STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH FOSTER,

Defendant-Appellant.

UNPUBLISHED
March 24, 2000

No. 210276
Oakland Circuit Court
LC No. 94-134959-FH

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). Thereafter, defendant pleaded no contest to two counts of possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to six to twenty years' imprisonment on the possession with intent to deliver less than fifty grams of heroin conviction, one year in the county jail on the possession of marijuana conviction and fourteen months' to fifteen years' imprisonment on both possession of a firearm by a felon convictions. Defendant's sentences on the firearm convictions are to be served concurrently, but consecutive to the sentences on the narcotics charges. All sentences are to be served consecutively to an unrelated federal sentence being served by defendant at the time of these convictions. Defendant appeals as of right. We affirm.

On August 5, 1994, police officers went to a residence at 233 Elm in Pontiac to execute a search warrant. On prior occasions, two vehicles owned by defendant and registered at that address were seen parked in front of the house. On the date in question, only one of defendant's vehicles was present. The officers decided to wait for defendant's second vehicle to return. While they waited, they observed a man, later identified as Eddie Otis Williams, exit the house, stand on the porch and then reenter the house several times. Defendant eventually returned, but left soon after in a car with Williams. The police stopped the car a short distance from the house and detained both men. Williams was released after the police determined he lived in Detroit. Upon searching the residence at 223 Elm, the police found 3.754 grams of heroin, .24 grams of marijuana, several firearms and $1,160 cash. They

also found an electronic scale containing a white powder residue, drug packaging material and drug ledgers. Several bills and other items bearing defendant's name were found inside the house. No evidence was found suggesting anyone, aside from defendant, lived in the house.

The trial court granted defendant's pretrial motion to sever the information and to try the drug and weapon charges separately. Defendant's issues on appeal challenge only his convictions on the drug charges.

Defendant first argues that his convictions should be reversed due to a violation of the Interstate Agreement on Detainers (IAD), MCL 780.601; MSA 4.147(1). We disagree. Statutory interpretation and application is a question of law that is reviewed de novo on appeal. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The IAD is an agreement between the State of Michigan and other jurisdictions setting the procedure by which a prisoner convicted and imprisoned in one jurisdiction may be brought to trial on outstanding charges in another jurisdiction. As identified by Article I of the IAD, the purpose of the agreement is to avoid uncertainties that obstruct prisoner treatment programs and rehabilitation by encouraging the expeditious and orderly disposition of charges pending against prisoners. Article VIII provides that the IAD is to be liberally construed so as to effectuate its purposes. Article III in part provides:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

Article IV in part provides:

> (e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Here, defendant claims that the IAD was violated when he was removed from a federal prison in Milan, Michigan, where he was serving a prior conviction, brought to state court to face the present charges and returned to federal prison before the completion of his trial. However, there is no indication that a detainer was lodged against defendant so as to implicate the IAD.

"Detainer" is not specifically defined within the IAD, but "has generally been recognized to mean written notification filed with the institution in which a prisoner is serving a sentence advising that the prisoner is wanted to face pending charges in the notifying state." *People v Gallego*, 199 Mich App 566, 574; 502 NW2d 358 (1993); see also *People v McLemore*, 411 Mich 691, 692 n 2; 311 NW2d 720 (1981); *People v Wilden (On Rehearing)*, 197 Mich App 533, 537; 496 NW2d 801 (1992). The prosecution has, at all times, asserted that defendant was brought from federal prison to face the present charges by way of a writ of habeas corpus. Defendant has not disputed that claim. In *McLemore*, the Michigan Supreme Court held that a "writ of habeas corpus ad prosequendum" does not constitute a detainer within the meaning of the IAD. The Court stated:

> We conclude that the writ of habeas corpus ad prosequendum remains available as means for a state to seek temporary custody of an accused incarcerated in another jurisdiction. The decision by federal authorities to honor a writ in the absence of a detainer as a matter of comity does not trigger the provisions of the agreement. Since the prosecution in the instant case obtained temporary custody as a result of the writ and no detainer had been lodged against the defendant, the time provision for trial in Article IV(c) is inapplicable. [*McLemore*, *supra* at 694.]

Given that there is nothing to indicate a detainer was lodged against defendant in the present case, the IAD does not apply. *Gallego*, *supra* at 574; *Wilden*, *supra* at 538.[1] Moreover, there is no indication that defendant complied with the requirements of Article III by sending notice to the prosecution that he was in custody and wished to have the present charges finally disposed of, or that defendant's transfer out of federal prison interrupted any rehabilitation program.[2] Accordingly, defendant's transfer did not frustrate the purpose of the IAD.

Defendant argues next that he was denied a fair trial when the prosecution elicited testimony regarding the contents of a resume found during the search of the house and when it referenced the resume during its closing argument. Defendant failed to object to any alleged improper reference to the resume and, therefore, these arguments were not preserved for our review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Cooper*, 236 Mich App 643, 650; 601 NW2d 409 (1999). We refuse to review the unpreserved alleged instance of prosecutorial misconduct because a cautionary instruction could have cured any error resulting from the prosecution's statement regarding the resume and failure to review the issue would not result in a miscarriage of justice. *Stanaway*, *supra* at 687; *Cooper*, *supra* at 650.

Defendant's additional failure to object to the admission of the resume, or to testimony regarding its contents, requires that our review of his claim that such evidence was erroneously admitted is only for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). A copy of the resume bearing defendant's name and stating that defendant had 250 hours experience as

both a drug counselor and AA chairman was found inside a spiral notebook that the police believed to be a drug ledger. The ledger containing the resume was admitted into evidence at trial. Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Here, defendant did not have actual possession of the drugs. The resume, which tended to prove that he lived at the house subject to the raid and had constructive possession of the drugs found therein, was thus relevant to proving defendant committed the crimes.

Significant other evidence suggesting defendant lived in the house was also introduced, including bills, a video card, magazines and a credit card slip that all bore defendant's name and/or address at 223 Elm. Moreover, the significant quantity of heroin, the scale, packaging materials, ledgers and firearms all suggested defendant conducted a drug trafficking operation. Therefore, to the extent it was error to admit testimony regarding defendant's prior experience, which evidence did not tend to prove any element of the crimes charged, such error does not require reversal because substantial other evidence supports defendant's convictions and because the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Defendant's additional claim that the resume and testimony regarding its contents were inadmissible under MRE 404(a) is also meritless. Such evidence was not character evidence admitted to prove that defendant had a predisposition to commit the present crimes. Accordingly, admission of the resume and testimony regarding its contents did not cause manifest injustice. *Ramsdell, supra.*

To the extent defendant claims that his trial counsel's failure to preserve these arguments constituted ineffective assistance of counsel, defendant did not raise the issue of ineffective assistance below and we review the claim only insofar as alleged deficiencies in trial counsel's performance are apparent from the lower court record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997); *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, given the substantial evidence of defendant's guilt, there is no reasonable probability that, but for defendant's trial counsel's failure to lodge an objection to the admission of the resume or testimony regarding the resume, the result of the proceeding would have been different. *Stanaway, supra* at 687-688; *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Defendant's claim alleging ineffective assistance is accordingly without merit.

Defendant next contends that the trial court erred in denying his motion for mistrial, a motion based on the claim that his Fifth Amendment right against self-incrimination was violated when the prosecution elicited testimony indicating that defendant spoke with the police while he was in jail. We disagree. We review a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). An abuse of discretion occurs when denial of a motion has deprived the defendant of a fair and impartial trial. *People v Wolverton*, 227 Mich App

72, 75; 574 NW2d 703 (1997). In the present case, before trial the court granted defendant's motion to suppress a statement he gave to the police, ruling that the statement could only be used to impeach defendant if he chose to testify. At trial, during the prosecution's questioning of ATF Special Agent Jeff Maggard, the following exchange occurred:

> *Q.* All right. Now when - - based upon your experience as an officer, when somebody is a user, can - - a user of heroin, can you tell, physically?
>
> *A.* There - - if they don't get their - - their fix, there will be a reaction. We just had one up north where we arrested a user in possession of firearms with the heroin in his pocket. He had not had a chance to use it yet. And by the time we got him down to the jail they would not take him because he was having a reaction. And he had to be watched at a hospital all night until the next day when the jail would actually take him.
>
> *Q.* Now being the officer in this case, did you observe that Mr. Foster had any kind of reac - - this type of reaction?
>
> *A.* No, I did not. And I talked to Mr. Foster the next Tuesday at the jail and he seemed to be as calm as he is now.

Following this testimony, defendant moved for mistrial, claiming Agent Maggard's statement that he "talked to" defendant violated the pretrial order and defendant's Fifth Amendment right against self-incrimination. The trial court disagreed, noting that no specific dialogue between defendant and the officers was disclosed and ruling that the testimony did not deprive defendant a fair trial.

We conclude that the trial court's ruling was proper. Agent Maggard did not testify to any specific statement made by defendant and his mere statement that he "talked to" defendant did not cause jurors to infer that defendant refused to talk to the police or confessed to the crimes. Not every mention of an inappropriate subject warrants a mistrial. *Griffin, supra* at 36. It is apparent that when Agent Maggard volunteered the complained-of response the prosecution was merely seeking to elicit testimony regarding defendant's physical appearance in order to show that defendant was not, himself, a heroin user. The jury was instructed that defendant had the absolute right not to testify and that his decision not to testify must not affect the verdict. Under such circumstances, Agent Maggard's testimony did not deprive defendant a fair trial.

Defendant argues further that the trial court erred in denying his motion to suppress evidence regarding the search warrant and that the court erred in admitting testimony regarding the contents of the search warrant, hearsay statements of the police's informant and firearms that were found in the house. Defendant also claims that the trial court erroneously denied his request to compel the prosecution to produce the informant at trial for cross-examination. We disagree with each of defendant's arguments in regard to this issue.

We review a trial court's decision on a motion to suppress evidence on legal grounds for clear error. *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *Id.* We will not disturb a trial court's decision to admit evidence absent a clear abuse of discretion. *Starr*, *supra* at 494. An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). A trial court's decision on whether an informant must be produced to testify at trial is reviewed for an abuse of discretion. *People v Thomas*, 174 Mich App 411, 416; 436 NW2d 687 (1989). Here, the trial court properly denied defendant's pretrial motion to exclude all evidence referring to the search warrant. The fact that the police had a warrant to search the residence at 223 Elm was relevant to explaining how the police were allowed to enter the residence. Accordingly, the court's ruling presents no clear error. *McElhaney, supra*. Furthermore, contrary to defendant's claim on appeal, no testimony at trial referenced the contents of the search warrant or hearsay statements of an informant. At most, Redford Police Officer James Turner testified briefly as to the procedure for obtaining a warrant. He did not testify to anything he was told by an informant, but instead merely answered affirmatively the prosecution's question whether he started to investigate defendant after he received "some kind of information that led [him] to believe that [he] should start investigating a - - somebody named Joseph Foster at 223 Elm." Consequently, production of the informant at trial was not "essential to a fair determination of a cause," and the trial court acted within its discretion in denying defendant's request to have the informant produced. *Thomas, supra* at 416. Insofar as defendant argues that several firearms found inside the residence were erroneously admitted, this argument is likewise meritless. The firearms were relevant to prove defendant had the intent to distribute the drugs. It was reasonable to infer from the presence of guns in the vicinity of the drugs and packaging material that defendant possessed the guns to protect his drug operation.

Defendant next argues that the cumulative effect of several improper comments by the prosecution during its closing argument and its rebuttal to defendant's closing argument denied him a fair trial. We disagree. Defendant first claims that the following statement by the prosecution was improper because the resume had not been admitted into evidence:

> Good morning, ladies and gentlemen. You know, it's always disturbing when a member of our society decides to sell drugs to people. But it's even more disturbing when that member of society is actually a drug counselor. The Defendant in this case had that position. He had that position of trust and authority - -

The resume was admitted as part of one of the ledgers that was seized from the house. Therefore, the prosecution's complained-of reference to the resume was not, itself, improper. Defendant also claims that the prosecution improperly referenced the contents of the search warrant during its explanation of why a key to the house was not seized. During its rebuttal to defendant's closing argument, the prosecution stated, in part:

> Let me talk to you about a point that the Defense attorney just brought up about the key. Let me tell you, when you execute a search warrant, there are certain things

> that you can confiscate and certain things that you can't, and the officers told you about that.
>
> The search warrant specifically, the order that the judge signs, tells you what you take. And it says you can take drugs, evidence of drug trafficking, which is all this stuff, and proofs of residency.

Those statements were a proper response to defendant's argument that the police's failure to recover a key to the house indicated they did not conduct a proper investigation. See *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Such statements did not deny defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Defendant failed to object to the prosecution's statements that defense counsel's argument involved "red herrings" and "smoke screens" and did not object to an alleged civic duty argument by the prosecution that referenced the police's action of taking a "drug dealer out of the community." Those unpreserved instances of alleged misconduct could have been cured by cautionary instructions below and failure to review the issues would not result in manifest injustice. Thus, we decline any further review. *Stanaway*, *supra* at 687; *Cooper*, *supra* at 650.

Defendant also contends that the trial court erred in failing to completely instruct the jury regarding constructive possession. We disagree. We review jury instructions 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 to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Here, the trial court gave adequate instructions regarding possession. The jury was apprised of the difference between actual and constructive possession. The trial court also distinguished between sole and joint possession. Overall, the instructions clearly apprised the jury that it must find that defendant controlled or had a right to control the contraband in order to find him guilty of the charges. A jury is generally presumed to have followed the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant claims that the jury should additionally have been instructed that a person's presence in the vicinity where drugs are found is, by itself, insufficient to prove construction possession. The evidence indicates defendant was not present where the drugs were found, but instead was arrested after he and Williams left the house in a car. Therefore, such an instruction was not pertinent to the present case and it was not necessary to include such an instruction.

Finally, defendant argues that there was insufficient evidence to support his conviction for possession of a controlled substance with intent to deliver. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Griffin*, *supra* at 31. To prove possession with intent to deliver less than fifty grams of a controlled substance, the prosecution must show that: (1) the substance in the defendant's control was a controlled substance; (2) the amount of the substance found weighed less than fifty grams; (3) the defendant's possession of the substance was unauthorized; (4) the defendant knowingly possessed the substance with an intent to deliver. See *People v Wolfe*, 440 Mich

508, 516-517; 489 NW2d 748 (1992). In the present case, defendant challenges the sufficiency of the evidence only with respect to the final element. That final element involves two components, possession and intent. *Id*. at 519. Physical possession is not required to find an individual guilty of possessing a controlled substance. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). "Possession may be either actual or constructive, and may be joint as well as exclusive." *Id*. A defendant may be said to have constructive possession of contraband when the totality of the circumstances indicate a sufficient nexus between the defendant and the contraband. *Wolfe, supra* at 521. "The essential question is whether the defendant had dominion or control over the controlled substance." *Fetterley, supra* at 515. It is not necessary that an individual own the premises where narcotics are found, or that he be the actual owner of the recovered substance. see *Wolfe, supra* at 520-524. Possession with intent to deliver may be proved by circumstantial evidence and inferences arising therefrom. *Id*. at 526; *Fetterley, supra* at 515.

Here, Officer Turner's testimony suggested two vehicles owned by defendant were registered at 223 Elm, Pontiac, and were the only vehicles seen at the house on a regular basis. The several pieces of evidence bearing defendant's name that were found inside the house suggested the seized items belonged to defendant. In particular, the bills addressed to defendant at 223 Elm, as well as the video card found inside the first-floor bedroom, suggested defendant lived in the house. Magazines bearing defendant's name and address and a credit card slip made out to defendant at 223 Elm were found inside a black, leather bag that contained the eleven packets of heroin. Such evidence suggested defendant exercised dominion and control over that heroin. The resume found inside one of the ledgers also provided evidence of defendant's ownership. The several items bearing defendant's name also suggested that he possessed the additional quantity of heroin in a yellow coin envelope, marijuana that was found in two shoe boxes and the gun found under a bed in the first-floor bedroom. Aside from testimony regarding Williams' presence at the house on the day of the raid, there was no evidence suggesting anyone other than defendant lived in the house or owned the items found inside.

Actual delivery of narcotics is not required to prove intent to deliver. *Wolfe, supra* at 524. Intent to deliver may be inferred from the quantity of drugs the defendant possesses, the packaging of the narcotics and other circumstances surrounding the arrest. *Id*. In the present case, officers testified that the quantity of heroin found suggested it was part of a drug trafficking operation as opposed to being kept for personal use. The seizure of items such as ledgers documenting drug sales, a scale, a bottle of lactose, bags, gloves and magazines used for packaging, significant amounts of money and guns suggested defendant intended to sell the heroin. The packaging of part of the heroin into eleven separate packets was also evidence of an intent to deliver. The police did not find paraphernalia that would suggest the occupant of the house possessed the heroin for personal use.

Defendant's claim that Williams' presence at the house prior to the raid precludes a finding that defendant possessed the drugs is meritless. "[T]he prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence is presented." *Fetterley, supra* at 517. Despite Williams' alleged involvement, the aforementioned evidence, viewed in light most favorable to the prosecution, allowed for the reasonable inference that defendant exerted dominion and control

over the items found inside the house and intended to deliver the heroin that was seized. Therefore, there was sufficient evidence to find that defendant committed the charged crimes.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ E. Thomas Fitzgerald

[1] The fact that it is not clear that the writ in the present case was specifically termed "ad prosequendum" does not alter that conclusion. See *Wilden, supra* at 538.

[2] Defendant has not disputed the prosecution's claims that defendant had not yet begun any rehabilitative program in the Milan facility and that he would only enter such programs following his pending transfer to a federal facility in Pennsylvania.