STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH BERNARD VAWTERS,

Defendant-Appellant.

UNPUBLISHED
May 16, 1997

No. 192141
Washtenaw Circuit
LC No. 95-4369-FH

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of possession of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), for which he was later sentenced to three years probation, with the first year to be served in the county jail. We affirm.

I

Defendant first argues on appeal that his right to remain silent, along with his right to a fair trial, was violated when the prosecutor improperly shifted the burden of proof to the defense when he suggested during his closing argument that there was no evidence presented to support the theory that defendant intended to use the cocaine rather than sell it. Specifically, defendant questions the following comments made by the prosecutor:

> The – Mr. Goldstein also made an argument toward the end of his closing argument regarding the issue of intent.
>
> He argued that there's no evidence on the record that the Defendant intended to deliver the cocaine as opposed to being someone who was going to use the cocaine – as opposed to being a user.
>
> Well, there is no evidence on the record that the Defendant is this heavy cocaine user –

[Objection raised by defense. Objection overruled by court.]

The Defendant was searched by Officer Eberts after his arrest. You know from Officer Pressley's testimony what this stuff is and how it is used. It is smoked.

I asked Officer Eberts, "In addition to the money, did you find anything else on his person?" He said no - no pipe, no lighter, no matches, nothing that a heavy cocaine user, someone who is going to smoke [$]450 to $500 of cocaine is going to have on him. None of that.

However, considering the fact that the jury was not persuaded by the prosecution's theory that defendant intended to sell or deliver the cocaine and, thus, acquitted him on that charge, we find that defendant's argument is irrelevant. We nonetheless find no error.

After reviewing the prosecutor's remarks in context, we conclude that rather than suggesting that the defense failed to provide evidence to support its theory, the prosecution instead merely noted that the state had provided uncontradicted evidence to the contrary. See *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). We further note that with respect to shifting the burden of proof to the defense, the jury was clearly instructed that the prosecution bore the burden of proving every element of the crimes charged beyond a reasonable doubt, and that defendant was not required to present any evidence of any kind to support his alleged innocence.

II

Defendant next argues that the court abused its discretion in failing to clarify the difference between the terms "carrying" and "possessing," upon the jurors' request. Defendant contends that confusion was created by the initial instructions given to the jury concerning the element of possession, and suggests that it is questionable whether the jurors understood that possession required both knowledge and control, whether direct or constructive, of the object in question.

After the jury was instructed on the offense of possession of cocaine with intent to deliver, along with the lesser included offense of mere possession, possession of a firearm during the commission of a felony, carrying a concealed weapon, and felon in possession of a weapon, each offense containing an element of possession, the jury submitted the following question to the court during deliberations:

Clarification on definitions of possession: carrying in a motor vehicle: (what the law reads) and what is the difference between carrying and possession? Why is this distinction made?

Before counsel was consulted, and without any further instruction from the court, the jury sent a note indicating it had reached a verdict. As the parties gathered to receive the verdict, but before the jury had returned to the courtroom, defense counsel and the court discussed (on the record) the sequence of the notes and the fact that the court had not further instructed the jury. Instead of requesting an instruction and a renewal of deliberations, defense counsel stated that the issue posed by the note "is a

good question for the Legislature." Thus, although defendant had ample opportunity to object to the procedure and seek a timely remedy, he tacitly consented to the court's actions.

While defendant's statement may constitute a waiver of the issue, *People v Pollick*, 448 Mich 376, 388; 531 NW2d 159 (1995), at a minimum it constitutes a failure to object. Ordinarily, the claimed error should not be considered on appeal unless preserved by an objection. MCR 2.516(C); *People v Kelly*, 423 Mich 261, 271-272; 378 NW2d 365 (1985). Relief will only be granted absent an objection in cases of manifest injustice. *Id*. We find no manifest injustice here.

After reviewing the record as a whole, we first note that because the court's instructions concerning the elements of the controlled substance offenses contained no reference to the terms "carried" or "carrying" in conjunction with possession of cocaine, the jury's confusion was seemingly with the firearm possession offenses only. Second, we hold that with respect to the crime for which defendant was ultimately convicted, that of possessing cocaine, the court's instructions accurately provided the jury with a sufficient understanding of the required elements. *Martin, supra*, 558.

More than once, the jurors were clearly instructed that in order to find defendant guilty of possessing a controlled substance, they must first determine that defendant knew that the pill bottle contained cocaine. We further conclude that the issue of control, raised by defendant as an essential issue of concern, was irrelevant considering the uncontested testimony that defendant held the pill bottle in his hand, regardless of how brief that possession. Therefore, we find that any error committed was harmless with respect to the jury's final verdict, and that the instructions given, even if imperfect, sufficiently protected defendant's rights and fairly presented the issues to be tried, *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995).

Affirmed.

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell