STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2000
v	No. 212645 Eaton Circuit Court
CARLOS TERRELL LEWIS, Defendant-Appellant.	LC No. 95-020381-FC

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to possess with intent to deliver over 650 kilograms of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant to life imprisonment without parole. Defendant appeals by right, and we affirm his conviction, but remand for resentencing.

First, defendant argues that counsel was ineffective because he made a remark in opening statement that was prejudicial to defendant. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To determine whether ineffective assistance of counsel occurred, this Court must determine (1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The performance of defense counsel is measured against an objective standard of reasonableness. *Id.* To persuade this Court that a defendant was prejudiced because counsel was ineffective, a defendant must establish a reasonable probability that, but for counsel's errors, the result would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). This Court should not substitute its judgment for that of defense counsel regarding matters of trial strategy, nor should it assess the competence of defense counsel with the benefit of hindsight. *Rockey, supra* at 76-77.

Defendant contends that the following remark by defendant's counsel in the opening statement constituted an admission of guilt:

> [I]t is somewhat different and refreshing frankly, to hear that Detroit is no longer the conduit for the drugs coming into this area, that it's just the reverse, that now this area supplies Detroit.

We disagree. Taken in context, it is apparent that this comment was intended to point out that the prosecution's theory that defendant was delivering drugs from Lansing to Detroit was both absurd and improbable. In *People v Juarez*, 158 Mich App 66, 75; 404 NW2d 222 (1987), this Court noted that a remark made in an opening statement as part of a plan consistent with defendant's argument that he was not guilty, was part of trial strategy. Here, because this remark was part of defense counsel's strategy and consistent with defendant's argument that he was not guilty, we conclude that the statement did not constitute ineffective assistance of counsel.

Defendant next argues that his counsel was ineffective for failure to request suppression of evidence of his fugitive status, as a prior bad act under MRE 404(b), which opened the door for the prosecution to ask if defendant was "picked up" on a fugitive warrant. Again we disagree. While defendant contends that evidence of the fugitive warrant was equivalent to inadmissible evidence of a prior bad act under MRE 404(b), this Court has held that actions by a defendant such as flight to avoid lawful arrest are admissible. *People v Ranes*, 63 Mich App 498, 500-501; 234 NW2d 673 (1975). Consequently, evidence of defendant's fugitive status was admissible. "Defense counsel is not required to make meritless or frivolous motions." *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Because a request to an order suppressing evidence of defendant's fugitive status would have been futile, defendant's counsel should not be deemed ineffective for failure to object to the prosecutor's questioning or failing to seek suppression of evidence of his flight to avoid arrest.

Defendant also contends his counsel's representation was deficient in failing to produce witnesses whose testimony would be favorable to defendant. The selection of defense witnesses is a strategic consideration left to the trial attorney that will not support a claim of ineffective assistance of counsel. *People v Grant*, 102 Mich App 368, 374; 301 NW2d 536 (1980). Because strategic decisions will not be second guessed by this Court with the benefit of hindsight, *Rockey, supra* at 77, defense counsel's decision not to call the witnesses did not constitute ineffective assistance of counsel.

Defendant argues that counsel was ineffective in failing to discover the criminal records and plea agreements of the prosecution witnesses. However, defense counsel brought out the criminal histories of the witnesses as well as possible motivation for bias in their testimonies on cross-examination. A defendant is required to show prejudice under a claim of unpreparedness. *Grant, supra* at 374. Consequently, since potential bias and motivation for the witnesses giving testimony at trial was revealed to the trier of fact, defendant was not prejudiced.

Next, defendant contends that counsel was ineffective when he failed to challenge the racial composition of the jury, as well as the grand jury that originally indicted him. We disagree. "A criminal defendant is entitled to an impartial jury drawn from a fair cross-section of the community." *People v*

Hubbard, 217 Mich App 459, 472; 552 NW2d 493 (1996). In order to establish a prima facie violation of the fair cross-section requirement the defendant must establish:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Id.* at 473, quoting *Durren v Missouri*, 439 US 357, 364; 99 S Ct 664, 668; 58 L Ed 2d 579 (1979).]

Here, even if minorities were underrepresented in the jury pool, the county clerk testified that the jury pool was selected at random and at the time the pool is selected, the clerk is not aware of the races of the jurors. Thus, defendant has failed to demonstrate how jurors were systematically excluded based on race. Defendant was not prejudiced by counsel's failure to raise the issue at trial.

Next, defendant argues that his conviction was not supported by sufficient evidence. We disagree. When ruling on the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the elements of the crime charged were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). A conspiracy is a "partnership in criminal purposes," in which "two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense." *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). To prove conspiracy, it must be established that the individuals specifically intended to combine to pursue a criminal objective. *Id.* However, not all coconspirators need to have knowledge of the extent of the conspiratorial enterprise. *People v Meredith (On Remand)*, 209 Mich App 403, 411-412; 531 NW2d 749 (1995). Circumstantial evidence may be used to establish an agreement. *Atley*, *supra* at 311.

Defendant argues that it cannot be inferred that, because he bought cocaine from Damon Costa on one occasion and from Tracy Edmond on other occasions, there was an agreement to possess cocaine with intent to deliver it. We disagree. In order for defendant to be convicted of conspiracy to deliver a controlled substance, it must be proven that

> (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. [*Justice*, *supra* at 349.]

Costa stated he repeatedly sold defendant cocaine. Edmond testified that he sold cocaine to defendant on three or four occasions and that he sold defendant five kilograms during their last transaction. Intent to deliver may be inferred from the amount of a controlled substance. *People v Ferguson*, 94 Mich App 137, 151; 288 NW2d 587 (1979). Edmond testified he sold defendant cocaine on consignment and defendant took the cocaine to Detroit to sell it, establishing the first element of the offense, defendant's intent to deliver 650 kilograms or more of cocaine. The evidence also demonstrated the

coconspirators had the requisite intent to deliver the cocaine and defendant and the other individuals were acting in concert with one another.

In *People v Missouri*, 100 Mich App 310, 343-346; 299 NW2d 346 (1980), this Court found that although there were buyers and sellers along the drug chain, all parties shared the knowledge that the narcotics were ultimately to be delivered to be used on the street. This Court concluded that because all parties agreed to the delivery, the defendant's conspiracy convictions could be sustained. *Id*. In the present case, the evidence established that several shipments came from Florida and that Edmond and Costa were supplying the cocaine to defendant on consignment to sell in Detroit. In the last transaction, defendant had five kilograms to be sold in Detroit. As in *Missouri*, because it is clear that all parties shared the knowledge that the cocaine was ultimately to be delivered to be used on the street, defendant's conspiracy conviction may be sustained. Because sufficient evidence was produced of a conspiracy, and that there was not merely a buyer-seller relationship, the jury had sufficient evidence to find defendant guilty of intent to deliver cocaine over 650 kilograms.

Next, defendant argues the prosecutor's "manipulation" of this case into Eaton County violated defendant's rights. Again, we disagree. This Court reviews charging decisions under an "abuse of power" standard to determine whether a prosecutor has acted in contravention of the law or constitution. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). Whenever a felony consists of or is a culmination of two or more acts done in perpetration thereof, the felony may be prosecuted in any county in which the act was committed. MCL 762.8; MSA 28.851. This statute merely requires that the defendant commit one act of a multiple-act felony in the prosecuting jurisdiction. *Meredith*, *supra* at 409. In order to establish proper venue, it is not necessary that the act constitute an essential element of the offense. *Id.* Here, the evidence demonstrates that several transactions occurred in Eaton County. Defendant bought drugs from Tracy Edmond at Daryl Sutton's home in Eaton County on several occasions. Defendant also bought drugs from Costa at the Hunter's Ridge apartment complex in Eaton County. Prosecutors have broad discretion in charging defendants and the judiciary is not to usurp that authority. *People v Farmer*, 193 Mich App 400, 402; 484 NW2d 407 (1992). No evidence has been presented in the present case that the prosecution abused its discretion by bringing the action in Eaton County.

Next, defendant argues that the prosecutor's actions deprived defendant of a fair trial. Once more, we disagree. In cases of prosecutorial misconduct, the determination must be made whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Absent an objection at trial, this Court's review of improper conduct by the prosecutor is foreclosed unless the prejudicial effect of the conduct is so serious that an objection or instruction would cure the prejudicial effect or a miscarriage of justice would result. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant argues that prosecutorial misconduct occurred where the prosecutor's office failed to turn over information regarding Clarence Woods' plea agreement. Where an accomplice or coconspirator has been granted immunity or other leniency, it is incumbent upon the prosecutor and trial judge, if the fact is brought out in trial, to disclose the fact to the jury upon request of defense counsel. *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). It has been held to be a denial of due

process where the witness testifies that he has not been promised consideration for testimony where the prosecutor knows the statement to be false. *Id.* at 173-174. A prosecutor has a constitutional duty to report to the defendant when a witness for the prosecution lies under oath and a duty to correct the false evidence. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). Here, however, the witness was not promised future consideration in exchange for his testimony. Woods was sentenced in March 1994, but defendant's trial did not take place until 1997. Thus, Clarence Woods truthfully answered when he stated he did not have a plea or sentence agreement in exchange for his testimony. Further, the focus of disclosure is to reveal factors that may motivate the witness in giving certain testimony. *Atkins, supra* at 174. Here, defense counsel questioned Woods about any motivation he may have had for providing testimony favorable to the prosecution. Consequently, the prosecutor's actions did not deprive defendant of a fair trial.

Defendant further argues that the prosecutor's remarks in closing arguments deprived him of a fair trial. We disagree. In reviewing cases of prosecutorial misconduct, this Court examines the record and evaluates the prosecutor's remarks in context on a case by case basis. *Noble*, *supra* at 660. Here, defendant objects to the prosecutor's remark in closing argument that "in modern times the fight on drugs requires you to use accomplice testimony." In making this remark, the prosecutor was not insinuating that he had some special knowledge of the truthfulness of the witnesses and was not using his office to give the witnesses for the prosecution special credibility. The prosecutor was merely rebutting defendant's claim that the witnesses were not reliable and the defense theory that the prosecutor's witnesses were biased and motivated to testify favorably in order to decrease their sentences. Given the context of the prosecutor's remarks, we conclude that defendant was not denied a fair trial.

Next, defendant argues that even if one of the trial court's errors, standing alone, would not have deprived defendant of a fair trial, the cumulative effect of several errors was enough to make a fair trial impossible and to require reversal. Because there was no error on any single issue, there can be no cumulative error. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Finally, defendant contends he must be resentenced in light of the modification of the Michigan Health Code, which is to be applied retroactively, permitting offenders who have been convicted of an offense involving a controlled substance over 650 kilograms of cocaine or greater to become eligible for parole after twenty years. See MCL 791.234(6); MSA 28.2304(6). The prosecutor concedes that defendant is correct and we agree. The Legislature intended that the 1998 amendment have the effect of making defendants previously sentenced under MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i) eligible for parole. See House Legislative Analysis, HB 4065, January 26, 1999. Consistent with this legislative intent, we vacate defendant's sentence and remand for resentencing.

Affirmed in part and vacated and remanded in part. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Michael R. Smolenski