

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANCISCO DAVID GUERRA,

Defendant-Appellant.

UNPUBLISHED

January 27, 1998

No. 195285

Oceana Circuit Court

LC No. 95-002450 FH

Before: MacKenzie, P.J., and Holbrook, Jr., and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), and was sentenced to three to eight years' imprisonment. Defendant appeals as of right. We affirm.

On October 27, 1995, state police trooper Kevin Leavitt and his partner stopped a car driven by defendant because it had a broken taillight. Javier Flores was a passenger in the car. Leavitt observed a bag, later determined to contain 94.4 grams of marijuana, on the floor near Flores' feet. Both men were arrested. Flores subsequently entered into a plea bargain providing that the charges against him would be dismissed in exchange for his testimony in this case and his plea of guilty in another case.

Defendant represented himself at trial, with some assistance from appointed counsel. He admitted possessing the marijuana for personal use but denied that he intended to sell it.

On appeal, defendant first contends that the trial court erred in allowing Trooper Leavitt to testify regarding certain statements Flores made to him. Specifically, defendant contends that Leavitt's testimony, that Flores told Leavitt that defendant had planned "to make a stop at a house near Shelby . . . to drop the bag of marijuana off," constitutes inadmissible hearsay. We conclude that Leavitt's testimony was admissible as a prior consistent statement to rebut defendant's charge that Flores was fabricating. MRE 801(d)(1), *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Defendant next argues that the trial court improperly allowed the prosecutor to question defendant about a pretrial phone conversation in which defendant refused to reveal from whom he had obtained the marijuana. According to defendant, his statements to the prosecutor during the phone conversation were inadmissible because they were made during plea negotiations. The record is insufficient to determine if defendant is correct. Even if defendant's statements were erroneously admitted, however, the error was harmless because defendant has not shown a reasonable probability that the error affected the outcome of the trial. *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995).

Defendant claims that the trial court erred in allowing him to represent himself because the court was aware that defendant was not competent to do so. This argument – based on the court's assessment that, "you read a little bit of law but you don't understand the law" – is without merit. A defendant has a constitutional right to self-representation and to proceed to trial without counsel. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). This right, however, is not absolute. *Id.* A defendant's competence is a pertinent consideration for the court when deciding if he may proceed in propria persona, but his "competence" in this context does not refer to his legal ability. *Id.* "[H]is technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." *Id.* Accordingly, we find no error.

In his supplemental brief, defendant contends that the trial court was biased against him and should have granted defendant's motion to disqualify the judge. This claim is also without merit. Disqualification cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995). Nor does Flores' sentence establish the court's bias against defendant; Flores was ultimately sentenced for a crime different than the one with which defendant was charged and the circumstances surrounding Flores' sentence differed greatly from those surrounding defendant. Finally, the judge's instructions to defendant, that he should question witnesses rather than argue with them, does not support a claim of bias or partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). The trial court, therefore, did not err in denying defendant's motion for disqualification.

Defendant further argues that the court's instructions to the jury regarding Flores as an accomplice, as well as the court's statements to the jury regarding deliberations, were erroneous and prejudicial. Because defendant failed to object to the instructions, any error is waived absent manifest injustice. *People v Hilliard*, 160 Mich App 484, 488; 408 NW2d 482 (1987). Read as a whole, the instructions regarding Flores as an accomplice encouraged the jury to consider his testimony carefully before accepting it as true; the instruction actually favored defendant, and relief is not necessary to avoid manifest injustice. Additionally, the judge's statements to the jurors did not indicate that the jury was restricted in the length of time it could spend deliberating, and did not attempt to force the jury to reach a verdict yet that night. *People v Harley*, 49 Mich App 729, 732; 212 NW2d 810 (1973). Rather, the statements were clearly intended to explain to the jurors that they would receive dinner at county expense regardless of whether they completed their deliberations that evening. We therefore decline to reverse on this basis.

Next, defendant contends that the prosecutor improperly questioned him about “work[ing] with [a narcotics] team before” and “[getting] into trouble before” for selling marijuana. Defendant did not object to this questioning, precluding appellate review unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). It would not. Defendant’s claim that the questioning should have been excluded under MRE 609 is without merit since the prosecutor never referred to any prior convictions. Furthermore, a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. MRE 611(b). In this case, the questioning was designed to impeach defendant’s testimony that he did not know where to purchase marijuana. Reversal is not required on this basis.

Finally, defendant argues that the prosecutor, in his closing argument, improperly attempted to shift the burden of proof to defendant and improperly based inference on inference. Again, defendant did not object to these remarks, precluding appellate review absent a miscarriage of justice. *Stanaway, supra*. In light of the overwhelming evidence of defendant’s guilt, no miscarriage of justice can be demonstrated on this record. Accordingly, we decline to review this claim.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Henry William Saad