

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY LIN MACCUNE,

Defendant-Appellant.

UNPUBLISHED

September 10, 1996

No. 180690

LC No. 94-009553

Before: Gribbs, P.J., and Hoekstra and C.H. Stark,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, contrary to former MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c).¹ Defendant was sentenced to four years' probation, but his sentence was stayed pending this appeal. Defendant now appeals as of right, and we affirm.

Defendant first argues that he was denied a fair trial by the prosecution's failure to comply with MCL 767.40a; MSA 28.980(5). Specifically, defendant complains of the prosecution's failure to exercise due diligence to produce a res gestae witness. We do not believe the prosecutor's actions denied defendant a fair trial. With the amendment of MCL 767.40a; MSA 28.980 in 1986, the prosecution's duty to produce res gestae witnesses was replaced by the obligation to provide notice of known witnesses and reasonable assistance in locating witnesses, and serving process upon a defendant's request. MCL 767.40a(5); MSA 28.980(1)(5); *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995). Here, defendant does not contest that he was given notice, but rather claims that reasonable efforts were not made to assist him in locating and serving process on a witness. We have reviewed the record below and conclude otherwise.

After the prosecution was informed that defense counsel wanted process to be served on Gilberto Ybarra, who defense counsel believed to be in an Illinois state prison, the prosecution timely provided defense counsel with Ybarra's complete address, and the address and telephone number of the jail in which he was confined. The prosecution also informed defense counsel that they could not

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

serve process upon defendant pursuant to MCL780.117; MSA 28.1287(7) because he was outside their jurisdiction and that defense counsel should contact them again if he had any further questions. Defense counsel made no further contacts with the prosecutor's office. We, like the trial judge, believe that the foregoing actions constituted reasonable assistance under the statute.

Defendant also argues that the search warrant should have been quashed because of numerous errors. We find this claim to be without merit. Here, the affidavit contained sufficient information based on the personal knowledge of the informant from which to conclude that there was a substantial basis for finding probable cause. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). The factual inaccuracies noted by defendant were minor and of too little significance to have merited invalidating the warrant or the search. Furthermore, the affidavit contained affirmative allegations from which the magistrate could have concluded that Ybarra spoke with personal knowledge.

Defendant next argues that the trial court abused its discretion in allowing the prosecution to admit hearsay statements made by Ybarra into evidence. Although the remarks were not hearsay because they were not admitted for the truth of the matter asserted, MRE 801(c), they were also not relevant pursuant to MRE 401. *People v Wilkins*, 408 Mich 69, 72-73; 288 NW2d 583 (1980). However, given the overwhelming evidence against defendant, the error had only slight or negligible influence on the verdict. Therefore, the error was harmless. *People v Mateo*, ___ Mich ___ ; ___ NW2d ___ (Docket No. 96079, issued 7/31/96).

Defendant's fourth argument is that the evidence was insufficient to support his conviction. Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that the essential elements of the crime, including an intent to deliver marijuana, were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508; 515; 489 NW2d 748 (1992).

Defendant also argues that the trial court abused its discretion by prohibiting defense counsel from asking certain questions of prospective jurors during voir dire. We have reviewed the trial court's conduct of voir dire, and find no abuse of discretion. See *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). The questions that defendant was prohibited from asking the potential jurors were irrelevant to the issues being tried and bore no relation to the jurors' abilities to judge the case impartially. *Id.* at 191.

Next, defendant argues that the trial court abused its discretion in denying him the opportunity to introduce into evidence at trial a certified record of Ybarro's convictions. Because Ybarro's convictions could have been used only to impeach his credibility as a witness and he was not in fact called as a witness, we find no abuse of discretion in the trial court's decision to bar this irrelevant evidence.

Defendant's seventh issue on appeal is that the trial court abused its discretion in giving the jury an additional instruction after deliberations had begun. Based upon our review of the record, we find no abuse of discretion in the trial court's decision to give CJ12d 4.3 to the jury after the jury expressed uncertainty about the evidence required to convict on intent to deliver. MCR 6.414(F) permits a trial

court to give additional appropriate instructions after deliberations have begun, and we believe the instruction at issue was appropriate.

Finally, defendant argues that the trial court abused its discretion in denying his motion for a mistrial after a prosecution witness revealed the existence of pictures taken during the raid on defendant's premises. A trial court's grant or denial of a mistrial will not be reversed on appeal absent an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). Here, the trial court properly denied defendant's motion for a mistrial. The disclosure of the pictures, which defendant does not claim contained inculpatory evidence, was not prejudicial to defendant's rights and did not impair defendant's ability to receive a fair trial. *Id.*

Affirmed.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Charles H. Stark

¹ MCL 333.7401; MSA 14.15(7401) was amended in 1994 and 1995. This subsection was changed to MCL 333.7401(2)(d); MSA 14.15(7401)(2)(d).