

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRES MOYA GOMEZ,

Defendant-Appellant.

UNPUBLISHED

January 16, 1998

No. 197719

Clinton Circuit Court

LC No. 96-006016-FH

Before: Fitzgerald, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of possession with intent to deliver more than fifty grams of a controlled substance, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and conspiracy to deliver or manufacture more than fifty grams of a controlled substance. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii); MCL 750.157a; MSA 28.354(1).¹ He was sentenced to two consecutive sentences of ten to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant and his codefendant were arrested in the parking lot of the Green Acres motel in DeWitt Township. A DeWitt Township police officer spotted defendant and a companion in the parking lot. The police officer pulled up next to defendant's car and started a casual conversation with defendant's companion. When defendant's codefendant pulled into the parking lot, the police officer's suspicions mounted so he took his dog, which was trained to uncover narcotics, out of the patrol car. The dog subsequently led the officer to 499 grams of cocaine hidden under defendant's passenger seat and approximately \$10,000.00 in cash located in the air filter of the codefendant's car.

Defendant, who emigrated from Cuba sixteen years previously, first argues that as a non-English speaking defendant he was denied a fair trial when the court used the only interpreter available to him to translate the testimony of his Spanish-speaking codefendant, leaving defendant without any means to communicate with his attorney. Because defendant did not object at the trial court level, this Court shall review the alleged error to determine whether it affected the trial's outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Recently, this Court stated that:

the proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken, so that the participants receive a timely, accurate, and complete translation of what has been said. Although occasional lapses will not render a trial fundamentally unfair, adequate translation of trial proceedings requires translation of everything relating to the trial that someone conversant in English would be privy to hear. [*People v Cunningham*, 215 Mich App 652, 654-655; 546 NW2d 715 (1996), citing 32 ALR 5th 149, § 71, p 466.]

Because the codefendant was testifying in Spanish, defendant did not need an interpreter at this point to translate the proceedings. However, in the absence of an interpreter, defendant could not talk with his attorney while his codefendant was testifying, posing the risk of rendering the trial fundamentally unfair. Nonetheless, the error was not outcome determinative. Nothing in the record indicates that defendant desired to speak with his attorney during the cross-examination, the defendants presented consistent defenses, and defendant has not identified any questions that his counsel would have posed if he had been able to freely communicate with his counsel during this time. Accordingly, we find no cause to reverse on this basis.

Next, defendant argues that the prosecutor impermissibly made a civic duty argument during his closing arguments and intentionally injected defendant's ethnic heritage into the closing arguments. Unpreserved claims of prosecutorial misconduct will be reviewed to determine whether failure to review would result in a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). We have reviewed the allegedly improper remarks within the context that they were made, *People v Legrone*, 2065 Mich App 77, 82-83; 517 NW2d 270 (1994), and find no impropriety that changed the outcome of the proceedings and, therefore, no miscarriage of justice.

Lastly, defendant argues that trial counsel was ineffective by failing to object to the prosecutor's allegedly improper remarks. To prevail on such a claim, a defendant must show first that an attorney committed such a serious error at trial that his performance fell below an objective standard of reasonableness governed by prevailing professional norms and second, that the defense was so prejudiced by the deficient performance that there existed a reasonable probability that, but for the error of trial counsel, a different outcome would have resulted. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Since we have already concluded that the prosecutor's remarks were not improper, defendant's argument is without merit.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ William C. Whitbeck

¹ The statutory citations in the final judgment of sentence are erroneous. Defendant was convicted of possession with intent to deliver more than fifty grams of a controlled substance, MCL

333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and conspiracy to deliver and manufacture more than fifty grams of a controlled substance, MCL 750.157a; MSA 28.354(1).