STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK MURDOCK,

Defendant-Appellant.

UNPUBLISHED
January 8, 1999

No. 197580
Recorder's Court
LC No. 94-007602

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for delivery of more than fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and delivery of more than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant was sentenced to six to twenty years' imprisonment for the delivery of more than fifty but less than 225 grams of cocaine conviction, and twelve to thirty years' imprisonment for the delivery of more than 225 but less than 650 grams of cocaine conviction, the sentences to run consecutively. We affirm.

Defendant's first issue on appeal is that the trial court erred in allowing into evidence hearsay statements made by coconspirators before a conspiracy was proven by evidence independent of the statements. We disagree. We review a trial court's admission of evidence under the abuse of discretion standard. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). "There is an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.".

A statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in the furtherance of the conspiracy on independent proof of the conspiracy." MRE 801(d)(2)(E). In *People v Hall*, 102 Mich App 483, 489; 301 NW2d 903 (1980), this Court stated:

> While some authority exists for the proposition that the independent proof of the conspiracy must be offered and admitted before the co-conspirator's statements can be

> admitted, we adhere to the rule that "the order of presentation of the proofs was unimportant, as it is clear that [the] trial court may vary the order of proofs and admit the co-conspirator's statements contingent upon later production of the independent evidence required under MRE 801(d)(2)(E). See MRE 104(b)." [*Hall, supra*, 102 Mich App 490 (citations omitted).]

Furthermore, the trial court has discretion to order the proofs. See *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996), quoting *Geders v United States*, 425 US 80, 86; 96 S Ct 1330; 47 L Ed 2d 592 (1976).

In his brief to this Court, defendant cites *People v Vega*, 413 Mich 773,780-782; 321 NW2d 675 (1982), for the proposition that the trial court erred in allowing hearsay statements into evidence to prove the existence of a conspiracy before independent proof of the conspiracy was put into evidence. However, the issue in *Vega* was not about the order of proofs, that is, whether the trial court erred in admitting hearsay statements before independent proof of a conspiracy was admitted. The issue in *Vega* was whether there actually was independent proof of a conspiracy. *Vega, supra*, 413 Mich 780. Therefore, defendant's reliance on *Vega* is misplaced.

Defendant's second claim of error on appeal is that he was convicted of a charge on which the prosecution did not proceed and which the jury was not asked to consider, similar to the error which occurred in *Vega*, *supra*, 413 Mich 782-783. However, defendant raises this issue for the first time on appeal, therefore the issue is waived. *People v Pitts*, 222 Mich App 260, 272; 564 NW2d 93 (1997).

Defendant's third claim of error on appeal is that the trial judge should have been disqualified because he expressed a preconceived notion as to defendant's guilt. We disagree. We review a lower court's determination as to whether a judge should be disqualified for an abuse of discretion. *People v Upshaw*, 172 Mich App 386, 389; 431 NW2d 520 (1988).

MCR 2.003(C)(1) states that a motion for disqualification must be filed within fourteen days of the discovery of the ground for disqualification, however, if the motion is untimely, this is a factor that can be considered in deciding the motion. Defendant waited nearly eight months to file the motion. Furthermore, the motion was filed less than three weeks before defendant's second trial was to begin. As MCR 2.003(C)(1) expressly states that avoiding delays in trial may be considered in deciding a motion for disqualification, defendant's claim of error must fail. Furthermore, a review of the proceedings below demonstrate that Judge Thomas E. Jackson was of the opinion that defendant would not be prejudiced if his case was retried before Judge Terrance K. Boyle. Although statements such as Judge Boyle's should be discouraged, we cannot say that Judge Jackson abused his discretion in reaching this conclusion.

Defendant's fourth claim of error on appeal is that the trial court denied defendant due process of law by failing to require the prosecution to produce two res gestae witnesses. We disagree. Although the issue was not preserved for review, this Court will review the claimed constitutional error if it would be decisive to the outcome of the trial. *People v Shively*, 230 Mich App 626, 629; 584

NW2d 740 (1998). Our review of the record reveals that the officers were not res gestae witnesses. Since the two officers were not res gestae witnesses, the refusal of the trial court to order the production of the witnesses was not decisive to the outcome of the trial.

Defendant also argues that the prosecution did not exercise due diligence in securing the presence of these witnesses at trial. However, due diligence is no longer required of the prosecution when attempting to secure witnesses for trial. See *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995).

Defendant further argues that the trial court erred in failing to give a requested instruction on the prosecution's failure to produce these witnesses at trial. However, the facts of the case did not warrant giving this instruction. See *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Defendant's fifth claim of error on appeal is that he was denied his right of confrontation when the trial court failed to order the production of the officers that stopped defendant's van and searched him. Although this issue was not preserved below, we will review this constitutional issue to determine whether the alleged error was decisive to the outcome of the trial. *People v Shively*, *supra* 230 Mich App at 629. Our review of the record demonstrates that the officers that stopped defendant did not search him or the van that he was in and the only reason for the stop was to learn defendant's identity. As such, the trial court's refusal to order the production of the officers was not decisive to the outcome of the trial.

Defendant's final claim of error on appeal is that he has not waived his claim of double jeopardy because his motion for mistrial was necessitated by prosecutorial misconduct. We disagree. We review a trial court's determination of whether the prosecution intended to goad a defendant into moving for a mistrial under the clearly erroneous standard. *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988). Our review of the record shows that the trial court's determination, that the prosecution's misconduct was unintentional, was not clearly erroneous. Therefore, as the mistrial was not the result of intentional misconduct by the prosecution, defendant cannot claim that his retrial is barred on double jeopardy grounds.

Affirmed.

/s/ William Henry Saad
/s/ Michael J. Kelly
/s/ Richard A. Bandstra