STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REYNALDO DE LA FE,

Defendant-Appellant.

UNPUBLISHED
May 7, 1996

No. 163367
LC No. 92-059217-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGEL PABON, a/k/a CARLOS MONTOYA,

Defendant-Appellant.

No. 164443
LC No. 92-059217-FH

Before: Corrigan, P.J., and Bandstra and W.A. Crane,* JJ.

PER CURIAM.

Following a joint jury trial, both defendants were convicted of one count of conspiracy to possess with intent to deliver 650 grams or more of cocaine, MCL 750.157a; MSA 28.354(1) and MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and one count of conspiracy to possess 650 grams or more of œcaine, MCL 750.157a; MSA 28.354(1) and MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i). Defendants were sentenced to life imprisonment for each count, and now appeal as of right. We affirm the conviction and sentence for conspiracy to possess with intent to deliver 650

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

grams or more of cocaine in both appeals. We vacate the conviction and sentence for conspiracy to possess 650 grams or more of cocaine on double jeopardy grounds in both appeals.

Defendants' convictions stemmed from evidence of an undercover "reverse buy" operation which culminated in their arrest while they were buying cocaine from an undercover federal agent, using defendant DeLaFe's Corvette vehicle as partial payment for the cocaine. An informant made the initial arrangements for the transaction. He was working with law enforcement officers as part of a plea agreement. As part of that agreement, the informant was to cooperate in drug investigations, to call potential buyers or sellers of cocaine, and to allow law enforcement officers to record his conversations. Under the agreement, the informant called defendant Pabon in Chicago in an attempt to arrange for a sale of cocaine. Defendant Pabon, in turn, contacted defendant DeLaFe and then accompanied defendant DeLaFe to Michigan for the purpose of buying cocaine. An undercover federal agent posed as the seller during the face-to-face meetings in Michigan, but was accompanied by the informant. Before the actual delivery of cocaine was made, defendants were arrested and charged with conspiracy.

DOCKET NO. 163367

I

Defendant DeLaFe first contends that the trial court erred in allowing the prosecutor to introduce evidence of defendant Pabon's statements in conversations under MRE 801(d)(2)(E). A number of taped conversations were played to the jury during the trial. The jury was provided with Spanish and English translations of those taped conversations to assist it in listening to the tapes. Further, the informant himself testified about the contents of his taped conversations.

The tapes played to the jury included the conversations in both the phone calls made by the informant and the face-to-face meetings held in Michigan before defendants were arrested. Having considered the particular conversations addressed in defendant DeLaFe's appellate brief, we find that the trial court's evidentiary rulings provide no basis for reversal.

With regard to Conversation Nos. 3, 6 and 8, the record does not reflect the evidentiary rule or rules upon which the trial court relied to admit these conversations. If the trial court's rulings were founded on MRE 801(d)(2)(E), the court erred because these conversations did not occur during the course of a conspiracy. A conspiracy is a mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. *People v Cotton,* 191 Mich App 377, 392; 478 NW2d 681 (1991). Conversation No. 3 merely provided some background facts on the informant's initial contact with defendant Pabon. Conversation No. 6 occurred before the defendants had agreed to commit a criminal act. Thus, defendant Pabon's statements could not have been made during the course of a conspiracy. Conversation No. 8 similarly provided evidence of steps taken by defendant Pabon to set up a conspiracy, but did not occur during the course of a conspiracy.

However, reversal is not required because the admission of defendant Pabon's statements during these conversations did not affect defendant DeLaFe's substantial rights. MRE 103(a). Any error was harmless because there was no reasonable possibility that these conversations contributed to the convictions. *People v Banks*, 438 Mich 408, 430; 475 NW2d 769 (1991). Other evidence, including defendants' concerted actions in Michigan, established the conspiracy offenses.

This Court may affirm a trial court's evidentiary rulings that are correct, but are made for the wrong reason. *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991). Here, the record shows that the prosecutor did not proffer defendant Pabon's statements in Conversation Nos. 3, 6 and 8 as proof of statements made in the course and in furtherance of a conspiracy, but rather for other purposes (*e.g.*, to show that the statements were made and to assist the jury in understanding later statements made during the course of a conspiracy). Moreover, the prosecutor's offer of proof supports the admission of Pabon's statements on grounds other than MRE 801(d)(2)(E). See *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990); *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993); *People v Buschard*, 109 Mich App 306, 311; 311 NW2d 759 (1981), vacated on other grounds 417 Mich 996 (1983).

With regard to Conversation Nos. 11, 12, 13 and 15, the prosecutor proffered defendant Pabon's statements as statements made in the course and in furtherance of the conspiracy. These phone conversations occurred on the same day that defendants came to Michigan to meet with the informant and the undercover federal agent. Applying the standards of MRE 801(d)(2)(E), we conclude that the trial court did not abuse its discretion in admitting defendant Pabon's statements because, exclusive of defendant Pabon's statements, the existence of the conspiracy was sufficiently established by the prosecutor. *People v Loy-Rafuls*, 198 Mich App 594, 599-600; 500 NW2d 480 (1993). The order of presentment of the proofs was unimportant. *People v Hall*, 102 Mich App 483, 490; 301 NW2d 903 (1980). Because the record reflects independent proof of a conspiracy, the trial court could properly consider the conversations themselves in determining that defendant Pabon's statements were made during the course and in furtherance of that conspiracy. *People v Bushard*, 444 Mich 384, 395 n 8; 508 NW2d 745 (1993) (Boyle, J.).

We decline to consider defendant DeLaFe's arguments concerning the identity of the participants in Conversation No. 15. Defendant DeLaFe's failure to identify these arguments in the statement of this issue, failure to demonstrate that the arguments were preserved by an objection, and failure to demonstrate any plain error affecting his substantial right precludes relief with respect to these arguments. *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992), *People v Lino (After Remand)*, 213 Mich App 89, 94; 539 NW2d 545 (1995), lv pending, and MRE 103.

Defendant DeLaFe's final claim in his first issue concerns a tape recording made from a body microphone worn by the informant during the face-to-face meetings in Michigan. For the same reasons discussed above with respect to Conversation Nos. 11, 12, 13 and 15, the trial court did not abuse its discretion in admitting defendant Pabon's statements in this recording under MRE 801(d)(2)(E). Further, we reject defendant DeLaFe's claim regarding the credibility of the evidence. When reviewing

a trial court's decision to admit evidence, we do not assess the weight and value of the evidence, but only determine if the evidence was the kind properly before the jury. *Cole v Eckstein*, 202 Mich App 111, 114; 507 NW2d 792 (1993).

II

Defendant DeLaFe next contends that the trial court should have ordered separate trials. We disagree. The essence of a conspiracy is the unlawful agreement between two or more persons. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). To prove the conspiracy, the prosecutor must establish that more than one person intended to combine for an unlawful purpose. *Blume, supra*, pp 482-483. Defendant Pabon's claim that he lacked the requisite knowledge was consistent with defendant DeLaFe's defense that there was no criminal conspiracy. Hence, the trial court did not abuse its discretion in denying separate trials. *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994).

III

Defendant DeLaFe next contends that the trial court erred in denying his motion to dismiss on the basis of entrapment. Since defendant DeLaFe did not move for an evidentiary hearing on the issue of entrapment, we have reviewed the trial court's decision on entrapment based solely on the trial proofs. Cf. *People v D'Angelo*, 401 Mich 167; 257 NW2d 655 (1977), and *People v Kage*, 193 Mich App 49, 56; 483 NW2d 424 (1992), vacated and remanded for further proceedings 439 Mich 1022 (1992).

The question concerns whether defendant DeLaFe was entrapped into entering into a conspiracy to possess cocaine. Although the trial court made no specific findings of fact on credibility issues pertaining to this question in its decision, we will presume for purposes of this issue that the trial court found that defendant Pabon's trial testimony was not credible inasmuch as defendant Pabon denied any criminality in this matter. Entrapment is not a denial of criminality; rather, its aim is to bar the government from prosecuting someone for criminal acts. *People v Alan Jones*, 203 Mich App 384, 386; 513 NW2d 175 (1994).

To the extent that defendant DeLaFe's entrapment claim is based on the informant's conduct towards defendant Pabon, we find merit in the prosecution's argument that defendant DeLaFe lacks standing to raise this argument. *People v Matthews*, 143 Mich App 45, 54-55; 371 NW2d 887 (1985). However, even assuming that defendant DeLaFe has standing, we would uphold the trial court's denial of the motion to dismiss because law enforcement officers did not entrap defendant DeLaFe, either directly or by means of the informant's initial phone contact with defendant Pabon, under the first prong of entrapment. A law-abiding person situated similarly to defendant DeLaFe would not have conspired with defendant Pabon to possess cocaine. *People v James Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992); *People v Fabiano*, 192 Mich App 523; 482 NW2d 467 (1992). Further, with regard to the second prong of entrapment, we do not find that the "reverse buy" nature of the transaction establishes entrapment. Law enforcement officers did nothing more than present defendants with an opportunity to engage in a conspiracy to possess cocaine. *People v Butler*, 444 Mich 965 (1994).

IV

Defendant DeLaFe next contends that the trial court erred in denying a mistrial based on certain unresponsive testimony by the informant. We disagree. The trial court's decision to strike the testimony and to give a cautionary jury instruction, rather than to order a mistrial, was not an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

V

Defendant DeLaFe next contends that the trial court erred in admitting the physical evidence of the cocaine. We disagree. The trial court's ruling was not an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 432 (1994); *People v Harvey*, 167 Mich App 734, 745-746; 423 NW2d 335 (1988); MRE 401; MRE 403. A sufficient foundation was laid by the prosecutor for the admission of the cocaine. *People v White*, 208 Mich App 126, 132-133; 527 NW2d 34 (1994); MRE 901.

VI

Defendant DeLaFe next contends that the trial court erred in refusing to instruct the jury on the offense of attempt. We disagree. An attempt, MCL 750.92; MSA 28.287, is a substantive offense separate from the underlying offense. *People v Anderson*, 202 Mich App 732, 734; 509 NW2d 548 (1993). An attempt consists of (1) an intent to do an act or to bring about certain consequences which in law amount to a crime; and (2) an act in furtherance of that intent which goes beyond mere preparation. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). Generally speaking, every solicitation is an attempted conspiracy. *People v Rehkopf*, 422 Mich 198, 213; 370 NW2d 296 (1985). If the listener agrees to the speaker's solicitation to commit an offense, both might be found guilty of conspiracy. *Rehkopf*, *supra*, p 205 n 3.

The evidence did not establish that a conspiracy was merely attempted by either defendant. Hence, the trial court properly refused to instruct on attempt. *People v Adams*, 416 Mich 53, 60; 330 NW2d 634 (1992); *People v Weatherspoon*, 171 Mich App 549, 555-556; 431 NW2d 75 (1988). Accordingly, we do not consider defendant DeLaFe's claim that the jury should have been instructed on abandonment as a defense to an attempt offense.

VII

Relying on *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992), defendant DeLaFe next challenges the constitutional validity of the sentences of life without parole. On the authority of *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993), we hold that the sentence of life without parole for the conviction offense of conspiracy to possess with intent to deliver 650 grams or more of cocaine is not constitutionally infirm.

With regard to the conviction offense of conspiracy to possess 650 grams or more of cocaine, this issue is moot because the conspiracy statute provides for punishment equal to that which could be imposed if the defendant had been convicted of committing the crime he conspired to commit. MCL 750.157a; MSA 28.354(1). By ameliorating the no-parole feature of the life sentence for possession of 650 grams or more of cocaine, *Bullock* has, in effect, ameliorated the no-parole feature of the penalty for the conspiracy offense as well.

VIII

Defendant DeLaFe's final claim is that the cumulative errors in this case served to deprive him of a fair trial. We disagree. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

DOCKET NO. 164443

I

Defendant Pabon first contends that the trial court abused its discretion in allowing a police officer to testify as an expert on narcotics trafficking. We disagree. Any relevant testimony is damaging to some extent. Because the witness was qualified based on training and experience, the information was not within a lay person's common knowledge, the information would assist the jury to understand the evidence and to determine the intent issue in this case, and defendant Pabon was not unfairly prejudiced, the trial court did not abuse its discretion in allowing the expert testimony. *People v Williams (After Remand)*, 198 Mich App 537, 541-542; 499 NW2d 404 (1993); *Harvey, supra*, pp 745-746; MRE 702; MRE 403.

Defendant Pabon also argues that the expert testimony harmed his entrapment defense. Entrapment is a question of law for the court to decide. *Alan Jones, supra*, 203 Mich App 386. Defendant Pabon has not shown that he pursued a motion to dismiss before the trial court based on entrapment. Further, defendant Pabon asserted to the jury that he did not engage in criminality. Under these circumstances, defendant Pabon's reliance on an entrapment defense to argue that the trial court's evidentiary ruling requires reversal is without merit. *People v Crall*, 444 Mich 463; 510 NW2d 182 (1993); *People v James Bailey No 1*, 439 Mich 897 (1991).

II

Defendant Pabon next contends that the trial court abused its discretion in overruling a defense objection to evidence of a conversation between a police informant and the alleged co-conspirator. Since defendant Pabon gives only cursory consideration to this issue, we could decline to consider it. *Community Nat'l Bank v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520-521; 407 NW2d 31 (1987). In any event, assuming for purposes of this issue that defendant Pabon challenges the admissibility of defendant DeLaFe's statements in Conversation No. 15 under MRE 801(d)(2)(E), we find no error. Unlike *People v Vega*, 413 Mich 773; 321 NW2d 675 (1982), the existence of the

conspiracy was established in this case by evidence independent of defendant DeLaFe's statements. *Loy-Rafuls, supra*, 198 Mich App 599-600.

III

Defendant Pabon next contends that the prosecutor gave an improper opening statement and improperly elicited testimony from a police officer on the penalty consequences of the informant's plea agreement. Our failure to consider this unpreserved issue will not result in a miscarriage of justice because the testimony elicited by the prosecutor could only have aided defendant Pabon's case by providing him with a basis for attacking the informant's credibility. *People v Mumford*, 183 Mich App 149, 151; 455 NW2d 51 (1990). Other witnesses, including the informant himself, testified about the sentencing consequences of the plea agreement. Under these circumstances, defendant Pabon has demonstrated no basis for relief. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

IV

Defendant Pabon next contends that the prosecutor engaged in misconduct by questioning the police expert on narcotics trafficking in a manner which bolstered his credibility. This issue was not preserved for appellate review. *Stanaway, supra, p 687*. In any event, we do not construe the questions as amounting to prosecutorial vouching for the witness' credibility. *People v Turner*, 213 Mich App 558, 584-585; 540 NW2d 728 (1995), lv pending, and *People v Oliver*, 170 Mich App 38, 48-49; 427 NW2d 898 (1988).

V

Defendant Pabon next complains about the trial court's failure to order separate trials and the denial of defendant DeLaFe's motion for mistrial based on the lack of separate trials. Since defendant Pabon did not join in the motion for mistrial, this issue is not properly before us. *Turner*, *supra*, p 575. In any event, for reasons discussed with respect to defendant DeLaFe's second issue on appeal, the trial court did not abuse its discretion in denying separate trials or the related motion for mistrial. Defendants did not present antagonistic defenses.

VI

Defendant Pabon next challenges the sufficiency of the evidence. Specifically, defendant Pabon argues that the evidence was insufficient that he conspired to possess cocaine. Viewed most favorably to the prosecution, we find that the direct and circumstantial evidence was sufficient to establish this charge. *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993); *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992). While evidence was adduced that the undercover federal agent and defendant DeLaFe negotiated the final terms of the transaction in the face-to-face meetings in Michigan, the jury could find beyond a reasonable doubt that defendants had conspired to possess 650 grams or more of cocaine. *Blume*, *supra*, p 485; and *Cotton*, *supra*, p 393.

Defendant Pabon has not briefed the merits of any issue concerning the "intent to deliver" element of the other conspiracy charge. Hence, this issue is abandoned. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992). Moreover, sufficient evidence supported this charge.

The amount of cocaine, combined with the reasonable inferences that may be drawn from the other circumstances of the case, provided sufficient evidence to allow a rational trier of fact to conclude that defendants conspired to possess with an intent to deliver 650 grams or more of cocaine. See *People v Meredith (On Remand)*, 209 Mich App 403, 412-413; 531 NW2d 749 (1995); and *People v Ray*, 191 Mich App 706, 708-709; 479 NW2d 1 (1991).

VII

Defendant Pabon next contends that the trial court should have excluded the physical evidence of the cocaine. For reasons discussed regarding defendant DeLaFe's fifth issue on appeal, we find that the trial court did not abuse its discretion in admitting this evidence.

VIII

Defendant Pabon next contends that the trial court erred in denying a directed verdict. A directed verdict is proper when the evidence is insufficient to support a conviction. MCR 6.419(A). For reasons discussed with respect to defendant Pabon's sixth issue, we hold that the evidence was sufficient to establish the conspiracy charges. Hence, the trial court did not err in denying a directed verdict.

IX

Defendant Pabon next contends that convictions for both conspiracy charges violates the prohibition against double jeopardy. We agree. The proper remedy for this error is to vacate the conviction on the lower charge. *People v Stewart (On Rehearing)*, 400 Mich 540, 550; 256 NW2d 31 (1977). Hence, we vacate defendant Pabon's conviction for conspiracy to possess 650 grams or more of cocaine. Although defendant DeLaFe did not raise this issue on appeal, for purposes of consistency, we also vacate defendant DeLaFe's conviction for conspiracy to possess 650 grams or more of cocaine. *People v Hayden*, 132 Mich App 273, 288 n 8; 348 NW2d 672 (1984).

X

Defendant Pabon next contends that the prosecutor improperly vouched for the credibility of police officers in closing argument. Since defendant Pabon has not provided a transcript of the closing arguments, we could deem this issue forfeited. *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992). In any event, defendant Pabon has not shown that he preserved this issue by presenting it to the trial court. *Stanaway, supra*, p 687. Even if the issue were preserved for appeal, defendant Pabon has not shown that he was denied a fair trial. *People v Marji*, 180 Mich App 525, 536; 447 NW2d 835 (1989). Accepting as true for purposes of argument defendant Pabon's claim regarding the contents of the prosecutor's argument, the prosecutor did not vouch for the credibility of police witnesses. Even if the argument was improper, the jury instructions given in this case dispelled any prejudice. *Bahoda, supra*, p 281; *Turner, supra, p 585.*

XI

Relying on *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), defendant Pabon next argues that the trial court erred by not sua sponte giving an accomplice instruction. We disagree because the informant was not an accomplice. *People v Atley*, 392 Mich 298, 311-312; 220 NW2d 465 (1974), and *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993).

XII

Defendant Pabon next contends that the trial court erred in failing to give an addict-informant instruction. We disagree because the trial court had no sua sponte duty to give an addict-informant instruction. *People v Atkins*, 397 Mich 163, 170; 243 NW2d 292 (1976), and *People v Smith*, 82 Mich App 132; 266 NW2d 476 (1978). In any event, because defendant Pabon has established neither evidentiary support for his claim that the informant was an addict nor plain error which was decisive of the outcome of this case, we find no basis for relief. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

XIII

Defendant Pabon next challenges the constitutionality of the sentence of life without parole for a conspiracy offense. On the authority of *Lopez*, *supra*, 442 Mich 889, we reject defendant Pabon's argument as it pertains to the conviction offense of conspiracy to possess with intent to deliver 650 grams or more of cocaine.

XIV

Defendant Pabon next challenges the exclusion of a Spanish-speaking juror at trial. Because we have not been provided with the transcript of the jury selection, we could deem this issue forfeited. *Wilson*, *supra*, p 615. In any event, accepting as true defendant Pabon's claim that his own attorney joined in the motion to exclude the juror for cause, we find no basis for relief. A defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

XV

Finally, defendant Pabon contends that the trial court erred in failing to instruct the jury on lesser included offenses based on the amount of the cocaine. We hold that this issue was not preserved for appellate review because defendant Pabon did not request the instruction. Further, we find no plain error. Defendant Pabon denied any criminality. No evidence was adduced that the object of the conspiracy involved less than 650 grams. Hence, this unpreserved issue warrants no relief. *Grant*, *supra*, p 553, and *People v Patrick*, 178 Mich App 152, 161-162; 443 NW2d 499 (1989) (even where instructions on lesser amount of cocaine are requested, a trial court may properly refuse the request when there is no evidence to support conviction on a lesser amount).

We affirm the conviction and sentence for conspiracy to possess with intent to deliver 650 grams or more of cocaine in both appeals. We vacate the conviction and sentence for conspiracy to possess 650 gram or more of cocaine on double jeopardy grounds in both appeals.

/s/ Maura D. Corrigan
/s/ Richard A. Bandstra
/s/ William A. Crane