STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MICHAEL WATROBA,

Defendant-Appellant.

UNPUBLISHED
December 17, 1996
ON REMAND

No. 192072
LC No. 92-007196

Before: Holbrook, P.J., and Wahls, and White, JJ.

PER CURIAM.

This case is before us for the second time. We initially reversed and remanded for a new trial, concluding that the trial court reversibly erred by summarily denying the jury's request to review testimony. *People v John Michael Watroba*, unpublished opinion per curiam of the Court of Appeals, issued June 9, 1995 (Docket No. 160373). In lieu of granting leave to appeal, the Supreme Court peremptorily reversed and remanded to this Court for consideration of the remaining issues defendant raised. We affirm.

I

Defendant was convicted following a jury trial of one count of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and two counts of possession with intent to deliver over fifty, but less than 225, grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). He was sentenced to two to twenty years on the count involving less than fifty grams, and to ten to twenty years on each count of over fifty grams, consecutively.

Defendant was charged and bound over with a fourth count, conspiracy to deliver over 225, but less than 650, grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), MCL 750.157a; MSA 28.354. This count was voluntarily dismissed by the prosecutor.

II

Defendant first argues that he was denied the effective assistance of counsel by counsel's (1) failure to file a motion to quash, (2) failure to conduct discovery, (3) failure to pursue an entrapment defense, (4) ineffective cross-examination on the search warrant affidavit, (5) failure to argue a defense theory in closing, and (6) failure to request instructions on the credibility of police witnesses and identification.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). We conclude that defendant was not denied the effective assistance of counsel.

Defendant first asserts that defense counsel was ineffective in failing to file a motion to quash. However, defendant has not explained what the motion would have argued, to which charges it would have pertained, and why it would have been successful. Further, to the extent the motion would have addressed the conspiracy charge, defendant was not prejudiced, as that charged was dismissed.

Defendant further contends that counsel was ineffective in failing to conduct discovery and in failing to raise an entrapment defense. Defendant offers no support for either contention and simply requests a *Ginther*[1] hearing. However, the record does not support defendant's contention regarding discovery,[2] and defendant has made no offer of proof indicating that he had a viable entrapment defense or that a *Ginther* hearing is appropriate.

Defendant also contends that he was denied the effective assistance of counsel when defense counsel elicited damaging testimony and opened the door to other testimony during cross-examination of Officer Grant. Counsel sought to impeach Officer Grant's testimony by cross-examining him regarding statements made in his affidavit in support of a search warrant. On redirect, the prosecution was permitted to read the selected paragraphs in their entirety over the objection of defense counsel. As evidenced by cross-examination, counsel was trying to undermine Officer Grant's credibility by demonstrating an inconsistency between his trial testimony and the affidavit. To establish ineffective assistance, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Lavearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant has not done so.

Defendant next asserts, without elaboration, that trial counsel failed to argue a defense theory in closing. During closing argument, counsel sought to undermine Officer Grant's credibility by reminding the jury of the inconsistencies between his testimony and the search warrant affidavit. Additionally, counsel argued that if defendant actually knew Officer Grant, as Officer Grant contended, defendant would not have involved himself in a drug transaction with him. Further, counsel asserted that defendant was merely present at the apartment but was not involved in the transaction. It is clear that trial counsel argued the defense of mere presence during closing.

Lastly, defendant argues that he was denied effective assistance of counsel by counsel's failure to request instructions on identification and the credibility of police witnesses. However, defense

counsel specifically stated that identification was not an issue in the case. Moreover, counsel was not arguing that someone else was at the apartment rather than defendant, but that defendant was merely present when the transaction occurred. As for the instruction on credibility, the trial court explained to the jury the factors to be used in determining whether a witness should be believed or not. Defendant has shown no prejudice.

We conclude defendant was not denied the effective assistance of counsel.

III

Defendant next argues that the trial court erred in failing to grant his request for substitution of counsel. We disagree.[3]

After carefully reviewing the record, including defendant's letter to the Chief Judge, the transcript of the aborted plea-taking proceeding, and the colloquy before the trial court on the day of trial, we conclude that the court did not abuse its discretion in refusing to adjourn the trial to allow defendant to proceed with substitute counsel. We observe that substitute retained counsel was present, but never indicated an intent to appear and never requested an adjournment. Further, the trial court gave defendant ample opportunity to explain his differences with counsel and his desire for substitute counsel, and fully explored defendant's expressed dissatisfaction. The trial court's implicit conclusion that defendant's disagreement with counsel lacked foundation was not unreasonable. Applying *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972), we conclude defendant has failed to demonstrate that the court abused its discretion in denying a continuance so that defendant could proceed with substitute counsel.

IV

Defendant next asserts he was denied a fair trial by the admission of hearsay testimony. During direct examination of Officer Grant, the prosecution questioned him regarding his conversations with Curtis Van, the main participant in the drug sale. Defense counsel objected on the ground that the testimony would constitute hearsay not subject to a valid exception. The prosecution indicated it would fall under the present sense impression and/or declaration against interest exceptions. The trial court allowed the testimony under the declaration against interest exception.

A statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted is hearsay. MRE 801(c); We first observe that many of the objected to statements were not hearsay because not offered for the truth of the matter asserted. Van's statements regarding the weight and quality of the cocaine fall into this category. Further, we reject defendant's argument that the testimony was not relevant.

Defendant challenges an additional colloquy wherein Officer Grant testified:

> Q (By the Prosecutor, continuing): Did you make arrangements on that conversation to purchase a quantity of cocaine?

A I did.

Q And what quantity of pur -- what quantity of cocaine did you agree to buy?

A Curt Van indicated that he and John [defendant] had three ounces of cocaine –

Q Okay.

A -- in their possession, right now, that they would give me for $1,200.00 apiece.

Q Okay. He said, he being Curt Van and John, had three ounces?

A Clearly is what he stated to me, that he and John had three ounces ready.

Defendant did not specifically object to the introduction of this testimony, and never responded to the argument that the earlier statements were admissible under MRE 804(b)(3) as declarations against interest. Hearsay by an unavailable declarant is admissible if the statement, at the time it was made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, that a reasonable person in his position would not have made the statement unless he believed it to be true. MRE 804(b)(3); *People v Petros*, 198 Mich App 401; 499 NW2d 784 (1993); *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). Where the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement including portions that inculpate another, is admissible pursuant to MRE 804(b)(3). *Poole, supra* at 161. The trial court did not abuse its discretion in concluding that Van's statement to Officer Grant falls within this exception.

V

Defendant next asserts he was denied a fair trial by the trial court's allowance of the impermissible bolstering of Officer Grant's testimony by the reading into the record of large portions of the search warrant affidavit. We disagree.

On cross-examination of Officer Grant, defense counsel sought to impeach him by inquiring why he testified defendant was named in a certain portion of the search warrant when in fact he was not

named. On redirect, the prosecutor sought to read the two paragraphs of the search warrant affidavit to show that the remainder of the material was consistent with Officer Grant's testimony. Defense counsel objected on hearsay grounds.

The trial court did not abuse its discretion in allowing portions of the affidavit to be read. As a general rule, neither a prosecutor nor anyone else is permitted to bolster a witness' testimony by referring to prior consistent statements of the witness. *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). However, a prior consistent statement is admissible if the declarant testifies at trial, the declarant is subject to cross-examination concerning the statement, the statement is consistent with the witness' testimony and the statement is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. MRE 801(d)(1)(B).

Here, defense counsel sought to impeach Officer Grant with his sworn search warrant affidavit by demonstrating inconsistencies between Officer Grant's testimony and the affidavit, specifically focusing on the omission of defendant's name in particular sentences of certain paragraphs in the affidavit. In doing so, defense counsel attempted to demonstrate fabrication by implicitly arguing if defendant was actually involved in the drug transactions, Officer Grant would have included his name in the search warrant affidavit, and his testimony at trial is therefore not true.

To rebut defense counsel's charge of recent fabrication, i.e., to show that Officer Grant's testimony was consistent with the prior statements contained in the search warrant affidavit in that defendant's name was within the affidavit, the prosecution sought to read to the jury prior consistent statements contained within the two paragraphs of the same document that defense counsel used on cross-examination. Pursuant to MRE 801(d)(1)(B), the trial court allowed the prosecution to read to the jury the prior consistent statements to show that Officer Grant was not testifying differently than his sworn affidavit. Under MRE 801(d)(1)(B), the trial court did not abuse its discretion.

