

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DORWIN C. SPIVEY,

Defendant-Appellant.

UNPUBLISHED

April 15, 2008

No. 276947

Wayne Circuit Court

LC No. 01-003441-01

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of 225 to 649 grams of cocaine, MCL 333.7403(2)(a)(ii), and third-degree fleeing and eluding, MCL 257.602a(3)(a). Because prosecutorial misconduct did not deny defendant a fair and impartial trial, the trial court did not err in instructing the jury, and the verdict was not against the great weight of the evidence, we affirm.

I

Defendant contends that the trial court abused its discretion when it denied his motions for a mistrial and a new trial based on allegations of prosecutorial misconduct, and, that the cumulative effect of prosecutorial misconduct denied him a fair and impartial trial. This Court reviews the decision of a trial court to deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). We also review the decision of a trial court to grant or deny a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). “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[.]” *Id.*, (internal citations omitted). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

In support of his argument defendant alleges that the prosecutor: willfully ignored a trial court evidentiary ruling; attempted to unfairly influence the jury; mischaracterized defendant’s trial testimony, improperly appealed to the jury’s civic duty to convict defendant in closing argument, and vouched for the credibility of the government’s witnesses. Some of defendant’s assigned errors are preserved, and some are unpreserved. Preserved allegations of prosecutorial misconduct are reviewed on a case-by-case basis, analyzing the prosecutor’s comments in view

of defense arguments and the evidence admitted at trial, to determine whether a defendant has been denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); see also, *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). In reviewing allegations of prosecutorial misconduct, “where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal.” *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: “(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant.” *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where “the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect(ed) the fairness, integrity or public reputation of judicial proceedings.” *Carines*, *supra* at 763 (internal quotations omitted).

We first address defendant’s contention that the prosecutor repeatedly violated the trial court’s ruling on a motion in limine precluding the prosecutor from eliciting testimony regarding drugs confiscated from a Detroit residence. In the trial court, defendant argued that although he visited the residence while it was under surveillance, there was an insufficient connection between defendant and the drugs recovered from the residence. The trial court agreed and granted defendant’s motion but only to the extent that the prosecutor was prohibited from questioning the witnesses regarding the drugs found at the residence. The trial court acknowledged that the raid crew was in the area conducting surveillance on the Detroit address and stated that the members of the raid crew could “testify as to what they do.”

On appeal, defendant argues that the prosecutor violated the motion in limine when she elicited testimony referring to a confidential informant. But our review of the record does not reveal that the prosecutor connected the confidential informant with the drugs seized from the residence. Instead, the testimony revealed only that a confidential informant was somehow involved in the case. The prosecutor did not seek prohibited testimony regarding cocaine recovered at the residence under surveillance with the attendant implication that defendant was connected in some way to that cocaine. The testimony fell squarely within the trial court’s ruling permitting testimony by the raid crew regarding “what they do.”

Defendant also claims that, contrary to the trial court’s ruling on defendant’s motion in limine, the prosecutor asked police officer Daniel Mitchell on redirect examination: “You and your crew confiscated other narcotics that day, didn’t you?” The prosecutor argues that no error occurred because she asked this question based on her belief that the defense had “opened the door” on cross-examination to testimony regarding drugs found at the Detroit address. No error occurred for two reasons. First, the prosecutor did not explore the circumstances under which the “other narcotics” were confiscated “that day,” and the jury had no concrete basis to connect those “other” narcotics with the Detroit address and defendant. And, in any event, the trial court eliminated any possible prejudicial effect by immediately striking the question sua sponte before Mitchell could answer. *Ackerman*, *supra* at 449.

Defendant next asserts that the prosecutor improperly referred to an audiotape used to refresh a witness's recollection. However, defendant fails to support this contention with any citation to legal authority. A party may not simply announce a position and leave it to the court to search for authority and develop arguments on the party's behalf. *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001). Nevertheless, material used to refresh recollection is not substantive evidence. *People v Favors*, 121 Mich App 98, 109; 328 NW2d 585 (1982). Though the witness's recollection does constitute substantive evidence, the material used to refresh the recollection is not. *Id.*

Defendant also presents an unpreserved argument that the prosecution improperly displayed two boxes confiscated in the raid at the Detroit address in the courtroom. Defendant did not object to the presence of the boxes at trial. In fact, defendant cross-examined Detroit Police Officer John Hall with regard to whether Hall had any personal knowledge regarding the boxes. Defense counsel even attempted to use the boxes to defendant's advantage, eliciting testimony regarding a box of audio equipment recovered from defendant's trunk. Defendant fails to explain how the presence of the boxes was unfairly prejudicial. That two boxes of audio equipment were confiscated from the Detroit residence is entirely consistent with defendant's theory that the reason for his visit to the house was solely for the purchase of audio equipment. Because the record does not demonstrate that this alleged error resulted in a miscarriage of justice, reversal is not warranted in this unpreserved allegation of prosecutorial misconduct. *Carines, supra* at 752-753.

Next, defendant argues that the prosecutor mischaracterized the evidence during her cross-examination of defendant when she asked him: "You're saying nobody in your car threw that cocaine in the curb, right?" The trial court immediately provided the following corrective instruction: "His testimony was, and if you want the jurors to correct you also, is that he never saw the cocaine in the car." When analyzed in context, although the trial court perceived a difference between what the prosecutor asked and what the trial court believed defendant stated, the prosecutor's question was not sufficiently prejudicial to defendant to deny him a fair trial. Further, because the trial court eliminated any possible prejudice with a timely instruction, reversal is not required. *Ackerman, supra* at 449.

Defendant asserts that the prosecutor's cross-examination of him was overzealous and otherwise disrespectful. Defendant alleges that the prosecutor gave the jury non-verbal cues that were "improper" and "derogatory." Once again, defendant fails to cite any authority to support his contention that this constituted prosecutorial misconduct warranting reversal; therefore, defendant has waived the argument. *Kevorkian, supra* at 388-389. Nevertheless, even if the prosecutor's remarks were arguably impolite, the trial court eliminated any possible prejudice to defendant with timely instructions on defendant's request, and reversal is not required. *Ackerman, supra* at 449. A prosecutor is not required to present her arguments using only the blandest terms possible. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004).

Defendant next argues that the prosecutor improperly vouched for the truthfulness of the prosecution's witness during closing argument. It constitutes improper argument for a prosecutor to vouch for a witness's credibility in order to imply that the prosecutor is privy to "special knowledge" that the witness is telling the truth. *Bahoda, supra* at 276. Here, the prosecutor stated during closing argument that, "I'm going to tell you what you saw here, suggest to you, is two police officers trying very hard to tell the truth of what they saw." This

statement did not imply that the government had special knowledge. Rather, the prosecutor argued that the two officers were credible witnesses and their testimony was worthy of belief. Defendant's argument is without merit.

Defendant's next argument involves the propriety of the prosecutor's statement regarding the legality of defendant's arrest. Specifically, defendant contends that the prosecutor improperly argued that the jury should not consider whether defendant was legally arrested because "we would not be here if a judge had not already decided that." A prosecutor may not invite the jury to abdicate its role as fact-finder and defer to the conclusions reached by the prosecutor and the police. See *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, once again, defendant failed to support the assertion that this prosecutorial comment warrants reversal with any citation to authority. *Kevorkian*, *supra* at 388-389. In any event, the prosecutor's statement did not invite the jury "to suspend its own powers of critical analysis and judgment in deference to those of the police and the prosecutor." *People v Humphreys*, 24 Mich App 411, 418; 180 NW2d 328 (1970). Defendant's argument that the prosecutorial comment regarding his arrest deprived defendant of a fair and impartial trial fails.

Defendant advances the unpreserved argument that the prosecutor improperly appealed to the jurors' civic duty to convict defendant during her closing argument. Prosecutors may not "resort to civic duty arguments that appeal to the fears and prejudices of jury members." *Bahoda*, *supra* at 282. Although defendant attempts to argue that the prosecution appealed to the jurors to solve the societal problem of drugs by convicting defendant, defendant does not explain how his conviction could alleviate the problem of society at large. A thorough review of the record reveals the prosecutor did not improperly appeal to the jurors to convict defendant regardless of the evidence as a part of their civic duty. Defendant forfeited this unpreserved argument under the plain error rule. *Carines*, *supra* at 752-753.

Finally, defendant argues that the cumulative effect of the alleged prosecutorial misconduct, when considered in the aggregate, denied him a fair, impartial trial and necessitates reversal. However, "only actual errors are aggregated to determine their cumulative effect." *People v LeBlanc*, 465 Mich 575, 592 n 12; 640 NW2d 246 (2002). Because defendant failed to establish that the prosecutor committed misconduct, there are no errors to aggregate, and there can be no cumulative effect. And, because all of defendant's allegations of prosecutorial misconduct lack merit, the trial did not abuse its discretion in denying defendant's motion for a new trial.

II

Next, defendant argues that the trial court erred in instructing the jury on the lesser-included offense of possession of between 225 and 649 grams of cocaine and on the prosecution's aiding and abetting theory, and abused its discretion in declining to instruct the jury on the concept of "lawful arrest." Challenges to jury instructions are reviewed on appeal de novo. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). However, this Court reviews a trial court's determination that an instruction was applicable under the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The jury instructions are reviewed in their entirety and as a whole to determine whether error warranting reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Pursuant to MCL 769.26, review of defendant's challenge to the jury instructions is limited:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Jury instructions “must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence.” *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). As a general rule, jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 221 (1998). Where a correct and incorrect jury instruction is given, this Court presumes that the jury followed the incorrect instruction. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995).

A jury may convict a defendant of a degree of an offense inferior to that charged in the indictment, or of an attempt to commit that offense. MCL 768.32(1); *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). If a charged greater offense requires the jury to find a disputed factual element, which is not part of the lesser-included offense, and a rational view of the evidence supports the instruction, a requested instruction on a necessarily included lesser offense is proper. *Smith, supra* at 69. The evidence must justify a jury instruction on a lesser-included offense in order to be supported by “a rational view of the evidence.” *People v Martin*, 271 Mich App 280, 289; 721 NW2d 815 (2006). Proof on an element differentiating the two crimes must be in dispute sufficiently to allow the jury to consistently find the defendant not guilty of the charged offense but guilty of the lesser offense. *Id.*

Possession of between 225 and 649 grams of cocaine is a necessarily included lesser offense of possession with intent to deliver between 225 and 649 grams of cocaine. See, by analogy, *People v Torres*, 222 Mich App 411, 416-417; 564 NW2d 149 (1997) (holding that “possession of more than 650 grams of cocaine has been considered to be a necessarily included lesser offense of possession with intent to deliver that amount of cocaine, because the only distinguishing characteristic is the additional element of the intent to deliver.”) Further, the trial court’s instruction on possession of cocaine was supported by a rational view of the evidence. Here, there was evidence that defendant was driving a 2001 Mercury Sable, defendant had a passenger, defendant fled the police, and during the chase, an object emerged from the passenger window soon after defendant made a “throwing motion.” Police recovered the objects later determined to contain cocaine weighing a total of 248.67 grams. Because a rational view of the evidence justified a jury instruction on possession of between 225 and 649 grams of cocaine, the instruction on the necessarily lesser-included offense was proper.

Likewise, the trial court properly delivered the aiding and abetting instruction requested by the prosecution. Evidence adduced at trial demonstrated that the cocaine was thrown from the passenger window of the Sable. Together with the testimony that defendant was the driver of the Sable and “Sean”¹ was the passenger, and defendant drove the Sable away at a high rate of speed

¹ The record does not show that defendant’s passenger, “Sean,” was apprehended for his alleged role in this incident.

after being stopped by the police officers, a rational view of the evidence supports the theory that defendant possessed the cocaine or assisted Sean in possession of the cocaine. Accordingly, the trial court did not erroneously deliver an instruction on the prosecution's aiding and abetting theory.

The trial court did not improperly decline to instruct the jury on what constitutes lawful arrest with regard to the third-degree fleeing and eluding charge. The trial court addressed all of the elements of third-degree fleeing and eluding when it instructed the jury. With specific regard to the first element, the trial court instructed: "First, that a police officer was in uniform and was performing his lawful duties and that the vehicle was marked as a law enforcement vehicle." Jurors are presumed to have followed their instructions. *Graves, supra* at 486. Defendant has not shown that the jury was misled when the trial court instructed it to decide whether the police officers were performing their lawful duties at the traffic stop. Further, the jury may have been confused by the instruction on lawful arrest because lawful arrest is not an element of third-degree fleeing and eluding. See *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999).

Moreover, a traffic stop is different than an arrest, which would have compounded the danger of jury confusion had it been instructed on the concept of legal arrest. See *People v Williams*, 472 Mich 308, 316; 696 NW2d 636 (2005). Although defendant argued that there was an insufficient legal basis for the traffic stop, the record does not show defendant actually contested the legality of his arrest. Because the jury was properly instructed on all of the elements of third-degree fleeing and eluding, and because a rational view of the evidence would not support the instruction on lawful arrest, the trial court did not erroneously decline defendant's request for a jury instruction on lawful arrest.

Because it does not affirmatively appear on the record that the jury instructions resulted in a miscarriage of justice, reversal is not warranted. MCL 769.26.

III

Defendant argues that the verdict was against the great weight of the evidence. Because a challenge to the great weight of the evidence requires an examination of the entire body of proofs, this Court must also determine whether the evidence preponderates so heavily against the verdict that allowing it to stand would result in a miscarriage of justice. *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998); *People v Gadomski*, 232 MichApp 24, 28; 592 NW2d 75 (1998). "[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). This Court reviews the decision of a trial court to deny a motion for a new trial for an abuse of discretion. *Cress, supra* at 691. Where the verdict is against the great weight of the evidence, a new trial may be granted on some or all of the issues. MCR 2.611(A)(1)(e). Where credibility is at issue, and conflicts in the evidence exist, the question of credibility is for the fact-finder to decide. *Lemmon, supra* at 642-643. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 647. Reversal is necessary only where the testimony is "inherently implausible" to the extent that it "contradicts indisputable physical facts or law." *Id.*

According to defendant, the favorable results of a post-conviction polygraph examination prove that the verdict was contrary to the great weight of the evidence. However, defendant

offers the results of his own polygraph examination, and not that of a newly discovered witness. Michigan courts have long held that a defendant's own polygraph test results are not properly considered on a motion for a new trial "because it serves only to in effect duplicate evidence the jury has already heard." *People v Barbara*, 400 Mich 352, 363 n 2; 255 NW2d 171 (1977). A trial court may, under limited circumstances, consider polygraph examination results when ruling on a motion for a new trial grounded on newly discovered evidence. *People v Cress*, 250 Mich App 110; 135-136; 645 NW2d 669 (2002), rev'd in part on other gds 468 Mich 678 (2003). Here, defendant offered the results of his polygraph examination only to support his general position "that what we have here is in fact a miscarriage of justice." And he does not offer any legal support for his contention that the polygraph results should substitute for the jury verdict in this case. Because defendant failed to legally support his argument that the polygraph results establish that defendant was actually innocent and thereby entitled to appellate relief, his argument fails on this ground. *Kevorkian, supra* at 388-389.

In any event, there was evidence in this case to support each element of possession of between 225 and 649 grams of cocaine. The elements of possession of between 225 and 649 grams of cocaine are: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing more than 225 grams, but less than 650 grams, (3) defendant was not authorized to possess the mixture, and (4) that defendant knowingly possessed the cocaine. MCL 333.7403(2)(a)(ii). In a criminal case, the trier of fact may infer the element of intent from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987).

Detroit Police Lieutenant Arthur MacNamara, the driver of the raid van, testified that his van was positioned directly behind and slightly above the Sable during the pursuit, he was able to observe defendant making a throwing motion, and he saw the softball-sized objects resembling a white towel come out of the passenger window of the Sable. Mitchell, who occupied the passenger seat of the raid van, recovered the objects later determined to contain cocaine weighing a total of 248.67 grams. Although defendant denied ever seeing any cocaine in his car, credibility of the witnesses is within the province of the trier of fact, and that the jury believed the police officers and not defendant does not demonstrate that the verdict was contrary to the great weight of the evidence. *Lemmon, supra* at 642-643, 647.

Defendant only addresses the "incredible" nature of the testimony regarding the possession of between 225 and 649 grams of cocaine charge, and does not argue that his third-degree fleeing and eluding conviction was against the great weight of the evidence. A review of the entire record does not persuade us that the verdict was against the great weight of the evidence. Contrary to defendant's argument, the testimony of the police officer that witnessed defendant making a throwing motion, and then saw packages emerge from the passenger window of the Sable that was later confirmed to be cocaine, was neither inherently implausible, nor does it "contradict[] indisputable physical facts or law." *Lemmon, supra* at 647.

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis