STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANZ LANE,

Defendant-Appellant.

UNPUBLISHED
April 26, 1996

No. 158338
LC No. 91-111105-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

PARIS LANE,

Defendant-Appellant

No. 158339
LC No. 91-111106-FC

Before: Holbrook, P.J., and Taylor and W. J. Nykamp,* JJ.

PER CURIAM.

Defendant Franz Lane and his younger brother, defendant Paris Lane, were charged with conspiracy to deliver, or possess with intent to deliver, over 650 grams of cocaine. A first trial resulted in a hung jury. At a second jury trial, Franz Lane was convicted of the lesser offense of conspiracy to deliver, or possess with intent to deliver, 225 or more but less than 650 grams of cocaine, MCL 750.157a; MSA 28.354(1); MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and was sentenced to serve twenty to thirty years in prison. Paris Lane was convicted of the lesser offense of conspiracy to

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* Circuit judge, sitting on the Court of Appeals by assignment.

deliver, or possess with intent to deliver, 50 or more but less than 225 grams of cocaine, MCL 750.157a; MSA 28.354(1); MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and was sentenced to serve ten to twenty years in prison. Defendants appeal as of right in this consolidated appeal. We affirm.

Common Issues

Defendants argue that the court erred when it refused to suppress evidence of telephone conversations that had been intercepted by federal law-enforcement agents pursuant to a wiretap. We disagree.

MCL 768.28a; MSA 28.1051(1) authorized admission of this evidence. The federal wiretap was authorized by Federal District Court Judge Gerald Rosen after review of a twenty-seven-page affidavit that established the need for the wiretap. After reviewing the testimony elicited at the suppression hearing and the affidavit, we find that the trial court did not clearly err in denying the motion to suppress. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983).

Defendants next argue that the trial court erred when it refused to read the names of the alleged coconspirators in the final jury instructions and, thus, failed to instruct the jury regarding an essential element of the crime and improperly amended the indictment. This claim is without merit. We review jury instructions in their entirety to determine if the court erred so as to require reversal. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Even if the instructions are imperfect, reversal is not required if they presented the issues to be tried and sufficiently protected the rights of the defendant. *Id*. During voir dire, the court began reading the indictment to the prospective jurors. After naming three of the alleged coconspirators, defense counsel asked to approach the bench. Immediately thereafter the court said the jurors were to disregard what had already been read and then the court reread the indictment substituting the words "and others both known and unknown" for the names of the coconspirators. Before final instructions defense counsel asked the court to read the indictment to the jury without mentioning the coconspirators' aliases and the court said that it had originally wanted to do this but that everybody agreed only to name the defendants and "persons known and unknown." The court said that, given the way the case had been tried, it would not be fair to read a bunch of other names (at that time). Defense counsel did not contradict the court's statement that he did not want the names of the coconspirators read to the jury at the beginning of the trial. Also, the court specifically told defense counsel that the other individuals could be named in closing arguments. Given these circumstances, we find no error requiring reversal. *People v Murry*, 106 Mich App 257, 262; 307 NW2d 464 (1981).

Defendants further argue that the court improperly instructed the jury that they had to find defendants agreed to commit a conspiracy rather than properly instructing the jury that they had to find defendants agreed to commit a criminal offense. Neither defendant objected to this instruction, thus foreclosing appellate review absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no manifest injustice. The instructions as a whole conveyed to

the jury that defendants had to agree with someone to commit the enumerated offense(s) in order to be found guilty. The court read the jury the conspiracy statute which specifically advised the jury that any person who conspires together with one or more persons to commit an offense prohibited by law is guilty of the crime of conspiracy. Defendants' rights were sufficiently protected. *Davis, supra*.

Defendants also contend that the court erred when it instructed the jury regarding lesser included offenses. Defendants expressed a desire to go for "all or nothing" verdicts. The trial court noted that the evidence supported lesser offenses and therefore determined that instructions regarding the lesser offenses were proper. MCL 768.29; MSA 28.1052 provides that it is the duty of the trial court to instruct the jury as to the law applicable to the case. Similarly, MCR 6.414(F) provides that the court must instruct the jury as required and is appropriate. Neither the prosecution nor the defense has the option of precluding the court from fulfilling this duty in hopes of forcing an "all or nothing" verdict. *People v Mann* 395 Mich 472, 476; 236 NW2d 509 (1975); *People v Stubbs*, 110 Mich App 287, 289; 312 NW2d 232 (1981). The evidence supported the lesser offenses and thus the trial court did not err. Indeed, we note that the Legislature's effort to preclude certain lesser-offense instructions that may be given in cases charging major controlled substance offenses was recently found unconstitutional by a panel of this Court in *People v Binder (On Remand)*, 215 Mich App 30; __ NW2d __ (1996).

Defendants further contend that the prosecutor improperly elicited testimony showing they had been bound over for trial after the preliminary examination and allowed the police officer in charge of the investigation to vouch for the prosecutor's witnesses. We find no error requiring reversal. The defense opened the door to the questioning regarding the preliminary examination by asking questions that implied that defendants had been railroaded in earlier grand jury proceedings due to the nonparticipation of defense attorneys. Defendants are therefore not entitled to any relief. *People v Paquette*, 214 Mich App 336, 342; __ NW2d __ (1995). The officer's brief comment that he did not want to ask the prosecutor's office to make a deal with one of the persons who testified against defendants until he felt he had all the facts at hand was not objected to and was not improper vouching for the prosecution's witnesses' credibility. In no event did it deprive defendants of a fair trial.

Franz Lane Issues

Defendant Franz Lane argues that the trial court erred in refusing to dismiss the indictment because a statute relating to a grand jury, MCL 767.23; MSA 28.963, violates the title-object clause of Const 1963, art 4, § 24. We disagree.

When assessing a title-object challenge of a statute, all possible presumptions should be afforded to find the statute constitutional. *Lawnichak v Dept of Treasury*, 214 Mich App 618, 620; __ NW2d __ (1995). The title-object clause is only violated if a statute embraces subjects that are so diverse in nature that they have no necessary connection. *Id*. This argument is flawed because it improperly assumes that the description of the statute in a caption/catchline inserted by the publishers of Michigan Compiled Laws is the statute's title. This caption/catchline was not before the Legislature

when it considered the statute and it is not the statute's title. The true title of this statute is the title to the Code of Criminal Procedure. *People v Wingo*, 95 Mich App 101, 105; 290 NW2d 93 (1980). This title is not inconsistent with the statute. Defendant has failed to establish a violation of the title-object clause.

Defendant next contends the court erred so as to require reversal in admitting hearsay statements because the prosecution failed to establish that the statements were made during the course of and in furtherance of the conspiracy. We disagree. No objection was raised when this testimony was first elicited. When this testimony was elicited a second time, an objection was sustained and the court instructed the jury to disregard the testimony. Given the court's instruction, defendant is not entitled to any relief. *People v Miller (After Remand)*, 211 Mich App 30, 42-43; 535 NW2d 518 (1995). This same testimony was elicited later by defense counsel. Defendant may not assign error to something his own counsel deemed proper. *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

Defendant alleges prosecutorial misconduct. First, defendant claims that the prosecutor improperly vouched for the credibility of the police officers. Defendant did not object to this alleged misconduct at trial. Appellate review of improper prosecutorial remarks is generally precluded absent an objection because it deprives the trial court of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *Id*. After a careful review of the record, we conclude that no miscarriage of justice will result from our refusal to consider this issue and that a cautionary instruction could have cured any impropriety in the remark. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). We are also satisfied that the court's instruction to the jury that the arguments of counsel were not evidence dispelled any potential prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Second, defendant claims the prosecutor made an improper civic-duty argument. Defendant did object to this argument and thus we review the matter to determine whether the argument denied defendant a fair trial. *Bahoda*, *supra* at 267. In response to defense counsel's objection, the court stated that the jury was to decide the case on the basis of the facts, whereupon the prosecutor indicated that this was the basis of his argument. Given the court's statement and the prosecutor's clarification of his intended argument, we find that there was not an improper civic-duty argument. Even assuming some impropriety in the challenged remark that was not cured by the court's immediate comment and the prosecutor's clarification, we are satisfied that the court's instruction to the jury that they were to decide the case on the basis of the facts and that the final instruction that the arguments of counsel were not evidence dispelled any potential prejudice. *Bahoda*, *supra* at 281.

Defendant contends that the court erred in refusing to apply the sentencing provisions adopted in *People v Schultz*, 435 Mich 517; 460 NW2d 505 (1990), and that the sentence was imposed in violation of the ex post facto clauses of the federal and state constitutions. We disagree.

Defendant was convicted for a drug conspiracy that extended from January, 1986 through April, 1991. In January, 1986 the penalty for defendant's conviction was a mandatory twenty years. In 1987, the Legislature lowered the penalty to a mandatory ten years and allowed a deviation therefrom upon a finding of substantial and compelling reasons. In 1989, the Legislature raised the mandatory minimum back to twenty years but continued the provision that a deviation was allowed for substantial and compelling reasons. Defendant argues that the rule of lenity and ex post facto concerns require that he be sentenced under the ten-year minimum version of the statute that was in effect for a brief time in the middle of the conspiracy. The trial court rejected these arguments stating that the penalty in place at the time of the verdict and sentencing controlled. The prosecutor argues that defendant is not entitled to the windfall he seeks as the mandatory minimum sentence was twenty years when defendant commenced his participation in the conspiracy and when defendant was arrested, convicted, and sentenced. The prosecutor also correctly notes that the court recognized that it was free to depart from the mandatory minimum upon a finding of substantial and compelling reasons which it did not find.

First, we find that *Schultz* is inapposite. In *Schultz,* the Supreme Court ordered defendants be sentenced under a more lenient statute that was not in effect when the crime was committed. Here, however, three separate statutes with three different penalty provisions were in effect during the term of the conspiracy. Moreover, the result in *Schultz* was to sentence convicted drug dealers in accordance with a statute that was in effect at sentencing or while a direct appeal was pending (as opposed to the statute that was in effect when the crime had been committed) and defendant in this case opposes being sentenced in accordance with the statute that existed at sentencing. Second, we reject any suggestion that sentencing defendant in accordance with the statute that existed during the latter portion of the conspiracy and at sentencing violated the prohibition of ex post facto laws. Ex post facto concerns would only be applicable if the statute defendant was sentenced under increased the penalty after the crime had been committed. *People v Russo*, 439 Mich 584, 592; 487 NW2d 698 (1992). Here the statute under which defendant was sentenced was in effect during the latter part of the conspiracy. Further, the statute under which defendant was sentenced did not necessarily require a harsher punishment as it allowed for a deviation from the mandatory minimum term upon a finding of substantial and compelling reasons. We find that the trial court did not err in sentencing defendant pursuant to the statute which was in effect during the last year and a half of the conspiracy and at sentencing. *People v Williams*, 78 Mich App 737, 742; 261 NW2d 189 (1977) (conspiracy is generally a continuing offense).

Finally, defendant argues that he was denied equal protection of law and subjected to cruel and unusual punishment because he received a mandatory twenty-year sentence even though persons found guilty of possession of more than 650 grams of cocaine are eligible for parole after only ten years. This Court recently rejected this exact claim in *People v Sardi*, ___ Mich App ___ (Docket No. 158365, issued 3/29/96). The fact that a person found guilty of possession of more than 650 grams of cocaine becomes eligible for parole after ten years on the basis of *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992), is irrelevant in that defendant was convicted of conspiracy to deliver or possession with intent to deliver cocaine. Conspiracy to deliver cocaine is a more serious offense than mere possession. *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993). Defendant is not similarly situated to a

defendant convicted of mere possession. Any incongruity in the sentencing of drug offenders as a result of the *Bullock* decision should be directed to the Legislature. *Bullock, supra* at 43, n 26. We also note that defendant could have received a sentence of less than twenty years if substantial and compelling reasons had existed. We further reject defendant's claim that his sentence constitutes cruel and unusual punishment. *People v Northrup*, 213 Mich App 494, 498-499; __ NW2d __ (1995).

Paris Lane Issues

Defendant Paris Lane contends that his conviction must be reversed because the court refused to give a jury instruction that precluded consideration of actions he took while he was a juvenile. Defendant claims this violated ex post facto principles. A law is considered ex post facto if it aggravates a crime or makes it greater than when it was committed. *People v Doyle*, ___ Mich __ (Docket No. 98809, issued 4/2/96) slip op at 6. A statute which affects the disposition of a criminal case involving crimes committed prior to the effective date of the statute violates the ex post facto clauses if it makes an act a more serious criminal offense or increases the punishment. *Riley v Michigan Parole Board*, ___ Mich App ___ (Docket No. 155257, issued April 5, 1996). However, a procedural change is not ex post facto even though it may work to the disadvantage of a defendant. *Russo, supra*, at 592-593. Defendant was a juvenile until he turned seventeen on June 1, 1987[1], i.e., a year and a half after the conspiracy allegedly began. Defendant thus contends that he may have been convicted as an adult for actions he took while he was a juvenile under the exclusive jurisdiction of the probate court. Defendant further notes that the automatic-waiver statute, MCL 712A2(a)(1); MSA 27.3178(598.2), did not take effect until 1988 and argues that application of this statute to his situation would be ex post facto. The trial court held that the automatic-waiver provision was procedural and did not implicate ex post facto principles. We agree.

Even before the automatic-waiver statute, the jurisdiction of the probate court for juveniles charged with serious felonies could be waived on the prosecutor's motion. Indeed, this Court has recently held that there are no constitutionally significant differences between the automatic-waiver provision and a waiver that results from a prosecution motion. *People v Parrish*, ___ Mich App ___ (Docket No. 188341, issued 4/2/96). Defendant is not entitled to any relief regarding this issue. *United States v Spoone*, 741 F2d 680, 687 (CA 4, 1984); *United States v Cruz*, 805 F2d 1464, 1477 (CA 11, 1986). Finally, we note that a juvenile does not have a constitutional right to be treated as a juvenile. *People v Hana*, 443 Mich 202, 220; 504 NW2d 166 (1993). The trial court did not err so as to require reversal in refusing to give the requested jury instruction.

Defendant next contends that he was deprived of effective assistance of counsel at trial and at sentencing. Defendant did not move for a new trial or seek an evidentiary hearing regarding this claim. Failure to do so forecloses appellate review unless the record contains sufficient detail to support defendant's claim. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). If so, review is limited to the record. *Id.*. To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation

deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must also show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant argues that counsel was ineffective at trial because he shifted the burden of proof when relating the concept of reasonable doubt during voir dire and when he failed to object to the conspiracy instruction. We disagree.

Viewed in context, defense counsel's voir dire was intended to persuade the jurors that if they were unsure of defendant's guilt that they should acquit. Further, the court gave the standard reasonable-doubt instruction at the conclusion of trial and told the jury that it was to follow what the court said and not the attorneys if they said anything different. We also find that defendant was not prejudiced by defense counsel's failure to object to the conspiracy instruction. *People v Pollick*, 448 Mich 376, 388, n 16; 531 NW2d 159 (1995).

Defendant claims counsel was ineffective at sentencing because he did not request a downward departure from the ten-year minimum sentence for substantial and compelling reasons and failed to have inaccurate information stricken from the presentence report. We disagree.

Given the fact that defendant had previous contact with the criminal justice system and the evidence adduced at trial, defense counsel could reasonably have concluded that defendant did not present an "exceptional" case which is necessary in order to find substantial and compelling reasons to depart from the statutory minimum sentence. *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). The record does not support a conclusion that there was a reasonable probability that the court would have imposed a minimum sentence under the statutory minimum if defense counsel had claimed substantial and compelling reasons existed to depart from the statutory minimum sentence. *People v Divietri*, 206 Mich App 61, 66; 520 NW2d 643 (1994). Also, defense counsel did argue for a sentence of less than ten years on the basis of the change in the maximum minimum sentence of the statute during the term of the conspiracy. Finally, we find no prejudice from defense counsel's failure to move to strike certain information from the presentence report. Defense counsel did tell the court that he had a problem with the investigator's version of the offense. The court indicated that it was not relying on that portion of the presentence report. Defendant suffered no prejudice. *People v Austin*, 209 Mich App 564, 571; 531 NW2d 811 (1995).

Finally, defendant contends he is entitled to resentencing because he was sentenced under a version of the statute that was harsher than was in effect at the time of the offense. In particular, defendant claims that the jury may have convicted him on the basis of actions that occurred when the mandatory minimum sentence was less harsh. Defendant was convicted for a drug conspiracy that extended from January, 1986 through April, 1991. In January, 1986, the penalty for defendant's conviction was a mandatory ten years. In 1987, the Legislature lowered the penalty to a mandatory five years and added that this could be deviated from upon a finding of substantial and compelling reasons. In 1989, the Legislature raised the mandatory minimum back to ten years but continued the provision

that a deviation was allowed for substantial and compelling reasons. We reject defendant's argument for the same reasons we rejected Franz Lane's similar argument.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Clifford W. Taylor
/s/ Wesley J. Nykamp

[1] Paris Lane's judgment of sentence erroneously lists Franz Lane's date of birth.