STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2009
v	No. 282837 Oakland Circuit Court
DEMETRIUS CREIGHTON, Defendant-Appellant.	LC No. 1995-139136-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 50 to 225 grams of cocaine, MCL 333.7401(2)(a)(iii),[1] and sentenced to ten to 20 years' imprisonment. He now appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At the jury trial, defendant's only argument was that he possessed less than 50 grams of cocaine. The Drug Enforcement Administration chemist testified that the net weight of the confiscated crack cocaine was 50.04 grams. A Drug Enforcement Administration agent testified that when a buyer ordered two ounces of crack cocaine, the buyer usually received 24 to 26 grams of cocaine, because some was lost in the process of turning powder cocaine into crack cocaine.

Defendant argues on appeal that he should be granted a new trial because, during closing argument, the prosecutor stated that the jury should not compromise and convict defendant of the lesser offense of possession of less than 50 grams, stating, "The judge has to give that instruction. It's called a lesser offense. They do it in every case." Defendant also argues that his trial counsel was ineffective for failing to object to the misstatement of the law. We disagree.

Review of an unpreserved allegation of prosecutorial misconduct is precluded unless no curative instruction could have removed the prejudice or if manifest justice would result. *People*

[1] Defendant's offense occurred on November 15, 1994. This statute was amended by 2002 PA 665, effective March 1, 2003, and now prohibits an amount that is more than 50 grams but less than 450 grams.

v Reid, 233 Mich App 457, 466; 592 NW2d 767 (1999). Clearly, the prosecutor's statement that the judge had to give the instruction and that the judge did it in every case was incorrect. An instruction on a lesser included offense is only proper where the charged offense requires the jury to find a disputed fact that is not a part of the lesser included offense and where a rational view of the evidence would support the lesser included offense. *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). However, it is just as clear that a contemporaneous objection and curative instruction could have easily removed any prejudice caused by the prosecutor's statement. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The trial court properly instructed the jury regarding how to consider the greater and lesser offenses when deliberating, and any prejudice was cured by the trial court's instruction that the prosecution's argument was not evidence. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Therefore, reversal is not required.

This Court's review of defendant's ineffective assistance of counsel claim is limited to those mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

As discussed above, defense counsel failed to object to the prosecutor's misstatement of the law regarding whether the court was required to give a lesser included offense instruction. However, the misstatement of the law was so minor and, as the prosecution notes, isolated, that one cannot fault defense counsel for failing to object. Further, defendant has not shown that the result of the proceedings would have been different where the trial court properly instructed the jury on how to consider the greater and lesser offenses when deliberating. Therefore, defendant established neither *Strickland* prong and has not shown that he was denied the effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra