STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL BERNARD COOK,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 176019
LC No. 93-1366-FH

Before: Corrigan, P.J., and Taylor and D.A. Johnston,* JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of delivery of more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and conspiracy to deliver more than 50 but less than 225 grams of cocaine, MCL 750.157a; MSA 28.354(1), and his sentences to consecutive terms of imprisonment of ten to twenty years. We affirm.

Defendant first argues that the trial court erred in admitting his coconspirator's statement under MRE 801(d)(2)(E). Because defense counsel elicited the information on cross-examination of the prosecution's witness, defendant may not claim appellate error on this ground. *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

Next, we reject defendant's claim that the evidence was insufficient to establish his specific intent to conspire with another to commit an unlawful act. In reviewing evidentiary sufficiency, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1991). A conspiracy may be proven by circumstantial evidence or may be based on inferences. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991).

In this case, the evidence established an agreement, the essence of a conspiracy. *Id.* The seller did not have cocaine when the undercover officer arrived. The seller told the undercover officer that he

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

had to call his "man." The seller made a phone call, then told the undercover officer that his "man" would arrive in approximately fifteen minutes. Defendant arrived at the seller's home thirteen minutes later. The seller said "he's here" when defendant arrived. Defendant and the seller exchanged a brown paper bag. Defendant remained at the seller's home after the exchange while the seller gave the brown bag containing cocaine to the undercover agent. Viewing this evidence in a light most favorable to the prosecution, we hold that a rational trier of fact could find beyond a reasonable doubt, based on permissible inferences, that defendant conspired to sell cocaine to a third person. *Wolfe*, *supra* at 515.

Next, defendant raises two claims of ineffective assistance of counsel. In the absence of a separate evidentiary record, our review is limited to the record furnished on appeal. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993). Defendant first claims that his counsel erred in eliciting his coconspirator's inadmissible statement. Defendant cannot, however, establish that the result of the proceedings would have been different absent this alleged error, *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995), because the court correctly deemed the statement admissible when the prosecution provided independent proof of the conspiracy. Defendant also claims that his counsel gave him erroneous advice regarding his possible sentence following a conviction. However, defendant admits that no errors appear on the record regarding this issue; therefore, we have no basis for appellate review. *Moseler*, *supra* at 299.

Next, defendant complains of four separate instances of prosecutorial misconduct. 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). The prosecutor's comments did not deprive defendant of a fair and impartial trial.

First, defendant claims that the prosecution's inquiry into his prior conviction for the unlawful use of a motor vehicle caused prejudice that could not be cured by the trial court's instruction. To prevail on a claim of prosecutorial misconduct, an improper question must have denied defendant a fair trial. *People v Yarger*, 193 Mich App 532, 540; 485 NW2d 119 (1992). The questioning did not deprive defendant of a fair and impartial trial because the trial court struck the reference to the unlawful use of a motor vehicle from the record. The court instructed the jury that the information was not evidence and that the jury could use only evidence to find defendant guilty. Evidence of defendant's prior conviction was not so prejudicial that the jury could not be expected to follow the court's instruction. *People v Hana,* 447 Mich 325, 351; 524 NW2d 682 (1994) (jurors are presumed to follow their instructions).

Second, defendant challenges the prosecutor's question to defendant regarding why the seller would call defendant his supplier, and contends that the trial court's instruction did not cure the prejudice. However, defendant told the trial court that its curative instruction was "exactly" what he wanted. The trial court instructed the jury that the prosecution based the question on a circumstantial situation and that it was not to consider the statement as evidence and further stated that questions are not evidence. The curative instruction removed prejudice and prevented manifest injustice.

Third, defendant complains about the prosecutor's request for a jury view in the jury's presence. When the trial reconvened the next day, the trial court instructed the jury that both counsel had requested a jury view, that it was the sole entity to determine whether one was necessary, and that it did not feel that one was necessary. The trial court's conduct thus assured a fair and impartial trial.

Defendant also takes exception to the prosecutor's reference to the denial of the requested jury view during the prosecutor's closing argument. The record does not support this claim. In closing, the prosecutor may comment on the evidence and reasonable inferences drawn therefrom as related to the prosecutor's theory of the case. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Further, prosecutorial comments must be 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 (1992). After a review of the pertinent portion of the record, we find that the prosecutor merely was responding to photographs introduced by defendant and not the denied jury view.

Defendant's last claim of prosecutorial misconduct concerns a comment about ethics that the prosecutor made while objecting to defense counsel's closing statement. Because defendant did not object to this comment, appellate review is precluded unless an instruction could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The prosecutor stated that defense counsel's opinions were against the canons of ethics. Defendant contends that the charge of unethical behavior from a government representative caused prejudice. In a similar case, we found that such a comment was disparaging, but did not deprive the defendant of a fair and impartial trial. *People v Guenther*, 188 Mich App 174, 183; 469 NW2d 59 (1991). After a review of the pertinent portion of the record, we find that failure to review this claim will not result in a miscarriage of justice, so our review is foreclosed. *Stanaway*, *supra* at 687.

Having found no individual errors, we need not address defendant's claim of cumulative errors prejudicing his trial. *People v Robert Morris,* 139 Mich App 550, 563; 362 NW2d 830 (1984).

Finally, defendant raises two sentencing issues. First, defendant asserts that his sentences should run concurrently. In *People v Otis Morris*, 450 Mich 316, 337; 537 NW2d 842 (1995), our Supreme Court held that "another felony" in MCL 333.7401(3); MSA 14.15(7401)(3) "includes any felony for which the defendant has been sentenced either before or simultaneously with the controlled substance felony enumerated in § 7401(3) for which a defendant is currently being sentenced." Therefore, his sentences should run consecutively.

Second, defendant asserts that his consecutive sentences violate the proportionality principle of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and amount to cruel and unusual punishment. First, the Legislature is empowered to establish the range of punishment for the commission of a particular felony. *Otis Morris*, *supra* at 333. Second, a legislatively mandated sentence is presumed proportional and valid. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). Last, the consecutive sentencing requirement applies when multiple charges arise from the same

incident. *People v Sammons*, 191 Mich App 351, 375; 478 NW2d 901 (1991). Hence, defendant's consecutive sentences are valid.

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston