

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCORPION REED,

Defendant-Appellant.

UNPUBLISHED

July 27, 2010

No. 291830

St. Clair Circuit Court

LC No. 08-002861-FH

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant, Scorpion Reed, appeals as of right his jury trial conviction of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and maintaining a drug house, MCL 333.7405(d). Because sufficient evidence supported defendant's convictions, the trial court did not err in admitting evidence, and defendant was not denied the effective assistance of counsel at trial, we affirm.

This case arises from a police investigation, surveillance, and search of 1010 Pine Street, Apartment 1 in Port Huron on September 4, 2008. After the St. Clair County Sheriff's Department Drug Task Force received a tip from a confidential informant, the task force conducted surveillance of the address to corroborate the tip. Deputy George Maschke performed surveillance of the address while the team awaited the search warrant for approximately two hours. Maschke saw defendant return home. He then saw a male in a gold Taurus arrive and enter the house. The male stayed inside for a minute or two and then left. Just as the Taurus was leaving, a Tahoe arrived and Maschke watched another male get out of the Tahoe and knock on the door. Defendant answered the door, the two men engaged in a hand-to-hand transaction, and then the male returned to the Tahoe and drove away.

Officer Brian Kerrigan testified that once the team obtained the search warrant, the team breached the door, and he found defendant in the bedroom of the apartment. Kerrigan stated that he took custody of defendant, explained to him that the police were there pursuant to a narcotics search warrant, and then read him his rights. Kerrigan testified that defendant waived his rights, agreed to be interviewed, and was very cooperative with police. Kerrigan asked defendant if there were any illegal controlled substances in the apartment. Defendant directed Kerrigan to a cabinet in the living room that he said had about half an ounce of marijuana in it, that it was for personal use, and that it was the only marijuana in the apartment. In the cabinet drawer, the team located sandwich-style baggies typically used to package marijuana, a digital scale typically used

to weigh marijuana for sale, and a bag of marijuana weighing 21.3 grams (approximately $\frac{3}{4}$ of an ounce). The marijuana was sitting directly on top of the digital scale. Police also located a total of five cell phones in the bedroom of the apartment and mail addressed to defendant scattered around the apartment. Kerrigan testified at trial that during his interview of defendant, defendant ultimately admitted to selling marijuana to close friends to support his own habit.

Defendant testified on his own behalf at trial. Defendant stated as a result of being shot in the head in 2004 he suffers constant severe headaches, extreme head pain, and migraines. Defendant stated that he self medicates with marijuana because it calms him down and deadens the pain. Defendant denied telling Kerrigan that he would sometimes sell marijuana. Defendant denied selling drugs and stated that the individuals that came over to his house on the date of the search were friends that were visiting for reasons other than marijuana. He stated that he only buys marijuana for personal use, that he buys at least half an ounce of marijuana so it lasts quite a while, and he has a scale to measure it to be sure he got the amount he paid for.

The jury found defendant guilty of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and maintaining a drug house, MCL 333.7405(d). Defendant now appeals as of right.

Defendant argues on appeal that there was insufficient evidence to sustain his convictions of possession with intent to deliver marijuana and maintaining a drug house. We review a defendant's allegations regarding sufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* However, we will not interfere with the role of the trier of fact to determine the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

A conviction for possession with intent to deliver marijuana requires proof, among other things, that the defendant knowingly possessed the marijuana and that he knew that the substance was marijuana. MCL 333.7401(2)(d)(iii); *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). A defendant need not own a controlled substance or have actual physical possession of it when it is discovered to have "possession" of it. *Wolfe*, 440 Mich 519-520. "Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Id.* at 524.

Here, viewing the evidence in the light most favorable to the prosecution, we hold that sufficient evidence connected defendant to the marijuana and he had the intent to sell it. The police were executing a search warrant that was issued as a result of a tip from a confidential informant that the task force corroborated by further investigation and surveillance of the address. Immediately prior to the search, Maschke witnessed an individual walk up to the door

of defendant's residence, enter and stay only a very short time, and a second individual engage in a hand-to-hand transaction with defendant on the porch. At the time of the search, when the officers arrived, defendant was in the bedroom of the apartment. As the officers were about to start the search of the apartment, defendant told Kerrigan that there was marijuana in his residence and exactly where it was in a cabinet in the living room. When the officers opened the drawer defendant pointed out, they found a plastic bag containing marijuana sitting on top of a digital scale, and several clear plastic sandwich baggies. Also inside the apartment officers found various pieces of mail addressed to defendant and five prepaid cell phone, three of which were dead.

Considering the circumstantial evidence, the reasonable inferences arising therefrom, and the totality of the circumstances, and resolving all evidentiary conflicts in favor of the prosecution, there was sufficient evidence to show that defendant possessed the marijuana with the intent to sell it. There was no evidence presented that anyone else lived in the apartment. The evidence was sufficient to support a finding that defendant knew that the substance was marijuana since he identified it as such to police. Based on the packaging of the marijuana, its proximity to the digital scale, the presence of clear plastic baggies commonly used to package marijuana for resale, the presence of multiple prepaid cell phones commonly used in narcotics trafficking, and ample eyewitness police testimony of brief visits to defendant's residence where hand-to-hand transactions occurred, it is reasonable to infer defendant possessed the marijuana with the intent to sell it. In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant possessed the marijuana in the apartment with the intent to sell it.

Likewise, the evidence was sufficient to enable a rational trier of fact to find that defendant kept or maintained a drug house. "[T]o 'keep or maintain' [a drug house] requires some degree of continuity and . . . the prosecution is required to prove . . . something more than a single, isolated instance of the proscribed activity." *People v Thompson*, 477 Mich 146, 155; 730 NW2d 708 (2007) (quotations and citation omitted). Police found a plastic bag containing marijuana sitting on top of a digital scale in the same drawer with other clear plastic baggies that appeared to be for packaging smaller quantities of marijuana. This evidence, along with the other evidence indicating narcotic trafficking, including eyewitness police testimony of individuals briefly visiting defendant's residence and a hand-to-hand transaction occurring on defendant's porch was evidence of some degree of continuity. In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant kept or maintained a drug house.

Next, defendant argues that the trial court erred when it allowed Kerrigan's testimony that defendant, during his police interview, admitted to him that he sold drugs sometimes to support his marijuana habit into evidence at trial. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). A trial court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727

NW2d 399 (2006). Because defendant did not object at trial, we review this unpreserved error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Kerrigan testified that he took custody of defendant, explained to him that the police were there pursuant to a narcotics search warrant, and then read him his *Miranda*¹ rights. Kerrigan stated that defendant waived his rights and agreed to be interviewed. At trial, Kerrigan testified that during the interview defendant insisted the marijuana was for personal consumption, but after Kerrigan confronted defendant with the possibility that controlled buys were done at his residence, defendant then admitted that sometimes he sells marijuana to friends to support his own habit. At trial, defendant denied making that statement to Kerrigan and specifically stated that he does not sell marijuana and only purchases it for personal use. Defendant's statement to Kerrigan after his lawful arrest and waiver of *Miranda* rights was properly admissible under MRE 801(d)(2)(A) as that of a party-opponent. Under MRE 801(d)(2)(A), a statement is not hearsay if it is offered against a party and is the party's own statement. Defendant has failed to demonstrate plain error affecting his substantial rights and, therefore, he is not entitled to relief on this issue.

Even if the trial court had abused its discretion in admitting defendant's statement, any error was harmless. An unpreserved nonconstitutional error is presumed harmless and does not warrant reversal unless it is more probable than not that the error was outcome determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In light of the substantial amount of evidence establishing defendant's guilt, he cannot prove that the outcome of the proceedings would have been different, but for the admission of this statement. *Id.*

Defendant argues that drug profile evidence was improperly used as substantive evidence of his guilt at trial. We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

"Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit" *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Drug profile evidence is not admissible as substantive evidence of a defendant's guilt. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). However, in controlled substance cases, a prosecutor may elicit expert testimony from police officers to explain the significance of items seized in order to aid the jury's understanding of the evidence. *Murray*, 234 Mich App at 52; see also *People v Ray*, 191 Mich App 706, 708; 749 NW2d 1 (1991) (police officer's testimony that the quantity of cocaine in the defendant's possession and the fact that cocaine rocks were evenly cut indicated that the defendant intended to sell the cocaine was admissible to aid the jury in determining the defendant's intent).

Maschke testified that in drug trafficking, people coming to purchase drugs stay for only a very short time because the individuals involved in the transaction already know what is involved. Maschke testified that it is common to use multiple prepaid cell phones in narcotics trafficking to manage the sales. Maschke testified a digital scale and clear plastic baggies are

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

used in narcotics to weigh the marijuana in order to sell it by weight in the clear plastic baggies. Maschke testified that in Port Huron, the most common quantity of marijuana sold is a dime-bag of marijuana which fluctuates between one and two grams of marijuana for \$10.00. Maschke's testimony did not constitute impermissible drug profile evidence. He did not testify, and the prosecutor did not argue during closing arguments, that because defendant exhibited certain innocuous characteristics, defendant was trafficking marijuana. Rather, Maschke's testimony explained the significance of items seized, and such testimony was permissible. *Murray*, 234 Mich App at 52; *Ray*, 191 Mich App 708. Accordingly, there was no plain error in the trial court's admission of Maschke's testimony.

Finally, because defendant has not established that Maschke's testimony was impermissible drug profile evidence, we reject his claim that counsel was ineffective for failing to object to the admission of Maschke's testimony. Counsel is not ineffective for failing to raise a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher