

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE HALL,

Defendant-Appellant.

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UNPUBLISHED

February 18, 1997

Nos. 147703, 164837, 181916

Gratiot Circuit Court

LC No. 91002353

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,\* JJ.

PER CURIAM.

Defendant was convicted of armed robbery, possession of a short-barreled shotgun and possession of a firearm during the commission of a felony. MCL 750.529; MSA 28.797, MCL 750.224b; MSA 28.421(2); MCL 750.227b; MSA 28.424(2). The trial judge sentenced him to concurrent terms of life imprisonment for the robbery count and to three years, four months to five years on the shotgun count. The sentences were to run consecutive to a two year term of imprisonment for the felony-firearm conviction. We reverse.

I

Defendant appealed from his convictions and sentences as of right. This Court remanded to allow him to move for a new trial and for resentencing. The trial judge denied him a new trial but revised the armed robbery sentence to twenty-five to forty years' imprisonment.

Defendant appealed from his new sentence as of right. This Court again remanded to allow him to move for resentencing. The trial judge revised the armed robbery sentence to twenty to forty years, and the possession of the shotgun sentence to two to five years.

Once again, defendant appeals as of right from his convictions and sentences. In Docket No. 147703, he argues error in the court's refusal to instruct on his primary defense. He asserts that the

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

judge precluded him from cross-examining an accomplice and allowed the accomplice to lie to the jury. He claims that numerous instances of prosecutorial misconduct denied him a fair trial. He urges that the judge abused his discretion in refusing to allow additional peremptory challenges. He asserts that there was insufficient evidence to sustain his conviction for possession of a short-barreled shotgun and that he was denied the effective assistance of counsel. He asserts that he was denied a fair trial where a critical *res gestae* witness was not revealed before trial. Finally, he claims that his sentence is invalid.

In Docket No. 164837, defendant argues that he is entitled to resentencing where (1) the court considered an invalid conviction, (2) the sentencing information report was incorrectly scored, and (3) the sentence is disproportionate. Furthermore, he asserts that he is entitled to 209 days' credit.

In Docket No. 181916, defendant's only argument is that his sentence is disproportionate.<sup>1</sup>

William Weaver agreed to purchase marijuana for defendant and his friends from Mike Garcia. Weaver arranged the purchase and gave defendant's money to Garcia in exchange for four ounces of marijuana. Because the marijuana did not meet defendant and Weaver's expectations, they decided to return it the next day for a refund. They returned the marijuana and demanded that Garcia return the money. When he refused, defendant produced a sawed-off shotgun from under his coat, told Garcia to get on his knees and hit Garcia on the head with the gun. Garcia finally told Weaver to get the money from a box on the kitchen table. Weaver and defendant took the money and left.

## II

Defendant argues that he was entitled to an instruction on his claim of right defense. Jury instructions must include all elements of the charged offense and must not exclude material issues, defenses and theories if there is evidence to support them. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Even if the instructions are somewhat imperfect, no error occurs if they fairly present the issues to be tried and sufficiently protect a defendant's rights. However, where there is evidence to support a defense instruction, the trial court is obligated to so instruct. *Id.*

An instruction on the defense of claim of right should be given where a defendant (1) believes the property legally belongs to him and, (2) where he was operating under an honest conviction that he was acting under a claim of right. CJI2d 7.5; *People v Karasek*, 63 Mich App 706; 234 NW2d 761 (1975).

At trial, defendant alleged that he was merely taking back money that belonged to him, because he had returned the drugs to Garcia. We agree with defendant that, if the jury believed defendant's testimony, he could not be convicted of armed robbery. *People v Holcomb*, 395 Mich 326, 333; 235 NW2d 343 (1975). He would not have had the requisite intent to support a conviction for that crime. *Id.*

The fact that the underlying transaction is illegal has no bearing on whether claim of right is a viable defense. *Holcomb, supra; People v Henry*, 202 Mich 450; 168 NW 534 (1918). Therefore, because there was evidence to support it, we hold that the judge erred in refusing to give the requested

instruction. Moreover, the failure to instruct cannot be considered harmless, because it had an effect on the outcome of the case. See *People v Norman*, 176 Mich App 271, 276; 438 NW2d 895 (1989).

### III

We also find that defendant was denied a fair trial due to prosecutorial misconduct. Questions of misconduct by the prosecutor are decided case-by-case. We examine the pertinent portion of the record in order to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Here, the prosecutor improperly asked Weaver about a drug operation in Andrea Gibson's house and defendant's involvement in it. The prosecutor also elicited testimony from Gibson that defendant set her up in drug trafficking. This testimony was irrelevant and highly prejudicial. Even though defendant failed to object, a curative instruction would not have cured the error. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). The record indicates that there were racial overtones in this case. The jury members were all white. Some expressed reservations about interracial relationships during voir dire. The prosecutor had a white woman testify that her black, married boyfriend, set her up on drug trafficking out of her home. We cannot condone the actions of the prosecutor.

The prosecutor also improperly focused on defendant's infidelity to his wife and the fact that he was unemployed. The prosecutor's questions appear to be a deliberate attempt to prejudice the jury. The testimony was irrelevant with respect to defendant's credibility. Moreover, evidence of a defendant's unemployment is generally inadmissible as proof of bad character or motive. *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980).

### IV

We do not find that reversible error occurred when the prosecutor brought out defendant's involvement in drug sales. The evidence was admissible under MRE 404(b), because it related to whether defendant had a plan or scheme to purchase and return drugs. *People v Vandervliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Furthermore, the prejudice was not so great as to substantially outweigh the probative value of the evidence. *Id.*

The prosecutor's questioning with regard to drug deliveries by defendant to Weaver was proper. The evidence was used to show Weaver's motive in setting up the transaction. Defendant opened up the door to this line of questioning by asking Weaver why he was willing to help defendant. See *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

### V

We do not find other errors which would necessitate reversal. However, because retrial is necessary we will briefly address some of defendant's remaining claims.

No reversible error occurred when the judge precluded defendant from cross-examining Weaver on whether he was getting a deal from the prosecution in exchange for his testimony. Any error was harmless, because Weaver's testimony was cumulative, and the prosecution presented a strong case. *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986). Moreover, Weaver was apparently unaware of any favorable consideration he may have received in exchange for his testimony. However, on retrial, defendant should be allowed to question Weaver with respect to any deal he received. *People v Mumford*, 183 Mich App 149; 455 NW2d 51 (1990).

Looking at the evidence in a light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to have found that the essential elements of the crime of possession of a short-barreled shotgun were proven beyond a reasonable doubt. See MCL 750.222(g); MSA 28.419(g); *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Therefore, the prosecution is free to retry defendant on this charge if it so chooses.

Defendant's remaining issues are moot in light of our reversal of his convictions and sentences.

Reversed and remanded. We do not retain jurisdiction.

/s/ Marilyn Kelly

/s/ Myron H. Wahls

I concur in the result only as to Part III and join in the balance of the opinion.

/s/ M. Richard Knoblock

<sup>1</sup> On February 16, 1995, this Court consolidated Docket Nos. 147703, 164837 and 181916.