S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT ROMMELL WASHINGTON,

Defendant-Appellant.

UNPUBLISHED
October 11, 2012

No. 305405
Macomb Circuit Court
LC No. 2007-003055-FH

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of possession with intent to deliver 20 to 200 plants of marijuana, MCL 333.7401(2)(d)(ii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), felony firearm (third offense), MCL 750.227b, felon in possession of a firearm, MCL 750.224f, and maintaining a drug house, MCL 333.7405(1)(d). We affirm.

After surveillance was conducted over an 18 month period of time, a search warrant was executed at a house where defendant had been seen entering and leaving. Police recovered marijuana, marijuana growing and distributing paraphernalia, as well as guns. Personal effects were also recovered, including male clothing and defendant's checkbook, mail, paperwork, and check. In defense of the subsequent charges, defendant argued that he did not live at the house. This appeal follows his convictions.

Defendant first argues that the trial court abused its discretion when it denied his motion for a new trial premised on his claim that he was prejudiced by an extraneous influence on the jury because the jury saw a district court document, that had been inadvertently included in the exhibits, which listed defendant's name and set forth the address of the searched house as his residence. We disagree. A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion which occurs only when an outcome falling outside the principled range of outcomes is chosen. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

During deliberations, the jury may only consider the evidence that was presented to it in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Thus, the jury room must be kept free of evidence not admitted during trial, the presence of which, if prejudicial, would vitiate the verdict. *People v Keeth*, 63 Mich App 589, 593; 234 NW2d 717 (1975).

> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. [*Budzyn*, 456 Mich at 88-89 (citations omitted).]

An inadvertent submission to the jury of an exhibit that has not been admitted into evidence requires reversal if the error may have operated to substantially injure the defendant's case. *People v Talley*, 56 Mich App 598, 601; 224 NW2d 660 (1974). However, if the substance of the objectionable exhibit was presented to the jury during trial, this Court has found that the inadvertent submission did not impair a defendant's rights. *People v Allen*, 94 Mich App 539, 543-544; 288 NW2d 451 (1980). Also, "[j]urors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

In this case, it appears that during deliberations the court was advised by the jury that it had received a document that was not marked as an exhibit. The document, as described above, had defendant's name on it and set forth the address of the searched house as his residence. After discussion with the prosecuting attorney and defense counsel, the trial court instructed the jury as follows: "We all agree it has no bearing on this case. Disregard it completely." After the jury was excused, defense counsel asserted to the trial court that the error was prejudicial because it arguably tended to establish that defendant lived at the subject house. Further, defense counsel expressed doubt that the trial court's instruction to the jurors to totally disregard the document cured the error. The prosecuting attorney responded that there was testimony throughout the trial on the issue of defendant's residence at the house and the document was likely part of an exhibit that contained several similar documents. The trial court reiterated that the document was properly excluded from the jury. Subsequently, defendant's motion for a new trial premised on this ground was denied by the trial court after it concluded that the jury was properly instructed to disregard the document completely; therefore, the document did not operate to substantially injure defendant. On appeal, defendant argues that the inadvertent submission of the document to the jury was substantially injurious and not remediated by the jury instruction. We do not agree.

Even if we concluded that the jury was exposed to an "extraneous influence" because the document was inadvertently submitted, defendant cannot establish that this submission gave rise to "a real and substantial possibility that [it] could have affected the jury's verdict" in light of the substance of properly admitted evidence. See *Budzyn*, 456 Mich at 89. First, during police surveillance defendant was seen multiple times at the subject house, including answering the door at the house, entering the house with a key, and exiting then re-entering the house. Second, multiple items located in a bedroom and throughout the main level of the house listed defendant's name and set forth the address of the searched house as his residence: a checkbook, a check, and several pieces of mail, including bills, credit card information, a church invitation, a Fed Ex receipt, and other items. Third, during the booking procedure after he was arrested,

defendant advised the police that his address was the address of the subject house. Accordingly, the challenged substance of the traffic violation document – that defendant's address was the subject home's address – was repeatedly submitted to the jury through other properly admitted evidence; thus, defendant cannot establish the existence of "a real and substantial possibility" that the submission could have affected the jury's verdict. See *Budzyn*, 456 Mich at 89. Furthermore, with regard to the document, the jury was instructed to "[d]isregard it completely," which cured any error. See *Mahone*, 294 Mich App at 212. Therefore, the trial court did not abuse its discretion when it denied defendant's motion for a new trial premised on this argument.

Next, defendant argues that the trial court abused its discretion when it denied his motion for a new trial premised on the ground that the constructive possession jury instruction denied him due process and a fair trial. We disagree.

A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. *Miller*, 482 Mich at 544. This Court reviews for plain error an unpreserved challenge to jury instructions. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). In our review, we consider jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). A conviction will not be reversed if the jury instructions fairly presented the issues to be tried and protected the defendant's rights. *Gonzalez*, 256 Mich App at 225.

The trial court must clearly instruct the jurors on the applicable law, which includes giving them all the elements of the charged offenses. *People v Fennell*, 260 Mich App 261, 265; 677 NW2d 66 (2004). The possession element of offenses in violation of MCL 333.7401 has been explained as follows:

> A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. [*People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002) (citations omitted).]

"[C]onstructive possession exists where the defendant has the right to exercise control over the narcotics and has knowledge of their [presence]." *Id*. at 421 n 4. Further, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 478, amended 441 Mich 1201 (1992).

Defendant asserts that the following part of the jury instruction regarding possession with intent to deliver was improper:

> Possession does not necessarily mean ownership. Possession means that either the person has actual physical control of the substance for instance as to the pen I am now holding or the person has the right to control this substance even though it's in a different room or place. Possession may be sole or one person alone possesses the substance or the thing. The possession may be joint where two or

more people each share possession. It's not enough if the defendant merely knew about the marijuana, the defendant possessed the marijuana only if he had control of it or the right to control it either alone or together with someone else.

Defendant argues: "This instruction directs the jury to find possession finding only that a defendant had the right to control a substance that is found elsewhere." However, the jury instruction regarding the possession element was accurate and consistent with the law. Further, the trial court also gave a more specific instruction explaining the meaning of "constructive possession." Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial premised on this argument.

Next, defendant argues that the trial court abused its discretion when it denied his motion for a new trial based on his claim of newly discovered evidence that someone else owned and lived at the subject house. After review of the trial court's decision for an abuse of discretion, we disagree. See *Miller*, 482 Mich at 544.

A new trial will be granted based on the asserted ground of newly discovered evidence if the defendant shows: (1) the evidence itself, not its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) using reasonable diligence, the defendant could not have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). That is, "newly available evidence is not synonymous with newly discovered evidence sufficient to warrant a new trial." *People v Terrell*, 289 Mich App 553, 562; 797 NW2d 684 (2010).

In his motion for a new trial, defendant argued that proposed testimony from his nephew was newly discovered evidence that warranted granting him a new trial. Defendant attached to his motion an unsigned, undated "affidavit" of his nephew that was not notarized. The trial court ruled that the "affiant" was not "unavailable" at the time of trial and his testimony was not newly discovered because defendant had offered a witness list, which he later amended, naming the "affiant" as a witness to be presented on his behalf. Additionally, the trial court ruled that the proposed testimony would have been cumulative. We agree.

It is undisputed that defendant was aware of his nephew's proposed testimony before trial; thus, pursuant to *Terrell*, the purported testimony was not newly discovered evidence. See *Terrell*, 289 Mich App at 562. Furthermore, defendant's ex-girlfriend, Latanjiiah Lloyd, and current girlfriend, Makini Pearson, testified that defendant did not live at the subject home. Lloyd also testified that the gun and the marijuana growing operation at issue belonged to the "affiant." Thus, the proposed testimony would have also been cumulative. See *Cress*, 468 Mich at 692. And, in light of the significant evidence against defendant, the proposed testimony does not make a different result probable on retrial. See *id*. Therefore, the trial court's denial of defendant's motion for a new trial premised on this argument did not constitute an abuse of its discretion.

Next, defendant argues that the trial court abused its discretion when it denied his motion for a new trial premised on his prosecutorial misconduct claims. After review of this unpreserved claim for plain error, we disagree. See *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). This Court reviews claims of prosecutorial misconduct on a case-by-case basis, examining the record and the prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010) (citation omitted). "Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quote marks and citation omitted). However, a prosecutor may not misstate the facts or argue facts not introduced into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). But where a curative instruction could have alleviated any prejudicial effect, error requiring reversal will not be found. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant raises two claims of prosecutorial misconduct. First, he argues that the prosecutor's closing argument included that defendant "knew that there were individuals frequenting that house," which was not supported by the evidence. However, defendant was observed freely coming and going from this house on a number of occasions during the surveillance of this house. He was also observed on one occasion speaking to people in a car that had pulled up to the house honking the vehicle's horn. In light of the other evidence admitted in this case—including but not limited to the surveillance camera in the house pointing toward the driveway with a monitor in the bedroom where defendant's checkbook and mail were found—the prosecutor was free to argue the reasonable inference and theory that defendant knew individuals frequented the house. See *Bahoda*, 448 Mich at 282. But even if this brief statement was inaccurate, plain error has not been established and a curative instruction could have alleviated any prejudicial effect; thus, reversal would not be warranted. See *Ackerman*, 257 Mich App at 448-449.

Second, defendant argues that the prosecutor improperly challenged defense witness Lloyd's testimony that someone else lived at the house and operated the marijuana operation by implying that such person did not exist both during cross-examination of Lloyd and closing argument. Defendant claims that the prosecutor "testified as to personal knowledge" that the person did not exist and impermissibly shifted the burden of proof to him. However, the prosecutor did not imply personal knowledge or shift the burden of proof, the prosecutor was merely arguing that the evidence did not support Lloyd's claim and, thus, challenged her credibility in that regard. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(c). And a prosecutor may comment on the credibility of witnesses during closing argument, including arguing from the facts that a witness should be believed. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005); *People v Lodge*, 157 Mich App 544, 550; 403 NW2d 591 (1987). Further, "it is not error [for the prosecutor] to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely." *McGhee*, 268 Mich App at 634 (quotation marks and citations omitted). And "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *Id*. at 635. Accordingly, defendant's claims of prosecutorial misconduct fail and the trial court did not abuse its discretion when it denied defendant's motion for a new trial premised on these claims. See *Miller*, 482 Mich at 544.

Finally, defendant argues that the trial court abused its discretion by denying his motion for a new trial premised on his claim of ineffective assistance of counsel. After review of this unpreserved claim, on the existing record, we conclude that the trial court did not abuse its

discretion. See *Miller*, 482 Mich at 544; *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. *Id*. Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *Id*. Decisions regarding whether to call and question witnesses and what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Further, "[c]ounsel is not ineffective for failing to make a futile objection." *Id*. at 39-40.

First, defendant asserts that defense counsel was ineffective by "conceding" during closing argument that there was an empty glass vial in defendant's car. However, in addressing the prosecution's argument that there was a nexus between the vial found in defendant's car and the vials found in the home, defense counsel characterized the vile purportedly found in defendant's car as an "alleged" vile and highlighted the fact that the police did not photograph or produce the vile. Thus, defense counsel did not "concede" the existence of the purported vile.

Second, defendant asserts that he was denied the effective assistance of counsel because his attorney failed to investigate and present documentary evidence that defendant did not own or rent the subject house and that other people lived at the house. However, defendant did not have to own or rent the subject house to be convicted of the charges, including maintaining a drug house; thus, defendant was not deprived of a substantial defense. See MCL 333.7405(1)(d); *People v Thompson*, 477 Mich 146, 155; 730 NW2d 708 (2007). Further, defense counsel presented witness testimony which included that defendant did not live at the subject house, other people lived at the subject house, and that someone else was responsible for the marijuana grow operation. Documentary evidence purporting to provide the same information would have been cumulative and does not demonstrate ineffective assistance of counsel.

Third, defendant claims that his counsel was ineffective for failing to object to the jury instructions and prosecutorial misconduct as set forth above. Because neither of these claims of error was established, this argument fails to demonstrate ineffective assistance of counsel.

Fourth, defendant asserts that defense counsel was ineffective for not requesting a mistrial with regard to the district court document that was inadvertently included in the exhibits seen by the jury. However, defense counsel preserved this issue during trial when he asserted that the jurors having seen this document was prejudicial and raised doubt that the trial court's instruction to the jurors to totally disregard the document cured the error. Additionally, defense counsel raised the same issue regarding the document in his first motion for a new trial in the trial court. And for the reasons set forth above, defendant cannot establish that this inadvertent

submission gave rise to "a real and substantial possibility that [it] could have affected the jury's verdict." See *Budzyn*, 456 Mich at 89. Thus, defendant's claim of ineffective assistance of counsel premised on this argument is without merit. In summary, defendant has not demonstrated that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for counsel's deficient performance, a different result would have been reasonably probable. See *Armstrong*, 490 Mich at 289-290.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens