STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOREYANO XAVIER GOODWIN,

Defendant-Appellant.

UNPUBLISHED
March 19, 1999

No. 207771
Jackson Circuit Court
LC No. 97-080553 FH

Before: Markman, P.J., and Hoekstra and Zahra 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). He was sentenced to a term of four to ten years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in allowing a police officer to provide opinion testimony on the issue of his intent to deliver. We disagree. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). Here, an officer testified that he was familiar with the size of a typical rock of cocaine in Jackson County and with the approximate size of a rock for a particular amount of money. The officer's testimony, which was based on his training and experience, was admissible with regard to the issue of intent to deliver. *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993); MRE 701, 704. Contrary to what defendant argues, the officer did not provide improper 'drug profile' testimony.

Next, defendant claims that the trial court erred in admitting evidence about the controlled buy and the search warrant. However, because defendant did not object to this evidence at trial, appellate review is foreclosed absent a showing of manifest injustice. *Stimage*, *supra* at 29. Defendant's reliance on *People v Wilkins*, 408 Mich 69; 288 NW2d 583 (1980), and *People v Tanner*, 222 Mich App 626; 564 NW2d 197 (1997), is misplaced. Those cases involved the admission of an informant's hearsay statements and a search warrant affidavit containing hearsay statements. In this case, the officer merely testified that a search warrant was obtained following a controlled buy. Although a search warrant may be admissible as a court order, MCL 600.2106; MSA 27A.2106, here the warrant was

not entered into evidence. Moreover, no hearsay evidence was admitted, nor did the police officer provide detailed testimony concerning background investigations and information received from the informant. See e.g., *People v Cadle*, 204 Mich App 646, 652; 516 NW2d 520 (1994). Accordingly, manifest injustice has not been shown.

Next, defendant claims that the trial court abused its discretion by admitting evidence of prior bad acts without advance notice, contrary to MRE 404(b). *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). Again, defendant did not object to the challenged evidence at trial. Absent manifest injustice, there can be no abuse of discretion if the trial court's discretion was not invoked by timely objection. *Marietta v Cliffs Ridge, Inc*, 385 Mich 364, 374; 189 NW2d 208 (1971); *City of Troy v McMaster*, 154 Mich App 564, 570-71; 398 NW2d 469 (1986). Defendant's reliance on *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996), is again misplaced. In *Ullah*, the complainant testified regarding other violent acts committed by the defendant against her. Here, defendant objects to testimony concerning evidence of a revolver, spent cartridges and cocaine that was seized during the execution of the search warrant. This testimony was admissible as part of the res gestae of the charged offense and does not constitute evidence of "other crimes, wrongs or acts" prohibited by MRE 404(b). *People v Rockwell*, 188 Mich App 405, 409; 470 NW2d 673 (1991). Moreover, the weapon in question was never attributed to defendant, nor was defendant criminally charged with its possession. Accordingly, this issue is without merit.

Defendant further argues that he was denied a fair trial because of prosecutorial misconduct. Defendant's failure to object to any of the allegedly improper questions or statements precludes appellate relief unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Viewed in context, we do not find that the prosecutor's questions or statements were improper such that they denied defendant a fair trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Any prejudice that conceivably arose from the questions and comments could have been remedied by a curative instruction. *Id.* Accordingly, appellate relief is not warranted.

Defendant next claims that the trial court erred in denying his motion for directed verdict. We disagree. At the time the search warrant was executed, defendant was sitting near a duffle bag, which contained six larger baggies of cocaine. Defendant's fingerprints were discovered on three of the larger baggies. Considering this and other evidence in a light most favorable to the prosecutor, we conclude that a rational trier of fact could have found that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). There was sufficient evidence of both constructive and joint possession. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1992); *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). Therefore, the trial court did not err in denying defendant's motion for directed verdict.

Next, the trial court's jury instruction on reasonable doubt was not improper. The instruction sufficiently conveyed the concept of reasonable doubt to the jury. *People v Hubbard (After Remand)*, 217 Mich App 459, 487-88; 552 NW2d 493 (1996); *Sammons, supra* at 372.

Defendant further argues that he was deprived of a fair trial because of ineffective assistance of counsel. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Several of defendant's claims of error have already been addressed and we have concluded that none of this evidence was improperly introduced at trial.

In addition, defendant's claim that counsel was ineffective for not moving to dismiss on the basis of prearrest delay is not apparent from the record. However, the fingerprint expert, testified that he did not examine the seized baggies "immediately," because of a backlog. It can reasonably be inferred then that the charge of possession with intent was not filed against defendant until his fingerprints were discovered on the baggies of crack cocaine. In any event, defendant has not demonstrated that any delay was either unreasonable or prejudicial.

As to defendant's argument that the prosecutor tried the case on an alternative theory of aiding and abetting, that claim is without merit. During his rebuttal argument, in response to defense counsel's argument that Corey Davis was the person who possessed and sold the cocaine, the prosecutor stated, in pertinent part:

> So don't be sidetracked about Mr. Davis here. Stay focused on the defendant. *He may very well have been acting in concert with Mr. Davis.* In fact, where was Davis getting the dope from, probably out of a duffel bag out of the packet of dope that the defendant's fingerprints was all over. That's probably where he was getting it from, if you want to play games here about worrying about Davis. But the issue again is the Defendant Goodwin.

The above remarks do not rise to the level of a claim of aiding and abetting. In any event, a defendant properly may be charged as a principal but convicted as an aider and abettor. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

Limiting our review to the record, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), we conclude that defendant has not established any basis for relief due to ineffective assistance of counsel.[1]

Affirmed.

/s/ Stephen J. Markman
/s/ Joel P. Hoekstra
/s/ Brian K. Zahra

[1] Additionally, having found no single error, there is no merit to defendant's claim that he was denied a fair trial because of cumulative error. *People v Malone*, 180 Mich App 347, 362; 447 NW2d 157 (1989).