

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIGUEL ZARATE,

Defendant-Appellant.

UNPUBLISHED

May 12, 1998

No. 205320

Saginaw Circuit Court

LC No. 96-011841 FC

ON REMAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICANOR JAMES MURRAY,

Defendant-Appellant.

No. 205321

Saginaw Circuit Court

LC No. 96-011772 FC

Before: Holbrook, Jr., P.J., and Gribbs and R.J. Danhof,* JJ.

PER CURIAM.

Following a joint trial by jury, defendant Murray was found guilty of conspiracy to possess with intent to deliver 650 grams or more of cocaine, MCL 750.157(a); MSA 28.354(1), delivery of more than 50 grams but less than 225 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), delivery of marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), possession with intent to deliver marijuana, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and four counts of delivery of less than fifty grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant Zarate was convicted of conspiracy to possess with intent to deliver cocaine and/or delivery of cocaine, MCL 750.157(a);

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

MSA 28.354(1), delivery of a mixture containing cocaine of 650 or more grams, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), possession with intent to deliver more than 225 grams but less than 650 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii); and delivery of more than 50 grams but less than 225 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401) (2)(a)(iii). During deliberations, the jury had access to a document not admitted at trial that, among other things, referred to post-arrest statements that defendant Murray had made to the police. The trial court set aside the jury verdicts. On remand from the Michigan Supreme Court, the court vacated its order setting aside the verdicts. The Michigan Supreme Court has directed this Court to review that ruling as if on leave granted. We affirm.

Defendant Murray contends that the jury's knowledge of the incident report was a "structural defect" that deprived him of a fair and impartial jury. Const 1963, art 1, § 20; *People v Clark*, 220 Mich App 240, 246; 559 NW2d 78 (1996). Defendant Zarate contends that the error created manifest injustice because it struck at the heart of his defense of innocence. The trial court concluded, and we agree, that this error did not rise to the level of a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards" and which requires automatic reversal. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994). Rather, the trial court held that the constitutional error was subject to analysis under the harmless-beyond-a-reasonable-doubt standard. While we would have found the error to be evidentiary in nature, rather than of constitutional dimension, see *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996), we would nonetheless agree with the trial court that, in light of the weight and strength of the untainted evidence, the error was not prejudicial and therefore was harmless, *id.*, pp 220-221.

Proceeding under a harmless error analysis, the trial court noted that the involvement of defendants Murray and Zarate in the delivery of cocaine was established overwhelmingly by (1) the testimony of an undercover detective regarding face-to-face meetings that he had with both defendants and numerous deliveries of cocaine and marijuana to him by each of the defendants, (2) the testimony of a police informant regarding prior drug dealings with defendants, his involvement in the overall investigation, and his presence during drug deals that he initiated at the request of the police, (3) tape recordings and transcripts of many conversations between defendants and either the undercover detective or the informant, (4) numerous cocaine and marijuana exhibits that were introduced at trial, including the results of laboratory analyses, and (5) the testimony of an FBI special agent and a Michigan State Police lieutenant confirming in all major respects the testimony of the undercover detective and the informant. Considering the quantity of evidence that tied defendants Murray and Zarate together and that tied both to the delivery of cocaine and marijuana, there could be no reasonable possibility that the jury's verdict was influenced by the inadvertent presence in the jury room of the document. Moreover, as the trial court noted, the testimony of the jurors firmly established that the contested document did not influence their verdicts. Accordingly, error requiring reversal of defendants' convictions did not occur. *Mateo, supra*; *People v Dumas*, 454 Mich 390, 409; 563 NW2d 31 (1997) ("Where there is overwhelming evidence of a defendant's guilt, there is no affirmative evidence of a miscarriage of justice."). See also MCL 769.26; MSA 28.1096.

To the extent that defendant Zarate argues that his constitutional right of confrontation was violated, we deem this issue to be waived because defendant Zarate did not raise this claim of constitutional error in the court below, nor does his brief on appeal cite any competent authority in support of such a claim. See *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994); *People v Pena*, 224 Mich App 650, 664; 569 NW2d 871 (1997).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Roman S. Gibbs

/s/ Robert J. Danhof