

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES FREDERICK SANFORD,

Defendant-Appellant.

UNPUBLISHED

June 29, 2010

No. 289439

St. Clair Circuit Court

LC No. 08-001484-FH

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver the controlled substance methylphenidate (Ritalin), MCL 333.7401(2)(b)(ii), possession with intent to deliver the controlled substance dihydrocodeinone (Vicodin), MCL 333.7401(2)(b)(ii), possession with intent to deliver the controlled substance diazepam (Valium), MCL 333.7401(2)(c), maintaining a drug house, MCL 333.7405(1)(d), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 3 to 15 years on all charges except felony-firearm, for which he was sentenced to a consecutive term of 2 years. Defendant appeals as of right. Because defendant was not denied a fair trial by prosecutorial misconduct or denied effective assistance of counsel, we affirm.

On appeal, defendant claims that the prosecutor engaged in misconduct throughout his trial. Because defendant did not object to any of the alleged misconduct, we review defendant's claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

Defendant argues that the prosecutor improperly elicited evidence of defendant's possession of drugs not specifically named in the charges in order to show that defendant had been dealing drugs for a long time. Defendant mistakes the evidence of the other drugs as bad acts evidence under MRE 404(b). Possession of those drugs was admissible to prove the charge

of maintaining a drug house. A prosecutor must show more than an isolated incident of drug-related activity to show that a defendant maintained a drug house. *People v Thompson*, 477 Mich 146, 156-157; 730 NW2d 708 (2007). Defendant denied knowledge of the charged drugs. The vast quantity of all the drugs seized and the locations of the drugs throughout the property established defendant's knowledge of the presence of the drugs and his purpose in maintaining the house. The evidence was properly submitted and admitted.

Defendant next argues that the prosecutor improperly elicited opinion testimony from police witnesses regarding defendant's guilt. A review of the alleged improper questions does not persuade us that the prosecutor's questions rose to the level of misconduct. The questions were asked by the prosecutor to gain an explanation for why the pill bottles that were seized from defendant's house were not initially sent for fingerprint testing.

Defendant asserts that the prosecutor improperly suggested to the jury that defendant was guilty because the police concluded that there were no other suspects. Defendant mischaracterizes the prosecutor's comments. The prosecutor recounted that because defendant lived by himself, possession was not an issue until the police informant, who subsequently married defendant, stated that she planted evidence in defendant's house at the request of the police. When viewed in context, the statements were not improper or misleading.

Defendant also asserts that the prosecutor improperly argued a fact that was not part of the record during closing argument. The prosecutor's reference to the IRS and its reporting requirements concerning money in safety deposit boxes was commentary on a matter not in evidence. However, it had little if any prejudicial effect because, absent the comment, the evidence and reasonable inferences arising therefrom would lead a reasonable juror to the conclusion that defendant was concealing money. In any event, there is no error requiring reversal if a curative instruction would have alleviated any prejudicial effect. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Such is the case here.

Defendant next argues that the prosecutor denigrated the defense and the presumption of innocence by using the term "defense of distraction." The prosecutor's comments, read in context, are a direct response to defense counsel's statement regarding widespread corruption in the financial markets and mortgage industry. The prosecutor was not denigrating the defense theory, but commenting on defense counsel's analogy. *Dobek*, 274 Mich App at 64.

Defendant claims that reversal is required based on the cumulative effect of the prosecutor's misconduct. The cumulative effect of several minor instances of misconduct can warrant reversal where individual errors would not. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). However, there was only one minor instance of prosecutorial misconduct, and this error did not deny defendant a fair trial.

Defendant also claims that trial counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct addressed above. We disagree.

To establish a claim for ineffective assistance of counsel, a defendant must prove that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v Payne*, 285 Mich App 181, 188-189; 774 NW2d 714 (2009). Defendant fails to establish that,

had trial counsel objected to any of the alleged improper evidence, questions, or statements, and had the trial court sustained any objection, the result of his trial would have been different.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Alton T. Davis