STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMAR SITTO,

Defendant-Appellant.

UNPUBLISHED
January 10, 1997

No. 170049
LC No. 91-109035-FC

Before: Doctoroff, C.J., and Corrigan and R.J. Danhof,* JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of conspiracy to possess with intent to deliver 650 grams or more of cocaine, MCL 750.157a; MSA 28.354(1) and MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). The court sentenced defendant to mandatory life imprisonment without parole. We affirm.

Defendant first argues that repeated acts of prosecutorial misconduct denied him a fair trial. We disagree. Prosecutorial misconduct issues are decided case by case. This court examines the pertinent portion of the record and evaluates a prosecutor's remarks in context. *People v Legrone,* 205 Mich App 77, 82; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* at 82-83. The only specific instance of misconduct alleged in defendant's appellate brief occurred during closing argument. Defendant claims that the prosecutor improperly argued that on the morning of his arrest, defendant was with Tommy Kalasho, the brother of drug dealer Harry Kalasho, and was awaiting a drug delivery. Because defendant cites no authority in support of his argument that these comments were improper, he has abandoned this issue on appeal. *People v Piotrowski,* 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, the prosecutor's remarks were based on the testimony of Sgt. Thibodeau and the reasonable inferences arising therefrom. Hence, the remarks were not improper. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Fisher,* 193 Mich App 284, 291; 483 NW2d 452 (1992).

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

Defendant next argues that the evidence was insufficient to prove that he engaged in a conspiracy to possess with the intent to deliver in excess of 650 grams of cocaine between March 17, 1988, and March of 1990. We disagree. A conspiracy to violate existing laws is usually a continuing offense, extending over some period of time. The prosecution may charge and prove the offense in any part of such period. *People v Norwood*, 312 Mich 266; 20 NW2d 185 (1945); *People v Louis Williams*, 78 Mich App 737, 742; 261 NW2d 189 (1977). The indictment charged that defendant engaged in the alleged conspiracy between March 17, 1988, and March 1990. Defendant correctly observes that the prosecutor was required to prove that defendant engaged in this conspiracy between those dates.

Viewing the evidence presented at trial in the light most favorable to the prosecution, we hold that a rational trier of fact could have concluded that defendant committed the charged offense between March 17, 1988, and March 1990. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748; modified 441 Mich 1201 (1992); *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974); *People v Ayoub*, 150 Mich App 150; 387 NW2d 848 (1985). The testimony of Salwan Asker was sufficient to support defendant's conviction. Asker testified that in May 1988, his car was undergoing repairs at the B & S Collision Shop. While waiting for his car, Asker saw defendant and codefendant Mazen Sitto pull into the collision shop parking lot in separate cars. Defendant put a grocery bag into Mazen's trunk. Mazen then gave defendant a plastic bag containing money. After Mazen left, defendant told Asker that he had just sold "a couple of kilos" to Mazen. About a month later, Asker was at co-conspirator Ray Akrawi's house when Akrawi instructed another co-conspirator to retrieve some cocaine from its hiding place. Defendant then asked Asker to drive him to the B & S Collision Shop. When Asker and defendant left Akrawi's house, defendant was carrying a bag "with a kilo of cocaine inside." When they arrived at the collision shop, codefendant Mazen Sitto was waiting in the parking lot. Defendant entered Mazen's car, gave Mazen the cocaine, and returned to Asker's car with the money he had obtained from Mazen. Defendant kept $2,000 of the money, but gave the balance to Ray Akrawi. This evidence alone, taken in a light most favorable to the prosecution, proved that defendant and Mazen Sitto conspired to possess with the intent to deliver over 650 grams of cocaine between the dates alleged in the indictment. Hence, the evidence was sufficient to support defendant's conviction.

Regarding defendant's claim that it was "improper to introduce acts before a certain date, and inappropriate to introduce acts after the prosecutor claimed a conspiracy had ended," defendant fails to set forth the specific evidence that was improperly introduced and cites no supporting authority. Thus, we cannot address this portion of his argument

Next, defendant claims that the trial court abused its discretion in refusing to strike the testimony of Rene Arias and George Naoum because the trial court's rulings in this regard denied him the right to confront and cross-examine his accusers. We disagree.

The Confrontation Clause primarily secures the right of cross-examination. *Delaware v Van Arsdall*, 475 US 673, 678; 106 S Ct 1431; 89 L Ed 2d 674 (1986); *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The right of cross-examination, however, is not without limit. Neither the Confrontation Clause nor the due process clause confers an unlimited right to admit all

relevant evidence or to cross-examine on any subject. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). The right does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society. *United States v Nixon*, 418 US 683; 94 S Ct 3090; 41 L Ed 2d 1039 (1974); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Defendants are, however, guaranteed a reasonable opportunity to test the truth of a witness' testimony. *Adamski, supra*. A limitation on cross-examination that prevents a defendant from placing before the jury facts upon which an inference of bias, prejudice or lack of credibility of a witness may be drawn can be an abuse of discretion that denies the right of confrontation. *People v Holliday*, 144 Mich App 560, 566-567; 376 NW2d 154 (1985). Defendant is entitled to have the jury consider facts that might have influenced a witness' testimony. *People v Monasterski*, 105 Mich App 645, 657; 307 NW2d 394 (1981). The sentencing consideration received in return for testimony is "undeniably a fact which is relevant to a witness' credibility." *People v Mumford*, 183 Mich App 149, 153; 455 NW2d 51 (1990). The disclosure requirement may be considered satisfied if the "jury [is] made well aware" of such facts "by means of . . . thorough and probing cross-examination by defense counsel." *People v Atkins*, 397 Mich 163, 174; 243 NW2d 292 (1976).

Where a prosecution witness refuses to answer certain questions on cross-examination, courts have generally identified three criteria in deciding whether to strike the witness' testimony:

> (1) If the information sought on cross-examination closely relates to the issues being tried and if the inability to develop the information deprives the defendant of his right to test the credibility of the witness, then the noncooperative witness's entire testimony should be stricken. (2) A less drastic approach is preferred where the information sought on cross-examination is only partly connected to the issues being tried or to the information obtained on direct examination. Under these circumstances a partial striking of the witness's testimony on direct examination is sufficient. (3) Finally, where the information sought on cross-examination is merely collateral or cumulative, the refusal of a witness to be cross-examined on those matters does not require that any testimony be stricken and an instruction to the jury is all that is necessary. [*People v Holguin*, 141 Mich App 268, 271-272; 367 NW2d 846 (1985).]

A trial court's improper refusal to strike testimony may be harmless error if other sufficient evidence of defendant's guilt has been adduced. *Holguin, supra* at 273.

The record reflects that defense counsel conducted a thorough, unrestricted cross-examination of Arias, asking him, among other things, about prior criminal convictions, prior bad acts, and prior drug abuse. Arias also was questioned thoroughly both on direct and cross-examination regarding the reduction in his sentence from 30 to 15 years as a result of his cooperation with authorities. Defendant thus placed before the jury facts upon which an inference of Arias' bias, prejudice or lack of credibility could be drawn. *Holliday, supra* at 566-567. Defendant's cross-examination of Arias allowed the jury to consider facts, including the sentencing consideration that Arias received, which might have influenced Arias' testimony. *Monasterski, supra* at 657. Defendant was not deprived of his ability to test Arias' credibility. Defense counsel's cross-examination thoroughly attacked Arias' credibility. The question that Arias refused to answer, whether he had received additional sentence reduction, was

cumulative where Arias had already admitted that his sentence was reduced in exchange for his cooperation with authorities. Under these circumstances, the trial court was not required to strike Arias' testimony. *Holguin, supra* at 271-272.

Defendant also claims that the trial court abused its discretion in refusing to strike the testimony of co-conspirator George Naoum. We disagree. Defense counsel effectively neutralized Naoum's brief testimony regarding an altercation between defendant and codefendant Aboud Sitto. Naoum admitted several times that he was not present during the altercation but only heard "noise" over the telephone. Further, when the prosecutor asked Naoum what Aboud had told him about the altercation, defense counsel objected. The trial court sustained his objection. Later, the trial court instructed the jury to disregard the testimony during its deliberations. It was unnecessary to strike Naoum's testimony because he never testified about what was said between defendant and Aboud during the altercation.

Defendant next claims that the trial court failed to give certain requested jury instructions. This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975); *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). Jury instructions must be read as a whole rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *Harris, supra* at 664. A trial court need not give requested instructions that the facts do not warrant. *People v Dalton*, 155 Mich App 591, 599; 400 NW2d 689 (1986).

Defendant first alleges that the trial court erred in denying his request to give a "special conspiracy instruction." The trial court did not err by rejecting the request because the charge as a whole covered the substance of the omitted instruction. *Harris, supra* at 664. The trial court instructed the jury that to find defendant guilty of the charged offense, it must find, beyond a reasonable doubt, that defendant and someone else knowingly agreed to commit the crime of possession with intent to deliver in excess of 650 grams of cocaine, that defendant intended to commit this crime, and that the agreement "took place or continued during the period from March 17, 1988 through on or about March 19, 1990." Further, the court instructed that the jury could "only consider what the Defendant did and said during the time the conspiracy took place," that a "person who joins a conspiracy after it has already been formed is only responsible for what he agreed to when joining, not for any agreement made by the conspiracy before he joined," and that members "of a conspiracy are not responsible for what other members do or say after the conspiracy ends." Hence, the jury instructions covered the substance of the omitted instruction. The trial court did not err by omitting the supplemental instruction.

Defendant also alleges that the trial court erred in omitting the supplemental instruction "on single or multiple conspiracies." We disagree. Because the facts did not warrant the requested instruction,

the trial court did not commit error requiring reversal in failing to give the instruction on single or multiple conspiracies. *Dalton, supra* at 599.

Finally, defendant claims that the trial court erred in denying CJI2d 5.13. Defendant had requested this instruction with regard to the testimony of George Naoum and Salwan Asker. The instruction would not have been proper regarding Naoum because he testified that he had no agreement with the prosecutor regarding charges against him. No evidence was presented that he did. The trial court properly refused to give CJI2d 5.13 with regard to Naoum.

Salwan Asker did testify that he had made a "deal" with the federal government and with the Oakland County Prosecutor's office that, in exchange for his truthful testimony, he would not be prosecuted for his drug offenses. Because the evidence regarding Salwan Asker supported the instruction, the trial court erred in failing to instruct the jury under CJI2d 5.13. Even imperfect jury instructions, however, do not require reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Wolford, supra* at 481. CJI2d 5.13 specifically provides that the jury only may consider evidence of a witness' agreement with the prosecutor as it relates to the witness' credibility in tending to show bias or self-interest. Because the court instructed the jury several times to carefully consider Asker's testimony and because the jury instructions given indicated that for various reasons Asker's testimony might not be credible, that CJI2d 5.13 was not given was harmless error. *Wolford, supra.*

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof