STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2008
v	No. 278093 Macomb Circuit Court
BYRON WILLIAMS, Defendant-Appellant.	LC No. 2006-003972-FC

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver 1,000 grams or more of cocaine, MCL 333.7401(2)(a)(*i*), and conspiracy to possess with intent to deliver 1,000 grams or more of cocaine, MCL 333.7401(2)(a)(*i*); MCL 750.157a. Defendant was sentenced to 25 to 50 years' imprisonment for the possession with intent to deliver conviction, and 25 to 50 years' imprisonment for the conspiracy conviction. We affirm.

Defendant first contends that the prosecutor committed misconduct because two statements made by the prosecutor during closing argument were allegedly unsupported by the evidence. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Carines, supra* at 763-764.

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation omitted). Further, a prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Bahoda, supra* at 282 (citation omitted). A prosecutor is not required to present her arguments using only the "blandest possible terms." *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004).

The first allegedly improper statement made during the prosecutor's closing argument is as follows:

> They start talking very quickly about the [kilogram of cocaine], where it's located, where's the money. Those are things that happen in a drug transaction. And this isn't going to be a twenty minute, how's your family discussion in a parking lot. The location already got moved once. It was objected to when Lieutenant [Richard] Margosian suggested that the defendant moved the location because he was nervous. I suggest the circumstances tell you that's exactly why it was moved.

With respect to this statement, the prosecution presented evidence, consisting of the testimony of Eric Thomas, acting as a confidential informant for the Macomb County Sheriff Department, that defendant telephoned Thomas and told him that he had moved the location of the drug transaction from the McDonald's parking lot to the parking lot of the CVS pharmacy across the street. Thomas testified further that defendant told him that he moved the location because he had been waiting so long for Thomas. A rational inference to be drawn from this evidence is that defendant moved the location because he was nervous due to Thomas's failure to arrive at the location where the drug transaction was to take place in a timely manner.

The second statement defendant contends was improper is as follows:

> I thought it was interesting that [defendant] asked, I think it was Detective [Randy] Costanzo, about his hundred and fifty-three dollars, and I was wondering as I was preparing for this case, why he didn't ask about his car or however else he got up there. And it occurred to me that he can [sic] in the van. And it's something that maybe you could think about, if you're wondering if maybe he possibly got there someway else. Wouldn't he have asked about it? If he cared enough to ask about that, wouldn't he have asked about what's going to happen to that?

Regarding the second statement, the prosecution presented evidence, consisting of Costanzo's testimony, that defendant asked him several questions following his arrest, including whether the police had recovered the van, and whether $153 seized from defendant at the time of his arrest was subject to forfeiture. Although the prosecution appears to have invited the jury to draw the inference that defendant arrived at the CVS parking lot in the van from the inference that had defendant arrived in his car, he would have asked about it, our Supreme Court has concluded that "if evidence is relevant and admissible, it does not matter that the evidence gives rise to multiple inferences or that an inference gives rise to further inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Defendant failed to argue on appeal that Costanzo's testimony was irrelevant or otherwise inadmissible. *Hardiman, supra* at 428. Thus, a rational trier of fact could ultimately infer that defendant arrived in the van because he did not express the same concern to Costanzo about a car (or any other means of transportation) as he did regarding the van and the $153. Moreover, the prosecution presented testimonial evidence that, after Thomas arrived at the location of the drug transaction, Thomas asked where the cocaine was located, and defendant responded that the cocaine was located in the van. This evidence further supports the prosecution's argument that defendant arrived at the location of the drug transaction in the van.

A prosecutor does not commit misconduct by arguing reasonable inferences from the evidence as it relates to the prosecution's theory, which in this case was that defendant possessed with the intent to deliver 1,000 grams or more of cocaine, and conspired to posses with the intent to deliver 1,000 grams or more of cocaine. *Bahoda, supra* at 282. Accordingly, the prosecution's statements do not constitute plain error. *Pipes, supra* at 279.

Moreover, defendant cannot demonstrate that the prosecutor's remarks during closing argument affected a substantial right. *Pipes, supra* at 279; *Carines, supra* at 763. Following the prosecutor's closing rebuttal argument, the trial court instructed the jury that: "The lawyers [sic] statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." Generally, jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the prosecution denigrated defense counsel and defendant's theory of the case when he stated during closing argument:

> Common sense tells you when you think about the pieces that the different officers told you about, the piece this one had, this one had, this one had, and the piece Eric Thomas added, the defendant is not an innocently or wrongfully charged person in this case.
>
> And I was trying to think of some analogy or something to think about how to describe the case. I've been talking with Lieutenant Margosian and I can't come up with a real adequate analogy for what I'm perceiving the defense to be in this case from the questioning. The best I can think of is its [sic] kind of like an ostrich with his head in the sand. It's kind of like you didn't catch me with it in my hand, nah nah, now you can't charge me. Well, I can see the rest of you and all the rest of the evidence. I can tell you're an ostrich. I don't care if I can see your head or not. That's the closest I could come. I don't know if it fits or not but it seems to me to make sense that the one thing that was pointed out was you didn't catch him with it in his hand. And I don't know if then the argument would be, for instance, in a different sort of a charge if the police didn't catch you doing it, too bad.

Prosecutors "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda, supra* at 282-283 (footnote omitted). However, a prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Bahoda, supra* at 282 (citation omitted). Here, when viewed in context, the disputed prosecutorial remarks are not an attack on either defendant or defense counsel; instead, the prosecution advanced its theory that defendant was guilty of the charged crimes on the basis of circumstantial evidence and reasonable inferences drawn from the evidence, and that the prosecution was not required to prove that defendant was in physical possession of the cocaine at the time of his arrest in order to prove beyond a reasonable doubt that defendant possessed the cocaine. Because defendant cannot show either plain error, or that the jury convicted defendant on the basis of the prosecution's statements during closing argument, defendant has forfeited his challenge to the prosecutor's remarks, and as such, reversal is not warranted. *Carines, supra* at 763.

Defendant next presents the preserved argument that the prosecutor committed misconduct by withholding defense counsel's access to Thomas. We disagree. Preserved allegations of prosecutorial misconduct are reviewed on a case-by-case basis, analyzing the prosecutor's comments in view of defense arguments and the evidence admitted at trial, to determine whether a defendant has been denied a fair and impartial trial. *Bahoda, supra* at 266-267. See, also, *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

MCR 6.201(A), which governs the discovery process in criminal cases, provides, in pertinent part:

> [A] party upon request must provide all other parties:
>
> > (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial[.]

At a March 21, 2007, pretrial conference, in response to defendant's request for an interview with Thomas, the prosecutor stated that he had placed a telephone call to a detective, and asked the detective to relay the information to Thomas that defense counsel wanted to interview him, and that "we can't force him to be interviewed." On the first day of trial, defense counsel advised the trial court that she had spoken to Lieutenant Richard Margosian, who told her that Thomas would not be available for an interview until that day. Defense counsel objected to the timeliness of Thomas's availability, and argued that her inability to interview Thomas before the day of trial prejudiced defendant. However, the trial court observed that defense counsel did in fact have the opportunity to interview Thomas before trial, and defendant was not prejudiced because counsel would have at least two hours during the lunch beak, as well as ample opportunity during the evening, to discuss the substance of Thomas's interview with defendant. The trial court also indicated that the court would address the issue after the lunch break, if necessary. After her lunch break conference with defendant, defense counsel indicated to the trial court that her objections to the timing of the interview were on the record, and that although "my client wanted to discuss discovery issues," she had nothing further to add.

That defense counsel did not have the opportunity to interview Thomas until the day of trial does not demonstrate that the prosecutor committed misconduct. Nothing in the record suggests that the prosecutor directed the police to deny defense counsel access to Thomas, or attempted to obstruct defense counsel in any way. To the contrary, the record shows that the prosecutor attempted to facilitate defendant's access to Thomas by advising the police that defense counsel sought to interview Thomas, and requesting that the police pass the information along to Thomas. Moreover, defense counsel did interview Thomas before trial, and as such, the prosecution complied with the requirements of MCR 6.201(A)(1). Moreover, defense counsel had the opportunity to discuss the interview with her client, and nothing in the record shows that the timing of the interview impacted defendant's right to a fair and impartial trial. *Bahoda, supra* at 266-267. Accordingly, this, as well as defendant's other allegations of prosecutorial misconduct, fails.

Defendant next argues that his trial counsel was ineffective because counsel failed to challenge Margosian's testimony regarding fingerprint evidence. According to defendant, the prosecution was required to qualify Margosian as an expert witness before he offered expert testimony regarding the fingerprint evidence pursuant to MRE 702, but failed to do so, and counsel should have objected to the admissibility such testimony. The prosecution argues that defendant is unable to rebut the presumption of effective assistance of counsel because Margosian testified that defendant's fingerprints were not recovered from either the package of cocaine or the van, which was testimony favorable to defendant. Again, we agree with the prosecution.

Defendant did not bring a motion for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*[1] hearing before the trial court. Accordingly, defendant's claim of ineffective assistance of counsel is unpreserved on appeal. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Id*. A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

Both the United States Constitution and the Michigan Constitution protect the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. It is presumed that a defendant received the effective assistance of counsel; to prevail, a defendant bears the heavy burden of proving that counsel was ineffective. *LeBlanc*, *supra* at 578. A defendant must establish that: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *Matuszak*, *supra* at 58.

This Court presumes that the questioning of witnesses is within the purview of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Only where the failure to present evidence deprives a defendant of a substantial defense will this Court conclude that a defendant was ineffectively assisted at trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Here, Margosian testified that defendant's fingerprints were not recovered from either the cocaine or the van, which was testimony favorable to defendant. Accordingly, defendant is unable to rebut the presumption that counsel's decision to challenge or object to Margosian's

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

testimony was a matter of sound trial strategy. *LeBlanc*, *supra* at 578. Moreover, because defendant cannot show that Margosian's favorable testimony deprived him of a substantial defense, his claim that he was ineffectively assisted at trial fails. *Dixon*, *supra* at 398.

Defendant next argues that the trial court improperly denied his motion for a directed verdict.[2] We disagree. This Court reviews de novo a trial court's decision on a motion for a directed verdict, in order to ascertain whether the evidence presented by the prosecutor, when viewed in a light most favorable to the prosecution, could persuade a rational trier of fact that the elements of the crimes charged were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Defendant was charged with possession with the intent to deliver 1,000 grams or more of cocaine, and conspiracy to possess with the intent to deliver 1,000 grams or more of cocaine. In order to convict a defendant of possession with the intent to deliver a controlled substance, the prosecution must prove: "(1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). "Possession may be either actual or constructive, and may be joint as well as exclusive." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Constructive possession of cocaine exists where direct or circumstantial evidence shows that defendant had "dominion and control" over it, and may be found where the defendant had the power to dispose of the substance. *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992). In a criminal case, the element of intent "may be inferred from all the facts and circumstances." *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987).

"To be convicted of conspiracy to possess with intent to deliver a controlled substance, the people must prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirator possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirator possessed the specific intent to combine to deliver the statutory minimum as charged to a third person." *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Circumstantial evidence or reasonable inferences from the evidence can be sufficient to prove a conspiracy. *People v Justice (After Remand)*, 454 Mich 334, 347-348; 562 NW2d 652 (1997).

[2] We note that although defendant frames his third issue on appeal as alleging that the verdict was against the great weight of the evidence, defendant actually argues in the discussion section of his brief that there was insufficient evidence to convict defendant of possession with intent to deliver 1,000 grams or more of cocaine, and conspiracy to posses 1,000 grams or more of cocaine. Defendant brought a motion for a directed verdict after the prosecution presented its case-in-chief, but defendant did not subsequently present any evidence at trial. Thus, defendant's third argument, that there was insufficient evidence to sustain defendant's convictions, and defendant's fourth argument, alleging that the prosecution failed to present sufficient evidence to overcome defendant's motion for a directed verdict, are essentially identical for the purposes of our analysis.

Viewed in a light most favorable to the prosecution, the prosecution presented sufficient evidence with respect to each element of the charged crimes sufficient to overcome defendant's motion for a directed verdict, and because defendant presented no evidence, to sustain defendant's convictions. With respect to the elements of the possession with intent to deliver 1,000 or more grams of cocaine charge, defendant stipulated to the admission of the laboratory report indicating that the package found in the alley where the van was discovered contained 1.0041 kilograms of a mixture containing cocaine.

Thomas testified that he arranged to purchase a kilogram of cocaine from defendant for $20,500. Thomas and defendant agreed upon a place where the transaction was to occur. Because Thomas kept defendant waiting, defendant moved the location of the cocaine sale to a parking lot across the street. After Thomas arrived at the parking lot, defendant asked to see the money, and Thomas, in turn, asked defendant where the cocaine was located. Defendant responded that the cocaine was located in the van. Soon afterward, the police arrived at the parking lot, and the van sped away from the scene. The van, driven and owned by Donald Blanks, led the police on a high-speed chase that ended in an alley overgrown with vegetation. The police discovered the abandoned van in the alley. Detective Ron Lehman observed Blanks running away from the scene. The police recovered a package containing over one kilogram of cocaine about 60 yards from the van, lying in an area that had been run over by the van's tires.

This evidence demonstrates that the recovered substance contained cocaine, and that the mixture weighed more than 1,000 grams. Under the circumstances, a rational trier of fact could reasonably infer that defendant was unauthorized to possess the cocaine. Further, Thomas's testimony demonstrates that defendant constructively possessed the kilogram of cocaine because defendant exercised dominion and control over the cocaine in his attempt to sell the cocaine to Thomas. *Wolfe, supra* at 521. Moreover, a trier of fact could rationally infer that defendant intended to deliver the cocaine to Thomas not only from Thomas's testimony, but also from the large quantity of cocaine recovered by the police. *Id*. at 515.

This evidence is also sufficient to support each element of the conspiracy to possess with the intent to deliver 1,000 grams or more of cocaine charge. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could infer that defendant possessed the specific intent to deliver the kilogram of cocaine to Thomas. Defendant arrived at the pre-arranged location where the drug transaction was to take place, and subsequently moved the location. When Thomas arrived at the new location, Thomas asked defendant where the drugs were located, and defendant responded that the cocaine was in a van. The van was owned and driven by Blanks, who led the police on a high-speed chase, and when the police chase ended, a kilogram of cocaine was found intact in an alley that was overgrown with vegetation, resting on a fresh tire-track. This circumstantial evidence, together with rational inferences drawn from the evidence is sufficient to prove that defendant possessed the specific intent to deliver the kilogram of cocaine to Thomas, Blanks possessed the specific intent to drive defendant and the cocaine in his van to the drug transaction, and that defendant and Blanks possessed the specific intent to deliver the kilogram of cocaine to Thomas. *Hunter, supra* at 8.

Hence, the prosecution presented sufficient evidence to support each element of possession with intent to deliver 1,000 grams or more of cocaine, and conspiracy to deliver 1,000

grams or more of cocaine; accordingly, the trial court properly denied defendant's motion for a directed verdict.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot