STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2000
v	No. 207692 Muskegon Circuit Court
MICHAEL A. LEWIS, Defendant-Appellant.	LC No. 97-140638-FH

Before: Fitzgerald, P.J., and Bandstra, C.J., and O'Connell, J.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction 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). He was sentenced as an habitual offender, third offense, to 7 ½ to 40 years' imprisonment. MCL 769.11; MSA 28.1803. We affirm.

I. Prosecutor's Comments that the Evidence was "Uncontroverted"

Defendant first argues that the prosecutor infringed on his right to remain silent when the prosecutor argued that certain evidence, including evidence of statements made by defendant, was uncontroverted. Because defendant failed to object to the prosecutor's comments, this issue is unpreserved, and defendant must demonstrate outcome-determinative plain error in order to avoid forfeiture of this issue. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant has the constitutional right to elect not to testify, and the prosecutor may not comment on the defendant's failure to testify. US Const, Am V; Const 1963, art 1, § 17; *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965); *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). Thus, "a prosecutor may not imply in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). However, the prosecutor "may observe that the evidence against defendant is 'uncontroverted' or 'undisputed,' even if defendant is the only one who could have contradicted the evidence . . . ." *Fields, supra* at 115 (internal citations omitted). See also *People v Guenther*, 188

Mich App 174, 177; 469 NW2d 59 (1991).[1] "A prosecutor's remark that evidence is undisputed is proper in urging the weight to be given the testimony." *Id*. Here, the prosecutor's comments did not impermissibly shift the burden of proof; rather, they were merely comments on the weight of the evidence presented. Defendant has not demonstrated error, let alone plain error sufficient to avoid forfeiture of this unpreserved issue.

II. Prosecutor's Comment on Witness Credibility

Defendant next argues that the prosecutor improperly distorted the burden of proof by making the following comment in rebuttal argument:

> I challenge you, if you believe these officers got on the stand and lied, let him [defendant] go, because the People's position is they didn't lie, and we have met our burden of proof, and that's proof beyond a reasonable doubt as to all the elements of this crime through this man's own statements. He told you through two police officers what he was—a drug dealer. I ask you to find him guilty as charged of the crime of possession with intent to deliver cocaine. Please, remember to take your common sense in there with you. Thank you.

However, defendant did not object to this comment; therefore, to avoid forfeiture of this unpreserved issue, defendant must demonstrate outcome-determinative plain error. *Carines*, *supra* at 763-764.

It is improper for a prosecutor to argue that, in order to acquit, the jury must conclude that prosecutorial witnesses lied. See *People v Bass (On Rehearing)*, 223 Mich App 241, 249; 565 NW2d 897 (1997), lv den and vacated in part on other grounds 457 Mich 866 (1998), discussing *United States v Vargas*, 583 F2d 380, 386-387 (CA 7, 1978). However, contrary to defendant's argument, the plain import of the prosecutor's comment in this case was not to instruct the jurors that, in order to acquit, they had to determine that the police officers were lying. Rather, the statement simply indicated that *if* the jury did determine that the officers were lying, it should acquit because the prosecutor would not have proved defendant's guilt beyond a reasonable doubt. As in *Bass*, the comment "did not expressly state that a verdict for the defendant would require a finding that all of the government's witnesses were lying." *Id*. at 250. Also, "[t]he prosecutor did not inform the jurors of what they must find to convict or acquit. Nor did the prosecutor exclude other ways to reach a

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[1] Although the Court in *Guenther*, *supra* at 178, suggested that prosecutors refrain from such comments when only the defendant could have contradicted the evidence, this suggestion was merely dicta—the panel specifically held that such comments did not constitute error. We see no reason to discourage prosecutors from making legally permissible comments on the weight of the evidence.

verdict." *Id*. at 251. In short, the prosecutor did not distort the burden of proof.[2] We find no error, let alone outcome-determinative plain error.

III. Refusal to Instruct Jury on Lesser Misdemeanor

Defendant also argues that the trial court abused its discretion by failing to give the requested lesser misdemeanor instruction on use of cocaine, MCL 333.7404(2)(a); MSA 14.15(7404)(2)(a).[3] A trial court's decision whether to grant a requested lesser misdemeanor instruction is reviewed for an abuse of discretion. *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982). The failure to grant an appropriate instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). We find no abuse of discretion in this case.

A request for an appropriate misdemeanor instruction must be given where it is supported by a rational view of the evidence, unless to do so would result in undue confusion or some other injustice. *Stephens*, *supra* at 255. Five conditions must be met before a lesser misdemeanor instruction must be given. *Id*. at 261-265; *People v Steele*, 429 Mich 13, 19-22; 412 NW2d 206 (1987). First, there must be a proper request. *Stephens*, *supra*, at 261. Second, an appropriate, or inherent, relationship must exist between the charged offense and the requested misdemeanor. *Id*. at 262. This condition is satisfied where the offenses "relate to the protection of the same interests" and are "related in an evidentiary manner such that, generally, proof of the misdemeanor is necessarily presented as part of the proof of the greater charged offense." *Steele*, *supra* at 19; *People v Corbiere*, 220 Mich App 260, 263; 559 NW2d 666 (1996). Third, "the requested misdemeanor must be supported by a rational view of the evidence adduced at trial." *Stephens*, *supra*, at 262. Fourth, the defendant must be given adequate notice if the instruction is requested by the prosecutor. *Stephens*, *supra*, at 264. Fifth, the requested instruction must not result in undue confusion or other injustice. *Id*.

In this case, the trial court correctly concluded that there was no inherent relationship between the charged offense and the requested misdemeanor because proof of use is not a necessary element in proving possession with intent to deliver. This Court has expressly held that "proof of drug use is never *necessarily* presented as part of the proofs supporting possession with intent to deliver." *People v Lucas*, 188 Mich App 554, 582; 470 NW2d 460 (1991). The trial court did not abuse its discretion in denying defendant's request for an instruction on use of cocaine.

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[2] Moreover, the comment was made in response to defense counsel's attack on the officers' credibility during closing argument. Even "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

[3] In his brief on appeal, defendant claims that use of cocaine is a ninety-day misdemeanor, citing MCL 333.7404(2)(d); MSA 14.15(7404)(2)(d). This is not correct. The use of cocaine is a one-year misdemeanor. MCL 333.7404(2)(a); MSA 14.15(7404)(2)(a).

IV. Great Weight of the Evidence / Sufficiency of the Evidence

Defendant next argues that the jury's verdict was against the great weight of the evidence. A trial court may grant a motion for a new trial based on this ground "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). However, defendant's argument is that the verdict was against the great weight of the evidence because insufficient evidence was presented to support his conviction. Thus, his argument on this issue is essentially a challenge to the sufficiency of the evidence. When reviewing claims of insufficient evidence, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). In any event, we discern no grounds for reversal under either standard.

The elements of possession with intent to deliver less than 50 grams of cocaine are that defendant knowingly possessed less than 50 grams of cocaine with the intent to deliver it to someone else. See *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Defendant primarily argues that there was no evidence of his intent to deliver. We disagree. There was sufficient circumstantial evidence of defendant's intent. For example, defendant confessed to swallowing the cocaine at issue and admitted that he had sold drugs. Additionally, another witness testified that defendant sold drugs and that he was picking up drugs the night he was arrested. Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The prosecutor presented evidence sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant possessed cocaine with the intent to deliver it. Also, the jury's verdict was not against the great weight of the evidence.

V. The Corpus Delicti Rule

Defendant next argues that the prosecutor did not prove the corpus delicti of the crime independent of his inculpatory statements. However, defendant failed to object to the introduction of his statements on this basis; thus, our review of this unpreserved issue is limited to determining whether defendant has demonstrated outcome-determinative plain error sufficient to avoid forfeiture of the issue. *Carines*, *supra* at 763-764.

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 rule is designed to avoid the use of a confession to convict a defendant of a crime that never occurred. *Id*. at 269. Where a defendant is charged with possession with intent to deliver cocaine, the corpus delicti rule is "satisfied by evidence independent of defendant's confession that the cocaine existed and was possessed by someone." *Id*. at 270. In this case, the prosecutor introduced independent evidence of the existence and possession of cocaine. A witness testified that defendant admitted that he was going to pick up cocaine. A knotted plastic baggie,

consistent with drug packaging, was found in the car that defendant was driving. Defendant's blood and urine tested positive for cocaine metabolites. We find no error.[4]

VI. Jury Instructions

Defendant next argues that the trial court's instructions on the elements of possession with intent to deliver were erroneous because the court failed to instruct the jury that, in order to convict defendant, the prosecutor must prove that cocaine or a residual amount of cocaine had to be literally recovered from defendant and that defendant actually delivered or attempted to deliver the cocaine to someone else. However, defendant did not object to the instructions given, and our review of this unpreserved issue is limited to determining whether defendant has demonstrated outcome-determinative plain error. *Carines*, *supra* at 763-764.

Defendant's contentions are without merit. Proof of actual physical possession of cocaine is unnecessary to convict a defendant of possession with intent to deliver. *Konrad*, *supra* at 271. Proof of constructive possession will suffice. *Id*. Additionally, by the plain language of the statute, the crime of possession with *intent* to deliver does not require proof of *actual* or *attempted* delivery.

VII. Other Acts Evidence

Defendant next argues that other acts evidence was improperly admitted at trial where his intent to deliver was not at issue. Again, this issue is unpreserved, and defendant must demonstrate outcome-determinative plain error to avoid forfeiture of the issue. *Carines*, *supra* at 763-764. We also bear in mind that it is within the trial court's sound discretion whether to admit or exclude other acts evidence under MRE 404(b). *Crawford*, *supra* at 383. Defendant claims that the evidence was not material to anything at issue in the case. However, "[i]t is well established in Michigan that all elements of a criminal offense are 'in issue' when a defendant enters a plea of not guilty." *Id*. at 389. Here, contrary to defendant's claim, his intent was at issue. Most of the other acts evidence about which defendant complains was properly admissible pursuant to MRE 404(b) for the noncharacter purpose of demonstrating intent. Moreover, much of it was necessary "to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). We also note that testimony from one witness that she did not want to testify because she was afraid of defendant was not admitted for an improper character purpose, but rather was admitted in the context of defense counsel's questioning, which was aimed at discrediting her testimony. Therefore, the other acts evidence was properly admitted under MRE 404(b). We find no error, let alone plain error.

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[4] Defendant also claims that the results of blood and urine tests may not be used to prove possession of cocaine. However, circumstantial evidence, including evidence of such tests, may be used to prove possession of drugs. See *People v Hellenthal*, 186 Mich App 484, 486-487; 465 NW2d 329 (1990).

VIII. Drug Profile Evidence

Defendant next argues that reversal of his conviction is required because improper drug profile evidence was admitted at trial. Again, this issue is unpreserved, and defendant must demonstrate outcome-determinative plain error to avoid forfeiture. *Carines, supra* at 763-764.

Drug profile evidence may never be used as substantive evidence of guilt. *People v Hubbard*, 209 Mich App 234, 235; 530 NW2d 130 (1995). A prosecutor may, however, use expert testimony regarding the drug trade to aid the jury in understanding evidence in controlled substance cases. *People v Murray*, 234 Mich App 46, 53-54; 593 NW2d 690 (1999). In this case, the evidence about which defendant complains was used to educate the jury and explain the significance of evidence found by police. The expert never compared defendant to the drug profile characteristics and, while he also testified about the facts surrounding defendant's arrest and the evidence that was recovered, he did not suggest that defendant met the profile and should be convicted based on the profile. Moreover, even if a few, isolated comments were made that amounted to an inappropriate comparison of defendant to the profile characteristics, defendant has failed to demonstrate outcome-determinative plain error. There was overwhelming evidence against defendant independent of any profile evidence; thus, profile evidence alone was not used to prove defendant's guilt.

IX. Vindictive / Selective Prosecution

Defendant also argues that the prosecution was vindictive and selective. Defendant's argument is meritless. A prosecution is vindictive when a defendant is penalized for exercising procedural, statutory, or constitutional rights. *People v Ryan*, 451 Mich 30, 36; 545 NW2d 612 (1996). Defendant has failed to show actual vindictiveness or facts that would give rise to a presumption of vindictiveness. *Id.*; *People v Goeddeke*, 174 Mich App 534, 537; 436 NW2d 407 (1988). Claims of selective prosecution require proof of intentional or purposeful discrimination. *People v Weathersby*, 204 Mich App 98, 114-115; 514 NW2d 493 (1994). Defendant has failed to offer any proof of intentional or purposeful discrimination. Defendant's speculation is insufficient.

X. Challenge to Jury Composition

Next, defendant contends that his constitutional right to a jury drawn from a venire representative of a fair cross-section of the community was violated. Defendant failed to exhaust all of his available peremptory challenges; therefore, he has forfeited his challenge to the jury array. *People v Rose*, 268 Mich 529, 531; 256 NW 536 (1934); *People v Hubbard (After Remand)*, 217 Mich App 459, 467; 552 NW2d 493 (1996). Additionally, defendant expressed satisfaction with the jury at the close of voir dire examination. *Hubbard (After Remand)*, *supra* at 466. A challenge to a jury array is timely only if it is made before the jury has been impaneled and sworn. *Id*. at 465. We also note that defendant's claim is unsubstantiated by any evidence of systematic exclusion of minorities from the jury selection process. *Id*. at 473. Defendant's bald assertions are insufficient. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

XI. Motion for New Trial

Defendant also argues that the trial court abused its discretion when it determined that a new trial was not warranted after finding that the seizure and testing of defendant's urine was unconstitutional and that the results of the urine tests should not have been utilized at trial. We review the trial court's decision whether to grant a motion for a new trial for an abuse of discretion. *Gadomski, supra* at 27.

Defendant did not object at trial to the admission of the urine test results or to the seizure and testing of his urine. Therefore, this constitutional error is not preserved, and defendant must demonstrate outcome-determinative plain error in order to avoid forfeiture. *Carines, supra* at 763-764. In this case, the trial court correctly determined that the unconstitutional seizure and testing of defendant's urine did not prejudice defendant. Testimony at trial indicated that the blood and urine results were basically duplicative, and it is clear that the blood test results were admissible. There was testimony that the amount of cocaine metabolites in the blood was "really" high and the amount in the urine was "pretty high too." There was also testimony that the amount of cocaine in the urine was greater than in the blood because urine concentrates whatever is in the blood. Because the evidence showed that the amounts were high in both the blood and urine and that any differences in amount were typical, the urine results could not have misled the jury. Defendant has failed to demonstrate that the admission of the urine results affected the outcome of the lower court proceedings where they were duplicative of the blood results and where the other evidence of defendant's guilt was substantial. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

XII. Assistance of Trial Counsel

Defendant also argues that his trial counsel was ineffective. He asserts numerous grounds of allegedly ineffective conduct. We find, as did the trial court, that none of the claims of ineffective assistance of counsel have merit. Defendant has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness and that he was so prejudiced as to be denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

XIII. Assistance of Appellate Counsel

Defendant also argues that his appellate counsel was ineffective for failing to timely file a motion for a *Ginther*[5] hearing so that the trial court could hear and determine whether defendant was provided with effective assistance of trial counsel. This issue is moot because this Court granted defendant's motion for remand, and a *Ginther* hearing was held.

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[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

XIV. Proportionality of Sentence

Finally, defendant argues that his sentence is disproportionately harsh. We disagree. We review a sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). Defendant's sentence within the statutory limits does not constitute an abuse of discretion, because defendant's underlying felony, in the context of his criminal history, demonstrates that he is unable to conform his conduct to the law. *Id*. at 323, 326. Moreover, defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).[6]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

[6] To the extent defendant relies on the recently enacted legislative sentencing guidelines, we note that the new guidelines do not apply to offenses committed before January 1, 1999. *People v Reynolds*, ___ Mich App ___; ___ NW2d ___ (Docket No. 211458, issued 3/17/2000), slip op at 2; MCL 769.34; MSA 28.1097(3.4).