STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMIL MARDENLI,

Defendant-Appellant.

UNPUBLISHED
December 29, 1998

No. 183635
Oakland Circuit Court
LC No. 92-114169 FC

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty 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 was sentenced to mandatory life imprisonment. He appeals as of right, and we affirm.

Defendant first argues that the trial court lacked jurisdiction to try him for a conspiracy that occurred during 1991 in California. A tribunal's lack of jurisdiction may be raised at any time. *People v Erwin*, 212 Mich App 55, 64; 536 NW2d 818 (1995). The general rule is that jurisdiction is proper only over offenses committed within a court's territorial jurisdiction. *People v Blume*, 443 Mich 476, 480; 505 NW2d 843 (1993), citing *People v Devine*, 185 Mich 50, 52-53; 151 NW 646 (1915). However, under an exception to the general rule against extraterritorial jurisdiction, Michigan courts may exercise jurisdiction over acts committed outside Michigan when the acts are intended to and do have a detrimental effect within this state. *Blume, supra* at 477.

Defendant argues that the trial court lacked jurisdiction because *Blume, supra*, which was decided several years after the conspiracy at issue here occurred, overruled or expanded substantive law regarding territorial jurisdiction. We disagree. The exception articulated in *Blume*[1] had been applied by Michigan courts well before the conspiracy at issue here occurred. See *Deur v Newaygo Sheriff*, 420 Mich 440, 446-447; 362 NW2d 698 (1984), and *People v Harvey*, 174 Mich App 58, 61, n4; 435 NW2d 456 (1989), both of which relied on *Strassheim v Daily*, 221 US 280, 285; 31 S Ct 558; 55 L Ed 735 (1911). *Strassheim* involved Michigan's jurisdiction over a defendant indicted in

Michigan for bribery and obtaining money by false pretenses from the state, but who had not set foot in Michigan until after the fraud was committed. The *Strassheim* Court held that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." After quoting the foregoing, this Court in *Deur, supra* at 446-447, noted that "[i]n effect, in *Strassheim*, Michigan was allowed to apply its penal laws extraterritorially because, while not being present in Michigan, the accused was found to have committed acts outside of Michigan intending them to have a detrimental effect in Michigan." The *Blume* Court also relied on *Strassheim*. *Blume, supra* at 480.

We conclude that *Blume* did not expand the law of territorial jurisdiction, or constitute an unforeseeable interpretation of law, or otherwise violate defendant's right to due process and it thus may be applied to defendant although the offense preceded the decision. *People v Doyle*, 451 Mich 93, 99-101; 545 NW2d 627 (1996).

Defendant next argues that the trial court clearly erred in finding that he was not entrapped. We review the trial court's findings of fact concerning entrapment for clear error. *People v Patrick*, 178 Mich App 152, 154; 443 NW2d 499 (1989). Entrapment occurs 1) if the police engage in impermissible conduct that would induce a law-abiding citizen situated similarly to defendant to commit the crime, or 2) if the police engage in conduct so reprehensible that it cannot be tolerated by a civilized society. *People v James Williams,* 196 Mich App 656, 661; 493 NW2d 507 (1992). Defendant had the burden of proving that he was entrapped by a preponderance of the evidence. *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991) (Brickley, J.) When a defendant is only given the opportunity to commit a crime, or is given aid in furthering an already committed conspiracy so that the government can acquire evidence of that crime, the defendant cannot claim entrapment. *Id.* at 52-53.

There was conflicting testimony at the entrapment hearing regarding the conspiracy. On the one hand, defendant testified that Murad, an acquaintance, convinced him to arrange a deal for a supplier to sell drugs to Murad by offering him $10,000. Defendant testified that his "job" in the arrangement was simply to get Murad and a drug supplier together. On the other hand, Murad, who had lived in Michigan for twelve years and had family and friends in Michigan, testified that defendant raised the idea of selling cocaine to people Murad knew in Michigan and that it was defendant who pursued the matter. Murad testified that after defendant initiated the drug discussions, he contacted Agent Houghtaling of the Immigration and Naturalization Service's Great Lakes Task Force, with whom he had worked on alien smuggling cases, and told him about defendant. Houghtaling testified that when Murad first called him regarding defendant, Murad said that defendant told him that he had been involved in transporting cocaine for about three years and that he would only sell in quantities of a kilo or more.[2] Houghtaling contacted an FBI language specialist, Nalu, who spoke Arabic, as did defendant, and also contacted the Oakland County Prosecutor, with whom he had been working on other investigations. Houghtaling testified that Murad received no benefit or consideration for the information he provided. Nalu contacted defendant, posing as a large drug buyer in Michigan, and arranged to purchase a kilo of cocaine from defendant and the supplier defendant had obtained. Defendant testified that he arranged for a supplier, Brass, to sell cocaine to Murad before Nalu contacted him.

The trial court concluded that defendant was not credible, and was lying about his level of awareness, involvement and knowledge of what was going on and about who initiated the drug deal. After considering the two-pronged test for entrapment and giving deference to the trial court's finding that defendant was not credible, we conclude that the trial court did not err in ruling that defendant was not entrapped. *James Williams*, *supra* at 661-662. The trial court's conclusions that the government did not instigate the conspiracy and that there was no reprehensible conduct by the government were amply supported by the evidence.

Defendant next argues that his conviction should be vacated because, as a matter of public policy, Michigan should not "import" or "manufacture" crime. Because defendant did not raise this issue below it is not preserved. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). In any event, defendant's argument that the authorities "imported" the instant crime to Michigan is premised on his own version of the facts, a version contradicted by other testimony at trial. The only support defendant cites for this argument is dicta in *People v Carmichael*, 86 Mich App 418, 421-423; 272 NW2d 667 (1978), regarding a particular prosecutor's penchant for overcharging, an issue not raised in the instant case. Further, this Court's authority over the discharge of a prosecutor's duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires. *People v Barksdale*, 219 Mich App 484, 487-488; 556 NW2d 521 (1996). Because defendant has not shown that the prosecutor's decision was unconstitutional, illegal, or ultra vires, his claim fails.

Defendant next challenges the constitutionality of his mandatory life sentence. This challenge has been rejected by our Supreme Court. In *People v Bullock*, 440 Mich 15, 37; 485 NW2d 866 (1992), the Court held that a mandatory life sentence for possession of 650 grams or more of cocaine constituted cruel or unusual punishment and struck down the portion of the statute denying parole consideration. However, in *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993), the Court declined to extend the *Bullock* holding to cases involving conspiracy to possess with intent to deliver more than 650 grams of cocaine. Thus defendant's claim fails. Defendant also argues that his sentence violates equal protection, noting that had he been convicted of the instant offense in California, he would have been subject to a prison term of three to five years, and that had he been convicted under federal law he would have been subject to a prison term of not less than five nor more than forty years.[3] Defendant's equal protection challenge to the sentence is unsupported by any authority and we thus do not address it, *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), beyond noting that the prosecution's position--that a disparity between the sentencing schemes of different jurisdictions in which the prosecution could be brought does not violate equal protection—has support. See *United States v Morehead*, 959 F2d 1489, 1498-1499 (CA 10, 1992) (noting that in the absence of proof that the prosecutor's choice of forum was improperly motivated or based on an impermissible classification as a matter of constitutional law, the prosecutor's discretion to prosecute in a federal rather than state forum does not violate equal protection or due process notwithstanding the absence of guidelines for the exercise of such discretion), on reh *United States v Hill*, 971 F2d 1461 (CA 10, 1992); *United States v McCoy*, 802 F Supp 128, 130-131 (WD Mich, 1992).[4]

Defendant next argues that he was deprived of a fair trial because the trial court refused to give a requested instruction on duress. We disagree. A trial court is required to give a requested instruction

except where the theory is not supported by evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995).

We first note that defense counsel requested an instruction on duress before the prosecution called its last witness and before defendant testified. The trial court stated that it would take the matter under advisement, after which the prosecution argued that duress was inapplicable because any duress occurred after the conspiracy had been completed. The trial court at that point merely stated "Right." Defense counsel did not subsequently raise the issue and no duress instruction was read to the jury. After the jury instructions were read, defense counsel stated that he had no objections to the instructions as given.

To properly raise the affirmative defense of duress, a defendant must offer evidence that the prohibited act was done under circumstances that excuse its commission. *People v Lemons*, 454 Mich 234, 247 n 17; 562 NW2d 447 (1997). The defense is applicable in situations where the crime committed avoids a greater harm. *Id.* at 246. The prohibited act in the instant case, a conspiracy, is complete upon formation of the unlawful agreement, *People v Justice (After Remand)*, 454 Mich 334, 345-346; 562 NW2d 652 (1997); all the requisite elements of conspiracy are met when the parties enter into the mutual agreement, and no overt act in furtherance of the conspiracy is necessary. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). The crime of conspiracy is a continuing offense; presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy. *People v Denio*, 454 Mich 691, 710; 564 NW2d 13 (1997). In order to have withdrawn from the conspiracy, defendant must have taken an affirmative act. *Id.*

Defendant's argument in this regard is that after the deal was arranged and during a time when Brass, who supplied the cocaine, would not front the drugs and Nalu would not front the money, defendant wished he had never gotten involved in the entire enterprise and considered cancelling the entire transaction or his involvement in it. During this time period when the transaction was at a standstill, Brass and a cohort, whom defendant testified carried a gun, told defendant that he had better come up with the money because the drugs had already been obtained from the Mexican mafia. It is clear from the record that the alleged duress occurred after defendant and Brass agreed to obtain a kilo of cocaine for the Michigan buyer, i.e., after the conspiracy had been formed. Under these circumstances, we conclude that defendant failed to present evidence from which the jury could conclude that the fear or duress was operating on his mind at the time the agreement constituting the conspiracy was made, as required to establish a prima facie case of duress. *Lemons, supra* at 246-247, 247 n 19, 250; *People v Terry*, 224 Mich App 447, 453; 569 NW2d 641 (1997).

Defendant has not provided any authority to support his argument that duress prevented him from withdrawing from the conspiracy, nor was this argument presented below. Moreover, the law requires an affirmative act, *Denio, supra* at 710, and there was no testimony that defendant would have taken such an act but for the duress or that he could not have both arranged for payment for the cocaine and taken such an act, e.g. notified the police.

Defendant next claims that he was denied a fair trial as a result of prosecutorial misconduct. We disagree. Examined in context, the prosecutor's rebuttal remark that defendant was given a "break" did not deprive defendant of a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). It appears from the record that the prosecutor was responding to defendant's argument in closing that the prosecutor, who selected the charges, charged defendant only with conspiracy, and not with delivery or possession with intent to deliver. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977). Further, as the court explained in addressing defendant's later objection, the jury was already aware of the penalty for the offense charged.

Next, we reject defendant's claim that the trial court abused its discretion in allowing the late endorsement of a witness. The trial court gave defense counsel the opportunity to further investigate the witness after the prosecution rested, and defendant does not argue nor is it apparent from the record that he pursued the matter. Moreover, defendant was aware of the witness, as is evident from his testimony at the entrapment hearing and at trial that it was the witness, and not he, who set up the drug scheme. Further, defendant thoroughly cross-examined the witness and defendant's trial testimony refuted the witness' testimony.

Next, although defendant argues that the court abused its discretion by allowing a witness to give rebuttal testimony, he has not articulated a challenge that would require reversal. Defendant argues only that this evidence could have been presented in the prosecution's case in chief, [5] and does not argue that it was more prejudicial than probative, or that it was more prejudicial when offered in rebuttal rather than in the prosecutor's case in chief.

Lastly, we reject defendant's claim that a new trial should be ordered based on the cumulative effect of error. *Bahoda, supra* at 292, n 64.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage

[1] The defendant in *Blume* was a Florida resident who sold cocaine to Hoyt, a Michigan resident in Florida. Blume was charged with conspiracy to deliver more than 650 grams of cocaine and aiding and abetting the manufacture or possession with intent to manufacture or deliver 650 grams of cocaine. The prosecution presented evidence that the defendant was aware that Hoyt was from Michigan, but presented no evidence that the defendant intended to commit the acts charged with the intent to have a detrimental effect within this state. On that basis, the Supreme Court reversed this Court's decision to affirm the circuit court's reinstatement of the charges:

> . . . . The 'knowledge' to which the prosecutor refers only is part of the evidence necessary to support a conviction for conspiracy or aiding and abetting. But knowledge alone is not enough to exercise extraterritorial jurisdiction. The prosecutor must present

> evidence that defendant intended to commit an act *with the intent to have a detrimental effect within this state.* That intent does not exist in this case. Accordingly, we reverse the Court of Appeals decision, and reinstate the district court's dismissal of the charge. [*Blume,* 443 Mich at 477-478.]

[2] Notwithstanding, it is undisputed that defendant had no criminal record before the instant case.

[3] This is a different argument than defendant made below. In his post-trial motion challenging his sentence on equal protection grounds, defendant argued that Michigan's mandatory life sentence for conspiracy to possess with intent to deliver more than 650 grams of cocaine violated his rights to equal protection when compared with Michigan's sentence for simple possession of over 650 grams of cocaine. Defense counsel argued at sentencing, when the motion was considered, that one who possesses 650 grams or more of cocaine can be no different than one who conspires to deliver that amount of cocaine, in that in order for one to possess that large of an amount, there must have been a conspiracy somewhere along the line, either for that person to get the manufacturing ability or to deliver the cocaine to lower level buyers. Defense counsel argued that this narrow issue had not been addressed by the Michigan Supreme Court.

[4] Michigan's Equal Protection Clause does not create rights broader in scope than those offered by its federal counterpart. *Doe v Dep't of Social Services,* 439 Mich 650, 670-671; 487 NW2d 166 (1992).

[5] The question whether rebuttal testimony is proper does not depend on whether the testimony should have been presented in the case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *People v Figgures,* 451 Mich 390, 398-399; 547 NW2d 673 (1996).