STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERONIMO SANCHEZ,

Defendant-Appellant.

UNPUBLISHED
May 16, 1997

No. 179825
Oakland Circuit Court
LC No. 92-117468-FC

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and was sentenced to life imprisonment. Defendant appeals as of right. We affirm.

This case arose out of a sting operation conducted by the Pontiac Police. Officers arranged for an informant to buy cocaine in escalating amounts from Sandra Osorio, a known drug dealer. The police informant learned that Osorio's boyfriend, Julio Rodriguez, was Osorio's supplier. At the direction of police, the informant conducted negotiations with Osorio to purchase one kilogram of cocaine in mid-August 1991. Osorio presented Rodriguez with the deal, who told her he could obtain one kilogram of cocaine if she could find a buyer. On September 4, 1991, police raided Rodriguez's home and found two kilograms of cocaine hidden in a barbecue grill located in Rodriguez's garage. The cocaine was placed in a shoe box which had been sealed with duct tape. Investigators found defendant's fingerprint on the duct tape.

Osorio testified at trial to Rodriguez's various statements concerning defendant's role in his drug smuggling activities. Osorio testified that, after she agreed to obtain customers for Rodriguez, he told her defendant was his partner in the cocaine trade. Rodriguez told Osorio of two occasions on which he and defendant transported kilogram quantities of cocaine from Miami to Detroit. On one such occasion in late August of 1991, Rodriguez called Osorio from Florida and told her that he and defendant had obtained three kilograms of cocaine. Rodriguez stated that they sold one kilogram in

Florida and would transport the remaining two kilograms to Michigan in a car that defendant and his wife were renting. Police spotted the rental car parked outside Rodriguez's house before they raided his residence.

I

Defendant first argues that the trial court abused its discretion by admitting Osorio's hearsay testimony concerning Rodriguez's statements about defendant. Specifically, defendant contends that the trial court improperly admitted Rodriguez's statements pursuant to MRE 801(d)(2)(E), which excludes from the definition of hearsay statements of coconspirators made during the course and in furtherance of the conspiracy.

MRE 801(d)(2)(E) provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy" is not hearsay when offered against a party. *People v Vega*, 413 Mich 773, 778 n 3; 321 NW2d 675 (1982). Before a court may admit a coconspirator's statements against a defendant, the prosecutor must establish the existence of a conspiracy or concert of action by a preponderance of the evidence independent of the coconspirator's statements. *Vega*, *supra* at 780-782. Additionally, the coconspirator's statements must be made "during the course" and "in furtherance" of the conspiracy. *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993) (Boyle, J.). To satisfy the "during the course" aspect of MRE 801(d)(2)(E), the conspiracy must be extant at the time the statement is made. *Id.* The "in furtherance" requirement has been defined broadly. *Id.* at 395. For example, statements made by one coconspirator to keep other conspirators informed about the progress of the scheme satisfy the "in furtherance" requirement. *Id.*

Defendant contends that the prosecution failed to establish the existence of a conspiracy by a preponderance of independent evidence. We disagree. The evidence clearly showed that Rodriguez, Osorio's supplier, was aware of her apparent need for at least one kilogram of cocaine in late August 1991. Defendant then met Rodriguez in Miami, where he and his wife rented a car for Rodriguez to drive from Miami to Detroit. When Rodriguez returned from Miami, police found two kilograms of cocaine in his possession, the packaging of which contained defendant's fingerprints. Thus, defendant had most likely come in contact with the cocaine, probably sometime before Rodriguez brought the drugs from Miami. This evidence established by a preponderance that defendant was aware of Rodriguez's plan to get cocaine from Miami to Osorio and her buyer in Michigan and further supports the conclusion that defendant rented Rodriguez a car so that he could accomplish his plan to deliver cocaine. Hence, the trial court did not abuse its discretion by finding that a preponderance of independent evidence established the existence of a conspiracy between defendant and Rodriguez to deliver cocaine. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996).

Additionally, defendant argues that Rodriguez did not make his statements in furtherance of the conspiracy. It is true that Rodriguez did not make his statements to Osorio in order to obtain her assistance in the plan to smuggle cocaine from Miami to Detroit. However, evidence established that

Rodriguez supplied Osorio with cocaine to sell to her various customers. All of Rodriguez's statements to Osorio can be characterized as statements made to apprise Osorio of the progress and status of the conspiracy to deliver cocaine, or statements made to foster trust and cohesiveness, so that Osorio would continue to procure customers with the knowledge that her supplier would have cocaine available to her for sale. See *Bushard*, *supra* at 395-396. In light of these considerations, the trial court did not abuse its discretion by admitting Rodriguez's statements through Osorio's testimony. *Phillips, supra*.[1]

II

Defendant next argues that the trial court should have declared a mistrial in response to Osorio's two volunteered statements that she had taken a polygraph test. Defendant did not raise this issue in the trial court and thus failed to preserve it for review. *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989). Nevertheless, we may grant review of an unpreserved issue where failure to do so would result in manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

Upon reviewing the lower court record, we conclude that our refusal to review this unpreserved issue will not result in manifest injustice. Osorio's statements about taking a polygraph test were brief, relatively innocuous, and totally unresponsive to defense counsel's questions. Generally, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Likewise, the mere mention of a polygraph test by a witness is not grounds for mistrial. *People v Kosters*, 175 Mich App 748, 754; 438 NW2d 651 (1989). After Osorio's second reference to taking a polygraph test, the trial court instructed the jury that "[l]ie detector tests and their results are not admissible in any court in the State of Michigan" and that it was to disregard Osorio's statements. We presume that the jury did just that. *People v Torres (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 197735, rel'd 3/25/97) slip opinion p 6. Osorio's statements were not grounds for a mistrial, and any prejudice was cured by the trial court's instructions to the jury.

III

Next, defendant argues that the prosecutor engaged in various forms of misconduct that denied him a fair and impartial trial. Defendant failed to object to the instances of alleged misconduct, thus foreclosing our review unless the prejudicial effect of the prosecutor's remarks was so great that it could not have been cured by appropriate instructions to the jury. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (!995). We have carefully reviewed each unpreserved instance of alleged misconduct, and determine that the prosecutor's remarks were either permissible, and thus did not adversely affect defendant's right to a fair trial, or of such a minimally prejudicial nature that timely requested curative instructions could have eliminated any resulting harm. Therefore, we decline to address defendant's unpreserved allegations of misconduct.

IV

Defendant next argues that his conviction should be reversed because he received ineffective assistance of counsel at trial. We disagree.

Defendant first argues that his trial attorney's failure to motion the trial court for a mistrial in response to Osorio's references to taking a polygraph test amounted to ineffective assistance of counsel. As we previously determined, Osorio's unresponsive, volunteered testimony about her polygraph test was not grounds for a mistrial. See *Haywood*, *supra*; *Kosters*, *supra*. A defense attorney cannot be faulted for his failure to pursue a motion that is destined for failure. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Moreover, any prejudice that may have arisen from defense counsel's failure to move for a mistrial was cured by the trial court's instruction to the jury to ignore Osorio's testimony. See *Torres*, *supra*. Accordingly, defendant may not predicate his ineffective assistance of counsel argument on his attorney's failure to move the trial court for a mistrial.

Next, defendant argues that he received ineffective assistance of counsel at trial because his attorney failed to put his wife, Sandra Sanchez, on the witness stand to testify that she saw defendant help Rodriguez pack the trunk of the rental car before Rodriguez drove their children from Miami to Michigan in August 1991. Defendant contends that her testimony could have explained how his thumb print was placed on the package of cocaine found in Rodriguez's garage.

Generally, the decision whether to call a witness is a matter of sound trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense that could have affected the outcome of the proceedings. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). There is no support in the lower court record for defendant's assertion that his wife, or anyone, saw him assist Rodriguez in packing the trunk of the rental car. In fact, one witness testified that Rodriguez's passengers "got their own luggage and carried it." Moreover, while testimony that could support the theory that defendant's fingerprint was placed on the package of cocaine by innocent means could have benefited the defense, it would have done little to diminish the impact of the most compelling evidence of defendant's guilt, Osorio's testimony. Therefore, we conclude that defendant has failed to establish that his attorney's failure to call Sandra Sanchez as a witness deprived him of a substantial defense and, accordingly, may not predicate his claim of ineffective assistance of counsel on his attorney's trial strategy.

Lastly, defendant argues that his attorney's failure to object to the many instances of alleged prosecutorial misconduct that defendant raises on appeal amounted to ineffective assistance of counsel. We previously concluded that most of the prosecutor's closing comments were entirely permissible and, therefore, unobjectionable. A defense attorney is not obligated to advance meritless objections at trial. See *Gist*, *supra*. Furthermore, any prejudice stemming from the prosecutor's comments during his closing and rebuttal was cured by the trial court's instructions to the jury. Defendant makes no further effort to establish that his attorney's failure to advance a barrage of objectionable objections during the prosecutor's closing argument and rebuttal fell below an objective standard of reasonableness, and

further fails to show that he was prejudiced by his attorney's representation. *People v Reed*, 453 Mich 685, 694-695; 556 NW2d 858 (1996). Accordingly, we find no merit to defendant's contention that he received ineffective assistance of counsel.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald

[1] Defendant also argues that, had the trial court refused to admit Osorio's testimony regarding Rodriguez's statements, there would have been insufficient evidence upon which the jury could find defendant guilty beyond a reasonable doubt of conspiracy to deliver cocaine. Because we have determined that the trial court did not abuse its discretion by admitting Osorio's testimony, we need not address this issue.