STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC NEUMAN SPENCER,

Defendant-Appellant.

UNPUBLISHED
December 4, 1998

No. 203620
Genesee Circuit Court
LC No. 96-054877 FH

Before: Griffin, P.J., and Gage and Danhof*, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and felon-in-possession of a firearm, MCL 750.224f; MSA 28.421(6). Following a jury trial, defendant was convicted of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), felon-in-possession of a firearm and being a fourth habitual offender, MCL 769.12; MSA 28.1084, and was sentenced to two to eight years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by the trial court's failure to sua sponte sever the felon-in-possession charge from the drug charge. However, a defendant who does not move for severance or object in the trial court fails to preserve the issue for review. *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Therefore, we will review this issue only if necessary to avoid manifest injustice. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

In the instant case, no manifest injustice will result from our failure to review this issue. In *Green, supra*, this Court detailed how the potential prejudice inherent in a felon-in-possession charge may be avoided:

> This Court has explained that "adequate safeguards" can be erected to ensure that a defendant charged with both felon-in-possession and other charges arising from the same incident suffers no unfair prejudice if a single trial is conducted for all the

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

> charges. See *Mayfield, supra* at 659-660. Specifically, these "safeguards" are (1) the introduction by stipulation of the fact of the defendant's prior conviction, (2) a limiting instruction emphasizing that the jury must give separate consideration to each count of the indictment, and (3) a specific instruction to consider the prior conviction only as it relates to the felon-in-possession charge. [*Green, supra* at 691-692.]

Before trial, defendant moved to prevent any reference to the fact that he was previously convicted of possession of cocaine, and the parties and trial court agreed that the jury would only be informed that he had committed a prior felony. However, regarding safeguard one, defendant did not stipulate to the admission of evidence that he was a felon for purposes of the felon-in-possession charge. Therefore the prosecutor offered the testimony of defendant's parole officer that he was convicted of a felony in 1994 and was sentenced for that offense to two to six years in prison. Although defendant now claims that this information caused the jury to assume that he was convicted of a serious offense, the defendant never objected at trial to the prosecutor's questions. Nor did the jury ever learn the nature of defendant's prior conviction. Because defendant offered no type of stipulation below, he may not now contend that the admission of evidence beyond the mere fact of his conviction constituted error. *Mayfield, supra* at 661.

Regarding safeguard two, the trial court did emphasize that the jury must give separate consideration to each count. The court directed that the jury first address individually the possession with intent to deliver less than fifty grams of cocaine charge and its lesser included charges, then the felon-in-possession charge, then the lesser charge of attempted felon-in-possession. Although, the court failed to satisfy the third safeguard by instructing the jury to consider the prior felony only as it related to the felon-in-possession charge, defendant failed to request such an instruction. See *Green, supra* at 692. In light of the trial court's instruction to consider each charge separately, the fact that the jury never learned that defendant's prior conviction also resulted from possession of cocaine, and defendant's failure to act to limit the jury's knowledge of his prior felony conviction, we conclude that no manifest injustice will result from our failure to further review defendant's due process argument.

Furthermore, substantial evidence existed independent of the evidence that defendant was previously convicted of a felony from which the jury could determine beyond a reasonable doubt that defendant possessed less than 25 grams of cocaine. City of Flint Police Officer Randolph Tolbert stated that he had participated in the police raid on defendant's home, and that the evidence taken from there by the police included three plastic bags containing suspected crack cocaine. Thelma Morris, a police investigator, testified that she received the three packages of drugs recovered from the search of defendant's home, and that they contained approximately 13.5 grams of crack cocaine. Defendant told another police sergeant that the cocaine belonged to him and was for his personal use. Therefore, even assuming arguendo that the trial court should have severed the possession of cocaine from the felon-in-possession charge, the error was harmless. *People v Coleman*, 210 Mich App 1, 7; 532 NW2d 885 (1995); *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994).

Next, defendant contends that the trial court erred by refusing the jury's request to rehear certain witnesses' testimony. We review the trial court's decision regarding the rereading of testimony for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

A court may refuse a jury's request to have testimony replayed as long as it does not foreclose the possibility that the evidence may be reviewed at a later time, should the jury still require it. MCR 6.414(H). See also *People v Harvey*, 121 Mich App 681, 687; 329 NW2d 456 (1982). In the instant case, the trial court responded to the jury's request for certain trial testimony by indicating that to rehear this testimony would take hours, and that therefore the requested testimony would not be supplied. Thus, the court abused its discretion by clearly foreclosing the possibility of playing back the requested testimony. *Davis*, *supra*.

However, we find it proper to apply a harmless error analysis in this case because the basis of the jury's confusion can reasonably be determined from the facts. See *People v Smith*, 396 Mich 109, 111-112; 240 NW2d 202 (1976); *People v Howe*, 392 Mich 670, 678; 221 NW2d 350 (1974). Defendant was initially charged with possession with intent to deliver cocaine. The jury ultimately convicted defendant of the lesser offense of possession of cocaine, acquitting him of possession with intent to deliver cocaine. After approximately two and-a-half hours of deliberation, the jury requested "[f]irst, testimony of [Sergeant John] Strickert account of the [confidential informant] buy; second, testimony of [Officer Randolph] Tolbert; third, testimony of [O]fficer [Richard Hetherington] who witnessed the buy; four, need Strickert first day testimony." Sergeant Strickert and Officer Richard Hetherington had testified regarding the confidential informant's drug buy from defendant. Officer Tolbert testified that he assisted in executing the search warrant at defendant's home and was responsible for tabulating the items seized from the home, explained his involvement in handling the seized items and revealed that he found two scales in defendant's home, the type of which in his experience were used for weighing and packaging cocaine. The first day of Sergeant Strickert's testimony involved his setting up the controlled buy and the subsequent search of defendant's home, and his testimony that guns, cocaine and money, including the $20 bill the confidential informant used for the controlled drug buy from defendant, were found in defendant's home. Thus, in light of the fact that all the testimony the jury requested involved the controlled buy and the finding of evidence linked to drug dealing, and the fact that approximately thirty-five minutes after the judge declined its request for this testimony the jury returned its verdict finding defendant guilty of the lesser simple possession charge, we may reasonably assume that the jury was uncertain regarding defendant's guilt of the possession with intent to deliver charge. The instant case is therefore distinguishable from *Smith*, *supra*, and *Howe*, *supra*, in which cases the courts reversed the defendants' convictions because the extent of the jury's confusion was unclear. Because the jury ultimately acquitted defendant of possession with intent to deliver cocaine, and because there was sufficient evidence besides the testimony that the jury requested establishing defendant's cocaine possession conviction beyond a reasonable doubt, we conclude that the trial court's error in refusing the jury's request was harmless. *People v Graves*, 458 Mich 476, 482-483, 487; 581 NW2d 229 (1998) (nonconstitutional error does not require reversal if it is highly probable that it did not affect the judgment).

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Robert J. Danhof