STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2002
v	No. 226950 Oakland Circuit Court
COLLIN DENNARD PITTMAN, Defendant-Appellant.	LC No. 99-166000-FH

Before: White, P.J., and Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

Defendant was convicted by a jury of delivery of less than five kilograms or less than twenty plants of marijuana, in violation of MCL 333.7401(2)(d)(iii). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to an enhanced sentence of 2 to 15 years in prison. He appeals as of right. We affirm.

This case arises from defendant's sale of marijuana to undercover officer Darren McAllister of the Pontiac Police Department.

Defendant argues that the court erred in denying his motion to dismiss on the basis of entrapment. We disagree.

The trial court's specific findings regarding entrapment are subject to appellate review under the clearly erroneous standard. *People v Connolly*, 232 Mich App 425, 428; 591 NW2d 340 (1998). The trial court's findings are clearly erroneous if this Court is left with a firm conviction that a mistake was made. *Id*. at 429.

"Michigan courts use the objective test of entrapment. The objective test focuses on the propriety of the government's conduct which resulted in the charges against the defendant rather than on the defendant's predisposition to commit the crime." *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999) (citation omitted). Entrapment occurs when (1) the police engage in impermissible conduct which would induce a person similarly situated to the defendant, although otherwise law-abiding, to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997).

The trial court correctly concluded that defendant failed to establish police conduct so reprehensible that it cannot be tolerated regardless of its relationship to the crime. *People v Fabiano*, 192 Mich App 523, 531-532; 482 NW2d 467 (1992). According to defendant's testimony at the entrapment hearing, Officer McAllister waived him down as he was approaching the corner of Wilson Street in his truck. McAllister approached him as he reached the corner, and said "who got the weed." Also according to defendant, defendant then responded that he had "a personal dime bag of weed." According to defendant, he had just purchased the bag from someone else. Defendant informed McAllister that he only had this "10 dollar bag" but McAllister offered him $20 for it, at which point defendant sold it to him. Defendant represented that he had not intended to sell marijuana that night; in fact, he was only in that area because he had been at a friend's house "trying to get [his] hair done" and had stopped at McDonald's to get something to eat. Defendant's testimony does not support a finding that the police conduct was reprehensible. *People v Jamieson*, 436 Mich 61, 86, 89; 461 NW2d 884 (1990); *Connolly, supra* at 429.

The trial court also correctly determined that defendant failed to establish police conduct that would induce a person, although otherwise law-abiding, to commit an offense. *Fabiano, supra* at 531. To determine whether the challenged police conduct constituted an improper inducement to commit a crime, consideration must be given to the willingness of the accused to commit the act weighed against how a normally law-abiding person would react under similar circumstances. *People v Juillet*, 439 Mich 34, 54; 475 NW2d 786 (1991). The mere furnishing of an opportunity to commit a crime is not entrapment. *Ealy, supra* at 510. Many factors are relevant to whether the police conduct would induce a hypothetical law-abiding citizen to engage in criminal conduct. *People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992). This Court examines the facts "to determine whether the government activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity." *Id*. at 662.

Defendant asserts that McAllister's offer to pay $20 for an amount of marijuana valued at $10 constitutes an inducement that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen. Defendant's position is untenable. A $10 or $15 profit would not, by any standard of reasonableness, induce an otherwise law-abiding citizen to commit a crime.

Defendant has not established entrapment and the trial court did not err in denying defendant's motion to dismiss.

Next, defendant argues that the trial court erred by failing to give the jury an "order of deliberation" instruction after instructing the jury with regard to the principle charge and a lesser included offense. Defendant has failed to preserve this issue for appellate review. *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000). Accordingly, we review defendant's claim to determine whether the trial court committed plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *McCrady, supra* at 30.

The trial court instructed the jury on the elements of the principle charge of delivery of marijuana and of the lesser included offense of possession of marijuana. The trial court also instructed the jury with regard to the meanings of the terms "delivery" and "possession." The

trial court failed to instruct the jury, however, regarding the order in which the jury was to consider lesser included offenses. Defendant argues that this omission constitutes error on the part of the trial court. We agree. A trial court must instruct the jury on the order of deliberations when the jury is allowed to consider lesser included offenses. *People v Gonzales*, 197 Mich App 385, 399; 496 NW2d 312 (1992), citing *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982).

Defendant argues that the trial court compounded its error by giving a supplemental instruction that was so confusing as to take the lesser included offense from the jury's consideration. Defendant did not object to this instruction below. Regardless of how inadequate the supplemental instruction may have been, this instruction alone, or in combination with the initial instructional error of failing to instruct on the order of deliberations, did not affect defendant's substantial rights, *Carines, supra* at 763-764, where defendant was not entitled to an instruction on the lesser included offense in the first instance. Here, the evidence presented at trial did not support giving the instruction. *People v Hendricks*, 446 Mich 435, 444-445; 521 NW2d 546 (1994), citing *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987); see also *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998).

Alternatively, defendant argues that he was denied the effective assistance of counsel as a result of counsel's failure to object to the trial court's omission of the instruction. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). Because defendant has failed to establish that counsel's failure to object to the alleged instructional error was prejudicial , he has not established an ineffective assistance claim.

Next, defendant argues that the prosecutor's comments during closing argument to the effect that the evidence was "completely uncontroverted" was an improper comment on defendant's right not to testify. We disagree. A prosecutor may observe that evidence against the defendant is "uncontroverted" or "undisputed" even if defendant is the only one who could have contradicted the evidence, or if the defense has failed to call witnesses, or it has failed to prove what it said it would in opening statement. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). Moreover, because the challenged remarks were proper, defense counsel did not render ineffective assistance by failing to object to the remarks. *Pickens, supra* at 327.

Next, defendant argues that the court abused its discretion in concluding that an endorsed witness did not have to be produced at trial by the prosecutor absent a hearing at which the prosecutor was required to show due diligence in attempting to produce the witness. Additionally, he contends that the court abused its discretion by denying the defense request to play a videotape of the witness' testimony to the jury, and that it erred by failing to give the missing witness instruction.

A trial court's decision to permit amendment to a witness list is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). The court's decision to admit evidence, in this case, the videotaped testimony from a prior hearing, is also reviewed for an abuse of discretion. See *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion occurs where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996). Additionally, because defendant failed to request the missing witness instruction, this Court reviews the court's failure to give the instruction for plain error. *Carines, supra* at 763-764.

A defendant must show prejudice before relief is warranted under the res gestae statute. *Burwick, supra* at 284. Here, defendant has failed to show prejudice where the testimony defendant wished to elicit from officer McLaughlin was cumulative to the testimony given by two other police officers. For the same reason, the court did not abuse its discretion in denying defendant's request to show the jury a videotape of officer McLaughlin's testimony taken at an earlier probation violation hearing involving defendant or by failing to sua sponte give the missing witness instruction.

Finally, defendant's claim of trial court bias fails for lack of record support, especially where the allegations of misconduct against the trial court in other drug cases were proven false and the court was exonerated of any wrongdoing by the Michigan Attorney General's office.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.