STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ROBERT WEEKS,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 190883
Calhoun Circuit
LC No. 95-001910-FH

Before: Michael J. Kelly, P.J., and Cavanagh and Lambros*, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a; MSA 28.354(1), and solicitation to deliver less than fifty grams of cocaine, MCL 750.157b; MSA 28.354(2). Defendant was sentenced to two to twenty years' imprisonment for the delivery conviction, a consecutive term of five to twenty years for the conspiracy conviction, and a consecutive term of one to five years for the solicitation conviction. We affirm.

Defendant's convictions were based on testimony that he and others planted cocaine and cash in his ex-wife's car and then contacted the police, who arrested her upon stopping the vehicle and finding the contraband.

I

The first argument presented by defendant addressed the trial court's denial of his motion for new trial based on newly discovered evidence. That issue has been withdrawn by appellate defense counsel and therefore, will not be addressed by this court.

II

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

Defendant argues that the trial court had no statutory authority to impose consecutive sentences for three offenses that occurred in the same criminal transaction, and that doing so violated his constitutional right against double jeopardy. We disagree.

Defendant was sentenced to consecutive terms of imprisonment for his convictions pursuant to MCL 333.7401(3); MSA 14.15(7401)(3), which provides in pertinent part:

> A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. [Footnote omitted.]

Defendant argues that because this statute does not specifically list the crimes of conspiracy and solicitation, its authorization of consecutive sentences does not apply in the present case. However, the term "another felony" as used in the statute "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." *People v Morris*, 450 Mich 316, 320; 537 NW2d 842 (1995); see also *People v Denio*, 454 Mich 691, 705, 713; 564 NW2d 13 (1997).

Defendant also challenges the propriety of his consecutive sentences on constitutional grounds, arguing that where two or more convictions arise from the same criminal transaction, as do his, they constitute the "same offense" for double jeopardy purposes and cannot be subject to multiple punishments. This argument was addressed and rejected in part by the Supreme Court in *Denio, supra* at 705-709, wherein the Court held as follows:

> In analyzing the intent of the Legislature, it must be remembered that "the Legislature's authority to define a single criminal 'act' or 'offense' is not diminished by the Double Jeopardy Clause." The Legislature is free to determine what activity constitutes a criminal offense subject to criminal penalty. The Double Jeopardy Clauses restrict the courts from imposing more punishment than that intended by the Legislature. Thus, if the Legislature desires, it may specifically authorize penalties for what would otherwise be the "same offense." "*[C]umulative punishment of the same conduct under two differ statutes in a single trial does not run afoul of the Double Jeopardy Clause in either the federal or state system*." [Emphasis added; citations omitted.]

The Court concluded that the Legislature clearly intended to separately punish a defendant convicted of both conspiracy to commit a drug offense and of the substantive drug offense, even if he committed those offenses in the same criminal transaction. *Id.* at 709-710. The Court also added that conspiracy and related drug offenses do not constitute the "same offense" because conspiracy is a "separate and distinct" offense that requires some kind of a combination or agreement, whereas the drug offenses require possession of an illegal drug. *Id.* at 710. Moreover, the crime of conspiracy does not merge into the offense committed in furtherance of the conspiracy. *Id*. at 712.

Similarly, in *People v Burgess*, 153 Mich App 715, 732-733; 396 NW2d 814 (1986), a panel of this Court held that solicitation was intended by the Legislature to be a separate crime from the completed offense and from a conspiracy to commit the object offense, and convictions on all three do not violate the Double Jeopardy Clause because each offense requires proof of a fact which the others do not. Thus, defendant's consecutive sentences do not violate the Double Jeopardy Clause because the Legislature provided for separate punishments under three different and distinct statutes, and because none of the offenses involved qualify as being the "same offense." Accordingly, defendant is not entitled to have any of his convictions vacated, nor is he entitled to resentencing.

III

Defendant claims that he was denied a fair trial because his trial counsel failed to present any defense on his behalf, allowed the prosecution's key witness to testify without objection, and, although counsel submitted a list of twenty-one potential witnesses to the lower court, failed to interview and present any of them to testify at trial. Defendant failed to properly preserve this issue by moving for a new trial or requesting an evidentiary hearing on the matter. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Consequently, this Court is limited to a review of the trial court record to determine whether defendant's argument is meritorious. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

After a careful review of the record, we find no merit to defendant's contention that he received ineffective assistance of counsel at trial. First, there is no support on the record for defendant's assertion that counsel did not interview the witnesses, and no further indication that the witnesses could have given testimony that would have benefited defendant. Moreover, the decision whether to call witnesses is a matter of trial strategy that we will not second-guess on appeal. *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 681 (1985). Second, with regard to counsel's alleged failure to present a defense, defendant has not revealed exactly what defense his attorney should have advanced, and we are unable to discern the existence of a defense that, in light of the overwhelming evidence of guilt, would have resulted in defendant's acquittal. Defense counsel seems to have chosen the only strategy available to him, i.e., a vigorous attack on the credibility of the testifying coconspirator. Choice of defense is a matter of sound trial strategy that we will not question. See *People v Barnett*, 163 Mich App 331, 337-338; 414 NW2d 378 (1987). Lastly, defendant posits that his counsel should have objected to admission of the coconspirator's testimony because the witness made a deal with the prosecutor's office in exchange for his testimony. Defendant has failed to articulate a sound basis for this testimony's inadmissibility. Defense counsel was not required to make meritless objections. See *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). In light of the foregoing, we conclude that defendant has failed to show that he received ineffective assistance of counsel.

IV

Defendant next argues that he was denied a fair trial because the prosecutor improperly commented on his failure to testify and vouched for the credibility of his key witness. We find no error.

Defendant first argues that the prosecutor violated his constitutional right to remain silent by commenting on his failure to testify. We disagree. In his challenged statements, the prosecutor merely argued that certain evidence concerning defendant's involvement in the charged crimes was uncontradicted, which is permissible, because it does not constitute a comment on defendant's failure to testify, particularly where someone other than the defendant could have provided contrary testimony. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996) (Batzer, J.). Indeed, the prosecutor reminded the jury that defendant was not required to prove his innocence. In sum, we find no misconduct as to the first statements defendant challenges on appeal.

Defendant also claims that the prosecutor improperly vouched for his key witness' credibility when he said to the jury during closing arguments, "Mr. Norris told you the truth about what had happened." However, although a prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), he is allowed to argue that his witnesses are worthy of belief, or are honest, based on the facts presented at trial, *People v Kedziora*, 125 Mich App 150, 156; 336 NW2d 460 (1983). After reviewing the context in which the prosecutor made the above statement, we conclude that the prosecutor did nothing more than what the law allows. Therefore, we reject defendant's argument that he received an unfair trial because of prosecutorial misconduct.

V

Defendant next argues that the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of mere possession of a controlled substance, and by failing to instruct that mere presence at the scene of a crime is not sufficient to prove guilt. We find no merit to defendant's claims.

Defendant first argues that the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of mere possession of a controlled substance. Possession of a controlled substance is a cognate lesser-included offense of possession with intent to deliver a differently categorized statutory amount, *People v Lucas*, 188 Mich App 554, 581; 470 NW2d 460 (1991), and an instruction on such need only be presented to the jury when requested by the defendant and where the evidence supports the instruction, *People v Kamin*, 405 Mich 482, 493; 275 NW2d 777 (1979). Because defendant never requested the instruction on possession, the trial court was not bound to give it. Moreover, there is no evidence that defendant merely possessed cocaine.

Similarly, an instruction to the jury that mere presence at the scene of a crime is insufficient to prove guilt would have also been unwarranted, because there is no evidence that defendant was merely present when the narcotics offenses were being committed. Instead, the record is replete with evidence that defendant actively participated at every stage of the criminal endeavor. The evidence presented against defendant was overwhelming, and the probability of the jury being persuaded by the inclusion of a mere presence instruction is slight. We conclude that defendant has failed to show any prejudice arising from the absence of the instruction, and absent a specific request for it at trial, has likewise failed to establish that this Court's refusal to grant him relief would result in a manifest injustice. See *People v McVay*, 135 Mich App 617, 618; 354 NW2d 281 (1984).

VI

Defendant also claims that the trial judge improperly coached the prosecutor by suggesting to him what questions he should ask the witnesses, and actually instructed him to use leading questions during direct-examination. We find no error.

The trial court was entitled adopt proper measures necessary to conduct an orderly trial and to preserve the administration of the law. See MCL 768.29; MSA 28.1052; *People v Greeson*, 230 Mich 124, 147; 203 NW 141 (1925). The testimony at defendant's trial was at times extremely detailed and somewhat repetitive. The challenged actions of the trial court were proper attempts to keep the attorneys focused on the important issues so as to minimize confusion and delay. Each time the judge prompted the prosecutor, it was at a point where the prosecutor was dealing with tangential or transitional evidence that did not directly relate to the issues being tried, and at no time did defendant object to the trial court's comments. Consequently, defendant has failed to establish that he suffered any prejudice.

VII

Lastly, defendant faults the trial court for allowing hearsay evidence to be admitted, as evidenced by the judge's comment, "We have danced around this too much. No more hearsay. Let's continue," and for violating his own sequestration order when he allowed defendant's coconspirator to remain in the courtroom between his direct and cross-examination while another prosecution witness was questioned out of order. We find that this argument is without merit.

We note that, despite the fact that the trial judge's comment does not establish that he abdicated his duty to oversee the admission of evidence, without objection, hearsay evidence may rightfully "be considered and given probative effect as if it were in law competent evidence." *People v Maciejewski*, 68 Mich App 1, 3; 241 NW2d 736 (1976); see also *People v Johnson*, 122 Mich App 26, 28-29; 329 NW2d 520 (1982). Therefore, we find that, to the extent that hearsay evidence was admitted at trial, the fault lies with defendant for failing to object, not with the trial court for failing, on its own initiative, to exclude it.

As to the witness sequestration issue, the record reveals that not only did defense counsel consent to a second witness testifying before he was able to cross-examine defendant's coconspirator, he never objected to the coconspirator being allowed to remain in the courtroom while the other witness testified. More important, however, is the fact that the coconspirator had already undergone direct-examination, and the additional witness' testimony dealt with a completely different issue. In no way could the coconspirator have used the witness' testimony to change or bolster his own. Hence, we find no prejudice.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros