STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTESE L. WIDEMAN,
a/k/a M & M, a/k/a MARK WHITE,
a/k/a MARTESE JONES,
a/k/a MARK JONES,

Defendant-Appellant.

UNPUBLISHED
September 20, 1996

No. 167063
LC No. 93122865 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE A. WYNN,

Defendant-Appellant.

No. 167064
LC No. 93122864 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN A. JACKSON,

Defendant-Appellant.

No. 167065
LC No. 931228633 FC

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 167066
LC No. 91110453 FC

DEMETRIUS T. CHAPPELL,

Defendant-Appellant.

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

In these consolidated cases, defendants, Martese Wideman, Dwayne Wynn, Kevin Jackson and Demetrius Chappell, appeal as of right following their convictions for conspiracy to possess with intent to deliver and to deliver a controlled substance in an amount exceeding 650 grams. MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). They were each sentenced to life imprisonment without parole.

The four defendants were involved in a cocaine delivery conspiracy with Ricky Franklin. Franklin purchased cocaine from defendant Jackson and recruited the other defendants to distribute it.

In Docket No 167063, defendant Wideman argues that he was denied the effective assistance of counsel and that numerous instances of prosecutorial misconduct denied him a fair trial. He argues that the evidence was insufficient to sustain a conviction and that the jury instructions were wrong. He claims that hearsay statements of his coconspirators were improperly admitted. With respect to his sentence, he argues that he should be entitled to parole and that his sentence was cruel or unusual punishment. We affirm.

In Docket No 167064, defendant Wynn argues that the trial judge erred in denying his motion to enforce an agreement he entered into with the prosecution, whereby he agreed to cooperate in exchange for a lesser charge. He asserts that his grand jury testimony should not have been admitted into evidence. Finally, he argues that the judge erred in denying his motion for a directed verdict. We affirm.

In Docket No 167065, defendant Jackson argues that there was insufficient evidence to sustain his conviction. He asserts error in the judge's instructions to the jury. As did defendant Wideman, he argues that it was error for the judge to admit the hearsay statements of his coconspirators, that the prosecutor's misconduct denied him a fair trial and that his sentence is cruel or unusual punishment. We affirm.

In Docket No 167066, defendant Chappell argues that there was insufficient evidence to sustain his conviction. He argues evidence was improperly admitted where the chain of possession had been broken. He asserts that the prosecution failed in its burden of proof relative to venue. He claims the judge erred in denying his motion for a directed verdict. He alleges that it was improper for the prosecutor to admit evidence regarding a hotel search. Finally, he claims he was denied the right to a speedy trial. We affirm.

Docket No. 167063 - Defendant Wideman

Defendant argues that he was denied the effective assistance of counsel where counsel failed to request that the prosecutor disclose the specific terms of immunity offered to several witnesses. However, we find that defendant failed to show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

The witnesses who implicated defendant presented testimony that revealed if they had been given preferential treatment in exchange for their testimony. Defendant's argument that there were other details not disclosed by the prosecutor is entirely hypothetical. Defendant has failed to overcome the presumption of effective assistance of counsel by showing that counsel failed to perform an essential duty and that the failure was prejudicial to defendant. *Stanaway, supra.*

Moreover, we do not find that any false testimony regarding the agreements was presented, necessitating correction by the prosecution. *People v Wiese*, 425 Mich 448; 389 NW2d 866 (1986).

Defendant argues that prosecutor James Halushka, testifying to provide a foundation for the introduction of the grand jury testimony of defendant Wynn, improperly vouched for the credibility of three prosecution witnesses. However, we find that the prosecutor did not vouch for the credibility of the witnesses to the effect that he had some special knowledge concerning their truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Next, defendant alleges that several instances of prosecutorial misconduct denied him a fair trial. Defendant argues that the prosecutor improperly (1) questioned a police officer regarding a raid on a poker game where cocaine was discovered that could not be linked to the conspiracy; (2) introduced and played a videotape that showed defendant Wilson selling cocaine that was not connected to defendants; and (3) asked irrelevant questions of witness Lytarian Weaver.

After reviewing the record, we find that defendant was not denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). With respect to the raid and the videotape, the judge struck the evidence as being irrelevant and provided cautionary instructions to the jury. With respect to the questioning of Lytarian Weaver, following an objection, the prosecutor moved to another line of questioning. Therefore, no prejudice resulted to defendant.

Defendant also asserts that he was prejudiced when the prosecutor (1) elicited testimony as to illegal gambling; (2) elicited testimony that defendant Chappell was involved in an uncharged assault; and (3) elicited testimony that Chappell had once carried a gun. However, we find that defendant waived these issues by failing to object below. *Stanaway, supra, p 687*; *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). No miscarriage of justice would result from our failure to review these issues of prosecutorial misconduct further.

In his supplemental brief, defendant argues that the prosecutor inflamed the passions of the jury by dwelling on the serious problems created by drug trafficking. However, defendant failed to cite where in the record this alleged impropriety occurred, as required by the court rule. MCR 7.212(C)(7). It is not our job to search the record and create defendant's argument for him.

Next, defendant argues that the prosecutor improperly used mug shots of several key players in the conspiracy, rather than using regular photographs. His argument is without merit. The judge allowed the mug shots to be admitted for identification purposes. There was no misconduct by the prosecutor.

Defendant also argues that the prosecutor improperly introduced evidence of an incident which occurred at the Southfield Bus Terminal. He asserts that the evidence should not have been admitted, because the persons were falsely arrested in violation of their fourth amendment rights. We find that defendant has waived this issue for appeal by not citing authority to support his position. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

Defendant argues that the cumulative effect of the prosecutor's errors necessitates reversal. However, because of our finding that none of the instances of alleged prosecutorial misconduct presented a valid claim of error, defendant was not denied a fair trial by their alleged prejudicial cumulative effect. *People v Weatherspoon*, 171 Mich App 549, 560-561; 431 NW2d 75 (1988).

We reject defendant's argument that he should be eligible for parole under MCL 791.234; MSA 28.2304. That statute provides:

> A prisoner under sentence for life or for a term of years, other than a prisoner sentenced for life for murder in the first degree or sentenced for life or for a minimum term of imprisonment for a major controlled substance offense, who has served 10 calendar years of the sentence in the case of a prisoner sentenced for a crime committed before October 1, 1992, or who has served 15 calendar years of the sentence in the case of a prisoner sentenced for a crime committed on or after October 1, 1992, is subject to the jurisdiction of the parole board and may be released on parole by the parole board. . . .

MCL 791.233b[1]; MSA 28.2303(2)[1] provides that "major controlled substance" includes conspiracy to deliver more than 650 grams of cocaine. Therefore, defendant is not entitled to parole. See *People v Jahner*, 433 Mich 490, 501; 446 NW2d 151 (1989).

Our Supreme Court has previously rejected defendant's argument that his sentence amounts to cruel or unusual punishment. *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993).

After reviewing the record in a light most favorable to the prosecution, we find sufficient evidence that defendant participated in the conspiracy. This Court has defined conspiracy as:

> [M]utual 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. Being a specific-intent crime, conspiracy requires both the intent to combine with others and the intent to accomplish the illegal objective. The essence of a conspiracy is the agreement itself. Nevertheless, direct proof of agreement is not required, nor is proof of a formal agreement necessary. It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement. A conspiracy may be proven by circumstantial evidence or may be based on inference. [*People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991) citations omitted.]

The evidence showed that defendant began transporting cocaine as early as 1988 and that he ran an operation out of Diggs' house in 1989 with Franklin's cooperation. In autumn 1989, Franklin spoke with him to determine if he needed a wholesale delivery, and he arranged logistics for the distribution of cocaine.

Defendant argues the trial judge incorrectly instructed the jury regarding whether the various amounts of cocaine could be aggregated to total more than 650 grams. However, defendant failed to object to the instruction and, in fact, specifically agreed to giving the instruction for aggregation of the amount. Defendant may not predicate error on an instruction which he requested. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Defendant argues that reversal is required where the prosecution failed to establish any act in furtherance of the conspiracy in Oakland County. Venue is a necessary portion of the prosecution's case, but is not an element of the offense. *People v Meredith (On Remand)*, 209 Mich App 403; 531 NW2d 749 (1995). A conspiracy may be prosecuted in any jurisdiction in which an overt act occurred in furtherance of the conspiracy. *Id*. p 408. Here, there was evidence of overt acts in furtherance of the conspiracy occurring in Oakland County.

The trial judge properly ruled that a coconspirator's statement was admissible evidence. MRE 801(d)(2)(E) provides that out-of-court statements made by a coconspirator during the course and in furtherance of the conspiracy are not hearsay and are admissible as independent proof of the conspiracy. The existence of the conspiracy must first be shown by a preponderance of the evidence. *People v Vega*, 413 Mich 773, 780-782; 321 NW2d 675 (1982). Contrary to defendant's argument, the conspiracy had been proven by a preponderance of the evidence when the statement was admitted.

Docket No. 167064- Defendant Wynn

Defendant argues that the trial judge erred in denying his motion to enforce the terms of an agreement that he entered into with the prosecution. He asserts that the prosecution agreed not to

charge him with conspiracy to possess with intent to distribute more than 650 grams of cocaine in exchange for his testimony. In the alternative, he asserts that the judge should have suppressed his statements made to the grand jury.

We review for clear error the trial judge's finding that no promise was made to defendant. MCR 2.613(C); *People v Brannon*, 194 Mich App 121, 128; 486 NW2d 83 (1992). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Kvam*, 160 Mich App 189; 408 NW2d 71 (1987).

At the evidentiary hearing, conflicting evidence was presented on the issue of whether defendant was promised anything in exchange for his cooperation. The detective in charge of the case as well as assistant prosecuting attorneys Sheridan and Halushka testified that no promises were extended to defendant. Defendant testified that he signed the waiver of rights form only because he was told he would be a witness and nothing more. Therefore, he believed an attorney was unnecessary. Because the evidence supported the judge's finding that no agreement had been reached, we conclude that the finding was not clearly erroneous.

However, we find it questionable whether defendant's statements were voluntarily given. Defendant was only seventeen years old when he gave his testimony to the grand jury, had no prior felony convictions and had only a tenth grade education. *People v Cipriano*, 431 Mich 315, 344; 429 NW2d 781 (1988). On the other hand, he was advised of his constitutional rights, was not physically threatened, deprived of food, sleep or medical attention or under the influence of drugs or alcohol when he gave the statement and agreed to testify before the grand jury.

Even if we were to exclude defendant's grand jury testimony, finding that it was not voluntarily given, overwhelming evidence linked defendant to the drug conspiracy. Lytarian Weaver testified that every other day over a thirteen month period he would drive defendant from Muskegon to defendant's house in Detroit. Upon arriving, defendant would make a phone call and Franklin would come over and give him four and a half ounces of cocaine. Defendant would convert it to rock form and package it for sale. The cocaine would be hidden in Weaver's car and transported back to Muskegon to be sold. Weaver would sell the cocaine for defendant. Weaver would get $50 for every $300 worth of crack sold. Up to $8,000 could be made on a given evening. Franklin would meet them back at defendant's house in Detroit and pick up the money. Therefore, we find that the admission of the grand jury testimony was harmless error.

Moreover, looking at the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could find the elements of the crime proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Therefore, the judge did not err in denying defendant's directed verdict motion.

Docket No. 167065 - Defendant Jackson

Defendant argues that there was insufficient evidence to support his conviction. He asserts that only two witnesses, both of whom were given immunity and lack credibility, testified against him. However, the credibility of the witnesses is for the trier of fact to decide. *People v Jackson*, 178 Mich

App 62, 65; 443 NW2d 423 (1989). Moreover, it does not matter if a defendant knows all the conspirators. *People v Heidt*, 312 Mich 629, 646-647; 20 NW2d 751 (1945). Viewing the testimony in a light most favorable to the prosecution, reasonable jurors could find defendant guilty beyond a reasonable doubt. *Cotton, supra*.

As with defendant Wideman, we will not review defendant Jackson's argument that the judge erred in failing to properly instruct the jury on the aggregation of the amount of cocaine. Defendant failed to object and specifically agreed to the giving of the instruction. *Barclay, supra*.

