

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

DIEGO MELENDEZ,

Defendant-Appellant.

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UNPUBLISHED

March 17, 2000

No. 203769

Recorder's Court

LC No. 96-004327

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). He was sentenced to twelve to thirty years' imprisonment, and appeals as of right. We affirm.

After two controlled buys occurred, police executed a search warrant of defendant's residence. Cocaine was found in a safe belonging to defendant. Baggies and a scale were also found in the residence. Money involved in the controlled buys was found on defendant's person. Police testified that defendant made a statement admitting knowledge and possession of the cocaine. Defendant denied that he made any such statement to police and alleged that the cocaine was planted by police or a houseguest. The amount of cocaine found in the various baggies was stipulated to at trial.

Defendant first argues that the trial court had improper ex parte contact with the jury when it submitted a note providing the amount of cocaine found in defendant's safe. We disagree. At 9:34 a.m., the jury was sent to deliberate. At that time, the trial court stated that defense counsel had to leave the courtroom on business. The trial court inquired whether defense counsel would provide a substitute, and he responded affirmatively. Review of the lower court file reveals that the jury sent a note to the trial judge asking for pencils, pictures, and the amount of grams of cocaine which were stored in the safe. The note was received at 9:55 a.m. At 12:17 p.m., the jury rendered its verdict on the record. Prior to accepting the verdict, the trial court made a record of all notes that had been received that morning. The trial court inquired whether the pencils, pictures, and note from the trial court, indicating the amount of cocaine in the safe, had been received. The foreman responded affirmatively, although the time of receipt of the information was unknown. At this time, defendant was

represented by substitute counsel who did not object to the trial court's conduct in responding to the jury's notes.

Defendant filed a motion for new trial and alleged that the trial court's conduct in responding to the jury's note regarding the cocaine constituted an improper ex parte communication. At the hearing, the trial court recalled that counsel for the prosecution and defendant's trial counsel were present, and their consultation resulted in a note being sent to the jury. The trial court denied any improper ex parte communication occurred. However, the trial court requested affidavits from defendant's trial counsel and the prosecutor for purposes of a complete record. The prosecutor filed an affidavit which corroborated the trial court's recollection of events. However, trial counsel for defendant stated that he had left the courtroom and was not present for any note from the jury regarding this issue. The trial court held that defense counsel's affidavit constituted a bold face lie. "Questions of credibility are left for the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Furthermore, we note that the parties stipulated to the amount of cocaine found in the various baggies, and the trial court instructed the jury that it need not regard stipulated facts as true. Accordingly, we cannot conclude that an improper ex parte communication occurred, and defendant's alleged claim of error is without record support.

Defendant next argues that he was denied a fair trial due to the numerous improper comments made during the prosecutor's closing arguments. We disagree. This claim is not preserved for appeal because defendant failed to object at trial. *Avant, supra* at 512. Therefore, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in manifest injustice. *Id.* Our review of each of the alleged instances of prosecutorial misconduct reveals that the prosecutor's comments were proper or a curative instruction could have alleviated any prejudice to defendant. Accordingly, defendant's claim of error is without merit.

Lastly, defendant argues that trial counsel was ineffective for failing to call witness Armondo Vega. We disagree. Effective assistance of trial counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Testimony of trial counsel is essential to support a claim of ineffective assistance, and, absent such testimony, our review is limited to what is contained in the record. *Id.* at 76-77. Decisions to call or question witnesses are presumed to be matters of trial strategy. *Id.* On the record available, we cannot conclude that the failure to call Vega constituted ineffective assistance. The failure to call Vega did not deprive defendant of a substantial defense because Vega's testimony would have been cumulative to the testimony of defendant. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Affirmed.

/s/ William B. Murphy  
/s/ Harold Hood  
/s/ E. Thomas Fitzgerald