

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONNIE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

August 26, 2010

No. 290933

Oakland Circuit Court

LC No. 2008-218935-FH

Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted in a jury trial for possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv). He was sentenced, as a fourth habitual offender, MCL 769.12, to 1 ½ to 30 years' imprisonment. He appeals as of right. We affirm.

Defendant's first issue on appeal is that there was insufficient evidence to convict him of possession with intent to deliver heroin. We disagree. When analyzing a claim based on insufficient evidence, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 132; 600 NW2d 370 (1999). This Court reviews the evidence in a light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007).

To convict a defendant of possession with intent to deliver a controlled substance, a prosecutor must prove: "(1) that the substance was a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Defendant only challenges the fourth element, arguing that the prosecution failed to demonstrate that he possessed the heroin. Possession may be demonstrated through actual or constructive possession. *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). Constructive possession occurs when the totality of the circumstances creates a sufficient nexus between the defendant and the substance. *Johnson*, 466 Mich at 500. Constructive possession may be established by the exercise of dominion or control over the substance. *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992). Circumstantial evidence and the reasonable inferences that arise from it can constitute satisfactory proof of possession. *McGhee*, 268 Mich App at 623.

As defendant states in his brief, there was no evidence that defendant actually possessed any heroin. Nevertheless, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant constructively possessed the heroin. Although defendant was not present when the search of the residence at 104 Mary Day occurred, sufficient evidence was admitted that defendant had dominion and control over the heroin recovered from the residence. Defendant's sister, Vickie Brown, indicated that defendant lived at 104 Mary Day. A search warrant was obtained after Sergeant Brent Miles saw defendant enter and leave 104 Mary Day and Sergeant Miles authorized a controlled buy where a confidential informant bought suspected heroin from defendant at 104 Mary Day. Pursuant to the warrant, a search of one room in the residence at 104 Mary Day resulted in the seizure of 16 bindles of tan powder, at least one of which was determined by a toxicologist to be heroin, found in a tan coat where there was also a document with defendant's name on it. In another room in the residence, a bowl was found filled with lottery tickets, scissors, a razor blade, a spoon, and a powder residue. Near the bowl were a bunch of folders with documents with defendant's name on them. Included in those documents was a notice of parole with defendant's name on it and the 104 Mary Day address. See *McGhee*, 268 Mich App at 623. Taken together, and viewed in the light most favorable to the prosecution, sufficient evidence was presented that defendant constructively possessed the heroin.

Defendant raises several issues in his Standard 4 Brief on appeal. Defendant first argues that the prosecution did not present sufficient probable cause to bind him over on possession with intent to deliver heroin because the prosecution did not present testimony from the toxicologist or the toxicologist's report showing that the substance at issue was heroin. The sufficiency of the evidence presented at the preliminary examination may not be challenged if the defendant received a fair trial and was not otherwise prejudiced by the error. *People v Matuszak*, 263 Mich App 42, 50-51; 687 NW2d 342 (2004). Defendant's challenge to the sufficiency of the bindover is moot as he was ultimately convicted beyond a reasonable doubt of possession with intent to deliver heroin. Defendant has failed to demonstrate any prejudice from the bindover decision or that he was denied a fair trial, and therefore, we will not review the bindover decision.

Defendant's next issue is whether the trial court erred in denying his motion for a directed verdict. When reviewing a trial court's denial of a directed verdict, made either during trial or after conviction, an appellate court views the evidence available at the time the motion was made in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008).¹

¹ As noted above, to convict a defendant of possession with intent to deliver a controlled substance, a prosecutor must prove: "(1) that the substance was a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it." *McGhee*, 268 Mich App at 622.

Defendant notes that only one of the bindles of tan powder was chemically tested and, defendant argues that without testing the substances in the other bindles, there is no evidence that the rest of the substances were narcotics. To satisfy the first two elements of the charged offense, the prosecution was only required to prove that the substance was a narcotic and it weighed less than 50 grams. MCL 333.7401(2)(a)(iv). Andrea Banish, a chemist with the Oakland County Sheriff's Office, testified that the amount of heroin in the one tested bindle was 0.175 grams, thereby satisfying that burden. Nevertheless, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that all of the 16 bindles of controlled substance recovered from 104 Mary Day were heroin. Banish testified that she obtained all of the bindles recovered from the residence at 104 Mary Day. She removed the substances from those bindles and put them in separate plastic bags. She then tested the substance in one of the bags twice and concluded that the substance at issue was heroin. However, Banish testified that all of the 16 bindles looked similar and the substance found in each of the bindles appeared similar. Given that one of the bindles was tested and contained heroin and the other 15 bindles looked similar to the one tested, the prosecution presented circumstantial evidence that all of the bindles contained heroin. *People v Whitehead*, 238 Mich App 1, 14; 604 NW2d 737 (1999) (circumstantial evidence and reasonable inferences drawn from it may establish the elements of a crime). It would be a reasonable inference for a rational fact finder to conclude that all of the bindles contained heroin. The fact that the powder residue in the bowl containing the lottery tickets, scissors, razor blade, and spoon may have been dissimilar in color from the substances in the bindles did not vitiate this inference.

Defendant also challenges the evidence demonstrating that he intended to deliver the substances recovered from the residence at 104 Mary Day. Although no mixing agents were recovered from the residence, other objects that are often used to package heroin, including a razor blade, lottery tickets, scissors, and playing cards, were recovered. The trial court properly resolved this conflict in the evidence in favor of the prosecutor. See *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004). Therefore, we conclude the trial court correctly ruled in denying defendant's motion for a directed verdict.

Defendant further argues that the cumulative effect of prosecutorial misconduct denied him a fair trial.² We disagree. As this issue was not preserved at the trial court, this Court reviews for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A defendant must establish that the error was plain, and that the error affected the outcome of the proceedings. *Id.* at 763. 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.*

² We have limited our analysis of defendant's claims of prosecutorial misconduct to the errors allegedly occurring at trial. As we concluded above, defendant's claims of error occurring at the preliminary examination hearing are moot as defendant was ultimately convicted of possession with intent to deliver heroin in a fair trial. See *Matuszak*, 263 Mich App at 50-51.

The cumulative effect of several minor instances of prosecutorial misconduct and evidentiary errors can warrant reversal even if the individual errors in the case would not. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.*

Due process requires that criminal prosecutions comport with prevailing notions of fundamental fairness. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). Consequently, a prosecutor must report to the defendant and to the trial court whenever a government witness lies under oath. *Herndon*, 246 Mich App at 417. A prosecutor may not knowingly use false testimony to obtain a conviction, and must correct false evidence. *Herndon*, 246 Mich App at 417. In addition, a criminal defendant has a due process right of access to certain impeachment evidence and exculpatory evidence possessed by the prosecution. *People v Brownridge (On Remand)*, 237 Mich App 210, 214; 602 NW2d 584 (1999).

In this case, defendant argues that 1) the prosecution allowed Sergeant Miles to testify untruthfully under oath and 2) the prosecution tampered with evidence by wiping away the residue in the bowl. First, defendant presented no evidence that Sergeant Miles explicitly lied under oath. Sergeant Miles's testimony regarding the color of the residue in the bowl may have been inconsistent between the preliminary examination and the trial, but defendant used that inconsistency to impeach Sergeant Miles's credibility on cross-examination. Given that defendant explicitly asked Sergeant Miles about the color of the residue in an attempt to undermine Sergeant Miles's credibility, the prosecution was not required to report that a government witness lied under oath and no prosecutorial misconduct occurred. Second, when defendant objected to the admission of the bowl into evidence and when defendant cross-examined Sergeant Miles and Sergeant Bart Wilson, defendant made clear to the jury that he believed the prosecution had interfered with the evidence. Therefore, the jury could use that argument in weighing the evidence and making its decision. Because the jury was aware of the inconsistencies in Sergeant Miles's testimony and defendant's objection to the bowl, defendant has failed to show that the alleged errors affected the outcome in this case or cumulatively denied him a fair trial.

Defendant next argues that he was prejudiced by the reassignment of his case from Judge Shalina Kumar to Judge Steven Andrews. We disagree. Defendant's unpreserved argument is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

A chief judge may reassign a case to another judge by a written order stating the reason for the reassignment. MCR 8.111. Subject to the court rule regarding the powers of the chief judge, the chief judge may reassign cases, other than those arising out of the same transaction or occurrence, to correct docket control problems resulting from the requirements of the case assignment rule. MCR 8.111(D)(4). A chief judge may assign cases to visiting judges. MCR 8.110(C)(3)(g). There is no time limit on reassigning cases to different judges. *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 260; 739 NW2d 121 (2007) (finding there was no error when a case was reassigned to a new judge after the prior judge had overseen the case for six months prior to trial). However, a chief judge may not reassign a case after one judge has already heard evidence at trial. *People v McCline*, 442 Mich 127, 132-133; 499 NW2d 341 (1993) (finding no prejudice occurred when a chief judge reassigned a case to a retired judge after voir dire but before opening arguments).

In this case, Chief Judge Potts reassigned defendant's case to Judge Andrews pursuant to MCR 8.110(C)(3)(g) and MCR 8.111(D)(4) before trial began. Defendant has failed to show that Chief Judge Potts incorrectly applied a court rule or failed to notify him of the reason for the case reassignment. Moreover, defendant has failed to show he was prejudiced by the reassignment. Therefore, we conclude there was no error affecting defendant's substantial rights that resulted from the case reassignment.

Defendant's final issue on appeal is that he was denied the effective assistance of appellate counsel. We disagree. Constitutional issues are reviewed de novo on appeal. *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007). In the absence of a hearing to address a claim of ineffective assistance of counsel as in this case, a defendant's claim of ineffective assistance of counsel is limited on appeal to errors apparent on the record. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

The test for ineffective assistance of appellate counsel is the same as that for trial counsel. *Pratt*, 254 Mich App at 430. To establish a claim of ineffective assistance of appellate counsel, a defendant must show that his appellate counsel's decision not to raise a claim fell below an objective standard of reasonableness and prejudiced his appeal. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). Appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance. *Pratt*, 254 Mich App at 430.

In this case, appellate counsel made one argument to this Court regarding the sufficiency of the evidence supporting defendant's conviction. Defendant argues that appellate counsel should have made additional arguments regarding the errors of the prosecution, especially the lack of probable cause and lack of any crime whatsoever. As is discussed at length above, defendant's arguments regarding prosecutorial misconduct and the lack of probable cause to support the bindover lack merit and, therefore, defendant cannot show that appellate counsel's performance was deficient or that he was prejudiced by counsel's failure to make the arguments. Defendant also did not suffer prejudice because he was able to make the arguments he thought appellate counsel should have made in his Standard 4 brief on appeal. Therefore, defendant was not denied the effective assistance of appellate counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher