STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 5, 2012
v	No. 301254 Kent Circuit Court
SACARRIO DONTE PARISH, Defendant-Appellant.	LC No. 09-002734-FH

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii). Defendant appeals as of right. We affirm.

I

On February 27, 2009, the Grand Rapids police received information from a confidential informant that defendant possessed a firearm. A surveillance team was deployed to a house on Kalamazoo Street in Grand Rapids where defendant was staying with his girlfriend.[1] Two cars pulled up at different times near the house. Defendant briefly got into each car. A third car came to the house, and a woman went into the house briefly. When defendant later got into a taxicab, the surveillance team radioed other officers to make a traffic stop. The officers ordered both defendant, who was in the back seat of the cab, and the cab driver out of the cab. The officers then searched the cab and found a quarter bag of marijuana tucked in the backseat. Defendant had $1,431 in cash but no smoking implements.

Officers Joe Garrett and Matthew Ungrey spoke with defendant after he received and waived his *Miranda*[2] rights. Officer Garrett testified at trial during direct examination that defendant "said it [the marijuana] was his, and him and his girlfriend were going to celebrate or to party that evening." On redirect, the prosecutor asked Officer Garrett the following questions:

[1] Defendant had been shot during a recent attempted robbery, and the police feared that he might attempt to retaliate.

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

(1) "Are you sure that the defendant said that he was going to his girlfriend's party and he was going to use the marijuana there to party with her to celebrate her birthday?" and (2) "What you heard there indicated that that marijuana was going to be shared between himself and his girlfriend?" Officer Garrett answered both questions "[y]es." Officer Ungrey testified that defendant "advised that he was going to his girlfriend's house so that they could celebrate together, I assume that it was for him and his - -" Defense counsel objected, and the trial court sustained the objection. Officer Garrett testified that the taxicab driver said that the marijuana was not his and that defendant "was making furtive movements and moving around in the back seat when we made the traffic stop." Officer Garrett also testified that defendant would not tell the officers where he got the marijuana.

An expert in drug trafficking testified that the activity observed by the surveillance team at the residence was consistent with drug trafficking, the 30 grams of marijuana seized from defendant was enough for about 84 doses and was an amount typically found on a seller, and defendant's possession of the money but no paraphernalia to use the drugs was consistent with selling drugs.

II

Defendant contends that he was denied his constitutional rights to confrontation, due process, and a fair trial as a result of prosecutorial misconduct and also ineffective assistance of counsel due to his counsel's failure to object to the prosecutor's improper questions and comments. We disagree.

We review preserved instances of alleged prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The plain error standard applies to defendant's unpreserved claims. See *id.* There are three requirements to show plain error: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750; 763; 597 NW2d 130 (1999) (citations omitted). To affect substantial rights, the error generally has to affect the outcome of the proceeding. *Id.*

Claims of prosecutorial misconduct are reviewed "case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citations omitted). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (citation omitted).

Defendant's only preserved claim of prosecutorial misconduct concerns the prosecutor's questioning of Officer Ungrey about whether defendant indicated an intention to share his marijuana with anyone else. In response to the inquiry, Officer Ungrey testified that defendant "advised that he was going to his girlfriend's house so that they could celebrate together, I assume that it was for him and his - -" at which point defense counsel objected to the witness making assumptions. Defense counsel objected as soon as the witness began to give speculative testimony, his objection was sustained, and the testimony was not evidence before the jury for consideration. Therefore, the testimony did not prevent a fair and impartial trial, and there was no prosecutorial misconduct.

With respect to defendant's seven unpreserved prosecutorial-misconduct claims, defendant first argues that the prosecutor improperly referred to defendant's post-*Miranda* silence when addressing defendant's refusal to tell the officers where he got the marijuana. "When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question" is not an invocation of the right to remain silent. *People v McReavy*, 436 Mich 197, 222; 462 NW2d 1 (1990). Here, defendant's refusal to answer a question was not an exercise of the right to remain silent; therefore, the prosecutor's reference to this was not prosecutorial misconduct.

Second, defendant challenges Officer Garrett's hearsay testimony about the taxicab driver's statements that the marijuana was not his and that defendant was making furtive movements in the back seat. However, this testimony was unresponsive testimony elicited, not by the prosecutor, but during defense counsel's cross-examination of Officer Garrett. Further, "unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990) (citation omitted). This testimony cannot be a basis for a prosecutorial-misconduct claim; there was no plain error. Moreover, the testimony did not affect the outcome of the trial because defendant admitted the marijuana was his. See *Carines*, 460 Mich at 763.

Third, defendant challenges Officer Garrett's testimony that defendant indicated he was going to share the marijuana with his girlfriend, which was prompted by the prosecutor asking on redirect, "Are you sure that the defendant said that he was going to his girlfriend's party and he was going to use the marijuana there to party with her to celebrate her birthday?" The prosecutor's question arguably assumed facts not in evidence. "A question which assumes the existence of a fact which has not been proven is objectionable." *People v Pollard*, 33 Mich App 114, 117-118; 189 NW2d 855 (1971) (citations and quotation marks omitted). Although the question may have been improper, we conclude that defendant has not shown plain error affecting the outcome of his trial. See *Carines*, 460 Mich at 763. There was significant evidence against defendant: the amount of marijuana and cash he had, the fact that he had no paraphernalia to use the marijuana, and the expert testimony indicating that his behavior was consistent with drug trafficking.

Defendant's remaining prosecutorial-misconduct claims involve comments during closing arguments when "[p]rosecutors are accorded great latitude." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation and quotation marks omitted). "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Schutte*, 240 Mich App at 721 (citation omitted).

Defendant's fourth prosecutorial-misconduct claim is that the prosecutor improperly referenced the taxicab driver's statement during closing. We disagree. This statement was in evidence, and prosecutors "are free to argue the evidence and all reasonable inferences." *Id.* (citation omitted). Furthermore, defendant has not shown that this claim of error affected the outcome of the trial. See *Carines*, 460 Mich at 763.

Defendant's fifth argument is that the prosecutor improperly referenced that defendant stated he was going to share the marijuana. Although Officer Garrett's testimony that defendant was going to share the marijuana was admitted through an improper question, it was evidence before the jury. Prosecutors are free to argue the evidence. *Schutte*, 240 Mich App at 721. Thus, we cannot conclude that plain error exists. Moreover, defendant has not shown that this argument affected the outcome of the trial. See *Carines*, 460 Mich at 763.

Sixth, defendant argues that it was misconduct for the prosecutor to argue that there was no contradicting evidence. We conclude that the prosecutor's comments did not shift the burden of proof onto defendant; indeed, the prosecutor emphasized that he was "not saying the defense ha[d] to put on a case." See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Rather, the prosecutor's comments were in reference to defendant's failure to produce evidence that defendant claimed would prove his alternate theory of the case; a prosecutor may comment on this failure. See *id.* Thus, defendant has not shown plain error requiring reversal. See *Carines*, 460 Mich at 763.

Defendant's final unpreserved prosecutorial-misconduct claim is that the prosecutor committed misconduct when he argued during closing argument that defense counsel was trying to confuse the jury. "A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001) (citation omitted). The prosecutor's comments were indeed improper and constitute plain error. Defendant has not shown, however, that it affected the outcome of the trial because there was significant evidence against him. See *Carines*, 460 Mich at 763. And, the jury was instructed that the lawyers' arguments were not evidence. This instruction remedied any potential prejudice. See *Schutte*, 240 Mich App at 720-721.

In addition to defendant's individual claims of prosecutorial misconduct, defendant argues that the cumulative effect of prosecutorial misconduct necessitates a reversal. We disagree. Defendant has not shown that the cumulative effect of the alleged errors denied him a fair trial. See *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

Defendant also argues on appeal that his counsel provided ineffective assistance. We review this unpreserved issue for errors apparent in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002) (citation omitted). To show ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). To show prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

We conclude that defense counsel was deficient for not objecting when Officer Garrett gave the unresponsive answer including the driver's statement, when the prosecutor asked Officer Garrett a question that assumed facts not in evidence, and when the prosecutor denigrated the defense during closing argument. However, defendant has not shown that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See *id.* There was strong evidence against defendant in this case, including his

admitting to possessing the marijuana and numerous circumstances supporting his intent to deliver. With respect to his other claims, defendant has not demonstrated that counsel's performance fell below an objective standard of reasonableness because counsel did not have to make meritless objections. See *Toma,* 462 Mich at 302; *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

III

Finally, defendant argues there that was insufficient evidence to establish an intent to deliver. In reviewing this claim, "a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (citations omitted). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993) (citation omitted).

For a conviction for possession with intent to deliver less than five kilograms of marijuana, the prosecutor must prove beyond a reasonable doubt that the defendant knowingly possessed the marijuana with the intent to deliver. See *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005); MCL 555.7401(2)(d)(iii). In this case, there was significant evidence against defendant to support his conviction. He was observed engaging in behavior indicative of drug dealing. When he was subsequently arrested, he possessed a large amount of cash in smaller denominations, had a large quantity of marijuana on him that was not indicative of personal use, and had no paraphernalia to support a plan to use the marijuana himself. Accordingly, the evidence was sufficient for a rational jury to determine beyond a reasonable doubt that defendant possessed the marijuana with the intent to deliver.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering