

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL L. HOWARD,

Defendant-Appellant.

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UNPUBLISHED

January 30, 2001

No. 214122

Wayne Circuit Court

LC Nos. 97-004716;

97-004718

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

The People charged defendant with two drug offenses in two separate cases and the trial court consolidated the cases for trial before a single jury. In lower court number 97-004716, the jury convicted defendant of possession of 650 or more grams of a mixture containing cocaine. MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i), and in lower court number 97-004718, the jury convicted defendant of possession of more than twenty-five, but less than fifty, grams of cocaine, MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv). The court sentenced defendant to a term of life imprisonment for the former conviction, and one to four years' imprisonment for the latter conviction, the sentences to be served consecutively. Defendant appeals as of right and we affirm.

Defendant argues that the prosecutor improperly urged the jury to consider as substantive evidence testimony that was admissible only for impeachment purposes. Defendant failed to object to the challenged testimony at trial, or to the prosecutor's remarks concerning that testimony during closing arguments. Because this issue was not preserved with an appropriate objection, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights, i.e., a clear or obvious error that affected the outcome of the trial. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Initially, because defendant did not object to the testimony at trial, it was not improper for the prosecutor to argue the substantive use of that evidence in closing arguments. *People v Maciejewski*, 68 Mich App 1, 3-4; 241 NW2d 736 (1976).

Defendant also says that, in lower court number 97-004716, the evidence was insufficient to prove that he possessed the cocaine. Accordingly, we must decide whether the prosecutor presented sufficient evidence to justify a rational trier of fact in finding the defendant guilty

beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id.* at 514-515.

To prove possession, proof of actual physical possession is unnecessary for a conviction. Rather, constructive possession is sufficient. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "The essential question is whether the defendant had dominion or control over the controlled substance." *Id.* "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe, supra* at 521. However, the mere presence of the defendant at a location where drugs are found is insufficient to establish constructive possession. *Id.* at 520. Circumstantial evidence and reasonable inferences drawn from the evidence can be sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Here, the cocaine in question was found in a basement bedroom of a house on Lindsay Street and there was sufficient circumstantial evidence linking defendant to that bedroom to enable the jury to find that defendant was in constructive possession of the cocaine. See *People v Echavarria*, 233 Mich App 356, 370-371; 592 NW2d 737 (1999); *Fetterley, supra* at 515-517.

Also, defendant alleges that the trial court erred in instructing the jury on aiding and abetting. Because defendant did not object to the court's aiding and abetting instruction at trial, this issue is not preserved. MCR 2.516(C); *People v Cooper*, 236 Mich App 643, 649; 601 NW2d 409 (1999). Regardless, a review of the record indicates that no error occurred. A court may instruct on aiding and abetting when there is evidence that "(1) more than one person was involved in committing a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998). The identity of the principal is not required to convict under an aiding and abetting theory, so long as the guilt of the principal is shown. *People v Wilson*, 196 Mich App 604, 611; 493 NW2d 471 (1992). Because the facts demonstrate that more than one person was involved in the possession, sale, and distribution of narcotics, the court properly instructed the jury on aiding and abetting. *Bartlett, supra* at 157-158; *People v Head*, 211 Mich App 205, 211-212; 535 NW2d 563 (1995).

Defendant failed to object to the trial court's admission of evidence of other bad acts or crimes and, therefore, we review this issue to determine whether there is plain error affecting defendant's substantial rights. *Carines, supra*. The evidence of defendant's drug-dealing activities was properly admitted as part of the res gestae of the charged crimes, the evidence was relevant to the issue of defendant's intent, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996); *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). Therefore, no plain error is apparent from the admission of this evidence. Further, the record does not support defendant's claim that the prosecutor improperly suggested that defendant was somehow involved in his brother's death.

Further, defendant claims that the prosecution violated his double jeopardy rights, US Const, Am V; Const 1963, art 1, § 15, by charging him with two separate crimes instead of a single crime involving possession of more than 650 grams of cocaine. We disagree.

The prosecutor was entitled to charge and try defendant for each act that constituted a separate crime. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993). Where two crimes are legally distinguishable on the basis of the facts relied upon for each, there is no double jeopardy violation. *People v Wynn*, 197 Mich App 509, 510; 496 NW2d 799 (1992). The intent behind MCL 333.7403; MSA 14.14(7403) is to punish the illegal possession of controlled substances. See *People v Green*, 196 Mich App 593, 595-596; 493 NW2d 478 (1992) (noting that § 7403 was intended to punish based upon two separate factors: (1) the amount of a controlled substance possessed; and (2) the type of controlled substance possessed). Where the facts show that the quantities of drugs are separately possessed, separate offenses are shown. Thus, in *People v Bartlett*, 197 Mich App 15, 17-18; 494 NW2d 776 (1992), this Court held that the double jeopardy protection against multiple punishments did not bar two convictions under § 7401 where the facts showed that two different deliveries were separately bargained and paid for, and both transactions occurred at different times. The Court concluded that each delivery constituted a separate offense. *Id.* at 18. See also *People v Hadley*, 199 Mich App 96, 103-104; 501 NW2d 219 (1993), *aff'd* 450 Mich 316 (1995).

Here, the facts reveal that defendant possessed separate quantities of cocaine at two separate locations. Under these circumstances, defendant was properly convicted of two separate possession offenses.

Additionally, defendant contends that the trial court erred in failing to instruct the jury on his alibi defense. We disagree. An alibi defense consists of testimony that places the defendant somewhere other than the scene of the crime. *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978). Thus, if the facts show that the defendant's presence was required at the time the crime occurred and the alibi defense is raised, the court must instruct on the defense. *People v Matthews*, 163 Mich App 244, 247-248; 413 NW2d 755 (1987). However, here, defendant's presence at the location where the drugs were found is not necessary to prove the elements of the offense. Because defendant's presence is not required, the defense of alibi was inapplicable and the trial court did not err in failing to instruct on that defense. *People v Lemons*, 454 Mich 234, 250; 562 NW2d 447 (1997). For these reasons, we also conclude that defense counsel was not ineffective for declining an alibi instruction. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Defendant further avers that the prosecutor made improper remarks during his closing and rebuttal arguments. However, because defendant did not object to the challenged remarks at trial, this issue is not preserved. Further, defendant has not demonstrated that the remarks amounted to plain error affecting his substantial rights. *Carines, supra*. The prosecutor did not improperly shift the burden of proof through his arguments on rebuttal, inasmuch as the challenged remarks were responsive to defense counsel's closing remarks. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Further, any error arising from the prosecutor's conduct of holding up a search warrant for the jury to observe and remarking that the warrant existed, even though the warrant itself was never admitted into evidence, does not merit reversal because there was substantial evidence that a warrant was legitimately issued.

The record does not support defendant's claim that the prosecutor improperly injected his personal opinion, nor did the prosecutor improperly vouch for the credibility of his witnesses.

*People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000). Finally, the prosecutor was free to argue to the jury that defendant was not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Also, defendant has not established plain error arising from the court's rereading to the jury of the instructions on aiding and abetting. *Cooper, supra*. Defendant does not sufficiently explain how the instruction was unbalanced. Furthermore, the court reminded the jury in those instructions that the burden of proof was on the prosecution. In addition, this Court has held that "[i]t is not an abuse of discretion for a trial court to fail to repeat instructions addressing areas not covered by a jury's specific request." *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998). Here, the court limited its instructions to only aiding and abetting because that was what the jury asked to hear.

Defendant also argues that he was improperly convicted in L Ct. No. 97-004718, because the information did not properly reflect the charge upon which he was convicted. However, where defendant was convicted of a necessarily lesser included offense, he was not prejudiced by the failure to specifically set forth that offense in the information. *People v Torres (On Remand)*, 222 Mich App 411, 416-417, 421-422; 564 NW2d 149 (1997); *People v Gridiron*, 185 Mich App 395, 400-401; 460 NW2d 908 (1990), conviction vacated on rehearing on other grounds 190 Mich App 366 (1991), modified in part on other grounds 439 Mich 880 (1991). See also MCL 768.32(2); MSA 28.1055(2).

To the extent defendant argues that the charge set forth in the information varied from the charge at the time of trial, we find that defendant was not prejudiced by the amendment. MCR 6.112(G); *People v Weathersby*, 204 Mich App 98, 103-104; 514 NW2d 493 (1994); MCL 767.76; MSA 28.1016. At the time of the preliminary examination, defense counsel acknowledged that the charge had been changed from one alleging delivery to one alleging possession with intent to deliver. Thus, defendant had proper notice of the charge against him in lower court number 97-004718.

Further, defendant claims that he was deprived of the effective assistance of counsel because counsel failed to address the foregoing errors. To warrant reversal due to ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied his right to a fair trial. *Pickens, supra* at 338. Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

While counsel may have erred in not properly preserving many of the foregoing issues, after reviewing the merits, we are satisfied that defendant has not identified any err that affected the result of the proceedings.

Affirmed.

/s/ Henry William Saad

/s/ Helene N. White

/s/ Joel P. Hoekstra