STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEROY ARQUETTE,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 185864
LC No. 90-101190-FC

Before: Taylor, P.J., and Markey and N. O. Holowka,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to possess with intent to deliver 650 grams or more of a mixture containing cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401(2)(a)(i), MCL 750.157(a); MSA 28.354(1), and was sentenced to a nonparolable term of life in prison. Defendant appeals as of right and we affirm.

Defendant contends that several instances of prosecutorial misconduct denied him a fair trial. In particular defendant claims the prosecutor: (1) made an improper comment during voir dire implying defendant was dangerous; (2) improperly vouched for the credibility of prosecution witnesses; (3) made an improper civic duty argument; (4) improperly intimidated a prosecution witness; and (5) improperly claimed defendant had been a pallbearer at a drug dealer's funeral where there was no evidence to this effect.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case and must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810

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

(1992). Appellate review of improper prosecutorial remarks is generally precluded absent an objection by trial counsel because the court is deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant's criticism of the comments the prosecutor made during voir dire are meritless. The prosecutor did not improperly suggest to a prospective juror that defendant was dangerous by telling her that the juror questionnaire did not list her home address. Because the juror omitted anything relative to where she lived from her juror questionnaire, it was reasonable to assume that she may have felt some apprehension about serving as a juror. The prosecutor merely attempted to assure the juror that there was nothing to fear from serving on the jury, and the comments did not constitute misconduct. The prospective juror was later excused. Defendant has not established substantial prejudice, *People v O'Guin*, 26 Mich App 305, 307-308; 182 NW2d 103 (1970), and defendant ultimately expressed satisfaction with the jury that was seated.

Defendant's claim of improper vouching is without merit. It was not improper to advise the jury of the agreement the prosecution's key witness had with the federal government. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). It was not improper to ask witnesses if the testimony they had given was truthful after the veracity of the witnesses' testimony had been challenged by defense counsel or to argue that prosecution witnesses were credible. *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985); *People v Turner*, 213 Mich App 558, 584-585; 540 NW2d 728 (1995).

We agree that a small portion of the prosecutor's closing remarks contained an impermissible "civic duty" argument, *Bahoda, supra* at 282. However, defendant did not immediately object, thus foreclosing an immediate curative instruction. We find no manifest injustice. *Stanaway, supra*. In any event, we deem the error was harmless in light of the evidence against defendant and find the error was cured by the court's instruction that the attorney's arguments were not evidence. *Bahoda, supra* at 281; *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

We do not find any prosecutorial intimidation. It is true that prosecutorial intimidation of witnesses is improper and may warrant reversal, *People v Crabtree*, 87 Mich App 722, 725; 276 NW2d 478 (1979), and that threats from law enforcement officers may be attributed to the prosecution. *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992). However, the jury heard evidence of the alleged intimidation and the witness's testimony that she was telling the truth. The jury was therefore able to assess the witness's credibility in light of all of this evidence. Because the key issue was whether the witness was telling the truth, rather than lying because of the alleged intimidation, reversal is not required. *Stacy, supra* at 28-30.

The prosecutor concedes that he erroneously stated in his closing argument that defendant had been a pallbearer at a drug dealer's funeral. In fact, the prosecution's key witness stated that the two codefendant's had been pallbearers but did not state that defendant had been. It is improper to argue facts that are not in evidence. *Stanaway, supra* at 686. However, there was no objection to this misstatement of fact and defense counsel did tell the jury that the prosecutor's statement was inaccurate in his closing argument. Thereafter, the court instructed the jury that the arguments of counsel were not

evidence. Under the facts of this case, we are satisfied that the prosecutor's inadvertent, isolated misstatement did not deprive defendant of a fair trial. *Bahoda, supra* at 267.

Defendant next contends that the trial court erred in allowing evidence contrary to MRE 404(b), which provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. The decision whether to admit evidence is left to the discretion of the trial court. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.* In this case, the trial court did not abuse its discretion in admitting the evidence. The evidence was offered to provide some context for the conspiracy charged in the indictment, and was not unduly prejudicial. Even if some of the acts occurred prior to the date of the conspiracy alleged in the indictment, it was still relevant to the establishment of the conspiracy. *People v Iaconis*, 29 Mich App 443, 467-468; 185 NW2d 609 (1971), affirmed 387 Mich 431; 196 NW2d 767 (1972). To the extent that the evidence involved defendant and his codefendants and was within the time frame of the conspiracy alleged in the indictment, it was used to prove the crime and was not improper similar acts evidence. We also reject defendant's assertion that the evidence was an improper admission of a coconspirator's acts.

Defendant claims that the trial court erred in allowing hearsay testimony of his coconspirator because the conspiracy had not been established by a preponderance of the evidence, as required by MRE 801(d)(2)(E). The trial court rejected this claim in denying defendant's motion for a new trial, stating that a member of the conspiracy established its membership, purpose, and operation before asking the witness about statements made by group members. Even if we were persuaded that there was no independent proof of a conspiracy involving defendant at the time the statements were admitted, we would find the error was harmless in light of the overwhelming evidence against defendant and the fact that defendant's involvement in the conspiracy was established shortly thereafter. *People v Mateo*, 453 Mich 203; ___ NW2d ___ (1996).

Defendant contends that his conspiracy charge should have been joined with a charge of delivering cocaine that stemmed from a March, 1989, incident at the Village Green Apartments and resulted in an earlier conviction. Under *People v White*, 390 Mich 245; 212 NW2d 222 (1973), the prosecution is required to join at one trial all the charges against a defendant arising out of a single criminal act, occurrence, episode, or transaction. However, in this case, the delivery and conspiracy did not stem from the same transaction. The conspiracy charge was different from the prior delivery offense. Because there is no indication that the two crimes were committed in the same time sequence or displayed the same goal and intent, the prosecution was not required to join the charges at one trial. *People v Hunt (After Remand)*, 214 Mich App 313, 315-316; 542 NW2d 609 (1995).

Next, the trial court did not err in failing to sua sponte give CJI2d 5.6 relating to accomplice testimony because this was not a closely drawn case, given that the testimony of Salwan Askar, the only accomplice, was corroborated by other witnesses. *People v Buck*, 197 Mich App 404, 415; 496 NW2d 321 (1992). Moreover, there was no credibility contest between Askar and defendant because defendant did not testify.

Further, we reject defendant's claim that the trial court was required to sua sponte instruct on simple possession. Possession is not a lesser, necessarily included offense of delivery and therefore the trial court is not required to sua sponte give such an instruction. *People v Binder (On Remand)*, 215 Mich App 30, 33-36; 544 NW2d 714 (1996). Because defendant was not entitled to the instruction, his attorney was not ineffective in failing to request it. Indeed, defense counsel's failure to request a simple possession instruction, where simple possession is easier to prove but nonetheless carries the same legislatively determined penalty, is readily understandable. Cf. *People v Reed*, 449 Mich 375, 396; 535 NW2d 496 (1995) (counsel is not ineffective for taking a position that, while objectively reasonable at the time, is later ruled incorrect). The fact that the Supreme Court reduced the penalty to parolable life for mere possession convictions in *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992), is irrelevant because this case was tried before *Bullock* was decided.

The trial court did not err in allowing the case to proceed simply because the prosecution failed to file a witness list, as it was required to do under MCL 767.40a(3); MCL 28.980(1)(3). Noncompliance with this provision does not require automatic dismissal. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991). The trial court only abuses its discretion in proceeding to trial where a defendant is able to show prejudice as a result of the failure to produce a witness list. *Id.* In this case, defendant failed to show any prejudice because all of the trial witnesses were listed on the grand jury indictment or true bill. Therefore, the trial court did not abuse its discretion in permitting the case to proceed.

There was no cumulative effect of errors such that defendant was deprived of a fair trial. *Bahoda*, *supra* at 292, n 64.

Finally, we reject defendant's claim that his mandatory life sentence is disproportionate and unconstitutional. Defendant has failed to overcome the presumption that his legislatively mandated sentence is proportionate. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). The sentence is not cruel or unusual, *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993). Finally, the sentence of mandatory life imprisonment does not violate the Equal Protection Clause of the federal or state constitutions as it bears a rational relationship to a legitimate state end. *People v O'Donnell*, 127 Mich App 749, 756; 339 NW2d 540 (1983).

Affirmed.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Holowka