STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORESTES SORI,

Defendant-Appellant.

UNPUBLISHED
September 8, 1998

No. 197837
Clinton Circuit Court
LC No. 96-006009 FH

Before: MacKenzie, P.J., and Whitbeck and G. S. Allen, Jr.*, JJ.

PER CURIAM.

Defendant was originally charged with possession of 225 or more grams of cocaine, MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii), possession with intent to deliver 225 or more grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), conspiracy to possess 225 or more grams of cocaine, MCL 333.7403(2)(a)(ii) and 750.157a; MSA 14.15(7401) (2)(a)(ii) and 28.354(1), and conspiracy to deliver or manufacture 225 or more grams of cocaine, MCL 333.7401(2)(a)(ii) and 750.157a; MSA 14.15(7401)(2)(a)(ii) and 28.354(1). Although the jury found defendant guilty of all four charges, based on double jeopardy concerns, the trial court sentenced defendant only on two convictions: (1) the possession with intent to deliver conviction and (2) the conspiracy to deliver or manufacture conviction. The trial court sentenced defendant to twenty to thirty years' imprisonment on each of the two convictions, with the sentences to run consecutive to each other. Defendant appeals by right.[1] We affirm.

I. Basic Facts and History

In the early morning of March 13, 1996, DeWitt Township Police Officer Michael Morgan saw Andres Moya Gomez and Diane Arizmendi sitting in a car, a red Nissan, parked at the Green Acres Motel. Officer Morgan was a "K-9 handler" and had his drug sniffing dog with him. According to Officer Morgan, Gomez and Arizmendi indicated that they were waiting for a friend. During the conversation, defendant pulled into the parking lot in a black Grand Mercury car.

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

As we will discuss in more detail later in this opinion, Officer Morgan eventually took his dog from his patrol car to sniff the exterior of the black Grand Mercury and red Nissan. Ultimately, this led to the discovery of $9,500 in cash hidden in the air filter of the black Grand Mercury and a rather large quantity of a white powder under the passenger seat where Gomez had been sitting in the red Nissan. A state police laboratory scientist later determined that the white powder consisted of cocaine mixed with other substances.

Arizmendi testified that she, defendant, Gomez and Israel Rodriguez (nicknamed "Izzy") were all involved in a common scheme to sell cocaine. Arizmendi testified that the other three people asked her to drive a "U-Haul" containing furniture and a refrigerator – in which was hidden about ten kilograms of cocaine – from Florida to Chicago in January 1996. According to Arizmendi, Rodriguez was unable to sell all the cocaine in Chicago. She testified that defendant suggested that they sell the cocaine in Lansing, leading to the transport of the cocaine at issue to Michigan.

II. The Search and Seizure Issue

Defendant contends that there was no reasonable suspicion justifying his warrantless detention by the police and that the trial court therefore erred by admitting evidence, including the cocaine and money found in the cars, seized as a result of the warrantless detention as well as by admitting statements by defendant that he contends resulted from the illegal seizure. The trial court denied defendant's suppression motion at a pretrial hearing. We review the trial court's factual findings in this regard for clear error. *People v Bloxson,* 205 Mich App 236, 245 (Holbrook, Jr., J.), 249 (Fitzgerald, J., concurring in Judge Holbrook's opinion); 517 NW2d 563 (1994). However, we review de novo as a matter of law whether an investigating officer's suspicion was reasonable under the trial court's factual findings. *Id.* The underlying facts at issue are essentially undisputed as both defendant and the prosecution in their argument below accepted for purposes of this issue the accuracy of Officer Michael Morgan's testimony at defendant's preliminary examination.

The Fourth Amendment of the United States Constitution and its analogous provision in the Michigan Constitution protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11.[2] However, when a police officer approaches an individual in a public place and merely asks questions or makes other requests for voluntary action, there is no "search" or "seizure" for constitutional purposes and the Fourth Amendment requires no level of justification for such action. *People v Taylor,* 454 Mich 580, 589-590; 564 NW2d 24 (1997).

Defendant argues that Officer Morgan unlawfully seized him by retaining his driver's license and thereby effectively precluding defendant from leaving the scene without reasonable suspicion to justify such a detention. We disagree.

At the preliminary examination, Officer Morgan testified as follows about his initial encounter with defendant and his request for defendant to produce his license:

… I walked toward that vehicle and [defendant] got out of the driver's side, he was the person driving the vehicle as it pulled into the lot, there was [sic] no other occupants in that vehicle.

And, I greeted him and asked him if he knew the two people that were sitting in the car, and I pointed to the red '91 Nissan, that Ms. Arizmendi and Mr. Moya were sitting in.

He stated, yes, that they were friends of his. At which point in time I asked him if he had any identification that I could look at. And, he provided me with a Florida ID card, and a Florida driver's license.

I gave him the ID card back, and kept the driver's license, and explained to him that I needed to make some notes in my log, for accounting for the time that I stopped to talk to them. And, it was cold out that evening, so I told him he could just go ahead and have a seat in his vehicle, where it was warm, and I'd be right with him, which he did.

I went back to my patrol car and I ran LEIN and Secretary of State checks on all three subjects and I was notified that [defendant] was suspended, out of the state of Florida.

* * *

I returned back to [defendant], and I asked him what the purpose of his visit was, where he was from, at which time he stated that he was here, looking for housing for some family that was at Guantanamo Bay, that was looking to come to the United States.

Because defendant entered into a consensual conversation with Officer Morgan, voluntarily complied with the officer's request for identification and could have reasonably expected that the officer would need a reasonable amount of time to inspect and verify the license, defendant was not seized during the first two periods of time in question. A reasonable person in defendant's position would also expect that the scope of consent in providing the police officer with his or her driver's license would include answering questions that the officer might have had after having performed a check on the license. In this regard, we note that Officer Morgan's initial communication with defendant was in English. Accordingly, the officer had no basis to conclude that defendant would be unable to carry on a substantial conversation in English. Thus, there was no violation of defendant's constitutional right to be free from unreasonable searches and seizures as a result of this consensual interaction with Officer Morgan because it did not involve a "search" or "seizure." *Taylor, supra.*

It is true when Officer Morgan instructed defendant to leave the car he was occupying and proceeded to pat him down, defendant was seized within the meaning of the constitutional protections, and reasonable suspicion was required to justify that seizure. *People v Champion,* 452 Mich 92, 98-

99; 549 NW2d 849 (1996). However, by that point, Officer Morgan had reasonable suspicion to detain defendant for an investigatory stop, with or without defendant's consent, based on information obtained during the LEIN check and the inconsistent statements about their reasons for being at the motel provided to Officer Morgan by Arizmendi and Gomez, on the one hand, and defendant, on the other, coupled with Officer Morgan's testimony indicating that he knew the motel was a place with many problems with drug trafficking. See *People v Nelson*, 443 Mich 626, 636-637; 505 NW 266 (1993) (while a person simply being in a "high crime area" does not provide reasonable suspicion for an investigatory stop of that person, together with other circumstances it may form a basis for reasonable suspicion). Accordingly, defendant has not established that the trial court erred by admitting evidence seized as a result of defendant's brief detention.[3]

III. Sufficiency of the Evidence

Defendant contends that the prosecution presented insufficient evidence to show that he possessed the cocaine with an intent to deliver or that he conspired to deliver the cocaine. We disagree. Challenges to the sufficiency of the evidence require this Court to review the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that all essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

First, in order to prove possession with intent to deliver more than 225 grams of cocaine, the prosecution must show that (1) the substance underlying the charge contains cocaine; (2) the cocaine is in a mixture weighing more than 225 grams; (3) no legal authorization for the defendant's possession existed; and (4) the defendant knowingly possessed the cocaine intending to deliver it. See *id*. at 516-517 (enumerating analogous elements of possession with intent to deliver less than fifty grams of cocaine). Testimony from a state police laboratory scientist, linked with the requisite chain of evidence testimony, was sufficient to establish that the substance at issue contained cocaine.

Possession may be actual or constructive and joint possession can exist with more than one person actually or constructively possessing cocaine. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); *Wolfe, supra* at 520. The test is, after giving due consideration to the totality of the circumstances, whether there exists "a sufficient nexus between the defendant and the contraband." *Id*. at 521. "The essential question is whether the defendant had dominion or control over the controlled substance." *Konrad, supra* at 271. In order to be in constructive possession of a controlled substance, a defendant need not have the drugs "on premises that he occupies but he must have the right (not the legal right, but the recognized authority in his criminal milieu) to possess them." *Id*. (Citation omitted.)

The testimony of Arizmendi indicated that defendant was part of a conspiracy to deliver the cocaine at issue. Indeed, Arizmendi testified that defendant mentioned Michigan, specifically Lansing, as a place to get rid of the cocaine that they were unable to sell in Chicago. Further, defendant intentionally placed himself at the motel, the same locale as the cocaine at issue. This was sufficient evidence to allow a reasonable jury to infer that defendant was in joint constructive possession of the cocaine at issue based on his proximity to the cocaine and his substantial authority over the cocaine

within the context of the "criminal milieu" in which he was participating. Moreover, Arizmendi's testimony that defendant and the other conspirators intended to deliver the cocaine provided sufficient evidence to support a finding beyond a reasonable doubt that defendant did not lawfully possess the cocaine and that he intended to deliver it to others. Thus, there was sufficient evidence to support defendant's conviction of possession with intent to deliver of 225 or more grams of cocaine.

To support a conviction for conspiring to possess with intent to deliver cocaine, there must be sufficient evidence showing that (1) the defendant possessed a specific intent to deliver the alleged amount of cocaine; (2) the coconspirators possessed specific intent to deliver the alleged amount of cocaine; and (3) the defendant and the coconspirators combined possessed the specific intent to deliver the same amount of cocaine to a third person. *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997). Arizmendi in her testimony described plans of the alleged conspirators, including defendant, to sell cocaine and that they were in Chicago and in Lansing. Obviously, Arizmendi was referring to selling the cocaine to people other than the conspirators in order to make money. This constituted ample evidence to support defendant's conspiracy conviction.

Also, contrary to defendant's position, his conspiracy conviction was not precluded by Wharton's Rule. Under Wharton's Rule, "an agreement by two persons to commit a crime cannot be prosecuted as a conspiracy where the target crime requires the participation of two persons." *People v Weathersby*, 204 Mich App 98, 107; 514 NW2d 493 (1994). However, Wharton's Rule is inapplicable "where the number of alleged coconspirators exceeds the number necessary to commit the target crime." *Id.* While defendant indicates that the target crime of delivery of more than 225 grams of cocaine requires the participation of at least two people, according to Arizmendi's testimony, more than two people were involved in the conspiracy. Thus, Wharton's Rule did not preclude defendant's conspiracy conviction.

IV. Jury Instruction on "Possession"

Defendant contends that the trial court provided the jury with an inaccurate and one-sided response to a juror's question about the meaning of possession. Because defendant did not object to this instruction below, our review of this issue is only for manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). However, even if defendant had properly preserved this issue, jury instructions do not constitute error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Here, a juror inquired about whether knowledge of an item's location was determinative of an individual's ability to possess the item. In its response, the trial court used an agent-principal example to convey the concept that the principal can constructively possess an item in his agent's possession without knowing the exact location of the item. This instruction accurately conveyed the concept that constructive possession may be established based on control of an item "through another person." *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). After reviewing this instruction together with the other jury instructions pertaining to possession, we are convinced that the issue of possession was fully and fairly presented to the jury in an understandable manner. We also note that the trial court in commenting on what did or did not constitute possession included an example of a

situation in which a person was not in possession of an item. Finding no manifest injustice, *Kuchar, supra*, we do not disturb defendant's convictions based on this issue.

V. Alleged Ineffective Assistance of Counsel

Defendant argues that his trial counsel was ineffective for failing to argue at defendant's sentencing hearing that substantial and compelling reasons supported a downward departure from the guidelines, for failing to ensure proper translation at trial and for failing to object to the trial court's erroneous definition of possession. In light of defendant's failure to move for relief in the trial court based on ineffective assistance of counsel, "our review is limited to the facts apparent in the lower court record." *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

During the sentencing hearing, defense counsel cited his client's alleged cooperation with police, his client's age and the fact that his client was not found in actual possession of the cocaine as reasons justifying a downward departure. Because counsel presented the trial court with arguably relevant factors to consider as mitigating circumstances, *People v Perry*, 216 Mich App 277, 280-281; 549 NW2d 42 (1996); *People v Poppa*, 193 Mich App 184, 189; 483 NW2d 667 (1992) (indicating that a defendant's post-arrest cooperation with the police may justify a downward departure), and defendant has failed to demonstrate how an alternative strategy would have been significantly more likely to be successful, we conclude that defendant has not established that defense counsel's performance fell below objectively reasonable standards. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Moreover, from the record before us, defense counsel was not ineffective for failing to object to the manner of translation of the trial proceedings because the record does not indicate that the translator exceeded his role as a translator by failing to provide substantially "simultaneous, continuous, and literal" interpretation of the proceedings, see *People v Cunningham*, 215 Mich App 652, 654-655; 546 NW2d 715 (1996) (articulating an interpreter's duty as translator of proceedings in a criminal trial). Unlike the outrageous facts in *Cunningham* that included the interpreter directly answering questions based on her personal understanding of prior portions of the testimony by the complainant in that case, *id.* at 656-657, there were no obvious inaccuracies in the translation that might have alerted defense counsel to an inadequate translator. Accordingly, no grounds for an objection existed. Based on this record, defendant has failed to show that his trial counsel was incompetent or that he was prejudiced by defense counsel's performance with regard to the manner of translation. *Pickens, supra*. Lastly, because we found no error in the trial court's answer to the jury's question regarding the issue of possession, defense counsel's performance cannot be found deficient based on a failure to object to that instruction. See *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994) (defense counsel not obligated to pursue motion that would have been unsuccessful). In sum, defendant has not established that he received ineffective assistance of counsel.

