STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2003
v	No. 242189 St. Clair Circuit Court
DONNELL SHINHOLSTER EL, Defendant-Appellant.	LC No. 01-002886-FH

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for manufacture of forty-five kilograms or more of marijuana, MCL 333.7401(2)(d)(i), conspiracy to manufacture forty-five kilograms or more of marijuana, MCL 333.7401(2)(d)(i) and MCL 750.157a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as second-offender for a controlled substance offense, MCL 333.7413(2), and as a second habitual offender, MCL 769.10, to eighteen to thirty years' imprisonment for his manufacture of forty-five kilograms or more of marijuana, second offense, conviction, 36 to 270 months' imprisonment for his conspiracy to manufacture forty-five kilograms or more of marijuana conviction, and twenty-four to ninety months' imprisonment for his felon in possession of a firearm conviction, to run consecutively to two years' imprisonment for his felony-firearm conviction. We affirm in part, vacate in part, and remand for restencing.

I. Facts

Based on a tip that there was a large marijuana growth operation at a house on Ravenswood Road, police drove by the suspect house and saw defendant outside the house and what looked like marijuana stalks growing on the property. Police parked their car and approached the house, where they smelled marijuana and saw somebody in the house. When the police announced their presence, the door opened, and police saw a large stack of marijuana in the house. Defendant and two other people crawled out of the house. A total of four people were arrested at the house. Inside the house, police found approximately 530 pounds (240 kilograms) of marijuana, a loaded shotgun, a variety of cutting instruments, packets containing seeds, a triple-beam scale, and a book entitled *Marijuana Grower's Handbook*. Later, while in police custody, defendant admitted that all of the marijuana plants that were inside the house and outside in the fields belonged to him.

II. Defendant's Prior Felony Conviction

First, defendant argues that the trial court erred in informing the jury that defendant had a prior felony conviction for attempt to manufacture five to forty-five kilograms of marijuana.[1] Because defendant failed to preserve this issue for appeal, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Before the jury was selected in this case, the trial court informed the prospective jury that defendant was being charged with felon in possession of a firearm because he had previously been convicted of attempt to manufacture five to forty-five kilograms of marijuana. At the end of the trial, the parties stipulated to the trial court's instruction to the jury that defendant had previously been convicted of an unspecified felony.[2]

In *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998), this Court set forth the law governing the situation in the present case:

> This Court has explained that "adequate safeguards" can be erected to ensure that a defendant charged with both felon-in-possession and other charges arising from the same incident suffers no unfair prejudice if a single trial is conducted for all the charges. See [*People v Mayfield*, 221 Mich App 656, 659-660; 562 NW2d 272 (1997)]. Specifically, these "safeguards" are (1) the introduction by stipulation of the fact of the defendant's prior conviction, (2) a limiting instruction emphasizing that the jury must give separate consideration to each count of the indictment, and (3) a specific instruction to consider the prior conviction only as it relates to the felon-in-possession charge. See *id* at 660, citing *United States v Mebust*, 857 F Supp 609, 613 (ND Ill, 1994).

In this case, defendant's prior felony conviction was introduced by stipulation, the specific nature of defendant's prior conviction was not mentioned apart from the initial remark to the prospective jury panel, and the trial court instructed the prospective jury panel that the charges in the information were not evidence of defendant's guilt. Although the trial court did not instruct the jury that defendant was entitled to a separate determination regarding each of the charges against him or that defendant's prior conviction was to be considered only as it related to defendant's felon in possession of a firearm charge, defendant never requested such instructions. Despite the fact that the trial court did not give defendant all of the safeguards set forth in *Green, supra* at 691-692, these safeguards were available, and defendant failed to avail himself of these safeguards. Therefore, the trial court's failure to follow all of the safeguards set forth in *Green,*

[1] In support of his argument, defendant cites several cases and court rules governing the admission of evidence. However, defendant alleges error with the reading of the information to the jury and the trial court's instructions to the jury—neither of which are evidence. Therefore, because no evidence was ever admitted that defendant has a prior felony conviction, the authorities cited by defendant are not applicable to this case.

[2] Because defendant expressly agreed to this instruction, he waived any argument that this instruction was erroneous. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

supra at 691-692, did not amount to a plain error that affected defendant's substantial rights. *Green, supra* at 692; *People v Mayfield*, 221 Mich App 656, 660-661; 562 NW2d 272 (1997).

III. Prosecutorial Misconduct

Next, defendant argues that he was denied a fair and impartial trial because the prosecutor vouched for her own witnesses. We review de novo claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). But because defendant failed to object to the alleged prosecutorial misconduct, this issue is unpreserved, and our review is limited to determining whether there was plain error that affected defendant's substantial rights. *Carines, supra* at 774; *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). In cases involving unpreserved allegations of prosecutorial misconduct, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.*

Defendant argues that the prosecutor vouched for her own witnesses when she stated during voir dire that police officers had special training in different areas, and that certain police officers might have certain areas of expertise based on this specialized training. A prosecutor may not vouch for the credibility of a witness by suggesting that the government has some special knowledge, not known to the jury, that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). Here, however, a review of the prosecutor's voir dire in context shows that she was not vouching for the officers' credibility or implying that she had some special knowledge that they were testifying truthfully, but was instead was providing a reasonable explanation for why some officers might have more expertise in the area of illegal drugs. It is not improper for a prosecutor to comment on the training and expertise of law enforcement officers. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

IV. Sufficiency of the Evidence

Next, defendant argues that the evidence was insufficient to support his conviction for conspiracy to manufacture forty-five kilograms or more of marijuana. "A trial court assesses the merits of a directed verdict motion through consideration of the evidence presented by the prosecution in a light most favorable to the prosecution, to determine whether a rational trier of fact could find that the elements of a crime were proven beyond a reasonable doubt." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993) (emphasis deleted). We apply the same standard in reviewing such a motion. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

Defendant argues that the evidence was insufficient to support a conspiracy in this case. In *People v Justice (After Remand)*, 454 Mich 334, 345-346; 562 NW2d 652 (1997), our Supreme Court explained the elements of conspiracy:

> Conspiracy is defined by common law as " 'a partnership in criminal purposes . . . .' " *People v Atley*, 392 Mich 298, 310; 220 NW2d 465 (1974), quoting *United States v Kissel*, 218 US 601, 608; 31 S Ct 124; 54 L Ed 1168 (1910). Under such a partnership, two or more individuals must have voluntarily

> agreed to effectuate the commission of a criminal offense. Establishing that the individuals specifically intended to combine to pursue the criminal objective of their agreement is critical because " 'the gist of the offense of conspiracy lies in the unlawful agreement' . . . [meaning] . . . the crime is complete upon formation of the agreement . . . ." *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982).
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> The specific intent to combine, including knowledge of that intent, must be shared by two or more individuals because "there can be no conspiracy without a combination of two or more." *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993); *Atley*, *supra* at 310. This combination of two or more is essential because "the rationale underlying . . . [the crime of] conspiracy . . . is based on the increased [societal] dangers presented by the agreement between the plurality of actors." *People v Davis*, 408 Mich 255, 273 n 5, 279; 290 NW2d 366 (1980). Accordingly, there must be proof demonstrating that the parties specifically intended to further, promote, advance, or pursue an unlawful objective. *Atley*, *supra* at 311.

Here, when police announced their presence at the Ravenswood house, defendant and two others crawled out. Defendant admitted to police that he lived at the house and had grown the marijuana. Inside the house, police found residency papers for Mustafa Muhammad-El and an invoice for ten bulletproof vests ordered by Muhammed-El. A note found in the house specifically asked for help protecting the house from police and other people. "[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *Justice*, *supra* at 347. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Jolly*, *supra* at 466. We conclude that, viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have inferred from this circumstantial evidence that defendant had agreed with another person to manufacture the marijuana found in the house.

V. Jury Instructions Regarding Conspiracy

Next, defendant argues that the trial court's conspiracy jury instruction erroneously omitted the element that the conspiracy must be between defendant and a specified person. However, defendant failed to object at trial to the court's conspiracy instruction. Furthermore, defendant affirmatively approved the trial court's instructions to the jury. By expressly approving the jury instructions, defendant has waived this issue on appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

VI. Sentencing

Finally, defendant argues that his sentence for manufacture of forty-five kilograms or more of marijuana, second offense, was disproportionate. Because defendant committed the offenses after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). However, the trial court in this case did not apply the legislative guidelines to defendant's conviction for manufacture of forty-five kilograms or more of marijuana, second offense, because the prosecutor informed the

court that no guidelines existed for sentencing a second-offense drug offender under MCL 333.7413(2). Defendant did not argue in the trial court or initially on appeal[3] that the trial court should have applied the legislative sentencing guidelines in sentencing defendant for manufacture of forty-five kilograms or more of marijuana, second offense. Therefore, this issue is not properly preserved or presented for appeal. However, this Court may address issues not raised by the parties when "further or different relief" is required. MCR 7.216(A)(7). We review this unpreserved sentencing issue to determine if the trial court committed plain error that affected defendant's substantial rights. *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003).

Defendant was convicted as a second-offender for a controlled substance offense, MCL 333.7413(2), and as a second habitual offender, MCL 769.10.[4] MCL 333.7413(2) provides:

> Except as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both.

MCL 777.18 specifically provides that the legislative sentencing guidelines apply to convictions under MCL 333.7413(2). The provision in MCL 333.7413(2) that a defendant may be imprisoned for a term not more than twice the sentence normally allowed does not affect the applicability of the guidelines or the guidelines range for the minimum sentence. In imposing defendant's minimum sentence for manufacture of forty-five kilograms or more of marijuana, second offense, the trial court should have determined the guidelines range for the underlying offense. MCL 777.21(4). Under MCL 333.7413(2), the trial court has the authority to impose a sentence up to twice the longest term otherwise authorized.

Because the trial court did not apply the legislative guidelines in sentencing defendant for manufacture of forty-five kilograms or more of marijuana, second offense, and sentenced defendant to a minimum sentence that was above any possible guidelines range without stating substantial and compelling reasons for the departure, the trial court committed plain error that affected defendant's substantial rights. Therefore, we remand this case for resentencing of defendant's manufacture of forty-five kilograms or more of marijuana conviction under the legislative guidelines.[5] If the trial court chooses to depart from the guidelines, it must state

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[3] Defendant addressed this issue in a supplemental brief submitted pursuant to an order of this Court.

[4] A second habitual offender may be sentenced "to imprisonment for a maximum term that is not more than 1-½ times the longest term prescribed for a first conviction of that offense or for a lesser term." MCL 769.10(1)(a). In *People v Fetterley*, 229 Mich App 511, 540; 583 NW2d 199 (1998), this Court held, "Where a defendant is subject to sentence enhancement under the controlled substance provisions, the sentence may not be doubly enhanced under the habitual offender provisions."

[5] Because we remand this case for resentencing, we need not address defendant's argument that his sentence was disproportionate. However, we note that defendant's reliance on *People v*

(continued…)

substantial and compelling reasons for doing so. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003).

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

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

(…continued)

Moore, 432 Mich 311; 439 NW2d 684 (1989), for the proposition that resentencing is required because he has no reasonable prospect of serving his minimum sentences in his lifetime (defendant will be seventy-three years old on the date of his earliest possible release from prison) is misplaced, as the holding in *Moore* has been overruled by *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). See *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997); *People v Phillips (After Second Remand)*, 227 Mich App 28, 31 n 2; 575 NW2d 784 (1997); *People v Kelly*, 213 Mich App 8, 15; 539 NW2d 538 (1995).