STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 300470 Oakland Circuit Court
DEON TERRELL RHIMES, Defendant-Appellant.	LC No. 2009-229859-FH

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver 50 or more but less than 450 grams of a mixture containing the controlled substance Oxycodone, MCL 333.7401(2)(a)(*iii*). He was sentenced, as a habitual fourth offender, MCL 769.12, to 10 to 30 years' imprisonment. Defendant appeals as of right, and we affirm.

This case arose when, on May 10, 2009, police stopped and searched an SUV owned and driven by defendant and found three pill bottles containing 328 Oxycontin pills in cup holders next to the vehicle's center console. The prescription label on one bottle indicated that it contained 60 Xanax pills for Tommie Brutton, and the prescription was filled on May 5, 2009, five days before the traffic stop. Inside the bottle supposedly containing Xanax, police found 69 green Oxycontin pills (18.3 grams). The prescription label on a second bottle indicated that it contained 60 Soma pills for Belinda Douglas, which prescription was filled on May 4, 2009. However, the bottle was actually "filled to the brim" with 199 Oxycontin pills (53.4 grams). The prescription label for the last bottle indicated that it contained 60 Oxycontin pills for Harold Rush, and 60 such pills were indeed found in the bottle (16.18 grams). That prescription was filled on May 5, 2009. The prescriptions for all three bottles were written by the same doctor.

Michael Houston was a passenger in defendant's SUV, but neither Brutton, Douglas, nor Rush were in vehicle at the time of the stop. Detective Douglas MacQuarrie initiated the traffic stop, and defendant told the detective that the pills belonged to his family. MacQuarrie testified that the 328 Oxycontin pills had an estimated street value of $6,500 and that the number of different bottles with prescriptions written to different persons evidenced intent to possess and distribute the drugs, rather than personal use. Defendant never presented MacQuarrie with a prescription for the Oxycontin. Rush testified that the bottle with 60 Oxycontin pills belonged to him, while Brutton testified that the bottle identifying Xanax as the prescription, but which

actually contained Oxycontin, belonged to him. Both Rush and Brutton indicated that they had inadvertently left the pills in defendant's vehicle. Houston testified that he had a prescription for Oxycontin and that some of the pills in the SUV belonged to him. There was testimony by defendant's doctor[1] that he had prescribed a one month's supply of Oxycontin for defendant on March 31, 2009, and then prescribed 90 Oxycontin pills for defendant on May 12, 2009, two days after the seizure. The doctor testified that he would never prescribe 199 or 328 Oxycontin pills at one time; the maximum amount was 90. Defendant testified that, unbeknownst to him, Houston had put the bottle with 199 Oxycontin pills in the SUV's console, which bottle reflected a Soma prescription for Douglas, who was Houston's girlfriend. Defendant denied possessing the Oxycontin, but asserted that he had driven Brutton and Rush to medical appointments in the past. When asked how many of the 328 Oxycontin pills belonged to him, defendant responded, "I don't know." Defendant denied that he engaged in the trafficking and selling of any drugs.

Defendant first argues that he was denied the effective assistance of counsel and a fair trial because counsel failed to interview and investigate witnesses. We disagree. Defendant did not move for a new trial or request a *Ginther*[2] hearing, and therefore, appellate review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). To establish a claim of ineffective assistance of counsel, the defendant bears the burden of demonstrating that trial counsel's performance fell below an objective standard of reasonableness and that this representation was so prejudicial that it deprived defendant of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). With regard to the second part of the test, the defendant must demonstrate that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error. *Id*. at 6. Counsel is presumed to have rendered effective assistance, and the defendant bears a heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy and will not assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant contends that trial counsel was ineffective by presenting the testimony of witnesses Harold Rush and Tommie Brutton and asserts that he failed to investigate their testimony before trial. Defendant's contention is not supported by the lower court record. At the preliminary examination, both Rush and Brutton testified that the prescription bottles found in defendant's vehicle belonged to them, not defendant. Consequently, defense counsel was aware of the content of their testimony before they were called as witnesses at trial. Defendant was charged with possession with intent to deliver Oxycodone. "The element of knowing possession with intent to deliver has two components: possession and intent." *People v Brown*, 279 Mich

[1] This was not the same doctor who had written the prescriptions relative to the pill bottles found in defendant's vehicle.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

App 116, 136; 755 NW2d 664 (2008). The defense presented evidence to negate the "knowing possession" element. Specifically, witnesses Rush and Brutton testified that they had valid prescriptions for the medication found in defendant's SUV and that they had accidentally left the pill bottles in defendant's vehicle. Additionally, the defense elicited testimony from Detective MacQuarrie, over the prosecutor's objection, that if a valid prescription existed, there could be no illegal possession of a controlled substance. Although Brutton could not account for the disparity between the content and quantity found in "his" bottle in light of the label, he nonetheless testified that the pills did not belong to defendant. Although Rush could not identify the doctor who prescribed the Oxycontin, nor remember the name of the pharmacy that filled the prescription, he claimed that the bottle with 60 Oxycontin pills, actually prescribed to Rush, belonged to him and not defendant and that he left the pills in defendant's vehicle. While the credibility of both witnesses was called into question on cross-examination, Rush and Brutton were steadfast that the two bottles containing Oxycontin belonged to them. Moreover, defendant's own testimony suggested that Rush and Brutton left the Oxycontin in the SUV, and in order to complete the picture, counsel needed to put Rush and Brutton on the stand; the testimony complimented each other. Without their testimony, damaged or otherwise, defendant would likely have been at an even greater disadvantage. We also cannot help but note that the third bottle containing 199 Oxycontin pills with a Soma prescription for Douglas weighed 53.4 grams, which, in and of itself, sufficed to support the conviction; therefore, it is within the realm of possibility that the jury may have given credence to Rush's and/or Brutton's testimony while still convicting defendant. In light of the defense theory and the testimony presented at trial, defendant failed to meet his burden of establishing ineffective assistance of counsel. *Hoag*, 460 Mich at 5-6.

Next, defendant asserts that prosecutorial misconduct occurred when the prosecutor allegedly denigrated defense counsel and a defense witness and when she argued facts not admitted into evidence. We disagree. When the defense fails to make a contemporaneous objection to or request a curative instruction for the alleged misconduct, our review is for plain error affecting the defendant's substantial rights. *Brown*, 279 Mich App at 134. Reversal is warranted only when plain error affected substantial rights and resulted in the conviction of an actually innocent person or where it seriously impacted the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Error requiring reversal will not be found where a curative instruction would have alleviated the prejudicial effect. *Id*. at 329-330.

Prosecutorial misconduct claims are reviewed on a case-by-case basis, examining the prosecutor's comments in context and in light of the defense arguments and the evidence admitted at trial. *People v Odom*, 276 Mich App 407, 413; 740 NW2d 557 (2007). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The prosecutor is afforded great latitude regarding her arguments and conduct at trial. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). The prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence related to her theory of the case. *Id*. When a timely objection and curative instruction would have alleviated the prejudicial effect of any improper prosecutorial statement, it cannot be concluded that the error denied defendant a fair trial or that it affected the outcome of the proceedings. *Id*. at 237.

Defendant cites to the closing argument by the prosecutor as demonstrating that she denigrated defense counsel, defense witnesses, and argued facts not in evidence. However, our review of the record reveals that the prosecutor did not denigrate defense counsel or his witnesses, but rather highlighted inconsistencies in the testimony presented by defense witnesses and the plausibility of their testimony. Additionally, the prosecutor did not argue facts not in evidence regarding the sale and delivery of the pills, but rather, submitted that the circumstances surrounding the acquisition of the prescriptions from the same doctor and the manner in which prescription drugs were sold on the streets were consistent with sale and delivery, not personal use. The prosecutor argued reasonable inferences from the evidence admitted at trial. Moreover, a timely objection and curative instruction could have alleviated any prejudicial effect. *Unger*, 278 Mich App at 237. Accordingly, this issue does not provide defendant with appellate relief.

Lastly, defendant asserts that there was insufficient evidence presented to support his conviction. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). Appellate review of a challenge to the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The reviewing court must draw all reasonable inferences and examine credibility issues in a manner that supports the jury verdict. *Id*. When assessing a challenge to the sufficiency of the evidence, the trier of fact, not the appellate court determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). "Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense." *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). When there is a challenge to the sufficiency of the evidence, the focus is on whether the evidence presented justifies submission of the case to the jury or whether judgment as a matter of law is appropriate. *Id*.

With regard to this case, the elements of the charge of possession with intent to deliver 50 or more but less than 450 grams of a mixture containing the controlled substance Oxycodone, MCL 333.7401(2)(a)(*iii*), are: (1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was Oxycodone and defendant knew it was Oxycodone; and (4) the substance was in a mixture that weighed more than 50 grams but less than 450 grams. See *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). In the present case, defendant only takes issue with the intent to deliver element. The evidence at trial revealed that Oxycontin was a heavily regulated narcotic. It could not be dispensed in quantities higher than 90 pills, and the prescription could not be telephoned in to a pharmacy and was not refillable. Despite the regulation, defendant admittedly drove Rush and Brutton all the way from Pontiac to Redford where they obtained prescriptions for Oxycontin. The prescriptions were all filled by the same doctor. Rush and Brutton had difficulty remembering the prescribing doctor's name and could not remember the instructions for usage. The prescriptions did not correlate to the pills dispensed. That is, a bottle with a prescription label for 60 Xanax pills actually contained 69 Oxycontin pills. The sheer

number of Oxycontin pills, 328, plainly indicates an intent to deliver. *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992); *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005) ("Intent to deliver may be inferred from the quantity of drugs in a defendant's possession"). Based on his experience in drug trafficking, Detective MacQuarrie testified that Oxycontin was a coveted drug that earned $20 per pill on the street. He testified that drugs were frequently left in the prescription bottle because users would trade the drug for other drugs. In light of the testimony admitted at trial, there was sufficient circumstantial evidence and reasonable inferences to support the jury's conclusion that defendant possessed Oxycontin with the intent to deliver.[3]

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens

[3] In the phrasing of defendant's appellate argument, he initially suggests that the verdict was against the great weight of the evidence; however, the substance of his argument was premised on the sufficiency of the evidence. To the extent that defendant is making a great weight argument, we hold that, given the evidence alluded to above, the verdict was not against the great weight of the evidence. See *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).