

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LYMAN GENE KOONCE,

Defendant-Appellant.

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UNPUBLISHED

July 21, 2000

No. 210326

Monroe Circuit Court

LC No. 96-027645-FH

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to four to twenty-five years in prison. We affirm.

Defendant first argues that the trial court erred by denying his motion to dismiss, or alternatively, that the trial court erred by failing to give a “missing witness” instruction based on the prosecution’s failure to produce a witness identified in the prosecution’s witness list. We disagree. A trial court’s ruling on a motion to dismiss is reviewed for an abuse of discretion, *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998), as is a trial court’s denial of a request for a missing witness instruction, *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). An abuse of discretion exists where an unprejudiced person would find that there was no justification for the trial court’s ruling in light of the facts presented to the trial court. *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

Pursuant to MCL 767.40a; MSA 28.980(1), the prosecution is obligated to provide a defendant with reasonable assistance in locating and serving process upon witnesses. However, this duty does not apply to a witness who is also an accomplice. *People v O’Quinn*, 185 Mich App 40, 45; 460 NW2d 264 (1990). An accomplice is one “who knowingly and willingly helps or cooperates with someone else in committing a crime.” *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJ12d 5.5.

In the present case, the prosecutor described the circumstances of the arrests of defendant and the witness and the trial court determined that the witness could be considered an accomplice based on the similarity of the charges under which the witness pleaded guilty and that defendant proceeded to trial. Because we conclude that an unprejudiced person would find justification for the trial court's denial of defendant's motion to dismiss on the ground that the witness was an accomplice, we find no abuse of discretion.

Defendant contends that even if the witness was an accomplice, the prosecution listed him as a witness and, therefore, had a duty to produce him. Defendant claims that the prosecution failed to exercise due diligence in locating the witness, and that dismissal was proper. We disagree. In *People v Paquette*, 214 Mich App 336, 343; 543 NW2d 342 (1995), where the defendant argued that the prosecutor failed to exercise due diligence in securing the presence of two res gestae witnesses, this Court explained:

A prosecutor's duty with respect to res gestae witnesses is only to list such witnesses known at the time of the filing of the information and those that become known before trial. There is no longer any duty to endorse or produce such witnesses. [*Id.*, citing MCL 767.40a; MSA. 28.980(1); *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995).]

Because the witness in the present case was a res gestae witness, which is one who witnessed an event in the criminal transaction and can provide testimony that would aid in fully developing the facts, *O'Quinn*, *supra* at 44, the prosecution did not have a duty to produce him. Moreover, the trial court considered the witness an accomplice and "the prosecutor does not have a duty to provide reasonable assistance to a defendant in locating and serving process upon an accomplice." *Id.* Thus, the trial court did not abuse its discretion when it denied defendant's motion to dismiss.

Defendant further contends that the trial court erred in failing to give the requested missing witness instruction, which resulted in prejudice to the defense. We disagree. Where the prosecution was not required to produce the witness, a missing witness instruction would be inappropriate. See *People v Ball*, 150 Mich App 535, 538; 389 NW2d 122 (1986). Thus, the trial court did not abuse its discretion when it denied defense counsel's request for a missing witness instruction.

Defendant next argues that the trial court erred by failing to exclude a note seized during the search of the incident location that the prosecution allegedly failed to properly disclose during discovery. We disagree. Evidentiary rulings are within the trial court's discretion and are reviewed on appeal for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). In the present case, defense counsel objected to admission of the note because defense counsel maintained that it was not turned over in discovery. However, the prosecution explained that the note was included in its discovery response under "miscellaneous drug paraphernalia." Further, the response also indicated "photographs" as exhibits, and in one of the photographs the note is depicted. Thus, the note was included within the discovery response, and defense counsel's lack of knowledge of the note was the result of his not availing himself of the opportunity to examine the items taken in the search. On this record, we find no abuse of discretion.

Next, defendant argues that the prosecutor engaged in misconduct when he asked defendant about prostitution and drug activity at the motel. Defendant made no objection to these questions during trial. Because defendant failed to preserve this issue by objection below, “appellate relief is precluded unless any prejudicial effect could not be cured by a cautionary instruction or failure to consider the issue would result in a miscarriage of justice.” *People v Cooper*, 236 Mich App 643, 650; 601 NW2d 409 (1999); *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). We are not persuaded by defendant’s argument that this line of questioning was improper, but even if it were improper, any prejudice could have been cured by a cautionary instruction. Accordingly, defendant is not entitled to appellate relief.

Defendant also argues that the trial court erred by denying defendant’s motion for a directed verdict based on its conclusion that a rational trier of fact could find that defendant was in possession of the drugs. We disagree. The trial court’s ruling on a motion for directed verdict is reviewed de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The evidence presented prior to the motion must be considered in the light most favorable to the prosecution. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). The inquiry on review is “whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt.” *Mayhew, supra*. If the evidence does not justify a finding of guilt beyond a reasonable doubt, a directed verdict must be entered. *Lemmon, supra*.

A conviction for possession with intent to deliver less than fifty grams of cocaine requires that the prosecution prove: (1) that the substance is cocaine; (2) that the substance weighs less than fifty grams; (3) that the defendant was not authorized to possess the cocaine; and (4) that the defendant knowingly possessed the substance with the intent to deliver it. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). The defendant’s possession of the substance can be actual or constructive. *Id.* at 520. Some connection between the defendant and the narcotics must be shown in order to establish constructive possession. *Id.* “Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime.” *People v Crawford*, 232 Mich App 608, 616; 591 NW2d 669 (1998).

Considered in a light most favorable to the prosecution, the evidence of crack cocaine being found in defendant’s motel room and another person in that room smoking crack cocaine in defendant’s presence established facts from which a rational trier of fact could find that the essential elements of possession with intent to deliver less than fifty grams of cocaine were proven beyond a reasonable doubt. Therefore, the trial court did not err in denying defendant’s motion for directed verdict.

Defendant next argues that the trial court’s instruction on reasonable doubt was inadequate because it did not include the concepts of proof to a moral certainty or to the utmost certainty. We disagree. Jury instructions are reviewed in their entirety to determine whether error requiring reversal exists. *People v Mass*, 238 Mich App 333, 339; 605 NW2d 322 (1999). “Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected defendant’s rights.” *Id.*

We conclude that the jury instruction regarding reasonable doubt was not erroneous. “To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt.” *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). “The failure to include ‘moral certainty’ language in the definition of reasonable doubt does not give rise to error warranting reversal.” *Id.* Viewing the instructions in their entirety, there is no doubt in the mind of this Court that the jury understood that the burden of proof was on the prosecution and what constituted reasonable doubt. Therefore, the jury instruction was not erroneous.

Defendant also argues that he was denied his constitutional right to effective assistance of counsel, thereby denying him a fair trial. We disagree. With regard to claims of ineffective assistance of counsel, this Court has explained:

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. In order for this Court to reverse on the basis of ineffective assistance of counsel, defendant must show that his counsel’s performance fell below an objective standard of reasonableness and so prejudiced defendant that he was denied the right to a fair trial. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. [*People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999) (citations omitted).]

Trial counsel is not required to raise meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Further, “[d]efense counsel is not required to make frivolous or meritless motions.” *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant cites eight different occasions where he claims that his trial counsel was ineffective, all of which involve the failure to object to certain evidence or the failure to move to suppress certain evidence. Having reviewed the record, we find that defendant has failed to overcome the presumption of effective assistance of counsel. Even if defense counsel’s performance fell below an objective level of reasonableness, for example, where he failed to object to alleged other acts evidence, defendant cannot establish that such deficiency in counsel’s performance resulted in prejudice. Given the overwhelming evidence against defendant, there is no reasonable probability that a different outcome would have resulted if trial counsel had objected to the evidence of defendant’s other acts.

Finally, defendant argues that the cumulative effect of the errors was so prejudicial that defendant was denied his right to a fair trial. We disagree. Constitutional issues are reviewed de novo. *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999). Errors must be established before a cumulative effect of the errors can be found. *Mayhew*, *supra* at 128. Where the cumulative effect of minor errors denies a defendant a fair trial, reversal of the conviction is

required. See *Cooper, supra* at 659-660. Having found no errors of consequence, nor cumulative errors, we conclude that this argument is without merit. See *id.* at 660.

Affirmed.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Jane E. Markey