

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERICK LAMONT REED,

Defendant-Appellant.

UNPUBLISHED

October 25, 2005

No. 256305

Wayne Circuit Court

LC No. 04-002336-01

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to deliver a controlled substance (cocaine), in the amount of more than 450 grams but less than 1,000 grams, MCL 333.7401(2)(a)(ii). Defendant was sentenced to eleven to thirty years' imprisonment for the charged offense. We affirm.

I. FACTS

Javan Lee ("Lee"), is defendant's cousin. On February 27, 2003, defendant phoned Lee, at his home, to confirm Lee's residential address and informed Lee he would be sending a birthday gift for defendant's sister in care of Lee at his home. Lee provided defendant with his address. Defendant told Lee that the gift was a radio.

Defendant phoned Lee again on February 28, 2003, to confirm Lee's mailing address. Defendant phoned later that same day to inform Lee that a package would arrive on Saturday. On Saturday, the day anticipated for delivery of the package, defendant phoned Lee three additional times checking on whether the package had been received. Lee verified to defendant, on the third phone call, that his package had been received.

Between the second and third phone calls by defendant to Lee on Saturday, defendant's package was delivered to Lee's home. Unbeknownst to Lee, the AirBorne Express delivery person that brought the package to his house was, in actuality, an undercover narcotics officer, Michael Patti ("Patti"), of the Detroit Police Department. The package received at Lee's home had been mailed from Oakland, California, and the return address on the package indicated it came from Reed Brothers, Inc., 1212 Clayton Road, Oakland, California.

Before shipment, while still in California, the package was intercepted and detected to contain narcotics by a trained canine used by the Oakland California Parcel and Addiction Team. The Oakland Team opened the package and confirmed that it contained narcotics, repackaged it, contacted local police and shipped it to police in Canton, Michigan, for a “controlled delivery.” Upon receipt by police in Michigan, the box was re-opened. A cassette recorder contained within the package was removed and disassembled, revealing a hidden brick of cocaine.

While a raid crew was ready and waiting outside Lee’s home with a search warrant, Patti donned the garb of an AirBorne Express delivery person and presented the package to Lee at his home. After leaving the premises, Patti went to a staging area to change so that he could join members of the raid team. While Patti was at the staging area, he was informed by another officer that a vehicle, with Illinois license plates, had pulled up outside Lee’s home and a man, later identified as defendant, had run up to the home’s entrance.

Lee reported returning to bed after delivery of the package, only to be disturbed almost immediately by the doorbell. Lee found defendant at his front door. Upon letting him into the home, Lee stated to defendant, “if you were coming here, you could have brought . . . the radio yourself.” At this point, believing someone other than police had been watching Lee’s home for the package delivery, police immediately raided the home.

Upon entry, police located Lee between the front stairwell and living room of his residence. Defendant was in the bathroom. The package was near the front stairwell, “undisturbed” and unopened. In searching defendant, police looked in his wallet, found and confiscated a cash receipt from a Radio Shack in Oakland, California, dated February 27, 2003, at 5:43 p.m. for a cassette recorder that matched the make and model containing the cocaine within the delivered package.

Lee gave police a statement at the scene, denying knowledge of the package contents and indicating he had merely accepted the package at the request of defendant. Police checked Lee’s home phone caller identification and verified the number, dates and times of calls received from a cell phone number that coincided with Lee’s description of his contacts with defendant. In addition, a cell phone, with the number corresponding to that located on Lee’s caller identification was taken from defendant’s person during the raid.

Neither Lee nor defendant were arrested at the scene. On November 14, 2003, defendant was arrested and charged with one count of possession of a controlled substance (cocaine) with intent to deliver, more than 450 grams but less than one thousand grams. At trial, defendant was convicted as charged and now appeals as of right.

II. JURY INSTRUCTION

Defendant asserts that the trial court’s failure to instruct the jury on specific intent constitutes reversible error.

A. Standard of Review

Unpreserved claims of instructional error are forfeited unless relief is necessary to avoid manifest injustice. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); MCL

768.29. Nonconstitutional unpreserved claims are reviewed for plain error. A defendant must demonstrate a plain error that affected substantial rights, and a reviewing court should reverse “only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Carines, supra* at 774.

B. Analysis

Jury instructions are reviewed in their entirety to determine whether a trial court committed error. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Jury instructions are required to include all elements of the charged offense and cannot exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if instructions are imperfect, they do not create error if they fairly present the issues for trial and sufficiently protect a defendant’s rights. *People v Tate*, 244 Mich App 553, 568; 624 NW2d 524 (2001).

Defendant contends that the trial court erred in failing to provide the jury with an instruction on specific intent. Defendant argues that the trial court’s failure to provide this instruction lessened the prosecutor’s burden of proof and was a shirking of the trial court’s inherent responsibility to assure that the jury was properly instructed on all elements of the crime charged.

Defendant acknowledges that the instruction that he claims was erroneously omitted was not specifically requested by his counsel and that, despite having the opportunity to hear the instructions provided to the jury, counsel assented to the instructions without objection. The trial court provided the jury with very explicit instructions on the elements of the crime charged. The trial court specifically informed the jury that each element of the charged crime must be proven by the prosecutor “beyond a reasonable doubt.” Within the instructions provided by the trial court, it was stated that it was necessary to show that “defendant *knowingly* possessed a controlled substance.” The trial court stated that it must be shown that “defendant *intended* to deliver the substance,” and that the substance was cocaine and that defendant “*knew* it was.” Further, when discussing possession, the trial court instructed the jury that “it is not enough if the defendant *merely knew* about the substance,” because control of the substance must be shown.

Because defendant failed to preserve the alleged instructional error through objection, this issue is reviewed for plain error affecting his substantial rights. *Carines, supra* at 763-764. A review of the lower court record reveals no error or prejudice arising from the instructions given by the trial court. The trial court clearly and completely explained to the jury all elements comprising the crime charged. The delineated elements sufficiently explained to the jury the necessary level of intent required for conviction. Failure to present a separate instruction on specific intent does not comprise error. When all of the instructions are reviewed, in their entirety, the trial court provided the jury with sufficient information on all elements of the offense to protect defendant’s rights.

III. SEARCH AND SEIZURE

Next, defendant contends that the search of his wallet by police was a violation of the Fourth Amendment and that the evidence obtained from the search should have been suppressed.

A. Standard of Review

Although the issue was not properly preserved, it is reviewed by this Court for manifest injustice because it involves a constitutional question. *Carines, supra* at 764-765

B. Analysis

The police had a warrant to search the location where defendant was, immediately following the controlled delivery of a package known to contain cocaine. Defendant was identified with a last name consistent with those on the mailing label on the package containing the cocaine. Defendant's arrival within minutes after delivery of the package and statements by the homeowner to police, linking defendant to the package containing the cocaine, were sufficient to establish probable cause. "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Defendant had a very clear connection to the package of illicit drugs, which were known by police to be on the premises. *People v Stewart*, 166 Mich App 263, 270; 420 NW2d 180 (1988). Based on the circumstances existent at the time, the search of defendant's personal effects was authorized and the evidence procured was not subject to suppression. *People v Tierney*, 266 Mich App 687; ___ NW2d ___ (2005).

IV. FAIR TRIAL

Next, defendant argues that comments by the trial court disparaging his counsel, in the presence of the jury, were improper and denied him a fair trial. We disagree.

A. Standard of Review

This Court has provided the standard for reviewing the conduct of a trial judge as follows:

The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.' [*Lansing v Hartsuff*, 213 Mich App 338, 349-350; 539 NW2d 781 (1995), quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988) (citations omitted).]

B. Analysis

A criminal defendant is entitled to expect a detached and neutral magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). A trial judge may destroy the balance of partiality through berating, scolding, or demeaning counsel. *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). Although unfair criticism of counsel by a trial court, while in the presence of a jury, is always deemed to be improper, reversal is not required unless the conduct of the trial judge denied defendant a fair trial. *Id.* To justify a new trial, defendant must demonstrate that actual prejudice resulted from the misconduct. *People v Johnson*, 245 Mich App 243, 268; 631 NW2d 1 (2001).

Viewing the record as a whole, the trial court's isolated comments did not deprive defendant of a fair and impartial trial. Suggestions by defendant that the trial court's conduct evidenced prejudice or bias are unsupported. The lower court record is replete with instances of the trial court permitting defendant's counsel to proceed with questioning of witnesses without interruption or comment. Following the one incident that led to the ruling holding defendant's counsel in contempt, the trial court took great effort to shield the jury from information regarding the reasons for delay of trial. The trial court reviewed case law presented by defense counsel in support of his position to permit reference to penalties in questioning a witness, which ultimately led to the trial court's reversal and correction of its prior ruling for the jury.

Judicial comments occurring during a trial that are critical, disapproving or hostile to an attorney, the parties or a case generally cannot be relied upon to demonstrate partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Displays of annoyance, anger, frustration, impatience or dissatisfaction, if deemed within the bounds of what individuals may on occasion display, cannot establish partiality. *Id.* The trial court did not comment on the evidence or testimony presented. It did not criticize defendant or witnesses or question their credibility. The comments asserted by defendant's counsel to be improper were the direct result of counsel's failure to abide by rulings of the trial court and counsel's insistence upon continuing to challenge those rulings, in the presence of the jury, while engaging in verbal conduct that was indisputably disrespectful of the court. The trial court's instructions to the jury regarding the presumption of innocence and emphasizing that rulings by the trial court are not evidence, were sufficient to cure any possible prejudicial effect attributable to the trial court's comments.

V. SUFFICIENCY OF THE EVIDENCE

Defendant also argues that insufficient evidence existed regarding an intent to deliver to support his conviction on the charged offense. We disagree.

A. Standard of Review

To the extent that defendant's assertion of error comprises a claim of prosecutorial misconduct it is unpreserved, and this Court will review the alleged improprieties for plain error affecting defendant's substantial rights. *Carines, supra* at 752-753, 763-764. This Court reviews de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

B. Analysis

A prosecutor may argue the evidence and all reasonable inferences that arise from the evidence as it relates to the theory of the case. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). The prosecutor's comments during opening and closing arguments do not vary from the evidence presented during trial. Defendant fails to demonstrate or support his assertion that the statements of the prosecutor did not fully comport with the standards and status of the law and served to mislead the jury. The trial court properly and specifically instructed the jury that comments or questions by the attorneys did not constitute evidence and that only the trial court's instructions on the law were relevant for their deliberations, thus effectively curing

any potential prejudice. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). To the extent that defendant asserts prosecutorial misconduct, he has failed to demonstrate a plain error affecting his substantial rights.

This Court has previously recognized that, “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). Proof that a defendant possessed cocaine with an intent to deliver requires a demonstration that “the defendant must have knowingly possessed a controlled substance, intended to deliver that substance to someone else, and the substance possessed must have actually been cocaine and defendant must have known it was cocaine.” *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002).

There was sufficient evidence to find that defendant had possession of the cocaine. “A person need not have actual physical possession of a controlled substance to be found guilty of possessing it.” *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Possession may be either actual or constructive. *Id.* Courts have determined the existence of constructive possession “when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband.” *Johnson, supra* at 500. The essential inquiry is whether defendant had “dominion or control over the controlled substance.” *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). The jury was presented with sufficient evidence to demonstrate a close connection between defendant and the package containing cocaine. The label for the package indicated defendant’s last name on the return address. The package was addressed to defendant’s sister. Evidence was presented that defendant had arranged for the delivery of the package through verified phone calls from a cell phone found on defendant’s person. Defendant appeared at the delivery site almost contemporaneously with arrival of the package containing the cocaine. Further, defendant possessed a receipt for the cassette recorder that contained the hidden cocaine. Hence, sufficient circumstantial evidence existed to demonstrate a significant and substantial link between defendant and the contraband. *Wolfe, supra* at 520.

Sufficient circumstantial evidence existed to demonstrate defendant’s intent to deliver or distribute the cocaine. “Intent to deliver has been inferred from the quantity of narcotics in a defendant’s possession, and from the way in which those narcotics are packaged” *Wolfe, supra* at 524. Defendant stipulated that the cocaine confiscated weighed approximately 972 grams. Police testified that the amount of cocaine seized was intended for delivery because it was consistent with quantities that would be processed for sale. Based on the amount of cocaine recovered, a reasonable fact finder could have concluded that defendant had constructive possession of the drugs with the intent to deliver.

Defendant argues that his conviction is improper because it is based on the uncharged offense of possession of cocaine. Defendant was charged with one count of possession of a controlled substance (cocaine), with the intent to deliver, more than 450 grams but less than 1,000 grams. MCL 333.7401(2)(a)(ii). Although, defendant asserts he was actually convicted of the uncharged, lesser included offense of possession of cocaine, there is no factual basis to support defendant’s contention that he was improperly convicted of a lesser included offense.

VI. SUBJECT MATTER JURISDICTION

Next, defendant asserts that the circuit court lacked subject matter jurisdiction due to failure to comply with MCR 6.110(G) in binding him over for trial. Defendant's argument fails.

A. Standard of Review

Defendant failed to raise the issue of jurisdiction at trial, resulting in a failure to preserve this issue for appellate review. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). This Court reviews unpreserved issues for plain error affecting a defendant's substantial rights. *Carines, supra* at 763-764; *People v Green*, 260 Mich App 392, 396; 677 NW2d 363 (2004).

B. Analysis

The record reflects the presence of three documents in the lower court file verifying the transfer of the case and bind over of defendant to the circuit court following preliminary hearings conducted in the district court. The verification provided within the lower court record, signed by the court clerk, fulfills all of the requirements of MCR 6.110(G). Based on the presence in the lower court file of documents evidencing compliance with the requirements of MCR 6.110(G), defendant's claim of improper jurisdiction is without merit.

VII. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant contends that his trial counsel was ineffective. We again disagree.

A. Standard of Review

Whether a defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). This Court will review the factual findings of the trial court for clear error and the constitutional determination is reviewed de novo with regard to defendant's preserved issue of the effectiveness of his counsel. *Id.* at 579. Effective assistance of counsel is presumed, and defendant carries a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish a claim of ineffective assistance of counsel, it must be shown that (a) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (b) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and (c) the resulting proceeding was fundamentally unreliable or unfair, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

B. Analysis

Defendant contends his counsel committed multiple, unspecified errors at trial and failed to secure recusal of the trial judge based on known animosity existing between the trial judge and defendant's counsel.

Following the trial court's holding of defendant's counsel in contempt, defendant was given the opportunity to continue the trial with alternative counsel, but declined to do so. Transcripts indicate that defendant's counsel did seek intervention from the Chief Judge, which

was refused. The motion for new trial brought by defendant's counsel, asserting bias toward him by the trial court regarding an unrelated case, was denied. Defendant asserts that his counsel was aware of the alleged basis throughout the trial. However, in making the motion for a new trial defendant's counsel alleged the motion was based on a transcript received just prior to the sentencing hearing. In contradiction to defendant's assertion that his counsel was ineffective, the lower court record demonstrates that defense counsel was especially persistent in advocating on defendant's behalf.

To be deemed ineffective, counsel must commit errors that are so serious that he was not performing as the "counsel" guaranteed by federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Deficient performance by defendant's counsel must have resulted in prejudice. To demonstrate prejudice, defendant must show a reasonable probability that but for counsel's mistakes, the results of the proceeding would have been different. *Id.* at 600. Even if trial had proceeded smoothly, given the evidence presented it is extremely unlikely that defendant would have been acquitted. As a result, defendant has failed to demonstrate that the alleged deficient performance by his trial counsel impacted or affected the outcome of the trial.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette