STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 30, 2010
v	No. 288598 Oakland Circuit Court
SEAN MICHAEL HAWES, Defendant-Appellant.	LC No. 2008-219052-FH

Before: Hoekstra, P.J., and Stephens, and M.J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and sentenced as an habitual offender, fourth offense, MCL 769.12, to 2 to 15 years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

On November 30, 2007, the police went to defendant's apartment to execute an arrest warrant. Deputy Sarah Myers and a second deputy approached the front door, while Deputy Michael Richardson went to the back of the building to ensure that no one fled using the second-floor balcony. Deputy Richardson, a canine handler, testified that as he walked around the building, he observed defendant and another male on the balcony; defendant had his leg over the balcony as if preparing to jump. Deputy Richardson yelled for the men to stop, the men ran back inside, and Deputy Richardson attempted to contact the other officers via his radio about defendant's actions. After another officer took the rear position, Deputy Richardson retrieved his canine from his patrol car for tracking assistance, and then waited outside the front door because he was told that he was not needed.[1] By this time, Deputy Myers had already been inside the apartment talking to a man and Erica Charbonneau, later identified as defendant's live-in girlfriend, and Charbonneau had gone into the bedroom to put on clothing.[2] Deputy Myers explained that Charbonneau gave the police permission to enter the apartment. Deputy Richardson eventually inquired about the delay in securing defendant. When Deputy Myers

[1] Deputy Richardson explained that his canine is trained in tracking human scent, apprehension, area and building searches, handler protection, as well as narcotics detection.

[2] Charbonneau answered the door wearing a towel.

stated that defendant was not there, Deputy Richardson advised that defendant had reentered the home from the balcony and asked the man, whom he had seen with defendant on the balcony, for defendant's location. With a head gesture, the man indicated that defendant was in the bedroom. Deputy Richardson yelled for defendant to come out, tried to open the door, and, after defendant ignored repeated warnings, kicked in the locked door. Deputy Richardson then gave three "canine warnings," and defendant and Charbonneau came out.

Deputy Richardson explained that after the occupants were secured, he ordered his canine, who was in an "excited state," to "lay down" in the kitchen area for the safety of the people in the apartment. He indicated that the canine immediately started "sniffing in the air," "got up a little bit and started creeping, just maybe two feet over to [Deputy Richardson's] location, scratched at some bags between a washer and dryer, and "alerted" for narcotics on a green metal ammunition box. Deputy Richardson had not ordered his canine to search for narcotics. Deputy Richardson pulled him away, and again ordered him to lie down. Deputy Richardson testified that he opened the box for safety purposes and closed it immediately after determining that it did not contain a gun. Deputy Richardson then called Narcotics Enforcement Team (NET) Detective Perry Dare, who advised that he would secure a search warrant for the residence.

NET officers subsequently arrived and executed the search warrant. Inside the box was 130 grams of marijuana, consisting of two different types: (1) regular, mid-grade marijuana, and (2) hydroponics, which is a "high-bred" marijuana. Officers also discovered "packaging, being sandwich baggies" in the same area as the marijuana, a digital scale and a finger scale in a closet off the main bedroom, $1,074 in the front closet, and proofs of residency for defendant and Charbonneau in the apartment. Both male and female clothing was found in the main bedroom and in the front closet where the currency was found.[3] There was no "use paraphernalia" for smoking or ingesting marijuana in the apartment.

Sergeant Dare testified that he advised defendant of his *Miranda*[4] rights and interviewed him. Sergeant Dare told defendant that the police had found a half-pound of marijuana during the search, and defendant responded that there were only five ounces. Defendant initially denied selling marijuana, stated that he smokes a lot, and explained that he had the two different grades because he obtained the regular marijuana first and later obtained the hydroponic marijuana. When Sergeant Dare subsequently asked defendant if he wanted to stop selling marijuana, defendant began to cry and stated, "Yes, yes, yes, I want to stop." He admitted that he had sold drugs "[a] long time." At the end of the interview, defendant asked to speak to his fiancée. When Charbonneau was brought in, she looked at defendant and said, "Sean, you're a dumb ass." In response, defendant stated, "Don't act like you don't know what's going on. You're just as deep as I am."

At trial, the defense admitted that defendant constructively possessed the marijuana that was in the apartment, but denied that defendant intended to sell it.

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[3] The second bedroom was used for storage.

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

II. Motion to Suppress

Defendant argues that the trial court erred in denying his motion to suppress the evidence seized from his apartment because the entry into his apartment was unlawful, and the subsequent canine sniff inside his apartment, which alerted the officers to the presence of the marijuana and provided the probable cause for the issuance of the search warrant, constituted an illegal search. We disagree.

This Court reviews a trial court's factual findings regarding a motion to suppress for clear error. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). The trial court's ultimate decision regarding a motion to suppress is reviewed de novo. *Id.*

Before trial, defendant moved to suppress the evidence seized from his apartment, arguing that the police were not lawfully in his apartment and that the subsequent search was illegal. The trial court scheduled an evidentiary hearing, but defendant did not appear and no witnesses or other evidence was presented. On the first day of trial, the matter was revisited, and the court noted that defendant had a prior opportunity for an evidentiary hearing but failed to appear or present any witnesses. After hearing the parties' arguments, the trial court denied defendant's motion, concluding that Charbonneau was not present to deny that she consented to entry, but even if she was, there was a valid warrant for defendant's arrest, and the subsequent search was not unlawful because the police were justifiably in the house to arrest defendant.

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Michigan Constitution is generally construed to provide the same protection as the Fourth Amendment of the United States Constitution. *People v Jones*, 279 Mich App 86, 91; 755 NW2d 224 (2008). A "canine sniff" by a trained narcotics-detecting canine is not a search within the meaning of the Fourth Amendment as long as the canine is legally present on the premises when its sense is aroused. *Id.* at 91-94. A canine sniff does not reveal the presence of lawful activity or items, but reveals the presence of contraband, in which there is no legitimate privacy interest. *Id.* at 94.

Here, the police officers and the canine were lawfully present in defendant's apartment when the canine detected the presence of contraband. Police officers testified that they went to defendant's apartment to execute a warrant for his arrest. Deputy Myers testified that she knocked on defendant's front door, Charbonneau answered through the closed door, and, in turn, the deputy identified herself and asked if they could talk. As Deputy Myers was speaking with Charbonneau through the door, she heard a man say, "go ahead and let her in." Deputy Myers testified that Charbonneau then "opened up the door and she asked [her] to come in." Deputy Richardson and his canine subsequently joined Deputy Myers in the apartment to search for defendant, whom Deputy Richardson had seen run into the apartment from the balcony. Based on these facts, Charbonneau gave the police permission to enter the premises and, therefore, the police were legally in the apartment. As aptly noted by the trial court, there was no evidence that the police were not lawfully in the apartment, and defendant has not presented any contrary evidence on appeal. Consequently, any contraband sniffed by the canine while legally in

defendant's apartment was not a search in violation of the Fourth Amendment, and the trial court did not err in denying defendant's motion to suppress.[5]

III. Effective Assistance of Counsel

Defendant also argues that defense counsel was ineffective for failing to file an additional motion to suppress the evidence resulting from the entry into his apartment and the subsequent discovery of the marijuana following the canine sniff. We disagree.

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant has failed to demonstrate that defense counsel's decision not to file another motion to suppress was objectively unreasonable, or that there is a reasonable probability that the outcome would have been different had another motion been filed. As previously discussed, the officers and the canine were legally on the premises, and the canine sniff that alerted to the presence of contraband did not violate defendant's Fourth Amendment rights. On appeal, defendant has not provided any evidence that the officers were not lawfully on the premises, or any new arguments that were not contained in the original motion to suppress. In addition, the matter was again raised in a post-conviction motion for a new trial. Given the absence of any new evidence or argument, defense counsel was not ineffective for failing to file an additional motion to suppress. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), lv den 463 Mich 855 (2000).

IV. Expert Testimony

Defendant further argues that he was denied a fair trial by the admission of Sergeant Dare's opinion testimony. We again disagree. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008), lv den 483 Mich 856 (2009).

Initially, contrary to defendant's assertion, the trial court did not prohibit the detective from rendering an expert opinion regarding whether the marijuana was intended for personal use

[5] To the extent that Deputy Richardson prematurely looked in the ammunition box, the remedy would not be suppression because the marijuana would have been inevitably discovered upon execution of the valid search warrant. See *People v Stevens (After Remand)*, 460 Mich 626, 637-638, 642; 597 NW2d 53 (1999), cert den 528 US 1164; 120 S Ct 1181; 145 L Ed 2d 1088 (2000).

or distribution. The prosecutor moved to qualify Sergeant Dare as an expert in narcotics trafficking under MRE 702 and 703, and sought to have him testify consistent with his preliminary examination testimony that, given the evidence seized in this case, the marijuana was likely intended for sale. In responding to defendant's objection, the trial court indicated that Sergeant Dare could give an expert opinion and stated, "I don't know that he can come to a *conclusion*. He can tell the jury what the facts are to determine it, and let them make their mind up." This statement was not a prohibition of expert opinion testimony. Moreover, such a ban would be contrary to MRE 702. The intent of the trial court's ruling is clarified by its subsequent instructions to the jury:

> You have heard testimony from two witnesses . . . and Sergeant Perry Dare, who gave you his opinion as an expert in the field of narcotics trafficking.
>
> Experts are allowed to give opinions in court about matters they are experts on. However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe it, and how important you think it is.
>
> When you decide whether you believe an expert's opinion, think carefully about the reasons and the facts that he gave for his or her opinion and whether those facts are true.
>
> You should also think about the expert's qualifications and whether his or her opinion makes sense when you think about the other evidence in the case.

