STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2006
v	No. 263942 Oakland Circuit Court
ANGELINA LEE GOMEZ, Defendant-Appellant.	LC No. 2005-201153-FH

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). She was sentenced to concurrent prison terms of 5 to 20 years for the cocaine conviction, 2 to 20 years for the heroin conviction, and one to four years for the marijuana conviction. She appeals as of right. We affirm.

I. Underlying Facts

On the morning of December 23, 2004, Pontiac police officers executed a search warrant at a condominium located on Brandon Street in Pontiac. The condominium, which was government-assisted "low-income" housing, was leased to defendant. Inside, the police found defendant and codefendant Cleve Brown asleep in the master bedroom, and the couple's two children in different bedrooms.

In the master bedroom, the police found a box of plastic sandwich bags, $2,500, and an expensive man's watch on top of a bedroom dresser, and an additional $900 in a dresser drawer. Behind a nightstand, the police found a black plastic bag inside a green and white plastic bag. The black plastic bag contained two bags of cocaine, heroin, seven one-ounce bags of marijuana, and two digital scales. One ounce of marijuana was found in a tall dresser, which also contained men's clothing. Police also located approximately $2,300 and Brown's Michigan identification card, listing an address of 131 Willard Street in Pontiac, in the pockets of a pair of men's jeans found on the bedroom floor. A coffee grinder containing cocaine residue was found in a kitchen cupboard above the refrigerator, along with a box of plastic sandwich bags. In a patio closet, the police found a bulletproof vest. In response to a police inquiry for keys to a Chevrolet Impala parked in the garage, Brown allegedly directed the police to a man's coat in the dining room. In

the coat, the police found keys for the condominium and the Impala, $170, a large plastic bag containing cocaine, and three corner-tie packs of heroin. According to police testimony, the condominium also contained many expensive items and high-end electronics, including hardwood tables, leather furnishings, jewelry, two big-screen televisions, and audio and digital equipment. A Dodge Durango registered to defendant at the Willard Street address, a conversion van, and a rental vehicle were also at the residence.

The police found both male and female clothing and documents for both defendant and Brown in the master bedroom, as well as photographs of defendant and Brown throughout the residence. In the nightstand was paperwork and a checkbook for a joint bank account held by defendant and Brown,[1] documents from the Family Independence Agency involving Brown, a rental property lease agreement for the condominium listing defendant as the tenant, a government Section VIII housing assistance payments contract for defendant, a verification from the Pontiac Housing Commission of defendant's intent to vacate 131 Willard Street, money transfer slips for defendant, and titles for different vehicles. On the nightstand in the bedroom, the police found a temporary license for Brown listing the Willard Street address. Also found in the bedroom was a pay stub for Brown showing year-to-date earnings (through December 2004) of $2,200, defendant's Michigan identification card, and a Consumers Energy bill addressed to defendant. No documents for any other adult were found.

Defendant did not testify. Brown testified that he has two children with defendant, but he did not live in the condominium. Brown claimed that he was at the condominium during the raid because he had taken their son to a sports game on the previous night, and when he brought the child home, "one thing led to another, and [he and defendant] ended up sleeping together." Brown denied ownership of the drugs in the residence, the coat in which drugs were found, or the Impala. He admitted ownership of the money in his jeans, explaining that he had saved it. Brown indicated that defendant "was messing around with other guys," and "[he] would assume somebody would have access [to the condominium]."

II. Sufficiency of the Evidence

Defendant argues that the prosecution presented insufficient evidence to sustain her convictions, because the evidence showed that Brown owned the drugs. 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 in determining the weight of evidence or 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).

---

[1] When the police began forfeiture proceedings, the bank account had a balance of $12,000.

Defendant does not challenge the individual elements of the offenses, MCL 333.7401(2)(a)(*iii*) and (*iv*) and MCL 333.7401(2)(d)(*iii*).[2] She only argues that there was insufficient evidence that she possessed the controlled substances. Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe*, *supra* at 519-520. "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521. "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). "[C]ircumstantial 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).

At trial, the prosecutor argued that defendant was guilty as a principal or an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if she directly committed the offense. MCL 767.39.

> To support a finding that a defendant aided and abetted a crime, the prosecution must show 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

---

[2] MCL 333.7401 provides:

> (1) [A] person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . .
>
> (2) A person who violates this section as to:
>
> (a) [Heroin or cocaine]:
>
> * * *
>
> (*iii*) Which is in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance is guilty of a felony . . . .
>
> (*iv*) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony . . . .
>
> * * *
>
> (d) Marihuana or a mixture containing marihuana is guilty of a felony punishable as follows:
>
> * * *
>
> (*iii*) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years . . . .

> intended the commission of the crime or had knowledge that the principal intended its commission at the time [s]he gave aid and encouragement. [*People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001), quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]

"'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 *Turner*, *supra* at 568. "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). An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant's participation in planning or executing the crime. *Carines*, *supra* at 757-758, quoting *Turner*, *supra* at 568-569. But "a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *Wolfe*, *supra* at 520.

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 either had constructive possession of the drugs or assisted Brown in possessing the drugs. It was undisputed that defendant leased and had control over the condominium where the drugs, large sums of cash, and expensive jewelry, furnishings, and electronic equipment were found. At the time of the raid, defendant was asleep in the master bedroom with Brown, who was the father of two of her children (ages five and nine). Behind a nightstand in the master bedroom, the police found a bag containing cocaine, heroin, marijuana, and two digital scales. Although the drugs were not in plain view, the evidence showed that the bag was not so hidden that defendant did not have access to it. Also, inside the nightstand were numerous personal documents belonging to defendant.

Moreover, there was testimony that $2,500 in cash and a box of plastic sandwich bags, which are used for packaging drugs, were in plain view on top of a bedroom dresser, and an additional $900 was in a drawer. A coffee grinder containing cocaine residue and another box of plastic sandwich bags were in defendant's kitchen cupboard. In Brown's coat, which was in the dining room, the police found $170, a large bag containing cocaine, and three corner-tie packs of heroin. Furthermore, defendant's condominium contained many expensive furnishings, electronics, and jewelry that were inconsistent with defendant's lack of employment and receipt of public assistance, and Brown's low-paying job. This evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to reasonably infer that defendant had constructive possession of the drugs found in her condominium.

Although defendant argues that the evidence showed that Brown alone possessed the drugs, possession may be joint, *Wolfe*, *supra* at 520. The evidence supported an inference of joint possession. The evidence showed a close association between defendant and Brown. Not only did Brown have clothing and personal documents in defendant's condominium, but defendant's former residence (131 Willard in Pontiac) was the address shown on Brown's personal documents. Also, among the documents found in defendant's condominium was paperwork showing that defendant and Brown had a joint bank account with a balance of approximately $12,000. The evidence was sufficient to sustain defendant's convictions.

III. Bindover

Defendant also argues that the district court abused its discretion when it bound her over for trial because the prosecution presented insufficient evidence at the preliminary examination to establish that she possessed the drugs. But "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004), citing *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990). Here, sufficient evidence at trial supported defendant's convictions, and she does not argue on appeal that she was otherwise prejudiced by the claimed error. Consequently, defendant has failed to state a cognizable claim on appeal regarding the sufficiency of the evidence at the preliminary examination.

IV. Effective Assistance of Counsel

Defendant, who was tried jointly with codefendant Brown, argues that defense counsel was ineffective for failing to move for severance. We disagree. Because defendant failed to raise this ineffective assistance of counsel issue in a motion for a new trial or an evidentiary hearing before the trial court, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Indeed, a strong policy favors joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that her substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 345; 524 NW2d 682 (1994). To make this demonstration, a defendant must provide the court with a supporting affidavit or make an offer of proof that "clearly, affirmatively, and fully demonstrates that [her] substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346. Mere inconsistency of defenses is not enough to require severance; the defenses must be mutually exclusive or irreconcilable. *Id.* at 349. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.* (citations omitted). Also, "finger pointing" is not a sufficient reason to grant separate trials. *Id.* at 360-361. In sum, severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 359-360, quoting *Zafrio v United States*, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993).

Defendant and Cleve Brown's joint trial involved several witnesses and substantially identical evidence. To hold separate trials in these substantially identical cases would have been unnecessarily duplicative and excessive. The interests of justice, judicial economy, and orderly administration favored a joint trial. Further, defendant has not provided concrete facts or reasons to justify separate trials, and has not persuasively demonstrated that her substantial rights were prejudiced by a joint trial. The record does not show "significant indication" that the requisite prejudice in fact occurred at trial.[3] *Hana*, *supra* at 346-347. Further, the jury was not required to believe one defendant at the expense of the other and, in fact, it did not. Defendant and Brown were each convicted of the charged offenses. Additionally, where, as here, the prosecutor advances a theory of aiding and abetting against both defendants, "[f]inger pointing by the defendants . . . does not create mutually exclusive antagonistic defenses." *Id*. at 360-361.

Finally, the risk of prejudice from a joint trial may be allayed by a proper cautionary instruction. *Id.* at 351, 356. The trial court instructed the jurors concerning reasonable doubt and the determination of guilt or innocence on an individual basis, and cautioned the jury that each case must be considered and decided separately and on the evidence as it applied to each defendant. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Because defendant has failed to show that she was entitled to severance, she has likewise failed to establish that she was prejudiced by defense counsel's failure to move for severance. *Effinger*, *supra* at 69. Consequently, defendant is not entitled to a new trial on this basis.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra

---

[3] Although Brown testified that the drugs did not belong to him, his testimony was equivocal with regard to defendant. Brown suggested that other men had access to defendant's condominium.