# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES BRUCE MURRAY,

Defendant-Appellant.

UNPUBLISHED
March 13, 1998

No. 189291
Macomb Circuit Court
LC No. 94-002085-FH

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Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

A jury convicted defendant of one count of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and one count of possession with intent to deliver marihuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). Defendant was sentenced to two to twenty years' imprisonment on the first count and one to four years' imprisonment on the second count, sentences to be served concurrently and to run consecutively to a parole violation. Defendant appeals as of right. We affirm defendant's conviction of possession with intent to deliver marihuana and reverse defendant's conviction of possession with intent to deliver less than fifty grams of cocaine.

Defendant was arrested in the upstairs bedroom of a townhouse in the City of Mount Clemens after police officers forcibly entered the townhouse to execute a search warrant. Also present in the townhouse were an eight-year-old boy and a woman named Dolores Washington. In the bedroom where defendant was arrested, the officers found marihuana between the mattress and box springs of the bed and a wad of cash amounting to $9,400. On the floor of the upstairs bathroom, the officers found a little black bag containing paperwork, a pay stub with defendant's name on it, and a cellophane baggy (of the type commonly used to store narcotics) with a torn corner. In a ceramic jar in the living room downstairs, the officers found .43 grams of cocaine in a plastic baggy and a pink paper receipt in the name of "Dolores Washington." The officers also found some marihuana in the living room. After being advised of his *Miranda*[1] rights at the townhouse, defendant allegedly told a police officer that he had just flushed drugs down the toilet in the upstairs bathroom. At trial defendant denied making this admission. Later, on the day of his arrest at the police station, defendant reportedly confessed to having

flushed approximately twenty to thirty boulders of crack cocaine down the toilet in the upstairs bathroom as the officers were entering the townhouse. Defendant also explained that he sold crack cocaine in order to support his children. Defendant's confessions were not recorded.

On appeal, defendant first argues that the trial court erred in allowing the prosecution to introduce rebuttal evidence of an inculpatory statement made by defendant at the time of his arrest. We disagree. Because a criminal trial does not follow a script, the trial judge must have "broad power to cope with the complexities and contingencies inherent in the adversary process." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996), quoting *Geders v United States*, 425 US 80, 86; 96 S Ct 1330; 47 L Ed 2d 592 (1976). Accordingly, the admission of rebuttal evidence rests within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *Figgures*, *supra* at 398.

Rebuttal evidence is admissible to contradict, repel, explain, or disprove evidence produced by the other party. *Figgures*, *supra* at 399. The test of whether rebuttal evidence was properly admitted is whether the rebuttal evidence was properly responsive to evidence introduced or a theory developed by the defendant. *Id.* As a general rule, a party is free to contradict answers elicited from his adversary on cross-examination regarding matters germane to the issue. See *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995); *People v McGillen No 1*, 392 Mich 251, 266-267; 220 NW2d 67 (1974). However, a party may not elicit a denial of some statement not properly in the case so as to interject a new issue into the case under the guise of rebutting a denial. *Vasher*, *supra* at 505; see also *People v Humphreys*, 221 Mich App 443, 446 n 1; 561 NW2d 868 (1997), distinguishing *Figgures*, *supra*. Thus, rebuttal evidence is admissible to contradict a defendant's denial on cross-examination, so long as the defendant's denial on cross-examination addressed a matter (1) that is material to the ultimate issue and (2) that was originally introduced into the case or further developed by the defendant. See *Vasher*, *supra* at 504-506; see also *People v Sutton (After Remand)*, 436 Mich 575, 597 n 23; 464 NW2d 276, amended 437 Mich 1208; 466 NW2d 281 (1990).

The issue in this case is complicated by the existence of a ruling by the trial court regarding the prosecution's use of the challenged evidence. On the first day of trial, the prosecutor informed the trial court and defense counsel that he had just become aware of an oral statement made by defendant to Sergeant Steve Thomas during the search of the townhouse. According to the prosecutor, Thomas was prepared to testify that defendant admitted to having flushed drugs down the toilet immediately prior to the search. Because defense counsel did not know about the statement until the day of the trial, the prosecutor offered to refrain from introducing evidence of the statement during his case in chief. After defendant objected to any use of the statement (because of the late notice), the trial court ruled that the prosecution could not introduce evidence of the statement during its case in chief, but that it could use the statement as rebuttal evidence.[2] When Thomas testified during the prosecution's case in chief, the prosecutor avoided any questions regarding defendant's alleged statement. However, on cross-examination, defense counsel asked Thomas whether defendant made any written statements to Thomas at the time of his arrest. Thomas explained that defendant made a statement to him, but that it was not written. Pursuant to the trial court's earlier ruling, the prosecution was not allowed to address the substance of defendant's statement on redirect.

Defendant then testified on his own behalf, but did not address the subject of his alleged statement to Thomas. On cross-examination, defendant denied telling Thomas that he had just flushed drugs down the toilet. On rebuttal, over defendant's objection, the prosecution offered Thomas' testimony regarding the statement. Thomas testified that when he *Mirandized* defendant and asked him whether there were any drugs to be found, defendant replied, "[N]o you missed it, I flushed it." Because (1) defendant denied making the statement on cross-examination, (2) defense counsel originally introduced the matter into the case during his cross-examination of Thomas (knowing that the prosecution could not address the substance of defendant's statement on redirect), and (3) the issue was germane to the ultimate issue of defendant's guilt, we hold that the trial court did not abuse its discretion in allowing the prosecution to attempt to explain the matter and contradict defendant's denial by way of Thomas' testimony on rebuttal. See *Vasher*, *supra* at 504-506; *Figgures*, *supra* at 398-399.

Defendant next argues that he was denied his right to a unanimous jury verdict on his conviction of possession with intent to deliver less than fifty grams of cocaine when the trial court failed to specifically instruct the jury that it was required to unanimously agree on the occurrence of one of the two alleged acts of possession of cocaine. We agree. A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995). In this case, although the trial court instructed the jury in general terms that its verdict must be unanimous, it did not instruct the jury that its verdict had to be unanimous as to at least one of the two alleged acts of possession of cocaine. Defendant expressed his satisfaction with the instructions as given and made no further request for a special instruction concerning unanimity with respect to a particular act of possession. Because defendant failed to object to the instructions given at trial or to request further instructions, we review this issue only to determine if manifest injustice resulted. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Manifest injustice occurs when the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991).

Under the Michigan Constitution, a criminal defendant is entitled to a unanimous jury verdict. Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). In order to protect this right, the trial court must instruct the jury regarding the unanimity requirement. *Cooks*, *supra* at 511. In some circumstances, a general unanimity instruction may not be adequate. If the prosecution offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. *Id.* at 530. The alternative acts are "materially distinct" if the acts themselves are conceptually distinct or if either party has offered materially distinct proofs regarding one of the alternatives. *Id.* at 524.

Here, the prosecution presented evidence (1) that cocaine was recovered from a ceramic jar in the living room of the townhouse and (2) that defendant twice confessed to having flushed "narcotics"

or cocaine down the toilet in the upstairs bathroom immediately before the search of the townhouse. In his closing argument, the prosecutor referred to and relied on evidence of both the cocaine recovered in the living room and the cocaine defendant allegedly flushed down the toilet. In response to the prosecution's case, defendant contended (1) that he was merely a visitor at the townhouse without constructive possession over any of the narcotics recovered during the search, and (2) that the testimony regarding his alleged confessions was unreliable. Because the prosecution offered materially distinct proofs regarding each alleged act of possession, we cannot now discern the basis for the jury's verdict. It is possible that some of the jurors agreed only that defendant possessed the cocaine found in the living room while others agreed only that defendant possessed the cocaine flushed down the toilet. Given these facts, the trial court should have instructed the jury that in order to find defendant guilty of possession with intent to deliver it was required to unanimously agree on at least one specific act of possession with intent to deliver. *Cooks, supra* at 524, 530; cf. *United States v Ferris*, 719 F2d 1405, 1407 (1983) (holding that a general instruction on the requirement of unanimous verdict was sufficient where the various acts indicating possession with intent to distribute were consistent with each other). A trial court's failure to give such an instruction when warranted under the circumstances amounts to manifest injustice. See *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992). Therefore, we hold that defendant's conviction of possession with intent to deliver less than fifty grams of cocaine must be reversed. If defendant is retried, an appropriate instruction should be given to the jury.

Defendant also argues that the admission of defendant's confessions violated the corpus delicti rule. We disagree. The corpus delicti rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury. *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). The purpose of the rule is to prevent the use of a confession to convict a defendant of a crime that did not occur. *Id.* at 269. In this case, cocaine was recovered from the townhouse and there was no evidence that any person was authorized to possess the cocaine. Accordingly, the corpus delicti rule was satisfied by evidence independent of defendant's confession that cocaine existed and that it was possessed by someone. See *Konrad, supra* at 270. Defendant's confession merely provided additional evidence (1) that more cocaine existed at the townhouse and (2) that it was possessed by defendant.

Next, defendant argues that he was denied a fair trial as a result of three instances of prosecutorial misconduct. We disagree. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* If the defendant fails to object to the alleged prosecutorial misconduct, appellate review is precluded unless a curative instruction could not have removed any prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant first contends that the prosecutor argued facts not in evidence when, during closing argument, he speculated about the true owner of the $9,400 cash found in the townhouse. Defendant did not object to this line of argument. Although the prosecutor may have strayed beyond reasonable inference arising from the evidence, see *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), a prompt curative instruction could have removed any prejudice, and our failure to consider the issue on appeal will not result in a miscarriage of justice. *Nantelle*, *supra* at 86-87.

Second, defendant contends that the prosecutor improperly asked defendant to comment on the credibility of a prosecution witness. Although it was improper for the prosecution to ask defendant to comment on the credibility of a prosecution witness, see *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), the trial court gave a prompt curative instruction upon defense counsel's objection. Thereafter, defense counsel did not contest the language or effectiveness of the trial court's curative instruction. Accordingly, defendant was not denied a fair trial as a result of the prosecutor's improper comments.

Third, defendant contends that the prosecutor improperly commented on the absence of a witness. Again, because the trial court gave a prompt curative instruction upon defense counsel's objection, defendant was not denied a fair trial.

Finally, defendant argues that it was reversible error for the trial court not to sua sponte instruct the jury on the lesser included offenses of simple possession of cocaine and marihuana. We disagree. With the sole exception of first-degree murder cases, a trial court's failure to instruct on a lesser included offense will not be regarded as reversible error, absent a request for such an instruction before the jury retires to consider its verdict. *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975); see also *People v Stephens*, 416 Mich 252, 261-262; 330 NW2d 675 (1982) (holding that a specific request is also required for an instruction on a lesser included misdemeanor).

The Michigan Supreme Court, in *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975), held that a trial court was required to instruct the jury sua sponte on the lesser included offense of second-degree murder in every trial for first-degree murder. The Court carved out this "sole exception" to the general rule because of the significant differences in the penalties between first- and second-degree murder and because second-degree murder is necessarily included within every charge of first-degree murder. *Id.* Although, in this case, the penalties for simple possession are less severe than the penalties for the corresponding offenses of possession with intent to deliver (as is usually the case with lesser included offenses), we are not persuaded that we should stray from the general rule in this instance. Unlike first-degree murder, neither charge in this case carried a penalty of life in prison without parole. Compare MCL 750.316; MSA 28.548 and *Jenkins*, *supra* at 442 with MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv) and MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial.[3] To do so would allow the defendant to harbor the alleged error as an appellate parachute. See *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988); *People v Roberson*, 167 Mich App 501, 516-517; 423 NW2d 245 (1988). Because defendant indicated satisfaction with the jury instructions and did not request instructions on the lesser offenses of simple possession, he is not entitled to relief on appeal. *Henry*, *supra* at 374; *Stephens*, *supra* at 261.

Defendant's conviction of possession with intent to deliver marihuana is affirmed. Defendant's conviction of possession with intent to deliver less than fifty grams of cocaine is reversed.

/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly

[1] See *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694, reh den 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966).

[2] Defense counsel later characterized the trial court's ruling as an "agreement" between the parties.

[3] In this case, for instance, defendant's decision not to request the instructions at trial may have been part of a strategic attempt to avoid conviction altogether.