

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND SIMMONS,

Defendant-Appellant.

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UNPUBLISHED

September 13, 1996

No. 178361

LC No. 93-003972

Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,\* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of cocaine in an amount less than fifty grams, MCL 33.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv). Defendant was sentenced to thirty to forty-eight months' imprisonment. We affirm.

Defendant first argues that the trial court erred in admitting into evidence the firearms found at the house where defendant was arrested. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

We conclude that the trial court did not abuse its discretion in allowing the firearms to be admitted into evidence. Defendant was originally charged with possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Intent to deliver a controlled substance may be inferred from the circumstances surrounding an arrest. *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992). In the instant case, defendant was arrested after the police executed a search warrant at the house on Cameron. The firearms found at the premises were properly admitted as part of the res gestae of the execution of the search warrant. *People v Mayes*, 78 Mich App 618, 623; 261 NW2d 22 (1977).

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

Defendant next argues that his conviction should be reversed on the basis of prosecutorial misconduct. The propriety of a prosecutor's conduct depends on all the facts and circumstances of a case and must be evaluated in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995).

After carefully reviewing the record, we find that the prosecutor's comments did not constitute misconduct. The defense theory at trial was that Kevin Reese, not defendant, had thrown the cocaine out the window. Comments intended to rebut a defense theory, even where normally inadmissible, do not constitute error requiring reversal. *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995). Because the comment complained of by defendant was in direct response to defense counsel's argument, we find no error.

Defendant also claims that he was denied the effective assistance of counsel. Because there was no hearing on this issue in the trial court, our review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). We conclude that this issue is without merit, as defendant has failed to show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). When defense counsel's closing argument is read in its entirety, it is clear that counsel was not arguing that the police testimony was credible, but rather challenging it. In addition, counsel was not ineffective for failing to move to suppress the evidence obtained in the search. Counsel had already made such a motion at bindover without success. Counsel's subsequent attempts to exclude the evidence at trial on other bases do not constitute unsound trial strategy.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Marilyn Kelly

/s/ J. Richardson Johnson