

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE L. NURSE,

Defendant-Appellant.

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UNPUBLISHED

April 2, 1999

No. 206333

Recorder's Court

LC No. 96-009214

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of more than 50 but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), and sentenced to seven to twenty years' imprisonment for the possession conviction. We affirm.

First, defendant argues that, after the jury indicated it was deadlocked, the trial court gave a supplemental instruction which coerced a verdict and deprived defendant of his right to a jury trial. We disagree. Defendant's failure to object to jury instructions serves as a waiver of any error. *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995). Therefore, appellate review is waived absent manifest injustice. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). We find no manifest injustice here.

We review jury instructions in their entirety to determine if error occurred requiring reversal. Instructions which are somewhat imperfect are acceptable, so long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). In this case, the trial court stated that it was disturbed that the jury had deadlocked after deliberating for a mere two to three hours. The trial court indicated that it believed that the jurors were not following its instructions and provided a supplemental instruction, which was not objected to by either party. This instruction provided that the jurors should examine their own views which could result in the changing of opinions, without surrendering individual convictions for the sake of reaching a verdict. While the trial court deviated from the standard instruction, the deviation was not substantial and we find no error.

Defendant also contends that the baggies of cocaine should have been suppressed because an illegal search and seizure occurred when defendant was arrested without a warrant and without probable cause. We disagree. Defendant preserved this issue by filing a motion to suppress in the trial court which was denied. *People v Carroll*, 396 Mich 408, 412; 240 NW2d 722 (1976). The denial of a motion to suppress evidence will not be reversed on appeal in the absence of clear error. A decision is clearly erroneous if, although there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made. *People v Shields*, 200 Mich App 554, 556; 504 NW2d 711 (1993).

In reviewing a claim that police lack probable cause to arrest, this Court must determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony. Each case must be analyzed in light of the particular facts confronting the arresting officer. *People v Oliver*, 111 Mich App 734, 747; 314 NW2d 740 (1981). A police officer may arrest a person without a warrant when a felony, misdemeanor, or ordinance violation is committed in the officer's presence. MCL 764.15; MSA 28.874

Here, a police officer testified that he had information that narcotics transactions were occurring at the abandoned apartment complex. In the common area of the apartment complex, after seeing the uniformed officer, defendant dropped two baggies containing a white powder and ran. The facts available to the officer would justify a fair-minded person of average intelligence in concluding that the baggies of white powder, abandoned by the fleeing defendant in a known narcotics area, were cocaine. In addition, the officer's entry into the abandoned apartment without a warrant to apprehend defendant was proper pursuant to the exigent circumstances exception. *People v Cartwright*, 454 Mich 550, 559; 563 NW2d 208 (1997).

Defendant also contends that the prosecutor inflamed the passions of the jury by referring to the impact of drugs on the community and improperly vouched for the credibility of a police officer witness in an improper civic duty argument. This issue is without merit. The prosecutor's summation was not objected to during trial. Failure to object during trial precludes appellate review of alleged prejudicial remarks by the prosecutor unless the prejudicial effect would not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

A prosecutor may not argue facts not in evidence, but is free to argue the evidence and all reasonable inferences as it relates to the prosecutor's theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). The prosecutor's statement in this case that the community neighboring the abandoned apartment complex was suffering was reflective of the police testimony that officers were patrolling the area due to citizen complaints of narcotics activity. The statement did not misstate facts or law and was not used to inflame the passions of the jury; therefore, a miscarriage of justice did not occur as a result of the statement. *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987). The prosecutor's statements regarding the credibility of the officer did not inject issues broader than defendant's guilt or innocence of the charges, and did not encourage the jurors to suspend their powers of judgment. Therefore, the disputed comments did not deprive defendant of a

fair trial. *People v Truong*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Finally, any alleged civic duty argument was cured by the cautionary instruction that arguments of counsel are not evidence. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Defendant was not denied his right to a fair trial.

Finally, defendant contends that counsel was ineffective for failing to object to the trial court's supplemental instruction, failing to move for a mistrial based on the instruction and failing to object to the prosecutor's summation. We disagree. Where defendant fails to move in the trial court for a *Ginther*<sup>1</sup> hearing or a new trial, this Court reviews the record for apparent error to determine if trial counsel's performance fell below an objective standard of reasonableness such that a different outcome would have occurred. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). This Court has concluded that the trial court's supplemental instruction was not coercive and that the prosecutor's comments were not improper. There is no requirement that defense counsel raise meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Defendant failed to meet his burden in demonstrating ineffective assistance of counsel. *Plummer, supra* at 307-308.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Roman S. Gribbs

/s/ Kurtis T. Wilder

<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).