STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN C. HOROWITZ,

Defendant-Appellant.

UNPUBLISHED
March 8, 2002

No. 228109
Oakland Circuit Court
LC No. 92-118236-FC

Before: Whitbeck, C.J., and Markey and K.F. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i), and possession of with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He was sentenced to life imprisonment for the cocaine conviction and one-month probation for the marijuana conviction. He appeals as of right. We affirm.

I. Basic Facts and Procedural History

Keith Kramer, a drug dealer, was arrested on March 3, 1992, after selling a kilogram of cocaine to an undercover officer. He was charged with possession and conspiracy to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i). Following his arrest, Kramer agreed to work with law enforcement officials. To that end, Kramer entered into an agreement whereby he could plead guilty to a reduced charge of possession with intent to deliver between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii) in exchange for his full cooperation and commitment to truthfully testify at subsequent trials arising from the investigations.[1]

Before Kramer was arrested, he made arrangements to sell defendant two kilograms of cocaine. Pursuant to the reduced plea agreement, Kramer contacted law enforcement officials who determined that they would conduct a reverse-buy in which defendant would purchase two

[1] In addition, if Kramer fully cooperated, officers agreed to testify at his sentencing and the prosecution agreed not to appeal the sentence imposed. Following Kramer's cooperation in several investigations, law enforcement agents spoke at his sentencing and he received a sentence of five years probation. In a separate and unrelated arrangement, he forfeited $334,000 in drug proceeds to law enforcement.

kilograms of cocaine, supplied by the police, for $42,000. The police then taped a conversation between Kramer and defendant, in which defendant stated: "I'm waiting to hear from you. What's going on." Kramer set the sale for March 17, 1992. Fully expecting that the transaction would proceed through completion, the officers obtained an anticipatory search warrant.

On the day of the sale, defendant and an undercover female officer[2], went to defendant's home. She had a duffel bag containing two kilograms of cocaine. One kilogram was wrapped with yellow plastic tape and the other was wrapped with silver duct tape. Upon arriving at the home, defendant appeared to be expecting them and let them into his house. They went into the master bedroom where the female officer handed defendant the duffle bag in an adjoining bathroom. In the bathroom was a digital scale and plastic baggies. Defendant opened the duffel bag, began to remove the cocaine and stated that the kilograms were different from before because they did not have floaters[3] on them. Defendant directed the undercover officer into the bedroom where he proceeded to pull down a bed comforter revealing five piles of money. Defendant had the money laid out in stacks of $5,000, except for one pile containing only $4,700. Defendant told them that a man named Steve, whom he had met before, was coming to pickup a "good chunk" of the cocaine and that Kramer would get the rest of the money later. Kramer told defendant that part of the cocaine would be "fronted" to defendant. Defendant started to weigh and cut the cocaine while the money was being counted. Kramer then put the money in the duffel bag and he and the undercover officer left defendant's home. After being advised that the transaction was completed, the surveillance officers executed the search warrant.

The search team entered defendant's house immediately. One NET officer was posted outside of defendant's house near a balcony. This officer heard members of NET announcing themselves upon entry and saw defendant come onto the balcony. He focused his flashlight and weapon at defendant and told him to "freeze." Defendant, however, looked at the officer, threw something off of the balcony, and walked back inside. In addition to the two kilograms of cocaine, the police also confiscated separate baggies of marijuana from defendant's refrigerator and from defendant's vehicle in quantities too great to signify mere personal use. Also recovered in the search were an orange and white plastic container with snow seals of cocaine discovered underneath the master bed along with a small baggie containing six snow seals of cocaine in the pocket of a suit jacket found in the master bedroom. Additionally, police observed a small plastic baggie containing paper folds of cocaine in one of defendant's drawers in the bedroom and a green dairying grinder[4]. Law enforcement officials also discovered a digital scale in the bedroom. The officers later detained an individual by the name of Steve, who arrived at defendant's residence, carrying $8,000.

The undercover officer returned to defendant's house approximately 45 minutes later, as the search warrant was being executed. She observed that one kilogram of the cocaine was still

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[2] The undercover officer is a member of the Oakland County Narcotics Enforcement Team, known as "NET."

[3] According to testimony at trial, floatation devices are placed in packages of cocaine for easier retrieval if the packages have to be thrown into the ocean.

[4] Used for the purpose of grinding cocaine and mixing in cutting agents.

on the bathtub and had not been touched. She observed the wrapper for another one-half kilogram which was also still in the bathroom. She testified that she saw one-half kilogram of cocaine on the ground outside of the balcony, one-half kilogram scattered on the ground surrounding the one-half kilogram and a plastic baggie and another one-quarter kilogram on the floor wedged in the doorway leading to the balcony.

Defendant was arrested and while out on bond, absconded to Florida. In 1999, law enforcement officials apprehended defendant and transported him back to Michigan. Defendant moved to dismiss the charges arguing that he was entrapped and that he was also subjected to sentence entrapment. After conducting an evidentiary hearing, the trial court denied the motion. Following a jury trial, defendant was convicted of possession with intent to deliver more than 650 grams of cocaine and possession with intent to deliver marijuana. Defendant appeals as of right. We affirm.

II. The Defense of Entrapment

A. Overview

Defendant first argues that the trial court erred in denying his entrapment defense. In analyzing an entrapment defense, Michigan courts apply the objective test, which focuses on the propriety of the government's conduct rather than the defendant's predisposition to commit the offense. *People v Juillet*, 439 Mich 34, 53; 475 NW2d 786 (1991); *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999). A two prong test governs the analysis where a defendant argues entrapment with entrapment existing with the satisfaction of either prong. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Entrapment occurs when: (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances, or (2) the police engage in conduct so reprehensible that it cannot be tolerated. *Id.* The mere furnishing of an opportunity to commit a crime is not entrapment. *Id.*

In analyzing whether impermissible police conduct exists, the court should consider actions which would induce criminal conduct, including: (1) appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime charged; (3) whether there was a long time lapse between the investigation and offense; (4) the existence of inducements that would make the criminal activity unusually attractive to a law-abiding person; (5) offers of excessive consideration or enticement; (6) guarantees that the acts were not illegal; (7) the existence and extent of government pressure; (8) the existence of sexual favors; (9) whether there were threats of arrest by the government agents; (10) the existence of government procedures that tend to escalate the defendant's criminal culpability; (11) police control over the informant; and (12) whether the investigation is targeted or untargeted. *People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992).

As it relates to reprehensible police conduct, this Court explained in *People v Fabiano*, 192 Mich App 523, 532; 482 NW2d 467 (1992): "there is certain conduct by government that a civilized society simply will not tolerate, and the basic fairness that due process requires precludes continuation of the prosecution where the police have gone beyond the limit of acceptable conduct in ensnaring the defendant, without regard to causation." Moreover, "[e]ntrapment could also occur under the second prong of the entrapment test if the furnishing of the opportunity for a target to commit an offense 'requires the police to commit certain criminal,

dangerous, or immoral acts.'" *People v Connolly*, 232 Mich App 425, 429-430; 591 NW2d 340 (1998). (Citation omitted.)

B. Standard of Review

A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). A trial court's factual findings concerning entrapment are reviewed under the "clearly erroneous" standard. *Juillet*, *supra* at 61; *Connolly*, *supra* at 429. The trial court's findings are clearly erroneous if, after review of the record, this Court is left with a firm conviction that a mistake has been made. *Id*.

C. Analysis

In the case at bar, we agree with the trial court's determination that the reverse-buy operation conducted by law enforcement officials in this case did not constitute entrapment. This Court has previously held that undercover drug sale operations conducted by government officials are not indicative of entrapment per se. *People v Jamieson*, 436 Mich 61, 83; 461 NW2d 884 (1990).

Upon careful review of the record, we cannot discern anything in the government's conduct that reeks of entrapment. Indeed, the trial court properly rejected defendant's claim that he was entrapped because he was not a known drug trafficker and not the target of any investigation. There was evidence presented at the evidentiary hearing that defendant had purchased cocaine from the informant on several prior occasions and that defendant had contacted the informant to purchase two kilograms of cocaine before the informant was arrested. In fact, the informant testified that over the course of the parties' two-year relationship, he had sold defendant approximately fifteen kilograms of cocaine, primarily in one-kilogram quantities. Defendant admitted that he had previously purchased cocaine from the informant, although he maintained that the largest amount ever purchased was 500 grams, which he in turn sold in smaller quantities. As such, there was an indication in the record that the police had knowledge that defendant was involved in drug trafficking.

We also reject defendant's claim that he was entrapped because the arranged deal of two kilograms for the price of $42,000 was unusually attractive. A narcotics officer testified at the hearing that $42,000 for two kilograms of cocaine was an average or reasonable price at the time of the transaction. In addition, the informant indicated that he had previously sold defendant one kilogram of cocaine for $21,000. Further, contrary to defendant's claim, the fact that he paid only $29,700 of the total price at the time of the transaction does not indicate that he was entrapped. There was testimony that the "fronting" of drugs was normal in the drug trafficking business.

Defendant also alleges that sentence entrapment occurred because even if he were predisposed to commit a minor or lesser offense, he was entrapped into committing a greater offense subject to greater punishment. See *Early*, *supra* at 510. However, there is no evidence that the conduct of law enforcement officials was reprehensible or unlawful, or otherwise induced or pressured defendant into purchasing the drugs. Law enforcement officials did nothing more than present defendant with an opportunity to purchase the drugs. Moreover, a narcotics officer testified that Kramer's plea agreement was not contingent upon his arranging to

sell defendant over 650 grams of cocaine but rather, turned on his cooperation with law enforcement. We find no error in the trial court's conclusion that defendant was not entrapped into committing a greater offense subject to a more severe punishment. In sum, the trial court did not err in rejecting the defense of entrapment and thus, properly denied defendant's motion to dismiss.[5]

III. Jury Instruction

Next, defendant argues that the trial court erred by denying his request to instruct the jury on attempt to possess over 650 grams of cocaine. Again, we disagree. This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Pursuant to MCL 768.32(2), as amended by 1978 PA 77, for a defendant charged with certain drug offenses, i.e. MCL 333.7403(2)(a)(i) or (ii), a jury can be instructed on a lesser-included offense only if the lesser included offense is a "major controlled substance offense." *People v Gridiron (On Rehearing)*, 190 Mich App 366, 367-368; 475 NW2d 879 (1991), amended 439 Mich 880 (1991). MCL 761.2 defines a "major controlled substance offense" as being a violation of MCL 333.7401(2)(a), a violation of MCL 333.7403(2)(a)(i)-(iv), or conspiracy to commit either offense. See *People v Fetterley*, 229 Mich App 511, 526-527; 583 NW2d 199 (1998).

In the instant case, because defendant was originally charged under MCL 333.7401(2)(a)(i), the above statutory provision is applicable and therefore, the trial court could not properly instruct on attempt, MCL 750.92, because it is not a major controlled substance offense. We further note that even if MCL 768.32(2) did not control this case, the trial court did not err in denying defendant's request for an attempt instruction.

Attempt is a cognate offense, *People v Adams*, 416 Mich 53, 57; 330 NW2d 634 (1982), and is a separate, substantive offense punishable under its own statute. *People v Johnson*, 195 Mich App 571, 575; 491 NW2d 622 (1992). The trial court is required to give an instruction for a cognate lesser included offense if the evidence presented would support a conviction of the lesser offense. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). MCL 750.92 specifies the punishment for the crime of attempt and provides:

> Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, *but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same*, when no express provision is made by law for the punishment of such attempt, shall be punished as follows: . . . . (Emphasis added.)

The evidence here did not support an instruction for mere attempt to possess the cocaine. Possession of a controlled substance occurs when a defendant knowingly has the power and

[5] We also note that contrary to defendant's suggestion, law enforcement's immediate execution of the search warrant and confiscation of the drugs was not improper, given their desire to ensure that the cocaine was not placed into the mainstream. See *Connelly, supra* at 432.

intention to exercise dominion or control over the drugs, either directly or through another person. See *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). Possession may be actual or constructive and may be joint as well as exclusive. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). In this case, the evidence showed that when the undercover officer and the informant entered defendant's home, defendant was given the cocaine and tendered $29,700 for it. Defendant immediately began cutting and weighing the cocaine. When the transaction ended, the undercover officer and the informant vacated defendant's premises and left the cocaine with defendant. Law enforcement officers immediately executed the search warrant. When the officers entered defendant's home, defendant had already broken down one kilogram of the cocaine. Defendant also threw a portion of the cocaine off of his balcony. As such, there was no evidence that defendant merely attempted to possess the cocaine but failed, or was prevented or unable to do so. Thus, even if MCL 768.32(2) did not apply, defendant would still not have been entitled to an attempt instruction.

IV. Motion for Mistrial

Defendant's final claim is that he was denied a fair trial because a prosecution police witness improperly vouched for the informant's credibility. We do not agree. During the trial, Detective Reis testified that Kramer "put his life in peril" while working with police and that he was satisfied with the sentence Kramer received. Reis testified that because of Kramer's cooperation and after he consulted with other agencies, including the FBI and DEA, regarding Kramer's cooperation with them, he spoke at Kramer's sentencing. Defendant objected to this testimony and subsequently moved for a mistrial which the trial court denied.

This Court reviews a lower court's decision regarding a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* (Citations omitted.)

Our review of the record reveals that defendant was not denied his right to a fair trial because of the prosecutor's question and the police witness' response. A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, reading the challenged question and answer in context, they were responsive to issues raised by defense counsel during voir dire and opening statement regarding the extent of the consideration granted to the informant for his cooperation. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW 2d 354 (1996). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Affirmed.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly