

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL WYNN, a/k/a PAUL WINN, a/k/a ERIC
THOMAS, a/k/a PAUL JONES,

Defendant-Appellant.

UNPUBLISHED

July 24, 1998

No. 198272

Kent Circuit Court

LC No. 96-001864 FH

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 50 to 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and was sentenced to a prison term of twenty-five to fifty years. He appeals as of right. We affirm.

After receiving a tip that defendant was hiding a significant amount of crack cocaine at the residence of his girlfriend, the police searched the residence and uncovered industrial razor blades containing cocaine residue, marijuana particles, a plate with two razor blades containing residue, a triple beam balance, two baggies containing crack cocaine, and several other baggies inside the large baggie that contained cocaine residue. The crack cocaine was in the form of two rocks, one weighing 46.87 grams and one weighing 3.5 grams. Loose material at the bottom of the bags weighed 17.3 milligrams. Defendant's girlfriend told the police that defendant resided with her when he was not with his wife in Detroit and that the cocaine belonged to him. She told police that she had seen defendant with these rocks of crack cocaine and that he had cut them into smaller amounts using the razor blades and the scales that were found. Defendant was arrested outside this residence for the possession with intent to deliver over fifty grams of cocaine.

I

Defendant argues that the evidence was insufficient to support a conviction for possession with intent to deliver 50 to 225 grams of cocaine. Due process requires the prosecution in a criminal case to introduce sufficient evidence to justify a trier of fact in its conclusion that the defendant is guilty beyond a

reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

In order to prove that defendant possessed an amount of cocaine greater than 50 grams but less than 225 grams with the intent to deliver, the prosecution must prove that defendant possessed that amount of cocaine and that he intended to deliver it for sale. Proof of actual physical possession is unnecessary for conviction of possession; rather, proof of constructive possession will suffice. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). The essential question in determining whether constructive possession existed is whether defendant exercised dominion and control over the substance. *Id.* Further, possession with intent to deliver a controlled substance can be established by circumstantial evidence and reasonable inferences arising from it, just as it can be established by direct evidence. *Wolfe, supra* at 526.

First, the evidence was sufficient to prove that defendant possessed the cocaine. Though he did not actually have it on his person at the time he was arrested, there was evidence that defendant had dominion and control over the cocaine. Shlisa Hamilton testified that before the police were called, defendant's girlfriend showed her a bag of "white stuff" that she said belonged to defendant. Defendant's girlfriend testified that she had discovered this bag when she was doing some cleaning in her basement. She stated that she had seen defendant with this cocaine earlier in the day and that she saw defendant put a rock on a plate to cut off pieces for individual sales. She told police that that the scale, the plate with residue, and box of paraphernalia belonged to defendant. The plate with the cocaine residue had defendant's fingerprints on it, and defendant kept his belongings in the dresser in which the police found the drugs.

Defendant argues that there is an issue of defendant's girlfriend's credibility, given the impeaching testimony that he elicited. However, credibility of a witness is a question for the jury and is not to be considered when determining whether the actual evidence was sufficient to support the verdict. *Wolfe, supra* at 514. If believed, defendant's girlfriend's testimony, in addition to the physical evidence found linking defendant to the cocaine and Hamilton's testimony, were sufficient to prove the possession element of the crime.

Second, the prosecution sufficiently proved that defendant intended to deliver the cocaine. The quantity of cocaine found consisted of one large rock weighing 46.87 grams, a knotted sandwich baggie with a rock weighing 3.5 grams, and loose material at the bottom of the bag weighing 17.3 milligrams. An expert police witness testified that the street value of this quantity was approximately \$10,600, and that the characteristics of the crack cocaine indicated that it was for sale, rather than use. He testified that it was common for drug dealers to come into town to stay with a girlfriend, hide their "stash" at her house and go out to sell it at different locations. Defendant stayed with his girlfriend during a significant portion of each month and thus met this criterion. Finally, the expert testified that it was common for dealers to be found with large amounts of cash, usually in \$20 denominations, and pagers, and a search of defendant upon his arrest revealed \$320 in \$20 bills and two pagers.

Our Supreme Court found evidence of this nature to be sufficient to support the inference of intent to deliver in *Wolfe, supra* at 525. The Court held that a defendant's possession of a beeper, the presence of \$255 in small denominations and the possession of a key to the apartment found to contain a large quantity of cocaine, taken together, "support much more than an inference" that the defendant intended to deliver the cocaine. *Id.* See also *People v Ray*, 191 Mich App 706, 709; 479 NW2d 1 (1991) (a police officer's testimony of these common characteristics was sufficient to support a finding that the defendant intended to deliver cocaine). Further, the fact that defendant possessed a rock weighing approximately forty-six grams is sufficient to support the inference that defendant intended this cocaine for sale. Accordingly, the prosecution met its burden of proving the elements of possession with intent to deliver an amount greater than 50 grams and less than 225 grams of cocaine.

II

Defendant asserts that the trial court erroneously admitted a photograph depicting defendant as a "stereotypical drug dealer." The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Sawyer*, 222 Mich App 1; 564 NW2d 62 (1997).

The photograph was described by Officer Butler as a photograph depicting defendant standing near a luxury automobile and holding an unknown amount of cash in his hand. Butler testified that he retrieved the photograph from a photo album at defendant's girlfriend's house when the police were conducting their search, along with other paperwork and mail items that belonged to defendant and that were found in the house. The court admitted the photograph over defense objection, finding that because defendant had effectively impeached defendant's girlfriend and Hamilton with respect to whether defendant lived in the house where the drugs were found, whether defendant had "dominion and control" was at issue and the fact that defendant's photos were found in the house was probative on that issue. The court also determined that the photograph was not substantially prejudicial simply because it depicted defendant as a black man wearing gold chains.

Whether a photograph is admissible as evidence depends on whether it is relevant under MRE 401, and whether the probative value is substantially outweighed by its prejudicial effect. MRE 403. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909, modified 450 Mich 1212 (1995). "Relevant evidence" is any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the actions more probable or less probable than it would be without the evidence. *Id.* at 67. The two questions that must be answered under MRE 401 are, first, whether the evidence is "material," or of some consequence to the determination of the action and, second, whether the evidence is probative of that material fact. *Id.*

The photograph in this case was of consequence to determining whether defendant resided at the house from which it was seized, and thus whether he could be said to have control over the cocaine that was found in that house. Whether defendant exercised control over the cocaine is a material element of the offense of possession with intent to deliver.

Even if relevant under MRE 401, the photograph may still be excluded under MRE 403 if its prejudicial effect substantially outweighs the probative value. *Id.* at 74. The issue is one of unfair prejudice, and though all evidence can be said to be prejudicial to some extent, it is only when the probative value is *substantially* outweighed by the prejudice that the evidence must be excluded. *Id.* at 75. This single photograph does not substantially outweigh the value it has in proving that defendant's belongings were found in that house in a manner indicating that he lived there. Accordingly, the trial court did not abuse its discretion in admitting the photograph into evidence.

III

Defendant contends that the trial court erred by allowing the prosecution to play an audio tape, portions of which were inaudible. Though the audible portions apparently revealed defendant's efforts to have Williams relocated to prevent her from testifying and to persuade Williams and Hamilton to testify that he did not reside with them, defendant claims that they were inadmissible without the context of the entire statement. Additionally, he argues that the inaudible portions could have contained exculpatory remarks; however, defendant fails to substantiate that claim.¹

Assuming the tape was improperly admitted, any error was harmless in light of the nature of the testimony on the tape. The tape recording was played to the jury in the prosecution's rebuttal case to refute defendant's testimony that he did not attempt to obstruct justice by contacting Williams or Hamilton and asking them not to testify against him. Additionally, though defendant's argument is that the inculpatory portions may have contained statements by defendant that the cocaine did not belong to him, we have concluded that the evidence was sufficient to establish defendant's dominion and control over the cocaine.

Pursuant to MCR 2.613(A) and MCL 769.26; MSA 28.1096, an error in the admission of evidence is not grounds for granting a new trial or vacating a guilty verdict unless refusal to take this action appears to the court inconsistent with substantial justice. In light of the extensive evidence of defendant's exercise of dominion and control over the cocaine, any allegedly exculpatory remarks to the effect that the cocaine did not belong to defendant would not have had a substantial impact on the verdict. Accordingly, defendant's conviction will not be reversed on this basis.

IV

Defendant maintains that counsel was ineffective for failing to insist that the entire audio recording be played for the jury because introduction of the entire tape may have made a difference in the outcome of the trial.² However, defendant fails to articulate any measurable form of error. It is unclear from the record, and defendant fails to articulate, what the unheard portions of the tape would have revealed. Defendant makes only the empty assertion that counsel was obligated to insist that the entire tape should have been played to the jury. Defendant has failed to carry his burden of showing prejudice. *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988), remanded on other grounds 436 Mich 866; 460 NW2d 226 (1990).

V

Defendant argues that the court erred by failing to read the standard jury instruction that a defendant's mere presence at the scene of a crime is insufficient to link him to the crime, failing to give the jury the proper cautionary instructions on the limitations of its use of similar acts evidence, and failing to properly instruct the jury on the essential element of "possession" in lieu of its supplemental instruction which confused and misled the jury. A party waives review of jury instructions to which he accedes at trial. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987); *Kohn v Ford Motor Co*, 151 Mich App 300, 310; 390 NW2d 709 (1986). The failure to instruct on a point of law is not grounds for setting aside a verdict if the defendant has failed to specifically request the instruction, MCL 768.29; MSA 28.1052, and manifest injustice will not be found where the alleged error or omission is not outcome determinative, *People v McVay*, 135 Mich App 617, 618; 354 NW2d 281 (1984), or does not pertain to a basic and controlling issue in the case, *People v Hughes*, 160 Mich App 117, 119; 407 NW2d 638 (1987). Defendant failed to request the specific jury instructions, and none of the cited omissions resulted in manifest injustice. Therefore, defendant has waived the issues with respect to jury instructions.

Defendant also argues that counsel was ineffective for acceding to these jury instructions. He proposes that "it is obvious that these were important instructions which were critical to defendant's case," and that the failure to give them constitutes ineffective assistance of counsel. Defendant has not presented any argument in support of his proposition and, therefore, he has failed to meet his burden of showing that counsel's performance was so far below an objective standard of reasonableness that it prejudiced defendant in the outcome of the trial. *Reinhardt, supra*.

VI

Defendant argues that the trial court denied defendant his right to self-representation. Because defendant's request was not unequivocal, the trial court did not err in denying the request. *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994).

VII

Defendant contends that prosecutorial misconduct denied him a fair trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

After review of the record and taking the comments of which defendant complains in the context of the prosecutor's argument, it is apparent that there was no prosecutorial misconduct. Defendant complains that the prosecutor referred to defendant as a liar, vouched for the credibility of defendant's girlfriend, denigrated defendant and his defense by accusing defendant of being abusive, obstructing justice, and being controlling, arguing his personal belief in the truthfulness of his witnesses and the guilt of defendant, argued facts not in evidence, suggested that defense counsel conspired with defendant to

mislead the jury and fabricate a defense, and shifted the burden of proof to defendant. The only objection made was that the prosecutor shifted the burden of proof to the defendant. Because none of the other remarks cited by defendant was of such a nature that it could not have been cured by a cautionary instruction from the court, defendant's failure to object to any of these statements waives these issues for review.

With respect to whether the prosecutor improperly shifted the burden of proof to defendant, the prosecutor's comment that there was no proof to support defendant's theory of the case was not an attempt to shift the burden of proof. Rather, it was a comment that defendant's theory of the case was unsupported by the evidence, which is not improper. *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995).

VIII

Last, defendant argues that the trial court considered improper factors when fashioning defendant's sentence. The three subarguments enumerated in defendant's brief all deal with defendant's complaint that the sentencing court improperly accepted and considered testimony about other crimes with which defendant was charged and/or convicted. Though worded somewhat differently, all three arguments encompass the theme that the trial court abused its discretion in considering defendant's other charges and convictions.

Our Supreme Court has held that a sentencing court is not precluded from basing a sentence on facts underlying prior convictions, pending charges, and uncharged offenses where those facts have been developed through sworn testimony presented before that very judge. However, the defendant must be afforded an opportunity to test the accuracy of those facts. *People v Ewing*, 435 Mich 443, 455; 458 NW2d 880 (1990). Defendant was afforded such an opportunity in this case. The testimony regarding defendant's prior convictions was submitted to show that numerous charges against defendant had been dropped at the preliminary hearing stage because witnesses failed to appear. Combined with the statements by victims and witnesses that defendant had made some form of threat to deter them from testifying, this pattern of witnesses failing to appear is telling of defendant's habit of obstructing the judicial process. The circumstances surrounding the criminal behavior, as well as the defendant's attitude toward his criminal behavior, are permissible factors for the court to consider. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985); see also *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

¹ This Court was unable to review the actual audio recording because the parties failed to submit the recording which has apparently been destroyed.

² Defendant did not make a testimonial record in the trial court in connection with a motion for new trial or evidentiary hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), and, therefore, our review is limited to the record.