STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2008
v	No. 278588 Wayne Circuit Court
MARIO ALBERTO MARTINEZ, Defendant-Appellant.	LC No. 07-004036-01

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction for possession with intent to deliver between 450 and 999 grams of cocaine, MCL 333.7401(2)(a)(ii). Defendant was sentenced to 7 to 30 years' imprisonment for the conviction. We affirm.

I. FACTS

Defendant's conviction stems from the execution of a search warrant on a residence where suspected drug activity was taking place. Police officers testified that they observed defendant pull up to the residence in a Ford van, exit the vehicle and enter the house, returning shortly thereafter to open the back of the van. The surveillance team observed defendant retrieve a plastic, blue and white shopping bag from the back of the van and carry it back in to the residence in a rushed manner. The surveillance team then notified the raid team, stationed nearby, to execute the search warrant. The raid team found defendant in the kitchen of the residence, alone. The same plastic shopping bag was within a few feet of defendant, on the kitchen counter. In the bag, officers found a ziplock bag containing approximately 530 grams of cocaine. There were three other individuals in the house at the time of the raid; they were located in the living room when police entered.

II. PERJURED TESTIMONY

Defendant first claims that his conviction was obtained on the basis of perjured testimony offered by the police officers who testified at the preliminary examination and at trial. We disagree.

A. Standard of Review

Defendant did not preserve this issue; therefore, we review for plain error. "'To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.'" *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 171-172.

B. Analysis

The prosecution is charged with the constitutional duty of informing the defendant and the trial court if a government witness presents perjured testimony. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). And the prosecution "may not knowingly use false testimony to obtain a conviction" and must correct false testimony. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001).

An examination of the challenged testimony reveals that there is no evidence that any officers testified falsely. Officer Adrian Lawrence, who testified during the preliminary examination, received a description of an individual who was to deliver drugs to the house. The information came second-hand from another officer. The description that Lawrence received of the individual was a Mexican male wearing a black "hoodie" sweat top. Lawrence did not receive a description of that individual's height or weight. Lawrence testified that this description matched defendant when he observed defendant exit the van in front of the residence, and later carry the shopping bag into the residence.

The search warrant, which was not introduced as evidence in the trial, provides the following description of an individual who was to be searched upon execution of the warrant. It appears that this individual was observed selling cocaine from inside the residence to individuals who came up to the house: "H/M/25-30 5'10" 170-180 lbs." It contained no description of the seller's clothing, and nothing in the affidavit or record supports that the individual listed in the warrant was the same individual that police believed would deliver drugs to the house. In the affidavit attached to the warrant, the affiant averred that he received information that the residence contained large amounts of drugs or weapons, and that, upon surveying the house, he observed three different individuals approach the house, and the "seller" described in the warrant would exit the house and meet the individual on the porch, then reenter the house, returning shortly after to exchange items on the porch with the individual, then the seller would remain in the dwelling. After these observations, the affiant averred that he "has probable cause to believe that the above-described items will be found on the above-described premises." On the record, Lawrence did not offer perjured testimony at the preliminary examination because his testimony reveals that he was describing the person who was delivering drugs to the address, not selling them from inside of the residence.

During the trial, Officer William Ashford, who was a member of the raid team that executed the search warrant on the residence, testified that before the raid, he received information from the surveillance team, which described an individual "wearing a white T-shirt, black sweat top with hood, blue jeans." Ashford was the first officer to enter the residence and found defendant in the kitchen, alone. Ashford testified that none of the other occupants

matched the description besides defendant. Ashford never testified that the description of the suspect that he received from the surveillance team came from the search warrant as opposed to personal observation of the surveillance team. The record does not support that Ashford perjured his testimony.

Finally, defendant has not demonstrated that Officer Kenneth Jackson's testimony was false. Jackson conducted surveillance with Lawrence. He testified that he received the description information second-hand from another officer, and that it pertained to the individual who would be delivering cocaine to the residence that was subject to the search warrant. Jackson set up surveillance, searching for this individual, who was described to Lawrence as, "Hispanic male, 20 to 22, five-six, 175 pounds, and it specifically said that he was going to be wearing a black hooded sweater." Lawrence further testified that he was not the individual who obtained the search warrant and was not the affiant on the affidavit.

The testimony demonstrates that no officer testified that the description of the individual observed during surveillance matched the description on the warrant or that the description in the warrant was supposed to be defendant. The record does not support that any officers invented the description of the person for whom they were looking to deliver drugs only after defendant's arrest.

Defendant has failed to show that perjured testimony was presented at trial. The testimony was not false; therefore, the prosecution did not violate a duty to report false testimony, and we cannot conclude that the conviction was based on false testimony. There was no plain error requiring reversal.

III. PROSECUTORIAL MISCONDUCT & EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that the prosecution committed misconduct by making improper statements during closing arguments, therefore depriving him of a fair trial, and that his counsel's failures with respect to the misconduct deprived of the effective assistance of counsel. We disagree.

A. Standard of Review

Defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting his substantial rights. *People v Goodwin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). Defendant's ineffective assistance of counsel claim is limited to a review of the errors that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

B. Analysis

"The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *Goodwin*, *supra* at 432. Allegations of prosecutorial misconduct are examined on a case-by-case basis, viewing the prosecution's statements in light of the defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Generally, prosecutors have great latitude in their arguments and conduct during trial. *People v Unger*, 278 Mich App 210, 236; 49 NW2d 272 (2008).

"They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id.*

Defendant first asserts that the prosecution committed misconduct in allegedly referring to his juvenile criminal record. During closing arguments, the prosecution objected when defense counsel argued that "I cannot say that this 21-year-old man who has never had . . . ." The trial court agreed with defendant that evidence of defendant's background check was in the record, and thus, it overruled the objection. Defense counsel continued, "He has never had a criminal conviction." The prosecution then interjected, "Adult criminal prosecution." Defense counsel then repeated, "He has never had an adult criminal prosecution." We find no prosecutorial misconduct.

Generally, evidence regarding previous criminal acts by the defendant is inadmissible as to the defendant's guilt or innocence unless it falls under the exception in MRE 404(b) or the res gestae exception. *People v Der Martzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). On the record, however, we find that the prosecution was not impermissibly attempting to place defendant's juvenile record into evidence. The prosecution's statements must be viewed in light of defendant's arguments. *Thomas*, *supra* at 454. Defendant argued that he had no prior convictions. It appears that the prosecution objected based on the fact that there was no evidence of defendant's criminal record or background in evidence. This was a legitimate objection because attorneys may not argue facts not in evidence. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). When it became clear that it was based on alleged evidence that a background check was conducted on defendant, the prosecutor merely clarified the point that no adult criminal prosecutions were revealed, a point on which defense counsel agreed. Defendant was not denied a fair and impartial trial because the prosecution's conduct did not constitute misconduct. *Goodwin*, *supra* at 432.

In ruling, we note that the prosecution's statement was brief, and did not specifically refer to any past juvenile convictions or even include the word "juvenile," it gave no details of any past crimes, and it was not an attempt to introduce evidence of past crimes; any inference to a record other than one of adult criminal prosecutions was indirect only.

Further, because the prosecution did not engage in misconduct, defense counsel was not ineffective for failing to object. Defense counsel is not ineffective for failing to raise a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant also asserts that the prosecutor improperly used an analogy in closing arguments to demonstrate that defendant had possession of cocaine. Defendant argues that the analogy lowered the burden of proof.

The prosecution may deprive defendant of a fair trial where he makes a clear misstatement of the law that remains uncorrected. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, an instruction to the jury regarding the proper law can cure the prosecution's mistaken legal argument. *Id.*

We find that the prosecution's analogy did not deprive defendant of a fair trial. The prosecution may prove its case with direct or circumstantial evidence; and possession, whether actual or constructive, may be demonstrated by direct or circumstantial evidence that defendant

had control over the drug or the property on which it was discovered. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1992). To illustrate the concept of using circumstantial evidence to support a theory, the prosecution used the challenged analogy. The use of analogies to illustrate a theory is not improper. See e.g. *People Hryshko*, 170 Mich App 368, 382-383; 427 NW2d 572 (1988). And because circumstantial evidence can be used to support a conviction, the prosecution did not make a misstatement of the law. In addition, the trial court instructed the jury that the lawyers' arguments were not evidence and that the prosecution bore the burden of proving all the elements beyond a reasonable doubt. Therefore, the trial court's instructions cured any alleged error with respect to the burden of proof. *Grayer*, *supra* at 357.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant next claims that he was convicted on the basis of insufficient evidence. We disagree.

A. Standard of Review

In reviewing claims of insufficient evidence, we view the evidence in the light most favorable to the prosecution, to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe*, *supra* at 515.

B. Analysis

Due process requires that the prosecution introduce sufficient evidence to justify the jury in deciding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). This Court is "required to draw all reasonable inferences and make credibility choices in support of the jury verdict" when reviewing the sufficiency of the evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is the jury's function alone, when considering the evidence, to determine what weight and credibility to give the evidence. *Wolfe*, *supra* at 514-515, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).

The prosecution must prove four elements beyond a reasonable doubt in order to support a conviction for possession with intent to deliver more than 450 grams but less than 1,000 grams of cocaine: (1) that the substance is cocaine, (2) that the cocaine contained between 450 grams and 1,00 grams, (3) that defendant was not authorized to possess the cocaine, and (4) that defendant possessed it knowingly and with the intent to deliver. *Wolfe*, *supra* at 516-517; MCL 333.7401(2)(a)(ii). In making his argument, defendant challenges only whether there was sufficient evidence to establish beyond a reasonable doubt that he was in possession of the cocaine.

Possession of a controlled substance may be constructive. *Wolfe*, *supra* at 520. Defendant does not have to own the controlled substance in order to possess it, and possession may be joint with one or more people. *Id.* Constructive possession is defined as the "'right to exercise control of the cocaine'" and knowledge of its presence. *Id.*, quoting *People v Germaine*, 234 Mich 623, 627; 208 NW 705 (1926). Presence at the location where drugs are found, by itself, is insufficient to establish constructive possession. *Wolfe*, *supra* at 520. Rather, the

prosecution must demonstrate that "some additional connection between the defendant and the contraband" exists. *Id.* When "the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband," constructive possession is established. *Id.* at 521. In addition, constructive possession may be shown by either direct or circumstantial evidence "'that the defendant had the power to dispose of the drug, or "the ability to produce the drug . . .," or that the defendant had the "exclusive control or dominion over property on which contraband narcotics are found . . . ."'" *Id.* (citations omitted).

Viewing the evidence in the light most favorable to the prosecution, we find that sufficient evidence was presented to establish that defendant constructively possessed the cocaine. *Tombs*, *supra* at 459. The evidence presented showed that defendant had knowledge of the cocaine and the right to control it. While defendant's mere presence in the residence, in proximity to the bag, may not otherwise have been sufficient, the prosecution presented additional evidence that connected the cocaine to defendant. Defendant was observed retrieving the bag from the van and carrying it into the house. When defendant carried the bag into the house, it was not empty; it was weighted down because of its contents. The same bag was discovered in the kitchen, on the counter, approximately three to four feet from defendant during execution of the search warrant, which occurred within minutes of defendant entering the house. Officer Jackson testified that the raid team arrived at the residence less than a minute after he notified them, which was as soon as he observed defendant reenter the residence with the bag. Defendant was the only person in the kitchen. The other occupants were in the living room. The police discovered a gallon-sized ziplock bag of cocaine in the shopping bag in the kitchen. A reasonable trier of fact could have found constructive possession beyond a reasonable doubt.

V. DIRECTED VERDICT

Lastly, defendant argues that the trial court erroneously denied his motion for a directed verdict of acquittal based on insufficient evidence. Again, we disagree.

A. Standard of Review

We must consider "all evidence adduced up to the time of the motion for a directed verdict, viewing that evidence in a light most favorable to the prosecutor, and [determine] whether a rational trier of fact could have found that the essential elements of the charged crimes were proven beyond a reasonable doubt." *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988).

B. Analysis

Defendant moved for a directed verdict at the close of the evidence. Defendant asserts that the case should not have gone to the jury where the description upon which the police based their arrest differed from the description that the officers gave during their testimony, and where the shopping bag defendant carried into the residence merely resembled the shopping bag that the police subsequently discovered on the kitchen counter, but no evidence supported that it was the same bag.

Resolving all conflicts in the evidence in favor of the prosecution, we find that the trial court properly denied defendant's motion for a directed verdict of acquittal. *People v Harmon*,

248 Mich App 522, 524; 640 NW2d 314 (2001). The officers all testified to similar descriptions of an individual who was to deliver drugs to the house that was the subject of the search warrant. They all described this individual as a Hispanic male, 20 to 22 years of age, five feet and six inches tall, approximately 170 pounds, and who would be wearing a black hooded sweatshirt. There is no merit, as discussed *infra*, to the claim that this description was manufactured after defendant's arrest or that the "seller" described in the affidavit was supposed to pertain to defendant. And we cannot conclude that any argument regarding variances in description has bearing on the directed verdict motion, wherein evidence is reviewed in the light most favorable to the prosecution.

In addition, we disagree with defendant's argument regarding the shopping bag. The officers' testimony at trial indicated that the shopping bag defendant retrieved from the van was the same shopping bag located on the kitchen counter. There was no evidence that another blue and white plastic shopping bag was involved. The prosecution is not required to "negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald