STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD HOLMES, a/k/a DAVID JONES,

Defendant-Appellant.

UNPUBLISHED
February 7, 1997

No. 189632
LC No. 95-000576

Before: Michael J. Kelly, P.J., and Saad and H.A. Beach,* JJ.

PER CURIAM.

Defendant, Reginald Holmes, a/k/a David Jones, appeals by right his jury trial conviction for possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to ten to twenty years' imprisonment for the possession with intent to deliver cocaine conviction, to be served consecutive to a term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's first claim on appeal is that the prosecution failed to present sufficient evidence to support his conviction. We disagree.

To convict a defendant for possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, the prosecution must prove the following elements: (1) that the recovered substance was cocaine; (2) that the cocaine was in a mixture weighing more than 50 but less than 225 grams; (3) that the defendant was not authorized to possess the cocaine; and (4) that the defendant knowingly possessed the cocaine with the intent to deliver it. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992). The jury may consider direct and circumstantial evidence, and any reasonable inferences arising from the evidence in determining whether the elements of the offense have been proven. *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).

Defendant first argues that the prosecution failed to prove that he possessed the cocaine that Tandy Jenkins discarded when he ran into Room 304. A person is said to have possessed a controlled

substance if he had either actual or constructive possession of it. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). Possession "need not be exclusive and may be joint, with more than one person actually or constructively possessing a controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). The essential question is whether the defendant had dominion or control over the controlled substance. *Id*. "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id*. at 521.

In the case at bar, there was sufficient evidence from which the jury could reasonably infer possession. Defendant was found sitting in Room 304, at a table with two large pieces of cocaine, as well as numerous individual ziplock packets containing cocaine. Defendant was also holding a razor blade, a tool commonly used in the packaging of narcotics. Several more empty ziplock packets were found on the floor. Moreover, Jenkins, who had only moments before been engaged in a narcotics sale and was being pursued by police officers, ran into the room and discarded even more packets of cocaine. This evidence clearly supports an inference that defendant and Jenkins were working together in this crack-selling operation, and that defendant had the right to exercise control over the cocaine that was confiscated from the table, as well as the cocaine that Jenkins was carrying.

Defendant also claims that the prosecution failed to prove that the cocaine was in a mixture weighing more than 50 grams. We find that this argument also is without merit. The police chemist, Lorin Budzinski, testified that when he opened the lockseal folder, he found a paper bag containing two pieces of white material that were wrapped in clear plastic, as well as 198 clear plastic packets, each containing a lumpy white material. Budzinski then labeled the two large pieces of cocaine Item A and the individual packets as Item B. Upon further questioning, he indicated that the material contained under Item A weighed 103.49 grams and contained cocaine. Budzinski then opened twenty of the 198 packets, finding the material uniform in shape, size, and texture. The material contained in the twenty packets weighed 1.6 grams. Finally, Budzinski ran tests on the twenty packets, finding that they each contained cocaine. This was sufficient evidence from which the jury could find that the cocaine was in a mixture weighing 50 grams or more but less than 225 grams.

In summary, viewing the evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found that defendant was guilty of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine.

Defendant next argues that the trial court abused its discretion in admitting evidence of defendant's December 21, 1994, arrest under MRE 404(b).

MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Other acts evidence is admissible under Rule 404(b) if: (1) it is relevant to an issue other than propensity; (2) it is relevant to an issue or fact of consequence at trial; and (3) its probative value is not substantially outweighed by the danger of unfair prejudice under Rule 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *People v Catanzarite*, 211 Mich App 573, 578-579; 536 NW2d 570 (1995). "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *VanderVliet*, *supra* at 65. Moreover, "a defense need not be formally set up to create an issue clearly within the facts." *Id*. at 79. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *Id*. at 75. "A general denial presumptively puts all elements of an offense at issue." *Id*. at 78.

Applying the test for admissibility of other acts evidence as enunciated in *VanderVliet*, we conclude that the evidence of defendant's arrest was properly admitted. Defendant's theory was that he was in his apartment at the time of the raid, that the police must have mistaken him for someone else, and that he had nothing whatsoever to do with the sale of drugs in the hotel. On the other hand, the prosecution's evidence tended to support the police officers' testimony that it was defendant they arrested in Room 304, and that they did not mistakenly identify him. Therefore, the evidence was relevant for a purpose other than defendant's character or propensity. Finally, defendant's identity was clearly a fact that was of consequence at trial.

In order for the evidence to come in under Rule 404(b), however, this Court must still determine whether its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403. Any relevant testimony is damaging to a certain extent. *Sclafani v Cusimano, Inc*, 130 Mich App 728, 735; 344 NW2d 347 (1983). "[P]rejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury." *Id*. Certainly the introduction of defendant's arrest created a danger of unfair prejudice. However, the danger was not so great as to substantially outweigh its probative value. The prosecutor never suggested that the arrest itself was proof that defendant committed the charged offense. Rather, the prosecutor's use of the evidence in her closing argument was in direct response to defendant's claim that he had nothing to do with the sale of narcotics being conducted at the Willard Hotel, and that he was the victim of mistaken identity. Finally, any unfair prejudice was cured by the trial court's instructions to the jury regarding the proper use of the evidence. The trial court did not abuse its discretion in admitting the evidence of defendant's arrest under MRE 404(b).

Defendant next argues that it was error for the trial court to permit the prosecutor to bring in evidence of defendant's use of an alias because it was more prejudicial than probative. We decline to address this issue because defendant failed to object to the evidence at trial. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Miller*, 211 Mich App 30, 42; 535 NW2d 518 (1995); *People v Burch*, 170 Mich App 772, 776; 428 NW2d 772 (1988).

Defendant's next claim of error is that the trial court should have, sua sponte, instructed the jury on what he refers to as the lesser included offense of possession with intent to deliver less than fifty grams of cocaine, because the evidence was lacking on the quantity element of the higher, charged

offense. We disagree. A trial court is not required to instruct on lesser included offenses absent request by counsel. *People v Jenkins*, 395 Mich 440, 441; 236 NW2d 503 (1975). Appellate review is precluded unless necessary to avoid manifest injustice to defendant. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). In the case at bar, we conclude that an instruction on possession with intent to deliver less than fifty grams of cocaine was not supported by the evidence at trial. Accordingly, we find no manifest injustice.

In a related claim, defendant briefly argues that he was denied the effective assistance of counsel because defense counsel failed to request the lesser included offense instruction at trial. However, because defendant did not set forth this issue in his statement of questions involved, we decline to address it. MCR 7.212(C)(5); *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

Defendant's final claim on appeal is that the prosecutor engaged in several instances of misconduct which warrant reversal of defendant's conviction. Defendant failed to object to this alleged misconduct at trial. Therefore, the issue has not been properly preserved for appellate review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995); *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995).

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Harry A. Beach