

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY KENNETH MCCALLUM,

Defendant-Appellant.

UNPUBLISHED

September 10, 1996

No. 178596

LC No. 93-002249-FH

Before: Hood, P.J., and Griffin, and J. F. Foley,* JJ.

PER CURIAM.

Defendant was convicted by a jury of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to an enhanced term of twelve to thirty years' imprisonment and now appeals as of right. We reverse and remand for a new trial.

I

Defendant's jury trial involved a credibility conflict regarding his participation in the sale of cocaine to a police informant. Prosecution witnesses testified that defendant and Hugo Ramos cooperatively sold the drug, while defendant contended that if cocaine was sold, it was sold by Ramos without his complicity. Ramos, whom plaintiff presented at trial solely for defendant's cross-examination, attributed possession and sale of the drug to defendant and stated that his only role was to "cut" it. Two passengers in the car with defendant and Ramos at the time of the sale averred that Ramos was the seller. The jury convicted defendant, and he was sentenced to twelve to thirty years' imprisonment after pleading guilty to habitual offender, second offense.

II

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

Defendant first contends the trial court erred by denying his motion to dismiss the charges, which alleged that he was prejudiced by the eight-month delay between the crime and his arrest for it. Plaintiff admitted that it had deliberately delayed arresting him to avoid having to make any "deals" regarding his testimony for the prosecution in an unrelated murder trial. The trial court found no prejudice resulting from the delay. Our review of the trial court's findings discloses that they are not clearly erroneous. *People v Betancourt*, 120 Mich App 58, 62; 327 NW2d 390 (1982).

To a limited extent, procedural due process guarantees protect a defendant against a delay between the commission of an offense and his arrest for it. *People v Bisard*, 114 Mich App 784, 788; 319 NW2d 670 (1982). The test of whether a delay denied due process is whether the defendant was prejudiced. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). The defendant bears the burden of going forward with evidence of substantial prejudice to his right to a fair trial and an intent by the prosecution to gain a tactical advantage. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). An unsupported statement of prejudice by the defendant is insufficient, as are undetailed claims of witness memory loss. *People v Williams*, 114 Mich App 186, 202; 318 NW2d 671 (1982).

Defendant's claim of memory loss affecting himself and other witnesses is not borne out by the record, and we are not persuaded by his assertion that if arrested at the scene of the crime he might have been found not to have in his possession the marked money allegedly used in the drug transaction. Finally, we reject his contention that he was entitled to a prompt arrest so that he could bargain with plaintiff regarding his testimony in the murder case. There was no error.

III

Defendant next argues that he was denied a fair trial by the trial court's questioning of himself and other witnesses. Defendant did not object at trial to the court's questions or comments. In the past, panels of this Court have differed regarding whether an objection is required to preserve this type of claim for appellate review. *People v Moore*, 161 Mich App 615, 619-620; 411 NW2d 797 (1987). Assuming arguendo that an objection is required, see MRE 614(c), we nevertheless review this issue because our failure to do so would result in manifest injustice. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

The court's questioning of the informant produced an assertion by the witness that, "I know he [defendant] sold a lot of dope." Although unresponsive to the court's question, this answer constituted improper evidence prejudicial to defendant's case. Further, the court did nothing to mitigate its impact on the jury.

The court's interrogation of defendant suggests the court's disbelief of defendant's testimony that he did not know of Ramos' intent to sell cocaine to the informant. The court also inquired regarding defendant's income, monthly living expenses, what kind of "luxuries" defendant had, and what type of car he drove, concluding, "Essentially your answer is when this occurred . . . you really didn't have anything?"

Also egregious was the court's questioning of a female defense witness, during which the court elicited prejudicial facts that she was unemployed, was receiving ADC, and had a child who "does work." When the defense witness denied ever buying narcotics, the court responded, "Essentially you just trade yourself for them?" At the conclusion of this interrogation, the court remarked, "On that high note I think this might be a good time to recess for the evening."

Although the trial court may question witnesses in order to clarify testimony or elicit additional relevant information, it must exercise caution and restraint to ensure that its interrogation is not intimidating, argumentative, prejudicial, unfair, or partial. MRE 614(b); *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). The test on review is whether the court's questions and comments may well have unjustifiably aroused jury suspicion regarding a witness' credibility and whether partiality quite possibly could have influenced the jury to the defendant's detriment. *Conyers*, *supra* at 405.

We conclude that the trial court's questioning crossed the line of judicial impartiality and denied defendant a fair trial. In this case, defendant's guilt or innocence depended on the jury's assessment of witness credibility. The court's questions and comments detailed above were improper and adverse to defendant. Further, we do not find the errors to be harmless as there is a reasonable probability that the court's questions and comments prejudiced the jury against defendant and affected the verdict. *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995). Under the circumstances of this case, we are compelled to reverse in order to prevent manifest injustice. In view of our disposition, we find it unnecessary to address the additional issues raised by defendant.

Reversed and remanded for a new trial.

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ John F. Foley