STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2001
v	No. 223963 Muskegon Circuit Court
CLARENCE DALE GREEN, Defendant-Appellant.	LC No. 98-042792-FH

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

Defendant Clarence Green appeals as of right from his jury trial conviction for possession with intent to deliver less than five kilograms of marijuana.[1] The trial court sentenced Green to serve six to thirteen years in prison. We affirm.

I. Basic Facts And Procedural History

Muskegon police secured a warrant to search Green's home in early 1998. Inside the house, Officer Mike Wasilewski primarily focused on searching a bedroom on the southwest side of Green's home, where he found a black duffel bag on the floor of the room, which had been zipped shut. Inside the black duffel bag was a plastic bag containing approximately four ounces of a green, leafy material that was later confirmed to be marijuana. Officer Wasilewski also found a denim duffel bag in the same bedroom. Inside that bag were three individual bags of marijuana. Aggregated, the total weight of the marijuana was approximately 2½ pounds. Officer Wasilewski found a third bag, a white plastic bag, containing four individual bags of marijuana between the bed and the closet in the southwest bedroom. Respectively, three of these four bags of marijuana weighed 4.8 ounces, 1.1 ounces, and 4.3 ounces. Officer Wasilewski also found a variety of similar and related items in the southwest bedroom, including a triple beam scale, two burned marijuana cigarettes, a marijuana leaf, a box of plastic sandwich bags, a number of marijuana stems, marijuana seeds, additional plastic bags, shrink wrap plastic and gallon-sized plastic bags with marijuana residue, rolling paper, and $6,260. In a bedroom at the northwest

[1] MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii).

side of the house, Officer Wasilewski also found a container with marijuana residue, seeds, and burned rolling papers.

At trial, as proof that Green possessed the marijuana the police seized, the prosecutor introduced evidence that his name was on the warranty deed to the house and that the police found an insurance bill bearing his name in the southwest bedroom. Additionally, Officer Wasilewski testified that he saw both men's and women's clothing in the southwest bedroom. The police did not, however, identify any fingerprint or DNA evidence that tied Green to the marijuana. Nor was there any eyewitness testimony connecting to Green to the marijuana in either bedroom. A witness, Tonya Maskell, testified, over defense objection, that she had seen Green smoking marijuana in his home two weeks before the search in this case. However, another witness, Carol Richards, asserted that Green's wife, Karon Green, smoked marijuana, that Green did not smoke marijuana, and that he did not use the bedrooms where the police found the marijuana.

On appeal, the Green challenges the sufficiency of the evidence, two evidentiary rulings the trial court made, and the instructions that the trial court issued to the jury. Because these last three issues depend on somewhat lengthy but discrete sets of facts, we outline them below in the discussion of each issue, where they are more relevant.

II. Sufficiency Of The Evidence

A. Standard Of Review

Green first contends that the evidence was insufficient for the jury to convict him of possessing marijuana because there was no proof that the marijuana found in the house belonged to him. His argument implicates his constitutional rights to due process of law.[2] Thus, review is de novo for this constitutional issue.[3]

B. Legal Standard

Though we apply review de novo to this issue, our analysis is nevertheless constrained by the legal standard we apply. "In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt."[4] To paraphrase the Supreme Court in *People v Wolfe*,[5] the prosecutor proves the essential elements of possession of less than five kilograms of marijuana with the intent to deliver by demonstrating that (1) the substance the police recovered was marijuana, (2) the marijuana weighed less than five kilograms, (3) the defendant was not authorized to possess the

[2] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); see also US Const, Am XIV; Const 1963, art 1, § 17.

[3] *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

[4] *People v Randolph*, 242 Mich App 417, 419; 619 NW2d 168 (2000).

[5] *Wolfe, supra* at 516-517.

marijuana, and (4) the defendant knowingly possessed the marijuana with the intent to deliver it.[6] Green only challenges the evidence of this fourth essential element.

C. Evidence Of Possession

Recently, in *People v Griffin*,[7] this Court described what constitutes possession:

> Possession may be actual or constructive. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). One need not have actually owned the prohibited substance to have possessed it, and one may possess the substance jointly with one or more others. *Wolfe, supra* at 520. However, "a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *Id.* ""[M]ere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession."" *United States v Disla*, 805 F2d 1340, 1351 (CA 9, 1986), quoting *Murray v United States*, 403 F2d 694, 696 (CA 9, 1968), quoting *Arellanes v United States*, 302 F2d 603, 606 (CA 9, 1962).

The prosecutor in this case proceeded under the theory that Green constructively possessed the marijuana. Thus, the prosecutor had to prove that "the totality of the circumstances indicate[d] a sufficient nexus between the defendant and the contraband."[8]

There is no question from the evidence presented to the jury that there were significant activities involving marijuana occurring in the house where the police found the marijuana seized in this case. The scales, various plastic bags used for packaging, and the cash all suggest that the individuals who possessed this marijuana did not merely intend to use it, but rather intended to deliver it. That Green owned this house and that he was present at the time of the search indicates that he had the sort of unfettered access to the drugs consistent with constructive possession. Because the marijuana and related paraphernalia was so voluminous and obvious in the house, including in a bedroom Green evidently shared with his wife, the jury could reasonably infer that he was aware of these drug activities.

The clothing in the bedroom where the police found the bulk of the marijuana belonged to both a man and a woman. A bill in the bedroom was also addressed to Green and his wife. As a result, the evidence may not have been sufficient to rule out a conclusion that Karon Green *also* constructively possessed the marijuana in the southwest bedroom by exercising dominion and control over it.[9] However, this evidence was sufficient to connect Green to the southwest

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[6] See MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii).

[7] *People v Griffin*, 235 Mich App 27, 34-35; 597 NW2d 176 (1999)

[8] *Wolfe, supra* at 521.

[9] *Konrad, supra*.

bedroom and the marijuana in it. While the evidence of Green's connection to this marijuana is circumstantial, it is sufficient when viewed in the light most favorable to the prosecutor.

III. Karon Green's Inculpatory Statement

A. Facts

At the outset of trial, defense counsel informed the trial court that Karon Green intended to assert her Fifth Amendment right not to testify if she were called as a witness. Consequently, defense counsel moved to admit at trial a statement that she made at her home to police following the search pursuant to MRE 804(b)(3), an exception to the rule making hearsay inadmissible.[10] MRE 804(b)(3), known as the statement against interest rule, makes a statement admissible if it

> was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Defense counsel argued that Karon Green's statement was against her penal interest because, in it, she admitted that she smokes marijuana, that she had a device used to smoke marijuana in her room, which was in the southwest corner of the house, and that the marijuana in the denim and black duffel bags was hers. She also reportedly conceded that she owned the triple beam scale the police found in the southwest bedroom, that she had grown marijuana in the past, and that the seeds in the bedroom were from plants she had grown. However, she denied selling the marijuana.

The trial court analyzed the statement under the standards set out in *People v Barrera*[11] and *People v Poole*,[12] reasoning:

> Considering the admission factors, the most I can say about the statement being voluntarily given is maybe. It – it appears here today that it's not been challenged today that Ms. Green was Mirandized. She knew the officers were there. So in that respect there wasn't duress. But on the other hand, when the Court evaluates the trustworthiness of the statements, one can't but help consider the fact that Ms. Green would probably not – would prefer not to be talking to police officers that day, and so likely the statement could not be considered voluntary in that context. So the highest the Court could assign there is maybe.

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[10] MRE 802.

[11] *People v* Barrera, 451 Mich 261; 547 NW2d 280 (1996).

[12] *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993).

> Number two, is it made contemporaneously with the evidence referenced? Again, maybe. It's not made contemporaneously with drug activity. It is made contemporaneously with the raid.
>
> But number three, is it made to family, friend, colleagues? No, it's not.
>
> Is it uttered spontaneously at the initiation of the declarant without prompting? No, it's not. So those two factors clearly favor inadmissibility. Considering the other factors favoring inadmissibility: was it made to law enforcement officers? Yes.
>
> Did it minimize the role or responsibility of the declarant or shift blame to the accomplices? Yes. I used but I don't sell. I don't know who has the white bag.
>
> Number three, is it made to avenge the declarant or to curry favor? That I think is a closer call and – and I would say that perhaps favors admissibility, that statement.
>
> And finally, does declarant have a motive to lie or distort the truth? Yes. She's been married to [defendant] for apparently some time. She would in my view know about the criminal history having been married for that length of time. And even if her motive for helping her husband is pure in the sense that she's trying to take the fall for him, it clearly provides a motive for one to distort the truth.
>
> So the Poole factors favor in-admission [sic] of the statement.

The trial court concluded that Karon Green's statement "simply lacks the reliability that we expect under Michigan Rule of Evidence 804. And for these reason – for that reason, the statement should be considered inadmissible."

B. Standard Of Review

Green argues that the trial court erred when it denied his motion to admit his wife's statement to police into evidence because the statement was trustworthy, contrary to the trial court's determination. We review the trial court's findings of fact on this issue for clear error and its ultimate decision to exclude the evidence for an abuse of its discretion.[13]

C. MRE 804(b)(3) And Trustworthiness

In *Barrera*, the Michigan Supreme Court outlined the four issues that are generally disputed in a motion to admit a statement against penal interest under MRE 804(b)(3):

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[13] *Barrera*, *supra* at 269.

> (1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement.[14]

The trial court excluded Karon Green's statement because it concluded that the statement was not trustworthy.[15] Consequently, only this last issue identified in *Barrera*, trustworthiness, is pertinent here.

When a statement against a declarant's interest is offered to inculpate the declarant while excusing the defendant from criminal liability MRE 804(b)(3) requires that "corroborating circumstances clearly indicate the trustworthiness of the statement." This rule "requires the trial court to consider the contents of the statement itself, the circumstances surrounding the declarant making the statement, and all other relevant facts in the case."[16] If, as in this case, the declarant was in police custody at the time she made the statement, the trial court should also consider three corroborating factors: whether the relationship between the declarant and the defendant, whether the statement was made voluntarily after the declarant was advised of her *Miranda*[17] rights, and whether the statement was made to gain an advantage with the authorities.[18] At the same time, the court should balance those circumstances with

> the defendant's constitutional right to present exculpatory evidence in his defense and the rationale and purpose underlying MRE 804(b)(3) of ensuring the admission of reliable evidence must reach a balance. We believe they may be viewed as having an inverse relationship: the more crucial the statement is to the defendant's theory of defense, the less corroboration a court may constitutionally require for its admission. In contrast, the more remote or tangential a statement is to the defense theory, the more likely other factors can be interjected to weigh against admission of the statement.[19]

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[14] *Id*. at 268

[15] On appeal, Green contends in part that the trial court erroneously concluded that the statement was not against Karon Green's penal interest because her assertion that she did not sell marijuana tended to minimize her criminal responsibility. However, read closely, the trial court's findings on the record indicate that it concluded that the statement passed the initial "against penal interest" threshold, but that the "mixed" inculpatory and exculpatory assertions in the statement made it untrustworthy. Thus, it is not necessary for us to focus on whether the statement was against her penal interest.

[16] *Barrera*, *supra* at 275-276.

[17] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[18] *Barrera*, *supra* at 275.

[19] *Id*. at 279 (citations omitted).

Ultimately, "the constitutional background of this balancing test must be of foremost consideration" and, because no bright-line rule exists to resolve admissibility, each case must be determined based on its facts.[20]

In ruling on the motion to admit Karon Green's statement, the trial court's reasoning closely tracked the analysis used in *Poole,* rather than the multiple factors identified in *Barrera*. Nevertheless, the factors in *Poole* not only serve as the foundation for *Barrera's* discussion of the appropriate factors to determine trustworthiness, *Poole* and *Barrera* essentially examine the same substantive matters to determine admissibility.[21] Thus, as a preliminary matter, that the trial court's reasoning followed the structure in *Poole* does not indicate error.

As for Green's argument that the trial court erroneously concluded that Karon Green's statement was involuntary because it was likely that she "would prefer not to be talking to police officers," we disagree. The trial court explicitly concluded that the statement was voluntary under Fifth Amendment law because the police had advised her of her rights. Only when the trial court examined whether the circumstances of statement for the purposes of the trustworthiness analysis did it conclude that the statement was not "voluntary." While, perhaps, the trial court did not make a precise choice of words, the context in which the trial court used this word indicates that it meant that, while legally voluntary, the statement was not spontaneous and Karon Green was likely a somewhat reluctant declarant. In other words, absent the productive police search, there was little likelihood that Karon Green ever would have approached the police to inform them that she had, at minimum, possessed and manufactured marijuana. The record and common sense support the trial court's findings on this factor.

Green challenges the trial court's determination that Karon Green did not make the statement contemporaneously with the crime. The trial court implicitly found that the possession crime had ended at the time Karon Green made the statement to the police, evidently because the marijuana was already in police custody either because they had seized it or because the police had entered the house and controlled access to the marijuana. We do not see any clear error in this finding because the record supports it. To the extent that "contemporaneously" might be considered a flexible concept, allowing statements made some time after a crime to be admitted in evidence, we do not see error requiring reversal in the trial court's determination that this statement was not necessarily made contemporaneously with the crime. The trial court's comments indicate that this factor, under the circumstances as a whole, made little difference in it decision to exclude the statement.

Green contends that the trial court erred in giving weight to its finding that Karon Green made the statement to the police rather than family or friends. We disagree. First, as a factual matter, there is no dispute whatsoever that she made the statement to the police. Second, and more importantly, that she made the statement to the police at their questioning implicates the spontaneity of the statement and her motive for making it, including any reason she had to lie. These factors may indicate that the statement was not trustworthy. In contrast, a statement

[20] *Id*. at 280.

[21] *Id*. at 275.

against penal interest made to family friends may be substantially more trustworthy because the declarant would be comfortable with her audience, she would not necessarily have a motivation to lie or fear legal consequences, and her statement would be more likely to be spontaneous.

Although not clear from his brief on appeal, Green may also contend that the trial court erroneously concluded that Karon Green made the statement to curry favor with the police. In actuality, the trial court concluded that it was difficult to make a finding on this factor, but that it was inclined to conclude that this factor favored *admitting* the evidence, the result Green desired. Thus, if there was error, it was harmless. Moreover, Green does not take into consideration the trial court's finding that Karon Green had a motive to lie to protect him. Overall, the trial court appeared to give this factor the most weight, as would we had we been put in the trial court's place.

Green also argues that this ruling deprived him of the opportunity to present his defense that all the marijuana in the house belonged to his wife, who took complete responsibility for it in her statement to the police. We disagree. Even though Karon Green admitted to owning the marijuana in the denim and black duffle bags the police found, she denied knowing who owned or otherwise possessed the marijuana the police found in the plastic white plastic bag in the southwest bedroom. Thus, even if the trial court had admitted her statement at trial, it would not have provided Green with a complete defense. Accordingly, in light of the trial court's proper factual findings that revealed the basic untrustworthy character of this statement and the lesser role this statement would have played a trial, we hold that the trial court did not abuse its discretion when it excluded the statement.

IV. Prior Bad Acts Testimony

A. Facts

Before trial the prosecutor gave notice that he intended to call Tonya Maskell to testify that she had seen Green smoking marijuana in his home before the police search. Green objected that Maskell's testimony would be inadmissible under MRE 404(b). The trial court, however, ruled:

> [A]s the Court examines People v VanderVliet and its progeny, certainly the 404(b) question is not an easy one, but under these circumstances if in fact [defendant] is denying that the marijuana is his; if he's denying that it's in the home, evidence that he's smoking it could go toward negating this defense of mistake, accident, if you will, knowledge, even intent.
>
> The Court's read the voluminous pleadings that [defendant] has submitted and the Court notes that in the motion to suppress he makes quite an issue of the fact that something – simply because something is a green leafy substance, doesn't prove that it's marijuana. This 404(b) evidence would certainly go to show that.
>
> So the Court finds that it's properly, as it's described to me now, admissible. The Court also finds that the timing, being within a couple weeks, is sufficient to make it admissible. Whether in fact the jury is persuaded by that,

> [defendant], is a question for it to decide. But I find that the evidence satisfies 404(b). I will allow it. The objections are respectfully overruled.

As a result of this ruling, the prosecutor called Maskell to testify at trial. She described what she had seen inside Green's home on one occasion, stating, "[Green] was sitting at the table with two other gentleman [sic]: a younger kid and an older gentleman. Karon was standing in the kitchen. [Green] turned around and looked at me. He had a joint in his mouth."

B. Standard Of Review

Green contends that the trial court committed error requiring reversal when it allowed Maskell to testify that she had seen him smoking a marijuana cigarette two weeks before the search warrant was executed at his home. Whether prior bad acts evidence is admissible is entrusted to the trial court's discretion, warranting review for an abuse of that discretion on appeal.[22]

C. Improper Purpose

MRE 404(b)(1) governs a trial court's decision to admit or exclude prior bad acts evidence, providing:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The majority in *People v VanderVliet*,[23] set out a four-legged test for a court to follow when determining whether to admit prior bad acts evidence at trial. Prior bad acts evidence is admissible if: (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered, defendant in this case.[24] A fourth factor articulated in *VanderVliet*, which does not fully conform to the idea of a test expressed in the preceding three factors, suggests that a party may request a limiting instruction under MRE 105 if the trial court decides to admit the challenged evidence.[25] The Michigan Supreme Court revisited MRE 404(b) recently in *People v*

[22] *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

[23] *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

[24] *Id*. at 74-75.

[25] *Id*. at 75.

Sabin (After Remand),[26] emphasizing not only that *VanderVliet* continues to state the law accurately,[27] but that MRE 404(b) is a rule of inclusion and courts should adopt a flexible approach when ruling on the admissibility of prior bad acts evidence.[28]

Green maintains that Maskell's testimony that she saw him smoking marijuana at home two weeks before the police search was not admissible because it was irrelevant to proving that he constructively possessed the marijuana the police found. As the Supreme Court recognized in both *VanderVliet*[29] and *Sabin (After Remand)*,[30] relevance is the critical threshold issue in determining admissibility under MRE 404(b). "'Relevant evidence' means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[31] The grounds for relevance listed in MRE 404(b) often form the basis for passing this leg of the *VanderVliet* test. Yet admission is not automatic, simply because a prosecutor claims that the evidence is admissible under one of these grounds articulated in the court rule.[32] "The trial court must still determine whether the evidence, under a proper theory, has a tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence.[33]

In this case, the prosecutor argued that the evidence was intended to disprove the defense theories that Green was unaware of the drug activities in his home and that he never participated in the drug activities. This testimony, which indicated that Green smoked marijuana in his kitchen two weeks before the police seized the marijuana from his house, plays almost no role in proving that he was connected to *the* marijuana the police found. While the evidence may have shown that Green was a drug user, it does not permit an inference that he had knowledge or possession of the marijuana found in his home two weeks later. The prosecutor's closing argument suggests that he used this as propensity evidence. Specifically, the prosecutor argued to the jury:

> [Y]ou're going to have to ask yourself: did the Defendant possess this marijuana with intent to deliver the marijuana? Again, I would submit to you [the jury] that

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[26] *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000).

[27] *Id*. at 55-56, 58.

[28] *Id*. at 56-59.

[29] *VanderVliet*, *supra* at 74.

[30] *Sabin (After Remand)*, *supra* at 56-57.

[31] MRE 401 (emphasis added).

[32] *Crawford*, *supra* at 386 ("Mechanical recitation of 'knowledge, intent, absence of mistake, etc.,' without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else.").

[33] *Sabin (After Remand)*, *supra* at 60, citing *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998).

> the evidence *shows that the Defendant is a marijuana user, that he did use marijuana*. [Emphasis added.]

The prosecutor then proceeded to argue that it is common for people to supply their own habits by selling marijuana. The prosecutor never tied this argument to the evidence introduced at trial to show that, for example, Green was selling the marijuana the police found in his home to support his habit. This argument implied that, as a marijuana user, Green had to be guilty of the crime charged. While, at places in the closing argument, the prosecutor contended that Green's drug use was evidence of his intent, he did not originally claim that Maskell's testimony was relevant to intent to distribute.

If, for instance, Maskell had testified that she saw Green retrieve the marijuana she saw him smoking from the bedroom, we would be more inclined to see the relevance of this evidence. Such testimony would connect him to the place where the police found the marijuana, establishing that he knew marijuana was in his home and that he possessed it because exercised sufficient dominion and control over the stash that he felt entitled to take from it. However, her testimony did not provide this or any similar link between Green and the marijuana in the bedrooms. Further, while Maskell saw Green smoking marijuana while sitting with other people, she also testified that she did not see any indication that they were transacting business, much less that Green was selling marijuana to these other people. The packaging materials and scale in the southwest bedroom, not Maskell's testimony, were probative of the intent to deliver in this case. Overall, we do not see how this evidence was relevant to proving that Green had dominion and control over the marijuana the police seized, the critical issue in dispute in this case, or – for that matter – any other theory. Frankly, we are at a loss to understand why, given the overall strength of the case against Green, the prosecutor introduced this evidence at all.

D. Harmless Error

Nevertheless, preserved nonconstitutional error merits reversal of a criminal conviction only if, "'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative."[34] There is no question that the amount of marijuana that the police found, when considered with the packaging materials and scale, indicated that the marijuana was not for personal use. Rather, it was to be sold or distributed, that is, to be delivered. The bill and the men's clothing tied Green to the room where the police found the marijuana. Maskell's brief testimony did not, and could not, overshadow this other proper evidence. Thus, the error was harmless.

V. Aiding And Abetting Instruction

A. Facts

Following closing arguments, the trial court, without the jury present, discussed the instructions it intended to issue with the attorneys. The prosecutor requested that the trial court

[34] *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26; MSA 28.1096.

give an aiding and abetting instruction under CJI 2d 8.1. Though defense counsel objected to this instruction, the trial court agreed to give the instruction, but did not explain its reasoning.

The trial court actually instructed the jury on the law of aiding and abetting twice, once before the jury retired to deliberate and the second time in response to a note the jury sent to the trial court while it was deliberating. Both times, the trial court explained the requirements for convicting a defendant of aiding and abetting a crime by reading directly from CJI 2d 8.1.

B. Standard Of Review

Green does not challenge the instructions as legally incorrect. Rather, he contends that the trial court erred in issuing this instruction because the evidence adduced at trial did not support an aiding or abetting theory. Because "a trial court is required to give requested instructions only if the instructions are supported by the evidence or the facts of the case," we review the trial court's decision that "a jury instruction is applicable to the facts of the case" for an abuse of discretion."[35]

C. The Propriety Of The Instruction

In this case, the prosecutor never specifically informed the jury how he believed the evidence demonstrated aiding and abetting. Because the trial court did not explain its reasoning for issuing the instruction, we have no better insight into why the evidence supported this instruction. Nevertheless, the prosecutor contends that, as in *People v Head*,[36] Green aided and abetted the person who possessed the marijuana by providing that person with a "virtual warehouse" for the drugs.[37] In *Head*, the defendant was convicted of possession with intent to deliver cocaine and possession of marijuana. The evidence at trial showed that when the police entered the defendant's home, they found him in a bedroom with male clothes. The drugs, which were in plain view, were near the defendant's wallet.[38] Nevertheless, the defendant claimed that the drugs belonged to his girlfriend or someone else.[39] The prosecutor asked the trial court to issue the aiding and abetting instruction on the theory that the defendant aided or abetted the drugs' real owner by providing a place to keep the drugs.[40] On appeal, this Court stated that

> [a]n aiding and abetting instruction is proper where there is evidence that (1) more than one person was involved in the commission of a crime, and (2) the

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[35] *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

[36] *People v Head*, 211 Mich App 205; 535 NW2d 563 (1995).

[37] *Id*. at 208.

[38] *Id*. at 210.

[39] *Id*.

[40] *Id*. at 211.

> defendant's role in the crime may have been less than direct participation in the wrongdoing.[41]

Reviewing the evidence, this Court agreed that the aiding and abetting instruction was proper because the evidence supported it.[42]

The two factors described in *Head* apply here. The evidence shows that, if not Green, someone in his home was distributing marijuana. This other person was likely his wife, given that the police found the marijuana in plain view in a bedroom Green evidently shared with her. Green plainly aided this by providing this person with a place to process the marijuana for distribution. Even if the trial court did not analyze this issue properly, we will not disturb the jury's verdict because this was the correct result.[43]

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper

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[41] *Id*.

[42] *Id*. at 211-212.

[43] *People v Chavies*, 234 Mich App 274, 284; 593 NW2d 655 (1999).