STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2004
v	No. 249241 Eaton Circuit Court
TYRON BERNARD DAVIS, Defendant-Appellant.	LC No. 03-020009-FH

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his conviction following a jury trial of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). We affirm.

Defendant first argues that the prosecutor elicited inadmissible character evidence, depriving him of a fair trial. We disagree. Defendant specifically challenges the prosecutor's questions to Rebecca Roy and rebuttal witness Charlene Fox. Over defendant's objection, Roy testified that she had seen defendant with a controlled substance on the night before the incident. Defendant objected at trial on the ground of relevance, but argues MRE 404(b) on appeal. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996); see MRE 103(a)(1). To obtain relief, defendant must show plain error affected his substantial rights. MRE 103(d); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

The prosecutor theorized at trial that defendant passed a roll of electrical tape containing cocaine to Roy, defendant's girl friend at the time, during an encounter with a Michigan State Trooper who had stopped to assist the two while they walked along I-96. Roy testified that earlier on the same date she had been with defendant at a motel and defendant was giving her a ride home when his vehicle failed. She and defendant began walking to a truck stop when the state trooper stopped to offer assistance. The trooper testified that he saw defendant place something in Roy's coat pocket which he later found to be a roll of electrical tape with two baggies of cocaine in its center. Roy denied the cocaine was hers and testified that defendant possessed the controlled substance earlier at the motel. The trial court did not plainly err by admitting this testimony because it was directly relevant to whether defendant possessed the cocaine in question without operating through an improper intermediate character-to-conduct inference. *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993); *People v Hall*,

433 Mich 573, 583; 447 NW2d 580 (1989). Here, the jury could have found from Roy's testimony that defendant possessed cocaine at the motel, still possessed cocaine while driving Roy home, and then transferred it to Roy when he was about to be searched by the state trooper.

At trial, defendant denied that he planted cocaine on Roy, denied that he had even touched cocaine on the date in question, and testified that he would "stay away from anything and everything to do with any type of drugs" because of a back injury and chronic anxiety attacks. In rebuttal, the prosecutor called Charlene Fox who testified that she was with defendant and Roy at a motel room the day before the offense. She testified that defendant "[p]ut out lines of cocaine" from a "bag or his own personal stash" and she further clarified that defendant removed the cocaine from "like a box or something." Defendant objected to this testimony on the basis that it was not relevant, but now urges this Court to grant him a new trial because the testimony was only used to show defendant acted in conformity with his criminal propensity to possess illegal drugs. MRE 404(b). Again, defendant has forfeited this issue unless plain error affected his substantial rights. *Knox, supra* at 508.

Defendant has not shown any error requiring reversal. Defendant testified that he eschewed "anything and everything to do with any type of drugs" because of a back injury and chronic anxiety attacks. "Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). Because of defendant's testimony, Fox's testimony was proper to rebut the inference that defendant's character was of such impeccable nature that he never went near cocaine.

Next, defendant argues that the prosecutor deprived him of a fair trial by asking the state trooper leading questions. We disagree. "This Court reviews 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). To obtain relief based on the use of leading questions, "'it is necessary to show some prejudice or pattern of eliciting inadmissible testimony.'" *People v Watson*, 245 Mich App 572, 587-588; 629 NW2d 411 (2001), quoting *People v White*, 53 Mich App 51, 58, 218 NW2d 403 (1974). Here, the leading questions could not possibly have prejudiced defendant because the jury had already heard the trooper give the same testimony without being led. Moreover, a prosecutor's good-faith effort to admit evidence cannot form the basis for a claim of prosecutorial misconduct. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant also contends that the prosecutor improperly argued facts not in evidence during closing. We disagree. Specifically, defendant argues that the following statement was improper: "Rebecca [Roy] also informed you too that on November 4, 2002, she had seen the defendant with a bag of cocaine. She had also seen the defendant do a line with that cocaine." Defendant objected, and the trial court stated, "The jury will rely on their collective memories as to what the testimony was."

A prosecutor is accorded wide latitude and may argue the evidence and all reasonable inferences from it. *Ackerman supra* at 453; *Aldrich, supra* at 112. Here, Roy testified that she had seen defendant with a controlled substance, and Fox testified that she had seen defendant put

out lines of cocaine which disappeared when her back was turned. Thus, although Roy did not testify she saw defendant use cocaine, it was reasonable to infer from the evidence that defendant used cocaine; therefore, the argument was within the wide latitude afforded the prosecutor. Moreover, the trial court instructed the jury that statements made by attorneys are not evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, "the trial court's instructions eliminated any possible unfair prejudice." *People v Houston*, 261 Mich App 463, 470; 683 NW2d 192 (2004), citing *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Thus, defendant has not established prosecutorial misconduct that denied him a fair and impartial trial. *Aldrich*, *supra* at 110.

Finally, defendant argues that newly discovered evidence in the form of a letter from Anthony Elbright, defendant's cellmate in Eaton County Jail, warrants a new trial. We disagree. This issue is unpreserved because defendant could have, but did not, move for a new trial pursuant to MCR 6.431(A)(2). Although defendant moved to remand, this Court properly denied the motion as untimely. MCR 7.211(C)(1); *People v Hernandez*, 443 Mich 1, 21; 503 NW2d 129 (1994). Therefore, defendant has waived this issue. *People v Kaczorowski*, 190 Mich App 165, 173; 475 NW2d 861 (1991). But even if we were to reach the merits of the issue, relief is not warranted. The purported newly discovered evidence was cumulative of other testimony offered by defense witness David Lopez and would not render a different result probable on retrial. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992).

We affirm.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood