and fairly presented the issues to the jury. *Dumas, supra* at 396; *Daniel, supra* at 53. Accordingly, we find no manifest injustice.

Defendant Powell argues that he received ineffective assistance of counsel by his trial counsel's failure to vigorously represent his interests. Specifically, defendant claims that trial counsel did not make an opening statement, deferred to the cross-examination of prosecution witnesses by defendant Titus'

counsel, and completely relied on the questioning and argument of Titus' counsel, all of which constituted a constructive denial of his right to counsel. We disagree.

Our review of the record reveals that trial counsel for Powell vigorously and effectively represented Powell's interests. Counsel's decision not to engage in repetitive cross-examination and argument that counsel for Titus had already presented constituted sound trial strategy with which we decline to interfere. *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997); *People v Rice*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). The jury had already been advised of defendants' theory of the case in the opening statement given by Titus' counsel. In addition, Titus' counsel had conducted a lengthy and effective cross-examination of the prosecution's witnesses. There was no rational basis for Powell's counsel to reiterate everything that the jury had already heard. Defendant has failed to overcome the presumption that counsel's decision in this regard was sound trial strategy. *Rice, supra*. Moreover, in light of the other evidence substantiating defendants' guilt, we do not find that the outcome of the trial would have been different had counsel made an opening statement or further cross-examined the prosecution's witnesses. *Rice, supra* at 445. Accordingly, we reject defendant's ineffective assistance of counsel claim.

Defendant Powell also argues that the trial court erred by refusing to instruct the jury on the lesser offense of delivery of less than 50 grams of cocaine. Defendant did not object to the trial court's instruction as given nor join in defendant Titus' objection to the trial court's refusal to instruct on the lesser offense. Accordingly, we review this claim only to avoid manifest injustice. *Van Dorsten, supra* at 544-546; *Morey, supra* at 159.

The trial court did not err in refusing to instruct on the lesser offense of delivery of less than 50 grams of cocaine because the instruction was not supported by a rational view of the evidence. The evidence at trial showed that defendants delivered approximately 83 grams of cocaine to the informant on May 15, 1991, and approximately 165 grams of cocaine on June 13, 1991. Thus, whether viewing the transactions as separate events or a single transaction, defendants delivered an amount of cocaine far in excess of 50 grams. On this record, an instruction on delivery of less than 50 grams of cocaine was not supported by the evidence and the trial court properly denied the request. *See Marji, supra* at 526.

In a related argument, defendant Powell argues that his trial counsel was ineffective for failing to join in defendant Titus' request for an instruction on the lesser included offense and his objection to the trial court's refusal to give the instruction. However, as noted above, because the instruction was not supported by the evidence produced at trial and was properly denied by the trial court, counsel was not ineffective in this regard. Counsel is not required to make frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

All of defendants' remaining claims on appeal challenge the trial court's imposition of life sentences for each of defendants' convictions. However, because defendants' life sentences were vacated on remand and they were resentenced to a term of years, these issues are moot and we decline to address them. *People v Schmitz*, 231 Mich App 521, 535; 586 NW2d 766 (1998); *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Affirmed.

/s/ Kathleen Jansen
/s/ Harold Hood
/s/ Kurtis T. Wilder

[1] *Batson v Kentucky*, 476 US 79, 106; S Ct 1712; 90 L Ed 2d 69 (1986).