# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 5, 2009 |
| v | No. 286060<br>Tuscola Circuit Court |
| DOUGLAS PAUL GREENMAN,<br><br>Defendant-Appellant. | LC No. 07-010451-FH |

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant appeals of right his conviction following a jury trial of possession of less than 25 grams of a controlled substance (cocaine), MCL 333.7401(2)(a)(*iv*), second or subsequent offense, MCL 333.7413(2), two counts of felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was found not guilty of possession of less than 50 grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(*iv*), and an additional count of felony-firearm. We affirm.

Defendant first argues that there was insufficient credible evidence presented at trial to prove that he was guilty of the charged crimes. We disagree. We review sufficiency of the evidence claims de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), viewing all evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Conflicting evidence is resolved in favor of the prosecution. *Id.*

After considering the evidence adduced in the proper light, we conclude that sufficient evidence was presented to convict defendant of possession of less than 25 grams of cocaine, a schedule 2 controlled substance. MCL 333.7214(a)(*iv*). First, we note that all subsequently discovered evidence adduced at trial was found by the police in a residence owned and occupied by defendant at the time of their discovery. Defendant had consented to a search of the residence.

A bag containing 4.29 grams of cocaine was discovered inside a shirt pocket that was in close proximity to a pair of pants in which defendant's identification was found. There was also evidence of other paraphernalia in the home, explained by the prosecution's expert as being indicators of illegal drug activity. This paraphernalia included little pieces of paper cut into

bindles with folded corners, pipes, glass vials, two canisters of Inositol, steel wool scrubbers, and a butane torch. Defendant admitted to the police that the bindles would test positive for cocaine, asserting that he used them to transport Inositol for his current medical condition. Additionally, both a triple beam scale and a digital scale found in the home tested positive for cocaine residue.

There was also enough evidence adduced to support the firearm convictions. The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). The elements of felon in possession of a firearm are that the defendant possessed a firearm and had been convicted of a prior felony. MCL 750.224f(2); *People v Perkins*, 262 Mich App 267, 270; 86 NW2d 237 (2004). Where the defendant has been convicted of a "specified felony," a potentially indefinite prohibition period applies for possessing a firearm. MCL 750.224f(2). The parties stipulated that there was a predicate "specified felony," which was proven by virtue of a conviction entered in 1977. Possession of a weapon can be constructive or actual, *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989), and can be established by circumstantial evidence, *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000).

Plaintiff presented evidence of defendant's constructive possession of a firearm by eliciting testimony from a police officer that he found a 12-gauge shotgun in the upstairs closet and a 16-gauge shotgun in a downstairs bedroom closet. The officer also testified that defendant informed him of the location of the 16-gauge shotgun after the 12-gauge shotgun had been found. The 12-gauge shotgun was found in close proximity to a shirt containing drugs in the pocket and the pair of pants with defendant's identification in them. There was also evidence that defendant was committing or attempted to commit a minimum of two felonies at the time of the constructive possession of the firearms, i.e., (1) felon in possession, as discussed above, and (2) possession of a controlled substance.

Defendant also argues that a police officer was improperly allowed to testify as an expert witness. We disagree. Because defendant failed to challenge the officer's qualifications, we review this issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 103 (1999). Under MRE 702, a court may allow expert testimony if it "determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The expert testimony must be based on reliable principles and methods. MRE 702(2). Defendant's argument that the expert testimony was not reached through reliable principles and methodology, and that the officer was not trained in making such evaluations, lacks merit. The officer provided a substantial amount of testimony regarding his training.[1]

[1] He testified that he had been in law enforcement for 18 years, with the previous two years as unit commander of a multi-jurisdictional task force known as the Thumb Narcotics Unit (TNU). He was first trained with narcotics in recruit school in 1990 and he spent ten years assisting in the Flint Area Narcotics Group as a trooper. He received specialized training while he worked with the Drug Enforcement Administration (DEA), which included a 40-hour basic narcotics investigation school, a 40-hour advanced narcotics investigation school, and a 16-hour DEA drug

It is reasonable to conclude that not all jurors are familiar with the terminology and indicators related to drug packaging and delivery procedures. The specialized knowledge of the expert was useful to explain to the jurors what bindles are and how they are used in drug transportation, how Inositol can be used as a cutting agent, and the importance of the scales found in the home. Accordingly, the trial court did not err in admitting the officer as an expert witness and then allowing him to testify within this area of expertise.

Defendant also argues that because there was insufficient evidence to convict defendant of possession with intent to deliver, this charge should not have been submitted to the jury. Because defendant did not request that the charge of possession of cocaine with intent to deliver be dismissed, we again review for plain error affecting substantial rights. *Carines*, *supra* at 763.

"The elements of possession of less than fifty grams of cocaine with intent to deliver are: '(1) that the recovered substance is cocaine; (2) that the cocaine is in the mixture weighing less than fifty grams; (3) that defendant was not authorized to possess the substance; and (4) that the defendant knowingly possessed the cocaine with intent to deliver." *People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (citation omitted), disapproved of on other grounds 469 Mich 967 (2003). The only disputed element is whether defendant knowingly possessed cocaine with intent to deliver. "'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.'" *Id.* at 226, quoting *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998).

In this case, the TNU unit commander testified that he saw several indicators in the TNU report that would lead him to believe that defendant was dealing, selling, or delivering drugs. Some of the items found in defendant's home that the officer pointed to included: (1) numerous bindles; (2) small Ziploc style bags; (3) cash in separate locations of the home; (4) Inositol; (5) a triple beam scale and a digital scale with white powder residue on them; (6) the alleged drug ledger to keep track of client sales; and (7) glass vials capable of containing drugs. The officer acknowledged that people that deal in controlled substances often use the drugs, as well. However, he opined that it would be uncommon for an individual that is merely using drugs personally, and not selling, to have most of the above indicators. The officer concluded that based on the facts in this case, he believed defendant was a drug dealer.

Considering the evidence in a light most favorable to plaintiff, a rational trier of fact could have concluded that the elements of the offense were proven beyond a reasonable doubt. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Thus, no error, plain or

recognition school. The officer took a field examination to test his skills regarding surveillance, undercover work, handling narcotics, purchasing narcotics, and identifying trafficking of narcotics. The officer estimated that he has handled more than a thousand investigations since recruit school, with roughly 40 percent of them involving cocaine.

The officer also indicated that he uses generally accepted practices in the area of drug dealing or trafficking, and spoke of the methodology that is used to identify whether an individual may be selling drugs and what indicators are sought in an expected drug dealer's home.

otherwise, occurred in submitting the charge to the jury. Moreover, defendant was not convicted of a lesser charge—he was convicted of a charge of possession that was entirely separate. Thus, any exception noted in *People v Graves*, 458 Mich 476, 488; 518 NW2d 229 (1998) for "where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense" does not apply. See also MCL 769.26. Moreover, defendant cites to no evidence of logically irreconcilable verdicts or unresolved jury confusion. *Graves, supra* at 487-488.

Defendant next argues that the judge improperly disallowed defense counsel from bringing out defendant's statements to the police denying possession of the drugs and that he had a lot of biker friends staying at the home. Defendant argues based on *People v Bowen*, 170 Mich 129, 133-134; 135 NW2d 824 (1912), *People v Hepner*, 285 Mich 631, 638; 281 NW 384 (1938), and *People v Warren*, 65 Mich App 197, 199-200; 237 NW2d 247 (1975), that since the plaintiff brought in some of the statements made by the defendant, the balance of statements should come in.

Out-of-court statements that are offered for the truth of the matter asserted are considered hearsay and are not admissible unless there is an exception to admit the hearsay statement. MRE 802. However, a statement that is offered against a party and is the party's own statement is not hearsay. MRE 801(d)(2). In this case, plaintiff could elicit statements by the officers regarding inculpatory statements made by defendant because they are being offered against defendant and they are his own statements. Thus, they are not considered hearsay under MRE 801(d)(2).

On the contrary, however, statements that are offered by a party, in favor of that party, and are the party's own statements are not included under MRE 801(d)(2). Here, defendant's self-serving statements to the police do not fall under any of the hearsay exceptions. Moreover, defendant was given the option to provide his own account of what he told the officers. Accordingly, no error has been shown.

As for defendant's argument that the trial court made instructional errors that prevented him from presenting a defense, he has failed to identify what instruction should have been included in his discussion of this issue. An appellant may not merely announce a position and then leave it to this Court to discover and rationalize the basis for his claim. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

To the extent that defendant is arguing that the jury instructions were improper because they failed to include a felony-firearm element stating that plaintiff must prove that defendant was carrying or armed with a firearm, this argument fails. As discussed above, the law does not require that a defendant charged with felony-firearm be carrying or specifically armed with a weapon to be convicted. It is sufficient for the plaintiff to prove that defendant had constructive possession of the firearm, as was the case here.

Next, we address defendant's assertion that the prosecutor erred by presenting prejudicial and irrelevant testimony regarding anonymous phone tips that drugs had been sold out of defendant's home, thereby denying defendant of his constitutional right of confrontation, and by eliciting testimony that defendant was unemployed. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

Upon being asked why the officers visited defendant's home, and whether this was explained to defendant, a police officer testified that he explained to defendant that the reason they were visiting his home was because of an anonymous tip that he was possibly dealing narcotics from the residence. On cross-examination, the officer referenced two tips, one in October 2006 and one the day before the officer's went to defendant's home.

Evidence is relevant if it has 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. Generally, all relevant evidence is admissible; conversely, evidence that is not relevant is not admissible. MRE 402. However, 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. MRE 403.

The confrontation clause of the United States and Michigan Constitutions provides a criminal defendant with the constitutional right to confront witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 42, 58, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). However, the confrontation clause is not implicated unless the elicited testimony is offered for the truth of the matter asserted. *Crawford, supra* at 36.

The testimony regarding the phone tips of drug sales out of defendant's residence is relevant to show what prompted the officers to visit defendant's home for a "knock and talk" and also to demonstrate that the alleged drug sales were not exclusively limited to a one-weekend event. The testimony was not offered for the truth of the matter asserted: the prosecutor did not attempt to use it to prove that defendant was dealing drugs. Rather, the testimony was merely to explain why the officers visited defendant's home. Because the testimony regarding the anonymous tips was not hearsay testimony, the confrontation clause is not implicated.

The single reference to defendant's employment status may have been elicited because it suggests how defendant obtained the money that was found in different areas of the home. His employment status was not an element of the crimes charged. See *People v Johnson*, 393 Mich 488, 486; 227 NW2d 523 (1975). However, it may be viewed in context as having relevance to his guilt or innocence. It was therefore admissible, and we do not find that the single reference during the entire course of the trial could have substantially outweighed its probative value with the danger of undue prejudice or confusion.

Finally, defendant's cumulative error argument is without merit. No error having been shown, there can be no cumulative negative impact. See *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

We also reject defendants claim that he received ineffective assistance of trial counsel. Defendant argues that defense counsel was ineffective in not requesting or objection to the jury instructions, claiming that this cannot be a trial strategy, but provides little support or explanation for this position. Again, an appellant may not merely announce a position and leave it up to this

Court to discover the basis for the argument. *Matuszak, supra* at 59. In any event, having found no error in the jury instructions, this claim of ineffective assistance necessarily fails. "Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Finally, for the reasons set forth in *People v Smith*, 478 Mich 292, 295-296; 73 NW2d 351 (2007), and *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003), we reject defendant's assertion that his felony-firearm and felon in possession of a firearm convictions violate double jeopardy.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck