STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2003
v	No. 242362 Oakland Circuit Court
KENYATTE N. ALEXANDER, Defendant-Appellant.	LC No. 01-181312-FH

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver cocaine in an amount of fifty grams or more, but less than 225 grams, MCL 333.7401(2)(a)(iii). He pled guilty during voir dire to operating a vehicle with a suspended license, second or subsequent offense, MCL 257.904(3)(b). The trial court sentenced defendant to ten to forty years' imprisonment for the drug offense and one year imprisonment for driving on a suspended license. Defendant appeals as of right from his drug conviction. We affirm.

I. Facts

This appeal arises out of a traffic stop conducted by several officers with the Narcotics Enforcement Division (NED) of the Pontiac Police Department during the early afternoon hours of July 12, 2001. The police were investigating defendant for narcotics and received information that he was in the area. After consulting the Law Enforcement Information Network (LIEN), the police discovered that defendant had three outstanding warrants and a suspended driver's license. Members of the NED proceeded to the area in question and observed defendant driving in a white Cadillac STS. He had a male passenger. Before defendant's vehicle was stopped, several officers testified that it appeared that defendant and his passenger were making furtive movements in their vehicle. For example, Officer Lasseigne testified "before the stop, I observed [defendant and Mr. Northern] moving around just in their general areas as if they were maybe putting something in their pockets or moving something around in their lap or something directly in front of them . . . ." During cross-examination, however, Officer Lasseigne acknowledged that his view was limited to their shoulders and the top part of their arms. A marked police vehicle pulled defendant over, and NED officers from three unmarked police vehicles responded to the scene.

Sergeant Robert Ford testified that he removed defendant from the vehicle and observed four individual bags of cocaine sitting on the driver's seat. He stated that these bags were located in the area where defendant's right leg had been. A further search of defendant revealed $993 in cash. Edward Northern, the passenger in the Cadillac STS, was also asked to step outside the vehicle. During the subsequent pat-down search of Mr. Northern, officers found 4.1 grams of cocaine in his pants pocket and $448 in cash. A bag of marijuana, with an estimated street value of $100, was discovered between the passenger seat and the center console. Both defendant and Mr. Northern were placed under arrest.

At trial, defense counsel stipulated to the toxicology report that the two larger bags of cocaine weighed approximately fifty-nine grams. Testifying as an expert in the area of narcotics enforcement, Sergeant Ford offered the opinion that the amount of cocaine recovered and the packaging of some of the cocaine in small amounts indicated an intent to distribute. Sergeant Ford explained that a typical drug user would not possess such a large quantity of cocaine. He further noted that there were no means to ingest the crack cocaine (i.e., lighters, pipes, cigarettes, etc.) recovered from the vehicle.

Defendant testified that he was borrowing his grandmother's vehicle to get some food at a local restaurant. He claimed that he agreed to give Mr. Northern a ride because Mr. Northern was going to help him obtain new tires for his vehicle. In exchange for the ride, defendant alleged that Mr. Northern gave him sixty dollars for the tires and two rocks of cocaine. Defendant claimed that this cocaine and the bag of marijuana were for personal use. He alleged, however, that he could smoke approximately forty-seven grams of cocaine in three hours.

Defendant admitted knowing that Mr. Northern was a drug dealer but specifically denied any knowledge that there was more cocaine in the vehicle. Rather, defendant asserted that Mr. Northern must have placed the cocaine in the driver's seat after defendant exited the vehicle during the traffic stop. He further claimed that the police were mistaken in their testimony that he was carrying $993 in cash. When initially questioned about this money, however, defendant stated that Mr. Northern handed him a large amount of money. Subsequently, defendant testified that he worked for his grandfather and on occasion for a temporary placement agency.

II. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to show that he possessed the cocaine in question with the intent to deliver. We disagree. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[1] "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."[2]

[1] *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

[2] *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

Possession with intent to deliver cocaine requires proof that "the defendant must have knowingly possessed a controlled substance, intended to deliver that substance to someone else, and the substance possessed must have actually been cocaine and defendant must have known it was cocaine."[3] Either actual or constructive possession of the cocaine may be used to support a conviction.[4] Courts have found constructive possession "when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband."[5] In this regard, "[t]he essential question is whether the defendant had dominion or control over the controlled substance."[6] Further, possession of a controlled substance may be joint, with more than one person possessing the substance.[7]

One who procures, counsels, aids or abets in the commission of an offense may also be convicted and punished as if he directly committed the offense.[8] A defendant may be convicted under an aiding and abetting theory if the prosecution shows that:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances.[9]

Viewing the evidence in the light most favorable to the prosecution, we find that there was sufficient evidence to support defendant's conviction. The record shows that defendant was driving the vehicle that contained the cocaine and knew that Mr. Northern was a drug dealer. Significantly, the cocaine in question was found on the driver's seat and both defendant and Mr. Northern were carrying large amounts of money. While defendant claims that Mr. Northern put the cocaine on the driver's seat, several officers testified that neither of the men moved after the vehicle was stopped. And defendant admitted at trial that he would have felt the cocaine if he had been sitting on it. Further, the two rocks of cocaine defendant claimed belonged to him were found in the general area of the other cocaine.

We also note that the intent to deliver may be inferred from the amount of narcotics in defendant's possession, the packaging of the narcotics, and the circumstances surrounding the

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[3] *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002).

[4] *Id.* at 500.

[5] *Id.*

[6] *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

[7] *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748, amended 441 Mich 1201 (1992).

[8] MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).

[9] *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995) (citations omitted), partially overruled on other grounds, *Mass*, *supra* at 628.

arrest.[10] Here, Sergeant Ford testified that the fifty-nine grams of cocaine was a significant amount and consistent with the quantities a drug seller would possess. According to Sergeant Ford, this cocaine was worth approximately $5,600 in street value. Sergeant Ford contrasted this with the $20 amounts (1/8 gram) of crack cocaine typically sold to drug users. From this testimony a reasonable finder of fact could have concluded that defendant either possessed or aided and abetted in the possession of between 50 and 225 grams of cocaine with the intent to deliver.

III. Prosecutorial Misconduct

Defendant further alleges several instances of prosecutorial misconduct. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[11] Because defendant failed to object to these alleged instances of misconduct, our review is limited to plain error affecting his substantial rights.[12] "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."[13]

A. Reference to Arrest Warrants

Initially, defendant claims that the prosecution improperly portrayed defendant as a "bad man" when it elicited testimony that defendant was wanted on three outstanding arrest warrants. Use of prior bad acts evidence is generally excluded, except as allowed under MRE 404(b), "to avoid the danger of conviction based upon a defendant's history of other misconduct rather than upon the evidence of his conduct in the case in issue."[14] Even assuming that this evidence was improper, defendant has failed to establish the requisite prejudice to warrant reversal. The record indicates that the prosecution presented this evidence to show that the police properly stopped defendant's vehicle. We note that there was no testimony regarding the nature of the arrest warrants. We find that the any unfair prejudicial effect from the prosecutor's statements could have been cured with a timely instruction from the trial court.[15]

In any event, defendant admitted to doing a favor for a known drug dealer by driving him to a house in the neighborhood. He did not dispute that over fifty grams of cocaine was recovered from the vehicle or that some of this cocaine, albeit a small amount, belonged to him. More importantly, the police discovered this cocaine in the driver's seat. And as previously

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[10] *Wolfe, supra* at 524.

[11] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[12] *Carines*, *supra* at 763-764.

[13] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

[14] *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998), quoting *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982).

[15] *Schutte, supra* at 721.

indicated, there were no means to ingest the crack cocaine found in the vehicle. In light of this evidence, defendant has failed to establish plain error affecting his substantial rights.[16]

Defendant's contention that the prosecutor improperly elicited testimony regarding the fact that the investigating police officers were members of the NED is without merit. Such testimony was relevant to show that the officers were qualified to recognize narcotics and testify regarding narcotics-related issues. We further note that the trial court's instructions to the jury that they were the sole judges of witness credibility and that they should not give special weight to witnesses based simply on their status as police officers cured any potential prejudice.[17]

To the extent defendant alleges that further misconduct occurred when the prosecution elicited testimony that Sergeant Ford's duties on the day in question were "to supervise the officers who will be going to that area to investigate information about [defendant] delivering drugs in the area of Pontiac[,]" we disagree. He claims that this testimony, along with the other police witnesses' claims that they were investigating defendant, was improper and highly prejudicial. It is apparent to this Court, however, that the prosecutor did not elicit the above statement from Sergeant Ford regarding the fact that an informant claimed defendant was delivering drugs. Further, the fact that the NED was investigating defendant was relevant to explain the circumstances surrounding the arrest. Any unfair prejudicial effect from this testimony could have been cured with a timely instruction from the trial court.[18] Moreover, we note that defendant admitted to using cocaine and marijuana on a frequent basis in the past. Thus, defendant has not shown how these alleged errors affected the trial's outcome, given the overwhelming evidence presented of his guilt.[19]

B. Opening Statements

Defendant next contends that the prosecution falsely mischaracterized the proposed testimony in its opening statements to the jury. Opening argument is the appropriate time to state the facts that will be proven at trial. But even if the facts at trial differ from those stated by the prosecution during opening argument, reversal is unwarranted absent a showing that the prosecution acted in bad faith or that the defendant was prejudiced.[20]

Defendant cites two alleged misstatements of fact put forth by the prosecution during opening statements. Initially, defendant notes the prosecution's claim that Sergeant Ford would testify that he saw defendant take his hand off the steering wheel and make a movement towards his lap. While Sergeant Ford did not testify in this regard, several other officers testified that they observed defendant with only one hand on the steering wheel and that it appeared to them that his other hand was in his lap area. Defendant has failed to show that the prosecutor acted in

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[16] *Carines, supra* at 763-764.

[17] See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[18] *Schutte, supra* at 721.

[19] *Carines, supra* at 763-764.

[20] *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997).

bad faith or how the prosecution's misstatement of the author of these statements prejudiced defendant.

We disagree, however, with defendant's claim that the prosecution mischaracterized Officer Lasseigne's testimony during the opening statement. While Officer Lasseigne admitted during cross-examination that he could not see Mr. Northern's hands before the vehicle was stopped, he testified that could see Mr. Northern's shoulders and that it looked like his hands were in his lap area. In any event, the trial court's instruction to the jury that the lawyers' statements and arguments were not evidence was sufficient to dispel any prejudice.[21] Juries are presumed to follow their instructions.[22]

C. Closing Argument

Defendant also claims that the prosecution improperly vouched for the credibility of its witnesses, bolstered the validity of his case, denigrated the defense as a whole, and mischaracterized the evidence during closing arguments. We disagree.

A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully.[23] But a prosecutor may freely "argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case."[24] Further, the prosecution may use "hard language" when it is supported by the evidence, and is not required to phrase arguments and inferences in the blandest possible terms.[25]

The record does not support defendant's claim of impermissible vouching or bolstering by the prosecution. Viewing the prosecutor's remarks in context, it is clear that he was permissibly arguing that the evidence supported a finding that defendant was guilty as charged. The prosecution does not personally vouch for the veracity of its police witnesses by simply citing their testimony during closing argument.[26] Moreover, the prosecution's suggestion to the jury during rebuttal argument that fingerprints evidence was unnecessary in this case was a reasonable argument based on the evidence. We further note that the prosecutor's comment was responsive to defense counsel's statements during closing argument that the police failed to test for fingerprints because they did not care about defendant's guilt or innocence.[27]

To the extent defendant claims the prosecution argued facts not in evidence when it stated during rebuttal argument that the scales utilized in making the toxicology report were calibrated,

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[21] *Schutte, supra* at 721-722.

[22] *Graves, supra* at 486.

[23] *People v Knapp,* 244 Mich App 361, 382; 624 NW2d 227 (2001).

[24] *Schutte, supra* at 721.

[25] *People v Ullah,* 216 Mich App 669, 678; 550 NW2d 568 (1996).

[26] See *Schutte, supra* at 721.

[27] See *id*.

he has failed to establish any prejudice. While the prosecutor referred to facts not in evidence when he stated that the State Crime Lab's scales were calibrated, defendant has failed to show how this affected the outcome of the trial.[28] As previously stated, any potential prejudice was dispelled when the trial court instructed the jury that the lawyers' statements and arguments were not evidence.[29] We further note that defense counsel stipulated to the admission of the toxicology report.

Because defendant has failed to present any instances of prosecutorial misconduct that denied him a fair trial, he has not shown that his trial counsel was ineffective for failing to object. An ineffective assistance of counsel claim requires a defendant to show that his counsel's performance prejudiced him to the extent that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different.[30] Defendant has not met this burden or overcome the presumption that his counsel's actions were sound trial strategy.[31]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper

[28] *Carines, supra* at 763-764.

[29] *Schutte, supra* at 721-722.

[30] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[31] See *id*.; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).