STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 7, 2010
v	No. 292747 St. Clair Circuit Court
JAMES EARL NELSON, Defendant-Appellant.	LC No. 09-000052-FH

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendant appeals of right from his convictions by a jury of possession of cocaine with intent to deliver, MCL 333.7401(2)(a)(*iv*), third-degree fleeing and eluding, MCL 750.479a(3), and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced, as a second-offense habitual offender, MCL 769.10, to three years' probation with one year in jail. We affirm.

Defendant first argues that his possession of cocaine with intent to deliver and fleeing and eluding convictions should be overturned because there was insufficient credible evidence to convict him of those crimes. We review a sufficiency-of-the-evidence claim de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), viewing all the evidence 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 crime were proven beyond a reasonable doubt, *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

> The elements of possession of less than fifty grams of cocaine with intent to deliver are: '(1) that the recovered substance is cocaine; (2) that the cocaine is in the mixture weighing less than fifty grams; (3) that defendant was not authorized to possess the substance; and (4) that the defendant knowingly possessed the cocaine with intent to deliver.' [*People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (2003) (citation omitted), disapproved of in part on other grounds 469 Mich 966 (2003).]

The prosecution presented evidence that two police officers suspected that one of the baggies found inside a styrofoam food container inside of defendant's vehicle contained cocaine. Expert testimony confirmed that the substance was 3.11 grams of cocaine. Based on Michigan law, defendant was not authorized to possess the substance. See MCL 333.7403(2)(a)(*iv*). This

evidence alone was sufficient to establish the first three elements of the offense; indeed, defendant concedes that he possessed the cocaine.

Defendant argues that the prosecutor did not prove that he possessed the cocaine with the intent to deliver. "'An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.'" *Gonzalez*, 256 Mich App at 226 (internal citations and quotation marks omitted). A police officer testified that one-tenth of a gram of crack cocaine was consistent with one-time personal use. The 3.11 grams recovered was roughly 31 times this amount. There was also evidence that defendant, even though he had been out of work and even though his sister testified that he had no assets, had over $250 in cash in his pockets and two cellular telephones. It was for the jury to determine witness credibility and the inferences to be drawn from this evidence. See *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2008). Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Harmon*, 248 Mich App at 524. As noted in *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002):

> Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide. [Internal citation and quotation marks omitted.]

Regarding the fleeing and eluding conviction:

> [T]here are six elements to establish a third-degree fleeing and eluding: (1) the law enforcement officer must have been in uniform and performing his lawful duties and his vehicle must have been adequately identified as a law enforcement vehicle, (2) the defendant must have been driving a motor vehicle, (3) the officer, with his hand, voice, siren, or emergency lights must have ordered the defendant to stop, (4) the defendant must have been aware that he had been ordered to stop, (5) the defendant must have refused to obey the order by trying to flee from the officer or avoid being caught, which conduct could be evidenced by speeding up his vehicle or turning off the vehicle's lights among other things, and (6) some portion of the violation must have taken place in an area where the speed limit was thirty-five miles an hour or less, or the defendant's conduct must have resulted in an accident or collision, or the defendant must have been previously convicted of certain prior violations of the law as listed in MCL 750.479a(3)(c) . . . . [*People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999).]

A police officer testified that he observed defendant travelling 47 miles per hour in a 35-mile-per-hour zone. The officer did a U-turn and pursued defendant, activating his vehicle's lights and siren. Thereafter, defendant continued to accelerate, eventually reaching a speed of 55 miles per hour. Defendant only came to a stop after losing control of his vehicle and crashing into a fence. An increase in speed of eight miles per hour after the warning lights and siren were activated supports the conclusion that defendant attempted to flee or avoid being caught. Reversal is unwarranted.

Defendant next argues that the trial court made various erroneous evidentiary rulings. First, he argues that the court allowed improper expert testimony by a police officer regarding the amount of cocaine that is consistent with personal use, and regarding how dealers carry money. Although defendant raised several objections during the course of the officer's testimony, he did not argue that the witness was not qualified to testify as an expert. Therefore, review is for plain error affecting substantial rights. *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under MRE 702, a court may allow expert testimony if it "determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." This Court has repeatedly held that expert testimony from experienced police officers regarding an inference of intent to deliver based on the circumstances surrounding the drugs found is admissible. See, e.g., *People v Williams* (*After Remand*), 198 Mich App 537, 541-542; 499 NW2d 404 (1993). In the case at hand, the officer testified that he was fully trained in the area of drug trafficking, having received education, knowledge, and skills regarding narcotics and how they are dealt, used, packaged, and smuggled. He had been an officer with Port Huron Police for roughly seven years, and for two of those years he was assigned as a Drug Task Force liaison between the police and sheriff's departments. He was also trained regarding basic knowledge of street drugs. It is reasonable to conclude that the officer's specialized knowledge was useful to explain the practices and indicators of drug use and delivery. No error requiring reversal occurred with respect to his testimony.

Defendant next argues that the trial court erred by not allowing defendant to present testimony by the person travelling and arrested with defendant that he had known defendant for 23 years and he had never seen him make a sale of a controlled substance. Even if the individual had not previously witnessed defendant taking part in the sale of a controlled substance, it does not necessarily make it less probable that he intended to do so on this occasion. MRE 401. There is no evidence that if defendant had previously engaged in delivery of controlled substances, the individual would necessarily have been in a position to observe it or defendant would have made him aware of it. Indeed, the individual testified that he was unaware that defendant had possession of the cocaine in issue until defendant handed it to him to dispose of it. Therefore, the court did not abuse its discretion in ruling that the testimony was inadmissible as irrelevant. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007) (discussing the abuse-of-discretion standard).

Next, defendant argues that the court erred in not allowing defendant to admit his sister's December gas bill in order to substantiate her testimony that she had given defendant money the day he was arrested in order to pay the bill for her. The record reflects that the bill was first provided to the prosecutor at approximately 1:30 p.m. on the second day of trial. Defendant did not indicate that the energy bill was not available earlier, nor did he provide any other reason for the delay. Certainly, if this document was needed to confirm the sister's testimony, it could have been presented before the second day of trial. Moreover, as the court pointed out, the document was not a self-authenticating document and would merely provide evidence that the sister could testify about. Thus, the trial court's decision to not admit the document was within the range of reasonable and principled outcomes, and it was not an abuse of discretion. *Id*.

Defendant next contends that the trial court erred in providing a jury instruction regarding flight. We review jury instructions in their entirety to determine if there was an error that

requires reversal. *Gonzalez*, 256 Mich App at 225. Reversal is not required if "the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*.

Here, the court considered the parties' arguments and determined that a modified instruction on flight was appropriate. The court reasoned that the jury had the right to consider whether defendant's actions while being pursued by police constituted flight and provided insight into defendant's state of mind with respect to the cocaine. Defendant argues that the instruction added nothing useful to the case because he would have had a guilty state of mind whether he simply possessed the cocaine or possessed it with the intent to deliver. The major premise of this argument—that defendant had a guilty state of mind—undermines the assertion that defendant was denied a fair trial. All the instruction provides is that if it found any evidence of flight, the jury could consider whether it was evidence of a guilty state of mind. Defendant cannot have been denied a fair trial by an instruction that simply indicated that the jury could find something that defendant was conceding. Further, there is nothing in the instruction itself that indicates a finding of flight necessitates a finding that defendant possessed the cocaine with the intent to deliver. How the jury chose to evaluate the evidence in light of the instruction was completely, and properly, within its province. There was no error requiring reversal. *Id*.

Defendant next argues that he was denied a fair trial based on the prosecutor's alleged misconduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). 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).

Defendant asserts that the prosecutor elicited irrelevant and unfairly prejudicial testimony from his sister regarding defendant's employment status and the length of time he recently spent in jail. The evidence and testimony showed that defendant had $293 cash in his pockets at the time he was arrested. The prosecutor's theory of the case was that defendant was buying and selling cocaine. Defendant's employment and income status at the time of his arrest was relevant to show where defendant may have obtained money to purchase the cocaine found, as well as the source of the $293. As for the questioning regarding how long defendant had been in jail, if the prosecutor was seeking to determine whether defendant had sufficient funds from a job previously held, she could simply have asked a direct question eliciting such information. Nonetheless, defendant's substantial rights were not affected in light of the fact that the matter was not dwelt upon and ample evidence of the elements of each crime and defendant's guilt was adduced. We cannot conclude that any potential error affected the outcome of the proceedings. *Carines*, 460 Mich at 763.

Defendant also argues that the prosecutor argued matters not in evidence. A prosecutor is afforded great latitude in making trial arguments. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor is allowed to argue the evidence and all reasonable inferences from that evidence, *id*., and need not do so only in the blandest terms, *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

When referring to the cocaine in terms of it being an extremely large or huge amount of drugs, the prosecutor also quantified the amount by stating that it was 3.11 grams. There was police testimony that one-tenth of a gram was consistent with one-time personal use of crack cocaine. Possession of 31 times the amount needed for a one-time use of the drug can be

reasonably characterized as huge or large. As for the prosecutor's statement that defendant "floored it" when being pursued by the police, the evidence shows that defendant was originally clocked by radar driving 47 miles per hour, and within six-tenths of a mile he had accelerated his car to 55 miles per hour, and he then crashed the vehicle. From this evidence, the prosecutor made the inference that defendant "floored it." This was permissible argument based on a reasonable inference drawn from the evidence.

Finally, defendant argues that the prosecutor improperly requested a verdict based on civic duty when she categorized the cocaine as being "an extremely large" amount and also stated that the incident occurred during the school day. A prosecutor may not urge jurors to convict the defendant as part of their civic duty because such an argument "unfairly places issues into the trial that are more comprehensive than a defendant's guilt or innocence and unfairly encourages jurors not to make reasoned judgments." *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, a prosecutor is permitted to ask the jury to convict defendant based on the evidence. See *Bahoda*, 448 Mich at 282.

As stated above, the prosecutor's statement regarding the size of cocaine found was consistent with the evidence. The prosecutor also argued that defendant was guilty of third-degree fleeing and eluding because it occurred "in an area that's posted less than 35-mile—or 35 miles an hour or less, not to mention it was 11:30 in the morning and on a school day." While this statement does raise the spectre of a danger posed to school children walking in the area, it did not implore the jury to convict defendant in order to protect school children. Moreover, the trial court properly instructed the jury that the lawyer's statements and arguments were not evidence. See *Abraham*, 256 Mich App at 279. Under the circumstances, reversal is unwarranted.

On a related matter, defendant claims that he received ineffective assistance of trial counsel. This assertion is predicated on his claims of evidentiary error, instructional error, and prosecutorial misconduct. We have found no error requiring us to reverse defendant's convictions, and the claim of ineffective assistance fails. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). We cannot find that counsel's alleged errors affected the outcome of the proceedings. See *id*. at 181.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter