

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL D. LOVE,

Defendant-Appellant.

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UNPUBLISHED

May 26, 2000

No. 211326

Wayne Circuit Court

LC No. 97-005426

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two to four years in prison for the felonious assault conviction, and a consecutive term of two years in prison for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant contends that the trial court erred in denying the motion for mistrial that he made after the prosecutor, while cross examining defendant, improperly referred to his status as a jail inmate. We review for an abuse of discretion the trial court's decision whether to grant a mistrial. *People v Ortiz-Kehoe*, 237 Mich App 508, 512-513; 603 NW2d 802 (1999).

References to a defendant's prior incarceration are generally inadmissible because the jury might focus on these references as evidence of the defendant's general bad character. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999); *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). Not every mention before a jury of some inappropriate subject matter, however, warrants a mistrial. *Griffin, supra*. A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Ortiz-Kehoe, supra* at 513-514.

In the instant case, the trial court agreed with defendant that the prosecutor's reference to defendant's incarceration and wearing of handcuffs on his arrival at court was improper, and struck the prosecutor's question from the record. No further mention was made of defendant's presence in jail. Defendant was acquitted of the most serious charges of two counts of first-degree criminal sexual

conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e) (armed with a weapon), and armed robbery, MCL 750.529; MSA 28.797, presumably because defense counsel successfully impeached the testimony of the victim, the only witness to these alleged crimes, concerning her identifications and descriptions of defendant as the perpetrator. The case's outcome demonstrates that defendant was not prejudiced with respect to these charges by the mention of his presence in jail because the jury clearly resolved the disputed issue of identity in defendant's favor.

The offenses for which defendant was found guilty, however, were supported by considerably more evidence. In addition to the victim's testimony, other eyewitness and medical testimony substantiated the victim's description of defendant's commissions of felonious assault and felony-firearm. In light of the substantial evidence of defendant's guilt of felonious assault and felony-firearm and the isolated occasion of the prosecutor's references that defendant was in jail and wore handcuffs, we cannot conclude that defendant was deprived of a fair trial or that the trial court abused its discretion in denying defendant's motion for mistrial.<sup>1</sup> *Ortiz-Kehoe, supra* at 512-513.

Defendant also disagrees with the trial court's failure to provide a curative instruction concerning the prosecutor's improper references to defendant's incarceration. While the trial court indicated its intention to provide a curative instruction, the court ultimately failed to do so. The instant record is devoid of any indication that defendant objected to the trial court's decision not to read a curative instruction. In a similar situation involving reference to a defendant's prior incarceration, the defendant's unsuccessful motion for mistrial, and the defendant's failure to object to the trial court's neglect of its expressed intent to offer a curative instruction, this Court explained as follows:

Nor do we find error in the trial court's not having provided the jury with a curative instruction. Had defense counsel asked the trial court to follow through with its indication that it would provide such an instruction, the court would have been obliged to do so. However, "failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052. See also *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). Further, because a special instruction concerning defendant's having been incarcerated would necessarily have highlighted that fact, defense counsel may well have decided not to bring that double-edged sword into play as a matter of sound strategy. [*Griffin, supra* at 37.]

Absent any recorded objection by defendant in this case, we similarly find no instructional error.

Affirmed.

/s/ Harold Hood

/s/ Hilda R. Gage

/s/ William C. Whitbeck

<sup>1</sup> Accordingly, we need not address defendant's second contention on appeal concerning the effect on the application of double jeopardy at defendant's retrial of the prosecutor's allegedly intentional misconduct "intended to goad the defendant into moving for a mistrial."