# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GERALD SPENCER,

Defendant-Appellee.

UNPUBLISHED
October 31, 1997

No. 191944
Recorder's Court
LC No. 94-010243

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD SPENCER,

Defendant-Appellant.

No. 192777
Recorder's Court
LC No. 94-010243

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Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Defendant was originally charged with possession with intent to deliver more than 225 grams but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and possession with intent to deliver marihuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). A jury convicted him of simple possession of more than 225 grams but less than 650 grams of cocaine, MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii), and simple possession of marihuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). Defendant was sentenced to ten to thirty years' imprisonment for the cocaine conviction and to time served for the marihuana conviction. The prosecution appeals defendant's sentence as of right, and defendant appeals his convictions as of right.

We have consolidated the appeals, and we now affirm defendant's convictions, vacate his sentence, and remand for resentencing.

Docket No. 192777

Defendant first argues that the trial court erred in sua sponte instructing the jury on the offense of simple possession and by instructing the jury that this offense was a "lesser included offense." We disagree. We begin by noting that defendant failed to object to the instruction on simple possession. Absent objection, we will only reverse to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

In a criminal trial, the trial judge is required to instruct the jury as to the law applicable to the case, MCL 768.29; MSA 28.1052, and to fully and fairly present the case to the jury in an understandable manner, *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The duty of the trial court to instruct on lesser included offenses is determined by the evidence. *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997), lv pending, citing *People v Hendricks*, 446 Mich 435, 442; 521 NW2d 546 (1994). Because the evidence will always support a necessarily included lesser offense if it supports the greater, refusal to give a requested instruction on a necessarily included lesser offense is reversible error. *People v Ora Jones*, 395 Mich 379, 390; 236 NW2d 461 (1975). Simple possession of cocaine is a necessarily included lesser felony offense of possession with intent to deliver cocaine. See *Torres, supra* at 416-421. This is true even though the penalties for both offenses are identical. *Id.* at 419. Thus, the trial court did not err in giving an instruction on simple possession. The fact that neither party requested the instruction is irrelevant; a trial court may, but need not, instruct sua sponte on a lesser included offense. *People v Chamblis*, 395 Mich 408, 417; 236 NW2d 473 (1975), overruled in part on other grounds *People v Stephens*, 416 Mich 252, 266; 330 NW2d 675 (1982).

Defendant also argues that the trial court and the prosecutor should not have referred to simple possession as a "lesser" offense because it carried the same mandatory penalty as possession with intent to deliver. Indeed, the mandatory minimum penalties are the same for both crimes. Compare MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii) with MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii). The panel in *Torres, supra*, addressed this issue and concluded that a trial court's reference to simple possession as a "less serious" crime did not lead to manifest injustice. *Torres, supra* at 423. Similarly, we do not believe that the references to simple possession as a "lesser" offense in this case resulted in a miscarriage of justice. Thus, reversal is not warranted. MCL 769.26; MSA 28.1096.

Defendant next argues that he was denied a fair trial due to numerous instances of prosecutorial misconduct. We disagree. When reviewing instances of alleged prosecutorial misconduct, we examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Here, however, defendant did not preserve this issue because his objections to the prosecutor's remarks were on different grounds than those which he now raises. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).

Thus, appellate review is precluded unless: (1) an instruction could not have cured the error, or (2) failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

A prosecutor may not make comments which imply that the prosecutor's office or the police are satisfied with defendant's guilt for reasons apart from the evidence admitted at trial. See, e.g., *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995); *People v Ignofo*, 315 Mich 626, 631-636; 24 NW2d 514 (1946); *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985); *People v Humphreys*, 24 Mich App 411, 418-421; 180 NW2d 328 (1970). Likewise, a prosecutor should not vouch for defendant's guilt on behalf of the court or imply that the court is allied with the prosecution against the defendant. See *United States v Frederick*, 78 F3d 1370, 1379-1381 (CA 9, 1996), citing *United States v Smith*, 962 F2d 923, 933-934 (CA 9, 1992). After reviewing the record, we do not believe that any of the prosecutor's remarks suggested that the court was allied with the prosecution or had the effect of improperly vouching for defendant's guilt.

The prosecutor's remark in his opening statement regarding the issuance of a search warrant was harmless because it did not disclose any more information than was later elicited at trial. Cf. *People v Smith*, 149 Mich App 189, 193-194; 385 NW2d 654 (1986). The prosecutor's remarks made during his rebuttal argument were also harmless. These remarks did not suggest that the prosecution and the court were "on the same team." Compare *Frederick*, *supra* at 1379-1380. In addition, these remarks were a proper response to defense counsel's closing argument. See *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). We will briefly address the other challenged remarks.

As defendant points out, a prosecutor may not make a comment during closing argument that is not supported by the evidence. *Stanaway*, *supra* at 686. However, the prosecutor's comment in this case regarding the condition of an envelope bearing defendant's name was a proper attempt to argue an inference that could be drawn from the evidence. To the extent that the this remark misstated defendant's testimony, it was harmless, since the trial court instructed the jury that the comments of the lawyers are not evidence. See *People v Carey*, 110 Mich App 187, 191-192; 312 NW2d 205 (1981). In addition, if defendant had objected, any prejudicial effect could have been eliminated by a curative instruction. *Id.* at 192.

Defendant next argues that the prosecutor improperly focused attention on a police officer's pre-raid surveillance of the car wash where the drugs were found. However, when a defendant attempts to use an alleged error to his tactical advantage at trial, and the results are not to his liking, this Court will not allow him to use the same error as grounds for reversal. *People v Baines*, 68 Mich App 385, 388-389; 242 NW2d 784 (1976). In his closing argument, defense counsel argued that the police had been observing the car wash for several days, but had no incriminating photographic or video evidence. Accordingly, defendant may not now argue that the evidence regarding the surveillance was improper.

Defendant next argues that the prosecutor improperly referred to defendant's filing of a "Witness and Alibi List." Indeed, a prosecutorial comment on a defendant's failure to produce a

witness, including a potential alibi witness, may infringe on the defendant's right not to testify and thereby constitute error. *People v Carl Fields*, 450 Mich 94, 104-116; 538 NW2d 356 (1995). However, when the defendant makes an issue legally relevant either by introducing evidence or advancing a theory, the prosecutor is not prohibited from commenting on the improbability of the defendant's evidence or theory. See *id.* at 115-116. Here, we find that the prosecutor's comment regarding defendant's filing of a "Witness and Alibi List" was not improper because it was made in direct response to defense counsel's closing argument. Defense counsel argued that the prosecutor could have produced the owner of the car wash, but that the prosecution was more interested in convicting defendant than in uncovering the truth. In response, the prosecutor simply pointed out that, while the defendant didn't have to produce any witnesses, the prosecutor fully expected defendant to call the car wash owner. This statement properly pointed out the weakness in defendant's theory that the prosecution was disregarding the truth in its attempt to convict the defendant.

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to object to the instruction on the offense of simple possession of cocaine and to repeated instances of alleged prosecutorial misconduct. We disagree. To justify reversal on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to show that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In doing so, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *Stanaway*, *supra* at 687. In order to demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688.

Another panel of this Court recently held that a defense attorney's failure to object to an instruction on the necessarily included lesser offense of simple possession did not constitute ineffective assistance of counsel. *Torres*, *supra* at 425. The panel in *Torres* reasoned that any objection would have been meritless. *Id.* Thus, for precisely the reasons set forth in *Torres*, we conclude that defendant was not prejudiced by his attorney's failure to object to the instruction on the necessarily included lesser offense of simple possession. Furthermore, because defense counsel's failure to object was not a dispositive factor in defendant's claim of prosecutorial misconduct and because defendant was not denied a fair trial as a result of the alleged instances of prosecutorial misconduct, we find that defendant was not prejudiced by defense counsel's failure to object to the alleged prosecutorial misconduct.

