STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IRVIN FOSTER,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 152358
LC No. 91-006183

Before: Reilly, P.J., and Sawyer and W.E. Collette,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and conspiracy to deliver 50 grams or more but less than 225 grams of cocaine, MCL 750.157a; MSA 28.354(1) and MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). For those respective convictions, he was sentenced to life imprisonment and ten to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant's convictions arose out of a drug transaction involving himself, codefendant Miguel Hermosillo, and an undercover police officer (Michigan State Trooper Tracey McAndrew). McAndrew contacted Hermosillo who in turn contacted defendant regarding McAndrew's request for two to four ounces of cocaine. McAndrew brought $2,700 to Hermosillo's house. When defendant arrived in a vehicle, Hermosillo went to defendant's vehicle with McAndrew's money. Both defendant and Hermosillo were arrested as they began to drive away. More than 650 grams of cocaine was found in the back seat of the vehicle, and approximately 56 grams (two ounces) was found in the front seat along with the $2,700.

Defendant first claims that he was not arraigned on the conspiracy count, that he was not examined on the formal charge of conspiracy nor did he intelligently waive that right, and that therefore the submission to the jury of the conspiracy count reversibly tainted the jury's deliberation. We do not agree. We note initially that defendant did not file a motion to quash, nor did he object to the

* Circuit judge, sitting on the Court of Appeals by assignment.

information. Arguably, the issue is not preserved for appellate review. See *People v Hernandez,* 80 Mich App 465, 468; 264 NW2d 343 (1978).

In any event, we are not persuaded that defendant's claim requires reversal. At defendant's first court appearance, which was more than six months before trial, the prosecutor moved to add the conspiracy count. Defendant appeared for the preliminary examination, acknowledged on the record that he was charged not only with possession with intent to deliver 650 grams or more of cocaine but also with conspiracy to deliver and delivery of 50 grams or more but less than 225 grams of cocaine, and then waived preliminary examination. Defendant's return to the circuit court did not include the two lesser counts involving 50 to 224 grams, and an amended information was issued to provide that defendant was charged with all three felonies. Importantly, at the calendar conference more than five months before trial, defendant acknowledged on the record that he was charged with all three felonies. In light of these facts, we conclude there was no unfair surprise, inadequate notice or insufficient opportunity to defend. *People v Fortson*, 202 Mich App 13; 507 NW2d 763 (1993).

Defendant next claims that, even though there was no objection, the admission of evidence of the coconspirator's guilty plea and the reference to that plea in the instructions resulted in manifest injustice. We do not agree. Not only did defendant fail to object to the admission of evidence of Hermosillo's plea (except to state that he had not had much time to "digest" the information), defendant also, in an attempt to undermine Hermosillo's credibility, cross-examined him about the consideration received in exchange for that plea. We will not allow a defendant to use the plea information to undermine Hermosillo's credibility at trial and then allow him to argue on appeal that introduction of evidence of the plea was prejudicial. *People v Dowdy,* 211 Mich App 562, 572; 536 NW2d 365 (1985).

Defendant next claims that the trial court erred in denying his motion to suppress the drugs found in his vehicle because the police did not have probable cause to search his vehicle and because his warrantless arrest was based on nothing more than mere suspicion. We again disagree. There was testimony that Hermosillo arranged for his source to drop off the drugs at that location, that the entire operation was under surveillance, that Hermosillo identified the driver of the vehicle as his source and that the surveillance officers were told by McAndrew that the vehicle was pulling away. Thus, the police had probable cause to believe that the vehicle contained drugs and that defendant was in possession of the drugs that McAndrew had arranged to buy. The trial court did not clearly err in denying defendant's motion to suppress. *People v Burrell,* 417 Mich 439, 448; 339 NW2d 403 (1983).

In two separate issues, defendant claims that judicial interference and bias prevented him from presenting his sole defense (i.e., that Hermosillo was not credible) and that, as a result, he was denied a fair trial. Although we agree with defendant that the trial court's involvement with the cross-examination of Hermosillo was excessive, and that the court exhibited behavior this Court has previously admonished, the evidence against defendant was overwhelming. Moreover, defendant's defense that Hermosillo was not credible and that "a reasonable construction of the evidence was that it was Hermosillo, not defendant, that [sic] had the cocaine," is without support in the record. Hence, any

error was harmless. *People v Davis*, 216 Mich App 47, 51; ___ NW2d ___ (1996); *People v Conyers*, 194 Mich App 395; 487 NW2d 787 (1992).

Defendant next claims that the sentence of mandatory life without the possibility of parole for possession with intent to deliver 650 grams or more of cocaine is cruel or unusual on its face as well as in the circumstances of this case. We do not agree. *People v Fluker*, 442 Mich 891; 498 NW2d 431 (1993).

In two separate issues, defendant claims there was insufficient evidence of both possession with intent to deliver 650 grams or more of cocaine and conspiracy to deliver 50 or more but less than 225 grams of cocaine. We do not agree. As to the possession with intent to deliver, there was testimony that defendant was Hermosillo's source, that defendant arrived in response to Hermosillo's call for two ounces of cocaine, that the larger amount in the back seat had defendant's thumb print on it, that suspected narcotics ledgers were found in defendant's wallet, that defendant was wearing a beeper, and that a search of defendant's residence produced packaging material for a kilogram of cocaine.

As to the conspiracy, there was testimony that defendant inquired about the purchaser, determined he would sell only two and not the four ounces of cocaine which the purchaser wanted, and asked that the delivery be at a bar rather than Hermosillo's house. Further, Hermosillo testified that he himself never had any narcotics. A rational jury could have found the essential elements of both crimes to be proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992).

Defendant next claims that, even though he waived the testimony of additional police officers as cumulative, the court's explanation of cumulative evidence implied that the testimony of Hermosillo and/or McAndrew was corroborated by eyewitnesses, as compared to "generic" witnesses, thereby effectively stipulating to the testimony of the police officers and denying defendant his right of confrontation. The issue is not preserved for appellate review, and the record indicates that defendant will not suffer manifest injustice by our refusal to address it. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

In three separate issues, defendant asserts the following instructional errors: First, that the instructions on presumption of innocence, reasonable doubt, and burden of proof, which were in accordance with those in CJI2d, were inadequate to convey the seriousness of the crime and gravity of the penalty; second, that the instruction on the law of admissibility of a coconspirator's plea had the effect of instructing the jury to find guilt as to conspiracy if they believed Hermosillo; and third, that the instruction on the elements of conspiracy could be construed to violate Wharton's rule[1] and may have permitted a conviction based on Hermosillo's, not defendant's, intent. There was no objection to the instructions, and on careful review of the record we find no manifest injustice. *People v Van Dorsten*, 441 Mich 540; 494 NW2d 737 (1993); *People v Freedland*, 178 Mich App 761; 444 NW2d 250 (1989).

Defendant next argues that the jury verdict of guilty on the conspiracy charge was against the great weight of the evidence. However, defendant failed to move in the trial court for a new trial, and so

the issue is not preserved for appellate review. *People v Patterson*, 428 Mich 502; 410 NW2d 733 (1987); *People v Anglin*, 111 Mich App 268; 314 NW2d 581 (1981).

Finally, defendant claims that the trial court erred in admitting Hermosillo's hearsay statements to McAndrew because a conspiracy was not shown by a preponderance of evidence independent of that hearsay. We do not agree. Hermosillo's in-court testimony, along with the rest of the prosecution testimony, proved a conspiracy by a preponderance of the evidence, independently of Hermosillo's hearsay statements to McAndrew. *People v Vega*, 413 Mich 773; 321 NW2d 675 (1982). Thus, the statements were properly admitted into the trial.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ David H. Sawyer
/s/ William E. Collette

[1] Wharton's rule "states that an agreement by two persons to commit a substantive crime cannot be prosecuted as a conspiracy where the crime itself necessarily requires the participation and cooperation of two persons." *People v Carter*, 415 Mich 558, 570-571; 330 NW2d 314 (1982).