

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RICARDO RAPHAEL ARIAS,

Defendant-Appellant.

UNPUBLISHED

January 17, 2006

No. 255428

Oakland Circuit Court

LC No. 2002-187132-FC

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of 650 or more grams of cocaine, MCL 333.7403(2)(a)(i).¹ The trial court sentenced defendant to life imprisonment. Because we are not persuaded by any of defendant's arguments on appeal, we affirm his conviction and sentence.

Defendant's conviction arises from his alleged involvement in drug trafficking on February 7, 2002 along with two other codefendants, Pablo Bonilla and Cory Hudson.² In late 2001, through early 2002, the Pontiac police investigated drug trafficking into Pontiac, and developed the names "Cory," "Pablo," and "Ricky," along with general descriptions and an address in Detroit. The police subsequently set up surveillance of the area and observed all three codefendants at the Detroit residence on February 6, 2002. Evidence was presented that the police observed the three defendants arrive at the residence in three separate vehicles the following day, February 7, 2002. Shortly thereafter, officers observed defendant, and codefendants Bonilla and Hudson come out of the house, and briefly converse in the street. Thereafter, codefendant Bonilla got into the passenger side of a pickup truck that defendant was driving. Codefendant Hudson removed a dark jacket from the car that he was previously driving, and walked over to a Taurus. The Taurus and pickup truck then left simultaneously, with the

¹ Defendant was originally charged with possession with intent to deliver 650 or more grams of a controlled substance, MCL 333.7401(2)(a)(i). MCL 333.7401(2)(a)(i) and MCL 333.7403(2)(a)(i) have since been amended to increase the statutory minimum from 650 grams to 1,000 grams. 2002 PA 665.

² Both codefendants appealed their convictions separately. See Docket Nos. 255426 and 255237.

pickup truck in the lead, and continued to travel from Detroit to Pontiac in tandem for approximately an hour. There was testimony that the Taurus closely followed the pickup truck, including switching lanes only when the pickup truck did so. Additionally, there was testimony that, when the police stopped the Taurus, the pickup truck immediately “crossed three lanes,” made a U-turn, slowly drove past where the Taurus was stopped, and then sped away, disregarding traffic laws. When the police stopped the Taurus, codefendant Bonilla was the sole rear-seat passenger. When the police removed codefendant Bonilla from the vehicle, he was sitting on a black jacket that was covering a “brick” of more than 916 grams of cocaine.

I. Evidentiary Rulings

A. Inadmissible Hearsay

Defendant first argues that he was denied a fair trial by the introduction of testimony that the police were investigating drug trafficking, developed the names “Cory,” “Pablo,” and “Ricky,” along with descriptions and an address in Detroit, and subsequently set up surveillance of the area. Defendant contends that this testimony was based on impermissible hearsay, and violated his right of confrontation under *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

The parties discussed the matter in chambers before trial, and, during trial, discussed the matter on the record outside the presence of the jury. The defendants primarily argued that the evidence was based on hearsay, and prejudicial. The court ruled that “some background has to be presented to the Jury, or otherwise the case doesn’t make any sense at all.” As requested, the trial court indicated that it would provide a cautionary instruction. During trial, the prosecutor questioned police officers regarding the purpose of the surveillance. When defense counsel objected, the trial court ruled that the officer could testify “as to what he was looking for, a description of a person, period.” Defendant also raised this issue in a motion for a new trial, which the trial court denied.

This Court reviews the trial court’s decision to admit or exclude evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). Where the decision involves a preliminary question of law, this Court’s review is de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

In *Crawford, supra*, the United States Supreme Court indicated that, for purposes of the Sixth Amendment Confrontation Clause, “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Crawford, supra* at 59. However, the Confrontation Clause³ does not bar the use of testimonial statements for a purpose other than to establish the

³ US Const, Am VI.

truth of the matter asserted. *Id.*; *People v McPherson*, 263 Mich App 124, 133-135; 687 NW2d 370 (2004).

Here, *Crawford* is not implicated because the contested statements are not hearsay. Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998) (*Boyle, J. concurring*). The challenged testimony was not attributed to an informant or any other declarant. Further, the challenged testimony was not offered to prove the truth of the matter asserted, i.e., that the defendants were drug dealers. Rather, the trial court exercised its discretion and overruled the defendants' hearsay objections, and allowed the testimony as "background information" for the limited purpose of explaining the officers' subsequent actions, e.g., setting up surveillance of codefendant Bonilla's residence and subsequently following the two vehicles. As noted by the prosecutor, "the Jury is entitled to have some context. It just wasn't a bunch of police officers out there just pulling over cars." Because the statements were admitted for the limited purpose of providing background information, they did not constitute hearsay, or statements of an absent declarant such that defendant's confrontation rights were violated.

Defendant also argues on appeal that the challenged testimony impermissibly created the inference that defendants were in fact drug dealers and therefore *Crawford, supra*, is implicated. However, as noted above, defendant objected on the basis of hearsay alone in the trial court. "Because the grounds for objection at trial and the grounds raised on appeal must be the same, an objection on the basis of the Rules of Evidence will not necessarily preserve for appeal a Confrontation Clause objection." *People v Bauder*, ___ Mich App ___, ___; ___ NW2d ___ (2005), citing *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). The *Bauder* Court also counseled that,

When constitutional error occurs that is preserved, as defendant alleges here, the admission of hearsay in violation of the right of confrontation, a new trial must be ordered unless it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). On the other hand, ordinary trial error, even if preserved, will merit reversal only when it involves a substantial right, and in the context of the entire trial, it affirmatively appears more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). [*Bauder, supra* at ___.]

Applying *Bauder* and *Coy*, since defendant did not properly preserve a Confrontation Clause issue at trial, our review is limited to ordinary evidentiary error. *Id.* Thus, in reviewing the hearsay challenge, we review alleged unpreserved non-Constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764, 774; 597 NW2d 130 (1999).

After carefully reviewing the exchange at issue, the record reveals that the prosecutor only narrowly questioned Officer Pittman in order to set the stage for Pittman's later interactions with defendants. Pittman revealed that he considered defendants "suspects" in drug activity and accordingly instituted further police action resulting in the accumulation of evidence that

ultimately resulted in defendant's arrest and later conviction. Pittman's testimony did not involve the considerations that led him to believe defendants were involved in a criminal enterprise. Contrary to defendant's assertion, one cannot infer from the challenged testimony alone that defendants had committed any crime, but only that defendants were persons of interest in an ongoing investigation. Thus, we cannot conclude that defendant's rights were violated because we agree with the trial court's conclusion that the challenged testimony served only as a backdrop for later police interactions with defendants, was not offered to prove the truth of the matter asserted, and for these reasons cannot be characterized as hearsay.

While we question the propriety of the prosecutor for seeking the identity information from the witness because identity was not an issue of consequence in the case, we point out that even if we were to consider the inference of which defendant complains as hearsay, i.e., that the defendants were drug dealers, the error is harmless beyond a reasonable doubt. None of the three defendants were convicted of possession with intent to deliver 650 or more grams of cocaine. And, defendant's conviction for possession of 650 or more grams of cocaine was supported separately and independently of the challenged testimony. Clearly, defendant's substantial rights were not violated. *Carines, supra* at 752-753, 763-764, 774.

Moreover, in its final instructions, the trial court instructed the jury that "there was some testimony that the police were targeting certain individuals. And the mere fact the Defendants may have been suspect [sic] is not evidence of their guilt." The court also instructed the jury that the case should be decided on the basis of the properly admitted evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). This claim does not warrant reversal.

B. Level of Drug Dealing

Defendant also argues that the trial court abused its discretion by allowing Officer Michael Story, who was not qualified as an expert, to give "prejudicial testimony" "concerning what level of drug dealing the defendants were at." Defendant relies on the following exchange:

[*The prosecutor*]: Why were so many surveillance people and vehicles sent down on the 7th?

[*Officer Story*]: Well, for a myriad [sic] of reasons. First and foremost, it's been my experience in narcotics of an upper-tier nature, that - -

* * *

[Defense counsel objected. The court overruled the objection.]

[*Officer Story*]: It's common practice in narcotics transactions of that type that there will be multiple propel involved in it, as oftentimes somebody will "mule", which is actually have the narcotics with them. They'll be usually not alone in a car. There'll [sic] usually be somebody with them, and there's usually a support -- a counter surveillance team basically that the traffickers will use to look for the police or to defend their -- to defend their product against possible rip-off or a police action.

In response to defense counsel's objection, the prosecutor indicated that the officer, who had arranged the surveillance, was explaining "why he did what he did." The court overruled the objection.

Defendant does not clearly argue why the evidence was inadmissible. In his brief, defendant primarily references the fact that the officer was not qualified as an expert. But in a reply brief, defendant asserts that the issue is "the prejudicial nature of the officer's opinions or speculation that this group is upper tier." Despite the specifics of defendant's claim in this regard, even if the challenged testimony was improper, reversal would not be warranted. See *Lukity, supra*, at 495-496 (a preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative). Given the unchallenged evidence against defendant, it is highly improbable that the outcome would have been different had the trial court excluded the challenged evidence.

III. Prosecutorial Misconduct

Defendant argues that he is entitled to a new trial because the prosecutor presented inadmissible hearsay suggesting that he was a drug dealer in order to obtain a conviction, argued facts not in evidence, made an improper civic duty argument, shifted the burden of proof, and denigrated defense counsel and the defense.

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendant failed to object to some of the prosecutor's conduct below. We review those unpreserved claims for plain error affecting substantial rights. *Carines, supra* at 752-753, 763-764. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford, supra*.

A. Inadmissible Hearsay

Defendant argues that he is entitled to a new trial because the prosecutor used inadmissible hearsay to impermissibly argue that the defendants were drug dealers, thereby garnering a conviction based on speculation. Defendant contends that, beginning with his opening statement, the prosecutor impermissibly suggested that the defendants were drug dealers:

Now how did this come about? The City of Pontiac has a police department special section, the Narcotics Enforcement Section. And their job is to do virtually nothing but ferret out those that are using and selling and dealing street drugs in the City of Pontiac.

Now leading up to February of the year 2002 they developed some information and they then developed some suspects. People the Narcotics Enforcement Section officers believed were the suppliers of cocaine to mid-level drug dealers in the City of Pontiac.

The three defendants over here (indicating) . . . are the suspects they developed

* * *

As a consequence of developing the suspects and this information that they were the ones moving kilo levels of cocaine to the City of Pontiac for redistribution, the police set up surveillance activity down in this (indicating) area of southwest Detroit.

Defendant argues that the prosecutor continued the impermissible speculation during closing argument when he stated:

I mean, first of all, why were [the police] there in the first place . . .

Now, it's already been belabored that the police had developed some intelligence and they formed some opinions about some suspects that they wanted to look deeper into.

As noted in part I(A), *supra*, the trial court allowed the testimony for the limited purpose of explaining the police officers' actions. Therefore, it was not improper for the prosecutor to refer to the background information in presenting the case in opening statement or closing argument. Further, immediately after making the challenged statements in closing argument, the prosecutor stated:

And of course you know and I'm sure the Court will instruct you that just because that there were suspects, people suspected of moving heavy quantities of cocaine from Detroit into Pontiac, in and of itself is not a crime. Being a suspect does not make you a criminal.

So understand that that's not direct evidence of guilt. It's not evidence at all of anyone's guilt. But it places in context, "Why were they there in the first place?"

As previously indicated, in its final instructions, the trial court instructed the jury on the proper use of the testimony. In sum, under the circumstances, the prosecutor's conduct was not improper. Consequently, this claim does not warrant reversal.

B. Judicial Expressions of Support

Defendant also argues that the prosecutor impermissibly implied judicial support for his case in the following comments made during rebuttal argument:

Every single case, before it gets here, to get here is judicially approved probable cause. Every one of them have come through here with a finding of probable cause.

Although the comments appear improper when viewed in isolation, viewed in context, they were focused on refuting defense counsel's closing argument. Specifically, in arguing that

the police did not have probable cause to obtain a warrant to search the house, defense counsel stated:

They don't prove their case beyond a reasonable doubt, because they can't even reach a probable cause standard. They had the cocaine, they had the people, and they can't reach a probable cause standard to get a search warrant to look at a house.

[A police officer's] own opinion, his expert opinion was that he could not get probable cause out of the circumstances of that stop. And if he can't get probable cause, you can't get reasonable doubt.

This is simply a case of the failure of proof.

Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Further, immediately after making the challenged remarks, the prosecutor stated:

You ultimately are not concerned about probable cause. You're concerned about me proving my case beyond a reasonable doubt. But I wanted you to know the response to those wild accusations.

Moreover, to the extent the prosecutor's remarks could be considered improper, the trial court instructed the jurors that the lawyers' comments and arguments are not evidence, and that the case should be decided on the basis of the evidence. These instructions were sufficient to cure any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Accordingly, this claim does not warrant reversal.

C. Facts Not in Evidence and Civic Duty Argument

Defendant argues that the prosecutor impermissibly appealed to the jurors' civic duty, and argued facts not in evidence by suggesting that the defendants were major drug dealers, and by asserting an inflated street-value of the seized cocaine where there was no evidence that the defendants were "street sellers," or that the cocaine was analyzed for purity. Regarding the alleged value of the cocaine, the prosecutor stated:

Number one, there's absolutely no evidence on this record to refute the testimony of the expert, Officer Pittman, that that is a weight that is only indicative of a redistribution quantity.

[Officer Jeremy Pittman] told you that about . . . \$100 a gram . . . is what you would pay on the street. So 917 times 100, \$91,700 street value.

* * *

And you heard the testimony also that this stuff gets stepped on, cut; in other words, it's - - put filler material in there to spread the weight so you can sell more of it, again, and again

If we just admit that it gets cut once, that one of those bricks turns into two, then it's \$91,700 times two. It has a minimum street value of \$183,000.

* * *

For me to simply say it gets stepped on only once and it gets doubled to \$183,000 is a very conservative estimate.

Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jurors. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Further, although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), he is free to argue reasonable inferences arising from the evidence as they relate to his theory of the case, and is not required to phrase arguments and inferences in the blandest possible terms. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Viewed in context, the prosecutor's statements were reasonable inferences from the evidence as they related to his theory of the case, which was that defendant possessed the cocaine with the intent to deliver it. During trial, defendant stipulated that the cocaine weighed 916.7 grams. Officer Pittman, who was qualified as an expert in cocaine trafficking, opined that, given the quantity of cocaine seized, the cocaine was likely being transported for redistribution. Officer Pittman also testified that a gram of cocaine would generally cost \$100, and that the profit is derived from "buying in bulk, stepping on the product, adding a cutting agent to the product making your product bigger, and selling it in smaller quantities." He explained that "[I]f you take a gram of cocaine and a half gram or a gram of a cutting agent and mix them together, you now have two grams of cocaine." He further indicated that before cocaine reaches a "person who shows up on the street," "it could have been stepped on five, ten, twenty times by then."

Further, to the extent the prosecutor's remarks could be considered improper, codefendant Bonilla's counsel objected and, in response, the trial court instructed the jury that "closing arguments are nothing more than the attorney's summation of what they believe the testimony to be. If you find there's no evidence supporting that, just ignore it." This instruction, combined with the trial court's final instructions that the jury should not be influenced by prejudice, that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence were sufficient to cure any possible prejudice. *Long, supra*. This issue does not warrant reversal.

D. Shifting the Burden of Proof

Defendant also argues that the prosecutor impermissibly shifted the burden of proof during opening statement when he argued that there was no reasonable explanation for why any of defendants got their fingerprints on the brown wrapping tape. Defendant contends that the prosecutor continued to make improper comments during closing argument when he remarked that the testimony regarding defendant's fingerprint being on the tape was "uncontroverted," that there was "no evidence on this record to refute the testimony of the expert . . . that that is a weight that is only indicative of a redistribution quantity," and that testimony regarding codefendant Hudson "moving around" after the Taurus was stopped was "uncontroverted."

Viewed in context, the prosecutor's comments were not improper. A prosecutor may not imply that a defendant must prove something or present a reasonable explanation because such an argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). However, it is permissible for a prosecutor to observe that evidence against a defendant is undisputed. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Moreover, even if the challenged remarks could be viewed as improper, any prejudice could have been cured by a timely instruction. *Schutte, supra* at 721. Indeed, the trial court's instructions that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, were sufficient to cure any possible prejudice. *Long, supra*. This unpreserved claim does not warrant reversal.

E. Denigration of Defense Counsel

Defendant claims that the prosecutor made several comments that denigrated and "attacked" defense counsel and the defense. In rebuttal argument, after stating that defense counsel incorrectly indicated in closing argument that a particular "brown bag" was evidence, the prosecutor stated that it was not an indication that defense counsel "was lying to [the jury] intentionally, although it's possible. It could just as easily be an indication that he made a mistake." The prosecutor also referred to the defense presentation as a "wild, gross exaggeration." Defendant also contends that the prosecutor suggested that defense counsel was attempting to confuse the jury.

A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorney's personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Considering the context of the remarks, which were made during rebuttal argument, drew no objection, and were made during a vigorous adversarial proceeding, they did not amount to an improper personal attack on defense counsel, or improperly shift the jury's focus from the evidence to defense counsel's personality. Viewed in context, the prosecutor's remarks conveyed his contention that, based on the evidence, the defense was a pretense and unreasonable, and ignored the evidence. In making the challenged remarks, the prosecutor urged the jurors to evaluate the evidence, and consider that, in light of the evidence, defendant was guilty. As previously indicated, a prosecutor is not required to phrase arguments and inferences in the blindest possible terms. *Ullah, supra* at 678. Furthermore, the trial court's instructions that the jurors were the sole judges of the witnesses' credibility and that the lawyers' comments are not evidence were sufficient to dispel any perceived prejudice. *Long, supra*. This claim does not warrant reversal.

III. Effective Assistance of Counsel

We reject defendant's claim that he was denied the effective assistance of counsel at trial. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish

ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

A. Failure to Object to Prosecutorial Misconduct

We reject defendant's claim that defense counsel was ineffective for failing to object to the unpreserved claims of prosecutorial misconduct raised in part II. In light of our determination that the allegations of prosecutorial misconduct did not deny defendant a fair trial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different.

B. Failure to Offer Evidence that Defendant did not Attempt to Flee

Defendant also argues that defense counsel was ineffective for failing to offer evidence from the preliminary examination that defendant did not attempt to flee. At trial, Officer Pittman testified that after the Taurus was stopped, the pickup truck immediately crossed over three lanes of traffic without signaling, made a "Michigan U-turn," slowly drove by the location where the Taurus had been stopped, and then sped up passing speed limit and swerving in and out of traffic. At the preliminary examination, Officer Steven Mellado, who stopped defendant's pickup truck, testified that he observed only one traffic violation, which was defendant's failure to obey a stop sign while making the U-turn. Defendant notes that the officer did not testify that defendant exceeded the speed limit, and indicated that he stopped defendant about 15 to 20 seconds after he disobeyed the stop sign.

When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Here, at best, the preliminary examination testimony may have impeached the trial testimony regarding flight to some extent, but it would not have completely refuted the evidence of flight. In addition to the testimony cited by defendant, Officer Mellado also testified that after the pickup truck passed the Taurus, "it began to speed up." He also observed defendant make "a lane change without signaling." In sum, the proposed testimony would have been of little significance in this case. Defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger, supra.*

C. Failure to Object to Testimony that Defendant had Prior Felonies

We reject defendant's claim that defense counsel was ineffective for failing to object to testimony that indicated he had prior felonies. A police officer who took defendant's fingerprints after his arrest explained that he took rolled impressions, which are taken when a person has prior felonies. Although defense counsel did not object to this testimony, defendant has not overcome the presumption that defense counsel's failure to object was trial strategy. Given the brief and isolated reference, defense counsel may have reasonably determined that an objection would have called more attention to the allegedly improper testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, even if counsel was ultimately

mistaken, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Further, in light of the evidence introduced at trial, it is unlikely that the brief reference to prior felonies, with no indication regarding the circumstances, affected the outcome of the case. Defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to object, the outcome would have been different. *Effinger, supra*.

D. Failure to Object to Testimony regarding "Crack" Cocaine

Defendant also contends that defense counsel was ineffective for failing to object to irrelevant and prejudicial expert testimony regarding crack cocaine habits, particularly where the seized cocaine was in powder form, and there was no evidence that it was going to be converted to crack cocaine.

While testifying regarding the street value of cocaine, a police officer mentioned crack cocaine. This case involved a large quantity of cocaine. Defendant has not shown how mentioning a different form of cocaine inflamed the passions of the jury. Even if the testimony was inadmissible under MRE 401 and MRE 402, in light of the evidence presented at trial, it is unlikely that the testimony affected the outcome of the case. Indeed, the evidence was relevant only to the intent to deliver element of the originally charged offense, but defendant was acquitted of that offense and found guilty of mere possession, thus indicating that the jury was not improperly influenced by the evidence. Defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to object, the outcome would have been different. *Effinger, supra*.

IV. Sentence

We reject defendant's claim that he should be sentenced under the amended version of MCL 333.7403. The amended statutory scheme in MCL 333.7403 applies only to offenses committed on or after March 1, 2003. *People v Doxey*, 263 Mich App 115, 122-123; 687 NW2d 360 (2004); *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004). The offense in this case occurred on February 7, 2002.⁴ Consequently, defendant was properly sentenced under the statute in effect at the time of the offense and, thus, is not entitled to resentencing. We decline to vacate defendant's sentence on the basis of his suggestion that *Thomas, supra*, and analogous decisions, were wrongly decided.⁵

⁴ On the date of the offense, MCL 333.7403(2)(a)(i) prescribed a minimum life sentence for persons found guilty of possession of 650 or more grams of cocaine.

⁵ We also reject defendant's claim that his parolable life sentence constitutes cruel and unusual punishment. Although our Supreme Court has held that imposition of a mandatory sentence of life imprisonment without possibility of parole for a conviction of simple possession of 650 or more grams of a controlled substance constitutes cruel or unusual punishment, *People v Bullock*, 440 Mich 15, 37-42; 485 NW2d 866 (1992), defendant has not cited any support for his claim that a parolable life term of imprisonment constitutes cruel and usual punishment. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the
(continued...)

V. Bindover

Defendant argues that the district court abused its discretion in binding him over for trial because the evidence presented at the preliminary examination was insufficient. Defendant specifically contends that the district court incorrectly stated that he was “riding shotgun.” The circuit court denied defendant’s motion to quash the information.

Generally, this Court reviews a circuit court’s decision to deny a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering the bindover. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

“If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover.” *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004). Here, defendant’s argument fails because he does not argue on appeal that the prosecutor presented insufficient evidence at trial to sustain his conviction, and there is no indication that he was otherwise prejudiced by the claimed error. *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990). We nonetheless note that, viewed in a light most favorable to the prosecution, sufficient evidence was presented at trial to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant committed the charged crimes. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

To sustain a conviction for possession of 650 or more grams of cocaine, the prosecution is required to show that (1) the defendant possessed a controlled substance, (2) the substance possessed was cocaine, (3) the defendant knew that the substance possessed was cocaine, and (4) the substance was in a mixture that weighed 650 or more grams. CJI2d 12.5. Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe, supra* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 520. “The essential question is whether the defendant had dominion or control over the controlled substance.” *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

At trial, the prosecutor advanced the theory that defendant was guilty as a principal or an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. “To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.” *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001).

(...continued)

basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.” *Watson, supra* at 587 (citation omitted).

“Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime.” *Carines, supra* at 757, quoting *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995). “The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime.” *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider and abettor’s state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant’s participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines, supra* at 758. But a defendant’s mere presence at a crime, even with knowledge that the offense is about to be committed, is not enough to make him an aider and abettor. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant either had constructive possession of the cocaine or assisted others in possessing the cocaine. At trial, evidence was presented that, during surveillance, the police observed the three defendants arrive at the residence in three separate vehicles. Shortly thereafter, officers observed the defendants come out of the house, and briefly converse in the street. Thereafter, defendant got into the driver’s seat of a pickup truck, while codefendant Hudson removed a dark jacket from the car that he was previously driving, and walked over to a Taurus. Defendant pulled away, and the Taurus closely followed, and the two vehicles thereafter traveled from Detroit to Pontiac in tandem for approximately an hour. There was testimony that the Taurus closely followed the pickup truck, including switching lanes only when the pickup truck did so. Additionally, there was testimony that, when the police stopped the Taurus, defendant immediately crossed three lanes, made a U-turn, slowly drove past where the Taurus was stopped, and then sped away, disregarding traffic laws. A jury could reasonably infer from this evidence that defendant was acting in concert with the driver of the Taurus, with defendant driving the lead vehicle, as they traveled from Detroit to Pontiac.

Evidence was also presented at trial that, when the Taurus was stopped, the police found codefendant Hudson sitting on a black jacket covering 916.7 grams of cocaine wrapped in brown packaging tape. Defendant’s fingerprints were found on the brown packaging tape. In sum, sufficient circumstantial evidence was presented to demonstrate a significant and substantial link between defendant and the cocaine. Because sufficient evidence at trial supported defendant’s conviction, defendant has failed to state a cognizable claim on appeal regarding the sufficiency of the evidence at the preliminary examination. *Wilson, supra*.

VI. Jury Instructions

A. Flight

We reject defendant’s claim that the trial court erred by instructing the jury on flight. Generally, claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions must include all elements of charged crimes, but must not exclude consideration of relevant issues, defenses, or theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). To give a particular instruction to the jury, there must be evidence to support it. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

“It is well established in Michigan law that evidence of flight is admissible” to support an inference of “consciousness of guilt.” *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The term “flight” has been applied to such actions as fleeing the scene of the crime, running from the police, and attempting to escape custody. *Id.* Here, after trailing defendant’s pickup truck and his companion vehicle, the Taurus, the police detained the Taurus. After the Taurus was stopped, defendant immediately “crossed over three lanes of traffic without signaling,” made a “Michigan U-turn,” slowly drove by the location where the Taurus had been stopped, and then “sped up passing speed limit and swerving in and out of traffic.” Contrary to defendant’s assertion, his actions could properly be considered evidence of “flight.” The trial court did not err by providing the instruction.

B. Possession of 650 or More Grams of Cocaine

We reject defendant’s claim that the trial court erred by instructing the jury on the lesser included offense of possession of 650 or more grams of cocaine. “[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). The prosecutor, as well as the defendant, may request an instruction regarding a lesser included offense. *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997) (citation omitted).

“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.” *Torres (On Remand)*, *supra* at 416-417. As discussed in part V, *supra*, the prosecution presented sufficient evidence for a rational jury to find defendant guilty of possession of 650 or more grams of cocaine beyond a reasonable doubt. During trial, the defendants argued the disputed element, i.e., intent to deliver. Consequently, the instruction on the lesser offense was supported by a rational view of the evidence. Instruction on the lesser offense was not prohibited. MCL 768.32(2). The trial court did not err by providing the instruction.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Pat M. Donofrio