

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SIMON CARUS-WILSON,

Defendant-Appellant.

UNPUBLISHED

October 14, 2003

No. 240752

Oakland Circuit Court

LC No. 99-165996-FH

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for manufacturing twenty or more, but less than two hundred, marijuana plants. MCL 333.7401(2)(d)(ii). We affirm.

Defendant first argues that the trial court erred when it failed to grant his motion for a mistrial. The denial of a motion for a mistrial is reviewed for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). “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.*, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

One of the detectives testified that, when he was in the house during the execution of the search warrant, he observed a hole in the floor of the bathroom located above the “grow rooms” in the basement. On cross-examination, defense counsel questioned the detective about the location of the hole in the bathroom floor. During this questioning, defense counsel indicated that the defense took pictures which showed that the hole was not above the “grow rooms”, but was over the laundry area located in the basement. The prosecutor objected, stating:

Objection, your Honor. He’s trying to submit facts that are not in evidence. There’s no picture, and if he wants to talk about it, then put his client on the stand.

A bench conference was immediately held, and defendant later moved for a mistrial outside of the presence of the jury. The trial court denied the motion, ruling that, although the prosecutor’s inadvertent statement was improper, prejudice was not affirmatively demonstrated. The trial court noted that the prosecutor’s comment related to an irrelevant collateral issue about the location of a hole in the floor, that defendant was not denied a fair trial, and that a curative instruction would be appropriate to cure any prejudice. A curative instruction, reminding the

jury that the prosecutor had the burden of proof and defendant did not, was given. After defendant was convicted, he renewed his motion for mistrial based on the comment. The trial court again denied the motion.

A prosecutor may not comment on a defendant's failure to testify or present evidence. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). Here, however, the trial court did not abuse its discretion in denying the motion for a mistrial based on the challenged statement. The prosecutor's brief, isolated, and improper comment was made during an objection related to a collateral matter. It did not impair defendant's right to a fair trial and does not require reversal. Preserved, constitutional errors that do not constitute structural defects do not automatically require reversal. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). Rather, they are reviewed to determine if the error was harmless beyond a reasonable doubt. *Id.* An error is harmless beyond a reasonable doubt if the beneficiary of the error proves, and this Court determines, that there was no reasonable possibility that the error contributed to the conviction. *Id.* The error must be assessed in the context of the other evidence presented at trial. *Id.*

In this case, there is no reasonable possibility that the error contributed to defendant's conviction. The evidence that defendant and his wife were manufacturing marijuana in their basement was overwhelming and included that (1) the home raided by the police belonged to defendant and his wife, (2) the smell of marijuana permeated the home, (3) an elaborate and sophisticated marijuana manufacturing operation was set up and was functioning in the basement, (4) thirty-nine plants were confiscated and all of the tested plants were positively identified as marijuana plants, (5) marijuana manufacturing magazines were found in the home, and (6) defendant's wife admitted that the plants were for her and defendant's personal use. In addition to the overwhelming evidence, the jury was given a cautionary instruction after defendant moved for a mistrial. Another burden of proof instruction was later given to the jury before it retired to deliberate. Under the circumstances, the trial court did not abuse its discretion in denying the motion for a mistrial based on the prosecutor's improper comment.

Next, defendant argues that the trial court erred in permitting a police detective to opine that defendant was guilty of manufacturing marijuana. The detective was qualified by the trial court as an expert in narcotics enforcement and the manufacturing of marijuana.¹ Over objection, the detective testified that he believed that defendant was involved in the manufacturing of the marijuana. After further prodding by the prosecutor, and over additional objections, the detective clarified that both defendant and his wife were involved in the manufacturing operation at the home.

A police officer may testify as an expert on drug-related law enforcement by virtue of his training and experience. *People v Williams (After Remand)*, 198 Mich App 537, 541-542; 499 NW2d 404 (1993). "[E]xpert opinion testimony will not be excluded simply because it embraces

¹ On appeal, defendant does not challenge the detective's qualifications as an expert. He also does not challenge the detective's testimony that the evidence found in the home supported a conclusion that a marijuana manufacturing operation existed at the home.

an ultimate issue to be decided by the trier of fact.” *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). However, “the function of an expert witness is to supply expert testimony.” *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122; 559 NW2d 54 (1996). While an expert’s opinion testimony may embrace ultimate issues of fact, an expert is not permitted to tell the jury how to decide the case. *Id.* at 122-123. In other words, a witness may not opine about the criminal responsibility of the accused. *Id.* at 123. It is error to allow a witness to give his own opinion on, or interpretation of, the facts because doing so invades the province of the jury. *Id.*

In this case, the expert was not offering an opinion with respect to an aspect of the case that required expert testimony. Rather, he was interpreting the facts and offering his personal opinion that defendant was responsible for the criminal activity occurring at the home. We note that the detective’s testimony that defendant was involved in the manufacture of marijuana was predicated by the phrase, “I would believe.” The conclusion was one that the jury could have reached alone after viewing the facts, and it was within the purview of laymen. Cf. *Ray, supra*. In *Ray*, the police officer was properly qualified as an expert because of his training and experience. *Ray, supra* at 708. He was allowed to testify that the quantity of crack cocaine found in the defendant’s possession, the way the rocks of cocaine were cut, and the street worth of the drugs “clearly indicated that [the] defendant intended to sell the drugs.” *Id.* This information was not within the knowledge of laymen and it aided the jury in determining the defendant’s guilt. *Id.* That the testimony embraced the ultimate issue did not render it inadmissible. *Id.* In this case, the expert properly testified that the evidence supported the existence of a marijuana manufacturing operation. His testimony that defendant was involved, however, was error. The witness told the jury his personal opinion on, and interpretation of, the facts. He invaded the province of the jury.

Nevertheless, reversal is not required unless defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). “[A] preserved, nonconstitutional error is not a ground for reversal unless ‘after an examination of the entire cause, it shall affirmatively appear’ that it is more probable than not that the error was outcome determinative.” *Id.* at 495-496.² The necessary inquiry focuses on the type of error and its effect in light of the weight and strength of the untainted evidence. *Id.* at 495. Upon examination of the entire cause, and in light of the overwhelming evidence against defendant as previously discussed, it does not affirmatively appear that the error was, more probably than not, outcome determinative. The evidence presented at trial could only support one conclusion — that defendant and his wife were involved in the manufacturing of marijuana. The evidentiary error does not require reversal.

Defendant next argues that the trial court committed instructional error. Defendant requested the instruction that “mere presence” is insufficient to prove the crime. The trial court refused to give the “mere presence” instruction without also giving the aiding and abetting

² Evidentiary errors fall into a category of nonconstitutional error. *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001).

instruction requested by the prosecution. On appeal, defendant argues that the aiding and abetting instruction should not have been given because there was no evidentiary support for it. Defendant's argument is cursory, and he fails to cite any authority to support his position that the instruction was improper. Consequently, we are not obligated to consider this issue on appeal. *People v Connor*, 209 Mich App 419, 430; 531 NW2d 734 (1995). Nevertheless, we have reviewed the issue and find no error requiring reversal.

We review de novo a defendant's claim that an erroneous jury instruction was given. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). The determination whether a jury instruction is applicable to the facts of a case lies in the sound discretion of the trial court, and the instructions are reviewed in their entirety. *Id.* There is no error requiring reversal if, on balance, the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Fairness, not perfection, is the standard. *People v Wilson*, 242 Mich App 350, 361-362; 619 NW2d 413 (2000).

In this case, the evidence supported the aiding and abetting instruction. Defendant lived in the house where the marijuana was growing, and his codefendant wife admitted that both she and defendant used the marijuana. Defendant's theory of the case was that, while marijuana was undisputedly growing in the basement of the house, there was insufficient evidence that he was growing it. In *People v Bartlett*, 231 Mich App 139, 157-158; 585 NW2d 341 (1998), this Court rejected a similar argument that the evidence was insufficient to support an aiding and abetting instruction:

The jury may be instructed about aiding and abetting where 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. Here, the prosecution presented evidence that defendant and Mitchell shared a bedroom located near the front door, that the bedroom had a large picture window facing the street and an entrance to the residence, that police found drug paraphernalia, a triple-beam scale, and a sawed-off shotgun in that bedroom, and that police found on another resident of the house prerecorded money used to conduct a controlled purchase of contraband. Given this testimony, as well as evidence that Mitchell was involved in controlled purchases and sales of contraband and defendant's admission to police that he had paid rent to Mitchell, we find that the prosecution presented sufficient evidence that more than one person was involved in keeping and maintaining a drug house and that defendant's role may have been less than direct participation in the wrong doing. Accordingly, the trial court did not err in instructing the jury regarding aiding and abetting. [*Id.* (citation omitted).]

In this case, defendant's knowledge of, and participation in, the marijuana manufacturing process was supported by the evidence and reasonable inferences drawn from the evidence, including that defendant and his wife lived in the house, that the laundry facilities were in the basement, that the basement was wide open and the manufacturing operation was visible to anyone walking into the basement, that the smell of marijuana permeated the home, that magazines related to the growing of marijuana were found in the bathroom, that items bearing the names of defendant and his wife were found in trash bags containing marijuana remnants, and that defendant's wife admitted that both she and defendant used the marijuana that was

growing. This evidence supported that more than one person was involved in the manufacturing of the marijuana and that, even if defendant was not directly participating in the manufacturing, he was assisting his wife, the other homeowner, in the wrongdoing. The aiding and abetting instruction was properly given, and we find no instructional error.

Defendant further argues that the evidence was insufficient to support his conviction because the prosecutor did not establish beyond a reasonable doubt that more than twenty of the seized plants were marijuana plants. When reviewing the sufficiency of the evidence in a criminal case, we “view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citation omitted). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The evidence was sufficient to support that defendant manufactured more than twenty marijuana plants. Thirty-nine plants were seized from the growing rooms found in the basement of defendant’s house. An additional 2.2 pounds of marijuana scraps were found in a garbage bag in the basement. The parties stipulated that some of the seized plants were tested and were positively identified as marijuana plants. Numerous pictures were admitted into evidence, including pictures of the marijuana found growing at the scene. The jury could view the pictures and compare the plants. Moreover, the evidence supported that all of the seized plants were being fertilized and cared for in the exact same manner. And, a detective who was qualified by the trial court as an expert in narcotics enforcement and marijuana manufacturing, testified that the plants being grown in the basement were marijuana plants. The evidence and reasonable inferences arising therefrom were sufficient to enable the jury to find that the element disputed on appeal, that more than twenty marijuana plants were being manufactured, was proven beyond a reasonable doubt.

Finally, defendant contends that the prosecutor shifted the burden of proof to him during closing argument. In his closing argument, defendant argued that the prosecutor had not proved that more than twenty marijuana plants were being manufactured. In rebuttal, the prosecutor responded by stating:

The bottom line in this case, is, ladies and gentlemen, we don’t need fingerprints; we don’t need to test all the marijuana. The testimony is clear that there were 39 plants. There’s no evidence to the contrary. The people that collected them said there were 39 plants. Part of it was analyzed just to make sure that it was marijuana; there are 39 marijuana plants. They’re all the same. You can look at the pictures on your own and determine whether or not they all look the same. All the big plants are in the pictures, and all the little plants were tested and are in here.

Although defendant moved for a mistrial after the prosecutor concluded her rebuttal argument, he failed to contemporaneously object to the challenged remark and request a curative instruction. Thus, the issue is not preserved, and we review it for plain, outcome determinative error. *Carines, supra*. We review the prosecutor’s remarks in context, as a whole, and in light of

defendant's arguments. A prosecutor's statement that certain evidence is undisputed or uncontradicted does not automatically require reversal. *People v Perry*, 218 Mich App 520, 538-539; 554 NW2d 362 (1996). It does not necessarily impact on a defendant's right against self-incrimination. *Id.*; see, also, *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). Further, a prosecutor's statement that inculpatory evidence is undisputed does not inevitably shift the burden of proof. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Here, the prosecutor did not shift the burden of proof or improperly comment on defendant's failure to testify during closing argument. She did not call upon defendant to disprove that the thirty-nine seized plants were marijuana. Rather, she responded to defendant's argument by attacking the credibility of his theory that there was no evidence to support that all of the seized plants were marijuana. She based her argument on the evidence, including testimony and pictures; thus, there was no error.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot