

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MCCLAIN HUNTER,

Defendant-Appellant.

UNPUBLISHED

July 7, 1998

No. 182324

Oakland Circuit Court

LC No. 93-129161-FC

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to possess with intent to deliver 650 grams or more of cocaine, MCL 750.157a; MSA 28.354(1), MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). He was sentenced to mandatory life imprisonment without parole. Defendant now appeals as of right. We affirm in part and reverse in part.

First, defendant claims that the evidence presented at trial was insufficient to show that he engaged in a conspiracy to possess with intent to deliver in excess of 650 grams of cocaine.¹ Specifically, defendant contends that the evidence was insufficient to show an agreement regarding the amount of cocaine defendant intended to deliver. We agree.

In determining whether there was sufficient evidence to sustain a conviction, 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. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); *People v McCrady*, 213 Mich App 474, 484; 540 NW2d 718 (1995).

To establish a conspiracy, a prosecutor must show a combination or agreement, express or implied, between two or more persons, to commit an illegal act or to commit a legal act in an illegal manner. MCL 750.157a; MSA 28.354(1); *People v Meredith*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995). A conspiracy to commit an offense is a specific intent crime, requiring the intent to

combine with others and the intent to accomplish the illegal objective. *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982) overruled in part on other grounds in *People v Robideau*, 419 Mich 458, 483-491; 355 NW2d 592 (1984). To convict a defendant of conspiracy to possess with intent to deliver a controlled substance, the prosecution must prove that: (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirator possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirator possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997). Therefore, although knowledge of the quantity of cocaine is not an essential element of the crime of possession with intent to deliver over 650 grams of cocaine, *People v Northrop*, 213 Mich App 494, 498; 541 NW2d 275 (1995), it is an element of the offense of conspiracy to possess with intent to deliver over 650 grams of cocaine. *Justice, supra* at 349. In other words, under *Justice*, both defendant and his coconspirator must have intended to deliver 650 grams or more of cocaine.

At trial, the prosecution presented evidence regarding an agreement between defendant and his coconspirator, Dorothy Jenkins, to possess cocaine. However, there was no evidence regarding the amount of cocaine defendant and Jenkins agreed to possess. The evidence on this issue can be summarized as follows: In January of 1993, defendant was planning a trip to Los Angeles, California. Before leaving for Los Angeles, defendant told Jenkins that he was going to send her a package and asked for her address. Jenkins admitted that she “had an agreement with [defendant] that [she] was going to sign for a package containing cocaine.” However, she acknowledged that she did not know how much cocaine would be sent. In Michigan, the crime of conspiracy is complete upon formation of the agreement. *Justice, supra* at 345-346. Thus, the evidence clearly established a conspiracy to possess cocaine. There was additional evidence from which the jury could infer that *defendant* intended to deliver in excess of 650 grams of cocaine. However, there was no evidence, direct or circumstantial, that Jenkins had the specific intent to combine with defendant to deliver in excess of 650 grams of cocaine to a third person. Under these circumstances, the prosecution failed to prove an essential element of the conspiracy charge, *Justice, supra* at 349, and defendant’s conviction on that charge must be reversed.²

Next, we reject defendant’s claim that his mandatory life sentence for possession with intent to deliver in excess of 650 grams of cocaine is unconstitutional. Our Supreme Court has made it clear that such sentences are constitutional. *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993); *People v Fluker*, 442 Mich 891, 498 NW2d 431 (1993); *People v Loy-Rafuls*, 442 Mich 915; 503 NW2d 453 (1993); *People v Poole*, 218 Mich App 702, 715-716; 555 NW2d 485 (1996). We also reject defendant’s equal protection argument. Defendant has failed to cite any legal authority for his position, and we will not search for it. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994). Finally, we reject defendant’s argument that his sentence is disproportionate. His sentence was mandatory, and the trial court had no discretion to issue a lighter sentence.

Next, defendant claims that the jury was improperly instructed, and that he was thereby denied a fair trial. We disagree. This Court reviews jury instructions in their entirety to determine whether the trial court erred so as to require reversal. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457

(1993). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

First, defendant did not request that the jury be instructed with regard to conspiracy to possess and possession of 650 grams or more of cocaine. Hence, the trial court was under no obligation to instruct the jury with regard to these offenses. *People v Beach*, 429 Mich 450, 482-483; 418 NW2d 861 (1988); *People v Binder (On Remand)*, 215 Mich App 30, 33-37; 544 NW2d 714 (1996), vacated in part on other grounds 453 Mich 915 (1996). Further, because defendant failed to refute the prosecutor's evidence that the subject package contained in excess of 650 grams of cocaine, the evidence did not support an instruction for the cognate lesser included offense of possession of less than fifty grams of cocaine. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325, amended on other grounds 453 Mich 1204 (1996); *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990); *Binder, supra* at 33-37. Because we are reversing defendant's conspiracy conviction, we will not address the trial court's failure to instruct on the cognate lesser included offense of conspiracy to possess with intent deliver less than fifty grams of cocaine.³

We also reject defendant's claim that the trial court reversibly erred in instructing the jury with regard to CJI2d 5.4(1)(b). The instruction did not prejudice defendant on the possession charge because the undisputed evidence showed that Jenkins possessed over 650 grams of cocaine. In addition, Jenkins' guilt of possession was essentially irrelevant to defendant's guilt of that crime. Because we are reversing defendant's conspiracy conviction, we need not address the impact of this instruction on that charge.⁴ Lastly, the trial court did not reversibly err in failing to sua sponte instruct the jury on an alibi defense. *People v Burden*, 395 Mich 462, 467, 471; 236 NW2d 505 (1975). Defendant does not contend that the trial judge improperly instructed the jury on the elements of the offenses or the prosecutor's burden of proof. In fact, the jury was repeatedly instructed that defendant was presumed innocent and that the prosecution must prove his guilt beyond a reasonable doubt. Moreover, the trial court properly instructed the jury on the elements of the crimes. Under these circumstances, the trial judge's failure to sua sponte instruct the jury on alibi did not constitute reversible error. *Burden, supra* at 467, 471; *People v Duff*, 165 Mich App 530, 541-542; 419 NW2d 600 (1987).

Next, defendant argues that he was denied a fair trial by repeated acts of prosecutorial misconduct. We disagree. Prosecutorial misconduct issues are decided on a case by case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* at 82-83. Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, defense counsel failed to object to the instances of alleged prosecutorial misconduct on the grounds raised on appeal. An appellate court will reverse in the

absence of objection only if a curative instruction could not have eliminated the prejudicial effect of the remarks or where the failure to review the issue would result in a miscarriage of justice. *Id.*

Having reviewed the numerous instances of alleged prosecutorial misconduct, we conclude that the prosecutor did not commit error which denied defendant a fair and impartial trial. Many of the remarks challenged were proper comments on the evidence presented at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). We conclude that the other allegations of misconduct are also without merit. First, while we question the relevance of the evidence regarding Jenkins' discussions with her former attorneys, we do not believe that the testimony constituted an attack on defense counsel. Second, it was not error for the prosecutor to argue that certain testimony was unbelievable or that the defense was not plausible. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). Third, defendant's argument that the prosecutor improperly elicited the fact that defendant refused to answer investigators' questions is not supported by the record. In fact, this information was elicited by defense counsel. Fourth, defendant failed to prove with objective evidence that the state prosecution was motivated by prosecutorial vindictiveness. *People v Ryan*, 451 Mich 30, 36-41; 545 NW2d 612 (1996). Finally, the prosecutor did not improperly vouch for his case, shift the burden of proof, or call for a conviction based on speculation. In sum, the alleged instances of prosecutorial misconduct did not deny defendant a fair trial.

Next, defendant is not entitled to reversal of his possession with intent to deliver conviction simply because the trial judge questioned a sitting juror outside of the presence of defendant and defense counsel.⁵ *People v Woods*, 172 Mich App 476, 479-480; 432 NW2d 736 (1988). Defendant has failed to show that there was a reasonable possibility that he was prejudiced by his absence during the questioning of the juror. See *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977). Defendant was not absent when evidence was presented. He was merely absent for the brief questioning of a juror regarding his ability to remain fair and impartial in light of a newspaper article he read concerning an unrelated case. See *id.* at 536. Moreover, the juror told the trial judge that he could disregard the knowledge he gained from the article and decide the case on a fair and impartial basis. Finally, it is clear that defendant was not prejudiced by the juror's exposure to the newspaper article because the same information was later revealed to the jury during the cross-examination of Jenkins.

Defendant next argues that he was denied his right to effective assistance of counsel. We conclude that counsel's performance was not deficient, nor was defendant prejudiced by it. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). The majority of defendant's allegations involve matters of trial strategy, which we will not second guess. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). The fact that these strategic decisions did not result in an acquittal does not change our analysis. In addition, most of defendant's allegations are not supported by the record, and we decline to review them. Finally, we are not persuaded that there is a reasonable possibility that, in the absence of defense counsel's alleged errors, the outcome of the proceedings would have been different. *Pickens, supra* at 309.

Defendant also argues that the trial court's comments and questions denied him a fair trial, an impartial jury, and trial by jury. We find no merit in this argument. The trial court's actions in this case were well within the bounds of proper judicial conduct.

Finally, defendant argues that the trial court's evidentiary rulings denied him a fair trial. We disagree. None of the trial court's rulings constituted an abuse of discretion.

Defendant's conviction and sentence for possession with intent to deliver in excess of 650 grams of cocaine are affirmed. His conspiracy conviction is reversed.

/s/ Joel P. Hoekstra

/s/ Myron H. Wahls

¹ Defendant does not challenge his conviction for possession with intent to deliver 650 grams or more of cocaine. Indeed, the evidence in support of this conviction was overwhelming.

² We recognize the apparent irony of this reversal, where defendant clearly had the intent to deliver the charged quantity of cocaine. However, a conspiracy is a separate crime from the underlying offense, and stems from a different societal interest. See *Justice, supra* at 347, n 22.

³ We note that, in the absence of any evidence regarding the amount of cocaine defendant and Jenkins agreed to deliver, this may have been the appropriate charge.

⁴ We note that this instruction may have been erroneous as to the conspiracy charge because it essentially instructed the jury that Jenkins had the requisite specific intent as a coconspirator. As noted above, this was an essential element of *defendant's* guilt on the conspiracy charge. *Justice, supra* at 349.

⁵ Defendant acknowledges that defense counsel waived his right to be present during the questioning of the juror.