

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN MANUEL GALLO-CERVANTES,

Defendant-Appellant.

UNPUBLISHED

July 26, 2005

No. 250004

Oakland Circuit Court

LC No. 2002-187111-FC

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of 650 or more grams of cocaine, MCL 333.7403(2)(a)(i).¹ Defendant was sentenced to a prison term of twenty to forty years. We affirm.

Defendant first argues that the trial court improperly admitted evidence under MRE 404(b) of a co-defendant's alleged drug sales five days before execution of the search warrant in this case. However, this issue is waived because defendant failed to provide this Court with a transcript of the hearing on the motion to exclude the MRE 404(b) evidence. MCR 7.210(B)(1)(a); *People v Petrella*, 124 Mich App 745, 755; 336 NW2d 761 (1983), aff'd 424 Mich 221 (1985).

Regardless, we conclude that the trial court properly admitted the evidence at issue because it falls within the *res gestae* exception to MRE 404(b). Here, the evidence of co-defendant's alleged drug sales showed the events that led up to the investigating officer obtaining the search warrant. Therefore, it falls under the *res gestae* exception. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (explaining that "[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime"); *People v Bowers*, 136 Mich App 284, 294; 356 NW2d 618 (1984) (noting that the *res gestae* exception allows

¹ MCL 333.7403(2)(a)(i) has since been amended to increase the statutory minimum from 650 grams to 1,000 grams. 2002 PA 665.

introduction of evidence of other criminal activity and is applied in cases where the act or conduct evidence is introduced “for the purpose of explaining the circumstances leading up to the charged offense” and “not offered to prove that [the] defendant, by virtue of his commission of the separate act, had committed the offense for which he was on trial”).

Defendant next argues that the trial court erred when it failed to consider his post-arrest cooperation with law enforcement officers for purposes of a downward departure from the mandatory minimum sentence of twenty years. We disagree. Generally, we review a trial court’s determination that substantial and compelling reasons do not exist to support a departure from the mandatory minimum sentence under MCL 333.7401(4) for an abuse of discretion. *People v Izarraras-Placante*, 246 Mich App 490, 497; 633 NW2d 18 (2001), citing *People v Fields*, 448 Mich 58, 78; 528 NW2d 176 (1995). However, because the issue was raised for the first time on appeal, defendant must show plain error affecting his substantial rights. *People v Brown*, 265 Mich App 60, 62; 692 NW2d 717 (2005). Reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant apparently relies on the former provisions of MCL 333.7403(3), to argue that a sentencing court may depart from a mandatory minimum sentence for certain drug possession crimes if the court finds on the record that there are substantial and compelling reasons to do so. *Fields, supra* at 62. However, by its plain language, MCL 333.7403(3) would not apply to defendant, i.e., it was inapplicable to a conviction of violating MCL 333.7403(2)(a)(i). Therefore, while cooperation with law enforcement officials may be a factor to consider for purposes of a downward departure under proper statutory authority, *Fields, supra* at 76-77, the trial court had no discretion to depart downward from the mandatory minimum in this case, and defendant’s argument is without merit.

Lastly, we reject defendant’s argument that he was denied his right to the effective assistance of counsel by trial counsel’s failure to object at trial to the presentation of the evidence discussed above under MRE 404(b) or by his failure to request a downward departure at sentencing based on defendant’s cooperation with law enforcement officials. As discussed above, the evidence in question was not barred from admissibility by MRE 404(b). Therefore, any objection by trial counsel would have been futile. Counsel cannot be faulted for failing to raise a futile or meritless objection. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Likewise, trial counsel was not ineffective in failing to raise at sentencing defendant’s cooperation with law enforcement officials as a ground for a downward departure because the trial court had no discretion to deviate from the statutorily mandated minimum sentence.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot