

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTINEZ WYANA,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 198470

Recorder's Court

LC No. 96-000347

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15 (7401)(2)(a)(iv). Defendant was sentenced to four to twenty years' imprisonment for this conviction. We affirm.

Defendant's first claim on appeal is that the admission of the seized narcotics into evidence violated his rights under the Fourth Amendment to the United States Constitution. We disagree. This Court reviews an unpreserved outcome-determinative constitutional issue such as this de novo. *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984).

Here, we find that defendant did not have a reasonable expectation of privacy. *U S v Acosta*, 965 F2d 1248 (CA 3, 1992). The drugs were found in the common hallway of the second floor of an apartment building. The building was accessible through two *unlocked* doors, to visitors, solicitors, workmen, and other members of the public; therefore, the police officers' presence, without authority or invitation, was constitutional. Further, defendant's denial of ever having possessed or owned the narcotics and the police finding them unattended in the hallway constituted an abandonment of the narcotics. *People v Rice*, 192 Mich App 512, 516; 482 NW2d 192 (1992).

Defendant next claims that he was denied a fair trial and due process because his trial counsel was ineffective in failing to challenge the admissibility of the seized contraband. Because we have determined that the evidence in question was properly admitted by the trial court, the defendant's

derivative claim that his trial counsel's performance was deficient for failing to object to the admission of that evidence must also fail. *People v Briseno*, 211 Mich App 11, 16-17; 535 NW2d 559 (1995).

Defendant further argues that his trial counsel failed to render effective assistance in failing to challenge the legality of his arrest. However, defendant failed to preserve this issue for appeal because he did not raise it in the statement of issues presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Appellate review is therefore inappropriate. *Brookshire Big Tree Assoc v Oneida Twp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 190488, issued 8/22/97).

Defendant's final claim is that the trial court abused its discretion in denying his motion for a mistrial because the polling of the jury caused a coercive impact on a juror who expressed her disagreement with the verdict. We disagree. This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

Here, we find no impropriety because the jurors were merely responding to a poll as directed by the court. *People v Bufkin*, 168 Mich App 615, 617; 425 NW2d 201 (1988). The trial court acted properly by immediately ordering further deliberations to continue after the polling indicated disagreement among the jurors with the verdict. MCR 6.420(C); MCR 2.512(B)(3). Defendant's reliance on *People v Wilson*, 390 Mich 689; 213 NW2d 193 (1973), and *People v Curry*, 77 Mich App 85; 257 NW2d 751 (1977), is not persuasive. In *Wilson*, the Michigan Supreme Court held that questions concerning the numerical division of the jury initiated by the trial court constituted reversible error. In *Curry*, the trial court unintentionally discovered the numerical division and the identity of the sole dissenter. Both situations we find distinguishable from discovery of a dissenter during a polling of the jury, which is the situation presented here.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Myron H. Wahls

/s/ Roman S. Gribbs