STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2008
v	No. 276153 Macomb Circuit Court
ANTONIO PEREZ-CHICA, Defendant-Appellant.	LC No. 2005-004731-FC

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(i), and conspiracy to possess with intent to deliver 1,000 or more grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(i). He was sentenced to concurrent prison terms of 15 to 30 years for each offense. Because there was sufficient evidence to support defendant's convictions, the trial court did not abuse its discretion by denying defendant's motion for a mistrial, and defendant was not denied a fair trial by the trial court's refusal to sever his trial or seat a separate jury from that of a codefendant, we affirm.

Defendant's convictions arise from the recovery of ten kilos of cocaine from a black Ford Explorer in the city of Roseville. Police officers received an anonymous tip that persons from Phoenix, Arizona may be involved in narcotics trafficking in the Roseville area. While conducting surveillance of a black Ford Explorer with an Arizona license plate at a Red Roof Inn, Detective-Sergeant Terence Mekoski observed defendant hand a set of keys to the vehicle to Jesus Ramon Cottleon,[1] who entered the vehicle and sped away. Shortly thereafter, Mekoski pulled the vehicle over and a K-9 search revealed ten kilos of cocaine in a hidden compartment at the rear of the vehicle. Defendant's theory of defense at trial was that he had no knowledge of the cocaine in the vehicle.

Defendant first argues that the evidence was insufficient to support his convictions. We disagree.

[1] Cottleon was known by an alias, Candelario Herrera.

When determining whether sufficient evidence exists to support a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether a rational finder of fact could conclude that every element of the crime charged was proven beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury's verdict. *Id.* at 400.

Defendant contends that the prosecutor failed to present sufficient evidence that he knowingly possessed the cocaine. "Possession may be either actual or constructive, and may be joint or exclusive." *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005). A defendant's mere presence where a certain item is found, however, is insufficient to establish possession. *Id.* Rather, there must exist an additional connection between the defendant and the item. *Id.* "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the controlled substance." *Id.* In addition, possession may be proven by circumstantial evidence and reasonable inferences drawn therefrom. *Id.*

Here, viewed in the light most favorable to the prosecution, the evidence was sufficient to show that defendant constructively possessed the cocaine. Although he denied knowledge of the cocaine in the hidden compartment of the Explorer, defendant admitted to the police that he and co-defendant Jose Martinez purchased the vehicle at a flea market in Arizona. Cottleon testified that he and co-defendant Rigoberto Cardenas-Borbon followed defendant and Martinez's Explorer to the Detroit area from Arizona for the purpose of delivering cocaine pursuant to a deal that had been arranged. The cocaine was located in the Explorer. After arriving in the Detroit area, Cottleon went to a Red Roof Inn to pick up the Explorer to deliver the cocaine. Defendant had been communicating with Cardenas-Borbon via their cell phones. Defendant handed Cottleon the keys to the Explorer and talked to Cottleon about obtaining drugs for his own personal use. Cottleon was arrested shortly thereafter. Drawing all reasonable inferences in favor of the jury's verdict, the evidence was sufficient to establish defendant's knowledge of the cocaine.

Defendant also argues that the evidence was insufficient to establish that he conspired to possess with the intent to deliver 1,000 or more grams of cocaine. As discussed above, however, the evidence showed that defendant and his co-defendants traveled to the Detroit area for the specific purpose of delivering ten kilos of cocaine at the rate of $18,500 a kilo. The circumstances, acts, and conduct of the parties are sufficient to establish a conspiracy. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Although defendant correctly argues that the prosecutor was required to prove that the agreement was for the statutory minimum of 1,000 grams of cocaine as charged, *People v Mass*, 464 Mich 615, 629-631, 633-634; 628 NW2d 540 (2001), the circumstantial evidence demonstrated that defendant was aware of the amount of cocaine involved. Cottleon testified that the agreement was to deliver ten kilos of cocaine. Moreover, the cocaine was located in defendant's vehicle, which he drove from Arizona to Detroit. Thus, the circumstantial evidence showed that defendant conspired to possess with the intent to deliver 1,000 or more grams of cocaine.

Defendant next argues that the trial court abused its discretion by denying his motion for a mistrial based on the prosecutor's elicitation of testimony from Martinez regarding the transportation of illegal immigrants. We disagree.

"We review for an abuse of discretion a trial court's decision on a motion for a mistrial." *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). A motion for a mistrial should be granted " 'only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.' " *Id*. at 195, quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). Thus, absent a showing of prejudice, reversal is not warranted. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

Defendant argues that the evidence was irrelevant and inflammatory and constituted inadmissible other acts evidence under MRE 404(b). The challenged evidence, however, was properly admissible as part of the res gestae of the offenses. The facts and circumstances surrounding an offense are properly admissible as part of the res gestae. *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981); *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). Upon the prosecutor's questioning, Martinez admitted during cross-examination that he and defendant had "smuggled illegal aliens" with them in the Explorer from Arizona to the Detroit area. MRE 404(b) does not preclude the admission of evidence intended to give the jury an intelligible presentation of the full context in which disputed events occur. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996), reh den 454 Mich 1211 (1997). The four illegal immigrants were in an adjoining room at the Red Roof Inn when defendant and Martinez were arrested. Thus, the evidence was part of the res gestae of the offenses.

Moreover, at the time that Martinez testified, testimony had already been presented that defendant admitted to the police that he had transported illegal immigrants from Arizona in his vehicle. The trial court instructed the jury not to consider such evidence in rendering its verdict. In addition, defense counsel conceded in his opening statement that defendant admitted bringing the illegal immigrants to the Detroit area. Accordingly, Martinez's admission on cross-examination did not prejudice defendant, and a mistrial was therefore not warranted. *Wells, supra* at 390.[2]

Defendant next argues that he was denied a fair trial by the trial court's refusal to sever his trial or seat a separate jury from that of co-defendant Martinez. We again disagree.

We review for an abuse of discretion a trial court's decision on a motion to sever the trials of multiple defendants. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994).

[2] Defendant further argues that the prosecutor elicited "other" irrelevant and prejudicial evidence that was also inadmissible prior bad acts evidence. He does not identify, however, the "other" evidence to which he refers. Accordingly, we cannot properly analyze his argument. A defendant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citation and quotations omitted).

"Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana, supra* at 346. Absent such a showing or an indication that the requisite prejudice actually occurred at trial, this Court will affirm a trial court's decision denying a motion for severance. *Id.* at 346-347. In order to show that his substantial rights will be prejudiced if separate trials are not granted, a defendant must establish that his defenses and his co-defendants' defenses are "not only inconsistent, but also mutually exclusive or irreconcilable." *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). Severance should be granted when defenses are antagonistic, i.e., when it appears that a co-defendant may testify to exculpate himself and incriminate the defendant. *People v Harris*, 201 Mich App 147, 152-153; 505 NW2d 889 (1993). In lieu of complete severance, a court may use separate juries. *Hana, supra* at 351. The dual-jury procedure should be evaluated using the same factors set forth above regarding motions for separate trials. *Id.*

The trial court did not abuse its discretion by denying defendant's motion to sever his trial because his defense and that of Martinez were not mutually exclusive or irreconcilable. Martinez testified that he was not aware of the cocaine hidden in the Explorer and that he merely agreed to transport the illegal immigrants to Chicago from Arizona in exchange for $4,000. He maintained that he and defendant did not stop in Chicago and continued traveling to the Detroit area so that defendant could collect money that was owed him. Defendant argues that this testimony was antagonistic and irreconcilable with his defense that he came to Michigan so that the Explorer could be repaired. Detective Carlos Lopez testified, however, that defendant had told him that he came to the Roseville area to get his car fixed *and* pick up some money. In addition, Martinez testified that he and defendant gave the Explorer to Cottleon at the Red Roof Inn because Cottleon was going to take the vehicle to have the transmission fixed. Martinez further testified that he and defendant waited at the Red Roof Inn for someone to bring money for defendant. Therefore, the defenses of defendant and Martinez were not mutually exclusive or irreconcilable such that separate trials were warranted. *Cadle, supra* at 469. For the same reason, the trial court did not abuse its discretion by failing to swear a separate jury for defendant's case.[3] *Hana, supra* at 351.

Affirmed.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[3] In addition to concerns about conflicting defense theories, defendant argues that separate juries should have been used because of "*Bruton* concerns." Although defendant cites *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), he fails to explain or elaborate the basis for his argument. As previously stated, a defendant may not announce a position and leave it for this Court to discover and rationalize its basis. *Matuszak, supra* at 59.