STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2011
v	No. 296938 Kent Circuit Court
WILLIAM MONROE MCBRIDE, Defendant-Appellant.	LC No. 09-007733

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

The police discovered William Monroe McBride's driver's license, vehicle title, and cell phone bill in a bedroom that also contained an unregistered handgun, a large quantity of cocaine, several bags of marihuana, and more than $18,000 in cash. McBride, however, was nowhere to be found. More than two years later, police arrested McBride in Mississippi. A jury subsequently convicted him of illegally possessing the drugs and the gun. McBride now appeals as of right, challenging several evidentiary rulings and the sufficiency of the evidence supporting his convictions. We affirm.

On January 18, 2007, officers of the Metropolitan Enforcement Team (MET) executed a search warrant at a residence located on Logan Street in Grand Rapids. The police found Sylvia Purnell and Jermaine Jones in the downstairs living area, and three children watching television in an upstairs bedroom. McBride was not present in the home. After securing the premises, the officers searched for contraband. In a small upstairs bedroom, Detective Scott Vogrig observed a light brown backpack on a bed. Inside the backpack, Vogrig discovered two digital scales, chunks of crack cocaine, and a bag of powder cocaine. On a nearby window ledge, Vogrig found a United States Postal Service change of address form bearing McBride's name, dated January 5, 2007. The form stated a former mailing address on Kalamazoo Street in Grand Rapids, but did not display a new address. Also near the bed, Vogrig located two blue "totes" stacked on top of each other. The top tote enclosed a man's shirt wrapped around a plastic bag containing $18,000 in currency. Another plastic bag held "rubber bands and money bands, with denominations on them." Underneath the red shirt, Vogrig found a male bullet-proof vest and additional male clothing. In the second tote, Vogrig came upon a letter addressed to Purnell at the Logan Street address.

Detective Gregory Duffy searched the bedroom's closet. A black duffle bag sitting on the closet floor held men's clothing, a Beretta .40 caliber handgun, and McBride's Mississippi driver's license. Inside the closet, Duffy discovered several bags of marihuana, a box of sandwich bags, and approximately $1500 stuffed into a girl's tennis shoe. Duffy recalled that a second, "Louis Vuitton-type" duffle bag found in the closet contained a smaller amount of marihuana. The closet search also yielded McBride's title to a Buick Regal, and a Sprint bill in McBride's name. Both the title and the Sprint bill identified McBride's address as a Grand Rapids location other than Logan Street.

McBride was eventually arrested in Mississippi and extradited to Michigan. At McBride's trial, Sergeant Dale Young testified as an expert in "drug trafficking." He opined that the Logan Street residence appeared to be a "stash house," which Young defined as, "a typical place where a distributor will keep his contraband, drugs, money, maybe weapons, to hide from police, or somebody that may rob him or her." Young explained that as a "cushion of protection … from being found out," drug distributors "don't normally keep their registered address" as the location where they store drug products. As factual support for his conclusion that the Logan premises served as a "stash house," Young cited: (1) the quantity of drugs and money found there, (2) the absence of any paraphernalia used to smoke marihuana or use cocaine, and (3) the presence of typical drug packaging materials.

McBride asserted an alibi defense. Nine witnesses testified that during the months before and after the raid, McBride had spent considerable time in Wisconsin and Mississippi. One alibi witness placed McBride in Mississippi on the same day the police searched the Logan Street house. But a different alibi witness supplied evidence that significantly bolstered the prosecution's case. McBride's sister, Crystal McBride, acknowledged awareness of her brother's friendship with Purnell, and recalled that when her brother arrived in Mississippi in December 2006, he carried a "Louie Vuitton bag" and a black "Burberry bag." Other alibi witnesses confirmed that McBride and Purnell had once been romantically involved.

The jury convicted McBride of possession with intent to deliver 50 grams or more of cocaine, MCL 333.7401(2)(a)(*iii*), possession with intent to deliver marihuana, MCL 333.7401(2)(d)(*iii*), being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced McBride as a third habitual offender, MCL 769.11, to concurrent terms of 13 to 40 years' imprisonment for the possession with intent to deliver cocaine conviction, three to eight years for the possession with intent to deliver marijuana conviction, four to 10 years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction.

I. SUFFICIENCY OF THE EVIDENCE

McBride first contends that insufficient evidence supported his convictions for possessing the controlled substances and the firearm, either as a principal or as an aider and abettor. According to McBride, the evidence established nothing more than that he and Purnell enjoyed a relationship "at some point in time," after which a few of McBride's personal belongings remained in her home. McBride suggests that because he was absent from Michigan at the time of the search and the prosecutor failed to establish when or how his personal items wound up in the bedroom, we must reverse his convictions.

This Court reviews de novo a challenge to the sufficiency of the evidence, viewing the evidence in the light most favorable to the prosecution. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2010). We must 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 Tombs*, 260 Mich App 201, 207; 679 NW2d 77 (2003). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (internal quotation omitted). A reviewing court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.*

Sufficient evidence supported that McBride constructively possessed the drugs and the gun found in the Logan Street bedroom. The constructive possession doctrine permits conviction for a possessory offense, even absent "red-handed" possession. "A person need not have actual physical possession of a controlled substance to be guilty of possessing it." *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1992). "Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance." *Id.* at 520. A person constructively possesses an item "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. . . .'" *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989), quoting *United States v Burch*, 313 F2d 628, 629 (CA 6, 1963). The test for constructive possession is whether "the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe*, 440 Mich at 521. The prosecutor may also prove constructive possession by demonstrating a defendant's participation in a "joint venture" to possess a controlled substance. *Id.* at 521, quoting *United States v Disla*, 805 F2d 1340, 1350 (CA 9, 1986). "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of possession." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

None of the trial witnesses testified that McBride actually possessed the drugs or the handgun. Nor does the record evidence substantiate that McBride resided at the home on Logan Street, or exercised any rights of ownership related to the dwelling. But the critical question is not where McBride lived when the police found the contraband, but whether sufficient evidence demonstrated a nexus between McBride and the seized items. *Wolfe*, 440 Mich at 521. Contrary to McBride's argument, ample circumstantial evidence linked him to the drugs and the weapon. The duffle bags found in the bedroom matched Crystal McBride's description of her brother's luggage. The uniquely personal identification documents stored among the drugs, digital scales, plastic bags, currency, and the Beretta give rise to an inference that the bedroom served as a storage space for a drug delivery operation that McBride controlled. Indeed, the officers' recitation of the bedroom's contents comported with Sergeant Young's depiction of a typical "stash house." A reasonable jury could readily conclude that the close proximity between McBride's personal items and the contraband signified that McBride owned the items, and intended to maintain control over them.

II. CONFRONTATION CLAUSE CHALLENGE

McBride next disputes the propriety of the trial court's admission of statements made by Jermaine Jones. McBride submits that Jones's out-of-court statements were testimonial, and

argues that their admission violated his constitutional right to confrontation. We agree that Jones's statements qualify as testimonial hearsay, but conclude that their admission, though erroneous, was harmless beyond a reasonable doubt.

Jones made the statements during the Logan Street raid. When the MET officers breached the home's front door, Jones was sitting on a first-floor living room couch. In a closet near the living room, the search team found a bag of crack cocaine hidden in a shoebox. During the prosecutor's case-in-chief, Sergeant Young recounted that he had questioned Jones about "what he was doing there, why he's there," the luggage on the floor in the living room, Jones's "financial condition, job, money, some of the narcotics that were found in the front closet, and how long he had been in town." Young did not disclose Jones's answers, but advised the jury that Jones's luggage did not contain contraband, and that no one had been arrested that night.

During McBride's case-in-chief, McBride re-called Young to the witness stand, and questioned him as follows:

> *Q.* Okay. Sergeant Young, you talked about taking a box out of the closet at 1127 Logan Street address yesterday. Do you remember that?
>
> *A.* There's - -
>
> *Q.* The lower level.
>
> *A.* In the hall closet?
>
> *Q.* [Sic] Right. I remember talking about a bag that was in the living room.
>
> *Q.* Okay. You don't remember talking about a box?
>
> *A.* About some drugs discovered in the closet?
>
> *Q.* Exactly.
>
> *A.* Yes.
>
> *Q.* Okay. Were those drugs in a box?
>
> *A.* Yes.
>
> *Q.* Okay. And were there some papers in that box?
>
> *A.* Yes.
>
> *Q.* And what kind of papers were those?
>
> *A.* Some music type papers.
>
> *Q.* Music type - - rap - - lyric papers. Right?

A. Yes.

Q. That's what you wrote in your report.

A. Yes.

Q. And do you have those papers?

A. I don't believe so.

Q. Okay. Did you determine who those papers belonged to?

A. Yes.

Q. Those papers did not belong to William McBride did they?

A. No.

Q. They belonged to Jermaine Jones, correct?

A. That's correct.

Q. And - - and was - - was a substance found in that box with those papers?

A. Yes.

Q. What was that?

A. Crack.

On cross-examination, the prosecutor asked Young, "What else did you learn from Jermaine Jones?" When Young began to answer, the trial court excused the jury, and expressed concern "about some *Crawford*[1] issues with this witness testifying as to what another witness who has not been called and is not here having to say." Ultimately, the trial court ruled that it would permit the prosecutor to question Young regarding Jones's statements because defense counsel "opened the door on this matter," and the prosecutor sought to introduce Young's answers "for impeachment purposes." The prosecutor's questioning continued as follows:

Q. Sergeant Young, I believe you indicated that Mr. Jones stated to you that he was visiting from Mississippi?

A. Yes, sir.

[1] *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Q. And that he had spent the night on the couch at that house?

A. He did, in fact, relate that to me.

Q. And he also indicated to you that his possessions were in the duffle bag that were [sic] in the living room that you've referred to previously, correct?

A. Yes.

Q. And did he indicate to you that he worked for Mr. McBride doing drywall?

A. Yes.

Q. And that that's how he would get some money?

A. Yes.

Q. Did he indicate whether or not he would be going back to Mississippi any time soon?

A. He did.

Q. And did he deny any knowledge of the drugs that were located in the southeast corner bedroom that we have in front of us here?

A. He claimed that the music in the box was his, but he did not own the narcotics that were in there, nor did he use narcotics.

Q. Did you ask him about the cocaine that was found in the bedroom?

A. He - - he denied any knowledge of any cocaine in the house.

Q. And he indicated that he was just a visitor.

A. Yes.

Q. Okay. Thank you.

McBride takes issue with this exchange, asserting that the "message" imparted to the jury was that Jones's answers eliminated his connection to the contraband found in the home. McBride contends that the trial court erred by ruling that his counsel's questions had opened the door to evidence that was otherwise inadmissible under *Crawford*, and incorrectly characterized Young's answers as impeachment.

Whether admission of evidence constitutes a violation of a defendant's Confrontation Clause rights involves a question of constitutional law that we review de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). "To the extent that our inquiry

requires an examination of the Michigan Rules of Evidence, we consider de novo the legal issues presented." *Barksdale v Bert's Marketplace,* 289 Mich 652, 655; __ NW2d __ (2010).

The Confrontation Clause guarantees the accused in a criminal prosecution the right "to be confronted with witnesses against him." US Const, Am VI. This guarantee prohibits "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford,* 541 US at 53-54. "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* at 52. However, the Confrontation Clause does not bar the use of out-of-court testimonial statements "for purposes other than establishing the truth of the matter asserted." *Id.* at 59, n 9. Nor does the Clause prohibit the introduction of testimonial statements introduced as impeachment evidence. *People v McPherson,* 263 Mich App 124, 134; 687 NW2d 370 (2004).

We agree with McBride that the prosecutor's cross-examination of Young bore no relationship to impeachment. Impeachment evidence is designed to attack a witness's credibility. While the prosecution may impeach its own witness, MRE 607, Young's answers to the prosecutor's questions neither reduced the effectiveness of his testimony nor discredited any of his previous answers. Moreover, the prosecutor admitted Jones's statements to demonstrate the truth of the matters asserted: that Jones spent the night on a couch, worked for McBride, planned to return to Mississippi, and lacked any knowledge of the narcotics in the shoebox or in the bedroom. Accordingly, the trial court erred by characterizing this testimonial hearsay as impeachment.

Whether McBride's questioning of Young opened the door to the introduction of Jones's statements presents a harder question. In *McPherson,* 263 Mich App at 134, this Court held that by testifying to a statement made by an unavailable witness, the defendant himself "opened the door to questioning by the prosecutor that [the witness] had 'ratted out' defendant." Here, McBride's counsel asked Young, "Did you determine who those papers belonged to?" This question was designed to elicit Jones's hearsay admission to ownership of the rap music found in the shoebox. But by eliciting this single piece of indirect hearsay, we perceive no indication that McBride's counsel intended to waive McBride's Sixth Amendment right to confrontation, or to open the evidentiary door widely enough to permit Young to recapitulate the balance of Jones's responses to interrogation.

The Sixth Circuit has held that "the mere fact that [the defendant] may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation." *United States v Cromer,* 389 F3d 662, 679 (CA 6, 2005). In *Cromer,* the Sixth Circuit rested its holding on *Crawford*'s admonition that "the Confrontation Clause, when properly applied, is not dependent upon 'the law of Evidence for the time being.'" *Id.* at 678, quoting *Crawford,* 541 US at 50-51. "If there is one theme that emerges from *Crawford,* it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements." *Cromer,* 389 F3d at 679. We detect no fundamental conflict between *Cromer* and this Court's decision in *McPherson.* In *McPherson,* the statement at issue actually qualified as impeachment, and was not admitted to prove the truth of the matter asserted. *McPherson,* 263 Mich App at

133-134. We decline to hold that counsel's single question seeking indirect hearsay evidence operated as a waiver of McBride's Sixth Amendment right.

We now consider whether the trial court's error in allowing the introduction of inadmissible hearsay requires us to reverse McBride's conviction. "A constitutional error is harmless if 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001), quoting *Neder v United States*, 527 US 1, 18; 119 S Ct 1827; 144 L Ed2d 35 (1999). There must be "no reasonable possibility that the evidence complained of might have contributed to the conviction." *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994) (quotation marks and citations omitted). We are convinced beyond a reasonable doubt that Young's recitation of Jones's statements did not contribute to the jury's verdict. Jones's statements exculpated Jones, but did not inculpate McBride. Jones did not identify McBride as a drug dealer, and not even a hint emerged from the challenged portion of Young's testimony that McBride owned, controlled, or knew of the bedroom contraband. Rather, Jones's responses to Young's questions distanced Jones from a small amount of cocaine hidden in a location separate and distinct from the contraband found in the bedroom. Notwithstanding this testimony, ample untainted evidence connected McBride to the drugs and gun found in the bedroom. Based on the unrefuted presence of McBride's personal documents among the contraband, we deem the admission of Jones's statements harmless beyond a reasonable doubt.

III. PROSECUTORIAL MISCONDUCT AND RELATED CONTENTIONS

McBride next challenges the prosecutor's repeated statements that McBride had been the target of the police investigation leading to the issuance of the search warrant, and the deliberate elicitation of evidence to the same effect. At trial, defendant offered no objection to any of the purported instances of prosecutorial misconduct, or to the testimony.

> Because the alleged error[s were] not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain (outcome-determinative) error. 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. Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. [*People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003) (internal citations omitted).]

This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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 Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (internal citations omitted), criticized in part on other grounds in *Crawford*, 541 US at 64.]

We review alleged instances of prosecutorial misconduct 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).

In his opening statement, the prosecutor introduced the notion that the police had targeted McBride for investigation:

> [Detective Vogrig] was the one that began this investigation. And he will tell you that the focus of his investigation was the defendant and the house on Logan Street. Those were the targets of his investigation. They didn't just pull this out of a hat. They did some investigative work, and the target was the defendant and the house on Logan Street.

As promised, the prosecutor inquired of Vogrig, "Now, with regards to the execution of this house [sic], did you have an individual that you were targeting as part of this investigation?" Vogrig identified McBride as his target. In closing argument, the prosecutor returned to this theme:

> What we know is that the defendant and 1127 Logan are the target of a drug investigation by the Metropolitan Enforcement Team. This didn't just pop up out of thin air. They didn't just draw the defendant's name out of a hat and decide to go investigate. They didn't just pop the name, 1127 Logan out of a hat. They had to get a search warrant. A document that they submitted to a judge for review to get permission to go in there, to look in this residence. And the defendant was the target of that investigation. That's inconsistent with what the defendant's witnesses have told you with regard to his alibi.

Had the prosecutor confined his remarks and questions to mere background information about the acquisition of the search warrant, his words would not concern us. General information setting the scene simply does not implicate a defendant's Sixth Amendment rights. See *United States v Martin*, 897 F2d 1368, 1371-72 (CA 6, 1990). But here, the prosecutor traveled well beyond the bounds of background. The prosecutor's "target" comments, and Vogrig's related testimony, placed before the jury the truth of the matters asserted: that the police possessed credible information directly tying McBride to drugs stored at the Logan Street address.

The central issue at the trial focused on McBride's relationship to the drugs and the gun. The only logical implication to be drawn from the "target" references was that the police had acquired information implicating McBride from witnesses who did not testify at the trial. The prosecutor referenced this information not to place the search in context, but to demonstrate the existence of otherwise unheard evidence substantiating McBride's involvement in the drug trade. By employing the target references to prove their truth, the prosecutor improperly bypassed *Crawford*. Nevertheless, we reject McBride's claim that the "target" comments denied him a fair

and impartial trial. Given the brief and isolated nature of Vogrig's "target" testimony, and the trial court's proper instruction that an attorney's statements do not constitute evidence, we conclude that the remarks and evidence did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of McBride's trial. *Callon*, 256 Mich App at 329. Pursuant to similar reasoning, no ineffective assistance of counsel was occasioned by defense counsel's failure to object to the "target" references, because no reasonable likelihood exists that the result of defendant's trial would have differed had counsel objected. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

Affirmed.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly