# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAZEN N. SITTO,

Defendant-Appellant.

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UNPUBLISHED
December 17, 1996

No. 169288
LC No. 91-109036-FC

Before: Doctoroff, C.J., and Corrigan and R.J. Danhof,* JJ.

PER CURIAM.

Defendant appeals by right his conviction of conspiracy to possess with intent to deliver over 650 grams of cocaine, MCL 750.157a; MSA 28.354(1) and MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and his sentence to a mandatory term of life imprisonment without parole. We affirm.

Defendant first argues that the trial court erred in denying his motion to dismiss the charge against him after the court declared a mistrial in his first trial. The mistrial motion was based on an alleged double jeopardy violation. We review this issue de novo on appeal. *People v Price,* 214 Mich App 538, 542; 543 NW2d 49 (1995). Under the double jeopardy provision of the federal and state constitutions, the state may not place a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Hicks,* 447 Mich 819, 826; 528 NW2d 136 (1994); *People v Dawson,* 431 Mich 234, 250; 427 NW2d 886 (1988). An accused is placed in jeopardy as soon as the jury is selected and sworn. *Dawson, supra* at 251; *People v Booker (After Remand),* 208 Mich App 163, 172; 527 NW2d 42 (1994). If the trial court declares a mistrial after jeopardy has attached, the state may be precluded from trying the defendant a second time. *Dawson, supra* at 252-253; *Booker, supra* at 172. Both the federal and the state protections against successive prosecutions for the same offense preserve the finality of judgments in criminal prosecutions and protect the defendant from prosecutorial overreaching. *People v Sturgis,* 427 Mich 392, 398-399; 397 NW2d 783 (1986).

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

A review of the record reveals that the prosecutor's conduct was not designed to prejudice the proceedings so as to deny defendant a fair trial. The prosecutor did not intend to provoke a mistrial. *Dawson, supra*. Nor did the prosecutor's conduct amount to intentional conduct for an improper purpose with indifference to a significant resulting danger of mistrial or reversal. *Id.* at 255 n 53. Hence, the trial court properly denied defendant's motion to dismiss on double jeopardy grounds.

Next, defendant argues that repeated acts of prosecutorial misconduct denied him a fair trial. We disagree. Prosecutorial misconduct issues are decided case by case. The reviewing court examines the pertinent portion of the record and evaluates a prosecutor's remarks in context. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Appellate review of improper prosecutorial remarks generally is precluded absent objection because the trial court otherwise has no opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Here, defense counsel failed to object to the conduct now complained of on appeal. Accordingly, appellate review is precluded unless failure to review the issue would result in a miscarriage of justice. *People v Gonzales*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989).

After reviewing defendant's claims of alleged prosecutorial misconduct, we conclude that the prosecutor did not commit error that denied defendant a fair and impartial trial. Most of the challenged remarks were proper comments on the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). The prosecutor permissibly argued that certain witnesses were not credible. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). Moreover, the prosecutor did not improperly bolster witnesses or vouch for their credibility. *Bahoda, supra* at 276; *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988). Further, the record does not support defendant's claim that the prosecutor continually and improperly elicited testimony regarding defendant's Chaldean heritage. The infrequent, non-prejudicial references to defendant's ethnicity made by both sides did not deprive defendant of a fair trial. *Bahoda, supra* at 265-273.

Defendant next argues that Officer Campbell's testimony regarding defendant's income and purchase of various assets was irrelevant and unduly prejudicial. We disagree. Defendant failed to object to this evidence and did not preserve the claim for appeal. Thus, absent a showing of manifest injustice, we will not reverse. *People v Stanton*, 97 Mich App 453, 460; 296 NW2d 70 (1980); *People v Moore*, 78 Mich App 150, 156; 259 NW2d 403 (1977). Our failure to review this claim will not result in manifest injustice. Even if the evidence regarding defendant's income and assets was not relevant under MRE 401, its admission was harmless in light of the overwhelming evidence of defendant's guilt.

Next, defendant argues that the trial court abused its discretion by admitting testimony that Rene Arias possessed ninety-nine kilograms of cocaine when arrested and by admitting five kilograms of the cocaine seized from Arias. We disagree. The decision to admit evidence is discretionary and will not be disturbed absent an abuse of discretion. *People v Davis*, 199 Mich App 502, 516-517; 503 NW2d 457 (1993). Evidence is relevant if it tends to make the existence of a fact at issue more or less

probable than it would be without the evidence. MRE 401. While all relevant evidence is generally admissible under MRE 402, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. MRE 403.

Defendant was charged with conspiracy to possess with intent to deliver over 650 grams of cocaine. Testimony revealed that defendant was part of an organization headed by Ray Akrawi who distributed large quantities of cocaine in northern Detroit and southern Oakland County. The cocaine itself was relevant to establish a conspiracy between defendant and his alleged co-conspirators. *People v Cadle*, 204 Mich App 646, 655; 516 NW2d 520 (1994) remanded on other grounds 447 Mich 1009 (1994). Evidence of the ninety-nine kilograms of cocaine assisted in proving that an organization headed by Ray Akrawi existed and that its purpose was to distribute cocaine. Rene Arias testified that eighty of the ninety-nine kilograms of cocaine were to be delivered to Akrawi. George Naoum and Salwan Asker testified that defendant was a member of the Ray Akrawi organization. A connection thus existed between the ninety-nine kilograms of cocaine and defendant. Further, the danger of unfair prejudice did not substantially outweigh the value of the evidence. *Id.* at 656. Defendant has not established how he was *unfairly* prejudiced by the evidence. The trial court did not abuse its discretion in admitting evidence regarding the ninety-nine kilograms of cocaine in Rene Arias' possession during his arrest.

Defendant next claims that the trial court failed adequately to instruct the jury that he specifically must have intended to deliver over 650 grams of cocaine to convict him of the charged offense. We disagree. This Court reviews jury instructions in their entirety to determine whether the trial court erred so as to require reversal. *Davis*, *supra* at 515. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). No error results from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991).

First, defendant failed to object to the challenged jury instructions. Absent manifest injustice, this issue is not preserved for appellate review. MCL 768.29; MSA 28.1052, *People v Hendricks*, 446 Mich 435; 521 NW2d 546 (1994); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We see no miscarriage of justice because the court adequately instructed the jury regarding the requisite intent. The court apprised the jury that defendant must have intended to possess, with the intent to deliver, over 650 grams of cocaine. The court specifically instructed the jury that, to find defendant guilty as charged, the evidence had to establish beyond a reasonable doubt that defendant knowingly and deliberately agreed to possess with the intent to deliver and to deliver in excess of 650 grams of a mixture containing cocaine. While the instructions may not have been perfect, they adequately set forth the elements of the crime charged, including the element of intent. *People v Atley*, 392 Mich 298, 310-311; 220 NW2d 465 (1974); *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995); *People v Ayoub*, 150 Mich App 150, 153-154; 387 NW2d 848 (1985).

Defendant next argues that he was denied the right to the effective assistance of counsel. On the record before us, we conclude that counsel's performance was not deficient, nor was defendant prejudiced by it. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In particular, defense counsel's failure to object to the alleged instances of prosecutorial misconduct did not amount to ineffective assistance of counsel. Defendant's claims of prosecutorial misconduct were unfounded. Additionally, defense counsel's failure to object to Officer Campbell's testimony regarding defendant's assets and earnings did not deny defendant the right to effective assistance of counsel. Because of the overwhelming evidence against defendant, he was not prejudiced by its admission. Hence, defense counsel's failure to object to Officer Campbell's testimony did not amount to ineffective assistance of counsel.

Regarding defendant's claim that defense counsel should have argued below that MCL 767.23; MSA 28.963 violates the title-object clause of the Michigan Constitution, because the statute does not violate the title-object clause (see *infra*) the failure to raise this claim was not ineffective assistance of counsel. Defense counsel is not required to make meritless motions. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Finally, defendant claims that defense counsel's failure to seek removal of Rudy Lazanno from the jury pool amounted to ineffective assistance of counsel. Defendant did not move for a new trial or an evidentiary hearing below. Failure to so move forecloses appellate review unless the record contains sufficient detail to support the defendant's claims, and, if so, review is limited to the record. *Barclay, supra* at 672.

A member of a jury panel is presumed to be qualified and competent to serve. The burden is on the challenger to present a prima facie case to the contrary. *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). See also *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Lazanno assured the court that in spite of his relationship with certain present and former prosecutors and others associated with law enforcement, and in spite of his pending lawsuit against a prosecution witness, he could be fair and impartial. Because the record fails to demonstrate any bias or prejudice on Lazanno's part, defendant's claim that defense counsel's failure to seek removal of Lazanno from the jury panel was ineffective must fail. *Barclay, supra* at 672.

Next, defendant argues that MCL 767.23; MSA 28.963 violates the title-object clause of the Michigan Constitution. Const 1963, art 4, § 24, states in part: "No law shall embrace more than one object, which shall be expressed in its title . . ." MCL 767.23; MSA 28.963 provides as follows:

> Indictment by grand jury; concurrence of 12 jurors, certification
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> No indictment can be found without the concurrence of at least 9 grand jurors; and when so found, and not otherwise, the foreman of the grand jury shall certify thereon, under his hand, that the same is a true bill.

Defendant contends that MCL 767.23; MSA 28.963 violates the title-object clause because the "title" of the statute indicates that an indictment requires the concurrence of twelve jurors while the

body of the statute indicates that an indictment will not be issued without the concurrence of "at least" nine grand jurors. Defendant has confused the title of the act with the catch line associated with MCL 767.23; MSA 28.963. With regard to catch lines, MCL 8.4b; MSA 2.215 states as follows:

> The catch line heading of any section of the statutes that follows the act section number shall in no way be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the section would indicate, but shall be deemed to be inserted for the purposes of convenience to persons using publications of the statutes.

In *Builders Square v Dep't of Agriculture,* 176 Mich App 494, 497; 440 NW2d 639 (1989), this Court stated:

> The purpose of the title-object clause is to prevent the Legislature from passing laws not fully understood and to avoid bringing into one bill subjects diverse in their nature and having no necessary connection. *Advisory Opinion re Constitutionality of 1972 PA 294,* 389 Mich 441, 467; 208 NW2d 469 (1973), citing *People v Carey,* 382 Mich 285; 170 NW2d 145 (1969). The goal of the title-object clause is notice, not restriction of legislation, and the title-object clause is only violated where the subjects are so diverse in nature that they have no necessary connection. *Constitutionality of 1972 PA 294, supra,* p 467. The object of a law is its general purpose or aim. *Local No 1644, AFSCME v Oakwood Hospital Corp,* 367 Mich 79; 116 NW2d 314 (1962); *City of Livonia v Dep't of Social Services,* 423 Mich 466; 378 NW2d 402 (1985). A statute may authorize the doing of all things which further its general purpose.

If the act centers on one main general object or purpose that the title comprehensively declares, although in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose, the constitutional requirement is met. *Loomis v Rogers,* 197 Mich 265, 271; 163 NW 1018 (1917); *Ace Tex Corp v Detroit,* 185 Mich App 609, 615; 463 NW2d 166 (1990).

MCL 767.23; MSA 28.963 is part of the Code of Criminal Procedure, MCL 760.1; MSA 28.841. The title of 1994 PA 445 (quoting from 1927 PA 175, which enacted the Code of Criminal Procedure) states that one purpose of the act is "to regulate the procedure relative to grand juries, indictments, informations, and proceedings before trial." This title does not conflict with MCL 767.23; MSA 28.963, which provides for the number of grand jurors necessary to issue an indictment. MCL 767.23; MSA 28.963 authorizes proceedings for the discovery of crime and sets forth the requirements for a grand jury indictment. See *People v Birch,* 329 Mich 38, 45-46; 44 NW2d 859 (1950). Hence, both the actual title of the Code of Criminal Procedure and the body of the statute relate to the same purpose. The primary purpose of the title-object rule is to avoid diverse, unrelated subjects in one act. *People v Rau,* 174 Mich App 339, 344; 436 NW2d 409 (1989). Both the title and the body of the statute address the same subject: the issuance of an indictment. The statute does not violate the one-object clause of the Michigan Constitution.

Lastly, we reject defendant's claim that his mandatory life sentence for conspiracy to possess with intent to deliver over 650 grams of cocaine is unconstitutional. *People v Lopez,* 442 Mich 889; 498 NW 251 (1993); *Cadle, supra* at 658.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof