

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON YOHANCE JACKSON,

Defendant-Appellant.

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UNPUBLISHED

August 15, 2006

No. 260902

Kent Circuit Court

LC No. 03-007187-FH

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and resisting and obstructing a person performing official duties, MCL 750.81d(1). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to serve concurrent terms of incarceration of twelve months for each conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

The prosecutor presented evidence that a police officer stopped defendant while he was riding a motorcycle, because defendant had no helmet and the vehicle's license plate was expired, then arrested defendant for operating without a driver's license. A search of defendant's person incidental to the arrest turned up a small plastic bag of what appeared to be cocaine. The arresting officer field tested the substance inside his patrol car, obtaining a result positive for cocaine, then noticed that some currency and other documents belonging to defendant were starting to blow away. While the officer tried to retrieve those items, he observed defendant, whom the officer had left in the back seat of his patrol car, appearing to grab the bag of cocaine from the front part of the vehicle. The officer forced defendant back into the back seat, but thereafter could not find the cocaine, causing the officer to conclude that defendant had succeeded in swallowing it.

The test kit the officer had used was placed in evidence, residue from which an expert from the State Police Crime Lab confirmed was cocaine. After the jury began deliberations, it asked whether a test kit was a single-use item. In deciding how to respond to the question, the trial court stated as follows:

I think, frankly, that there are things in the record, if we had it typed up, that would answer the question. But, frankly, rather than undertake that laborious task, it struck me that the easiest thing to do is just ask somebody.

The court then took testimony from a police officer who happened to be present, who testified that standard procedure was to use such test kits only once. The jury afterward found defendant guilty as charged.

Defense counsel declined to cross-examine the witness in that event, but after the witness finished testifying objected on the ground that the jury's question had been answered in earlier testimony, which might have been transcribed instead of having yet another police witness provide damaging testimony.

Defendant's sole issue on appeal is whether the trial court erred in reopening proofs after the jury began deliberations. "[A] trial judge has wide discretion and power in matters of trial conduct." *People v Ramano*, 181 Mich App 204, 220; 448 NW2d 795 (1989), quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). Accordingly, a trial court's decision to reopen proofs is reviewed for an abuse of discretion. See *People v Shields*, 200 Mich App 554, 561; 504 NW2d 711 (1993). "An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996).

A trial court may reopen proofs after both sides have rested to allow evidence in connection with an element of the crime omitted from the case in chief. *People v Betts*, 155 Mich App 478, 480-482; 400 NW2d 650 (1986). This holds even if the jury has already begun deliberating. *Id.* at 481-482, citing 75 Am Jur 2d, Trial, § 158, p 246. A court further has the discretion to call or question witnesses on its own motion. See MRE 614; see also *Betts*, *supra* at 482. However, a court deciding whether to reopen proofs should consider whether doing so would cause unfair surprise or prejudice to the opposing party. See *Collier*, *supra* at 694-695. It is an abuse of discretion to allow the prosecutor to present a rebuttal witness after the close of proofs and closing arguments. *People v Rhinehardt*, 201 Mich App 1, 2; 506 NW2d 1 (1993).

In this case, defendant points out that defense counsel had suggested in closing argument that the cocaine from the test kit might have come from an earlier test, and characterizes the trial court's action in response to the jury's questions as allowing a rebuttal evidence after the arguments. But defendant concedes that the additional testimony was not newly discovered evidence, but rather cumulative to matters presented in earlier testimony.<sup>1</sup> The trial court thus reopened proofs not to introduce wholly new evidence, but as an expeditious way of refreshing the jury's memory over ground already covered, the purpose being to avoid delays attendant to having transcripts prepared. This exposed the defense to no surprise or prejudice. Moreover,

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<sup>1</sup> We note that the arresting police officer testified that he "tagged the field tester, which had the small portion of cocaine in it from the original test," and later detailed that such tests are conducted with ampoules that must be broken, impregnated with the suspect substance, and then shaken. This testimony indicated both that only one source of cocaine was involved in this instance, and that such testing equipment was designed for single uses.

defense counsel raised no objection until after the trial court announced its intention, and conducted the ensuing examination.

For these reasons, we conclude that the trial court did not abuse its discretion in taking the additional testimony in response to the jury's questions.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder