

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LEE LOUIS,

Defendant-Appellant.

UNPUBLISHED
October 21, 1997

No. 193877
Delta Circuit Court
LC No. 95-005858-FH

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of possession of a stolen automobile with intent to pass title, MCL 257.254; MSA 9.1954. The trial court sentenced defendant to thirteen to twenty-five years' imprisonment, which reflected enhancement based on defendant's status as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. We affirm.

Defendant correctly argues that the trial court erred when it used the habitual offender procedures created by a 1994 amendment to the Michigan Code of Criminal Procedure, see 1994 PA No. 110, amending MCL 769.13; MSA 28.1085, because defendant's infraction took place before the amendment's effective date. The pre-amendment procedure required that a jury decide the evidentiary issues involved in an habitual offense information unless waived by the defendant while the post-amendment procedure does not require a jury determination. Defendant argues that this error resulted in a violation of his constitutional right to a jury. However, defendant's right to a jury trial under the pre-1994 habitual offender procedure was statutorily granted and did not constitute a constitutional right to a jury determination. MCL 769.13; MSA 28.1085; *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). A plain, unpreserved nonconstitutional error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or prejudice can be presumed. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). As defendant did not object to the trial court's findings as to his prior convictions, we fail to see an impact on the outcome and accordingly, we decline consideration of the issue.

Defendant also argues that when the trial court dismissed the jury that convicted him on the underlying offense, jeopardy attached, thereby precluding a determination on the habitual offender information under double jeopardy principles. We disagree. This Court has repeatedly held that a sentence enhancement pursuant to the habitual offender provisions does not place the defendant in double jeopardy. *People v Stevens*, 130 Mich App 1, 8; 343 NW2d 219 (1983); *People v Thornsberry*, 148 Mich App 92, 99; 384 NW2d 88 (1985); *People v Anderson*, 210 Mich App 295, 297-298; 532 NW2d 918 (1995). These decisions have been premised on the determination that the habitual offender provisions allow for enhancement of a sentence and the result is not considered a separate offense. *Stevens, supra* at 8; *Thornsberry, supra* at 99; *Anderson, supra* at 298; *Zinn, supra* at 345. Thus, a determination of defendant's prior convictions by another jury would not place him in jeopardy again. Moreover, the determination of these prior convictions by the trial court does not raise double jeopardy concerns because the determination did not constitute a conviction of an offense and, consequently, jeopardy did not attach.

Finally, defendant argues that the trial court erred when it denied defendant's motion for a mistrial after the prosecution made the following statement in its closing argument:

I haven't talked about O.J. Simpson to any jury yet, so you're the first one so don't assume I use this all the time. Regardless of what your assessment of that verdict was, you remember that there was all kinds of talk back and forth about what this case was and what kind of a message the jury was sending out with its verdict. Whether the case was really about domestic violence or murder, whether it was really a message to the LAPD or something else, when our criminal justice system gets in that business we fail at each single case that is in front of us at the time. . . . do not please speculate about other criminal activity by any person in this case, about other charges that were, might or could have been brought, about sending the police or the prosecutor a message that they should -- that they should charge somebody else, because you can't send that message or any other message clearly through your verdict. The only thing we ask juries to do in the Anglo American System is to decide this particular case. And if there's alleged criminality and alleged wrongdoing by any of the participants in this case that's outside the scope of this case, for heaven's sakes, please do not try to deal with that because that case isn't before you.

Although prosecutors have a duty to see that a defendant receives a fair and impartial trial, *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996), they are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Nevertheless, there are a number of arguments to which a prosecutor should not resort among which are civic duty arguments that appeal to the fears and prejudices of jury members. *Id.* Such arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

In the context of this closing argument, this statement was not an improper request for the jury to perform a broader civic duty. Rather, it was a plea to the jury not to attempt to send any message or to perform any civic duty other than to decide the facts of this particular case. Moreover, the prosecution does not compare defendant with O.J. Simpson or even make comparisons between the two cases. Thus, the prosecution's remarks were not improper and did not deny defendant a fair and impartial trial.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Richard A. Bandstra