Further, the trial court did not abuse its discretion in allowing the expert opinion testimony. During trial, Sergeant Dare, who had been a member of the Narcotics Division for 6-1/2 years, and had been involved in "hundreds of cases" involving marijuana and the trafficking of marijuana, testified that, given the weight of the marijuana, the two separate types of marijuana, the unused sandwich baggies, the digital and finger scales, and the lack of use paraphernalia, the marijuana at issue was not consistent with personal use, but was intended for distribution. The sergeant's knowledge of the drug trade was used to help the jury understand the significance of the types and quantity of the marijuana at issue, and the packaging materials. Expert police testimony regarding the quality and quantity of drugs found and packaging is permitted to show that the defendant intended to sell the drugs and not simply use them for personal consumption. See *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). In addition, there was substantial other evidence supporting defendant's conviction, including his statement to the police and the actual presence of the drugs and packaging materials in his apartment. Moreover, as noted, the trial court properly instructed the jury on the proper use of expert witness testimony. It is presumed that the jurors followed the instruction. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Consequently, reversal is not warranted on this basis.

V. Prosecutor's Conduct

Next, defendant argues that he is entitled to a new trial because the prosecutor impermissibly denigrated him and defense counsel. We disagree. Because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claims for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d

130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that, during rebuttal argument, the prosecutor denigrated defense counsel when he made the following emphasized remark:

> Now, ladies and gentlemen, you have to ask yourself, why are some of the things [defense counsel] is asking, why are they important if the whole issue is intent to deliver?
>
> Why is it important how far the distance is from here to that wall? Why is it important about a vacuum cleaner? Why is it important about a metal can?
>
> You are not going to hear an element that I have to show that there wasn't loose marijuana. You are not going to hear an element that I have to show you a particular distance. *It's throwing everything up there to see what sticks.*

A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorneys' personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Considering the context of the challenged remark, which was made during rebuttal argument and drew no objection, it did not amount to an improper personal attack on defense counsel, or improperly shift the jury's focus from the evidence to defense counsel's personality. The prosecutor's remark conveyed his contention that, based on the evidence, the defense was a pretense and ignored the evidence. The prosecutor discussed what he considered to be issues raised during defendant's closing argument that were not evidence, urged the jurors to evaluate the evidence, and noted that the attorneys' arguments were not evidence that could be considered. A prosecutor is not required to phrase arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). In addition, in its final instructions, the trial court instructed the jurors that the lawyers' statements and arguments are not evidence, and that they were to decide the case based only on the properly admitted evidence and to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant also argues that the prosecutor denigrated him during rebuttal argument by comparing him to Pablo Escobar:

> Like I told you, ladies and gentlemen, this is not - - *I'm not here to tell you he's public enemy number one or Pablo Escobar* or he has this huge marijuana operation coming out of his house.
>
> What I'm here to tell you is that based on everything, a totality of the circumstances, the evidence is consistent with one thing, not possession, not use,

> because you don't have any items that would suggest that; this is consistent with intent to deliver from everything you see. And I encourage you to take a look at that evidence. But everything you see, and specifically the defendant's statements, given all of this evidence, ladies and gentlemen, I ask that you find the defendant guilty as charged.

A prosecutor may not denigrate a defendant with prejudicial or intemperate comments. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). To the extent that the reference to Pablo Escobar was inappropriate, defendant has failed to demonstrate that this brief reference affected his substantial rights. Viewed in context, the prosecutor was addressing defense counsel's assertion that possessing a smaller amount of marijuana made it improbable that defendant intended to distribute it. The prosecutor explained that it is not necessary to be a major crime figure or operate a vast drug trafficking business to be guilty of intent to deliver a controlled substance. For example, in closing argument, defense counsel stated:

> But if this was an operation where narcotics was sold, then it would be consistent that in fact there is marijuana somewhere in that sofa, somewhere on the floor, in the carpeting, somewhere that is evident to show that there is a lot of movement between the marijuana and the bags.
>
> Not one bag is here that shows you any residue at all. The scale, the scale itself, nothing. There's no marijuana on the floor where this is - - where in fact the marijuana was found. None of it. No.

The prosecutor's comments must be considered in light of defense counsel's comments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Considering their responsive nature, the prosecutor's remarks do not require reversal. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Moreover, any prejudicial effect could have been cured by a timely instruction. *Watson*, *supra*. Indeed, defendant's right to a fair trial was protected by the trial court instructions that the lawyers' statements and arguments are not evidence and that the jury was to decide the case based only on the properly admitted evidence. *Long*, *supra*. Consequently, this unpreserved claim does not warrant reversal.

VI. Sufficiency of the Evidence

Defendant also argues that the evidence was insufficient to support his conviction. 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 the credibility of witnesses. *Id.* at 514. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant asserts only that there was insufficient evidence that he intended to deliver the marijuana. To show intent to deliver, proof of actual delivery is not required. *Wolfe*, *supra* at 524. "Intent to deliver has been inferred from the quantity of narcotics in a defendant's

possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Id*. Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession and intent to deliver. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

The evidence was sufficient to permit a rational trier of fact to reasonably infer that defendant intended to deliver the marijuana. In defendant's residence, the police confiscated 130 grams of marijuana hidden in a box, a digital scale, a finger scale, sandwich baggies near the marijuana, and $1,074. There was no evidence of use paraphernalia. Sergeant Dare, who was qualified as an expert in the field of narcotics trafficking, testified that, given the quantity of drugs, the two types of marijuana, the lack of drug use paraphernalia, and other factors, including the scales, the plastic baggies, and the amount of cash, the marijuana at issue was not consistent with personal use, but was intended for distribution or delivery. He noted that the amount of marijuana could make 260 to 350 marijuana cigarettes. In addition, defendant admitted to the police that he had been selling marijuana for "a long time" and that he wanted to stop. The evidence was sufficient to sustain defendant's conviction.

VII. Cumulative Error

We reject defendant's argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under a cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

VIII. Sentencing

A. Presentence Investigation Report

We disagree with defendant's cursorily presented claim that he is entitled to resentencing because the trial court failed to comply with MCR 6.425(E). At the sentencing hearing, defense counsel indicated that he had reviewed the facts of the case, and stated:

> Mr. Hawes has had some problems. He also is an habitual fourth. I think the recommendation in which probation has made here *on PSI*, is a fair recommendation under the circumstances.
>
> I don't think he needs to be sent to prison for what happened here. He had -- it really wasn't a large amount of marijuana. There was question as to whether, in fact, the warrant was proper or not, but still the jury found him guilty.
>
> So I would ask the Court to accept the recommendation as to the person who wrote *this report*, send him to jail as they recommend for three years, instead of sending him to prison.
>
> I have nothing else to say. [emphasis added]

Thereafter, when given the opportunity to address the court before the imposition of sentence, defendant gave no indication that he had not reviewed the presentence report. Rather, defendant stated:

> I would like to apologize to the Court. I [sic] like to take blame for my actions. I would like to apologize to my dad and mom, because they need me right now and I think prison would be bad for me. I wouldn't make [sic] there, because I've had a hard time in the county right now as it is.
>
> I learned my lessons. I would like to get on with my life and do right with it . . . And I would like to thank my attorney. [ST, p 4.]

The trial court then noted that it had read the presentence report and delineated the information contained therein with no objection from the defense:

> I've carefully reviewed the Michigan Department of Correction Bureau of Probation Pre-Sentence Investigation Report.
>
> This defendant is 22 years old. He has three prior felonies, 17 misdemeanors and a juvenile history.
>
> Defendant attended high school until the 11th grade, he has received his GED. The defendant is currently employed and has a history of employment.
>
> The defendant possessed a large amount of drugs. The defendant has a history of probation violations that resulted in jail sentences.
>
> The defendant has been in and out of trouble all of his life, both adult and juvenile. It should be note [sic] that he was on probation when he committed the within offense. It's time that this drug dealer went to prison.
>
> It's the sentence of this Court that you be incarcerated with the Department of Corrections for a minimum of two years and a maximum of 15 years and that you receive 71 days of credit for time served.
>
> * * *
>
> The record should further note that I believe the sentence imposed today is proportionate to the seriousness of the defendant's conduct regardless of any potential errors in the scoring of the sentencing guidelines.

In sum, the record plainly shows that the trial court and the defense reviewed the PSIR, that defendant and his attorney had an opportunity to address the court, and that the court delineated the necessary information regarding the sentence imposed. Consequently, defendant's argument that the trial court failed to comply with MCR 6.425(E) is without merit.

B. Scoring of PRV 4

Defendant also argues that resentencing is required because the trial court should have scored zero points for prior record variable (PRV) 4, instead of two points. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

MCL 777.54 provides that two points should be scored for PRV 4 for "1 prior low severity juvenile adjudication" and zero points for "no prior low severity juvenile adjudications." Defendant argues that none of his four juvenile offenses qualify as low severity adjudications. Even if the trial court erred in scoring this variable, however, resentencing is not required. If PRV 4 is scored at zero, defendant's total PRV score would decrease from 47 to 45 points. Even with this scoring adjustment, defendant remains in the same PRV level D (25 to 49 points), and his guidelines range does not change (57 to 95 months). MCL 777.67. Because the alleged scoring error does not affect the appropriate guidelines range, defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly