STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 272310 Oakland Circuit Court
DANIEL CARDENAS, Defendant-Appellant.	LC No. 2006-207256-FH

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of conspiracy to deliver 45 or more kilograms of marijuana, MCL 750.157a and MCL 333.7403(2)(d), possession with intent to deliver 45 or more kilograms of marijuana, MCL 333.7403(2)(d), malicious destruction of police property, MCL 750.377b, and operating a vehicle without a valid driver's license, MCL 257.301. We affirm.

I. Basic Facts

Defendant's convictions arise from his participation with codefendant Jesse Duran and others in trafficking marijuana from Texas to Michigan. As a result of information received, the Oakland-Macomb Interdiction Team (OMIT) set up surveillance at a hotel in Southfield on December 8, 2005. In the hotel parking lot was a silver Honda with a Texas license plate, a red SUV with a Texas license plate, and a U-Haul truck that had been rented in Texas by codefendant Duran. At one point, codefendant Duran and his girlfriend left hotel room 119, got into the silver Honda, and left. Thereafter, other individuals came out of room 119, got into the red SUV, and left. A drug-sniffing canine alerted the police of drugs in the area of the rear door of the U-Haul. Subsequently, codefendant Duran and his girlfriend returned and reentered room 119.

Later that evening, a Hummer drove into the parking lot with its lights off. It slowly circled near the U-Haul, stopped by the U-Haul, and left the lot. About 30 minutes later, the Hummer returned, passed by the U-Haul, left the parking lot, and parked at an adjacent hotel. Occupants of the Hummer pointed toward the U-Haul. After about 15 minutes, the Hummer returned, and defendant got out of the rear passenger seat and went toward the U-Haul. Codefendant Duran came out of the hotel room and conversed with defendant before returning to the hotel room. It did not appear to the OMIT members that codefendant Duran gave defendant

any keys. Defendant got into the U-Haul truck and drove it out of the lot. The Hummer closely followed the U-Haul as it traveled down I-696. Eventually, the Hummer pulled adjacent with the U-Haul, and the occupants of the Hummer beckoned toward the next exit.

After the vehicles exited the interstate and drove into a residential area, the police stopped both vehicles for traffic violations. Defendant, who did not have a valid driver's license, claimed that he was paid $500 to drive the U-Haul, but did not know the renter of the U-Haul or the U-Haul's contents.[1] The drug-sniffing canine again alerted for the presence of drugs in the U-Haul. The police found a key to a padlock on the U-Haul's back door on the same key chain with the key for the ignition. Inside the U-Haul, the police found household materials, children's toys, and a large mattress covering some boxes. Inside the boxes, the police found 197 pounds of marijuana packaged in large bricks.

In the meantime, the three occupants of the Hummer had been placed in a patrol car. The driver of the Hummer was Borche Todorovski. The two passengers, Jose Gonzalez and Hipolito Gonzalez, were from Texas. Inside the Hummer were several non-traceable prepaid phones, and Hipolito possessed a tally sheet. An officer testified that as the police were talking to defendant, the patrol car's videotape captured Hipolito making statements. The jury listened to the videotape to discern what Hipolito was stating. Hipolito purportedly stated, "[Defendant] is talking to them. No, he's too smart to say anything." Hipolito later stated, "[defendant] said something to them." He then stated, "They are trying to open it . . . [defendant] is a smart mother-f**ker. He's not going to give permission to search it."

After being placed in a separate patrol car, defendant summoned a detective and stated that he wanted to give a statement. He also asked for a cigarette, which the police gave him. While an officer was walking over to take defendant's statement, defendant yelled that he was paid to drive the U-Haul and was unaware of the U-Haul's contents. Defendant also complained about being claustrophobic and requested his inhaler, which the police could not locate. When defendant asked for a second cigarette, the officer denied the request because defendant had asked for an inhaler. An officer noted that defendant did not complain of any breathing problems and did not appear to be in any distress. Subsequently, defendant yelled, "Let me go!" He then kicked out the window of the patrol car.[2]

After the traffic stop, the police returned to the hotel and spoke with codefendant Duran. Codefendant Duran stated that individuals in Texas loaded the marijuana and other items into the U-Haul, and he loaded his silver Honda in the U-Haul's car carrier and drove the U-Haul to Toledo to deliver the marijuana, but was redirected to Southfield. Once in Southfield, codefendant Duran was directed to the hotel where he parked the U-Haul and gave the key to a man named "Joe." Codefendant Duran claimed that he later saw a "white guy" whom he did not know walk up to the SUV. He explained that the marijuana had been purchased for $160 a

[1] According to the police testimony, defendant became very nervous and asked for a cigarette when asked about the contents of the U-Haul.

[2] A videotape of defendant kicking out the window was played for the jury.

pound, they were going to sell it for $1,600 a pound, and he was to be paid $8,000 on December 9, 2005.

At trial, codefendant Duran testified that he was a tattoo artist in Texas, was acquainted with an individual named Joe, and agreed to help Joe move his furniture from Texas to Michigan because Joe did not have a driver's license. Codefendant Duran rented the U-Haul in Texas with money that Joe provided. Defendant loaded his silver Honda, and followed Joe's cousin Jose Garcia, who was driving a red SUV, to Toledo and then to Michigan. Once in Southfield, Garcia paid for two hotel rooms and codefendant Duran gave the key to the U-Haul to Joe. A white male, who was not defendant, later arrived for the U-Haul. Codefendant Duran denied having any knowledge that marijuana was in the U-Haul, that he was present when the U-Haul was packed, and denied knowing any of the other charged coconspirators.

II. Drug Profile Evidence

Defendant argues that he was denied a fair trial when the trial court allowed impermissible drug profile evidence through a police officer with no demarcation between the officer's testimony regarding his observations and his testimony regarding his prior experience in the field of narcotics. Defendant contends that after being qualified as an expert in narcotics trafficking, Sergeant Mekoski was allowed to testify as an expert regarding the typical drug dealer profile, but this testimony was inextricably intertwined with direct references to defendant, the circumstances of defendant's arrest, and the items recovered from the U-Haul. Defendant thus contends that because the drug profile and the facts of defendant's case were presented to the jury contemporaneously, without any cautionary instruction regarding the witness' dual role as a fact and expert witness, the jury likely used Sergeant Mekoski's "expert" testimony as substantive evidence to find defendant guilty. Defendant therefore argues that he is entitled to a new trial. We disagree.

Because defendant did not object to this evidence at trial, we review this unpreserved claim for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

"Drug profile evidence has been described as an 'informal compilation of characteristics often displayed by those trafficking drugs.'" *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). "[D]rug profile evidence is not admissible as substantive evidence of guilt." *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). A qualified expert may, however, properly testify with respect to drug profile characteristics in a manner that "give[s] the trier of fact a better understanding of the evidence or assist[s] in determining a fact in issue." *Murray*, *supra* at 53 (internal quotation omitted). In *Murray*, the Court identified four factors that help distinguish "between the appropriate and inappropriate use of drug profile evidence":

> First, the reason given and accepted for the admission of the profile testimony must only be for a proper use—to assist the jury as background or modus operandi explanation. Attorneys and courts must clearly maintain the distinction between the profile and the substantive evidence, and the former should not argue that the profile has any value in and of itself; it is only an aid for the jury. Second, the profile, without more, should not normally enable a jury to infer the defendant's guilt. The prosecutor must introduce and argue some

> additional evidence from the case that the jury can use to draw an inference of criminality; multiple pieces of a profile do not add up to guilt without something more. In other words, the pieces of the drug profile by themselves should not be used to establish the link between innocuous evidence and guilt. Third, because the focus is primarily on the jury's use of the profile, courts must make clear what is and what is not an appropriate use of the profile evidence. Thus, it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony. Fourth, the expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied. . . . [*Id*. at 56-57.]

Here, first, the prosecutor failed to explain for what specific basis she intended to offer the drug profile testimony of Sergeant Mekoski. With regard to the second factor, there was ample other evidence supporting defendant's conviction, including the large quantity of marijuana obtained from the U-Haul defendant was driving, and the fact that defendant had keys to both the ignition of the U-Haul and the padlock on the rear door where the marijuana was hidden. With regard to the third factor, as defendant argues, the trial court did not clearly instruct the jury on the "distinction between the profile and the substantive evidence," *id*., or Sergeant Mekoski's dual role.

With regard to the fourth factor, some of Sergeant Mekoski's testimony regarding methods of drug trafficking, and customary procedures and practices in the drug trade, constituted general background for the case, and Sergeant Mekoski never expressly opined that defendant must be guilty because he matched the drug profile. But Sergeant Mekoski did testify to some specific drug profile details that matched the circumstances of defendant's case, including, e.g., his opinion that a "dupe" would not normally be entrusted with $300,000 worth of marijuana. Because defendant claimed to be unaware of the marijuana, which had a "street value" of approximately $300,000, the drug profile testimony by Sergeant Mekoski was intertwined with defendant's case.

Nonetheless, we do not find that the testimony challenged by defendant rose to the level of plain error requiring reversal. As already mentioned above, ample properly admitted evidence supported defendant's conviction. In light of this properly admitted evidence, we cannot conclude that defendant actually was innocent of the drug charges, or that Sergeant Mekoski's challenged testimony "seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." See *Carines*, *supra* at 774. Consequently, reversal is not warranted.

III. Sufficiency of the Evidence

Defendant further argues that the evidence was insufficient to sustain his convictions. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, 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. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id*. at 514. Rather, "a

reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A. Conspiracy to Deliver 45 or More Kilograms of Marijuana

Under MCL 333.7401(2)(d)(1), it is unlawful for a person to deliver 45 or more kilograms of marijuana. A "person who conspires together with 1 or more persons to commit an offense prohibited by law . . . is guilty of the crime of conspiracy[.]" MCL 750.157a; *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Conspiracy is a specific intent crime, requiring the intent to combine with others and the intent to accomplish an illegal objective. *Id*. To prove the intent to combine with others, it must be shown that the intent, including knowledge, was possessed by more than one person. *People v Blume*, 443 Mich 476, 482, 485; 505 NW2d 843 (1993). For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective. *Id*. Direct proof of a conspiracy is not essential. Rather, a conspiracy may be proven by circumstantial evidence or by reasonable inference, and no formal agreement is required. *People v Justice* (*After Remand*), 454 Mich 334, 347; 562 NW2d 652 (1997); *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant conspired with others to deliver 45 or more kilograms of marijuana. Defendant and several of the charged coconspirators are from Texas. There was evidence that codefendant Duran rented a U-Haul in Texas, and drove the marijuana in the U-Haul from Texas to Michigan, traveling in tandem with Joe and Garcia. Once in Southfield, codefendant Duran parked the U-Haul at a hotel where Garcia had rented two rooms, and gave the keys to Joe. That night, defendant and his associates, Todorovski, Jose, and Hipolito, arrived at the hotel in a Hummer. The Hummer had no lights on as it drove into the hotel lot, although it was dark outside. In the Hummer, defendant and his associates tentatively approached and circled near the U-Haul before driving into an adjacent hotel lot and parking. Minutes later, defendant and his associates again cautiously approached the U-Haul. Defendant got out of the Hummer and walked toward the U-Haul. Codefendant Duran then came out of his hotel room and he and defendant conversed before codefendant Duran returned to his room and defendant continued toward the U-Haul. No keys were exchanged between defendant and codefendant Duran, thereby enabling the jury to reasonably infer that defendant had previously retrieved the keys to the U-Haul.

Defendant thereafter got into the U-Haul, and defendant and his associates in the Hummer traveled in tandem for a distance before being stopped by the police. When apprehended, defendant had keys to both the ignition and the padlock on the rear door where the marijuana was hidden. As previously indicated, after defendant's associates were placed in a patrol car, Hipolito made statements that could support a finding that defendant was aware of the contents in the U-Haul and that defendant and his associates were working together to transport the marijuana.

This evidence established a basis for the jury to conclude that defendant conspired with others to deliver the marijuana found in the U-Haul. Also, defendant's and his associates' interaction and concordant behavior are evidence of concert of action, which creates an inference of conspiracy. See *Justice* (*After Remand*), *supra*, and *Cotton*, *supra* at 393-394. Although

defendant asserts that the evidence was insufficient to establish his involvement in the conspiracy, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of conspiracy to deliver 45 or more kilograms of marijuana.

B. Possession with Intent to Deliver 45 or More Kilograms of Marijuana

For this offense, defendant only argues that there was insufficient evidence that he "knew the controlled substance of marijuana was present." Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe*, *supra* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id*. at 520. A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id*. Instead, some additional connection between the defendant and the contraband must be shown. *Id*. "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). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Viewed in a light most favorable to the prosecution, the same evidence that enabled the jury to conclude that defendant conspired with others to deliver the marijuana also established a basis for the jury to conclude beyond a reasonable doubt that defendant possessed the marijuana. As indicated above, defendant and his associates discreetly approached the U-Haul. Eventually, defendant drove the U-Haul for a distance. Defendant had in his possession keys to both the ignition and the padlock securing the large quantity of marijuana hidden in the rear compartment. From this evidence, a rational jury could reasonably infer that defendant exercised dominion over the marijuana. The jury could have reasonably accepted the prosecution's argument that it is highly unlikely that an individual would entrust a large quantity of marijuana to a completely unknowing individual. Furthermore, although the marijuana could also have belonged to others, possession may be joint. See *Wolfe*, *supra*. The evidence was sufficient to sustain defendant's conviction of possession with intent to deliver 45 or more kilograms of marijuana.

C. Malicious Destruction of Police Property

"The essential elements of malicious destruction of police property are that defendant did (1) willfully and maliciously destroy or injure, (2) personal property belonging to the police department." *People v Richardson*, 118 Mich App 492, 494-495; 325 NW2d 419 (1982). The words "willful and malicious" require a specific intent to damage property or injure its owner. *People v Culp*, 108 Mich App 452, 458; 310 NW2d 421 (1981).

Viewed in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of malicious destruction of police property were proven beyond a reasonable doubt. It is undisputed that defendant damaged the patrol car window. Defendant argues, however, that he damaged the window because he was suffering an asthma attack. Although defendant claimed that he needed his inhaler, he had smoked a cigarette, and requested that the officer provide him with a second cigarette. The police could not locate an inhaler in the U-Haul, Hummer, or on defendant's person. Also, before requesting his inhaler, defendant

became angry with the officer for denying his request for a second cigarette. There was also testimony that defendant did not complain of any breathing problems and did not appear to be in any distress. In addition, immediately before kicking out the window, defendant yelled, "Let me go!" Moreover, the jury viewed the videotape of defendant kicking out the patrol car window, which allowed them to draw inferences regarding defendant's intent.[3] In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of malicious destruction of police property.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[3] "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Fetterley*, *supra* at 517-518.