

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 21, 2012

v

ALFONZO ANTWON JOHNSON,
Defendant-Appellant.

No. 304273
Monroe Circuit Court
LC No. 06-035599-FH

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant Alfonzo Antwon Johnson appeals as of right his jury trial conviction for delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv).¹ The trial court sentenced Johnson as a fourth habitual offender, MCL 769.12, to three to 30 years' imprisonment for this conviction. We affirm.

Johnson first challenges his conviction based on insufficiency of the evidence. In particular, Johnson takes issue with the prosecution's failure to submit any concrete or objective forensic evidence at trial demonstrating his guilt. We review de novo questions pertaining to the sufficiency of the evidence. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "This Court will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). In addition, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The elements comprising the delivery of less than 50 grams of a controlled substance include: (a) delivery of a controlled substance and (b) that the controlled substance was of an

¹ The trial court also convicted Johnson of criminal contempt of court at his sentencing hearing but he does not challenge this conviction on appeal.

amount constituting less than 50 grams. *People v Schultz*, 246 Mich App 695, 703-704; 635 NW2d 491 (2001). In turn, the term “deliver” or “delivery” has been defined as constituting “the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there was an agency relationship.” *Id.*, quoting MCL 333.7105(1). “[T]ransfer is the element which distinguishes delivery from possession.” *Schultz*, 246 Mich App at 703 (citation, internal quotations, and emphasis omitted). It is “well settled that the act of transferring a controlled substance is sufficient to sustain a finding of an actual delivery.” *Id.* at 704 (citations and internal quotations omitted). In challenging the sufficiency of the evidence to sustain his conviction, Johnson does not contest that the controlled substance was cocaine or the amount of the substance involved.

The individual involved in the purchase of the cocaine from Johnson was his neighbor, Ronald Salkey. Allegedly, Salkey suspected Johnson of having stolen a stereo from Salkey’s apartment and was aware that drugs were being sold from Johnson’s apartment. Salkey informed police that he had arranged to purchase cocaine from Johnson. Officer Jason Flora searched Salkey to ensure that he did not have any monies or drugs on his person immediately before the purchase. Officer Flora also provided Salkey with specially designated funds to effectuate the purchase. Officer Flora and other officers observed Salkey enter into the apartment building and one of the officers watched Salkey enter one of the apartments. Shortly thereafter, the officers observed Salkey exit the apartment building and proceed directly to Officer Flora’s vehicle. Salkey reported that he exchanged the provided funds for a bag of cocaine, which Salkey gave to Officer Flora, who immediately sealed it into an evidence bag. Officer Flora also searched Salkey twice after he exited the apartment building to ensure that he had no other funds or drugs on his person.

Johnson’s challenge to the sufficiency of the evidence is two-fold. Johnson suggests that the evidence is insufficient because it is circumstantial since none of the police officers actually observed Salkey directly engage in the drug transaction with Johnson or had sight of Salkey from the time he left the apartment until he exited the building. Contrary to Johnson’s assertion, the evidence more than sufficiently links him to the cocaine that Salkey gave to Officer Flora. Officers ensured that Salkey had no controlled substances on his person or any funds other than those that the police specifically provided to him to effectuate the purchase of the controlled substance. An officer observed Salkey enter into the apartment. While officers may not have directly observed Salkey from the moment he exited the apartment until he left the building, they did observe him return directly to Officer Flora and was subject to an additional search of his person. All of this transpired within a relatively short time frame. This Court has previously “unhesitatingly reject[ed a] defendant’s suggestion that a prosecutor may only establish delivery of a controlled substance if a police officer directly views an illegal narcotics exchange” *People v Williams*, 294 Mich App 461, 472; 811 NW2d 88 (2011). In the circumstances of this case, sufficient circumstantial evidence existed to sustain Johnson’s conviction.

In challenging the sufficiency of the evidence, Johnson also takes issue with Salkey’s credibility and the testimony he provided at trial, asserting that Salkey had an ulterior motive for contacting police and participating in this transaction. “This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Specifically, “[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the

evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Consequently, the evidence submitted in conjunction with the reasonable inferences drawn therefrom, viewed in the light most favorable to the prosecution, is sufficient to sustain Johnson’s conviction.

Johnson next contests the trial court’s use of the standard jury instruction pertaining to reasonable doubt rather than the proffered versions he submitted, which he asserts were more specific and informative. This Court reviews de novo issues of law arising from jury instructions, but this Court reviews for an abuse of discretion a trial court’s decision whether to provide an instruction. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

The trial court’s use of CJI2d 3.2, the standard jury instruction on reasonable doubt, did not comprise error. The trial court provided the standard instruction verbatim. “This standard jury instruction has repeatedly been held to adequately convey the concepts of reasonable doubt, the presumption of innocence, and the burden of proof.” *People v Hill*, 257 Mich App 126, 151; 667 NW2d 78 (2003). As such, reversal is not warranted.

Johnson also contends several instances of prosecutorial misconduct involving (a) improper voir dire, (b) elicitation of hearsay evidence, (c) engaging in an improper “civic duty” argument, and (d) arguing facts not in evidence during closing. We review Johnson’s allegations of prosecutorial misconduct for plain error affecting substantial rights because Johnson failed to properly preserve these claims by objecting to the statements in the trial court. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is warranted “only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error ‘seriously affected the fairness, integrity, or public reputation of judicial proceedings,’ regardless of his innocence.” *Id.* at 454 (citation omitted). “[W]e consider issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant’s arguments.” *Id.*

Johnson first asserts that the prosecutor engaged in misconduct when, during voir dire, he questioned the prospective jurors whether they could consider a police officer’s training and background as a component of the officer’s credibility. “The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury.” *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). “[T]here is no right to any specific procedure for engaging in voir dire. There is simply a right to a jury whose fairness and impartiality are assured by procedures generally within the discretion of the trial court.” *People v Sawyer*, 215 Mich App 183, 191; 545 NW2d 6 (1996).

Because three of the prosecution’s primary witnesses at trial were police officers, the prosecutor sought during voir dire to ascertain whether any of the possible jury members held any bias against police officers. Such an inquiry does not exceed the permissible scope of voir dire and was not improper because it did not imply or suggest how potential jurors should gauge the credibility of such witnesses.

Johnson also asserts that the prosecutor engaged in misconduct by eliciting improper hearsay testimony from Salkey regarding comments by other residents of the apartment complex and his conversations with police. Although Johnson asserts this issue solely in the context of

prosecutorial misconduct, we initially analyze whether the trial court abused its discretion by permitting the prosecutor to present allegedly impermissible hearsay. Hearsay is defined as “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Hearsay is deemed to be inadmissible at trial unless there is a specific exception permitting its introduction. MRE 801; MRE 802. In this instance, the elicited testimony was not proffered to prove the truth of the matter asserted, i.e., that Johnson was a drug dealer. Rather, the testimony served as background information to provide the jury with a context for the events that occurred and to explain how police were made aware of Johnson’s activities and Salkey’s involvement. Further, it has been consistently recognized that, “prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence.” *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A “prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant.” *Id.* at 660-661. Johnson has failed to establish either bad-faith by the prosecutor in the elicitation of this testimony or that he was prejudiced by its admission. Consequently, Johnson’s assertion of error cannot be sustained.

We similarly reject Johnson’s contention of error regarding the elicitation and admission of this testimony based on undue prejudice in violation of MRE 403 and MRE 404b. MRE 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” This rule only excludes evidence that is deemed unfairly prejudicial. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Unfair prejudice is found to exist when there is a tendency for a jury to give the evidence undue or preemptive weight, or when it would be inequitable to permit the evidence to be used. *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Johnson suggests that permitting Salkey to testify regarding statements by other individuals not called as witnesses served to improperly bolster Salkey’s credibility to the jury. Again, the contested testimony did not comprise hearsay because it was not proffered to demonstrate the truth of the matter asserted but merely served to place in context events and explain to the jury how Johnson came to the attention of police. Johnson provides no evidence to support his contention that the jury gave these statements undue or preemptive weight.

Johnson further asserts that admission of this testimony violated MRE 404(b) because it comprised evidence of “other bad acts” and led the jury to infer that he was a “bad person.” Contrary to Johnson’s contention, this evidence was admissible as part of the *res gestae* of the offense and was independent of MRE 404(b). *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). “Evidence of other criminal acts is admissible when so blended or connected with the crime of which [the] defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.” *Sholl*, 453 Mich at 742 (citation and internal quotations omitted). In the circumstances of this case, the testimony was relevant to the reasons for Salkey’s involvement and the actions of police in the delivery of the cocaine and, therefore, admissible pursuant to MRE 401 and MRE 402, independent of MRE 404(b).

Challenging the admission of this testimony, Johnson argues that allowing Salkey to repeat statements or information he obtained from unidentified individuals who were not

produced as witnesses at trial violated his constitutional right to confrontation. Again, as the contested testimony was admitted for a non-hearsay purpose, no violation of Johnson's right to confrontation occurred. "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 10-11; see also *Crawford*, 541 US at 59. "[A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Chambers*, 277 Mich App at 11. Salkey's testimony was not offered to establish the truth of the statements, i.e., to prove that Johnson was involved in the sale and delivery of illegal substances. Rather, the statements merely provided a context to understand the course of action that led to the police arresting Johnson. See *id.* We further note that Johnson fails, in his appellate brief, to fully explicate his reasoning on this issue. A defendant may not simply claim error or announce a position and then leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (citation omitted).

Johnson additionally contends that the prosecutor engaged in an improper "civic duty" argument seeking to evoke jury sympathy. In general,

prosecutors are accorded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case. Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinion of a defendant's guilt and must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal. [*People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995) (internal citations and quotation marks omitted).]

Johnson, however, misconstrues what constitutes an improper "civic duty" argument. An improper civic duty argument typically occurs when a prosecutor urges jurors to convict a defendant as part of the "civic duty" of the members of the jury. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). In this instance, during closing argument, the prosecutor referenced civic duty in the context of discussing testimony elicited from Salkey pertaining to his motivation for becoming involved in this matter and reporting Johnson's conduct to police. As such, the statements did not serve to "unfairly encourage[] jurors not to make reasoned judgments." *Id.* at 273. In addition, because prosecutors are permitted to "free[ly] argue the evidence and any reasonable inferences that may arise from the evidence[.]" *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003), it did not constitute misconduct for the prosecutor to engage in the challenged statement as it conformed to testimony elicited at trial.

In conjunction with his allegations of prosecutorial misconduct, Johnson finally asserts that the prosecutor improperly indicated to the jury that Salkey had not received anything in exchange for his trial testimony. Specifically, Johnson contends that this statement constituted an impermissible inference from Salkey's testimony that he received "nothing of value" for testifying at trial. As noted previously, "[a] prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman*, 257 Mich App at 450. "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Salkey indicated at trial that he had not received anything "of value" in exchange for his testimony. It was a reasonable inference, on behalf of the prosecutor, to indicate that Salkey had not received *anything* for testifying. This comment could also be construed as a permissible emphasis by the prosecutor on the credibility of his own witness. *Thomas*, 260 Mich App at 455. Regardless, even if we were to deem the prosecutor's comment to be improper, Johnson would not be entitled to relief because a timely curative instruction could have served to dispel any potential prejudice caused by the statement. *People v Unger (On Remand)*, 278 Mich App 210, 238; 749 NW2d 272 (2008).

Johnson contends that the cumulative effect of the errors he alleged pertaining to prosecutorial misconduct resulted in a denial of his right to a fair trial and precludes application of a "harmless error" standard. While "[i]t is true that the cumulative effect of several minor errors may warrant reversal where the individual errors would not[.]" *id.* at 258 (citation and internal quotations omitted), because we find no errors to aggregate Johnson's claim cannot be sustained.

Johnson's next claim of error involves the filing of an amended supplemental information and whether the trial court entered an order permitting such amendment. "A trial court may amend the information at any time before, during, or after trial in order to cure a variance between the information and the proofs as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H).

The prosecution timely filed the original information on September 28, 2006. The same day, the prosecution filed a supplemental information, which provided notice of the prosecutor's intent to seek a sentencing enhancement premised on Johnson's status as a fourth habitual offender. The trial court arraigned Johnson on October 13, 2006. On February 23, 2007, the prosecutor filed a motion seeking to amend the supplemental information based on a realization that the dates and convictions listed pertaining to sentencing enhancement were incorrect. Counsel for Johnson objected. While the lower court record fails to include an order permitting the filing of the amended supplemental information, the document was filed with the lower court on March 1, 2007. It is relevant to note that the criminal charge for the instant offense remained consistent on all three versions of the information. In addition, both the supplemental information and the amended supplemental information indicated that the prosecutor was seeking sentencing enhancement premised on Johnson's status as a fourth habitual offender. The only difference in these two documents was the correction of Johnson's prior arrest dates and offenses.

Johnson contends that he should not have been sentenced as a fourth habitual offender because the prosecutor's notice in terms of the amended supplemental information was untimely and not in compliance with MCL 769.13, which provides in relevant part:

(1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

(2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

Notably, MCL 769.13(2) provides: "A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement." Because the prosecutor need only list convictions that "may be" relied upon, our Legislature has provided the prosecutor a certain amount of leeway in the accuracy of the notice. This Court has previously indicated that the purpose of the notice is merely to inform a defendant that the prosecutor intends to seek sentencing enhancement. See *People v Manning*, 163 Mich App 641, 644; 415 NW2d 1 (1987), overruled in part on other grounds *People v Bailey*, 483 Mich 905 (2009). The prosecutor's notice is not deemed to be "evidence" of a defendant's status, as MCL 769.13(5) provides:

The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

- (a) A copy of a judgment of conviction.
- (b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
- (c) A copy of a court register of actions.
- (d) Information contained in a presentence report.
- (e) A statement of the defendant.

Case law precludes the prosecutor from filing an initial notice and then seeking to amend the notice to increase the level of sentencing enhancement. *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997); see *People v Hornsby*, 251 Mich App 462, 469-473; 650 NW2d 700 (2002). We find the instant case to be analogous to *Manning*, where this Court determined that the trial court did not err in allowing the prosecutor to file an amended information that corrected the convictions underlying the defendant's status as a fourth habitual offender. *Manning*, 163 Mich App at 644-645. Similar to the *Manning* defendant, Johnson was given sufficient notice of the prosecutor's intent to seek sentencing enhancement, satisfying the primary purpose of MCL 769.13(2). Consequently, we find no error.

Johnson's assertion of error on this issue is also premised on the absence of an order from the trial court permitting the amended supplemental information. Johnson does not dispute that the supplemental information provided notice that the prosecutor was seeking sentencing enhancement based on his status as a fourth habitual offender. He acknowledges that the prosecutor brought a motion before the trial court, to which Johnson objected, indicating the necessity of correcting inaccurate prior convictions that were listed in the supplemental information. Johnson does not contend that the amended supplemental information served to, in any manner, increase his potential sentencing consequences. In effect, Johnson is placing form over substance as correct procedures were followed, notice was received, and the statutory requirements were not violated. This Court has previously rejected a similar argument pertaining to a prosecutor's failure to file a proof of service in conjunction with a notice of intent to seeking sentencing enhancement. See *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999). The *Walker* Court determined "reversal [was] not warranted on a basis of this issue because any error was harmless beyond a reasonable doubt." *Id.* Similar to the factual circumstances of *Walker*, Johnson "makes no claim that he did not receive the notice of intent to enhance" but "simply contends that the [order permitting amendment of the supplemental information] was not filed with the lower court. If true, this in no way prejudiced defendant's ability to respond to the habitual offender charge." *Id.* at 314-315. Specifically, a prosecutor's failure to strictly follow the statute does not necessarily offend due process, if in fact a defendant has received actual notice. *Id.* at 315.

We further note that, for purposes of sentencing enhancement, the court had to determine the existence of Johnson's prior convictions at the sentencing hearing. MCL 769.13(5); *People v Green*, 228 Mich App 684, 698-699; 580 NW2d 444 (1998). At the sentencing in this matter, Johnson's attorney and the trial court referenced his status as a fourth habitual offender on the basis of offenses enumerated in the presentence investigation report (PSIR). Johnson did not object to the underlying offenses as contained in the PSIR. Because the trial court had sufficient evidence to sentence Johnson as a fourth habitual offender, there was no error in sentencing or prejudice to Johnson. Because Johnson has failed to demonstrate lack of notice, surprise, or prejudice, his contention that resentencing with removal of his fourth habitual offender status is required is unavailing. Similarly, his contentions pertaining to the proportionality of his sentence are rendered moot. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

As his final issue on appeal, Johnson asserts ineffective assistance of counsel. A claim of ineffective assistance of counsel must be raised by a motion for new trial or an evidentiary hearing in accordance with *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Because Johnson failed to seek a new trial or evidentiary hearing, our review of this claim is based on the existing record. *Rodriguez*, 251 Mich App at 38.

First and foremost, Johnson fails to specify what actions or omissions by his defense counsel at trial constituted deficient performance. As discussed in conjunction with Johnson's assertion of error regarding violation of his right to confrontation, we note that a defendant may not simply claim error or announce a position and then leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Kevorkian*, 248 Mich App at 389 (citation omitted). We further observe that "trial counsel is not ineffective when failing to make objections that are lacking in merit." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Based on our conclusion that the prosecutor did not engage in misconduct, the permissibility of enhancement of Johnson's sentence, and our affirmation of the trial court's rulings, Johnson's claim of ineffective assistance must fail.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan