STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEJO GONZALEZ,

Defendant-Appellant.

UNPUBLISHED
November 15, 1996

No. 156916
LC No. 91-045634-FC

Before: Markman, P.J., and McDonald and M. J. Matuzak,* JJ.

PER CURIAM.

Defendant appeals as of right his May 4, 1992, jury convictions before the Genesee Circuit Court for conspiracy to deliver over 650 grams of cocaine, MCL 750.157a, MCL 28.354(1); and MCL 333.7401(2)(a)(i); MSA 14.15(7401), and delivery of over 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401) (Appendix A). Defendant was found guilty of both charges. We affirm defendant's convictions but remand with instructions to amend defendant's judgment of sentence to impose concurrent sentences.

Defendant first argues that his rights to confrontation and due process were violated because the trial court precluded cross-examination of a key witness, Ernesto Galarza. Whether a trial court has properly limited cross-examination is reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). Moreover, where a defendant claims that the denial of cross-examination has prevented the exploration of a witness' bias, this Court reviews this question for harmless error. *Id.* at 688. The burden of demonstrating its harmlessness rests with the prosecutor. *Id.* at 685. Two inquiries are raised when examining whether an alleged error of constitutional dimension is harmless. First, is the error harmless beyond a reasonable doubt? An error is harmless beyond a reasonable doubt when it has no effect on the verdict. Second, is the error so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless? *Id.* at 686. While the scope of proper cross-examination lies within the sound discretion of the court, "the bias or interest of a witness is always a relevant subject of inquiry upon cross-examination." *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995). Where a defendant claims that the denial of cross-

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

examination prevented the exploration of a witness' bias, this Court will review this contention under a harmless error analysis. *Id.* at 336.

Galarza was one of defendant's original co-defendants but entered into plea negotiations with the prosecutor's office before trial. The prosecutor initially elicited that Galarza had entered into a plea agreement with the prosecutor's office. Galarza stated that at the time of trial, he was still charged with conspiracy to deliver 650 grams of cocaine and delivery of cocaine and that after trial, he would plead guilty to delivery of cocaine between 225 grams and 649 grams and the conspiracy charge would be dropped.

Defense counsel attempted to ask Galarza about his past experiences as a witness. He acknowledged that he could not impeach Galarza with the previous drug offenses under MRE 609,[1] but stated that he wanted to inquire about whether Galarza's sentence would be enhanced based on his two prior drug convictions. Indicating that it felt that such questioning would result in the circumvention of MRE 609, the court ruled that defendant could not ask Galarza about his two prior drug convictions. The court indicated in this regard:

> You may explore on cross-examination whether [Galarza] is looking for leniency in the sense that you may have heard if you were listening at the time the plea agreement was placed on the record that his attorney is in a position to argue for a departure below the minimum. His attorney was not foreclosed from arguing to the Court at the time of sentencing for a departure that would fit into this looking for leniency area, but the enhancement provision in a direct explicit way may not be brought out because it's getting in the back door what you can't get in the front door. You can ask if there is any other aspect or provision in terms of plea negotiations but not the specifics.

The prosecutor disclosed Galarza's plea agreement during direct examination and later assured the court that no enhancement agreement had been discussed during plea negotiations with Galarza. In addition, defense counsel chose not to cross-examine Galarza at all on the subject of lenient treatment by the prosecutor. Under these circumstances, we are unable to conclude that the trial court erred in its decision to limit the scope of cross-examination in order not to circumvent MRE 609. *Minor, supra* at 684; MRE 611.

Even assuming the trial court erred in curtailing cross-examination, any error should be regarded as harmless in view of the ample evidence pointing to defendant's culpability. The police surveillance team saw defendant transfer the package of drugs to its informant. The informant testified that defendant handed him the kilo of cocaine. Defendant's fingerprints were found on the package containing the cocaine. As a result, the omission of defense counsel's questions into Galarza's potential bias, even if error, appears harmless beyond a reasonable doubt. *Minor, supra* at 685. The jury could infer from the information elicited on direct that Galarza's "deal" was contingent on his testimony and weigh such testimony accordingly.

Next, defendant contends that the trial court abused its discretion in failing to appoint an interpreter for defendant. Although defendant failed to raise this issue before the trial court, because it raises a potentially dispositive question, it will be addressed. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). A trial court's decision regarding whether to appoint an interpreter for a defendant is reviewed for an abuse of discretion. *People v Warren (After Remand)*, 200 Mich App 586, 591; 504 NW2d 907 (1993). The applicable statute, MCL 775.19a; MSA 28.1256(1), provides:

> If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language, the inability to adequately communicate by reason of being mute, or because the person suffers from a speech defect or other physical defect which handicaps the person in maintaining his or her rights in the case, the judge shall appoint a qualified person to act as an interpreter.

The record indicates that defendant had been in the United States since 1980 when he arrived from Cuba. Witnesses at trial testified that defendant spoke in Spanish during the incidents relating to the drug deal and defendant avers that he possessed a limited knowledge of English.

However, there is nothing in the transcript which indicates that defendant requested the appointment of an interpreter or that he failed to comprehend the trial or pretrial proceedings. Defendant's several exchanges with the trial court indicate that he was capable of understanding the trial judge and no concern was expressed on the part of any participant in the trial with regard to defendant's proficiency in English. Further, defendant demonstrated an ability to communicate with the trial judge in English at his sentencing. There is nothing which "appeared" to warrant the appointment of an interpreter by the trial court. That defendant spoke Spanish during the drug transactions merely evidences that he had retained knowledge of his native language or that Spanish was the preferred language of his cohorts. A trial court is not required affirmatively to establish a defendant's English proficiency, at least where the issue has not been introduced either by defendant or as a result of the trial court's encounters with the defendant. *People v Atsilis*, 60 Mich App 738, 739; 231 NW2d 534 (1975). As a result, no abuse of discretion occurred with respect to the court's failure to appoint an interpreter for defendant.[2]

Next, defendant argues that the trial court abused its discretion by unduly restricting voir dire. We disagree. Defendant was jointly tried for charges punishable by life imprisonment. He exhausted his ten peremptory challenges, and the issue is properly preserved. See *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992); MCR 6.412(E)(1). "Where the trial court rather than the attorneys conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). A trial court is vested with "considerable discretion in both the scope and conduct of voir dire." *People v Sawyer*, 215 Mich

App 183, 186; 545 NW2d 6 (1996). When reviewing the trial court's conduct, this Court must determine "whether the trial court conducted a voir dire 'sufficiently probing to uncover potential juror bias.'" *Id*. at 187.

"The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *Id.* Notably, there is no right to have counsel conduct voir dire or to individual, sequestered voir dire. *Id*. at 191. Further, there is no right to have the court ask questions submitted by counsel. A defendant is entitled to a fair and impartial jury as assured by procedures conducted within the discretion of the court. *Id.*

Defendant claims that no questions regarding defendant's race or ethnicity were asked by the court after the court precluded defense counsel from pursuing individual voir dire. Defense counsel was permitted to question the panel and failed himself to ask any questions relating to race or ethnicity. Further, defense counsel failed to express dissatisfaction with the jury selected or indicated that he wished to ask additional questions. The court asked the jury panel a thorough series of questions concerning potential prejudices, biases toward drugs, familiarity with the parties, and the presumption of innocence. The court did not abuse its discretion in its ruling.

Next, defendant maintains that counsel was ineffective. Defendant failed to move for an evidentiary hearing required by *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Thus, this Court's review is limited to deficiencies apparent in the record. *People v Amendarez*, 188 Mich App 61; 468 NW2d 893 (1991). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the alleged deficiencies were prejudicial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Tommolino*, 187 Mich App 14; 466 NW 2d 315 (1991).

Defendant contends that his trial counsel was ineffective because he failed to cross-examine witnesses adequately concerning plea bargains, because he failed to procure an interpreter for defendant and because he failed to provide a substantial defense for defendant. The record in this case does not support defendant's claims. We are neither persuaded that there was deficient performance on counsel's part nor that "but for counsel's alleged failure[s]" the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-88; 521 NW2d 557 (1994). We will not substitute our judgment for that of counsel regarding trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant finally asserts that the trial court was without authority to impose consecutive sentences for defendant's life sentences for delivery and conspiracy of controlled substances. We agree. In *People v Denio*, 214 Mich App 647, 651; 543 NW2d 66 (1995), lv gtd 451 Mich 897 (1996), this Court expressly held that drug conspiracy offenses were excluded from the scope of the consecutive sentencing provisions of MCL 333.7401(3); MSA 14.15(7401)(3). Therefore, defendant's sentences should have been imposed to run concurrently.[3]

Finally, defendant argues that his mandatory minimum sentence of non-parolable life for conspiracy and delivery of cocaine was cruel and unusual as applied to him. This sentence has been held not to be "cruel and unusual" or "cruel or unusual" under the U.S. or Michigan Constitutions. *People v Fluker*, 442 Mich 891-892; 498 NW2d 431 (1993); *People v Loy-Rafuls*, 442 Mich 915; 503 NW2d 453 (1993); *People v Sardy*, 216 Mich App 111; 549 NW2d 23 (1996). Moreover, defendant's sentence is not disproportionate. Mandatory minimum sentences are presumptively valid and proportionate. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). Defendant's lack of a criminal history will not overcome the presumption in favor of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Nor has defendant raised any unusual circumstances which would mitigate the proportionality of the sentence as to him personally.

Accordingly, the case is remanded to the trial court with instructions to amend defendant's judgment of sentence to indicate that defendant's two convictions should run concurrently. The remaining issues are affirmed. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak

[1] MRE 609 provides that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination and (1) the crime contained an element of dishonesty or false statement . . . "

[2] Defendant, in his appellate brief, cites passages from his preliminary examination where he was apparently provided an interpreter. Yet, he has failed to include this transcript on appeal. However, we do not see how this would change the instant analysis unless there were evidence that the trial judge was aware of the provision of the interpreter and failed to further consider the matter.

[3] Judge Markman alone would invoke Administrative Order 1996-4, 451 Mich xxxii, on the basis of his disagreement with *Denio* for the reasons set forth in his concurring opinion in *People v Feazel*, __ Mich App __; __ NW2d __ (Docket No. 181072, issued 11/1/96).