STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2009
v	No. 280438 Washtenaw Circuit Court
COREY MALIK TAYLOR, Defendant-Appellant.	LC No. 05-001797-FH

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of marihuana, MCL 333.7403(2)(d). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 2 to 15 years' imprisonment for the delivery conviction, and, as a second offender, MCL 333.7413(2), to 16 to 24 months' imprisonment for the marihuana possession conviction. We affirm defendant's conviction, but remand for an evidentiary hearing consistent with this opinion.

We first dispatch with defendant's argument that the prosecutor committed plain error by eliciting testimony from Detective Williams that implied the government only pursues cases it is certain to win thereby vouching for the credibility of the informant-witness. Defendant relies on the following:

> *Q.* Okay . . . Do informants like Michael Robinson make purchases of narcotics on your behalf or as your agent?
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> *A.* The only – the only time that they make narcotics purchases on our behalf is under our direction. Okay. They come to us. We decide how we're going to – how we're going to make the purchase. *We take steps to ensure that the purchase is one that we can use for prosecution in the future*. We don't allow them to go out and make purchases or deals on their own. Everything that they do with us has to be supervised by us.
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> *Q.* …Okay, And just – are there any other steps other than what we already heard Trooper Temelko talk about with a controlled purchase, *other steps to preserve the integrity of these buys*?

> *A.* Well after our initial debriefing *we determined which cases we're going to attempt to investigate based on the information and the feasibility of reasonable success*. At that point I usually, myself or the team leader mixed with the informant, we tell them at that time what to do, okay. What route to take, which way to go, which way to come back. *We do all this stuff to preserve the integrity of the investigation*. [Emphasis added.]

"The test of prosecutorial misconduct is whether [defendant] was denied a fair and impartial trial." *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the relevant portion of the record, evaluating a prosecutor's remarks in context. *Id*. 30. Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case, . . . and need not confine argument to the blandest possible terms." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

We hold that there was no error in the prosecutor's questioning. The questions that elicited the relevant answers were both aimed at having Detective Williams describe the procedure of using informants, which controlled buys to undertake, and the procedure used for the actual purchase. The prosecutor was merely bringing out evidence concerning the reliability of the evidence from a controlled buy because of the procedures used. *See People v Brown,* 267 Mich App 141, 152-153; 703 NW2d 230 (2005) (holding that prosecution questioning of a witness which attacked the defense theory was proper). The prosecutor did not vouch for the credibility of the witness; instead, he merely posed questions about procedures and methods.

The prosecution's closing[1] did not constitute error. A prosecutor may properly argue in closing regarding the credibility of witnesses, and may argue from the evidence and the inferences to be drawn from the evidence that the defendant is guilty. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992). In this case, the prosecutor did just that by arguing not only that Robinson was a credible witness, but also that his testimony was only necessary to fill in a portion of the story. The prosecutor then argued that the remainder of the necessary

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[1] Defendant focuses on the closing argument in which the prosecutor stated:

> As I talked about in my opening and even on the voire dire, this case really hinges in large part on Michael Robinson. And again, I urge you to use your common sense and to think about his testimony and think about how it fits into the other portions of the testimony that we heard. And I submit that you have to rely on Michael Robinson's for your analysis of what happened here, but you don't have to rely on him entirely because the methods were put into place to ensure the integrity of this buy, and that's with this controlled purchase we talked about.

evidence could be inferred from the procedures and methods used by the officers to preserve the integrity investigation. This is easily distinguished from *People v Smith*, 158 Mich App 220; 405 NW2d 156 (1987), which defendant cites, where the prosecutor argued that the investigation and interviews by the police after the crime ensured that the right person had been charged. *Id*. at 230-231. Here, the argument concerned the careful process of conducting a controlled buy, rather than after the fact criminal investigation and interviewing of witnesses. The prosecutor in this case simply encouraged the jury to find Robinson credible in order to fill in the remaining evidentiary gap.

Moreover, even if there were error in the prosecutor's questioning or closing argument, the error did not "in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The prosecution, through its proofs, carefully and deliberately lay on the chain of custody for receipt and handling of the obtained narcotics, as well as the entire procedure for the controlled buy. There is nothing to suggest an actually innocent person was convicted or the fairness, integrity, or public reputation of judicial proceedings were seriously affected.[2]

Next, defendant argues that neither his attorney nor he was served with notice that the prosecution would pursue a habitual offender sentence enhancement under MCL 769.12 of his delivery of cocaine conviction. Defendant acknowledges that the habitual offender notice was timely filed with a proof of service, but points out that the proof of service filed was invalid because the stamped proof of service on the face of the notice did not indicate the manner in which the document was served. Defendant concedes that an invalid proof of service can amount to harmless error if the notice had been timely filed and the defendant received actual notice, but he contends that neither he nor his trial counsel received actual notice of the enhancement.[3] Defendant argues that because there is no evidence in the record to suggest that he received actual notice and the record reflects an invalid proof of service, no filed felony information, and no waiver of arraignment, he is entitled to resentencing or, in the alternative, an evidentiary hearing.

This Court reviews questions of law de novo on appeal. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). Findings of fact are reviewed for clear error. *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005); MCR 2.613(C).

The prosecuting attorney may seek to enhance the sentence of the defendant as a habitual offender pursuant to MCL 769.13 by filing a written notice of his intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if

[2] In any event, the trial court did instruct the jury that the lawyers' statements and arguments are not evidence and that it was up to the jury to determine what testimony it believed. These instructions were sufficient to fairly present the issues to be tried and sufficiently protected defendant's rights. *Dobek, supra* at 66 n 3; *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

[3] Defendant maintains that even if his trial counsel received notice, he did not.

arraignment is waived, within 21 days after the filing of the information charging the underlying offense. *People v Hornsby*, 251 Mich App 462, 470-471; 650 NW2d 700 (2002). The purpose of MCL 769.13 is to ensure that a defendant has notice at an early stage in the proceedings that he could be sentenced as a an habitual offender. *People v Morales*, 240 Mich App 571, 582; 618 NW2d 10 (2000). The notice also has to be served upon the defendant or his or her attorney within same time period. MCL 769.13(2). A written proof of service must also be filed with the court. MCL 769.13(2). A valid proof of service requires a certificate stating the facts of service, including the manner, time, date, and place of service. MCR 2.104(A)(2). However, an invalid proof of service can constitute harmless error when the notice had been timely filed and defendant has actual notice of the sentence enhancement. *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999).

There is no evidence that either defendant or his attorney was served with notice as required by MCL 769.13. During the sentencing hearing, defense counsel stated he was never served with any notice, and defendant maintains that he did not receive notice. The prosecution filed proofs of service, but they are invalid under MCR 2.104(A)(2) because they do not indicate the manner of service since no box is checked for how the notices were served. This failure could merely be a clerical error, but there is no way to substantiate this. It is also unclear whether defendant's trial attorney had notice of the enhancements. Therefore, an evidentiary hearing is necessary to determine whether the prosecution violated MCL 769.13 by not properly providing notice of its intent to pursue a sentence enhancement of defendant's delivery conviction under MCL 769.12,[4] and whether defendant or his trial counsel had actual notice of the enhancement.

The prosecution argues that defendant waived this claim because defense counsel's objections were only to stacking the habitual offender enhancements, and he waived the notice objection. Waiver is "'the intentional relinquishment or abandonment of a known right.'" *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *People v Carines*, 460 Mich 750, 762-763 n 7; 597 NW2d 130 (1999). "'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights . . . .'" *Carter*, *supra* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). A reading of the entire sentencing transcript puts defense counsel's objections in context. He initially objected on lack of notice. The judge addressed this by stating that a notice had been filed. Defense counsel then raised a new objection regarding whether enhancements would be applied to both counts.

[4] This error would be harmless provided that the notice had been timely filed and defendant had actual notice of the sentence enhancement. *Walker*, *supra* at 314-315. It is undisputed that the notice was timely filed. However, there is some indication that defense counsel was aware of the prosecution's intent to pursue some form of a sentence enhancement. During the sentencing hearing, he attempted to explain how he had understood from the prosecutor at trial that the sentence enhancement was for the cocaine charge. Later in the hearing, defense counsel reversed course, stating he had no problem with enhancement of the misdemeanor marijuana charge, but that enhancement of the delivery of cocaine conviction was objectionable. There is no indication that defense counsel's apparent understanding from the trial prosecutor was made known to defendant. Thus, remand is necessary to determine what defendant or his attorneys actually knew about the enhancement, if anything.

Defendant did not waive this issue for appellate review by raising a subsequent objection after his objection on notice grounds.

Defendant's convictions are affirmed and the case is remanded for a hearing consistent with this opinion, and whether defendant is entitled to resentencing on his delivery of less than 50 grams of cocaine conviction without a habitual offender enhancement will depend on the outcome of this hearing. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis