STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARMEN GOMEZ, JR.,

Defendant-Appellant.

UNPUBLISHED
October 29, 1999

No. 208902
Ingham Circuit Court
LC No. 97-072181 FC

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of conspiracy to deliver, or possess with the intent to deliver, 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and delivery of, or possession with the intent to deliver, at least 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). The trial court sentenced defendant to concurrent terms of life imprisonment without parole for the conspiracy conviction and ten to twenty years' imprisonment for the delivery conviction. We affirm.

Defendant first argues that the prosecution's failure to timely provide requested discovery materials violated his right to a fair trial. We disagree.

This Court reviews a trial court's rulings on discovery matters for an abuse of discretion. *People v Lemcool (After Remand)*, 445 Mich 491, 497; 518 NW2d 437 (1994); *People v Loy-Rafuls*, 198 Mich App 594, 597; 500 NW2d 480, rev'd in part on other grounds 442 Mich 915 (1993). First, contrary to defendant's contention, the record indicates that defendant indeed received the police report from an interview with prosecution witness Roy Garza about one month before trial. The three pages allegedly missing from the report were simply attached to the back of another report the prosecution gave defense counsel the same day. Second, with respect to the other witness statements at issue, neither of whom testified at trial, while it appears that the prosecution did not turn over the documents until the day of trial, defendant has not established or even argued how the absence of these reports prejudiced his case. Moreover, the trial court adjourned the case for three days to allow the prosecution an opportunity to turn over any additional reports the defense might be missing. Therefore, because defendant has failed to demonstrate how the untimely disclosure of the reports

prejudiced his case, and in view of the overwhelming evidence substantiating defendant's guilt, we decline to disturb the trial court's ruling. See *Loy-Rafuls, supra* at 597-598; *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

Next, defendant argues that the trial court gave confusing and inaccurate jury instructions on the two charged offenses in violation of his right to due process and a fair trial such that the jury was unable to render a coherent and reliable verdict. Initially, we note that there was no objection to the trial court's instructions; to the contrary, defense counsel expressly complimented the trial court on its reading of the instructions. Accordingly, we will only review this unpreserved issue to avoid manifest injustice. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995). Manifest injustice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *People v Bartlett*, 231 Mich 139, 144; 585 NW2d 341 (1998).

Jury instructions are reviewed as a whole, rather than extracted piecemeal, to determine whether there is error requiring reversal. *Bartlett, supra* at 143. The jury instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if there is evidence to support them. *Id.* As long as the instructions fairly and accurately present the issues to the jury and sufficiently protect the defendant's rights, slight imperfections do not constitute error requiring reversal. *Id.* at 143-144; *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

Defendant first argues that the court erred in instructing the jury on the delivery charge because it advised the jury that it could find that defendant delivered cocaine *or* possessed cocaine with the intent to deliver it without indicating whether unanimity was required on one of the theories. We disagree.

MCL 333.7401; MSA 14.15(7401), states that "a person shall not . . . deliver . . . or possess with intent . . . to deliver a controlled substance[.]" This Court has previously held that when a statute lists alternative means of committing an offense, which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory. *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996). Therefore, we find no error in the trial court's instruction that the jury could convict defendant if they found that he either delivered cocaine or possessed cocaine with the intent to deliver it.

Second, defendant contends that the trial court erred in instructing the jury on the conspiracy charge because it did not define the term "delivery" during the instruction on that charge, and waited instead to define the term in conjunction with the instruction on the delivery charge. We disagree.

After instructing the jury on the two principal offenses, the trial court stated:

> Now, regarding all of the charges in count two, delivery means that the defendant transferred or attempted to transfer the substance to someone else knowing that it was cocaine and intending to transfer it to that person.

Although the trial court waited to define the term "delivery" until after instructing the jury on both of the charged offenses, it nonetheless accurately stated the definition. Moreover, during the course of instructing the jury, the trial court explicitly informed the jury that it would define "delivery" as it related to both counts after instructing on the second count. On this record, we are not persuaded by defendant's argument that the trial court's instruction confused the jury. The jury instructions, considered as a whole, accurately apprised the jury of the elements of the delivery charge and the conspiracy charge, and sufficiently protected defendant's rights. Therefore, we find no manifest injustice.

Third, defendant argues that the trial court erred by presenting the six lesser included conspiracy and delivery charges as separate, additional charges as opposed to alternative, lesser charges. We disagree.

The trial court instructed the jury as follows:

> Now, in this case, there are two different principal crimes that you may consider. When you discuss the case, you must consider those principal charges in count one and count two first. If you all agree that the defendant is guilty of those charges, you may stop discussions and return a verdict. If you believe the defendant is not guilty of those principal charges or you cannot agree about them, you should consider the various less serious charges that I've read to you. You are the ones who decide how long to spend on those principal charges before discussing the less serious charges. Now, you can go back to the more serious charges after discussing the less serious charges if you want to.

This instruction clearly advised the jury that it could only find defendant guilty of one crime under each count. Moreover, to further clarify that the lesser charges were not separate counts, the verdict form specifically indicated that the jury could "mark only one box" under each count, and the trial court explained the verdict form to the jury before presenting it. Accordingly, no manifest injustice resulted from this instruction. See *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985).

Lastly, defendant argues that the trial court erred in instructing the jury that in order to convict defendant of conspiracy, they had to find the existence of an agreement to commit one of the offenses in count one, which was the conspiracy charge, instead of count two which outlined the underlying crimes. We disagree.

The trial court instructed the jury on count one, the conspiracy charge, as follows:

> Now, regarding conspiracy, an agreement is the coming together or the meeting of the minds of two or more people, each person intending and expressing the same purpose. It is not necessary for the people involved to have made a formal agreement to commit the crime or to have written down how they were going to do it. . . . Now, *to find the defendant guilty of conspiracy, you must satisfy - be satisfied beyond a*

reasonable doubt that there was an agreement to commit one of the various offenses in count one.

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The defendant is not responsible for the acts of other members of the conspiracy unless those acts are part of the agreement or further the purposes of the agreement. *If the defendant agreed to commit a completely different crime, then he is not guilty of conspiracy to commit one of the various offenses in count one.* (Emphasis added).

Reviewing the instructions as a whole as we are required to do, *Bartlett*, *supra* at 143, the trial court's instructions clearly informed the jury that defendant was charged with conspiring to commit a drug offense, and actually committing a drug offense. Moreover, the instructions, as well as the verdict form, made clear that defendant was charged with conspiracy in count one, and with the underlying drug offense in count two. Therefore, we are not convinced that the trial court's mistaken reference to count one, when it should have referred to the offenses in count two, resulted in manifest injustice.

Next, defendant argues that the trial court erred by denying the jury's request to review the testimony of a prosecution witness in violation of MCR 6.414(H).[1] Defendant did not object to the trial court's response to the jury's question, and in fact, defense counsel expressly acquiesced to the manner in which the trial court responded to the jury's request. A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Further, this Court has previously held that the trial court's denial of a jury's request to review transcripts was not an abuse of discretion where both counsel agreed to such denial. *People v Wytcherly (On Rehearing)*, 176 Mich App 714, 716; 440 NW2d 107 (1989). Accordingly, we find no error.

Finally, defendant argues that his trial attorney rendered ineffective assistance of counsel by (1) failing to present a viable defense to the charges against him; (2) not giving an opening statement; (3) conceding defendant's guilt in closing arguments by acknowledging that defendant's statement to the police supported a finding of guilt; (4) failing to argue for suppression of defendant's confession and failing to call defendant as a witness during a pretrial motion to suppress defendant's confession; (5) failing to adequately advise defendant regarding the advantages and disadvantages of proceeding to trial; (6) failing to object when the trial court denied the jury's request to review Gary McDonald's testimony; (7) failing to object to the challenged jury instructions; and (8) failing to challenge the admissibility of defendant's confession on the basis that the investigating police officer's handwritten notes from his interview with defendant had been destroyed.

Defendant did not object to defense counsel's representation in the trial court; nor did he request a *Ginther*[2] hearing or move for a new trial on this issue. Therefore, this Court's review is limited to any errors that are apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To establish ineffective assistance of counsel, a defendant must show that his

attorney's performance was objectively unreasonable in light of the prevailing professional norms, and that, but for counsel's deficiencies, a different outcome would probably have resulted. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Moreover, defendant must overcome a strong presumption that the challenged actions constituted sound trial strategy within the wide range of reasonable professional assistance. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

After a thorough review of the lower court record, we find no apparent errors demonstrating ineffective representation by defendant's trial counsel. All of the challenged conduct is attributable to counsel's trial strategy which this Court will not second guess on appeal. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). That such strategy proved unsuccessful does not equate to ineffective assistance of counsel. See *Pickens*, *supra* at 327. Further, defendant has failed to establish that had a different strategy been employed, or had defense counsel refrained from employing certain tactics, the result of the trial would have been different. *Pickens*, *supra* at 327; *Effinger*, *supra* at 69. Finally, because we conclude that no error occurred in this case, any objections or motions based on these alleged errors would have been frivolous. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998); *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Therefore, because defendant has failed to show that the actions of his trial counsel were deficient, his ineffective assistance of counsel claim must fail.[3]

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

[1] MCR 6.414(H) states:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] Defendant submits that if this Court fails to reverse his convictions based on ineffective assistance of counsel, it should remand the case to the trial court for an evidentiary hearing on the issue. We note, however, that this Court has already denied defendant's motion to remand for an evidentiary hearing, and we decline to revisit this decision.