VI

Defendant next asserts he was prejudiced by Officer Grant's references to past contacts with defendant and that his motion for a mistrial should have been granted. We disagree.

Defendant contends that he was prejudiced on two separate occasions when Officer Grant stated that he knew defendant from previous contacts. Officer Grant testified that when he first went to Van's apartment and defendant opened the door he recognized defendant because he had had face to face contact with him on numerous occasions. Officer Grant also testified that he recognized defendant's voice on the phone because of his numerous contacts with him. After the jury was excused, defense counsel objected and moved for a mistrial, arguing that the logical inference to be drawn from the statements is that Office Grant had contact with defendant in his official capacity. The prosecution argued that those statements could also mean that since defendant had several meetings with Officer Grant, Officer Grant was referring to those meetings as previous contacts with defendant. The trial court concluded that the previous contacts could have taken place anywhere, and not necessarily in Officer Grant's official capacity, and found the statements more probative than prejudicial. Thereafter,

during recross examination, defense counsel reopened the issue by asking Officer Grant if he was in police uniform when he had these previous contacts with defendant, and Officer Grant replied "yes." Defense counsel then attempted to use the previous contacts to his advantage by arguing in closing argument that if defendant actually knew Officer Grant, he would not have then engaged in a drug transaction with a police officer .

We conclude the trial court did not abuse its discretion in admitting the testimony and in declining to grant a mistrial. *People v McAlister,* 203 Mich App 495, 503; 513 NW2d 431 (1994).

VII

Defendant next asserts that prosecutorial misconduct denied him a fair and impartial trial. Defendant asserts the prosecutor improperly shifted the burden of proof to defendant to prove his innocence.

Appellate review of prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction, unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant or if manifest injustice would result from this Court's failure to review the alleged misconduct. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Here, defendant failed to object or request a curative instruction. Therefore, this Court's review is for egregious misconduct resulting in prejudice which could not have been cured by a curative instruction or would result in manifest injustice. *Id.*

We have reviewed the arguments challenged on appeal in the context in which they were made, and conclude that the arguments were not improper and that defendant was not denied a fair trial.

VIII

Defendant next asserts that he was denied a fair trial by the inclusion on the jury of a juror who was equivocal about her ability to exercise independent judgment in rendering a verdict.

A party who has not exhausted all peremptory challenges, and has expressed satisfaction with the jury, waives issues regarding jury selection on appeal. *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). Defendant exercised two out of the five peremptory challenges and twice stated his satisfaction with the jury. Thus, defendant has waived this issue on appeal.

Further, the trial court did not abuse its discretion when it failed to excuse the juror. The unidentified juror stated that she might have a conflict because a person sitting on the jury was considered "family." The juror said they might have "too much of the same mind set." The trial court did an extensive voir dire of the juror regarding her ability to be fair and impartial. Ultimately, the juror did state that she could be fair and render an independent judgment. A potential juror's self-analysis as to whether she has formed an opinion need not necessarily control the determination of the potential juror's impartiality; rather, that determination is reserved for the trial judge after sufficient inquiry. *People v Tyburski,* 196 Mich App 576, 580; 494 NW2d 20 (1992), aff'd 445 Mich 606 (1994).

IX

We next address whether defendant was denied a fair trial by the trial court's failue to instruct the jury, sua sponte, regarding the credibility of police witnesses and identification. Defendant did not specifically object to the lack of jury instructions on these issues. Therefore, this Court's review is for manifest injustice.

Jury instructions are reviewed as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. We conclude the trial court did not deny defendant a fair trial when it failed to sua sponte instruct the jury on identification and the credibility of police witnesses. The general instruction on credibility was sufficient to preserve defendant's rights.

X

Defendant next asserts that the trial court erred in ruling that a tape recording made by the police of conversations during the negotiations of the narcotics transactions was inadmissible. The decision to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 456 (1993).

Defendant was originally charged with four counts, the last count being conspiracy to deliver over 225 grams, but less than 650 grams, of cocaine. Prior to trial, the prosecutor dismissed the conspiracy count and indicated he was not planning to introduce the tape, as it pertained to the conspiracy count and was irrelevant to the remaining counts. Defense counsel was of the opinion that the tape was more prejudicial than probative, and tried to convince defendant that it should not be introduced. Defendant, however, wanted portions of the tape introduced to impeach Officer Grant. The court undertook to review the tape. The following day, after reviewing the tape, the trial court concluded that the tape had no probative value as it was useful for limited impeachment purposes regarding the dismissed conspiracy count, and ruled it inadmissible. The court expressed its willingness to reevaluate its ruling should defendant take the stand.

Defendant identified only one area of impeachment. At the preliminary examination, Officer Grant testified:

> Q. Okay. Did he – did Mr. Watroba ever tell you he didn't want to sell 12 ounces of cocaine to you?
>
> A. No, he did not.
>
> * * *
>
> A. He just said, stated they were a little worried about selling the 12 ounces and he went into the charges for deliveries of 50 and over 25 [sic] and over 625.

Defendant contended that the tape would establish that he did state he did not want to participate in the transaction.

Based on the record presented, we conclude that the trial court did not commit reversible error in ruling the tape inadmissible. Defendant never established that the tape was relevant to the charges being tried, or that the tape had more than marginal impeachment value.

XI

Defendant next argues that the trial court's erroneous admission of a "narcotics ledger" denied him a fair trial.

We find no reversible error in the admission of this evidence. To the extent the ledger, which included Officer Grant's address and pager number, tended to show that the transactions occurred, they were relevant. To the extent that the prosecutor failed to connect the ledger to defendant, the failure was evident and the admission of the evidence did not prejudice defendant's mere presence defense.

XII

Lastly, defendant asserts he was denied due process by the trial court's failure to require a unanimous verdict. He asserts that the trial court erred in not requiring the jury to unanimously find him guilty as either an aider and abettor, or a principal. We find no error.

A jury verdict must be unanimous. MCR 6.410(B); *People v Yarger*, 193 Mich App 532, 537; 485 NW2d 119 (1992). If a case involves a single offense that could be committed by alternative means, a unanimous verdict as to the means is not required. *Id*. (citing *People v Johnson*, 187 Mich App 621, 629-630; 486 NW2d 307 (1991)). However, if the case involves two distinct offenses and each could have been committed by an alternative method, then a unanimous verdict is required as to the method. *Yarger, supra*.

Here, the distinction between an accessory and a principal has been abolished. One who aids or abets the commission of an offense may be prosecuted, indicted, tried, and on conviction shall be punished, as if he had directly committed the offense. MCL 767.39; MSA 28.979; *People v Flowers*, 191 Mich App 169, 175; 477 NW2d 473 (1991). The trial court's instruction was not erroneous. *People v Paintman*, 92 Mich App 412; 285 NW2d 206 (1979), rev'd on other grounds 412 Mich 518 (1982). The court required unanimity on the ultimate issue of guilt.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Myron H. Wahls
/s/ Helene N. White

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] During the September 4 hearing, defense counsel stated:

> I've probably spent between 30 and 40 hours on this case, with [defendant], visiting him two times, once with her [defendant's mother's] husband, who would be the stepfather of [defendant]. I gave her all pleadings, all the information, the transcripts. She read it over, didn't understand it, came back again. [Defendant's sister] came to the office with all the pleadings, again. We discussed this matter . . .

On the morning of trial, defense counsel explained to the court that he had all the necessary discovery in this matter:

> . . . I've talked to [the prosecution] about all this evidence. I've had all this evidence.

Additionally, defense counsel stated:

> . . . I spent 7 hours yesterday, I documented it, going from top to bottom, made copious [sic] of search warrant, tapes, affidavits of search warrants, preliminary exam transcript, and I will do the best I can . . .

[3] We observe that the trial court did not technically deny defendant's motion for substitution of counsel, and would have allowed substitute counsel, who was present, to enter an appearance and proceed with trial. The court, however, stated that the trial would go forward that day.