STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE GROVER,

Defendant-Appellant.

UNPUBLISHED
January 16, 1998

No. 183793
Kent Circuit Court
LC No. 93-61733-FH

Before: Hoekstra, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of delivery of under fifty grams of cocaine, MCL 333.74001(2)(a)(iv); MSA 14.15(2)(a)(iv), and conspiracy to deliver less than fifty grams of cocaine, MCL 750.157(a); MSA 28.354(1). He was sentenced to five consecutive terms of two to twenty years' imprisonment. Defendant now appeals as of right. We affirm.

I

Defendant first argues that the trial court improperly admitted certain evidence which resulted in an inference that defendant was a "dangerous" drug dealer known to police through prior investigations. We initially note that none of the following testimony cited in this regard was objected to by defendant. The standard of review for unpreserved error is set forth in *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). The *Grant* Court considered the concept of issue preservation in general in addressing whether an instructional error could be considered if no objection had been tendered at trial. The Court cited MRE 103 and prior decisions for the proposition that "issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *Id*. at 546. The Court found the federal standard for unpreserved, nonconstitutional error set forth in *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), to be instructive. The *Olano* Court developed a three-part test for determining whether such error could be considered: (1) there must be an error, (2) the error must be "plain," that is, it must be clear or obvious, and (3) the plain error must affect substantial rights, meaning that the error is prejudicial and

has affected the outcome of the proceedings. *Grant*, *supra* at 548-549, citing *Olano*, *supra* at 123 L Ed 2d 518-519. Relying on this language, the *Grant*, *supra* at 553, Court stated:

> [P]roper interpretation of the term "prejudice" in the context of issue preservation for plain error may be equated with the long-standing state precedent of outcome determination. . . .In other words, a plain, *unpreserved* error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic. [Emphasis in original.]

We review the following allegations of error in light of this standard.

Defendant maintains that one of the investigating undercover police officers, Sergeant Rozema, should not have been allowed to testify that his job was to make sure that controlled substances purchases were done "safely" and that it was his job "to make sure that my officers go home at night to their families in the same way they came to me in the morning." Sergeant Rozema also testified that in a typical investigation of controlled substances, the police usually "start at a low level and work our way up the pyramid," from the "crackheads" up to the "bigger dealers" and the "people who are supplying it."

Defendant contends that this testimony was irrelevant and prejudicial under MRE 401 and 403 because it overemphasized the element of danger and improperly inferred that defendant was a very dangerous man, a major cocaine dealer, and a threat to the community, contrary to the evidence which, from defendant's point of view, did not establish him as the supplier and involved relatively small amounts of cocaine. Defendant maintains that this perception was enhanced when another police officer testified that eighty people were arrested in the undercover operation, giving the impression that defendant was part of a "bigger project" and was at the top of the pyramid in drug dealing. We disagree.

Sergeant Rozema's testimony accurately characterized the general nature of undercover drug surveillance and was relevant to explain the nature of the particular investigation which lead to the arrest of defendant. The police proceeded cautiously by setting up surveillance units and engaging in several drug transactions over an extended period of time with an addict, Cindy Moore, and her boyfriend, Bob Jost. The police were trying to ascertain the identity of a drug supplier known only as "Eddie." Thus, the drug users were not arrested until the supplier's identity was confirmed. The contested issue at trial was whether defendant was the person who supplied drugs to the intermediaries, Moore and Jost, and the undercover officer. The officers were unable to personally identify defendant as the supplier. However, after several transactions in which the same green blazer arrived on the scene, corresponding with the delivery of drugs, the police were able to trace the license plate number of the blazer to a vehicle of the same description belonging to defendant. Police also followed the blazer to defendant's address. Cindy Moore also testified at trial that she was well acquainted with defendant and that he was the supplier. Thus, there was ample evidence from which the jury could believe, as it chose to, that defendant was in fact a drug supplier who could be categorized as higher up in the drug hierarchy.

Defendant also alleges that Sergeant Rozema "swung into full gear as an advocate" when he testified that an undercover officer wears a transmitter not only for safety reasons but also because if transactions were not recorded, a defense attorney would argue that it was poor police work. Defendant argues that this comment amounted to prejudicial editorializing by a witness. While we agree that the comment was unsolicited and irrelevant, defendant did not object and this lone remark certainly did not affect the outcome of the trial. *Grant, supra*.

Defendant alleges further error in comments by police witnesses that the police had pictures of defendant and knew who he was from "prior investigations." Cindy Moore also testified that she obtained drugs from "Eddie before." Defendant contends that the contested issue of identification was improperly influenced by references to prior bad acts contrary to MRE 404(b). To the extent that defendant suggests that these references were inadmissible, we agree. As a general rule, evidence that tends to show the commission of other criminal acts by a defendant is not admissible to prove guilt of the charged offense. *People v Delgado*, 404 Mich 76; 273 NW2d 395 (1978); *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994). However, defendant's assignment of error in this respect is not preserved for appellate review. Defendant did not object to any of the references, some of which were elicited on cross-examination by defense counsel. Moreover, the references were brief and vague as to nature of the investigations and defendant's role therein. The admission of this testimony did not change the outcome of the trial and was therefore harmless. *Grant, supra*; *Williamson, supra*; *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992).

In conjunction with the errors alleged above, defendant claims that his trial counsel was constitutionally ineffective in not objecting to the evidence complained of on appeal. Because no evidentiary hearing was held on defendant's claim of ineffective assistance of counsel, appellate review is foreclosed unless the record contains sufficient detail to support defendant's claims. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Mere failure to object to allegedly improper evidence cannot be held ineffective assistance of counsel where the record lacks sufficient detail to evaluate the claim. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). To establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and the counsel's representation prejudiced defendant, i.e., that the result might have been different but for the alleged errors of counsel. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

As our review of the alleged errors demonstrates, either there was no error at all or the error was harmless in nature, having only peripheral bearing on the decisive issue of identification, that is, whether defendant was the person who supplied the drugs which were purchased in the undercover drug operation. Cindy Moore identified defendant as the supplier, "Eddie." Other circumstantial evidence, most notably identification of the green blazer as defendant's vehicle, strongly linked defendant to the crimes. While Moore's credibility was at issue, her testimony was amply supported by the observations of the police, who during a prolonged investigation and surveillance were able to ascertain that the supplier known as "Eddie" was in fact defendant Eddie Grover. The record does not

support a conclusion that the outcome of the trial would have been different but for defense counsel's performance. *Pickens, supra.*

II

Defendant next contends that the trial court abused its discretion in precluding his cross-examination of Sergeant Rozema concerning why he did not order a traffic stop of the green blazer delivering the cocaine in order to identify the driver. Defendant argues that the testimony would have shown that the police could have established the identification of the supplier in this manner, thereby revealing that defendant was not the driver. The trial court properly precluded cross-examination regarding a possible traffic stop, noting that since the vehicle was not actually stopped, there was no point to be made on cross-examination. Inquiry into this topic would have been speculative and irrelevant. MRE 401. The trial court's restriction on this inquiry was not an abuse of discretion, *People v Blunt*, 189 Mich App 643, 651; 473 NW2d 792 (1991).

The trial court also restricted defense counsel from asking about the consideration Cindy Moore received for her testimony. A defendant has a right to elicit testimony about any consideration that a witness receives for the witness' testimony, and it is error for the prosecution to hide such information. *People v Wiese*, 425 Mich 448; 389 NW2d 866 (1986). However, the objection to this line of questioning in the instant case was sustained by the trial court, not because of the line of inquiry, but because of the argumentative nature of defense counsel's questioning. Defense counsel was asking the witness, a police officer, to comment on his opinion of the bias of Cindy Moore which, as the trial court properly noted, was a matter for the jury to determine. A witness is not allowed to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Defense counsel was free to elicit testimony on the actual consideration given to Moore and to argue before the jury that this should be considered in evaluating her credibility. However, he was not entitled to elicit from another witness that witness' subjective opinion regarding her credibility. *Id.*

III

Defendant next maintains that the trial court erred in admitting hearsay evidence concerning the color of the vehicle that had been identified by police as belonging to the supplier of the drugs. Sergeant Rozema testified that initial surveillance reports indicated that the blazer was "light blue or gray" but that it was "later determined that it was a green blazer." When asked if the color was light or dark, the witness stated that he did not know because "I didn't see it."

A witness may not testify to a matter unless the witness has personal knowledge. MRE 602. However, in the absence of objection by defendant, the error must be reviewed under the standards applied to forfeited issues. See *Grant*, *supra*. In view of the other evidence adduced at trial, which clearly established through several witnesses that the blazer was in fact green in color and registered to defendant, any error in this regard was harmless.

IV

Defendant next argues that it was error for the trial court to preclude evidence that another person, Ricky Hamilton, had used defendant's name when he was arrested. In the defense case in chief, defense counsel sought to elicit evidence that on July 17, 1992, a person had been arrested and

had identified himself to police as "Eddie Grover," the defendant. The prosecutor objected to the admission of the evidence on relevancy grounds since the present offenses occurred in November, not July, of 1992. The defense argued that the evidence directly proved its theory that defendant did not commit the crime and that someone else was using his name. The trial court responded:

> [T]he identity of the person in the blazer…is a key issue in this particular case. However, given the nature of the proofs in this particular case, I must conclude that someone else a few months earlier using Mr. Grover's name, as these records apparently indicate someone was, isn't at all probative of anything at issue in this particular case.
>
> There are only two conclusions which can reasonably be drawn from Ms. Moore's testimony. Either Mr. Grover is the person she was dealing with, or she's lying about Mr. Grover being that individual.
>
> One thing which cannot possibly be a conclusion based on the evidence in this case is a mistake on her part thinking that she was dealing with Eddie Grover when, in fact, she was dealing with someone else.
>
> If that latter conclusion were even a remote possibility, then evidence that there was, indeed, somebody who had used his name at a prior time would be probative. But her testimony here is that she's known him for some period of time, that Mr. Grover is the person that she was dealing with. That may well be rejected by the jury as credible evidence, but not because of a mistake. That's just not even a remotely realistic conclusion here. And this particular evidence is probative only of a mistake on her part thinking she was dealing with Mr. Grover when she was not.

We agree with the trial court's ruling. As the trial court noted, Cindy Moore testified that she had known defendant for a long time. Thus, there was no likelihood that she was mistaken in her identity or had somehow confused defendant with someone else who was using his name. The fact that Ricky Hamilton used defendant's name at another time and in another setting was not probative of Cindy Moore's identification of defendant as the person who delivered drugs to her. The defense was still able to argue to the jury that Cindy Moore was lying in her identification of defendant, but there was no evidence to support a potential claim that Cindy Moore could have confused defendant and Ricky Hamilton. Had there been such evidence, as the trial court indicated, then the fact that someone used defendant's name on a prior occasion would be probative. In this instance, the proffered evidence was simply not relevant. The trial court did not abuse its discretion in excluding the evidence. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

In a related matter, defendant's assignment of error in the admission of hearsay testimony showing that Ricky Hamilton was in prison at the time of the alleged offenses has not been preserved for appellate review. *Grant, supra.*

V

Defendant next contends that miscellaneous errors during the trial resulted in an unfair trial. These alleged errors have not been properly preserved for appeal and are without merit. Error is also cited in the prosecutor's questioning of defendant regarding whether he was employed at the time of trial. *People v Andrews*, 88 Mich App 115, 118; 276 NW2d 867 (1979). The prosecutor never intimated in any manner that defendant was motivated to deal drugs by virtue of poverty or unemployment. Moreover, no objection was raised to this question. We, therefore, do not find reversible error stemming from that solitary reference. *People v Martin*, 75 Mich App 6, 13-14; 254 NW2d 628 (1977); *People v Thomas Jones*, 73 Mich App 107, 109-110; 251 NW2d 264 (1976).

Defendant's argument that the trial court erred in finding that a conspiracy existed is likewise without merit. There was ample testimony that Cindy Moore and Bob Jost called a third party, later determined to be defendant, and that defendant gave them the drugs to deliver to the undercover police officer. A conspiracy may be found where two or more people agree to deliver controlled substances to a third party. *People v Betancourt*, 120 Mich App 58, 63-65; 327 NW2d 390 (1982). Moreover, the trial court correctly found that statements made by Bob Jost and Cindy Moore in furtherance of the conspiracy to deliver drugs from defendant to a third person were admissible pursuant to MRE 801(d)(2)(E).

VI

Defendant contends that the trial court committed reversible error by summarily denying defendant's request for self-representation. A defendant has a constitutional right to represent himself. US Const, Am VI, US Const, art I, § 20; Const 1963, art 1, § 13; MCL 763.1; MSA 28.854. However, "a defendant has either a right to counsel or a right to proceed in propria persona, but not both." *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996).

Defendant did not unequivocally assert his right to self-representation at the beginning of trial. *Id.* In fact, defendant never asked to represent himself. He only asked to make his own final argument, after being represented by counsel throughout the trial. The trial court responded as follows to his request:

> As you've had a lawyer speak for you all this time, Mr. Grover, and changing in midstream not only would be awkward, I think it would be inappropriate for two reasons. First of all, your right is to be represented by a lawyer or to represent yourself, not to do a little of one and a little of the other. And, furthermore, my bigger fear was that not knowing the rules as to how arguments are to be made, you would, out of ignorance and not out of malevolence, say things that were inappropriate argument and open doors to all kinds of problems and to possible rebuttal argument by the government that otherwise would not be permitted. I think, the chances are you would do yourself a lot more harm than good. Had this been at the beginning of the trial, you could have made the choice to do that. But since it was at the very end of the trial, I think it was inappropriate to change for those reasons.

The trial court's decision in this matter was entirely appropriate under the circumstances and forms no basis for reversal of defendant's conviction. *Adkins, supra*.

VII

Defendant finally argues that resentencing is required because the trial court improperly imposed consecutive sentences for delivery of cocaine and conspiracy to deliver cocaine. The conspiracy statute, MCL 750.157a(a); MSA 28.354(1)(a), mandates that a person convicted of conspiracy "shall be punished by a penalty equal to that which could have been imposed if he had been convicted of committing the crime he conspired to commit. . . . " The consecutive sentencing provision of MCL 333.7401(3); MSA 14.15(7401)(3) requires that prison terms for the pertinent drug offenses "shall be imposed consecutively with any term of imprisonment imposed for the commission of another felony." Defendant argues that conspiracy does not constitute "another felony" within the meaning of § 7401(3). He maintains that his consecutive sentence violates rules of statutory construction as well as state and federal constitutional prohibitions against double jeopardy. This argument has been recently considered and rejected in *People v Denio*, 454 Mich 691, 695-696; 564 NW2d 13 (1997):

> We hold that . . . consecutive sentences for an enumerated drug offense and for conspiracy to commit the enumerated drug offense do not violate double jeopardy, even when the offenses are committed in the same criminal transaction. We base this holding on our conclusion that the Legislature intended multiple punishments at a single trial for persons who commit a drug offense enumerated in §7401(3) and conspiracy to commit that drug offense.

See also, *People v Sammons*, 191 Mich App 351, 375; 478 NW2d 901 (1991).

Accordingly, the trial court properly imposed defendant's cocaine conspiracy sentence to run consecutively with his cocaine delivery sentence.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra