STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 17, 1999
v	No. 208827 Recorder's Court
WILLIE HURBERT MANNS, Defendant-Appellant.	LC No. 97-000995

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). The trial court sentenced defendant to fifteen to thirty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence presented at trial to support his conviction. We disagree. This Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *Id.*

To sustain a conviction for possession with intent to deliver 650 grams or more of cocaine, the prosecution is required to show (1) that the recovered substance was cocaine, (2) that the cocaine was in a mixture weighing over 650 grams, (3) that the accused was not authorized to possess the cocaine, and (4) that the accused knowingly possessed the cocaine with the intent to deliver it. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). Possession can be actual or constructive. *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995). Constructive possession is established when a defendant had the right to exercise control of the cocaine and knew that it was present. *Id.*

The prosecution presented evidence that a home had been under police surveillance. Defendant drove up to that home, walked into the house, exited the house carrying a black and white bag, got into his vehicle and drove away. Defendant picked up a passenger and continued driving. Then, when a police officer tried to stop defendant, he drove away at a high rate of speed and the police pursued him. During the chase, defendant stopped the car, pushed the passenger out of the passenger's door, along with the black and white bag, and then drove away. Expert testimony established that inside the black and white bag, in several smaller bags, was crack cocaine weighing 664.95 grams.

Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence for a rational trier of fact to find that defendant knowingly possessed more than 650 grams of cocaine. Further, given the amount of the cocaine involved, a reasonable inference can also be drawn that defendant intended to sell the cocaine. *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Therefore, sufficient evidence was presented to sustain defendant's conviction.

Defendant next argues that the trial court erroneously admitted his testimony from his first trial, which ended with a hung jury. We disagree. The decision whether to admit or exclude evidence is within the discretion of the trial court and will not be disturbed by this Court on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). A defendant's testimony from a prior trial is generally admissible at a subsequent trial on the theory that once a defendant voluntarily waives his privilege against self-incrimination that waiver is not revocable in future proceedings in the same case. *People v Armentero*, 148 Mich App 120, 124-125; 384 NW2d 98 (1986). An exception exists where the defendant's testimony at the prior trial was prompted or impelled by the admission of illegal evidence. *Id.* Defendant does not claim that his testimony from his first trial was prompted or impelled by the admission of illegal evidence. Thus, the trial court did not abuse its discretion by allowing defendant's testimony from his first trial to be read to the jury at his subsequent trial.

Defendant next argues that the trial court erred in failing to instruct the jury that they were entitled to infer that a missing witness would have given testimony unfavorable to the prosecution's case. We disagree. Defendant's failure to object to the jury instructions as given or request an adverse witness instruction limits review of this issue to whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Jury instructions are reviewed by this Court in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id.*

During their deliberations, the jury sent the trial court a note asking why the passenger in defendant's car during the high speed chase was not present in court:

> *THE COURT*: Please be seated everybody. The newest note: Why wasn't the second passenger present in the court? Those are the kind of questions that even though they might be in your head are something that are of no concern in terms of how you deliberate this case, okay?

JUROR MAY: Say that again.

THE COURT: Huh?

JUROR MAY: Say that again.

THE COURT: Okay. It doesn't have anything to do with the elements. What happened to this person should in no way influence your decision based on the evidence or the lack of evidence in this case. You know, it's almost like when we were talking about reasons why the defendant would not take the stand if he chose not to. He couldn't take the stand because maybe he doesn't want to incriminate himself, maybe his lawyer told him not to take the stand, maybe he didn't take the stand because he has an absolute right not to take the stand, you know, and not speculate or try to guess why something happens. In terms of this, -- why wasn't the second passenger present in the court, -- that's something that you all shouldn't speculate about why, what happened to 'em. That should in no way influence your assessment of the truthfulness of the witness in trying to determine if there's proof beyond a reasonable doubt. Okay. Thank you.

We disagree with defendant's contention that the trial court improperly instructed the jury as to why the passenger did not testify. The passenger was a res gestae witness, because she witnessed an event in the continuum of the criminal transaction and her testimony would aid in developing a full disclosure of the facts. *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990). While the prosecutor is required to disclose res gestae witnesses pursuant to MCL 767.40a; MSA 28.980(1), the prosecutor is not required to produce all res gestae witnesses. *O'Quinn, supra* at 44. Because defendant does not contend on appeal that the prosecution failed to provide reasonable assistance in locating the passenger, or failed to exercise due diligence in discovering and disclosing the identity of the witness in violation of MCL 767.40a; MSA 28.980(1), we conclude that the court was not required to instruct the jury to draw a negative inference from the prosecutor's failure to produce the witness at trial. See *People v Jackson*, 178 Mich App 62, 65-66; 443 NW2d 423 (1989). The trial court's instructions to the jury, viewed in their entirety, fairly presented the issues for trial and sufficiently protected defendant's rights. *Piper, supra* at 648. No manifest injustice will occur if we do not grant the requested relief.

Next, defendant argues that the prosecutor committed misconduct during closing argument by calling defendant a liar and asking jurors to consider a serious matter not in evidence. We again disagree. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v LeGrone,* 205 Mich App 77, 82; 517 NW2d 270 (1994). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353-354; 492 NW2d 810 (1992). Because defendant failed to object to the prosecutor's closing argument, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997).

Although a prosecutor may not suggest that the government has some special knowledge that the witness is testifying truthfully, a prosecutor may argue from the facts that the defendant is not worthy of belief. *Howard, supra* at 548. In this case, the prosecutor's challenged remarks regarding defendant lying were made in reference to the testimony and evidence presented at trial; namely that defendant had lied to a police officer about his name, address and date of birth. The prosecutor argued that the facts and evidence demonstrated that defendant was not credible. In this context, the remarks were not improper.

Defendant also argues that the prosecutor was testifying to factual matters of his own personal knowledge when the prosecutor stated, "[y]ou have to ask yourself how many times did he pick up dope at the Exeter address. Remember the address, -- how many times did he pick up dope there?" Defendant argues that there was no testimony adduced by the prosecution that defendant went to Exeter on any other occasion to pick up dope. Although a prosecutor may not argue or refer to facts not on the record, a prosecutor is entitled to comment on the evidence and to draw reasonable inferences from it. *People v Wilson*, 163 Mich App 63, 66-67; 414 NW2d 150 (1987). Evidence was presented that on November 10, 1996, defendant told a police officer that he lived at 19217 Exeter street. However, defendant subsequently testified that he had never lived at that address, and although his aunt had lived there, he had not been to the Exeter house since July 1996. In this context, the prosecutor's statement, that defendant had been to the Exeter house several times, was a reasonable inference considering the clarity with which defendant stated the address when a police officer asked him where he lived, even though defendant testified he had never lived there and had not been there for several months. Viewing the prosecutor's comments as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial, defendant was not denied a fair and impartial trial. Further, no miscarriage of justice will occur if we do not grant the requested relief.

Defendant next argues that the trial court's instruction to the jury regarding possession and intent was erroneous and denied him a fair trial. We disagree. Defendant's failure to object to the jury instructions as given limits review of the issue to whether relief is necessary to avoid manifest injustice. *Haywood, supra* at 230. "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *Wolfe, supra* at 519-520. "Constructive possession is established where the accused had the right to exercise control of the cocaine and knew that it was present." *Catanzarite, supra* at 577. Although the trial court did not instruct the jury regarding the legal definition of possession in its main charge to the jury, the trial court did instruct the jury regarding possession in the following supplemental instruction:

> The term, possession, connotes dominion or the right of control over the drug with knowledge of its presence and character. The term, possession, may be construed in its commonly understood sense and may encompass both actual and constructive possession. So, that really doesn't tell you much but again, applying common sense and reasonableness, I imagine that which you have in your pocket you actually possess, -- those keys, your car, you know, your gym shoes that may be in the closet, -- anything you have the ability to control or exercise control over, even though it might not

> presently be with you it could be considered that you have constructive possession over that, the right of dominion or control. So, you drove down here, your car's in the parking lot, it could be said that you constructively possess that because even though you don't actually have it here you do have the ability to exercise control and dominion over it. You can go get it any time you want to, it belongs to you and you can say who can get it or who can't get it, where it is, that sort of thing. Does that satisfy you?

Contrary to defendant's assertion, the trial court's instructions to the jury conforms to case law defining possession. Even though the instruction was not concisely stated, it fairly presented the issue to be tried and sufficiently protected defendant's rights. No manifest injustice will occur if we do not grant the requested relief.

Regarding the instruction to the jury on the intent necessary to convict defendant, the trial court instructed the jury:

> In this particular case the information charged [defendant] with possession with the intent to deliver 650 grams or more of a mixture containing the controlled substance, cocaine. To prove that the People must prove the following beyond a reasonable doubt: First, that the defendant, Mr. Manns, knowingly possessed a controlled substance. Second, that the defendant intended to deliver this substance to someone else. And third, that the substance was cocaine and the defendant knew it. And fourth, that the substance was a mixture that weighed more than 650 grams – yes – more than 650 grams.
>
> This particular offense is called a specific intent offense. That means that the prosecution must prove not only that [defendant] possessed it but at the time of the possession it was his intent to deliver it.

We note that the trial court's instruction to the jury was virtually identical to the standard jury instruction for unlawful possession of a controlled substance with intent to deliver, CJI2d 12.3, and specific intent, CJI2d 3.9, and conclude that the court's instructions accurately reflect statutory and case law for unlawful possession of a controlled substance with intent to deliver and the specific intent necessary for a jury to convict a defendant of that crime MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). See *Catanzarite, supra* at 577-578. Because the trial court's instructions presented the issues to be tried and sufficiently protected defendant's rights, we find that no manifest injustice will occur if we do not grant the requested relief.

Defendant's final issue on appeal is that he received ineffective assistance of counsel on several grounds, all of which require reversal. We disagree. Because defendant did not move for a new trial or an evidentiary hearing before the trial court, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that under an objective standard of reasonableness counsel made an error so serious that counsel was not functioning as an attorney guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523

NW2d 830 (1994). The deficiency must be prejudicial to the defendant and the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant first argues that his trial counsel was ineffective for failing to move for a directed verdict on grounds that could be supported by the record. However, defendant's trial counsel did move for a directed verdict arguing that there was insufficient evidence presented to support a conviction for possession with intent to deliver over 650 grams of cocaine. Defendant, on appeal, fails to specifically allege what other grounds defense counsel should have moved for a directed verdict. "A party may not merely announce a position and leave it to [this Court] to discover and rationalize the basis for the claim." *People v Leonard,* 224 Mich App 569, 588; 569 NW2d 663 (1997). Therefore, we conclude that defendant failed to overcome the presumption that he received effective assistance of counsel at trial.

Defendant's second argument is that his trial counsel was ineffective for failing to object to the trial court's jury instructions regarding intent and possession, and the trial court's failure to define possession in its instructions to the jury immediately following closing arguments. As discussed above, the jury instructions as given fairly presented the issues to be tried and sufficiently protected defendant's rights. A defense counsel's failure to object to a proper jury instruction does not constitute ineffective assistance of counsel. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Therefore, we conclude that defendant failed to show that he received ineffective assistance of counsel.

Finally, defendant argues that his trial counsel was ineffective for failing to object to remarks made by the prosecutor during closing arguments. As discussed above, the remarks of the prosecutor did not deny defendant a fair and impartial trial. Because the remarks of the prosecutor did not deny defendant a fair and impartial trial, defendant cannot show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Poole,* 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Therefore, defendant failed to overcome the presumption that he received effective assistance of counsel at trial.

Affirmed.

/s/ Hilda R. Gage
/s/ Michael R. Smolenski
/s/ Brian K. Zahra