STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2001
V	No. 222828 Huron Circuit Court
FREDERICK MARTIN KOSINSKI, Defendant-Appellant.	LC No. 99-004071-FH

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of manufacture and/or possession with intent to deliver forty-five kilograms or more of marijuana or two hundred or more plants of marijuana, MCL 333.7401(2)(d)(i). He was sentenced to a term of two to fifteen years' imprisonment. He appeals as of right. We affirm.

I

Defendant argues that his conviction must be set aside because the evidence is insufficient to support the conviction. We disagree.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *Id.* In doing so, this Court must not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, modified 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Questions of credibility and intent are left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

In the instant case, defendant was charged with the manufacture and/or possession with intent to deliver forty-five or more kilograms of marijuana or two hundred or more plants of marijuana, contrary to MCL 333.7401(2)(d)(i). The elements of the possession with intent to deliver alternative of this offense are: (1) that the defendant knowingly possessed a controlled substance; (2) that the defendant intended to deliver this substance to someone else; (3) that the

substance possessed was marijuana and the defendant knew it was marijuana; and (4) that the substance was in a mixture that weighed forty-five or more kilograms or consisted of two hundred or more plants. See *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998); *People v Delongchamps*, 103 Mich App 151, 159; 302 NW2d 626 (1981); see also CJI2d 12.3.

A person need not have physical possession of a controlled substance to be found guilty of possessing it. *Wolf, supra* at 519-520. Possession may be either actual or constructive, and may be joint as well as exclusive. *Id.* The controlling question is whether the defendant had dominion or control over the controlled substance. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). An individual's presence at the place where the drugs are found is insufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown. *Wolfe, supra* at 520; *People v Vaughn*, 200 Mich App 32, 36; 504 NW2d 2 (1993). However, circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998); *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). Likewise, the specific intent to deliver may be shown by circumstantial evidence (e.g., intent to deliver may be inferred from the amount of controlled substance possessed). *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991); *People v Ferguson*, 94 Mich App 137, 150; 288 NW2d 587 (1979).

With respect to the unlawful manufacture or production of marijuana alternative of this offense, the elements are: (1) that the defendant manufactured a controlled substance; (2) that the manufactured substance was marijuana; (3) that defendant knew he was manufacturing marijuana; and (4) that the substance was in a mixture that weighed forty-five or more kilograms or consisted of two hundred or more plants. See CJI2d 12.1.

The evidence presented in this case was sufficient to enable the jury to find beyond a reasonable doubt the requisite elements of each alternative version of the charged offense. Regarding possession with intent to deliver, the testimony of various police witnesses established the existence of a field of marijuana containing over 1,200 marijuana plants. This amount supports an inference that the possessor was not growing the marijuana for personal use, but for the purpose of delivering it to another. *Ray, supra* at 708; *Ferguson, supra* at 150. The evidence also sufficiently established that defendant was the possessor of the plants in the field and was aware that the plants were marijuana. First, several witnesses, including some police officers, observed defendant in the field at various times, including after dark. Although presence alone is insufficient to prove possession, *Wolfe, supra* at 520, evidence of defendant's constructive possession in this case was supported by the testimony of a neighbor who stated that defendant called him during the early morning hours and told him that "them kids were down there stealing from him" after chasing another witness from the field as she and her companions attempted to harvest some of the marijuana for themselves, and that defendant told him that if he would come to his house, "he'd give me some" (marijuana) because he "needed a hand." Other witnesses testified that defendant confronted and challenged them while they were present in the field, while referring to the "weed patch." Thus, the evidence was sufficient to allow the jury to find beyond a reasonable doubt both that defendant was aware of the existence of the marijuana and that he exercised dominion and control over the field so as to establish constructive possession of the marijuana. *Konrad, supra* at 271.

The foregoing evidence, considered in conjunction with evidence that someone was cultivating the marijuana in the field in "finely manicured rows" that had been planted from seedlings, was also sufficient to establish the alternative charge of unlawful manufacture/production.[1]

For these reasons, we conclude that defendant is not entitled to reversal based upon his argument that the evidence was insufficient to support his conviction.

II

Defendant alternatively argues that his conviction was against the great weight of the evidence, thereby warranting a new trial. We disagree.

We review for an abuse of discretion the trial court's decision to deny defendant's motion for a new trial on the basis that the verdict was against the great weight of the evidence. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Such a motion will be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998). In cases resolving themselves on witness credibility, the trial court may not simply sit as a thirteenth juror and must leave the decision of whether to believe all or part of a witness' testimony to the factfinder, absent "exceptional circumstances." *Id.* at 642-643. Such exceptional circumstances may be found when the testimony "contradicts indisputable physical facts or laws," is "patently incredible or defies physical realities," is "material and is so inherently implausible that it could not be believed by a reasonable juror," or where "the witness testimony has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies.'" *Id.* at 643-644.

The instant case does not disclose exceptional circumstances concerning the testimony of the prosecution's witnesses, and the evidence did not so clearly point toward the innocence of defendant so as to constitute a miscarriage of justice. Therefore, we conclude that the trial court did not abuse its discretion in refusing to grant defendant a new trial on this ground.

III

Defendant next argues the trial court erred by finding that the evidence at the preliminary examination was sufficient to bind him over for trial. We again disagree. Because sufficient evidence was presented at trial to support defendant's conviction, any error at the preliminary examination regarding the decision to bind defendant for trial would have been harmless. *People*

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[1] Defendant's argument with regard to the manufacturing charge, that the prosecution failed to prove that he was not growing the marijuana for his own personal use, is flawed, because "personal use" is not a defense to the cultivation or growing of marijuana, only to a charge of "preparation" or "compounding" already existing marijuana. *People v Pearson*, 157 Mich App 68, 72; 403 NW2d 498 (1987). See also MCL 333.7106(2)(a). Thus, this argument is without merit.

v Moorer, ___ Mich App ___; ___ NW2d ___ (Docket No. 221855, issued 7/17/01), slip op pp 1-2; see also *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

IV

Defendant's allegations of instructional error were not preserved with an appropriate objection at trial. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Viewed as a whole, we conclude that the jury instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Defendant has not satisfied his burden of demonstrating plain error affecting his substantial rights.

V

Defendant argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence. In order to merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence: (1) is newly discovered; (2) is not merely cumulative; (3) would probably have caused a different result; and (4) was not discoverable and producible at trial with reasonable diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994); *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Defendant has failed to satisfy these requirements.

The alleged newly discovered evidence was that defendant routinely provided gardening and cleanup services for a neighbor and, during the course of these services, gathered fallen leaves from the neighbor's lawn and took them to the area where a witness at trial claimed to have seen defendant "hoeing" near the marijuana plants. Defendant maintains that this evidence was newly discovered because the witness had indicated that he was working in a different area of the woods at the preliminary examination and the defense could not discover the materiality of this new evidence prior to the witness' trial testimony. However, defendant confuses the requirement that evidence could not have been discovered prior to trial with a showing that the significance of a previously known fact was not evident until trial. Defendant was aware both of his previous work on the neighbor's behalf and the fact that a witness was prepared to testify that he was observed performing activities similar to those performed for the neighbor in an area near both his and the neighbor's house. Thus, defendant failed to establish that the evidence was not discoverable and producible at trial with reasonable diligence. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

VI

Defendant alleges that misconduct by the prosecutor denied him a fair trial. We disagree.

First, defendant maintains that the trial court should not have allowed the prosecution to present the preliminary examination testimony of a missing prosecution witness because the prosecutor failed to exercise due diligence in attempting to locate the witness for trial. After reviewing the record developed in connection with this issue, we conclude that the trial court did not abuse its discretion in finding that due diligence was exercised and, consequently, admitting the witness' preliminary examination testimony. MRE 804(a); MRE 804(b)(5); *People v Bean*,

457 Mich 677, 684; 580 NW2d 390 (1998); *People v Conner*; 182 Mich App 674, 681; 452 NW2d 877 (1990).

Defendant also argues that the prosecution committed discovery violations, including failure to disclose the full criminal histories of the prosecution witnesses and any leniency agreements made with the witnesses. However, the record indicates that the prosecutor did provide the defense with some information known to the prosecution relating to the criminal histories of some of the prosecution's witnesses. Other than claiming error, defendant fails to specify exactly what information was not provided, fails to provide support for his claim of entitlement to that information, and fails to allege how any error prejudiced defendant. Defendant may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Mackle* 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Therefore, defendant is not entitled to relief on this issue.

Although defendant alleges that the prosecutor also violated his duty to disclose agreements made with witnesses in exchange for their testimony, see MCR 6.201(B), *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997), the record before us indicates that the prosecutor did, in fact, provide such information. Defendant has not shown any plain error with regard to this unpreserved issue. *Carines, supra* at 763.

Defendant also maintains that the prosecutor improperly used his subpoena power to force reluctant witnesses to testify and then used leading questions coupled with the threat of perjury for untruthful testimony to obtain answers to his liking, in effect "scripting" or coaching the witnesses to improperly obtain evidence against defendant. After a thorough review of the record, we find no error in the decision to request and the trial court's decision to issue investigative subpoenas, considering the uncooperative nature of the witnesses in this case. MCL 767A.2; MCL 767A.3; MCL 767A.4. Furthermore, the record fails to disclose any evidence of witness intimidation during questioning. It was not improper to merely caution witnesses of the consequences of perjury during questioning. *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999). Regarding a witness' assertion that he was provided a "script" to refresh his memory before testifying, we note that this comment referred simply to a prior police report prepared following prior questioning of the witness to refresh his memory, see MRE 612(b), and thus find no misconduct in this regard.

Defendant also challenges some of the prosecutor's remarks during closing argument. Defendant did not object to the challenged remarks at trial, thus precluding appellate relief absent plain error affecting his substantial rights. *Carines, supra*. Having reviewed the challenged remarks, we conclude that defendant has failed to establish plain error. See *People v Duncan*, 402 Mich 1, 15-17; 260 NW2d 58 (1977); *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

VII

Finally, defendant argues that the approximate 1-1/2 year delay between the commission of the instant offense and his arrest violated his constitutional due process rights. We disagree.

To merit reversal of a defendant's conviction for a violation of procedural due process, a prearrest delay must have resulted in actual and substantial prejudice to the defendant's right to a

fair trial and the prosecution must have intended a tactical advantage. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). To be substantial, the prejudice must have meaningfully impaired the defendant's ability to defend against the charges such that the outcome of the proceedings was likely affected. *Id*. An unsupported statement of prejudice by defense counsel is not enough, *People v Williams*, 114 Mich App 186, 202; 318 NW2d 671 (1982), nor are undetailed claims of loss of physical evidence, witness memory loss, or witness death. *Crear, supra*; *People v Adams*, 232 Mich App 128, 136-137; 591 NW2d 44 (1999). The court must balance the defendant's interest in a prompt adjudication of the case against the state's possible interest in delaying prosecution. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). Once the defendant establishes prejudice, the prosecutor bears the burden of persuasion and must show that the reasons for the delay were sufficient to justify the prejudice. *Id*. at 109. The need to investigate further, rather than a desire to obtain a tactical advantage, is a proper reason for a delay and it is not improper for a prosecutor to refuse to indict "until he is completely satisfied that he should prosecute and will promptly be able to establish guilt beyond a reasonable doubt." *Adams, supra* at 140, citing *United States v Lovasco*, 431 US 783, 795-795; 97 S Ct 2044; 52 L Ed 2d 752 (1977).

In this case, defendant has failed to establish actual and substantial prejudice due to the delay. Defendant's specific allegations of prejudice are limited to an assertion that the delay caused the loss of a key witness at trial and resulted in memory loss of certain witnesses, forcing the prosecution to seek investigative subpoenas and use those subpoenas to "badger, bully, and threaten witnesses with perjury." Neither of these specific claims establish the requisite prejudice. As noted, the record is devoid of support for defendant's allegations of prosecutorial misconduct regarding the questioning of witnesses. Moreover, defendant's bare allegation that the use of subpoenas in this case was caused by the delay and the resultant witness memory loss rather than the uncooperative nature of the witnesses themselves are unsubstantiated. With respect to the failure of one of the witnesses to appear for trial, we note that, as discussed above, this witness was present at the preliminary examination and subject to cross-examination at that time. Defendant has thus failed to establish that this witness's later failure to appear for trial was due to prearrest delay.

Moreover, even were we to find substantial prejudice in this case, we would conclude that the prejudice was outweighed by the prosecution's decision to delay charging defendant in order to continue the investigation of this offense. Although one of the prosecutor's witnesses stated that defendant was the primary suspect in the case from the beginning, this does not lead to the conclusion that the prosecutor was required to forego additional investigation in order to strengthen its case. *Adams, supra*. Given the highly circumstantial nature of the case and the reluctance of various witnesses to cooperate with the police investigation, we conclude that the prosecutor's delay in charging defendant was not based upon an improper desire to obtain a tactical advantage, but instead a valid need to conduct further investigation in order to establish guilt beyond a reasonable doubt. *Id*.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot