

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LEE MCGUIRE, JR.,

Defendant-Appellant.

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UNPUBLISHED

January 3, 1997

No. 188589

LC No. 95-071312-FH

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

Defendant Richard Lee McGuire Jr., appeals by right his jury trial conviction for delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(a)(iv). Defendant was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to eight to forty years' imprisonment. We affirm.

Defendant first claims on appeal that the trial court erred in instructing the jury on defendant's presumption of innocence, reasonable doubt, and the prosecution's burden of proof. Defendant did not object to the trial court's instructions or request that a specific instruction be given, so he has therefore failed to preserve the issue for appeal. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Nevertheless, we will review defendant's claim of error to determine whether relief is necessary to avoid manifest injustice. *Id.*

It is error to instruct the jury that reasonable doubt cannot be based on a lack of evidence or the unsatisfactory nature of the evidence. *People v Davies*, 34 Mich App 19, 26-27; 190 NW2d 694 (1971). An instruction defining reasonable doubt is proper if, "when read in its entirety, [it] must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt." *People v Hubbard* (After Remand), 217 Mich App 459, 486-487; 552 NW2d 593 (1996); *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988). In addition, "[t]he instruction must convey to the jurors that a reasonable doubt is an honest doubt based upon reason." *Jackson, supra* at 391.

In instructing the jury on reasonable doubt, the trial court stated, in pertinent part:  
[A] reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

This instruction was virtually identical to CJI2d 3.2(3). Although the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court, *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996), it is clear nonetheless that the trial court's instruction conveyed to the jury that a "reasonable doubt is an honest doubt based upon reason." *Jackson, supra* at 391. Moreover, the trial court correctly apprised the jury that a reasonable doubt could grow out of a lack of evidence. See *Hubbard, supra* at 487-488; *Davies, supra* at 26-27.

Still, defendant asserts that the trial court, by adding an additional instruction that the jury could only consider evidence that was properly admitted in the case, somehow tainted the reasonable doubt instruction. Specifically, defendant claims that the two instructions were "inconsistent," and that the end result was that the jury felt constrained to consider only "the evidence," rather than both the evidence and the lack of evidence, in making their reasonable doubt determination. This claim is without merit.

In support of his claim of error, defendant extracts certain portions of the trial court's instructions and pieces them together entirely out of context. This piecemeal approach is entirely unsupported by the caselaw, however. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The trial court gave the following instruction on what is evidence:

When you discuss the case and decide your verdict, you may only consider the evidence that has been properly admitted in this case. Therefore, it is important for you to understand what is evidence and what is not evidence. Evidence includes only the sworn testimony of witnesses, the exhibits that I have admitted into evidence in this matter, and anything else that I may have told you to consider or tell you to consider as evidence.

Many things are not evidence, and you must be careful not to consider them as such. I'll now describe some of the things that are not evidence.

\* \* \*

. . . You are the only judges of the facts, and you should decide this case from the evidence.

At times during the trial I may have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in and nothing else.

A reading of the trial court's evidence instruction as a whole indicates that the trial court was merely apprising the jury of what is and what is not evidence. Despite defendant's claim to the contrary, the instruction cannot be construed as any sort of limitation on the jury's right to find a reasonable doubt based on a lack of evidence. Rather, the trial court's combined instructions, taken as a whole, adequately apprised the jury that a reasonable doubt is an honest doubt based upon reason, and that it can indeed arise from a lack of evidence. Moreover, because the trial court emphasized defendant's presumption of innocence, the instructions did not improperly shift the burden of proof to defendant. *Jackson, supra* at 391. No reversible error was committed.

Defendant next argues that he was denied the effective assistance of counsel because trial counsel failed to object to the purportedly erroneous jury instruction. We disagree.

In order to establish a claim of ineffective assistance of counsel, a defendant must show that "counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant so as to deprive him of a fair trial." *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Because we have already concluded that the trial court properly instructed the jury on the prosecution's burden and what constituted a reasonable doubt, we find that defendant has failed to overcome the presumption that he received the effective assistance of counsel at trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Affirmed.

/s/ Barbara B. MacKenzie  
/s/ Myron H. Wahls  
/s/ Jane E. Markey