STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2003
v	No. 239350 Wayne Circuit Court
HANK CARTER, Defendant-Appellant.	LC No. 01-002099-02

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and sentenced to lifetime probation. He appeals as of right. We affirm.

I

Defendant first argues that his conviction should be reversed because the jurors were administered a defective oath. Because defendant did not object to the oath or otherwise raise this issue below, we may grant relief only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).[1] We find no such error here.

Defendant claims that the oath administered by the trial court was defective because it did not mention "evidence," as required by MCL 768.14 and MCR 2.511(G). However, while it is

[1] We reject defendant's argument that this issue involves structural error requiring automatic reversal even though there was no objection below. See *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000) (declining to apply the *Carines* standard to unpreserved structural constitutional error). Only a "limited class of constitutional errors are structural" and defendant has not established any constitutional error with regard to the present issue. *Id*. at 51. While defendant vaguely argues that this issue implicates his due process right to a fair trial, for the reasons discussed below, we find that the oath administered to the jury in this case effectively bound the jury to decide the case based on the evidence. Thus, there is no reasonable basis to conclude that defendant was denied his due process right to a fair trial based on this issue. See *People v Pribble*, 72 Mich App 219, 224; 249 NW2d 363 (1976).

true that the oath administered in this case failed to use the word "evidence," it did require the jurors to swear or affirm that they would decide the case "according to the laws of this state."[2] In its initial instructions to the jury, the trial court also instructed the jurors that when it became time for them to decide the case they were "only allowed to consider the evidence that was admitted in the case." In its final instructions to the jury, the trial court also reminded the jurors that they had "taken an oath to return a true and just verdict, based only on the evidence and [the court's] instructions on the law," and that they could "only consider the evidence that has been properly admitted in this case." Considering that the jurors promised in their oath to decide the case according to the laws of the state, and that the trial court instructed the jurors of their obligation to decide the case based on the evidence, we conclude that the oath administered in this case effectively reflects a promise by the jurors to decide the case based on the evidence. When read together with the remainder of the trial court's comments and instructions, the substance of the oath administered served its purpose of informing the jurors that they were to pay attention to the evidence, judge the credibility and demeanor of the witnesses, and conduct themselves at all times consistent with the important role in which they were serving. See *People v Pribble*, 72 Mich App 219, 224-225; 249 NW2d 363 (1976). Thus, there is no reasonable basis to conclude that the failure of the oath to expressly refer to "evidence" affected defendant's substantial rights. *Carines, supra*. Accordingly, defendant is not entitled to relief based on this unpreserved issue.

II

Defendant next argues that there was insufficient evidence to support his conviction. We disagree. In assessing whether there was sufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to decide whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). A conviction of possession of cocaine with intent to deliver requires proof that the defendant knowingly possessed cocaine that he intended to deliver to someone else. *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002). However, actual physical possession is unnecessary because constructive possession may be sufficient to support a conviction. Constructive possession exists when there is "a sufficient nexus between [the] defendant and the contraband." *Id*. at 500. Possession includes control of the disposition of drugs and may be either joint or exclusive. *Id*.

At trial, Officer Magdalena McKinney testified that after receiving numerous complaints of "street level narcotics" activity in the vicinity of 6634 Crane Street in the city of Detroit, she began conducting undercover surveillance of that address. On the afternoon of defendant's arrest, Officer McKinney was seated in an unmarked police car when she saw defendant and codefendant Christopher Kirkwood walking back and forth in front of 6634 Crane Street. Officer McKinney testified that she eventually saw Kirkwood engage in a brief conversation with another man, receive "green paper currency" from him, and then go to the rear of a nearby

[2] The prosecution suggests that the failure of the oath, as recorded in the trial transcript, to refer to "the evidence" may have been a transcription error. However, this is mere speculation and we accept the trial transcript as accurate in this regard.

store where he reached down to the ground and retrieved what she suspected to be narcotics. Officer McKinney indicated that she then saw Kirkwood give the suspected narcotics to the man, who left the area.

Officer McKinney also recounted seeing defendant receive "green paper currency" from a woman then go to the "stash location" at the rear of the store where he picked up what she believed to be narcotics, which he too gave to the woman. A second man then approached and engaged in conversation with Kirkwood before giving Kirkwood money, at which point Officer McKinney notified an arrest team "to move in" and directed Officer John Dembinski to the suspected "narcotics stash" behind the store. Officer Dembinski testified that behind the store he found seven zip lock packets containing a substance he believed to be cocaine, which he placed in a "lock seal folder." A forensic scientist with the Detroit Police Department testified that he analyzed one of the seven items in that lock seal folder and determined that it was in fact cocaine weighing .08 grams. On the basis of this testimony, a rational trier of fact could have determined beyond a reasonable doubt that defendant was engaged in the sale and delivery of the substance found by Officer Dembinski behind the store, which defendant knew to be cocaine. See *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748, mod 441 Mich 1201 (1992) (possession with intent to deliver can be established by circumstantial evidence and the reasonable inferences arising from that evidence). A rational trier of fact could further determine beyond a reasonable doubt that defendant at least constructively possessed the cocaine in question, regardless of whether he did so exclusively or jointly with Kirkwood, because he was exercising control over that substance in connection with his efforts to sell it. Thus, there was sufficient evidence to support defendant's conviction of possession with intent to deliver less than fifty grams of cocaine.

III

Next, defendant argues that he was denied the effective assistance of counsel as a result of trial counsel's failure to move for dismissal of the charge against him based on a violation of defendant's right to a speedy trial. We disagree. To obtain reversal of a conviction based on the ground that his counsel was ineffective, "'a defendant must show that [his] counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.'" *People v Knox*, 256 Mich App 175, 201; 662 NW2d 482 (2003), quoting *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Generally, when considering whether a defendant has been denied a speedy trial, we balance four factors: "(1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay." *People v Levandoski*, 237 Mich App 612, 620 n 4; 603 NW2d 831 (1999). However, for purposes of considering the present ineffective assistance of counsel claim, we do not consider defendant's failure to assert his right to a speedy trial as weighing against defendant because that is the very premise of defendant's claim.

With respect to the other factors, the prosecution acknowledges that the delay in this case was over eighteen months and that, therefore, prejudice is presumed. See *People v Holtzer*, 255 Mich App 478, 492; 660 NW2d 405 (2003). Nonetheless, there is no evidence suggesting that the defense was actually prejudiced by the delay. There is no indication that a potential witness favorable to defendant, or other exculpatory evidence, was lost due to the delay in bringing

defendant to trial. See *People v Gilmore*, 222 Mich App 442, 461-462; 564 NW2d 158 (1997). Further, defendant was not prejudiced by his continued incarceration awaiting trial because the record reflects that he was released on bond before eighteen months after his arrest and incarceration.[3] *Id.*

The reason for the principal delay at issue here appears to have been that, when trial was set to begin on October 16, 2000,[4] slightly more than one year after defendant's arrest, the prosecution informed the trial court that its main witness, Officer McKinney, was unable to attend because she had to remain in bed in relation to her pregnancy, which resulted in the trial court dismissing the case without prejudice, after which the prosecution refiled the charge. The delay resulting from Officer McKinney's medical condition was obviously for good reason. Similarly, the ensuing and not unusual period of delay from October 2000 until trial was held in August of the following year appears to have been based simply on ordinary delays inherent in the court system and, while technically attributable to the prosecution, should be given only minimal weight. *Id.* at 460. Considering the lack of actual prejudice to defendant and the reasons for the delay, we conclude that defendant's right to a speedy trial was not violated. It follows, therefore, that defendant was not denied the effective assistance of counsel by trial counsel's failure to move for dismissal based on the right to a speedy trial.

IV

Finally, defendant argues that he was denied a fair trial by certain prosecutorial remarks during closing and rebuttal argument. Because defendant did not object to any of these remarks below, we may grant relief only for plain error affecting defendant's substantial rights. *Carines, supra*; see also *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We again find no such error on the record before us. Important to our consideration of defendant's various allegations of improper prosecutorial remarks is the basic principle that prosecutors "remain free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

Defendant first faults the prosecutor for asserting during closing argument that this case essentially "boils down" to whether the police officers were credible. We find nothing improper about this remark. The critical evidence against defendant included Officer McKinney's testimony that she saw defendant give something retrieved by him from behind the store to a woman in exchange for money, and Officer Dembinski's testimony that he found cocaine behind

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[3] According to undisputed testimony, defendant was arrested on October 6, 1999, the date of the charged crime. The record reflects that defendant posted bond on February 6, 2001, which was sixteen months after the date of his arrest.

[4] Although trial was originally set to begin on June 5, 2000 (only eight months after defendant's arrest), the trial court was apparently closed that day as the result of an unexplained "emergency." While delays caused by the court are generally attributable to the prosecution, see *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997), given defense counsel's acknowledgment that he would have sought an adjournment had the court not be closed, we decline to attribute this delay to either party.

the store. In contrast to this version of events defendant testified that he did not sell drugs, and had merely stopped by the store to buy a soft drink and happened to speak with Kirkwood "for a minute" after leaving the store. Given this competing testimony, the prosecutor reasonably characterized the credibility of the police officers as being critical to this case.

Defendant also faults the prosecutor for arguing that if the police were going to lie they could have done a better job by planting drugs on defendant's person, rather than acknowledging that no drugs were found on either codefendant. We again conclude that this was proper argument from the evidence. It was not unreasonable to contend that the officers' acknowledgment that they did not find drugs on the persons of defendant or Kirkwood supports their credibility because, if the officers were going to lie to incriminate defendant and Kirkwood, one or more of them could have claimed to have seen or found drugs on the codefendants' persons rather than recounting the facts as they did.

Defendant also asserts that the prosecutor improperly advised the jury that defendant lied about the reason for his presence outside the store on the day in question. However, this argument is not supported by the record. A review of the remarks referenced by defendant indicates that the prosecutor did not state that defendant lied, but rather asked the jury to consider what motive the police officers who testified might have to tell the truth or to lie, and to consider what the jurors themselves knew "about those who lied and the stories that they make up." These remarks were made as an introduction to the prosecutor's argument that the fact that the police officers did not claim to have found drugs on defendant or Kirkwood supported their credibility because "[g]enerally when people lie they make up a story pretty good."

Defendant further argues that the prosecutor improperly vouched for police witnesses and argued facts not in evidence when making the following remarks during closing argument:

> Police Officer McKinney, she was in the car. Nothing was blocking her view. She has done this for years. And she saw the narcotics transaction actually go down. She saw the drug deal. She knows what they look like, and she saw it. And then she saw another one. She saw when the guys, the defendants, they were going back to an area reaching around and going back.
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> * * *
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> You will find that they possessed it with intent to deliver. Well, first of all, they had already been seen doing transactions alone. It pretty much clarifies what their intent was. They didn't have those drugs to use for themselves. They had the drugs to make money. They had quite a bit of cash on them, proceeds. They hadn't been out there that long. They had the money. They were out there to sell drugs.

These remarks did not involve improper vouching, but rather simply constituted reasonable argument supported by the evidence. Officer McKinney testified that she had made over one thousand narcotics arrests and described the conduct of defendant and Kirkwood during her observations of them as being indicative of illegal narcotics transactions. Accordingly, it was reasonable argument from the evidence to assert that Officer McKinney's experience supported the reliability of her belief or suspicion that defendant and Kirkwood were engaged in drug

trafficking. Similarly, the prosecutor's statement that defendant and Kirkwood had "quite a bit of cash on them" was supported by Officer Lyle Dungy's testimony that he took $70 from Kirkwood's person and $52 from defendant's person.

Defendant also argues that the prosecutor improperly diminished her burden of proof when she pointed out during closing argument that the defense did not object to the admission of the cocaine found behind the store:

> We had Officer Dembinski testifying to taking the narcotics. I moved to admit the narcotics. There is no objection and they are admitted.
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> Then we had the expert come in. He testified this is cocaine. There is no question of it. There's some cocaine. It's less than 50 grams. That, by the way, is the easiest aspect of this case. It's here. It was admitted. It was testified to. It is cocaine.

We believe that it was inappropriate for the prosecutor to refer to the lack of objection by the defense to the admission of the cocaine found by Officer Dembinski because this was not argument based on the evidence. A party's lack of objection to the admission of evidence is not itself evidence and obviously does not constitute an acknowledgment of the reliability of the evidence that was admitted. However, any error with regard to this matter does not warrant reversal. The reference to the lack of an objection was brief. Further, that the substance in question was in fact cocaine was not a point disputed by either of the defendants at trial. Rather, the principal issue with regard to defendant was whether he was connected to the cocaine at issue or, as indicated by his testimony, whether he was simply in the area buying a soft drink.

Lastly, defendant suggests that the following rebuttal remarks by the prosecutor constituted improper vouching for Officer McKinney:

> And as far as the officer, Officer McKinney, testifying to what she saw, defense counsel tried to be nice about it and say we're not saying she's a liar, she just didn't see what she thought she saw. She testified she clearly saw both of these men. She saw each one of them go to a corner. She saw each of them take money. She saw each of them return.
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> That was a mistake?
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> People don't make mistakes over that. It's either a lie or it's the truth.

These remarks were a proper response, based on the evidence, to a portion of defense counsel's closing argument in which he stated that "nobody is really arguing that the cops are out and out lying. We're just arguing that McKinney didn't see what she thought she saw." As set forth in Part II of this opinion, Officer McKinney testified in significant detail about seeing defendant take money from a woman, go behind the store, and then give the woman an item retrieved by him from behind the building. In contrast, defendant's testimony indicated that he merely spoke with Kirkwood briefly after having purchased a soft drink in the store. Under the circumstances, it was extremely unlikely that Officer McKinney could have been honestly mistaken when she indicated that she saw defendant take money from a woman and then obtain an item for her

during a time at which she was engaged in surveillance as a police officer for possible drug trafficking. These were not small details about which a person might likely be confused. Thus, we conclude that it was not improper for the prosecutor to argue that the jury should reject the possibility of an honest mistake with regard to the key aspects of Officer McKinney's observations of defendant's conduct.

We affirm.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell