

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAWAYNE CALLAHAN,

Defendant-Appellant.

UNPUBLISHED
October 23, 1998

No. 202463
Recorder's Court
LC No. 96-002237

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced to three to twenty years in prison. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court should have sua sponte given the instruction regarding evidence of flight. However, because defendant neither requested this instruction nor objected to its omission in the trial court, the issue has not been preserved for appellate review absent manifest injustice. See *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996). As a general rule, this Court is hesitant to reverse the judgment of a lower court because of an error in jury instructions where no objection was raised at trial. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995).

After reviewing the record, we find no manifest injustice. The sole reference to defendant's flight during trial occurred when the prosecutor asked a police officer if defendant ran to the porch when the police made their move. The prosecutor did not argue that defendant's flight indicated consciousness of guilt. Because flight was not a material issue here, defendant was not prejudiced by the omission of an instruction on flight. See *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Furthermore, even if the trial court should have given the instruction, any error was harmless because there was overwhelming evidence presented to support defendant's conviction. See *People v Dumas*, 454 Mich 390, 409; 563 NW2d 31 (1997).

Defendant next asserts that defense counsel's failure to request an instruction on flight constituted ineffective assistance of counsel. However, on the record before us, it seems likely that defense counsel did not request the instruction because he did not wish to emphasize defendant's flight. We conclude that defendant has not overcome the strong presumption that the assistance of his counsel was sound trial strategy. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995). Moreover, defendant has utterly failed to establish that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

In his final issue, defendant contends that he was denied a fair trial as a result of the prosecutor's remarks during both her closing and rebuttal arguments. Defendant did not object to any of the remarks he now claims were improper. Appellate review of prosecutorial remarks is generally precluded absent an objection because the trial court was deprived of an opportunity to cure the error. *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). An appellate court will reverse in the absence of an objection if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *Id.*

After reviewing in context the comments cited by defendant, we conclude that the remarks were either proper or any prejudicial effect could have been eliminated by a curative instruction. The prosecutor's remarks did not improperly denigrate defense counsel. The prosecutor merely asked the jury not to be distracted by minor discrepancies, but rather to concentrate on whether she had established the elements of the charged crime. Furthermore, the prosecutor's comments during rebuttal were not a "civic-duty" argument because they neither injected issues broader than defendant's guilt or innocence of the charge nor encouraged the jurors to suspend their powers of judgment. See *People v Truong*, 218 Mich App 325, 340; 553 NW2d 692 (1996). The prosecutor was permitted to argue that Officer White's testimony was credible. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor did not suggest that she had personal knowledge of the truthfulness and credibility of the witness. See *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell