STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 15, 2009
v	No. 280956 Wayne Circuit Court
ALAN EDWARD REBER, Defendant-Appellant.	LC No. 07-009642-01

Before: Saad, C.J., and O'Connell, and Zahra, JJ.

PER CURIAM.

The jury convicted defendant of manufacture of marijuana, MCL 333.7401(2)(d)(iii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 18 months' probation for the manufacture of marijuana and possession with intent to deliver convictions (concurrent), and two years in prison for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that the trial court erred in not giving an instruction on the offense of possession of marijuana because it is a necessarily included lesser offense of both manufacture of marijuana and possession with intent to deliver marijuana, and furthermore, a rational view of the evidence supported such an instruction for possession of marijuana.

This Court reviews de novo the determination whether an offense is a lesser-included offense. *People v Nickens*, 470 Mich 622, 625; 685 NW2d 657 (2004). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). Generally, "all the elements of a necessarily considered lesser offense are contained within those of the greater offense. Thus, it is impossible to commit the greater without first having committed the lesser." *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001) (internal citations omitted). To warrant reversal of convictions on the basis of the failure to instruct the jury on a lesser-included offense, a "defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict." *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).

Even assuming that possession of marijuana is a necessarily included lesser offense of both manufacture of marijuana and possession with intent to deliver marijuana, a rational view of the evidence does not support an instruction for possession of marijuana. The evidence presented at trial reflects no real dispute regarding whether defendant intended that the marijuana be delivered to others. Defendant admitted that he was engaged in selling marijuana to friends. Further, the police also recovered quantities of marijuana and other evidence consistent with ongoing sales: (1) three marijuana plants growing in the yard and starter plants present inside, (2) a digital scale found in close proximity to marijuana, which, as Detective David Juras explained, is "generally used . . . to weigh drugs when they are packaged for delivery, distribution, or sale"; (3) small plastic zipper bags, commonly used to package drugs, and (4) 13 guns, including a loaded AK-47, which Detective Michael Kowalski described as the type of weapons that drug dealers use "to protect their business." Therefore, the trial court did not err in refusing to give an instruction on possession of marijuana.[1]

Defendant next argues that, on two occasions, the prosecutor made arguments that were prejudicial and without evidentiary support, thereby denying defendant a fair trial. We disagree.

This Court reviews de novo claims of prosecutorial misconduct "to determine whether the defendant was denied a fair trial." *People v Wilson*, 265 Mich App 386; 695 NW2d 351 (2005). This Court considers issues of prosecutorial misconduct "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court also examines the relationship between the remarks and the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Curative instructions, however, "are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

"A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but . . . is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). "[P]rosecutors may use 'hard language' when it is supported by evidence and are not required to

[1] Although the trial court based its decision on the fact that possession of marijuana is a misdemeanor, the correct rule is: "MCL 768.32(1) precludes cognate lesser misdemeanors and only permits necessarily included lesser misdemeanors if supported by a rational view of the evidence." *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), overruled in part on other grds *People v Mendoza*, 468 Mich 527, 533, 664 NW2d 685 (2003). Thus, refusal to give the instruction was proper because, as discussed, a rational view of the evidence did not support it. This Court, however, "will not reverse a trial court if it reached the right result for an alternative reason." *Detroit International Bridge Co v Commodities Export Co*, 279 Mich App 662, 668; 760 NW2d 565 (2008).

phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

During closing arguments, defendant first objected when the prosecutor stated, in reference to the half-pound bag of marijuana that defendant admitted buying, "$650 is a lot of marijuana money. Why does the defendant need to buy marijuana when he is also manufacturing it and selling it? *Because he has a thriving business*. He can't even produce enough marijuana to sell to all of the people that he is selling to." Defendant argues on appeal that no witnesses testified to the size or success of defendant's business, and the prosecutor did not produce any direct evidence that defendant was actually selling any marijuana. We find that the prosecutor's description of defendant's drug sales as a "thriving business," however, is not an unreasonable inference based on the facts.

Here, defendant admitted that he was engaged in selling marijuana to friends. Although on appeal, defendant suggests his admission referred to something that happened in the past, the question was phrased in the present tense: "Do you sell drugs?" and the answer was "a gram or so to friends." Further, as discussed above the police also recovered quantities of marijuana and other evidence consistent with ongoing sales: (1) three marijuana plants growing in the yard and starter plants present inside, (2) a digital scale found in close proximity to marijuana, which is "generally used . . . to weigh drugs when they are packaged for delivery, distribution, or sale"; (3) small plastic zipper bags, commonly used to package drugs, and (4) 13 guns, including a loaded AK-47, the type of weapons that drug dealers use "to protect their business." In additional to evidence that defendant was growing and selling marijuana, defendant admitted that he bought the half-pound bag of marijuana from a third party for $650, and had been buying from this person for two months. Therefore, it was not an unreasonable inference, based on the evidence, to argue that defendant had a thriving marijuana business.

Defendant also objected when, during rebuttal, the prosecutor argued, "[t]he defendant has sold drugs in the past. How many marijuana plants do you have? Three . . . . Have you grown them? Yes. Have you grown them before? Yes. He has sold these drugs in the past, and that's what he does. That's how the person who was the CI knew about it. If you don't sell drugs to people, if you don't have marijuana in your home, how do people even know about it?" After defendant's objection, the prosecutor reiterated, "[h]ow do you even know what is in someone's home unless you [sic] been there, and you saw it." Defendant argues on appeal that none of the witnesses testified that the informant bought marijuana from defendant or that the informant had ever seen defendant sell marijuana, and therefore, this argument was not supported by evidence presented at trial. We disagree.

Initially, we note the prosecutor did not explicitly say that the confidential informant saw defendant sell drugs. Nonetheless, the prosecutor's argument is not improper given the following direct examination testimony of Detective Trooper Jon Bowerman:

> *Q*. When did you get knowledge or information that the defendant in court may be involved in *selling drugs*? About what time was that?
>
> *A*. Within a week of the execution of the search warrant.

Q. What did you do as far as follow up on the information that you got that the defendant may be involved in drugs?

A. I conducted surveillance on more than one occasion, observing the residence, and found that it was accurate to what *my informant* had advised me. [Emphasis added.]

And although Detective Bowman's testimony on cross-examination only indicated that the confidential informant told him that defendant was growing and using marijuana, the jury may have believed that the informant passed on evidence of drug sales.

Even if the prosecutor's comments were improper, however, the judge instructed the jury that "the lawyers' statements and their arguments are not evidence. They are only meant to help you understand the evidence, and each side's legal theories." As noted, curative instructions "are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Unger*, *supra* at 235. Therefore, defendant was not denied a fair trial.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra