STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD POINEAU,

Defendant-Appellant.

UNPUBLISHED
June 21, 2002

No. 229667
Saginaw Circuit Court
LC No. 00-018409

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of one count each of: (i) possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i); (ii) maintaining a drug house, MCL 333.7405(1)(d) and MCL 333.7406; and (iii) possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). He was sentenced to twenty to thirty years' imprisonment, three to six years' imprisonment, and three to ten years' imprisonment, respectively.[1] He appeals as of right. We affirm in part, vacate in part, and remand for correction of defendant's judgment of sentence.

Defendant challenges the sufficiency of the evidence supporting his conviction for possession with intent to deliver more than 650 grams of cocaine. Specifically, defendant contends that a police officer tainted the evidence by mixing defendant's bags of white powder together, without first having the bags separately tested to determine whether each bag constituted a mixture containing cocaine. Defendant argues that, in the absence of evidence pertaining to the contents of each separate bag, the prosecutor failed to present evidence demonstrating that defendant possessed more than 650 grams of a mixture containing cocaine.

A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78

[1] With the exception of the possession with intent to deliver conviction, defendant's maximum sentences were enhanced, as a second habitual offender, pursuant to MCL 769.10. In addition, defendant's maximum sentences for these two convictions were also enhanced as a repeat offender pursuant to MCL 333.7413(2). Defendant challenges this multiple enhancement of the maximum sentences on appeal.

(2000). Circumstantial evidence, and reasonable inferences arising from it, may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

In *People v Barajas*, 198 Mich App 551, 557 n 3; 499 NW2d 396 (1993), aff'd 444 Mich 556 (1994),[2] we noted that punishing for the possession of a mixture containing cocaine cannot be based on the potential for creating a mixture. However, the issue in *Barajas* was whether there was, in fact, a mixture containing cocaine in light of undisputed facts. Here, the issue was a factual question as to whether it was defendant or the police officer that created the mixture containing cocaine. Defendant argued below, as he does on appeal, that some bags could have contained mixtures containing cocaine, but that other bags may have merely contained a cutting agent, and that, if so, defendant never possessed more than 650 grams of a mixture containing cocaine.

We note that the police officer's actions prevented the prosecutor from presenting direct evidence establishing that each of the bags contained a mixture containing cocaine. Again, this could have been accomplished by simply having each bag tested or, at the very least, field tested. However, in the absence of more persuasive evidence, the prosecutor argued that it was illogical for defendant to package identical bags of white powder—with some bags containing a mixture containing cocaine and others containing just a cutting agent—without labeling the bags to distinguish the bags containing cocaine from those that did not contain cocaine. Thus, the police officer's actions forced the prosecutor to rely on circumstantial evidence, rather than direct evidence. Nevertheless, circumstantial evidence may be sufficient to support the elements of a crime. *Avant, supra* at 505. Therefore, viewing this circumstantial evidence in a light most favorable to the prosecution, we are not persuaded that the evidence was insufficient to support defendant's conviction. *Nowack, supra* at 399.

Defendant also contends that the prosecutor improperly shifted the burden of proof by commenting that there was no evidence indicating that defendant's bags of white powder contained anything other than a mixture containing cocaine. Generally, we review claims of prosecutorial misconduct "case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). However, where, as here, "a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *Id.* To avoid forfeiture, a "defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings." *Id.*

In *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983), we ruled that "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." However, we have also observed that "[o]therwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

---

[2] It should be noted that, although our Supreme Court affirmed our decision in *Barajas*, it cautioned that "the analysis employed by the Court of Appeals is limited strictly to the facts of this case." *Barajas, supra* at 557.

In the instant matter, defense counsel repeatedly asserted that the prosecutor had failed to satisfy its burden of proof because some of the bags of white powder may not have contained a mixture containing cocaine. Thus, the prosecutor's comments were responsive to issues raised by defense counsel. *Schutte, supra* at 721. Alternatively, the prosecutor was simply commenting on the evidence presented. Accordingly, we are not persuaded that the prosecutor's comments were plainly erroneous or that defendant was denied a fair trial. Moreover, even if the prosecutor's comments did have an effect of shifting the burden of proof onto defendant, any possible prejudice could have been cured by a timely objection and appropriate curative instruction by the trial court. In fact, the trial court did instruct the jury that the attorneys' arguments were not evidence and that the prosecutor had the ultimate burden of proof. Consequently, we do not believe that the prosecutor's comments affected defendant's substantial rights, as necessary to avoid forfeiture of this issue. *Aldrich, supra* at 110.

Defendant also contends that he is entitled to resentencing because the trial court failed to recognize that it had discretion to make a downward departure from the mandatory minimum sentence if it found substantial and compelling reasons to do so. We note that defendant did not raise this issue below; accordingly, this issue is forfeited. Defendant may only avoid forfeiture by establishing plain error affecting his substantial rights. *Aldrich, supra* at 110.

Here, defendant was sentenced to a minimum term of twenty years' imprisonment for possession with intent to deliver more than 650 grams of a mixture containing cocaine, even though the appropriate sentencing guidelines range was 81 to 168 months. MCL 333.7401(2)(a)(i) provides that the punishment for possession with intent to deliver more than 650 grams of a mixture containing cocaine is "life or any term of years but not less than 20 years." MCL 769.34(2)(a) provides that if a statute mandates a minimum sentence, the trial court "shall" sentence a defendant to the mandatory minimum, and that such a sentence does not constitute a departure under the legislative sentencing guidelines. Thus, the trial court was required to sentence defendant to a mandatory minimum sentence of twenty years' imprisonment.

However, MCL 769.34(3) provides that the court may depart from an appropriate sentencing range "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." Similarly, MCL 333.7401(3) provides that a trial court may depart from a mandatory minimum "if the court finds on the record that there are substantial and compelling reasons to do so." As such, defendant correctly argues that the trial court could have departed from the mandatory minimum sentence if it found substantial and compelling reasons to do so.

During sentencing the trial court opined in pertinent part:

> The Court has reviewed with care the presentence investigation report. I've also received quite a few letters from relatives which indicates to me that—which indicates to me that you have a loving family, relatives that—a sister, a niece or nephew, I'm sorry, uncle. These people are very supportive of you, and that's why it's—you had those people that you could look to for assistance, and you continued to engage yourself in drug activities.

> And, unfortunately, the legislature has some pretty severe penalties for the types of activity that—in the quantity that you were dealing with in this case, and they leave me no alternative on the major case in this—the major crime here.

Defendant contends that the trial court's commentary indicates that the trial court did not know that it had discretion to depart downward from the mandatory minimum sentence.

However, we believe that it is more likely that the trial court was attempting to deflect "responsibility" for imposing the mandatory sentence onto the Legislature. In other words, it is not clear that the trial court actually felt like it was imposing an unfair sentence, but was instead attempting to sympathize with defendant and his family. Moreover, there is no indication that defendant was a proper candidate for a downward departure. The trial court's suggestion that the punishment was "unfortunate" could apply to any defendant similarly situated, rather than factors exclusive to defendant. Moreover, other than his general request for leniency, defendant did not attempt to demonstrate that his circumstances were sufficiently atypical to present "substantial and compelling reasons" for departing from the mandatory minimum. Indeed, "[o]nly in exceptional cases should sentencing judges deviate from the minimum prison terms mandated by statute." *People v Izarras-Placante*, 246 Mich App 490, 497; 633 NW2d 18 (2001). In the absence of exceptional circumstances, or a clearer indication from the trial court that it would have imposed a more lenient sentence had it not been "bound" to do so by the Legislature, defendant may not avoid forfeiture of this issue.

Finally, defendant challenges his maximum sentences for his convictions for maintaining a drug house, MCL 333.7405(1)(d) and MCL 333.7406; and possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). Specifically, defendant contends that the trial court erroneously enhanced the maximum sentences pursuant to two different enhancement schemes: MCL 333.7413(2) and MCL 769.10. Plaintiff concedes that the maximum sentences were erroneously calculated. Accordingly, we vacate the trial court's enhancement of defendant's maximum sentences pursuant to MCL 769.10. See *People v Fetterley*, 229 Mich App 511, 525-542; 583 NW2d 199 (1998). Consequently, we remand for correction of defendant's judgment of sentence.

We affirm in part, vacate in part, and remand for correction of defendant's maximum sentences for maintaining a drug house and possession of less than twenty-five grams of cocaine consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper