STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY SCOTT BAILEY,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

No. 353709
Clare Circuit Court
LC No. 19-006217-FH

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of possession of methamphetamine with intent to deliver, MCL 333.7401(2)(b)(*i*), and possession of methamphetamine, MCL 333.7403(2)(b)(*i*). Because conviction of both of these offenses on the basis of the same conduct violates the protection against double jeopardy, we vacate defendant's conviction of possession of methamphetamine and affirm his conviction of possession of methamphetamine with intent to deliver.

I. BACKGROUND

This case arises from the execution of a search warrant at defendant's apartment. During a traffic stop, a woman reported to police that she had been purchasing methamphetamine from defendant. Subsequently, the police obtained a warrant to search defendant's home. During the search, in the bedroom that defendant shared with his girlfriend, the police discovered over $1,200 in cash, black latex gloves, and powdery residue on a plastic tote that appeared to be methamphetamine. In a different room, police discovered a backpack containing defendant's laptop, a bracelet with defendant's name and picture, and a small box. Inside the box, the police discovered several small plastic baggies, two of which tested positive for methamphetamine, along with the debit card of defendant's girlfriend.

II. DISCUSSION

A. DOUBLE JEOPARDY

Defendant argues that his double jeopardy rights were violated when he was convicted of both possession of methamphetamine and possession of methamphetamine with intent to deliver. Plaintiff concedes this error. We agree.

The United States Constitution provides, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." US Const, Am V. Furthermore, the Michigan Constitution provides, "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. To determine if multiple convictions are for the "same offense," this Court applies the "same elements" test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). *People v Dickinson*, 321 Mich App 1, 14; 909 NW2d 24 (2017). "This test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008) (cleaned up). The *Blockburger* test does not apply if the Legislature has clearly and plainly articulated an intent to impose multiple punishments, but in the absence of any such articulation, double jeopardy is violated "where it is impossible to commit the greater offense without also committing the lesser offense." *People v Miller*, 498 Mich 13, 17-19, 19 n 14; 869 NW2d 204 (2015), citing *Ream*, 481 Mich at 241.

Possession of methamphetamine is governed by MCL 333.7403, which provides in relevant part, "A person shall not knowingly or intentionally possess a controlled substance . . . ." MCL 333.7403(1). Possession of methamphetamine with intent to deliver is governed by MCL 333.7401, which provides in relevant part, "Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. . . ." MCL 333.7401(1). Importantly, neither statute contains any language to the effect that it does not prohibit punishment for a simultaneous violation of the other. Cf. *Miller*, 498 Mich at 22-24. In contrast, by way of example, MCL 333.7401a(2) expressly "does not prohibit a conviction or sentence for any other crime arising out of the same transaction." Therefore, the Legislature clearly could have, but equally-clearly did not, indicated that it intended to impose multiple punishments for the same offense.

Applying the *Blockburger* test, possession of methamphetamine with intent to deliver has the unique element that the defendant must have had the specific intent to deliver the methamphetamine. MCL 333.7401(1). Possession of methamphetamine does not require proof of any elements that are not also required by the other offense. See MCL 333.7403(1). Therefore, we conclude that convicting defendant of both offenses violated the Double Jeopardy Clause. *Ream*, 481 Mich at 227. However, "[I]t is an appropriate remedy in a multiple punishment double jeopardy violation to affirm the conviction of the higher charge and to vacate the lower conviction." *Herron*, 464 Mich at 609. Accordingly, we vacate defendant's conviction of possession of methamphetamine.

B. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution failed to prove the elements of possession of methamphetamine with intent to deliver beyond a reasonable doubt. We disagree.

We review de novo challenges to the sufficiency of the evidence. *People v Savage*, 327 Mich App 604, 613; 935 NW2d 69 (2019). To decide "whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime. Minimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004) (cleaned up). To convict a defendant of possession of a controlled substance with intent to deliver, the prosecution must show "(1) that a defendant possessed a controlled substance, (2) that the defendant knew he or she possessed the controlled substance, (3) that the defendant intended to deliver the controlled substance to someone else, and (4) the amount of the controlled substance, if applicable." *People v Robar*, 321 Mich App 106, 131; 910 NW2d 328 (2017).

Defendant argues that the prosecution failed to establish beyond a reasonable doubt that he ever possessed the methamphetamine found in his home. We disagree.

A conviction can be based on actual or constructive possession. *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010). "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

> Possession can be established with circumstantial or direct evidence, and the ultimate question of possession is a factual inquiry to be answered by the jury. Proof of actual physical possession is not necessary for a defendant to be found guilty of possessing contraband, including a controlled substance. Although not in actual possession, a person has constructive possession if he knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. Dominion or control over the object need not be exclusive. [*Flick*, 487 Mich at 14 (cleaned up).]

"[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe*, 440 Mich at 521.

In the present case, the evidence established a sufficient nexus between defendant and the methamphetamine that was found in the backpack. The backpack was located inside of the apartment where defendant resided. Defendant's laptop, and a bracelet with defendant's name and picture, were found inside of the backpack. Defendant's girlfriend's debit card was found in the box with the methamphetamine. Further, possible drug paraphernalia, including powdery residue, black gloves, and a significant amount of cash, were also found in the bedroom that defendant

shared with his girlfriend. This evidence was sufficient to establish beyond a reasonable doubt that defendant possessed the methamphetamine found in his home.

Defendant also argues that the prosecution failed to prove intent to deliver beyond a reasonable doubt. We disagree.

"Just as proof of actual possession of narcotics is not necessary to prove possession, actual delivery of narcotics is not required to prove intent to deliver." *Wolfe*, 440 Mich at 524. "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Therefore, intent to deliver may be inferred from circumstantial evidence, including "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." *Robar*, 321 Mich App at 126 (cleaned up).

The prosecution presented sufficient evidence for a rational jury to infer that defendant intended to deliver methamphetamine. In the bedroom defendant shared with his girlfriend, police found more than $1,200 dollars in cash as well as latex gloves. In the backpack the police found several small baggies that had "stay high" logos on them. Two of the baggies tested positive for methamphetamine. Police also found a small digital scale within a few feet of the backpack, and the scale had what appeared to be methamphetamine residue on it. These circumstances supported an inference that defendant intended to deliver methamphetamine.

C. PROSECUTORIAL MISCONDUCT

Defendant argues that he is entitled to a new trial on the basis of an improper comment made by the prosecutor during closing arguments. We disagree.

Claims of prosecutorial misconduct are generally reviewed de novo. *People v Dunigan*, 299 Mich App 579, 588; 831 NW2d 243 (2013). This Court reviews "claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, defendant failed to preserve his claims of prosecutorial misconduct by timely and specifically objecting below. See *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights." *Id*. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (cleaned up). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions." *Id*. (cleaned up). Additionally, unpreserved claims of prosecutorial misconduct will not warrant reversal unless a curative instruction would have been insufficient to alleviate the harm caused by the alleged misconduct. *Id.*

During rebuttal, the prosecutor stated that "[the informant] said she had known [defendant] for about a year and a half and she had gotten drugs from him 50 times or more." "A prosecutor

may not make a factual statement to the jury that is not supported by the evidence . . . ." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007) (cleaned up). While the evidence did support the prosecutor's statement that the informant had been buying drugs from defendant for a year and a half, the record does not contain any evidence pertaining to the number of purchases that the informant made. Therefore, the prosecutor's statement that the informant had purchased drugs from defendant 50 or more times was improper. *Id*. However, defendant is not entitled to reversal because he has failed to establish that the error affected his substantial rights or that a curative instruction could not have alleviated the harm. *Unger*, 278 Mich App at 235; see also *Dobek*, 274 Mich App at 68.

The prosecutor's improper comment comprised one sentence that was spoken during a two-day trial. The prejudice caused to defendant was likely minimal. Given that there was evidence that the informant had been buying drugs from defendant for a year and a half, it was likely unsurprising to the jury to hear that she had made more than 50 purchases. Moreover, the prosecution's case was based almost entirely on the evidence collected at his home during the execution of the search warrant. Finally, at the close of arguments, the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence" and that "[y]ou should only accept things that lawyers say that are supported by the evidence or by your own common sense and general knowledge." As indicated, jurors are presumed to follow their instructions, *Unger*, 278 Mich App at 235, and defendant has not presented this Court with any basis to conclude that the jurors did not follow their instructions.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel's failure to object to the prosecutor's improper comments constituted ineffective assistance of counsel. We disagree.

"Whether a defendant was deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). Factual findings are reviewed for clear error and legal conclusions are reviewed de novo. *Id*. Because the trial court has not held an evidentiary hearing, our review is limited to mistakes that are apparent from the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome of the proceeding would have been different but for trial counsel's errors." *Head*, 323 Mich App at 539 (cleaned up). We presume counsel was effective, and the defendant carries a heavy burden to overcome this presumption. *Id*. There are situations when defense counsel may reasonably decide that "it is better not to object and draw attention to an improper comment." *Unger*, 278 Mich App at 242 (cleaned up). "Furthermore, declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Id*. Defendant has failed to overcome the strong presumption that trial counsel's decision not to object was strategic. As discussed, the prosecutor's improper comment did not seriously impact the fairness of the proceedings. Accordingly, defense counsel likely believed that raising an objection would do his client more harm than good by drawing additional attention to the comment. For reasons already stated, defendant has also failed to establish the second prong

because, it is highly unlikely that the outcome of the proceeding was impacted by the comment or by defense counsel's failure to object. Therefore, defendant has failed to meet his burden for his ineffective-assistance-of-counsel claim.

E. HEARSAY TESTIMONY

The deputy testified about statements that an informant made to him during a traffic stop. In a Standard 4 brief, defendant argues that the deputy's testimony violated the Confrontation Clause and the rules of evidence because it was hearsay. However, because defendant waived this issue, we decline to review it.

"This Court has defined 'waiver' as the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (cleaned up). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id*. (cleaned up).

"The right to confrontation may, of course, be waived, including by failure to object to the offending evidence . . . ." *Melendez-Diaz v Massachusetts*, 557 US 305, 314 n 3; 129 S Ct 2527; 174 L Ed2d 314 (2009). A defendant is deemed to have waived an evidentiary error when the defense attorney agrees to the admission of the evidence. *People v McDonald*, 293 Mich App 292, 295; 811 NW2d 507 (2011). Further, "[I]f the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record." *People v Buie*, 491 Mich 294, 315; 817 NW2d 33 (2012).

The informant's statements were introduced into evidence via the testimony of the deputy. However, this testimony was first elicited by the defense. During cross-examination, defense counsel asked the deputy if the police investigation began with a traffic stop and then asked if the deputy had suggested to the informant that she had obtained her methamphetamine from defendant. The deputy testified that the informant told him that she obtained the methamphetamine from "Jeff" and then the deputy asked if she was referring to defendant. During redirect examination, the deputy testified, without objection, that the informant told him that she was friends with defendant and that she had been purchasing drugs from him for a year and a half. Further, during re-cross-examination, defense counsel acknowledged that the informant told the deputy that she purchased drugs from defendant. To allow defendant to affirmatively elicit testimony concerning the statements made by the informant to the deputy and then to challenge the testimony on appeal would serve to provide "defendant with an appellate parachute." *Buie*, 491 Mich at 313 (cleaned up).[1]

[1] Moreover, in light of the strength of the additional evidence against him, we conclude that defendant cannot establish that the alleged error was outcome-determinative. *Carines*, 460 Mich at 763.

We remand this case for the limited purpose of vacating defendant's conviction of possession of methamphetamine. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick