

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 13, 2012

v

ORINTHIAN JOMAR EISON,
Defendant-Appellant.

No. 306109
Jackson Circuit Court
LC No. 10-005596-FH

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver more than 50 but less than 450 grams of cocaine, MCL 7401(2)(a)(iii); maintaining a drug house, MCL 333.7405(d); use of a police radio during the commission of a felony, MCL 750.508(2)(b); possession of more than 50 but less than 450 grams of cocaine, MCL 750.7403(2)(a)(iii); and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to prison terms of 8 to 20 years for possession with intent to deliver less than 450 grams of cocaine, 8 to 20 years for possession with intent to deliver more than 50 but less than 450 grams of cocaine, 16 to 24 months for maintaining a drug house, 16 to 24 months for use of a police radio during the commission of a felony, and 106 days in jail for the possession of marijuana. Defendant appeals as of right. We affirm.

Defendant's convictions arise out of evidence obtained during the execution of a search warrant at a residence in Jackson following a controlled buy at the residence a few hours earlier. Defendant first contends that the trial court abused its discretion in denying a motion for a mistrial following the admission into evidence of photographs that were taken during a search of another house and which were unrelated to defendant's case. We review a lower court's denial of a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). In ruling on a motion for a mistrial, the trial court must consider "not whether there were some irregularities, but whether the defendant had a fair and impartial trial." *People v Lumsden*, 168 Mich App 286, 298; 423 NW2d 645 (1988). "[A] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *Id.* at 299. Reversal of a trial court's denial of a motion for a mistrial "is not warranted unless the defendant makes an affirmative showing of prejudice resulting from the abuse of discretion." *People v Vettese*, 195 Mich App 235, 246; 489 NW2d 514 (1992). The trial court's denial of a mistrial must be "so grossly in error as to deprive a defendant of a fair

trial or to amount to a miscarriage of justice.” *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983).

There is no dispute that photographs were admitted that were not relevant to defendant’s case and therefore inadmissible. See MRE 401; MRE 402. The photographs were from a separate raid on a different home and were unrelated to defendant’s prosecution. However, defendant has failed to show that he was prejudiced. The record clearly establishes that the jury was told that the photographs were from an unrelated case. In addition, the admission of the photographs appears to have been inadvertent. The police officer who took the photographs testified that he had no idea how the photographs got mixed up, and the record indicates that the defense was provided with a disk of the proposed exhibits, including the unrelated photographs, months before trial. The defense again reviewed the photographs immediately before they were introduced, without objection. Moreover, the prosecution removed the unrelated photographs from the exhibits after the error was discovered and did not further display or reference them. Defense counsel also questioned the police officer about his error during cross-examination. Although defendant contends that the admission of the photographs prejudiced him by portraying him as a habitual drug seller, nothing in the record supports that the erroneously admitted photographs were connected to defendant in any way. There is no reason to believe that the jury drew impermissible inferences about defendant based on the photographs, nor would the jury have had difficulty in disregarding the improperly admitted evidence. Although no specific curative instruction was provided, defense counsel expressed his satisfaction with the jury instructions. Because the evidence was unrelated to the case against defendant, a cautionary instruction, had one been requested, could have removed any taint. See *Lumsden*, 168 Mich App at 299. “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The error related to the photographs was not so egregious as to deny defendant of a fair and impartial trial, and the trial court did not abuse its discretion in denying defendant’s motion for a mistrial.

Defendant also argues that his trial counsel rendered ineffective assistance by failing to properly review the photographs before trial. Defendant failed to properly present this issue on appeal by raising it in the questions presented in his appellate brief. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009); MCR 7.212(C)(5). Nevertheless, this claim is without merit. To demonstrate ineffective assistance of counsel, a defendant must present evidence that the claimed deficient performance prejudiced the defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because we find that the admission of the unrelated photographs did not prejudice defendant in this case, defendant’s ineffective assistance claim is without merit.

Next, defendant challenges the sufficiency of the evidence with regard to the element of possession of the drugs and other items in the residence. We review claims of insufficient evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We view the evidence in the light most favorable to the prosecution to determine whether the evidence was sufficient to allow any rational trier of fact to find guilt beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). “The element of possession . . . requires a showing of dominion or right of control over the drug with knowledge of its presence and character.” *People v McKinney*, 258 Mich App 157, 165-166; 670 NW2d 254 (2003) (quotations and citations omitted). “Possession may be either actual or constructive, and may be joint as

well as exclusive.” *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). “[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.” *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The ultimate question in determining constructive possession is “whether, viewing the evidence in a light most favorable to the government, the evidence establishes a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised a dominion and control over the substance.” *Id.* at 521-522, quoting *United States v Disla*, 805 F2d 1340, 1350 (CA 9, 1986). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to establish possession. *Fetterley*, 229 Mich App at 515. However, “[a] person’s presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown.” *Id.*

In this case, defendant was found alone in the residence. He was sitting on a couch in the living room with cocaine, marijuana cigarette roaches, plastic baggies, and a razor in plain sight on tables near the couch. Defendant admitted to an officer that he lived in the residence. Defendant also admitted to smoking marijuana in the residence earlier on the night of the search. This evidence, when viewed in the light most favorable to the prosecution, was sufficient to allow a rational jury to reasonably find that defendant had constructive possession of the drugs and other items in the residence. See *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995) (finding sufficient evidence of the defendant’s constructive possession of drugs where the defendant admitted to living at the house, the defendant was found “lying on a bed in the same bedroom where the drugs lay in plain view,” the defendant’s wallet was near the drugs, and the bedroom contained men’s clothing).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot