

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HECTOR LEOS,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 185608
LC No. 94-001015-FH

Before: Neff, P.J., and Hoekstra and G. D. Lostracco,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of conspiracy to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c); MCL 750.157a(a); MSA 28.354(1)(a). Defendant was sentenced as an habitual offender, second offense, MCL 333.7413(2); MSA 14.15(7413)(2), and received a sentence of two to eight years' imprisonment. We affirm.

First, defendant argues that because the only evidence connecting him to the offense was the testimony of his alleged co-conspirators, the trial court should have given, sua sponte, a cautionary jury instruction regarding the credibility of accomplices. However, other testimony of defendant's guilt existed. Officer Paul Matyas testified that defendant's girlfriend admitted that she and defendant were attempting to smuggle the marijuana for resale.

In any event, defendant failed to object or request that a cautionary instruction regarding accomplice testimony be given to the jury; therefore, our review is precluded unless relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497(1995). After a thorough review of the record, we find that the trial court properly instructed the jury and that manifest injustice will not result from our failure to further review the issue. *Id.* See also *People v Worden*, 91 Mich App 666, 684-685; 284 NW2d 159 (1979).

Defendant further contends that the prosecutor's cross-examination and argument denied him a fair trial. Defendant raises three separate claims of error, none of which require reversal. We note, first,

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

that defendant failed to object to the alleged misconduct or request a curative instruction. Therefore, our review of the issue is precluded, unless the conduct was so egregious that no curative instruction could have removed any prejudice to defendant or if manifest injustice would result from our failure to review the alleged misconduct. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

Defendant argued that he was denied a fair trial because, during the cross-examinations of defendant and another defense witness, the prosecutor improperly interjected each of the witnesses' criminal records in violation of MRE 404(b) and MRE 609. A prosecutor may question witnesses on those matters which were raised on direct examination. *People v Federico*, 146 Mich App 776, 791; 381 NW2d 819 (1985). Since defendant admitted on direct examination that he was on parole, the prosecutor was able to explore the details of defendant's parole on cross-examination. However, neither the evidence of defendant's 1983 conviction, nor the evidence of the other defense witness' conviction, was admissible pursuant to either MRE 404(b) or MRE 609. Nonetheless, after a thorough review of the record, we conclude that a curative instruction could have remedied any prejudice arising from the admission of both defendant's and the defense witness' prior convictions and that no manifest injustice will result from our failure to further review the issue. *Paquette, supra*.

Defendant also maintains that the prosecutor knowingly or negligently presented evidence of a telephone conversation without a sufficient foundation. Again, we note that defendant failed to object to the admission at trial of the telephone conversation. Therefore, we will review the issue only to the extent that a substantial right of defendant's was affected. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). We conclude that the prosecutor laid a proper foundation pursuant to MRE 901(b)(5), and that a substantial right was not affected.

Finally, defendant argues that he was denied effective assistance of counsel when defense counsel failed to adequately object to the above-argued incidents. We disagree. Upon a thorough review of the record, we conclude that defendant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness, or that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Gerald D. Lostracco