We reject defendant's arguments that the prosecution failed to establish an act in furtherance of the conspiracy in Oakland County and that hearsay statements of a coconspirator were improperly admitted, for the reasons cited in Docket No 167063, *supra*.

Defendant argues that several instances of prosecutorial misconduct denied him a fair trial. First, he argues that the prosecutor improperly told the jury during opening arguments that he was the supplier for Franklin's drug organization, and no evidence supported that accusation. We disagree.

The evidence demonstrated that defendant sold a large amount of cocaine to Franklin who then processed and distributed it. Because the evidence supported the prosecutor's opening statement, no prosecutorial misconduct occurred. See *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

Defendant's remaining claims of prosecutorial misconduct are identical to those raised by defendant Wideman in Docket No. 167063. We reject those claims for the reasons stated before. We also reject defendant's argument that his sentence constitutes cruel or unusual punishment for the reasons stated in Docket No. 167063.

Docket No. 167066 - Defendant Chappell

Defendant argues that the verdict was against the great weight of the evidence. We disagree.

A denial of a motion for new trial based on a great weight of the evidence argument is reviewed for an abuse of discretion. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). A verdict may be vacated only when it does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence. *Id*.

The evidence presented at trial did not weigh in defendant's favor. It could reasonably be inferred from the testimony that defendant was distributing cocaine and collecting money in furtherance of the conspiracy. The evidence does not clearly support defendant's argument that he was merely associated with members of the conspiracy. *People v Sobczak*, 344 Mich 465; 73 NW2d 921 (1955).

We agree with defendant that the trial judge improperly admitted the cocaine into evidence where the chain of the evidence had been broken.

A perfect chain of custody is not required for the admission of the cocaine. It may be admitted where a mistaken exchange, contamination, or tampering is established to a reasonable degree of certainty or probability. *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994). The threshold issue is whether an adequate foundation for the admission of the evidence is laid under all the facts and circumstances of the case. Once the proper foundation is established, any deficiencies in the chain of custody go to the weight afforded the evidence, and not its admissibility. *Id*.

Here, the evidence revealed that seizing officers withheld the cocaine from the evidence officer for over twenty-four hours. The prosecution did not offer any evidence to show that the cocaine was not subject to mistaken exchange, contamination, or tampering. The exhibit should not have been admitted.

Regardless, we conclude that the error was harmless. A great deal of testimony shows that defendant was involved in a conspiracy which distributed large amounts of cocaine over an extended period of time. Defendant would have been convicted even without the admission of the physical evidence itself.

Once again, for the reasons stated in Docket No. 167063, *supra*, we reject defendant's claims: (1) that the prosecution failed to establish that any overt acts of the conspiracy occurred in Oakland County; and (2) that prosecutorial misconduct occurred when evidence of the hotel raid was introduced.

Defendant argues that the trial judge erred in denying his motion for a directed verdict. Defendant has not properly presented this issue. To properly present an appeal, a party must appropriately argue the merits of the issues identified in the statement of the questions presented. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). A party must not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Here, Defendant merely recited the law without the relevant facts that support his position. We will not review this issue under the circumstances.

Finally, defendant argues that he was denied his right to a speedy trial. In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant. *People v O'Quinn*, 185 Mich App 40, 47-48; 460 NW2d 264 (1990).

Our review of the record indicates that defendant contributed to some of the delays. Moreover, the matter was adjourned several times with the concurrence of defense counsel. We note that in June, 1992, defendant waived his right to a speedy trial. A defendant's claim that his speedy trial right has been denied is heavily offset by a failure to assert that right. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). While some delay is attributable to the prosecution because of docket congestion, it is given a neutral tint and only minimal weight. *People v Holland*, 179 Mich App 184, 195; 445 NW2d 206 (1989); *People v Cooper*, 166 Mich App 638, 654; 421 NW2d 177 (1987). Finally, defendant has failed to present any evidence that the delay prejudiced him.

Affirmed.

/s/ Marilyn Kelly
/s/ Myron H. Wahls
/s/ M. Richard Knoblock