STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC CLYDE BALL,

Defendant-Appellant.

UNPUBLISHED
October 7, 1997

No. 193881
Calhoun Circuit Court
LC No. 95-002897 FC

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). He was sentenced to a mandatory sentence of life in prison without the possibility of parole. Defendant now appeals as of right, and we affirm.

Defendant's conviction arose out of an incident in which defendant was a passenger in a car stopped by the police for a traffic violation. The police arrested the driver for lack of a driver's license and a registration violation, and they then searched the driver and defendant as well as the passenger compartment of the car. The police also called a canine unit to sniff the car. The dog indicated several areas were positive for the scent of narcotics, and the police, upon searching those areas again, discovered over 650 grams of cocaine in a compartment behind the glove box of the car. Defendant moved to suppress the cocaine, arguing that the dog sniff was an invalid search in violation of his Fourth Amendment rights. The trial court denied defendant's motion at an evidentiary hearing, and the cocaine was introduced as evidence in the subsequent trial.

I

Defendant first argues that the trial court erred in denying his motion to suppress the cocaine. The right not to be subjected to unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Davis*, 442 Mich 1, 9-10; 497 NW2d 910 (1993). If evidence is unconstitutionally seized, it must be excluded from trial. *Terry v Ohio*, 392 US 1; 88 S Ct 1868, 1875; 20 L Ed 2d 889 (1968). Generally a search conducted without a warrant is unreasonable; however, one of the recognized exceptions to the warrant requirement is a search incident to a lawful arrest. *Id*. Further, it is well settled that when an officer "has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" and compartments therein, including glove compartments. *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981); *People v Bullock*, 440 Mich 15, 26; 485 NW2d 866 (1992). In the present case, because the officer had arrested the driver before searching the passenger compartment of the car, there was no error in the trial court's finding that, at least as far as the officer's physical search of the car, it was a valid search incident to the arrest.

Defendant also argues that the dog sniff constituted a second search, which was unsupported by probable cause and therefore violated his right against being subjected to an unreasonable search. We review the trial court's ruling on a motion to suppress evidence for clear error. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

Upon review of the facts and relevant case law, we conclude that the trial court's decision to deny defendant's motion to suppress was not clearly erroneous. In *United States v Place*, 462 US 696; 77 L Ed 2d 110, 121; 103 S Ct 2637 (1983), the U.S. Supreme Court held that protection against unreasonable searches and seizures does not apply to the exposure of personal property to a trained canine, because such an investigation does not constitute a "search" within the meaning of the Fourth Amendment. This rule has been applied to police investigations of automobiles. In *People v Clark*, 220 Mich App 240, 243; 559 NW2d 78 (1996), a dog sniffed the trunk of the defendant's car after it had been lawfully stopped and the defendant had been arrested for driving with a suspended license. This Court ruled that the police acted legally in the decision to call a canine unit after the driver of the car had been arrested and the car was to be impounded. *Id.* In the present case, there was no question that the car was lawfully detained for impounding after the driver had been arrested. Therefore, the dog sniff of the outside of the car did not constitute a constitutionally protected search. *Place*, *supra* at 121.

Further, the dog's positive indications on the outside of the car provided sufficient probable cause to permit the officers to search every part of the vehicle, under the automobile exception to the warrant requirement. See *People v Carter*, 194 Mich App 58, 60-61; 486 NW2d 93 (1992). Therefore, because the dog indicated a positive scent for drugs in the present case, probable cause to allow the dog to enter the car and to subsequently search the entire contents of the car, including the area behind the glove compartment where the cocaine was found, was established. We conclude that the trial court did not err in denying defendant's motion to suppress the cocaine.

II

Next, defendant argues that several instances of prosecutorial misconduct denied him a fair trial. We disagree with defendant's position.

Defendant first contends that in his closing arguments the prosecutor misstated the testimony regarding the amount of cocaine seized and its total value. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Misconduct must be determined on a case-by-case

basis, reviewing the prosecutor's comments in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Upon review of the testimony, we find that the prosecutor did misstate the witness' testimony regarding the average price for a rock of cocaine. However, we conclude that the error was harmless in light of the court's cautionary instruction to the jury and the prosecutor's reminder to the jurors that it was their job to determine the facts and remember the testimony. Similarly, we find no merit in defendant's argument that the prosecutor misstated the testimony regarding whether defendant voluntarily offered false identification. The record supports the prosecutor's statement, and the court correctly instructed the jury that lawyers do not testify and that the jury is responsible for recalling the correct testimony.

Defendant also moved for a mistrial based on statements by the prosecutor during closing arguments, which defendant argues vouched for the credibility of a witness and resulted in shifting the burden of proof from the prosecution to defendant. This Court reviews the trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

Our Supreme Court has held that a prosecutor may not vouch for the credibility of a witness to the effect that the prosecutor has some special knowledge concerning a witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, it is not improper to argue that a witness should be believed. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Viewing the prosecutor's comments in context, we agree with the trial court's finding that the prosecutor was not vouching for the credibility of the witness but rather was stating to the jurors that they must determine whether to believe the witness. Further, the court instructed the jury on the prosecutor's burden of proof, and the prosecutor reiterated that the jury must determine the credibility of witnesses. We find that the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on prosecutorial vouching for a witness.

Similarly, defendant's argument that the prosecutor shifted the burden of proof to defendant lacks merit. The prosecutor employed a method of asking hypothetical questions to the jury to highlight the deficiencies in defendant's theory. We do not believe that the prosecutor's technique rose to a level requiring reversal. The jury was not left with the impression that defendant must respond to the hypothetical questions. See *People v Green*, 131 Mich App 232; 345 NW2d 676 (1983). Again, viewing the prosecutor's comments in context, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on improper burden-shifting.

Defendant asserts several other instances of prosecutorial misconduct for which he provides no argument and cites no authority regarding why the trial court's rulings were incorrect. Because defendant failed to sufficiently argue these claims, he has effectively abandoned them on appeal. *Dresden v Detroit Macomb Hospital*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

III

Finally, defendant argues that the evidence presented was insufficient to support his conviction of possession with intent to deliver over 650 grams of cocaine. Defendant argues that the evidence was insufficient to prove possession or intent. We disagree. Conviction requires proof that defendant knowingly possessed the cocaine and had the intent to deliver it to someone else. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992).

In reviewing a claim of insufficiency of evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to prove the essential elements of the crime beyond a reasonable doubt. *Id*. at 515. This standard inherently precludes this Court from interfering with the factfinder's task of weighing the evidence or making determinations as to witnesses' credibility. *Id*. at 514-515.

First, the element of possession may be satisfied by actual, physical possession of the controlled substance or by constructive possession. *Id*. at 520. Constructive possession can be shown by knowledge of the presence of the cocaine coupled with the right to exercise control over it. *Id*. While a person's mere presence at a location where drugs are found is not enough by itself to establish constructive possession, many factors may be considered to find a sufficient nexus between the defendant and the drugs. *Id*. at 520-521. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id*. at 521.

We find that there was sufficient evidence in the present case to find that defendant at least constructively possessed the cocaine. The cocaine was found in the glove compartment directly in front of where defendant had been sitting. A police officer testified that defendant told him that the car was borrowed from defendant's girlfriend, indicating the likelihood that defendant had some control over the car and its contents. Further, the driver of the car testified that defendant stated that he had "dope" in the glove compartment. The driver also testified that defendant was involved with drug dealing on several similar trips. Viewing all of the evidence presented in the light most favorable to the prosecution, the evidence was sufficient for the jury's finding that defendant at least constructively possessed the cocaine.

There was also sufficient evidence to prove an intent to deliver. As with possession, actual delivery is not required to prove intent to deliver. *Id*. at 524. Surrounding circumstances such as the quantity of drugs recovered and the way in which the drugs are packaged can demonstrate an intent to deliver. *Id*. In the present case, evidence was presented regarding the average size and cost of one rock of cocaine and the total amount of cocaine discovered. There was also evidence of several pagers and cellular phones found in the car. Upon a careful review of the record, we conclude that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to justify the jury's finding that defendant knowingly possessed the cocaine with the intent to deliver it.

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage