

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAFAEL DEJESUS,

Defendant-Appellant.

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UNPUBLISHED

January 21, 1997

No. 175370

Kent Circuit Court

LC Nos. 93-063251-FH

93-063253-FH

Before: Neff, P.J., and Smolenski and D. A. Roberson,\* JJ.

PER CURIAM.

After being convicted by a jury, defendant was sentenced to consecutive terms of ten to twenty years' imprisonment for delivery of fifty grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii); ten to twenty years for conspiracy to deliver the same, MCL 750.157a(a); MSA 28.354(1)(a) [Docket No. 93-63251-FH]; twenty to thirty years for possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii); twenty to thirty years for conspiracy to possess with intent to deliver the same, MCL 750.157a(a); MSA 28.354(1)(a); and two years for possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2) [Docket No. 93-63253-FH]. Defendant appeals his convictions and sentences as of right. We reverse defendant's conviction for felony-firearm and affirm his remaining convictions and sentences.

I

On August 12, 1993, defendant was staying with his friend, Elsa Guzman. Sometime around noon, defendant gave Guzman a gun to hold for him and left the residence. Later that afternoon, defendant returned to Guzman's residence and was contacted by Elizabeth Rodriguez around 6:00 p.m. to meet for a drug transaction. Earlier, the Grand Rapids Police had discovered cocaine at Rodriguez's residence on Fulton Street and secured her agreement to help them "climb the ladder" to her dealer, defendant. Rodriguez told defendant that she would also repay him \$350 for some cocaine that he previously had "fronted" for her. Rodriguez and defendant agreed to meet at a Burger King restaurant

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\* Recorder's Court judge, sitting on the Court of Appeals by assignment.

to complete the transaction. Before leaving Guzman's residence to meet Rodriguez, defendant gave Guzman a bag of cocaine and asked her to hold it for him. Defendant then left with Carlos Santana, who also had been visiting at Guzman's residence.

Defendant and Santana drove to the Burger King and defendant let Santana out of the car across the street from the restaurant. Defendant parked in the Burger King lot, and Rodriguez met him at his car and gave him the money she owed him for a previous drug deal. Defendant told Rodriguez to go inside the restaurant. Santana, who had been hiding in the bushes across the street from the Burger King, entered the restaurant and gave Rodriguez the cocaine. Santana returned to defendant's car, and they were arrested shortly after leaving the restaurant.

Later that evening, Guzman's residence was searched. The gun and cocaine were found in a bottom drawer of a chest and more than \$2,000 was found in a box in a closet. Guzman said that defendant had given her the money that day and she had hidden it for him.

## II

This case began with two separate informations against defendant, one pertaining to the "Burger King case" [Docket No. 93-63251-FH] and the other, the "Fulton Street case" [Docket No. 93-63253-FH]. The cases were joined for trial over defendant's objection. On appeal, defendant argues that he was entitled to a separate trial on each information. We disagree.

Under MCR 6.120(B), the offenses were related as a "series of connected acts" committed to aid in accomplishing a single scheme or plan. At least one of the offenses, the conspiracy to possess with intent to deliver, was based upon evidence that defendant and Santana agreed at Guzman's house to go to the Burger King to make the delivery, one of the offenses in the other case. Thus, the conspiracy at Guzman's house was an offense committed to aid in accomplishing the delivery at the Burger King. The circuit court correctly determined that the offenses were related, and we find no error in their joinder.

## III

Second, defendant contends that the prosecutor presented false testimony that Santana, Guzman and Rodriguez had no plea bargains when, in fact, the witnesses did have favorable deals with plaintiff. It is well settled that a prosecutor's knowing presentation of false testimony may constitute grounds for reversal. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Indeed, a prosecutor has a duty to correct a witness' false testimony that he was not promised consideration for his testimony. *People v Wiese*, 425 Mich 448, 455; 389 NW2d 866 (1986).

In the present case, the prosecutor brought out both in his opening statement and during direct examination that the witnesses expected some type of leniency, although no promises had been made by the prosecutor. Moreover, defense counsel vigorously cross-examined the witnesses on these matters. Defendant's allegation that there were "secret deals" is pure speculation.

Defendant also contends that the court erroneously limited his cross-examination of the witnesses regarding promises of leniency. Defendant failed to object and, at one point, agreed with the court's ruling; thus, defendant has waived this issue. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). In any event, the record shows that the court's limitation was solely to exclude evidence subject to the attorney-client privilege. We find no error here.

#### IV

Defendant contends that the evidence was insufficient to sustain his conviction for felony-firearm. We agree. The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; MSA 28.424(2); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). A defendant cannot be convicted of felony-firearm when the weapon was neither in the defendant's physical possession nor available and accessible to him at the time he committed the felony. *People v Myers*, 153 Mich App 124, 126; 395 NW2d 256 (1986).

Here, the evidence showed that defendant gave Guzman a gun to hold for him at approximately noon, then left Busman's residence. Defendant returned later that evening and gave Guzman cocaine to hold for him at approximately 6:00 p.m. We are not persuaded by plaintiff's argument that it is a "fair" inference that defendant possessed the gun and the cocaine simultaneously at some point in time. There is simply no evidence that the gun was available and accessible to defendant during the time that he committed one of the drug-related felonies. Furthermore, to convict defendant under the felony-firearm statute would not serve the statute's purpose of reducing the possibility of injury to victims, passersby, and police officers. *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995).

Because the evidence was insufficient to establish the element of felony-firearm beyond a reasonable doubt, we reverse defendant's conviction for this offense.

#### V

Next, defendant contends that the court deprived him of the opportunity to present substantive evidence by limiting Michael Torrez's testimony regarding prior drug transactions between Rodriguez and Santana. Defendant argues that Torrez's testimony that Rodriguez and Santana had prior transactions helped support the defense theory that Santana was the "mastermind" of the Burger King transaction with which defendant had been charged. The court excluded the details of these transactions, reasoning that Rodriguez was not on trial and the evidence was relevant only to impeach Rodriguez's testimony.

We review a trial court's limiting of cross-examination for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1996). An abuse of discretion occurs if an unprejudiced person, considering the facts upon which the trial court made its decision, would conclude that there was no justification for the ruling. *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993). Here, the court was justified in excluding the details of the Rodriguez-Santana transactions because, as the trial court noted, Rodriguez was not on trial. We further note that defendant remained

able to present evidence to support his defense theory. Indeed, Torrez testified that Rodriguez and Santana conducted many cocaine transactions. The trial court did not abuse its discretion in limiting defendant's cross-examination of Torrez.

Defendant also argues that the court erred when it advised Torrez of his right against self-incrimination, which, according to defendant, was a signal to the jury that Torrez was a criminal who should not be believed. After the court's warning, Torrez testified that he had been a drug user, but denied dealing drugs. Although defendant did not object to the trial court's advisement, we will review issues where they seriously affect the substantial rights of the accused, *People v Poma*, 96 Mich App 726, 730; 294 NW2d 221 (1980), or where the unpreserved error was of constitutional magnitude and could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Neither danger is present here.

There was no error in the court informing Torrez of his rights under the Fifth Amendment. Torrez was not intimately connected with the criminal enterprise at issue, and the mere advisement of the right did not draw an adverse inference against defendant. *See, e.g., Poma, supra* at 731-733. Nor does this case involve an instance where a court's strong admonitions caused the witness to refuse to testify. *See generally People v Callington*, 123 Mich App 301; 333 NW2d 260 (1983). In sum, there was no error in the trial court's brief advisement to Torrez.

## VI

Defendant next contends that the prosecutor improperly bolstered the testimony of its witnesses in closing argument. Defendant failed to object to the prosecutor's remarks and absent objection or request for a curative instruction, we will not review alleged prosecutorial misconduct unless the misconduct is so egregious that no curative instruction would cure the prejudice to defendant or unless manifest injustice would result. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Any error in the prosecutor's brief comment during rebuttal regarding the credibility of the detectives could have been cured by a cautionary instruction to the jury. *See People v Mezy*, 453 Mich 269, 285; 551 NW2d 389 (1996). We therefore conclude that manifest injustice will not result from our failure to review this issue.

## VII

Defendant claims that the jury selection process systematically excludes minorities. Defendant did not raise and preserve this issue for appellate review. *People v Burton*, 219 Mich App 278, 291; \_\_\_ NW2d \_\_\_ (1996). We further conclude that defendant has failed to demonstrate that defense counsel was ineffective for failing to challenge the jury selection process. *Id.* at 292.

## VIII

Defendant next contends that the court abused its discretion by admitting Rodriguez's testimony that defendant sold cocaine to her before the transaction at issue, evidence which defendant contends is inadmissible under MRE 404(b). We find no abuse of discretion because the evidence meets the four-

pronged test of *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). The evidence was offered for the proper purpose of showing defendant's scheme or plan in "fronting" cocaine to Rodriguez and receiving payment later, and was logically relevant to show defendant's intent to deliver the cocaine at Burger King. The prejudicial value of the evidence did not substantially outweigh its considerable probative value. Further, the court gave the jury limiting instructions regarding the proper use of this evidence both before the testimony was presented and in its final instructions.

## IX

Finally, defendant contends that the court erred by not making a downward departure from the statutory minimum sentence because defendant was a first time offender, had completed two semesters of college, was employed at the time of his arrest, and had strong family support. The determination regarding the existence of a reason to depart from the minimum is reviewed for clear error. *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996). The only ground raised below was defendant's criminal history. After reviewing the entire record, however, we are not convinced that the trial court's decision to not depart from the statutory minimum sentence was an abuse of discretion. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995).

Reversed in part and affirmed in part.

/s/ Janet T. Neff  
/s/ Michael R. Smolenski  
/s/ Dalton A. Roberson