STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY TOMAS,

Defendant-Appellant.

UNPUBLISHED
December 30, 1996

No. 178408
LC No. 94-0145-FH

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

Defendant appeals as of right from a conviction for possession with intent to deliver less than 50 grams of cocaine in violation of MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He pleaded guilty to being a fourth-felony offender, MCL 769.12; MSA 28.1084, and was sentenced to 3-1/2 to 25 years imprisonment. We affirm.

Defendant contends that his conviction cannot be upheld because the proof that he knowingly possessed cocaine with the intent to deliver was insufficient because it was based upon layers of inference. "Inference upon inference" is improper when both inferences are based on the same evidence, *People v Delongchamps,* 103 Mich App 151, 160; 302 NW2d 626 (1981), or evidence that is merely conjectural, *People v McWilson,* 104 Mich App 550, 555; 305 NW2d 536 (1981). A factfinder is not prevented from making more than one inference in reaching a decision. *Id.*

Defendant's contention fails because each element of defendant's offense was inferred from the evidence, not from another inference. The element of possession was not based upon an inference, but was based upon testimony by the police officers that an object, that subsequently was determined to be a baggy containing crack cocaine, came out of the passenger window of defendant's car as the officers were stopping defendant. The element of knowledge that the substance was cocaine was not based upon an inference, but was based upon the evidence that the police officers and the lab

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* Circuit judge, sitting on the Court of Appeals by assignment.

technician believed that the recovered substance contained cocaine and the testimony that defendant threw it out of the car window.

Also, there was plenty of evidence for a rational trier of fact to infer that defendant intended to deliver. Defendant possessed a large amount of cocaine, thirty rocks, and a police officer testified that a person in possession of that large an amount of cocaine was not just a user, but a dealer, *People v Ray*, 191 Mich App 706, 708-709; 479 NW2d 1 (1991). In addition, other evidence allowing the inference of intent included that defendant told the police officers that he did not use cocaine, which indicated that the cocaine was not for personal use but for sale; that defendant had a pager; and that defendant possessed a number of bills of small denomination. See *People v Wolfe*, 440 Mich 508, 524-525; 489 NW2d 748, amended 441 Mich 1201 (1992). Thus, the elements of knowing possession of cocaine with intent to deliver were properly based on inferences from the evidence, not layers of inference. Viewing the evidence in the light most favorable to the prosecution, *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993), the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant knowingly possessed the cocaine with the intent to deliver.

Next, defendant contends that the circuit court improperly instructed the jury that it must find that defendant possessed the cocaine if the jury believed the lab technician's testimony that the substance found contained cocaine. This issue is unpreserved because defendant failed to object to the instruction and defendant cannot show that he was prejudiced. *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1995). Defendant cannot show prejudice because the premise of his argument is incorrect. The court did not instruct the jurors that they must find possession if they believed the lab results, as defendant contends, but instructed the jurors that they must find the substance was cocaine if they believed the lab results.

Next, defendant raised several allegations of prosecutorial misconduct. These arguments are unpreserved because defendant did not object and an instruction would have cured any error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, ___ US ___; 130 L Ed 2d 802; 115 S Ct 923 (1995). For instance, defendant contends that the prosecutor improperly adduced evidence regarding defendant's failure to claim his forfeited property. Even though this evidence was irrelevant, an instruction by the court could have cured any error, had defendant brought the matter to the court's attention.

Defendant cannot show prejudice regarding his remaining allegations of misconduct, because the allegations are without support in the record and the challenged remarks were reasonable inferences drawn from the evidence. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Defendant contends that the prosecutor made an improper "drug profile" argument to show that he was guilty. See *People v Hubbard*, 209 Mich App 234, 241-243; 530 NW2d 130 (1995). The record shows that the prosecutor did not argue that defendant fit a "drug profile," but argued that on this specific occasion, the circumstantial evidence indicated that defendant was dealing drugs.

Defendant also contends that the prosecutor attempted to mischaracterize the evidence by arguing that defendant was trying to avoid detection by driving a rental car with license plates that belonged to another car, when the license plate error was the fault of the rental car company. The record shows that the prosecutor properly characterized this evidence as a basis for the police officers to stop defendant, and properly argued that defendant was trying to avoid detection based on the evidence that defendant was in a car that had been rented under someone else's name, not that his plates were incorrect.

Next, defendant contends that the prosecutor denigrated defendant and his defense by suggesting that a witness adjusted his story to make it more believable to the jury. The record shows that the prosecutor was not denigrating defendant, but was comparing what defense counsel said in his opening statement to the actual evidence shown at trial. In opening, defense counsel stated that a witness would testify that he buried the cocaine in the snow, whereas at trial, the witness testified that the cocaine was thrown, not buried. Finally, defendant contends that the prosecutor vouched for the truthfulness of the police officers in closing argument. The record shows that the prosecutor vigorously argued that her witnesses were credible compared to defendant's version of events, and did not vouch for her witnesses' truthfulness. Thus, the record does not support any of defendant's allegations of misconduct because the prosecutor's remarks were reasonable inferences drawn from the evidence.

Finally, defendant contends that his sentence was disproportionate because he committed the instant offense while on parole and now must serve the maximum term on his prior sentence. Defendant is incorrect because there is no mandate that he complete the maximum term on his prior conviction. Rather, he will be required to serve the combined minimums of his sentences, plus whatever portion of the earlier term the parole board may require him to serve. *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569; 548 NW2d 900 (1996).

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Michael J. Talbot