

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID SCOTT KLUEGER

Defendant-Appellant.

UNPUBLISHED

June 22, 1999

No. 207752

Crawford Circuit Court

LC No. 97-001520 FH

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of being a prisoner in possession of contraband, MCL 800.281(4); MSA 28.1621(4), and was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to five to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the evidence was insufficient to support his conviction because his fingerprints could have been impressed on the plastic bag and paper packet containing the marijuana before these items were used in conjunction with the marijuana. When ruling on a motion for directed verdict, the court must consider the evidence presented by the prosecutor, up to the time the motion was made, in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-269; 380 NW2d 11 (1985). This Court applies the same standard on review of a ruling on such a motion. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

Here, the evidence presented revealed that defendant's fingerprints were found on the plastic bag containing the marijuana, as well as on a paper packet inside the bag. The evidence also revealed that defendant had access to the area in which the marijuana was discovered. This evidence, when viewed in a light most favorable to the prosecution, was sufficient to permit a reasonable juror to conclude that defendant possessed the marijuana. The prosecutor was not required to negate every reasonable theory, but rather must prove his own theory beyond a reasonable doubt in the face of

whatever contradictory evidence the defendant provides. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). Hence, the trial court properly submitted the case to the trier of fact.

We agree with defendant's contention that the trial court violated MCR 6.419(A) by reserving its decision on defendant's motion until after defendant presented his case. Any error was harmless, however, in light of the prosecution's presentment of sufficient evidence to convict defendant at the close of its proofs. *People v Higgs*, 209 Mich App 306, 307; 530 NW2d 182 (1985).

Defendant next argues that he was denied a fair trial as a result of the prosecutor's introduction of evidence regarding defendant's prior cocaine use. We disagree. Defendant opened the door to the line of questioning regarding the packaging of cocaine when he testified that he had never folded a "packet" inside the system. See e.g., *People v Figgures*, 451 Mich 390, 399-400; 547 NW2d 673 (1996); *People v Maleski*, 220 Mich App 518, 522-523; 560 NW2d 71 (1996). Further, the trial court struck the testimony and issued a cautionary instruction regarding the stricken testimony, and no further reference was made to the testimony during trial. Under these circumstances, we are convinced that the jury instruction cured the prejudicial effect of the testimony. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

Defendant also contends that he was denied a fair trial by the prosecutor's references to defendant's appearance. There is no indication in the record that defendant objected to the prosecutor's remarks and, therefore, appellate review is precluded absent a miscarriage of justice. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Because defendant himself testified regarding his change in appearance, and because any impropriety in the remarks could have been cured by a timely cautionary instruction, no manifest injustice will result from our declination to review this issue.

Last, defendant contends that the trial court erred by denying his motion for new trial that was brought on the basis of newly discovered evidence consisting of the testimony of Anthony Kress, an inmate at the Chippewa Correctional Facility. Kress testified at the hearing on the motion that another inmate stored marijuana in the same location where the marijuana defendant was charged with possessing was discovered. Kress did not relay this information to defendant until the two were charged in the same prison facility after defendant had been convicted of the present crime.

To justify a new trial on the basis of newly discovered evidence, the moving party must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

Here, Kruss' testimony would merely have shown the actual owner of the discovered marijuana. Defendant was charged with possessing marijuana, and the jury was instructed that possession did not necessarily mean ownership. With regard to possession, the jury was presented with evidence of defendant's fingerprints on two separate items that contained marijuana. It is unlikely that the introduction of Kruss' testimony would have caused a different

result. *People v Safiedine*, 152 Mich App 208, 210, 211; 394 NW2d 22 (1986). Consequently, the trial court did not err by denying defendant's motion for new trial.

Affirmed.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald