STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 21, 2008
v	No. 274237 Berrien Circuit Court
EDDIE JOE ANDERSON IV, Defendant-Appellant.	LC No. 06-403716-FH

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced him, as a second-offense habitual offender, MCL 333.7413(2), to 36 to 480 months' imprisonment for the cocaine conviction and to 16 to 24 months' imprisonment for the marijuana conviction. We affirm.

At approximately 7:00 a.m. on July 15, 2006, the police went to James Paige's apartment. The police knocked for several minutes, and defendant ultimately answered the door. After observing drugs in plain view near the couch, which was ten to 15 feet from the door, the police detained defendant with handcuffs. Paige testified that defendant slept on the couch the previous night. Defendant disputed this, testifying that he did not sleep on the couch, but instead slept on the floor in Paige's room. Upon further investigation, the police discerned that the drugs consisted of a baggie containing 27 individually wrapped rocks of crack cocaine packaged for individual sale, as well as a baggie of loose marijuana. The police arrested defendant based on his proximity to the drugs. The police noticed a baseball cap and a pair of shoes next to the couch, and defendant acknowledged ownership of the clothing, which he wore for transportation to the police station. Defendant denied that the drugs belonged to him.

Defendant argues that there was insufficient evidence to sustain his convictions. Defendant argues that there was no scientific evidence or eyewitness testimony to prove that he possessed the drugs, that the drugs could have belonged to Paige, and that he would have disposed of the drugs if they belonged to him.

> We review de novo challenges to the sufficiency of the evidence in a criminal trial to determine whether, when viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found all the

> elements of the charged crime to have been proven beyond a reasonable doubt. [*People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005).]

The elements of possession with intent to deliver less than 50 grams of cocaine are:

> (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that the defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with intent to deliver. [*People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499, disapproved of in part on other grounds 469 Mich 966 (2003) (internal citation and quotation marks omitted).]

The elements of possession of marijuana are: (1) that the recovered substance is marijuana, (2) that defendant was not authorized to possess the substance, and (3) that defendant knowingly possessed the marijuana. See, e.g., *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); see also MCL 333.7403 and CJI2d 12.5.

"A person need not have physical possession of a controlled substance to be guilty of possessing it." *Wolfe*, *supra* at 519-520. Possession may be actual or constructive. *Id*. at 520. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). A person's presence at the location where the drugs are found is not sufficient to prove constructive possession. *Id*. Rather, some additional link between the defendant and the controlled substance must be shown. *Id*. Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to establish possession. *Id*.

Here, we find that sufficient circumstantial evidence was presented that defendant constructively possessed the drugs, given that the drugs were found in the apartment living room, next to the couch on which defendant had been sleeping, and next to his shoes and hat. Moreover, defendant opened the door to the apartment when the police knocked, thereby demonstrating some authority over that space. This is not a case of mere presence where drugs were located.

Defendant also argues that there was no scientific evidence or eyewitness testimony to prove intent to deliver the cocaine. However, "[a]n actor's intent may be inferred from all of the facts and circumstances" in the case. *Id*. at 517-518. "[B]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Id*. at 518. Possession with intent to deliver may be established by direct evidence or by circumstantial evidence and reasonable inferences arising from that evidence. See *id*. at 515. Here, the testimony established that the amount of cocaine (27 individual rocks with a value of $20 each), when considered with the way in which it was packaged (separate tied-off baggies), was indicative that the cocaine was intended for delivery, as opposed to merely possession for personal use. Thus, there was sufficient circumstantial evidence to support the conviction.

Defendant contends that certain testimony of the narcotics expert – that the amount and packaging of the cocaine was strongly indicative of intended sale – was insufficient to prove intent to deliver. However, "[i]ntent to deliver can be inferred from the quantity of the controlled

substance in the defendant's possession, and from the way in which the controlled substance is packaged." *Id*. at 518.

Defendant additionally argues that Paige's testimony lacks credibility. However, the jury was free to believe Paige's testimony that the drugs did not belong to him and to disbelieve defendant's testimony that the drugs were not his. See, e.g., *People v Creith*, 151 Mich App 217, 227-228; 390 NW2d 234 (1986). "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found that all the elements of possession with intent to deliver less than 50 grams of cocaine and possession of marijuana were proven beyond a reasonable doubt.

Defendant next argues that the trial court abused its discretion in admitting prior bad-acts evidence. During a 1999 traffic stop, a search incident to arrest revealed that defendant had 24 rocks of crack cocaine on his person, and defendant admitted that he purchased the drugs earlier and intended to sell them for profit. Also, during the execution of a search warrant at defendant's apartment in 2004, defendant flushed crack cocaine down the toilet, individual packages of crack cocaine were found on the floor, and a large sum of money was found in defendant's pocket, some of which was marked "buy" money from a previous controlled narcotics purchase. The trial court allowed the prosecutor to present evidence of the 1999 and 2004 incidents.

We review for an abuse of discretion a trial court's decision to admit other-acts evidence. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). To be admissible under MRE 404(b), other-acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The prosecution sought to introduce other-acts evidence to show defendant's intent, knowledge, and absence of mistake or accident. Defendant argues that the prior bad acts were not offered for a proper purpose, but, rather, were offered to prove his propensity to commit the crimes at issue here. However, the reasons offered by the prosecutor were proper because they did not involve inadmissible character or propensity evidence and because MRE 404(b)(1) specifically provides for them. *McGhee*, *supra* at 610.

The prior bad acts also constituted relevant evidence. Relevant evidence is "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." MRE 401. Relevance involves both materiality and probative value. *McGhee*, *supra* at 610. "Materiality refers to whether the fact was truly at issue." *Id*. "Constructive possession of an illegal substance requires proof that the defendant knew of its character." *Id*. "[P]ossession with intent to distribute an illegal substance requires the specific intent to distribute." *Id*. Here, defendant denied knowledge or constructive possession. Further, "a plea of not guilty requires the prosecution to prove every element of the offense." *Id*. Thus, knowledge and intent were at issue. *Id*.

Evidence of intent was relevant because it "negates the reasonable assumption that the incident was an accident," *id*. at 611, or that defendant was innocent as claimed. Defendant's defense was that there was no proof that the drugs were his or that he intended to sell them. The evidence showed that defendant admitted possessing drugs with the intent to sell them in 1999 and that he was packaging drugs for distribution in 2004. This evidence "made it less likely that he acted accidentally or innocently in the case at hand." *Id*. "The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently, and conversely, the more likely it is that the defendant's act is intentional." *Id*. (internal citation omitted).

Defendant contends that the prior bad acts were too dissimilar to the crimes at issue here to be admissible. However, "[w]here other-acts evidence is offered to show intent, the acts must only be of the same general category to be relevant." *Id*. The 1999 incident was similar to the incident at issue here because "[t]he quantities of drugs uncovered in both searches indicated an intent to distribute." *Id*. "Intent to deliver may be inferred from the quantity of drugs in a defendant's possession." *Id*. Additionally, the 2004 incident was substantially similar to the incident at issue here because both involved the search of an apartment that revealed that defendant was in close proximity to illegal drugs. Therefore, the trial court did not abuse its discretion when it found the 1999 and 2004 evidence relevant.

Nor did the court abuse its discretion in failing to exclude the evidence under MRE 403, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *McGhee*, *supra* at 614. "This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Id*. (internal citations and quotation marks omitted). There is no indication that the proposed evidence at issue here injected such extraneous considerations. The evidence was highly probative of defendant's knowledge, intent, and absence of mistake. On the record before us, we do not find that the probative value of the other-acts evidence was substantially outweighed by the danger of unfair prejudice. Further, the trial court issued a cautionary instruction, thereby eliminating any danger of unfair prejudice that may have stemmed from the other-acts evidence. The trial court did not abuse its discretion in allowing the other-acts evidence.

Defendant next argues that the trial court erred in denying his motion to suppress statements he made to the police that the hat and shoes found in close proximity to the drugs belonged to him. Specifically, defendant argues that the trial court should have suppressed his statements because they were obtained in violation of his Fifth Amendment rights. We review for clear error a trial court's factual findings made in conjunction with a ruling on a motion to suppress. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). "To the extent that a

trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *Id*.

"The right against self-incrimination is guaranteed by both the United States Constitution and the Michigan Constitution." US Const, Am V; Const 1963, art 1, § 17; *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). Statements made during custodial interrogations are admissible only if a defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v McBride*, 273 Mich App 238, 249; 729 NW2d 551 (2006). Procedural safeguards were set out by the United States Supreme Court in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *Miranda* warnings are only necessary in situations involving custodial interrogation. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). Interrogation can include express questioning, as well as its "functional equivalent," i.e., "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

Here, the trial court properly determined that defendant was in custody, because he was handcuffed, was the focus of the investigation, and was not free to leave. *Coomer*, *supra* at 219. The trial court then found that defendant's statements that the hat and shoes belonged to him did not constitute statements made in response to the "functional equivalent" of interrogation, because the words or actions on the part of the police – made in an attempt to discern which articles of clothing belonged to defendant, so that he could wear those items, including shoes, to the police station – were "normally attendant to arrest and custody." *Innis*, *supra* at 301. The trial court's factual findings were not clearly erroneous, and the trial court properly denied defendant's motion to suppress the statements regarding ownership of the hat and shoes.

Defendant next argues that the trial court committed instructional error. However, defense counsel's expression of approval of the jury instructions constituted a waiver that extinguished any error, thereby precluding appellate review. *People v Carter*, 462 Mich 206, 215-216, 219; 612 NW2d 144 (2000).

Defendant argues that the trial court erred in allowing a police officer, who was qualified as an expert in the area of narcotics trafficking, to testify regarding his opinion that the quantity of drugs at issue, as well as the quantity of plastic seal baggies found in the 2004 case, was indicative of an intent to sell, as opposed to personal use. Defendant failed to preserve this issue with an appropriate objection at trial; therefore, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has not demonstrated plain error affecting his substantial rights. There was sufficient testimony in the record showing that the officer was qualified as an expert because of his knowledge, experience, training, and education; that his testimony was based on sufficient facts; that his testimony was the product of reliable principles; and that he applied the principles reliably to the facts of this case. See MRE 702; see also, generally, *People v Williams (After Remand)*, 198 Mich App 537, 541-542; 499 NW2d 404 (1993).

Defendant next argues that the trial court erred in allowing the prosecutor to question the defendant regarding his financial situation. Although defense counsel lodged an objection to this line of questioning, he failed to state a basis for the objection, merely voicing his opinion that the

questioning was "improper." See MRE 103(1), *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), and *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). Therefore, this issue is not properly preserved, and our review is for plain error affecting substantial rights. *Carines*, *supra* at 763.

Defendant has not demonstrated plain error affecting his substantial rights. Evidence of poverty or employment status is inadmissible to show a motive or predisposition to commit the charged crime. *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980). However, the prosecutor did not elicit the testimony for those purposes. Rather, the evidence was relevant to the prosecution's theory of the case, by suggesting that defendant had unexplained income as a result of selling drugs. See MRE 401 (discussing relevance).

Defendant also argues that the trial court erred in failing to suppress evidence of the drugs, because the search was conducted without a warrant and was not subject to any of the exceptions allowing for warrantless searches. Because defendant did not move to suppress the evidence, this issue is unpreserved, and our review is for plain error affecting substantial rights. *Carines*, *supra* at 763-764.

"The right of individuals to be secure against unreasonable searches and seizures is guaranteed by both the federal and state constitutions." *Gonzalez*, *supra* at 232. "The lawfulness of a search and seizure depends on its reasonableness." *Id.* "Searches conducted without a warrant are unreasonable per se, unless the police conduct falls under one of several specifically established and well-delineated exceptions." *Id.* The plain-view exception to the warrant requirement allows seizure of objects falling within the plain view of an officer who has a right to be in the position to have that view. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). That is, "seizures of items in plain view [will not be excluded] if the officers are lawfully in the position from which they view the item, and if the item's incriminating character is immediately apparent." *Gonzalez*, *supra* at 232.

When defendant answered the door to Paige's apartment, one of the police officers saw, from his vantage point in the doorway, the drugs at issue in plain view in the main room. The plain view exception to the search warrant requirement was applicable under the facts of this case, because the officer was lawfully in the position from which he viewed the drugs[1] and the incriminating character of the drugs was immediately apparent to that officer. No plain error occurred, and we need not reach defendant's arguments that the consent and exigent circumstances exceptions to the search warrant requirement were not applicable here.

Defendant next asserts various claims of prosecutorial misconduct. "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Because the alleged errors were not preserved by contemporaneous objections and

[1] Defendant has not sufficiently demonstrated that the police were not allowed to be in the apartment building itself. No plain error is apparent.

requests for curative instructions, our review is for plain, outcome-determinative error. *Id*. Reversal is only warranted if "plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*.

When reviewing claims of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *Id*. at 330. The propriety of the prosecutor's remarks depends on the facts of the case, and we read the prosecutor's comments as a whole and evaluate them in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id*.

Defendant argues that the prosecutor engaged in misconduct by eliciting certain irrelevant and prejudicial information. This issue is as much an evidentiary issue as it is a prosecutorial misconduct issue; therefore, we focus our inquiry on whether the prosecutor elicited the testimony in good faith. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Id*. Regarding the prosecutor's elicitation of evidence concerning defendant's employment status and lack of financial assets, this line of questioning was proper, as noted above. Regarding the prosecutor's elicitation of testimony that the 2004 incident involved marked money, this was fully within the scope of explaining the incident. Further, the police officer's initial response referring to "marked buy money" was unsolicited and unresponsive, only after which the prosecutor sought to have the police officer explain that reference to the jury. Regarding the prosecutor's elicitation of evidence that defendant exercised his right to remain silent after being *Mirandized*, defendant is correct that testimony concerning a defendant's post-arrest, post-*Miranda* silence is inadmissible. *People v Crump*, 216 Mich App 210, 214; 549 NW2d 36 (1996). However, the police officer's response was an unsolicited answer to an open-ended question about what occurred next in the investigation, and the prosecutor's question was not purposefully designed to elicit the improper testimony. Finally, regarding the prosecutor's elicitation of evidence regarding the reason why defendant was arrested, a review of the record reveals that the prosecutor did not directly ask the officer why he arrested defendant, and, in any event, the questioning was within the scope of explaining the circumstances surrounding the arrest. No plain error is apparent.

Defendant also argues that the prosecutor engaged in misconduct by arguing facts not in evidence during closing argument. "Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Callon*, *supra* at 330. All of the comments with which defendant takes issue were supported by the evidence and constituted proper closing argument.

Defendant argues that the prosecutor improperly expressed a personal belief in the facts of the case by commenting that Paige "sure seemed to [her] like he was telling the truth and was trying to be very candid with [the jury]." While a prosecutor may not vouch for the credibility of a witness to the effect that she has some special knowledge that the witness testified truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), a prosecutor may argue from the facts in evidence that a witness is worthy of belief, see, e.g., *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The prosecutor specifically commented that it was "for [the

jury] to judge the credibility of Mr. Paige," and she acted properly in arguing that, based on the facts in evidence, Paige was credible.

Defendant next argues that the prosecutor engaged in misconduct by misstating the law during voir dire, when she explained to the prospective jurors that "possession" included the *ability* to exercise control over something. Defendant argues that the prosecutor should have more accurately stated that possession includes the *right* to exercise control over something. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). "However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Id*. Here, the prosecutor's imprecise definition of possession was cured by the trial court's correct instruction regarding the meaning of the term "possession." See CJI2d 12.7.

Defendant also argues that the prosecutor engaged in misconduct by misstating the law during closing argument, when she stated that, if the jury believed defendant's version of events – that he slept in Paige's bedroom, that the shoes and hat did not belong to him, and that he was not involved with the drugs – a reasonable doubt would exist. Specifically, defendant argues that, while the prosecutor's statement was technically true, it implied that that was the only way the jury could find a reasonable doubt. However, the trial court provided the jury with the standard reasonable doubt instruction, thereby curing any potential misunderstanding arising out of the prosecutor's comment. See CJI2d 1.9(3).

Defendant argues that the sum total of the alleged instances of prosecutorial misconduct deprived him of a fair trial. However, defendant has failed to establish cumulative error, let alone that the cumulative effect of the alleged errors deprived him of a fair trial. *McLaughlin, supra* at 649.

Next, defendant argues that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, defendant was required to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness, that the representation so prejudiced him as to deprive him of a fair trial, and that the proceedings were fundamentally unfair or unreliable. *Thomas*, *supra* at 456; *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant failed to move for a new trial or evidentiary hearing with regard to this claim; therefore, our review is limited to the existing record. *Thomas*, *supra* at 456.

Defendant argues that his attorney was ineffective for agreeing to the expert qualification of a police officer in the area of narcotics; for failing to object to the opinion of that officer regarding defendant's intent; and for failing to object to the other-acts testimony. However, as noted above, the officer was properly qualified as an expert; the officer properly offered his opinion that the quantity of drugs at issue here, as well as the quantity of plastic seal baggies found in the 2004 case, was indicative of an intent to sell, as opposed to personal use; and the prior bad acts were admissible under MRE 404(b). Because counsel is not ineffective for failing to make a futile objection, *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003), defendant's arguments lack merit.

Defendant also argues that his attorney was ineffective for failing to move to suppress the drugs. However, as noted above, the plain view exception to the search warrant requirement was applicable, and defendant has failed to demonstrate that a motion to suppress would have been successful. Counsel is not ineffective for failing to make a meritless motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Reversal is unwarranted.

Finally, defendant argues that his attorney was ineffective for failing to request a jury instruction on the crime of possession, as opposed to possession with intent to deliver, in connection with the cocaine charge. However, we conclude that an instruction on the offense of possession would not have been appropriate, because a rational view of the evidence did not support mere possession. See *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). Moreover, given the lack of an evidentiary hearing concerning this issue and given the possibility that a possession instruction could have led to a compromise verdict, we cannot conclude that counsel's failure to request the possession instruction fell below an objective standard of reasonableness. See *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000) ("[w]e presume that a challenged action might be considered sound trial strategy . . . that we will not second-guess").[2]

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Christopher M. Murray

[2] Although defendant does not set forth a reasoned argument with regard to this issue in the "ineffective assistance" portion of his appellate brief, we reject his suggestion that he has established a viable ineffective assistance of counsel claim with regard to his attorney's approval of the court's jury instructions concerning other-acts evidence. First, we conclude that his non-specific briefing of this issue is deficient. See, generally, *People v Hicks*, 259 Mich App 518, 532; 675 NW2d 599 (2003), and *People v McClain*, 218 Mich App 613, 615; 554 NW2d 608 (1996). Second, although the trial court's instructions with regard to other-acts evidence were not perfect, we believe that the court's statement that "[y]ou must not convict the Defendant here because you think he's guilty of other bad conduct" served to safeguard defendant's rights. Accordingly, we cannot conclude that defense counsel's approval of the jury instructions deprived defendant of a fair trial.