

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC RENAUD GILMORE,

Defendant-Appellant.

---

UNPUBLISHED

November 12, 1996

No. 174389

LC No. 93-36147-FH

Before: Gribbs, P.J., and Markey and T.G. Kavanagh, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by jury for conspiracy to deliver less than fifty grams of cocaine, MCL 333.7401; MSA 14.15(7401) and his plea of guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to seventy-two to four hundred eighty months' imprisonment. We affirm.

Defendant was charged with conspiracy to sell crack cocaine based on his involvement with coconspirator Marcellus Alexander, who was selling crack cocaine to street distributors. Others involved with the conspiracy testified against defendant at trial pursuant to agreements with the prosecutor's office. Defendant denied any involvement, testifying that his association with Alexander was limited to part-time construction work and simple friendship.

Defendant first argues that the trial court erred in instructing the jury regarding accomplice witnesses. The trial court gave CJI2d 5.5 instead of CJI2d 5.4. Because two witnesses admitted their involvement and one witness pleaded guilty to a related charge, the latter instruction was more appropriate. Defendant failed to object, however, and therefore we review for manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1983). Defendant relies on *People v Jensen*, 162 Mich App 171, 186-190; 412 NW2d 681 (1987), for the proposition that, even absent an objection, failure to give the latter instruction requires reversal. We find *Jensen* out of step with other precedent regarding review of jury instructions, see, e.g., *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991), and because *Jensen* was published before November 1,

---

\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

1990, we are not bound by its holding. Administrative Order 1996-4. Because the court's instructional error had no impact on the outcome of the case, and because the nature of the accomplice witnesses' involvement was thoroughly explored before the jury, we find that the instructional error did not result in manifest injustice. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

Defendant also argues that the court's preliminary instruction that it would not have testimony read back to the jury was error requiring reversal. Again, defendant failed to object; consequently, we review only to avoid manifest injustice. *Van Dorsten, supra*. Although this instruction was improper, MCR 5.414(H), nothing in the record indicates that the jury was confused regarding any testimony. Therefore, this instructional error does not necessitate reversal of defendant's conviction. MCL 768.29; MSA 28.1052; *Van Dorsten, supra* at 544-545.

Defendant also seeks to persuade us that we should reverse his conviction because the prosecutor allowed the accomplice witnesses to testify that part of their agreement was to testify truthfully. Revealing that a witness is called under an agreement requiring truthful testimony does not necessarily express a prosecutor's special knowledge or opinion regarding the witness' veracity. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Turner*, 213 Mich App 558, 584-585; 540 NW2d 728 (1995). The comments to which defendant directs this Court's attention fell squarely within the parameters of *Bahoda*, and *Turner* and, therefore, do not require reversal.

Moreover, none of defendant's other allegations of prosecutorial misconduct require reversal. The prosecutor's tardy production of the police report regarding Elizabeth Thomas was not so serious as to deprive defendant of a fair trial, particularly because the testimony that defendant believes was prejudicial addressed only a collateral matter. Nor is defendant's assertion that Thomas' testimony was coerced supported by the record. We also must disagree with defendant's interpretation of the prosecutor's comments during jury voir dire. Read in context, it is apparent that the prosecutor was merely explaining that unrelated witnesses are not always available and, thus, the prosecution must sometimes rely on witnesses who were involved in the crime. Reversal is therefore unwarranted. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

Defendant also asserts that the prosecutor's comments in closing argument regarding Reola Mims' testimony deprived him of a fair trial. While a prosecutor may not appeal to the jury to sympathize with the victim, the prosecutor may comment on a witness' testimony, which is all the prosecutor did regarding Mims' testimony. *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Nor was defendant prejudiced by the prosecutor's comment that Ibn Raqib was "on his way up from the jail" because Raqib's guilty plea was part of his testimony. Nor do we see how the prosecutor's comments regarding the rental van prejudiced defendant's case, and defendant failed to explain how it deprived him of a fair trial.

Defendant also argues that the prosecutor made improper use of prior bad acts evidence. Defendant first asserts that the prosecutor failed to file the requisite notice, but because the modification

of MRE 404(b)(2) upon which defendant relies was not incorporated into the Michigan Rules of Evidence until June 24, 1994, it did not apply to defendant's case. Regarding the evidence itself, defendant failed to object and, thus, we review for manifest injustice. See *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). We find no error in the admission of this evidence. Whether defendant carried a weapon was a relevant consideration to whether he was involved in cocaine trafficking. See *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 338 (1993). Similarly, defendant's romantic relationship with Tina Thomas was relevant, both to her own credibility and that of witness Jennifer Arnson. Finally, the fact that Arnson felt fearful of testifying was relevant to her credibility. Nonetheless, she did not testify that she had actually received any threats.

Defendant raises several other evidentiary issues, most of which he failed to preserve below, and therefore, we review for plain errors that affected defendant's substantial rights. MRE 103(d); *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994). None of the alleged hearsay in Arnson's testimony was so damaging as to meet this standard. Nor do we accept defendant's premise that the duration of a particular conspiracy for purposes of MRE 801(d)(2)(E) is limited by a charging document. Cf. *People v Meredith (On Remand)*, 209 Mich App 403, 412; 531 NW2d 749 (1995). Police testimony regarding the contents of the search warrant they executed in connection with the case did not include statements falling within the definition of hearsay, MRE 801(C), because the officers did not testify regarding assertions. The officers' testimony concerning the object of their search when executing the warrant constituted statements of fact, not opinion testimony. Similarly, we disagree with defendant's characterization of Raqib's testimony regarding the relationship between defendant and Alexander. Raqib testified to his observations and the impression those observations made on him. This did not rise to the level of a legal conclusion. The final evidentiary issue defendant raises is the trial court's refusal to allow him to recall Lisa Bennett as a surrebuttal witness. Although defendant requested permission to recall Bennett, he made no offer of proof. Thus, he did not properly preserve this issue for appeal, thereby limiting our review to a deprivation of substantial rights resulting in a miscarriage of justice. MRE 103(a)(2); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992). Because there is no indication that Bennett would have done anything but reiterate her earlier testimony, the trial court's precluding her recall did not result in a miscarriage of justice.

Defendant next argues that his counsel was ineffective because he elicited testimony regarding a previous conviction, failed to object to the testimony of three unendorsed prosecution witnesses and failed to preserve most of the issues defendant raises on appeal. *People v Conners*, 27 Mich App 47, 53; 183 NW2d 348 (1970). In the absence of a *Ginther*<sup>1</sup> hearing, we review the record and find that none of the alleged errors overcome the presumption of effective counsel because none establish that counsel failed to perform an essential duty that prejudiced defendant or that counsel's performance failed to meet a minimum level of competence. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The prosecutor could properly have introduced the evidence of defendant's prior conviction for uttering and publishing under MRE 609; consequently, defense counsel may have thought it good trial strategy to elicit this damaging testimony first. None of the unendorsed witnesses gave testimony that the jury would have given much weight and, therefore, defendant was not prejudiced. Finally, none of the issues defense counsel "failed" to preserve have significant merit, so there is no basis to believe that defense counsel missed an

objection that could have changed the outcome of this case. On a related issue, we must disagree with defendant's argument that the effect of cumulative error deprived him of a fair trial. Because no errors were found on any one issue, there can be no cumulative effect of multiple errors. *People v Anderson*, 166 Mich App 455, 473; 421 NW2d 200 (1988).

Finally, in light of the fact that our Supreme Court has reversed this Court's decision in *People v Young*, 206 Mich App 144, 154; 521 NW2d 340 (1994), see *Wayne County Prosecutor v Dep't of Corrections*, 451 Mich 569; 548 NW2d 900 (1996), this Court will not address at this time the sentencing issue that defendant seeks to preserve.

Affirmed.

/s/ Jane E. Markey

/s/ Roman S. Gibbs

/s/ Thomas Giles Kavanagh

<sup>1</sup> *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).