VI. Sentencing

Defendant contends that the trial court abused its discretion by failing to depart downward from the generally applicable mandatory minimum sentences for the crimes of which he was convicted and

that his sentences were disproportionate. We disagree. Defendant's sentences of twenty to thirty years on each conviction were the generally applicable mandatory minimums provided by statute for the crimes of which he was convicted. MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii) and MCL 750.157a; MSA 14.15(7401)(2)(a)(ii). Contrary to defendant's argument, the trial court did not abuse its discretion, *People v Fields*, 448 Mich 58, 65-67; 528 NW2d 176 (1995), by concluding that there were not substantial and compelling reasons to support a downward departure from the mandatory minimum sentences in light of the amount of cocaine involved and the minimal indication that defendant may, at best, have finally provided some cooperation to police on the eve of sentencing. Reasons justifying a downward departure "should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *Id.* at 67. The trial court appropriately determined that such reasons were not present in this case. Accordingly, defendant's "mandatory minimum" sentences do not violate the principle of proportionality. *People v DiVietri*, 206 Mich App 61, 63; 520 NW2d 643 (1994). We also note that the fact that sentences are imposed consecutively is immaterial to our review of their proportionality. *People v Hardy*, 212 Mich App 318, 320-321; 537 NW2d 267 (1995); *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991).

VII. Instruction on Accomplice Liability

Defendant, acting pro se in his supplemental brief, argues that the trial court's failure to issue a jury instruction sua sponte regarding the unreliability of accomplice testimony was error requiring reversal. However, this argument is without merit inasmuch as review of the trial court record indicates that the trial court sua sponte issued two instructions pertaining to the unreliability of accomplice testimony. Defendant further argues that trial counsel's failure to object to the trial court's alleged failure to issue this instruction constituted ineffective assistance of counsel. However, defense counsel's performance cannot be considered deficient where there were no grounds for an objection. *Daniel, supra*.

VIII. Alleged Prosecutorial Misconduct

Defendant also contends that he was denied a fair trial because the prosecutor improperly bolstered and vouched for the credibility of the prosecution's witness during closing arguments. Due to the lack of an objection challenging the prosecutorial remarks at issue, appellate review is precluded unless a curative instruction could not have removed the prejudicial effect or failure to consider this issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Regardless, the remarks at issue were proper. There was no indication that the challenged statements conveyed an improper "message to the jury that the prosecutor had some special knowledge or facts indicating the witness' truthfulness." *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995). The prosecutor opined that he believed the elements of the crime had been proven beyond a reasonable doubt, argued reasonable inferences from the accomplice's testimony and highlighted the inconsistencies between defendant and his codefendant's testimony. This constituted permissible argument, reasonably based on the evidence. *Id.* at 282.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ William C. Whitbeck
/s/ Glenn S. Allen, Jr.

[1] We note that some of the issues addressed in this opinion have been raised in the brief on appeal submitted by appellate defense counsel while others have been raised in defendant's pro se supplemental brief.

[2] However, we note that Const 1963, art 1, § 11 includes states, "The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug … seized by a peace officer outside the curtilage of any dwelling house in this state." Thus, while the distinction is not determinative in this case, the cocaine seized in this case would potentially be subject to suppression only if its seizure involved a violation of the Fourth Amendment as applied against the states through the Due Process Clause of the Fourteenth Amendment, not based on any violation of Const 1963, art 1, § 11. *People v Houstina*, 216 Mich App 70, 74; 549 NW2d 11 (1996).

[3] In light of our analysis of this issue, we find it unnecessary to consider the soundness of the trial court's holding that defendant lacked standing to challenge the search of the red Nissan in which the cocaine was found.