Finally, defendant argues that he was denied his right to a fair trial by the cumulative effect of the alleged errors. We disagree. A criminal defendant has a right to a fair trial, not a perfect one. *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). Thus, although one error in a case may not necessarily provide the basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to reversible error. *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984). We conclude that defendant was not denied a fair trial.

Docket No. 191944

In his appeal, the prosecutor argues that the trial court abused its discretion when it departed from the mandatory minimum twenty-year sentence for defendant's conviction of possession of more than 225 grams but less than 650 grams of cocaine. We agree.

The mandatory minimum sentence for a defendant convicted of possession of more than 225 grams but less than 650 grams of cocaine is twenty years' imprisonment. MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii). However, a sentencing court may depart from this mandatory minimum term if it finds on the record that there are substantial and compelling reasons to do so. MCL 333.7403(3); MSA 14.15(7403)(3). In order to qualify as "substantial and compelling," a reason for a downward departure from the mandatory minimum sentence must be "objective and verifiable" and post-arrest factors should be given as much weight as preexisting factors. *People v Warren Fields*, 448 Mich 58, 67-69, 77; 528 NW2d 176 (1995).

The existence or nonexistence of a particular factor is a factual matter for the sentencing court's determination. As such it is reviewed for clear error. *Id.* at 77. The question whether a particular factor is objective and verifiable is reviewed de novo. *Id.* at 77-78. Finally, a trial court's determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.* at 78.

In the instant case, the trial court based its downward departure solely on defendant's possibility for rehabilitation. According to the trial court, this finding was "based on what they tell me has occurred afterwards," referring to defendant's post-arrest change in behavior. However, the trial court also explained, "I got all of these letters from various people talking about what a wonderful person he is. How he's just doing such great work out there in the community. And see, everybody says that, but I don't see any of it." The trial court then described the existence of substantial and compelling reasons under the circumstances as "a real stretch for me." The court also admitted:

> The only thing I could possibly talk about is a possibility for rehabilitation. And I don't know. I'm going to be real honest with everybody who's sitting here. I don't think that he has suddenly seen the way of God as much as he realizes if [sic] he could go to prison for up to 20 years, and that that is the reason why his behavior has changed. But I don't know that.

Ultimately the trial court concluded that a just sentence would be ten to thirty years' imprisonment.

Here, the trial court's reliance on defendant's "potential for rehabilitation" as a substantial and compelling reason for departure was misplaced. Such "potential" is not objective and verifiable, and therefore cannot constitute a substantial and compelling reason for departure. See *People v Perry*, 216 Mich App 277, 280-283; 549 NW2d 42 (1996). Thus, we must remand for resentencing.

On remand, the trial court may again consider whether there are any substantial and compelling reasons for departure. The trial court should first make findings of fact regarding any factors which might warrant a departure. If any such factors exist, the trial court must decide as a matter of law whether they are objective and verifiable. Finally, if any objective and verifiable factors exist, the trial

court must determine the extent to which they justify a departure from the mandatory minimum sentence. *Perry*, *supra* at 280. While a defendant's post-arrest behavior may constitute a substantial and compelling reason for departure, see *People v Hellis*, 211 Mich App 634, 650-651; 536 NW2d 587 (1995), substantial and compelling reasons only exist in exceptional cases. *Warren Fields*, *supra* at 68; *Perry*, *supra* at 281-282. We do not believe that a defendant who becomes religious and becomes active in community work after an arrest necessarily presents an exceptional case justifying departure.[1] In order to justify a departure based on this type of post-arrest behavior, the trial court must point to some evidence that makes defendant's case exceptional.

Defendant's convictions are affirmed. We vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra

[1] These characteristics are undoubtedly common to many defendants, and would certainly become even more common if we held that they were sufficient to warrant a departure from a mandatory minimum sentence.