STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELIAZAR ALEX SILVA, a/k/a ALEX SILVA,

Defendant-Appellant.

UNPUBLISHED
March 27, 1998

No. 193163
Kalamazoo Circuit Court
LC No. 95-000781 FH

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for possession of marijuana with intent to deliver, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). Defendant was initially charged with a total of four counts, i.e., two counts each of delivery of marijuana and possession of marijuana with intent to deliver.[1] Defendant was sentenced to three to eight years in prison, with the sentence enhanced pursuant to MCL 769.11; MSA 28.1083, as defendant was an habitual offender, third offense. We affirm.

On January 12, 1994, the police conducted a valid search of a Kalamazoo residence, owned by defendant's sister, wherein defendant had been engaged in remodeling work. A twenty-pound bale of marijuana was seized from the attic. Furthermore, the search revealed a black and blue duffel bag, containing marijuana, as well as cellophane, duct tape, and ziplock bags. John Kornmiller, who had been hired by defendant to do remodeling work, was arrested just before the search of the residence. A search incident to Kornmiller's arrest revealed one-half pound of marijuana. He testified that the marijuana had come from the residence.

I

Defendant first contends on appeal that there was insufficient evidence presented at trial to sustain his conviction for possession of marijuana with intent to deliver. This Court reviews sufficiency of the evidence claims by considering the evidence in the light most favorable to the prosecution and

determining whether a rational trier of fact could have found that the essential

elements of the charged crime were proven beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). In analyzing an insufficiency claim, this Court does not resolve credibility assessments anew. *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989).

The crime of possession of marijuana with the intent to deliver consists of four elements that must be proven by the prosecution: (1) the defendant knowingly possessed marijuana, (2) the defendant intended to deliver this substance to someone else, (3) the substance possessed was marijuana, and defendant knew it was marijuana, and (4) the substance was in a mixture that weighed a specific weight. CJI2d 12.3. Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence. *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The intent to deliver can be "inferred from 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." *Id*. at 524. Constructive possession may be proven "where a defendant knowingly has the power and intention to exercise dominion or control over a substance, either directly or through another person, or if there is proximity to the substance together with indicia of control." *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991).

The evidence adduced at trial showed that defendant had directed Kornmiller to break up one of the bales; afterwards, the marijuana was placed into freezer ziplock bags. The second bale of marijuana, weighing approximately twenty pounds, was placed in the attic. In addition, when Kornmiller's work on the ceiling interfered with the bale of marijuana stored in the attic, defendant told Kornmiller to move the bale and cover it up again with insulation. This evidence was sufficient for the jury to infer defendant's constructive possession of the marijuana and his knowledge that the substance was in fact marijuana. Furthermore, since the quantity (i.e., twenty pounds) and form (i.e., compressed bale) of the marijuana, and the presence of ziplock bags, cellophane, and duct tape were associated with drug trafficking of marijuana, the jury could reasonably infer that defendant possessed the intent to deliver the marijuana. *Wolfe*, *supra*. We therefore conclude that the prosecution presented sufficient evidence to support defendant's conviction for possession of marijuana with the intent to deliver.

II

Defendant next argues that the trial court erred in permitting the prosecution to confront defendant with a past instance of involvement with the sale of marijuana. The extent to which a witness may be cross-examined on questions affecting his or her credibility rests in the sound discretion of the trial court. *People v Bouchee*, 400 Mich 253, 267; 253 NW2d 626 (1977); *People v Khabar*, 126 Mich App 138, 141; 337 NW2d 9 (1983).

In the case at bar, during the direct examination of defendant, the following colloquy developed:

Q. Did you, at any time, bring marijuana into the 706 Arthur Street residence?

A. No, I did not.

Q. Did you, at any time, pick up marijuana from a semi-truck in Van Buren County?

A. No, I did not.

Q. Did you know of anybody who was doing that at the time?

A. No. No, I don't.

Q. Did you know John Kornmiller to be dealing drugs at that time?

A. Well, he – he used to smoke weed at – at Arthur, but it's – it was – it was all, you know, hearsay and – and this. You know? I didn't get involved with it.

Q. Did you give John Kornmiller marijuana that was subsequently located in a – in a lunch box?

A. No, I did not.

Q. Did you give him any marijuana?

A. No, I did not.

Q. Were you smoking marijuana back then?

A. No, sir.

Q. Were you involved, in any way, with the sale of marijuana?

A. No, I was not.

Q. Were you involved, in any way, with the transportation and bringing into Kalamazoo of marijuana?

A. No, I was not. [Emphasis Added].

On cross-examination, the prosecution, pursuant to MRE 608(b),[2] attempted to inquire whether defendant had on a prior occasion been involved in the sale of marijuana. The prosecution argued that defense counsel had "opened the door" by eliciting the general claim that defendant had not been involved in the sale of marijuana. The trial court overruled defense counsel's objection to this line of questioning, and the prosecutor then elicited from defendant that he, in fact, had been involved in the sale of marijuana on more than one past occasion. In so doing, the prosecutor did not present any extrinsic or intrinsic evidence regarding defendant's prior convictions. On redirect examination, defense counsel clarified that defendant's prior involvement in sales of marijuana occurred in 1987 with a resulting conviction in 1987.

Defendant contends that his testimony on direct examination, read in context, constituted a specific denial of culpability as to the charges in the instant case. Defendant argues that he did not testify that he had *never* been involved in the sale of marijuana, and because he did not make a broad denial implicating his truthfulness, the prosecutor improperly impeached him with a past instance involving the sale of marijuana. We disagree.

Defendant testified in his own defense; therefore, his credibility may be impeached like any other witness. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). A defendant's broad denial of criminal involvement on direct examination may subsequently be refuted by the prosecution during cross-examination by the use of specific instances when the defendant was involved in such criminal activities. As this Court explained in *People v Edmonds*, 93 Mich App 129, 134-135; 285 NW2d 802 (1979):

> Matters which may not be admissible on direct examination may be used to impeach a defendant. *People v Brown*, 399 Mich 350, 356; 249 NW2d 693 (1976). The prosecutor was not bound to refrain from attacking [codefendant] Elmore's statements, even though disproving the statement required evidence of other crimes that Elmore had committed.

Similarly, in the instant case, defense counsel through his questioning of defendant attempted to portray defendant as a totally innocent individual who never brought marijuana into the residence, did not know that it was being transported, and was not "involved in anyway with the sale of marijuana." Defendant's direct examination testimony provided the jury with the suggestion that defendant had never been involved in selling marijuana in the past. The prosecutor's questions regarding defendant's involvement with the sale of marijuana were properly within the scope of impeachment. *Edmonds, supra*.

In a related argument, defendant argues that defense counsel rendered ineffective assistance of counsel when, on redirect examination, he questioned defendant about his prior 1987 conviction for selling marijuana. Defendant claims that he chose to testify based on the express assurances of his attorney that defendant's criminal convictions would not be admissible. Because defendant neither requested an evidentiary hearing nor moved for a new trial on the basis of ineffective assistance of counsel, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). A review of the record does not demonstrate that trial counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious as to deprive defendant of his Sixth Amendment right to representation. *People v Pickens*, 446 Mich 298, 309, 326; 521 NW2d 797 (1994).

Defendant has also failed to prove that the allegedly deficient performance prejudiced the defense. *Id*. at 309, 312. Evidence of the conviction was brought up by defense counsel in an attempt to define and clarify a timeline in response to the prosecution's questioning; as such, the challenged actions could be considered sound trial strategy. Moreover, on two occasions, the trial court instructed the jury that evidence of defendant's past criminal involvement or conviction was limited to impeachment

purposes. Therefore, we find defendant's argument that the jury engaged in forbidden inferences due to trial counsel's alleged error to be without merit.

III

Defendant next claims that the trial court erred in allowing other acts evidence under MRE 404(b)[3] where such evidence was offered solely to show defendant's conformity with the other acts. We disagree.

The other acts evidence in question pertained to defendant's acceptance of a delivery of marijuana from a semi-truck two to three days before the police searched his residence, and defendant's delivery of marijuana to Kornmiller's trailer. The context in which this evidence was introduced is important. Defendant was originally charged with four counts: two delivery charges stemming from different transactions and two possession with intent to deliver charges, likewise distinct. The "other acts" evidence was introduced during the prosecution's case-in-chief and related not only to the offense at issue but also to the other counts, two of which were subsequently dismissed by the court at the close of plaintiff's proofs.

This evidence constituted part of the res gestae of the charged offense and is therefore admissible as a recognized exception to MRE 404(b). *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990), remanded on other grds, 437 Mich 1004 (1991); *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). The res gestae exception applies when the other acts evidence is so blended or connected with the charged offense, that proof of one incidentally presents proof of the other. *Id*. In the present case, the other acts were interrelated, corroborative, and explanatory and, prior to the dismissal of the two counts, provided a more complete story about the four charged offenses. *People v Smith*, 119 Mich App 431, 436; 326 NW2d 533 (1982); *People v Bostic*, 110 Mich App 747, 749-750; 313 NW2d 98 (1981). Under these circumstances, we conclude that the trial court did not abuse its discretion in admitting this evidence because it constituted relevant res gestae evidence. *Crowell, supra*.

IV

Defendant's next claim on appeal is that he was prejudiced by the prosecution's misconduct in calling a witness the prosecution knew would invoke the Fifth Amendment. We disagree.

Claims of prosecutorial misconduct are decided on a case by case basis. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). In the instant case, where no objection or curative instruction was requested by defendant at trial, appellate review of alleged prosecutorial misconduct is foreclosed unless the conduct was so egregious that no curative instruction could have removed the prejudice to defendant or if manifest injustice would result from this Court's failure to review the alleged misconduct. *Id*. at 341-342.

Defendant alleges that the prosecutor engaged in misconduct by calling to the stand a witness, serving a sentence for a delivery of marijuana conviction, who had forewarned the prosecutor that he would not testify about certain subjects, including any questions having to do with defendant or questions focusing on identifying his source of marijuana. The prosecution called the witness and elicited testimony only as to its conference with the witness the night before and the witness' consistent refusal therein to identify the source of marijuana.

The prosecution may not call a witness knowing that the witness will claim a valid privilege not to testify under the Fifth Amendment. *People v Paasche*, 207 Mich App 698, 708; 525 NW2d 914 (1995); *People v Sowders*, 164 Mich App 36, 40; 417 NW2d 78 (1987). The rationale for this rule is that the prosecution (or defense counsel) is professionally prohibited from calling such a witness "for the purpose of impressing upon the jury the fact of the claim of privilege." *People v Dyer*, 425 Mich 572, 576-577; 390 NW2d 645 (1986), quoting *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). However, in the instant case, the witness never invoked or attempted to invoke his Fifth Amendment privilege. Moreover, while this brief line of questioning was irrelevant to the matters at issue, no objection was raised by defendant. We conclude that the prosecutor's conduct was not so egregious that no curative instruction could have removed the prejudice to the defendant. *Paquette*, *supra*.

V

Defendant finally contends that the trial court erred by denying his motion for a mistrial. Defendant argues that a mistrial was warranted by the jurors' encounter with a spectator who blocked their path and yelled at the jurors that the police were "setting up" defendant. Defendant further argues that cumulative error necessitated a mistrial. We disagree.

A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Error requiring reversal is not presumed merely because jurors have been exposed to prejudicial remarks about a defendant made by a stranger or passerby, but only where actual prejudice can be shown. *People v Johnson*, 164 Mich App 634, 638; 418 NW2d 117 (1987), rev'd on other grounds 432 Mich 931; 442 NW2d 625 (1989). A mere possibility of prejudice is insufficient to justify a mistrial. *Id*. The trial court's finding that a juror has the ability to render an impartial verdict may only be reversed for a clear abuse of discretion. *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986).

In the instant case, after the spectator confronted the jurors, the trial court questioned each juror separately about their contacts with the individual. The trial court was satisfied, after interviewing the jurors, that no prejudicial inference had been created that would interfere with the ability of the jurors to fairly decide the case. The spectator was not a witness in the case and the court concluded that neither plaintiff nor defendant had anything to do with the spectator's actions. The trial court gave the parties an opportunity to request and draft a cautionary instruction. When the trial resumed, no instruction was requested immediately following the incident or at the end of the trial. Therefore, no cautionary

instruction was ever given. We conclude that, under these circumstances, the trial judge did not abuse his discretion by concluding that defendant's motion for a mistrial should be denied. *Haywood, supra*.

On the basis of our conclusions set forth above regarding the other issues raised by defendant, we hold that defendant's claim of cumulative error is likewise without merit.

Affirmed.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] Defendant was convicted of count III which had charged him with the possession of a bale of marijuana, found at the residence, with the intent to deliver it.

[2] MRE 608(b) states in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . .

[3] MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.