STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORY I. HUDSON,

Defendant-Appellant.

UNPUBLISHED
January 17, 2006

No. 255237
Oakland Circuit Court
LC No. 2002-183420-FC

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of 650 or more grams of cocaine, MCL 333.7403(2)(a)(i).[1] The trial court sentenced defendant to life imprisonment. Because we are not persuaded by any of defendant's arguments on appeal, we affirm his conviction and sentence.

I. Sufficiency of the Evidence

Defendant's convictions arise from his alleged involvement in drug trafficking on February 7, 2002 along with two other codefendants, Pablo Bonilla and Ricardo Raphael Arias.[2] Defendant argues first that the evidence adduced at trial was insufficient to sustain his conviction for possession of 650 or more grams of cocaine. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or

[1] Defendant was originally charged with possession with intent to deliver 650 or more grams of a controlled substance, MCL 333.7401(2)(a)(i). MCL 333.7401(2)(a)(i) and MCL 333.7403(2)(a)(i) have since been amended to increase the statutory minimum from 650 grams to 1,000 grams. 2002 PA 665.

[2] Both codefendants appealed their convictions separately. See Docket Nos. 255426 and 255428.

the credibility of witnesses. *Id.* at 514-515. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To sustain a conviction for possession of 650 or more grams of cocaine, the prosecution is required to show that (1) the defendant possessed a controlled substance, (2) the substance possessed was cocaine, (3) the defendant knew that the substance possessed was cocaine, and (4) the substance was in a mixture that weighed 650 or more grams. CJI2d 12.5.

Defendant argues that there was no evidence to establish that he knew of the presence of the cocaine or acted in any way to constitute knowing possession. Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe, supra* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 520. A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id*. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant knowingly possessed the cocaine. Evidence was presented that, during surveillance, the police observed the three defendants arrive at a residence in three separate vehicles. Shortly thereafter, officers observed defendant, and codefendants Arias and Bonilla come out of the house, and briefly converse in the street. Thereafter, codefendant Bonilla got into the passenger side of a pickup truck that codefendant Arias was driving. Defendant removed a dark jacket from the car that he was previously driving, a light-colored Taurus, and walked over to a dark-colored Taurus. The dark-colored Taurus and a pickup truck then left simultaneously, with the pickup truck in the lead, and continued to travel from Detroit to Pontiac in tandem for approximately an hour. When the police stopped the Taurus, defendant was the sole rear-seat passenger. As the police secured the Taurus, officers observed defendant making suspicious movements, including reaching under his seat and behind his back. When the police removed defendant from the vehicle, an officer saw that defendant was sitting on a black jacket that was covering a "brick" of more than 916 grams of cocaine. From this evidence, a jury could reasonably infer that defendant knew that the cocaine was present and, through his actions, attempted to conceal it.

Although the cocaine could also have belonged to others, possession may be joint. *Wolfe, supra.* Here, defendant was charged as a principal and as an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *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). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). Further, even though defendant asserts that the evidence linking him to the cocaine was weak, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Moreover, a prosecutor need not negate every reasonable theory of innocence, but

must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The evidence was sufficient to sustain defendant's conviction of possession of 650 or more grams of cocaine.

II. Prosecutorial Misconduct

We reject defendant's claim that he is entitled to a new trial because the prosecutor impermissibly argued facts not in evidence, shifted the burden of proof, and appealed to the jurors' civic duty. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendant failed to object to some of the prosecutor's conduct below. We review those unpreserved claims for plain error affecting substantial rights. *Carines, supra*, at 752-753, 763-764. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A. Facts Not in Evidence

Defendant first claims that the prosecutor argued facts not in evidence in the following emphasized comments made during closing argument:

> [*The prosecutor*]: I had to have some witnesses come and testify to you what they observed during the surveillance . . . .
>
> * * *
>
> They meet at Bonilla's house. They come in separate cars. They all get out. They go in the house. They come out of the house. They talk.
>
> *And then I saw Defendant Hudson go back to the light-colored Taurus, remove People's Exhibit 2, a dark jacket, and then go into - -*
>
> [*Defense counsel*]: Your Honor, that misrepresents the testimony. There was no testimony that that was the jacket that he carried, if in fact he carried a jacket at all.
>
> [*The trial court*]: It's argument. Go ahead. [Emphasis added.]

Defendant asserts that there was no evidence that the item of clothing that he removed from the light-colored Taurus was the jacket that was later recovered from the dark-colored Taurus.

Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), he is free to argue reasonable inferences arising from the evidence as they relate to his theory of the case, and is not required to phrase arguments and inferences in the blandest possible terms. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d

568 (1996). During trial, an officer testified that, during surveillance, he observed defendant remove a dark jacket or sweater from a light-colored Taurus, and walk with the item to the dark-colored Taurus. When the police subsequently stopped the dark-colored Taurus, officers observed defendant, who was the sole rear-seat passenger, sitting on a dark-colored jacket that was concealing the cocaine. Given this testimony, the prosecutor's statement was a reasonable inference from the evidence as it related to his theory of the case.

Further, when defense counsel objected, the trial court instructed the jury that the prosecutor's comments constituted "argument." In its final instructions, the court instructed the jurors that the lawyers' comments and arguments are not evidence, and that the case should be decided on the basis of the evidence. These instructions were sufficient to cure any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, this claim does not warrant reversal.

B. Shifting the Burden of Proof

Defendant also agues that the prosecutor impermissibly shifted the burden of proof in closing argument when he made the following comment:

> But when the Taurus was stopped, [the police] saw moving around. Remember that. The testimony was uncontroverted. There was no testimony to the contrary that Defendant Hudson was moving around. Moving his hands around.

A prosecutor may not imply that a defendant must prove something or present a reasonable explanation because such an argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). But it is permissible for a prosecutor to observe that evidence against a defendant is undisputed. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Here, two officers testified that defendant made suspicious movements after the police stopped the Taurus. Moreover, even if the challenged remark could be viewed as improper, any prejudice could have been cured by a timely instruction. *Schutte*, *supra* at 721. Indeed, the trial court's instructions that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, were sufficient to cure any possible prejudice. *Long*, *supra*. Consequently, this claim does not warrant reversal.

Defendant also contends that the prosecutor shifted the burden of proof during rebuttal argument when he made the following comments to which defense counsel objected:

> [*The prosecutor*]: To suggest, as [defense counsel] does, that this was just a social engagement and they were all going to party in some Hispanic venue in the City of Pontiac does this: It absolutely ignores the facts and circumstances in this case.
>
> And it raises in front of you by way of a frivolous argument some fact and circumstance that's not in evidence. There no evidence of that whatsoever.

[*Defense counsel*]: Well, Your Honor, I would just object. I think it's a bargain [sic] shifting attempt by the prosecutor.

[*The trial court*]: It's argument.

[*The prosecutor*]: I'm not shifting the burden. I'm just suggesting it's pie in the sky. "What if" - - "what if" . . . [Emphasis added.]

Although a defendant has no burden to produce any evidence, once he advances a theory, argument with regard to the inferences created does not shift the burden of proof. *Godbold*, *supra*. Here, viewed in context, the prosecutor's remarks were focused on refuting a defense theory advanced during closing argument. Specifically, defense counsel argued:

> And if you start with the presumption of innocence of [defendant] what signs are there, to him, that this isn't a location that he should be?
>
> Just because he's friends with somebody there and going out socially does not mean that he had any involvement with cocaine.
>
> Why go to Detroit from Pontiac? Well, for one, there's a night activity in Pontiac.
>
> There's a number of bars there. There's Hispanic individuals here. There's a large Hispanic community in Pontiac. There's social occasions to go to.

The prosecutor's comments constituted a permissible response to defense counsel's closing argument and, thus, were not improper.

C. Civic Duty Argument

Finally, defendant argues that the prosecutor impermissibly appealed to the jurors' civic duty by discussing the alleged "street-value" of the cocaine:

> [Officer Jeremy Pittman] told you that about . . . $100 a gram . . . is what you would pay on the street. So 917 times 100, $91,700 street value.
>
> * * *
>
> And you heard the testimony also that this stuff gets stepped on, cut; in other words, it's - - put filler material in there to spread the weight so you can sell more of it, again, and again . . .
>
> If we just admit that it gets cuts once, that one of those bricks turns into two, then it's $91,700 times two. It has a minimum street value of $183,000.
>
> * * *
>
> For me to simply say it gets stepped on only once and it gets doubled to $183,000 is a very conservative estimate.

Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jurors. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). But viewed in context, the prosecutor's statements were reasonable inferences from the evidence as they related to his theory of the case, *Fisher*, *supra*, which was that defendant possessed the cocaine with the intent to deliver it. During trial, Officer Pittman, who was qualified as an expert in the area of cocaine trafficking, testified that a gram of cocaine would generally cost $100, and that the profit is derived from "buying in bulk, stepping on the product, adding a cutting agent to the product making your product bigger, and selling it in smaller quantities." He explained "that if you take a gram of cocaine and a half gram or a gram of a cutting agent and mix them together, you now have two grams of cocaine." He further indicated that before cocaine reaches a "person who shows up on the street," "it could have been stepped on five, ten, twenty times by then."

Further, to the extent the prosecutor's remarks could be considered improper, codefendant Bonilla's counsel objected and, in response, the trial court instructed the jury that "closing arguments are nothing more than the attorney's summation of what they believe the testimony to be. If you find there's no evidence supporting that, just ignore it." This instruction, combined with the trial court's final instructions that the jury should not be influenced by prejudice, that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence were sufficient to dispel any possible prejudice. *Long*, *supra*. Consequently, this issue does not warrant reversal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio