STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2001
v	No. 225781 Cass Circuit Court
JERRY HENRY OWENS, JR., Defendant-Appellant.	LC No. 99-009961-FH

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than fifty grams of a controlled substance (cocaine), MCL 333.7401(2)(a)(iv), and thereafter sentenced to two to twenty years' imprisonment. Defendant appeals as of right and we affirm.

I

Defendant first argues that he was denied the effective assistance of counsel at trial. More specifically, defendant contends that his counsel was ineffective for failing to move for a mistrial where the informant testified that he had prior drug dealings with defendant. He also contends that counsel was ineffective for failing to object to testimony of a police officer that he was able to confirm the suspect was defendant because of a photograph he saw.

With respect to the allegation of failing to move for a mistrial, defense counsel's performance was not deficient. *People v Toma,* 462 Mich 281, 302; 613 NW2d 694 (2000). At trial, when the prosecutor asked the informant about prior drug deals with defendant, defense counsel objected twice and the trial court sustained both objections. The informant, in fact, never testified about any prior drug deals because of the objections. Moreover, to the extent that defendant contends that the prosecutor's questions themselves were improper and that no instruction could cure it, we disagree. The trial court instructed the jury that the lawyers' questions were not evidence, that only the answers given by the witnesses were evidence, and that the jury's decision should be based only on the evidence and not on the judge's rulings. See *People v Bahoda,* 448 Mich 261, 281; 531 NW2d 659 (1995).

Under these circumstances, the "failure" of defense counsel to move for a mistrial was not in any way deficient because counsel successfully kept out evidence of any prior drug deals between the informant and defendant by objecting to the prosecutor's questions.

With respect to the argument that defense counsel was ineffective for failing to object to the police officer's reference to a photograph of defendant, which defendant asserts suggested that defendant had a criminal history and the police had a "mug shot" of him, we find that the lack of objection was not prejudicial to defendant. *Toma, supra* at 302-303. Here, there was no reference or testimony to a "mug shot" and, there was no indication that the photograph belonged to police or was contained in any police "picture book." The scant reference to "a photograph" or "picture" in this case, without more, "had no logical capacity to inform the jury of [defendant's] previous contact with the police, much less of the nature of any allegedly 'prior bad acts.'" *People v Wilson*, 242 Mich App 350, 354; 619 NW2d 413 (2000). Therefore, defendant has not shown that defense counsel's failure to object to the reference to the photograph prejudiced him in any way.

II

Defendant next argues that the chain of evidence of the cocaine was never established at trial and that defense counsel was ineffective for stipulating to the chain of evidence.

Defendant's contention that the police search of the informant before the buy lacked thoroughness relates to defendant's trial theory, which was that the informant hid the drugs on his person before the buy and did not actually purchase any cocaine from defendant in order to ensure a successful buy, to earn money from the police, and to avoid getting "burned" by furthering the investigation which would ultimately lead to defendant's arrest. This theory was one to be evaluated by the jury, based on the credibility of the witnesses, and was one which defense counsel explored thoroughly at trial. This Court will not interfere with the jury's role of judging credibility and weighing evidence. *People v Wolfe,* 440 Mich 508, 514-515 ; 489 NW2d 748 (1992).

Defendant's other contention is that defense counsel's stipulation to the chain of custody of the cocaine after it was turned over to the police constituted ineffective assistance of counsel. Initially, we note that defendant's proffered defense at trial was that of mistaken identity; defendant argued that he was not present during the incident, and that the informant and police officer had mistaken defendant for someone else. Given the mistaken identity theory, defendant has not shown that stipulating to the chain of custody of the cocaine did not constitute sound trial strategy. *Toma, supra* at 302.

Furthermore, there was ample evidence regarding the chain of custody and no basis upon which to challenge it. A perfect chain of custody of cocaine evidence is not required. *People v White*, 208 Mich App 126, 132-133; 527 NW2d 34 (1994). In this case, the chain of custody of the cocaine was substantially complete, any gaps could be reasonably inferred, and an adequate foundation for the admission of the cocaine was laid. Consequently, defense counsel was not ineffective for stipulating to the chain of custody of the cocaine because defendant has not proven that defense counsel was either deficient or that the deficiency was prejudicial. *Toma, supra,* at 302-303.

III

Next, defendant argues that there was insufficient evidence to establish the element of identification beyond a reasonable doubt and that defense counsel was ineffective for failing to request an identification jury instruction.

In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe, supra* at 515.

The record indicates that the informant and police officer identified defendant as the individual who sold the drugs to the informant. The informant had known defendant for five or six years. Both the informant and police officer were in close proximity with defendant during the transaction. To the extent that defendant's argument is that both the informant and police officer failed to provide credible testimony and should not have been believed for various reasons, we will not interfere with the jury's role of deciding the weight and credibility to be given witness testimony. *Id.* at 514. There was ample evidence to support the element of identification.

Defendant further argues that the evidence supporting the identification was so weak that defense counsel was ineffective for failing to request the identification instruction, CJI2d 7.8. A review of the jury instructions reveals that they accurately informed the jury about how to view and consider the testimony given and accurately reflected the burden of proof and the elements of the crime. *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000). The record indicates that it was clear that identification was an issue and that the jury was informed that the prosecution needed to prove beyond a reasonable doubt that defendant sold the drugs. Because the jury was properly instructed on the applicable law, defense counsel was not ineffective for failing to request an identification instruction.

IV

Defendant next argues that the trial court erred by failing to sua sponte give the identification instruction, CJI2d 7.8. As we have stated in issue III, *supra*, the instructions in this case accurately informed the jury about how to view and consider the testimony that was given and accurately reflected the burden of proof and elements of the crime. The trial court specifically instructed the jury that it had to find beyond a reasonable doubt that defendant delivered a controlled substance. Under these circumstances, no error occurred during the jury instructions. *Lee, supra* at 184.

V

Lastly, defendant argues that the prosecutor engaged in misconduct in both opening statement and closing argument by referring to defendant as a "businessman" and implying that defendant sold drugs on a regular basis.

Opening argument is the appropriate time to state the facts to be proven at trial. When a prosecutor states that evidence will be presented, which later is not presented, reversal is not

required if the prosecutor acted in good faith, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and the defendant was not prejudiced by the statement, *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997).

As discussed in issue I, *supra*, the prosecutor sought to introduce evidence of other "bad acts" in which defendant had allegedly sold drugs to the informant. Such evidence was never introduced, however, because defense counsel objected successfully that no notice had been given under MRE 404(b)(2). Although the prosecutor's remarks implied that defendant engaged in drug sales on a regular, ongoing basis, and there was no evidence admitted at trial to support that implication, we find that defendant was not prejudiced by the prosecutor's remarks. In light of the informant's and police officer's testimony, as well as the trial court's instructions regarding statements made by the lawyers, we conclude that any improper implication drawn from the prosecutor's opening remarks did not prejudice defendant.

Defendant also takes issue with similar remarks that the prosecutor made at closing argument. Although the evidence did not support the prosecutor's multiple inferences made at closing argument, there was no objection made to the prosecutor's remarks. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). In this case, had defendant objected at the time the comments were made, a curative instruction would have eliminated any possible prejudice. Moreover, we again note that the trial court instructed the jury on more than one occasion that the questions and statements made by the lawyers were not evidence, thereby dispelling any prejudice. *Bahoda, supra* at 281.

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell