

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NASHAT BUTRIS, a/k/a  
NASHAT ISHIG BURTRIS,

Defendant-Appellant.

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UNPUBLISHED  
March 30, 1999

No. 201898  
Macomb Circuit Court  
LC No. 96-000774 FH

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). The trial court sentenced defendant to five to twenty years' imprisonment for the cocaine conviction, consecutive to a term of one to four years' imprisonment for the heroin conviction, and to a concurrent one-year term of imprisonment for the marijuana conviction. Defendant appeals as of right. We affirm.

I. Basic Facts And Procedural History

It was the prosecutor's theory in this case that defendant concealed the contraband drugs underneath the back seat of a patrol vehicle following his arrest for suspected auto theft. In support of that theory, Warren Police Officer David Geffert testified at trial that in mid-December, 1995, he and his partner, Officer Steven Mills, began their shift at 4:00 p.m. According to Officer Geffert, department policy required all officers to inspect the interior of their assigned vehicle at the beginning and end of each shift for contraband, weapons, or other items that may have been left by passengers. Pursuant to that policy, Officer Mills inspected the vehicle that had been assigned to him and Officer Geffert that day and found nothing inside it. At approximately 6:00 p.m., Officer Geffert and Officer Mills received a report regarding a stolen van. Soon thereafter, they observed defendant standing near the subject vehicle. The officers approached defendant, and Officer Mills conducted a quick patdown search for weapons. Officer Mills then placed defendant in the rear driver's side of the patrol vehicle,

without handcuffs, while the officers investigated the scene. After the officers completed their investigation, they handcuffed defendant and took him to the police station.

Officer Geffert testified that, upon arriving at the police station, the patrol vehicle was parked in a garage where it remained locked until they returned to it at the end of the shift at approximately 10:00 p.m. At that time, Officer Mills, again pursuant to departmental policy, searched the vehicle once more. When Officer Mills lifted the back seat, he found what Officer Geffert suspected to be a rock of cocaine the size of a golf ball, packets of heroin, and a bag of marijuana. Officer Mills found the items directly underneath the area where defendant had been sitting. Officer Geffert stated that defendant was the only individual placed in the back seat on the day in question. He further stated that the only way the contraband could have gotten into the patrol vehicle was if defendant put it underneath the seat with the hope that the police would not discover it.

Officer Mills' testimony essentially paralleled the testimony of Officer Geffert with respect to the discovery of the drugs. Officer Mills also confirmed that he conducted a patdown search of defendant for weapons at the scene. At that time, defendant was wearing a "very heavy" three-quarter length jacket with wool lining inside it. When asked why he did not find the drugs during the patdown, Officer Mills stated that the drugs must have been in the lining of defendant's coat and that he did not check there because he was only searching the areas where a weapon might be concealed. Officer Mills also testified that, before placing defendant back into the patrol vehicle, he searched the back seat and did not find anything. Officer Mills also stated that, during a subsequent search at the police station, he found a weight scale used to measure narcotics in the lining of defendant's coat and that this scale was not visible when Officer Mills conducted the patdown. Officer Mills also discovered a beeper and a motel key during the search at the station. On re-direct examination, Officer Mills stated that the seat did not have to be lifted in order to place an item under the seat because there was a gap between the seat and the underneath portion. He further stated that a person could place an object underneath the seat while sitting on it.

Warren Police Detective James Laraway testified that he was familiar with the difference between an individual's possession of narcotics for personal use and distribution and stated that a scale is a valuable tool for individuals intending to sell or purchase narcotics. He further stated that the scale found on defendant's person was commonly used because it could be carried and easily concealed. Detective Laraway opined that the amounts of cocaine, marijuana, and heroin found in the patrol vehicle were all consistent with an intent to sell or deliver and were not consistent with personal use. He specifically noted that the "exceptionally large amount of cocaine," the expense involved, and the individual packets of heroin were not consistent with personal use.

Thereafter, defense counsel moved for a directed verdict on grounds that the prosecutor failed to establish that defendant intended to deliver the narcotics in question. The trial court denied the motion. The prosecution then recalled Officer Mills who testified that after defendant was handcuffed and placed in the patrol vehicle a second time, defendant remained in the vehicle approximately fifteen to twenty minutes before being driven to the police station. Officer Mills reiterated that there was a crack or gap in the right rear side of the back seat of the patrol vehicle which led to the portion underneath the seat where the narcotics were found. Officer Mills testified that he had handcuffed

defendant across his back and stated that defendant's handcuffed hands were located directly over the gap in the seat. Officer Mills then stated that it would be possible for a person to move and reach into coat pockets while handcuffed and demonstrated, without objection, how it could be done.

The jury returned a verdict of guilty as charged of possession with intent to deliver less than fifty grams of cocaine, guilty to a lesser charge of possession of marijuana, and guilty of the less serious offense of possession of less than twenty-five grams of heroin.

## II. Standard Of Review

### A. Insufficient Evidence

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a reasonable jury could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). This Court should not interfere with the jury's role in determining the credibility of the witnesses or the weight of the evidence. *Wolfe, supra* at 514-515; *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993); *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

The denial of a motion for a new trial on the ground that the verdict is against the great weight of the evidence rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), overruled in part on other grounds, *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the great weight of the evidence. *DeLisle, supra*, 202 Mich App 661. Questions of witness credibility are, absent exceptional circumstances, for the jury and should not be disturbed by trial or appellate courts. *Id.*, 642; *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

### B. Prior Bad Acts Evidence

This Court reviews a trial court's decision regarding the admission of prior acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997). "Close questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Ordinarily, the trial court's decision on a close evidentiary question cannot be an abuse of discretion. *Id.*

Defendant objected to the trial court's decision to admit his prior conviction pursuant to MRE 404(b). Therefore, he preserved this issue for appellate review. MRE 103(a)(1); *People v Kilbourn*,

454 Mich 677, 685; 563 NW2d 669 (1997); *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997).

### C. Prosecutorial Misconduct

This Court reviews allegations of prosecutorial misconduct on a case by case basis. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997); *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court must examine the record and evaluate the alleged improper remarks in context. *Howard*, *supra* at 544. The test is whether the defendant was denied a fair and impartial trial. *Id.*

While defense counsel objected to the prosecutor's request to re-open his proofs, he did not object to the contested demonstration or to allegedly improper prosecutorial remarks. Absent an objection, this Court's review is precluded absent manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Defense counsel also failed to object to the allegedly improper prosecutorial comments and did not request a curative instruction. Therefore, appellate review is precluded unless the misconduct was so egregious that no curative instruction could have eliminated the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998); *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997).

### III. Insufficient Evidence

Defendant argues that the prosecutor presented insufficient evidence to support his convictions. In particular, defendant challenges the sufficiency of the evidence to establish that he possessed the controlled substances found underneath the back seat of the patrol vehicle following his arrest. All the crimes for which defendant was convicted required the prosecutor to prove that defendant knowingly possessed marijuana, heroin, and cocaine. *Wolfe*, *supra* at 516-517 (possession with intent to deliver less than fifty grams of cocaine); *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990) (possession of marijuana and possession of less than twenty-five grams of a controlled substance). A person may be convicted of possession of a controlled substance if he has either actual or constructive possession of it. *Wolfe*, *supra* at 519-520; *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). "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); *People v Fetterley*, *supra* at 515. Circumstantial evidence and reasonable inferences arising therefrom are sufficient to establish possession. *Id.*

Defendant asserts that there was insufficient evidence to establish that he possessed the controlled substances found in the patrol car because it was likely that either the officers did not inspect the vehicle prior to the shift as required or that other officers used the vehicle between the time defendant was brought to the station and the alleged search, creating the possibility that someone other than defendant placed the contraband there. However, "the prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence is presented." *Fetterley*, *supra* at 517. Viewed in a light

most favorable to the prosecution, the circumstantial evidence discussed above and the reasonable inferences arising therefrom were sufficient to support a finding that defendant possessed the controlled substances in question beyond a reasonable doubt.

Defendant also argues that there was insufficient evidence to support his conviction for possession with intent to deliver less than fifty grams of cocaine because the prosecutor presented no evidence to establish that defendant intended to deliver the cocaine. Actual delivery is not required to prove intent to deliver. *Wolfe, supra* at 524. An actor's intent may be inferred from all of the facts and circumstances and, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Fetterley, supra* at 517-518. Intent to deliver may be inferred from the quantity of narcotics, the manner in which the narcotics are packaged, and from other circumstances surrounding the arrest. *Wolfe, supra* at 524.

Here, there was testimony that the 7.22 grams of crack cocaine recovered could be divided into approximately seventy rocks for individual use, indicating that it was being held for sale rather than for personal use. The police also found a portable weight scale used to measure narcotics on defendant's person. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence from which the jury could conclude that the cocaine was not solely for defendant's personal use and that he intended to deliver it to others.

Defendant also contends that the verdict was against the great weight of the evidence because the only evidence suggesting defendant's guilt was elicited from two police officers who gave incredible and uncorroborated testimony at trial. A jury verdict may be vacated and a new trial granted only where the evidence "preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon, supra* at 627.

After a thorough review of the record, we hold that the trial court did not abuse its discretion by denying defendant's motion for a new trial based on the great weight of the evidence. As stated above, there was substantial circumstantial evidence to establish that defendant possessed the controlled substances in question and that he intended to deliver cocaine. Defendant correctly states that the verdict in this case depended heavily upon the credibility of two police officers; however, absent exceptional circumstances, the determination of witness credibility is exclusively the province of the jury and must stand even if the trial court would have reached a different conclusion. *Lemmon, supra* at 642-643; *DeLisle, supra* at 662. Here, the officers gave consistent and corroborating testimony at trial. At the conclusion of trial, the trial court instructed the jury at length on the issue of witness credibility. We therefore defer to the conclusion of the factfinders who were present in the court room to observe the testimony of the witnesses.

#### IV. Prior Bad Acts Evidence

Defendant asserts that the trial court abused its discretion in admitting his 1990 delivery of cocaine conviction under MRE 404(b). However, we conclude that the error, if any, in admitting this prior acts evidence was harmless. Even without considering defendant's prior conviction, the evidence of defendant's guilt was overwhelming. See *People v Mateo*, 453 Mich 203, 220 & n 21; 551 NW2d

891 (1996) (overwhelming evidence of guilt established that an error was harmless). Moreover, the trial court's lengthy limiting instruction regarding the prior acts evidence minimized any prejudice which may have resulted from the admission of the conviction.<sup>1</sup> A jury is generally presumed to follow the trial court's instructions. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). Accordingly, we conclude that it is highly probable that the admission of defendant's prior conviction did not contribute to the verdict. See *Crawford, supra* at 400; *People v Bone*, 230 Mich App 699, 703; 584 NW2d 760 (1998).

#### V. Prosecutorial Misconduct

Defendant contends that the prosecutor impermissibly shifted the burden of proof by remarking during his rebuttal argument that defendant could have produced the jacket he was wearing at the time he was arrested. After reviewing the prosecutor's comments in context, we find no manifest injustice. *Asevedo, supra*. The contested prosecutorial comments were no more than a response to defense counsel's repeated statements that the prosecutor's theory and subsequent demonstration were incredulous because a different jacket was used. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996) (otherwise improper comments may not require reversal if they address issues raised by defense counsel). To this end, the prosecutor asserted that defense counsel could have performed a demonstration with the proper jacket if he believed that the results would have been different. Further, the trial court's instruction that defendant need not prove his innocence or produce evidence dispelled any prejudice to defendant. *People v Dersa*, 42 Mich App 522, 524-525; 202 NW2d 334 (1972).

Defendant further argues that the trial court abused its discretion in allowing a police officer to conduct a demonstration to show how it would be possible for defendant to reach into his pockets and place the contraband under the seat of the patrol car while handcuffed. Defendant contends that this demonstrative evidence should not have been admitted because the coat used for the demonstration was not the same size, length, or style as the coat worn by defendant when he was arrested. We find no manifest injustice. *Asevedo, supra*. Here, defendant's ability to remove contraband from his coat pocket and place it through a gap in the back seat of the patrol vehicle while handcuffed was relevant to determine whether defendant possessed the drugs found in the patrol car. Although the same jacket was not used, the demonstration aided the jury in reaching a conclusion on a matter material to the case. In addition, the prejudicial effect, if any, in allowing the demonstration was minimal. Defense counsel had the opportunity, through cross-examination of the police officer, to create doubt regarding the prosecution's theory. Specifically, defense counsel elicited testimony that defendant's mobility was restricted in the back seat, that the coat used for the demonstration was different than the one defendant was wearing at the time of his arrest, and that it was possible that the location of the pockets on defendant's coat was different than the location of the pockets on the coat used in the demonstration. Moreover, during his closing argument, defense counsel vigorously argued that the demonstration was inaccurate and irrelevant because the jacket defendant was wearing was not used in the demonstration. Therefore, the jury was free to weigh the evidence and to find the prosecutor's

demonstration irrelevant. See *People v Stone*, 195 Mich App 600, 603-604; 491 NW2d 628 (1992). Accordingly, the demonstration did not result in manifest injustice.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

<sup>1</sup> The trial court specifically instructed the jury that the evidence was not to be used to show that defendant “is a bad person or that he is likely to commit crimes” and that the jury “must not convict the defendant here because you think he is guilty of other bad conduct.”