STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL TOLER,

Defendant-Appellant.

UNPUBLISHED
August 27, 1996

No. 177878
LC No. 93-127444-FC

Before: Sawyer, P.J., and Bandstra and M.J. Talbot,* JJ

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to possess with intent to deliver 650 grams or more of cocaine, MCL 750.157(a); MSA 28.354(1) and MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and delivery of 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). He was sentenced to consecutive terms of life imprisonment. He now appeals and we affirm.

Defendant contends that the trial court committed several instructional errors. First, he argues that the court erred in refusing to instruct on simple possession of over 650 grams as a lesser offense of the delivery count. Simple possession is a cognate lesser included offense of delivery of cocaine and defendant would be entitled to the instruction if the evidence supported it. *People v Binder (On Remand)*, 215 Mich App 30; 544 NW2d 714 (1996). Here, the court refused to give the instruction, finding no evidence to support it. The court did not err. There was no evidence that defendant possessed the cocaine that was sent to Leflet. From the evidence presented at trial, the jury could believe that defendant delivered the drugs or he did not. There was no testimony that he merely possessed it. Under these circumstances, the trial court did not err in refusing to give the instruction. *People v Nadort*, 39 Mich App 84, 87; 197 NW2d 290 (1972). Defendant also contends that an instruction on conspiracy to possess over 650 grams of cocaine should have been given as a lesser offense of conspiracy to possess with intent to deliver that amount. However, review of the record shows that he failed to specifically request this instruction. Appellate review of the issue is waived

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

because we do not believe manifest injustice would result to defendant. *People v Todd*, 186 Mich App 625, 630-631; 465 NW2d 380 (1990).

Defendant also contends that the court erred in giving an aiding and abetting instruction, when, after the preliminary examination, the prosecutor indicated it was not relying on this theory. We do not believe that this situation denied defendant notice of the charges. In *People v Clark*, 57 Mich App 339, 344; 225 NW2d 758 (1975), this Court rejected a claim that the defendant was denied notice of the charges because the jury was instructed on aiding and abetting even though the information never included the charge. The *Clark* Court declined to reverse because it is permissible to charge an aider and abettor as a principal. Similarly, although the prosecutor represented that it would be trying defendant as a principal, there was no due process violation from later instructing on aiding and abetting. This is especially true given that defendant did not testify at the preliminary examination, but at trial denied sending the drugs and suggested that he helped arrange the transaction.

Defendant contends that the trial court erred in refusing to instruct the jury that he must have intended to cause a harm in Michigan as a prerequisite to finding him guilty. Although *Commonwealth v Bighum*, 307 A2d 255, 258-259 (Pa, 1973), held that such an instruction is proper where jurisdiction depends upon the resolution of disputed facts, the court there also held that the refusal to so instruct is not error requiring reversal if no reasonable juror could fail to find that jurisdiction vested with the state. Here, the evidence is undisputed that the drugs were sent to Michigan. There was also some evidence that defendant had discussed renting a place in Detroit to facilitate the delivery of future shipments. Given these facts, no reasonable juror could fail to find that jurisdiction vested in Michigan. Therefore, the trial court did not err in refusing to give the instruction.

Defendant next contends that the court improperly exercised jurisdiction over him. The State of Michigan may exercise extraterritorial jurisdiction over acts committed outside Michigan when the acts are intended to and do have a detrimental effect within the state. *People v Blume*, 443 Mich 476, 477; 505 NW2d 843 (1993). Given the evidence that defendant delivered the drugs to Michigan and had discussions relative to future shipments, the exercise of jurisdiction was proper.

Next, defendant contends that the delivery charge should have been dismissed because he was entrapped. Entrapment occurs if the police either engage in impermissible conduct that would induce a law-abiding person similarly situated to the defendant to commit the crime or engage in conduct so reprehensible that it cannot be tolerated by a civilized society. Entrapment exists if either prong of this test is met. *People v Juillet*, 439 Mich 34; 475 NW2d 786 (1991); *People v Fabiano*, 192 Mich App 523; 482 NW2d 467 (1992); *People v Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992). This Court reviews a trial court's findings concerning entrapment under the clearly erroneous standard of review. *Williams, supra*. Here, the evidence established that the original agreement between defendant and Leflet was for three kilos, and that after the money was sent for the first kilo, defendant would send the other two kilos to Michigan. Given this evidence, we are compelled to conclude that the police neither induced defendant to commit the crime nor engaged in reprehensible conduct. The trial court did not clearly err in finding that defendant was not entrapped. Further, we reject defendant's contention that, under conflict of law principles, California's sentencing provisions

should govern this case. Since the drugs were delivered in Michigan, the trial court did not err in applying Michigan's sentencing provisions. *People v Krause*, 206 Mich App 421, 422; 522 NW2d 667 (1994).

Next, defendant contends that the delivery charge should have been dismissed because Article V(d) of the Interstate Agreement on Detainers was violated. We disagree. The conspiracy and the delivery arose out of the same transaction and, under Article V(d), defendant could properly be tried for the delivery offense although it was not listed in the detainer.

Defendant claims he was denied a fair trial because of prosecutorial misconduct. We disagree. Questions of misconduct by the prosecutor are decided case by case. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). In the instant case, defendant has waived any error stemming from questions about the Mexican Mafia and about his brothers' criminal records because there was no objection to this. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992). Further, we do not believe the questions about defendant's gang membership denied him a fair trial given that he denied membership and the court refused to allow in pictures of an alleged gang-related tattoo. Also, contrary to defendant's claim, the prosecutor made no clear implication that defendant was involved in a murder. Nor did the prosecutor improperly vouch for Leflet's credibility by suggesting that he had some special knowledge concerning his truthfulness. Cf., *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Therefore, defendant was not denied a fair trial.

Finally, the trial court did not err in imposing consecutive sentences pursuant to MCL 333.7401(3); MSA 14.15(7401)(3). *People v Morris*, 450 Mich 316; 537 NW2d 842 (1995).

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael J. Talbot