

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEVI GARDNER,

Defendant-Appellant.

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UNPUBLISHED

May 3, 1996

No. 180311

LC No. 94-2557-FH

Before: Taylor, P. J. and Fitzgerald and P. D. Houk,\* JJ.

PER CURIAM.

As a result of a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine. MCL 333.7401(2)(a)(iv); MSA 14.15(2)(a)(iv). He was sentenced to three to twenty years in prison as a second offender under the controlled substances act. MCL 333.7413(2); MSA 14.15(7413)(2). Defendant appeals as of right and we affirm.

Defendant first argues that he was denied a fair trial as a result of supplemental instructions the trial court gave upon receiving a note from the jury asking: "What happens if we can't agree on intent?" Defendant claims the court coerced a verdict, failed to advise the jury that they were not necessarily required to agree on a verdict and erred by not reinstructing the jury on the lesser offense of possession of cocaine. This claim is without merit. Initially we note that this issue is not preserved for appellate review as defense counsel did not object to the response the court gave to the jury after receiving the jury's question. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In fact, defense counsel opposed reinstructing the jury regarding the possession charge. In any event, a review of the record shows the trial court properly responded to the jury's inquiry. The court's response was not coercive and there was no need to reinstruct the jury regarding the lesser offense because it was not related to the jury's question. Moreover, the court did remind the jury in the supplemental instruction that one possible verdict was guilty of the lesser offense of possession of cocaine.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also challenges the court's allowing an assistant prosecutor to testify regarding a conversation she overheard immediately after the conclusion of defendant's preliminary examination. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). This issue is also not preserved for appellate review. Defendant argues on appeal that there was an insufficient foundation for the testimony. However, at trial defendant merely expressed concern that one of the witnesses was an assistant prosecutor. This expression of concern was not adequate to preserve defendant's argument that the challenged testimony should not have been admitted due to a lack of foundation. MRE 103; *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). After reviewing the record, we are satisfied that defendant's arguments concerning an alleged lack of foundation go to the weight that should have been accorded the testimony and did not prevent its admission. *People v Curry*, 175 Mich App 33, 47; 437 NW2d 310 (1989). Assuming, arguendo, that admission of this testimony was error, we are satisfied that it was not outcome determinative and did not result in a miscarriage of justice. *Grant, supra* at 544-546.

Defendant next argues that his conviction must be set aside because the jury's verdict was not transcribed. Defendant claims he was not convicted of a crime based upon the lack of transcription. This claim is without merit. This issue was not raised at the trial court level. If the jury actually did not convict defendant, the issue surely would have been raised at or before sentencing. While the transcript of the trial does not record the jury's verdict, it does state that a verdict was received. The record, which consists of the original papers filed in that court, MCR 7.210(A)(1), contains an order of conviction showing defendant was convicted as charged. This is all that is necessary. *People v Miller*, 143 Mich App 274, 276; 372 NW2d 329 (1985).

Defendant's final claim is that the district court erred in binding him over for trial. Defendant preserved this issue for appeal by unsuccessfully moving to quash the information at the circuit court level. The district court must bind a defendant over for trial if the evidence presented at the preliminary examination establishes that a felony was committed and that there is probable cause to believe the defendant committed the crime. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). We review the district court's decision for an abuse of discretion. *People v Whipple*, 202 Mich App 428, 431; 509 NW2d 837 (1993). Testimony at the preliminary examination showed that defendant was in an area known for narcotics trafficking at 3:00 a.m. waving cars down. When approached by police officers, defendant dropped a baggie containing approximately fourteen rocks of cocaine. There was sufficient evidence presented at the preliminary examination to allow the district court to bind defendant over for possession with intent to deliver less than fifty grams of cocaine. We find no abuse of discretion. We further note that even if the bindover was improper, any deficiency in the proofs at a preliminary examination is harmless error if sufficient evidence is presented at trial. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989). Defendant does not argue on appeal that the evidence presented at trial was insufficient.

Affirmed.

/s/ Clifford W. Taylor  
/s/ E. Thomas Fitzgerald  
/s/ Peter D. Houk