

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYLL D. HOLBDY a/k/a DARRYLL  
HOLBY,

Defendant-Appellant.

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UNPUBLISHED

November 14, 2000

No. 215410

Wayne Circuit Court

LC No. 96-007980

Before: Jansen, P.J., and Doctoroff and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for attempted possession with intent to deliver less than fifty grams of cocaine, MCL 750.92; MSA 28.287, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). The court sentenced defendant to twenty months to five years in prison for the attempted possession with intent to deliver cocaine conviction, and time served for the possession of marijuana conviction. We affirm.

Defendant contends that his convictions should be reversed because the prosecutor committed misconduct when she submitted evidence based on a stipulation that defense counsel had earlier withdrawn. This Court reviews issues of prosecutorial misconduct on a case-by-case basis, examining the prosecutor’s conduct in the context of the record. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). We must determine whether the alleged misconduct denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

In the instant case, Detroit police officer Otha Craighead testified that he purchased drugs at 14227 Arlington in the city of Detroit. Although defendant initially told him that he did not sell drugs, he eventually instructed Darryl Robertson to “sell it to him,” and Robertson sold Officer Craighead approximately one gram of cocaine. Defendant admitted to possession of marijuana. Detroit police officer Joseph Tiseo confiscated six packets of heroin and an automatic assault rifle from the front room of the premises. In addition to the properly admitted evidence, the prosecution submitted a stipulation regarding evidence that Detroit police officer John Simmons confiscated at the scene. Defendant objected, stating that he had not stipulated to

the evidence. The prosecutor proceeded to read into the record that Officer Simmons confiscated eighteen packets of cocaine and twenty packets of heroin from the premises where defendant was arrested. Later, the trial court sua sponte struck the objectionable portion of the stipulation from the record.

At various stages of this case defendant had different counsel representing him. Defendant's trial counsel first became involved in the case on October 15, 1997. Defendant's previous counsel had entered into the stipulation on November 22, 1996. On January 6, 1998, for reasons unclear from the record, the prosecutor endorsed Officer Simmons as a witness and the case was adjourned. Based on the foregoing facts, defendant seems to argue that the prosecutor must have known that the stipulation was invalid regarding the evidence confiscated by Officer Simmons. However, the record indicates the confusion of the prosecutor as well as defendant's trial counsel, who initially stated, "That is a correct stipulation, your honor."

A prosecutor's good faith effort to admit evidence cannot be the basis of prosecutorial misconduct. *Noble, supra* at 660-661. Further, even if we accepted defendant's implied contention that the prosecutor submitted the stipulation in bad faith, defendant cannot prevail. In a bench trial, the trial court is presumed to be able to distinguish between admissible and inadmissible evidence. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992); *People v Vaughn*, 186 Mich App 376, 385; 465 NW2d 365 (1990). Because the properly admitted evidence supported defendant's conviction, we hold that any alleged misconduct on the part of the prosecutor did not deny defendant a fair and impartial trial.

Affirmed.

/s/ Kathleen Jansen  
/s/ Martin M. Doctoroff  
/s/ Peter D. O'Connell