

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARTH GREGORY LANGLEY,

Defendant-Appellant.

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UNPUBLISHED  
October 28, 1997

No. 193825  
Huron Circuit Court  
LC No. 94-003658

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), convictions that arose from defendant's sale of cocaine on three separate occasions to Michael Snider, who was participating at the behest of the police. Defendant was sentenced to two one-to-twenty year prison terms and one two-to-twenty year prison term, all to be served consecutively to each other. He now appeals as of right, and we affirm.

Defendant argues that the prosecution engaged in misconduct that deprived him of a fair trial. Specifically, defendant contends that his right to due process was violated by the prosecutor's failure to identify four surveillance officers who were known to the chief investigating officer of the case and to list them as witnesses, despite the existence of a discovery order and a request from defense counsel. We disagree with defendant's position.

A prosecutor has the duty to disclose any mitigating or exculpatory evidence. *People v Paris*, 166 Mich App 276, 279; 420 NW2d 184 (1988). However, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial. *United States v Agurs*, 427 US 97; 96 S Ct 2392; 49 L Ed 2d 342, 352 (1976).

In the present case, the prosecutor had already filed a witness list that did not include the four surveillance police officers when the trial court entered its discovery order. There is no indication that the prosecutor failed to comply with this order. Moreover, defendant's claim that the four officers could

have provided exculpatory evidence is unsupported by the record. The jury apparently based its convictions on the testimony of the informant Snider, having found him credible, and not on the testimony of surveillance officers who did not observe any of the transactions with Snider. As the prosecution points out, it was defense counsel who suggested recalling Koehler, one of the surveillance officers, to clarify that Snider's testimony was the only independent evidence of defendant's involvement in the transactions. Defense counsel also stated that recalling Koehler would remedy any problems he had with the testimony of the surveillance officers. A defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Furthermore, the testimony given by Officer Koehler when he was recalled was damaging to the prosecution, not the defense.

Defendant next argues that he was denied a fair trial because the prosecutor failed to produce critical res gestae witnesses (the four surveillance officers). Although defendant raised this issue before the trial court during trial, he did not move for a new trial. This issue is therefore not properly preserved for our review. See *People v Robinson*, 390 Mich 629, 634; 213 NW2d 106 (1973). Nonetheless, we will briefly review its merits.

MCL 767.40(a)(1); MSA 28.980(1)(1) requires that the prosecutor provide defense counsel with a separate list of witnesses not being called. *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). Although defendant argues that the statute requires the prosecutor to list or call all the res gestae witnesses, the statute actually imposes the duty to list all witnesses "known to the prosecuting attorney" and all res gestae witnesses "known to the prosecuting attorney or investigating law enforcement officers." A res gestae witness is one who witnessed some event in the continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts. *Calhoun*, *supra* at 521. The record indicates that the prosecutor was not aware of the identities or existence of the four missing surveillance officers. Moreover, although the chief investigating officer was aware of their existence, none of the surveillance officers witnessed the drug transactions between Snider and defendant and are therefore not res gestae witnesses. Accordingly, there was no violation of the statute.

Defendant next contends that the trial court abused its discretion in not allowing him to explore potential charges that were pending against Snider at the time he made his decision to cooperate with the police, except for the drunk driving charge which was to be dismissed in exchange for Snider's cooperation. These crimes allegedly included aggravated assault and criminal sexual conduct. The trial court allowed defense counsel to question Snider about the drunk driving charge. However, the trial court did not allow defense counsel to disclose the other alleged charges or bad conduct unless defense counsel was able to elicit the information from Snider's own testimony.

The decision whether to admit evidence is within the sound discretion of the trial court, and this Court will not disturb such a decision absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). A witness' pending charges may not normally be used for general impeachment purposes. *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973). However, the fact that a prosecution witness has charges pending is particularly relevant to the issue of the witness' interest in testifying and may be admitted for this purpose. *People v Hall*, 174 Mich App 686, 690-

691; 436 NW2d 446 (1989). A prosecutor is obligated to disclose to the jury any inducements or consideration given or reasonably likely to be given to an accomplice or coconspirator witness in exchange for his testimony. *People v Dowdy*, 211 Mich App 562, 570-571; 536 NW2d 794 (1995). However, the prosecutor is not required to disclose future possibilities of leniency for a jury's speculation. *Id.* at 571.

Although Snider's testimony was extremely critical to the prosecution's case against defendant, the trial court did not abuse its discretion in refusing to directly admit evidence that amounted to no more than mere allegations of prior bad conduct by Snider. Defendant did not present evidence to the trial court and does not now allege that Snider was ever charged with crimes other than the drunken driving charge. If defendant had evidence of the dismissal of other charges or of further alleged deals with Snider, he needed to come forward with such evidence to the trial court. In the absence of the offer of such proof, we do not find that the trial court abused its discretion.

Finally, defendant argues that the prosecutor impermissibly bolstered Snider's credibility in his closing argument. Defendant failed to object to the allegedly improper remarks at trial. Appellate review of improper prosecutorial remarks is generally precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US \_\_\_\_; 115 S Ct 923; 130 L Ed 2d 802 (1995). No miscarriage of justice will occur if we decline to review this issue. The prosecutor's comments were not personal guarantees of credibility and were permissible argument. A prosecutor is free to relate the facts adduced at trial to his theory of the case and to argue the evidence and all reasonable inferences to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Affirmed.

/s/ Hilda R. Gage  
/s/ Gary R. McDonald  
/s/ E. Thomas Fitzgerald