STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE J. CAUSEY,

Defendant-Appellant.

UNPUBLISHED
January 16, 1998

No. 180059
Oakland Circuit Court
LC Nos. 93-124614 FC
93-128983 FC

Before: Fitzgerald, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver more than 650 grams of cocaine, MCL 750.157(a); MSA 28.354(1), possession with intent to deliver more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). Defendant was sentenced to two statutorily-mandated terms of life without parole for the conspiracy and possession convictions and two years' imprisonment for the felony-firearm conviction. The sentences run consecutive to each other. MCL 333.7401(3); MSA 14.15(7401)(3) and MCL 750.227b(2); MSA 28.424(2)(2). Defendant now appeals as of right. We affirm.

Defendant's convictions arise out of a controlled delivery of cocaine on March 31, 1993. The transaction was initiated by Jack Griffith, who was in prison in North Carolina on federal charges. Griffith approached Henry Guzman, a government informant with whom he was imprisoned, and Guzman introduced him to Enricke Vargas, another government informant. Griffith provided Vargas with defendant's pager number, and he, Vargas, defendant, and DEA Agent Tim Smith began negotiating the transaction.

Defendant first argues that the trial court erred in determining that the circumstances surrounding his conviction did not constitute entrapment. Whether entrapment occurred is a question of law for the trial court to decide. *People v Patrick*, 178 Mich App 152, 154; 443 NW2d 499 (1989). The trial court must make specific findings of fact when rendering its decision, and this Court reviews those findings under the clearly erroneous standard. *Id.*

The purpose of the entrapment defense is to deter law enforcement officials from instigating or manufacturing a crime by a person who would not otherwise commit the crime. *People v Juillet*, 439 Mich 34, 52 (Brickley, J); 475 NW2d 786 (1991). Michigan has adopted an objective test for determining whether entrapment has occurred. *Id.* at 53. In *People v Fabiano*, 192 Mich App 523, 525-526; 482 NW2d 467 (1992), this Court concluded that entrapment can be found in one or both of the following two circumstances: "(1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the Court." *Id.* at 526. Where the police do nothing more than offer a defendant the opportunity to commit a crime for which he is later convicted, entrapment will not be found. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997).

The first prong of the entrapment test looks to "whether the government activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity." *People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992). A number of factors are relevant to determining whether entrapment has occurred under this prong:

> (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. [*Id.* at 661-662.]

The second prong analyzes whether the police conduct "run[s] afoul of the basic fairness required by due process." *Id.* at 663. The fact that the government supplied contraband is not reprehensible per se, but is one factor to consider. *People v Jamieson*, 436 Mich 61, 88-90 (Brickley, J); 461 NW2d 884 (1990). Similarly, the use of undercover agents is not reprehensible per se. *People v Nixten*, 160 Mich App 203, 208; 408 NW2d 77 (1987), on remand 183 Mich App 95; 454 NW2d 160 (1990). Where a person who is not a law-enforcement official acts with official encouragement or assistance, he is treated as a government agent for purposes of an entrapment defense. *People v Jones*, 165 Mich App 670, 674; 419 NW2d 47 (1988).

Given the circumstances of this case, the trial court correctly held that entrapment did not occur. Guzman testified that Griffith approached him, asking if they could make some money. According to Guzman, Griffith indicated he knew some people to whom he could sell cocaine. After speaking to his control agent, Guzman introduced Griffith to Vargas, who was also cooperating with the government.

After an attempted transaction in Miami failed, Griffith told Vargas that he knew someone in Detroit who could handle the deal; Griffith provided Vargas with defendant's pager number.

The evidence in the record establishes neither that the government induced defendant to commit the crime nor that the government engaged in reprehensible conduct. Testimony indicated that it was defendant who consistently suggested the amount of cocaine during the negotiations. Defendant was able to raise $50,000 – half the purchase price – for the five kilograms. Furthermore, defendant had both a pager number and a cellular phone number where he could be contacted. Finally, defendant admitted that when he went to Smith's hotel room, he intended to give Smith the money, take the cocaine, and either wait for Griffith to contact him or sell the drugs to raise the money Griffith needed.[1]

Defendant next argues that the prosecutor's conduct deprived him of a fair trial. Defendant asserts that the prosecutor argued and elicited testimony that Griffith was not acting as a government informant, but that evidence produced at Griffith's trial indicated that the prosecutor was aware that Griffith was acting as an informant. Questions of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). This Court must evaluate the remarks in context to determine whether defendant was denied a fair and impartial trial. *Id.* Prosecutorial arguments should be considered in light of defense counsel's arguments. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

After reviewing the record from defendant's trial, as well as the evidence produced at Griffith's trial, we conclude that the prosecutor did not engage in any prejudicial misconduct. The evidence produced at Griffith's entrapment hearing and trial supports the prosecutor's assertion that Griffith was not acting as a government informant in this case and his assertion that he could not bring Griffith to Michigan at the time of defendant's trial. Therefore, the prosecutor did not knowingly present false testimony. Furthermore, defense counsel repeatedly emphasized in closing argument Griffith's absence from defendant's trial. The prosecutor did not err in responding to this argument by explaining Griffith's absence.

Defendant next argues that the trial court's instructions omitted an essential element of the conspiracy charge because they failed to identify with whom defendant conspired, making it impossible to determine whether the jury's verdict might have been based on defendant's discussions with government informants and DEA agents, who cannot conspire to commit a crime, or an accomplice, who could. Because defendant failed to object to the jury instructions, we consider this issue only to determine whether the trial court's failure resulted in manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

The trial court's instructions did not omit an essential element of the crime of conspiracy. The trial court gave the standard jury instructions on conspiracy. See CJI2d 10.1-10.3. The trial court also instructed the jury on specific intent. CJI2d 3.9. The instructions do not require the trial court to identify with whom defendant conspired. However, a review of the record reveals that the prosecution clearly explained that the conspiracy was between defendant and Griffith. Moreover, the jury instructions required the jury to find that defendant and another person knowingly agreed to *commit the crime*. The evidence clearly demonstrated that Vargas, Guzman, and Smith intended to *assist the*

government in its investigation. Thus, they could never have possessed the intent to commit the crime, and the instructions precluded the jury from considering them as co-conspirators.

Defendant next argues that the trial court abused its discretion by allowing the jury to consider statements made during transactions committed after defendant's arrest. The prosecutor offered evidence that after defendant's arrest, arrangements were made for Griffith to receive his profits for brokering the transaction. Two weeks after defendant's arrest, two officers presented $20,000 to Marjorie Miller at a shopping mall in Miami. The money was contained in a clear flower box. Tape recordings of the meeting, as well as the arrangements concerning the meeting, were played for the jury. Defendant contends that this evidence was not admissible because his role in the conspiracy had ended. We disagree.

To be admissible under MRE 801(d)(2)(E), the statement of a co-conspirator must be made "during the course and in furtherance of the conspiracy." Arrest generally terminates one's participation in a conspiracy. *People v Ayoub*, 150 Mich App 150, 154; 387 NW2d 848 (1985). In *Ayoub, supra*, this Court concluded that the conspiracy ended before the taped conversation at issue was made, and therefore that the transcript of the conversation was inadmissible against defendant at trial. *Id.* at 154-155. This Court found no evidence that the conspiracy was continuing because the only evidence offered was that the defendant and his co-conspirator concentrated on covering up the original conspiracy. Therefore, the taped conversation was not made "to advance the common objective and criminal purpose." *Id.*

We believe that the present case is distinguishable from *Ayoub*. In the present case, the statements were made to advance the common objective and criminal purpose of the conspiracy, which was to raise money for Griffith by brokering a cocaine transaction. Thus, the conspiracy did not end until Griffith received his profit. Given the nature of the drug transaction at issue, we find that the trial court did not abuse its discretion by admitting the evidence. See *People v Scotts*, 80 Mich App 1, 5-6; 263 NW2d 272 (1977).

In any case, even if the statements were inadmissible, the error was harmless in light of the other evidence on the record. See *People v Cadle*, 204 Mich App 646, 653; 516 NW2d 520 (1994), on remand 209 Mich App 467; 531 NW2d 761 (1995). A number of other taped conversations were admitted into evidence, including several videotapes of meetings between Smith and defendant. Given the evidence, we conclude that the error would not have provided independent grounds for reversal. *Cadle, supra.*

Finally, defendant argues that his mandatory consecutive sentences are disproportionate, that they constitute cruel and unusual punishment, that they are not authorized by statute, and that they violate principles of double jeopardy. However, Michigan courts have rejected all of defendant's arguments concerning this issue. First, the sentences are authorized by statute. In *People v Denio*, 454 Mich 691, 704-705; 564 NW2d 13 (1997), the Supreme Court concluded that because the consecutive sentencing provision constitutes a "penalty" within the meaning of the conspiracy statute, MCL 750.157a; MSA 28.354(1), the trial court properly imposed the defendant's cocaine conspiracy sentence to run consecutive to his marijuana conspiracy sentence. Moreover, the Court concluded that

sentencing the defendant consecutively for an enumerated drug offense and for conspiracy to commit that offense did not violate the federal or Michigan double jeopardy provisions, even where the offenses were committed in the same criminal transaction. *Id.* at 695-696.

Additionally, the Supreme Court has rejected defendant's cruel and unusual punishment argument. In *People v Fluker*, 442 Mich 891, 891-892; 498 NW2d 431 (1993), the Court clarified its ruling in *People v Hasson*, cited as *People v Bullock* 440 Mich 15; 485 NW2d 866 (1992). In *Bullock*, the Court concluded that the mandatory life imprisonment provision constituted cruel and unusual punishment under the Michigan constitution for those defendants convicted of mere possession of greater than 650 grams of cocaine without any intent to sell or distribute. *Id.* at 37-38. However, in *Fluker* the Court explained that *Bullock* distinguished between possession and delivery and concluded that *Bullock* should not be extended to delivery cases. *Fluker, supra,* at 891-892; see also *People v Poole*, 218 Mich App 702, 715-716; 555 NW2d 485 (1996). Because defendant's conviction involves possession with intent to deliver and not mere possession, his mandatory life sentences do not constitute cruel and unusual punishment.

Finally, defendant argues that his sentence is extraordinarily severe and disproportionate. However, the *Milbourn*[2] principle of proportionality does not apply to legislatively mandated sentences. *Poole, supra,* at 715, n 6 (citing, *Bullock, supra,* at 34, n 17). Therefore, defendant's consecutive sentences were appropriate under the circumstances.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] The admission was made at a pre-trial hearing; defendant did not testify at trial.

[2] *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).