STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS WASHINGTON,

Defendant-Appellant.

UNPUBLISHED
November 20, 1998

No. 199984
Recorder's Court
LC No. 95-009550 FY

Before: Jansen, P.J., and Holbrook, Jr. and MacKenzie, JJ.

PER CURIAM.

A jury convicted defendant of possession of more than 50 but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). The trial court sentenced him to ten to twenty years' imprisonment. Defendant appeals as of right. We affirm.

On August 10, 1995, two Detroit police officers in a marked patrol car were passed by a car traveling between ten and fifteen miles per hour over the speed limit. The officers stopped the car and approached it on foot from separate sides. One of the officers noticed that there was no key in the car's ignition, suggesting that it was stolen. One officer noticed that the car's steering column was damaged and the other officer saw defendant, the back seat passenger, stuff a bag down his pants. The occupants were ordered out of the vehicle. When defendant emerged, there was a large bulge in his pants. One of the officers began a patdown search of defendant, starting with the bulge, and retrieved a clear plastic bag containing cocaine. Defendant was then arrested. Further investigation revealed that the car was not stolen, but that it was bearing a license plate from a different vehicle. The driver was therefore arrested for improper plates. The other passenger was arrested on outstanding traffic warrants.

Defendant first contends that the trial court should have suppressed the cocaine as evidence because it was the product of an unlawful search and seizure. We disagree. The initial stop of the vehicle was justified either for speeding or on suspicion of theft. *People v Peebles*, 216 Mich App 661, 665; 550 NW2d 589 (1996). Upon seeing the condition of the car's steering column and watching defendant stuff a bag down his pants, the officers were well within their discretion to order the occupants out of the car, *Maryland v Wilson*, 519 US 408; 117 S Ct 882, 886; 137 L Ed 2d 41

(1997), and to conduct a patdown search for weapons. *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996). After viewing the bulge in defendant's pants and feeling the hard object during the patdown, the officers had probable cause to believe the object was contraband, justifying its immediate seizure. *Champion*, *supra*, p 114. Moreover, the officers had probable cause to believe that defendant was in possession of a stolen vehicle or contraband before the seizure of the cocaine and could have properly placed him under arrest at that point. A search incident to arrest is permissible, prior to the actual arrest, when probable cause to make the arrest already exists. *Id.* at 115-116. On either basis, the evidence was legally seized, and the trial court did not err in refusing to suppress it.

Defendant next asserts that he was denied a fair trial based on a number of improper remarks made by the prosecutor during closing argument. We review claims of prosecutorial misconduct by examining the record as a whole to see if defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The People concede that the prosecutor made improper remarks when he characterized defendant as a drug dealer, because defendant was only charged with a crime of possession, and when he urged the jury to consider the deleterious effects that drugs have had on the community. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, given the overwhelming evidence of defendant's guilt, we conclude that the comments do not rise to the level of error requiring reversal. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The balance of the prosecutor's remarks were not objected to and no request was made for curative instructions. Review is therefore foreclosed unless failure to consider the claim would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). It would not. Taken in context, while some of the remarks were imprudent, none was so egregious as to require reversal.

Defendant also contends that the trial judge's characterization of an exhibit as cocaine, as well as his statement that he was reluctant to allow the exhibit to be taken into the jury room, denied defendant a fair trial. The claim is without merit. The judge stated that the exhibit purported to be cocaine and instructed the jurors that they had to decide the facts. He also made it clear that the jurors would probably be allowed to see the exhibit in the jury room if they insisted. Defendant's claim of prejudice is unsupported conjecture and does not require reversal.

Defendant next contends that he was denied effective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must demonstrate that trial counsel's performance was objectively unreasonable and that the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). A defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant claims that his attorney should have impeached the police officers at the suppression hearing by using discovery materials to establish that the police did not learn of the improper license plates on the car until after they seized the cocaine from defendant's pants. However, the officers' testimony was consistent with that information. Defendant also argues that counsel was ineffective for failure to move in limine to suppress the testimony of a K-9 officer about the reaction of a drug-sniffing dog after the car was impounded. Although this evidence was of marginal relevance, it appears that counsel was able to use it to illustrate the weakness of the prosecution's case. We are not persuaded that this strategy by counsel was either deficient or prejudicial to defendant.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie