S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXANDER FLIE,

Defendant-Appellant.

UNPUBLISHED
March 25, 2004

No. 242864
Wayne Circuit Court
LC No. 00-011714-01

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of 225 grams or more but less than 650 grams of a controlled substance (to wit: cocaine), MCL 333.7403(2)(a)(ii). He was sentenced to 20 to 30 years in prison. Defendant appeals as of right. We affirm.

While executing a search warrant at defendant's residence, police found 535 grams of cocaine in the basement. The officers also found a scale, approximately $10,000, several empty Ziploc bags, two pieces of identification bearing defendant's name, and a telephone bill addressed to defendant at that address. Moreover, defendant's fingerprint was found on the cocaine packaging. Defendant was in the living room. Defendant's mother, brothers, and child were also in the house. Two officers testified that during the booking process, defendant "stated that the drugs was his and his family had nothing to do with it." Also, a report indicated that defendant had also said that the money was his. One of the two officers present said that this was incorrect. The other officer said that defendant inquired "whether or not we seized his money" late in the thirty-five minute conversation and that the first officer was in and out during that period and may not have been present.

Defendant, who was charged with possession *with intent to deliver* 225 grams or more but less than 650 grams of cocaine, first argues that the jury should not have been instructed on the lesser offense of simple possession of this amount. He asserts that the facts did not support the instruction, that the instruction violated his constitutional rights to due process and notice of the charges, and that he should have been acquitted of the delivery charge rather than convicted of simple possession as a compromise. After the Court instructed the jury, counsel objected based on the compromise and notice claims but never challenged the alleged lack of factual support. Therefore, relief is only available on the factual support claim if there was plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999).

A court may not instruct on a lesser offense over the defendant's objection unless the language of the charging document gave the defendant fair notice that he might be charged with the lesser offense. *People v Darden*, 230 Mich App 597, 600-601; 585 NW2d 27 (1998). Notice is adequate if the lesser offense is a necessarily included offense of the original charge. *People v Usher*, 196 Mich App 228, 232; 492 NW2d 786 (1992), overruled on other grds in *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). An 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 the instruction. *People v Cornell,* 466 Mich 335, 357; 646 NW2d 127 (2002). A necessarily included lesser offense is one that must be committed as part of the greater offense. In other words, the greater offense would include all the elements of the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

In *People v Gridiron,* 185 Mich App 395, 400-401; 460 NW2d 908 (1990) (*Gridiron I)*, vac on reh on other grds, *People v Gridiron,* 190 Mich App 366; 475 NW2d 879 (1991) (*Gridiron II)*, amended on other grds, 439 Mich 880; 476 NW2d 411 (1991), the Court concluded that possession is a necessarily lesser included offense of possession with intent to deliver since one obviously cannot possess a controlled substance with the intent to deliver it without having also committed the offense of possession. Although *Gridiron* involved simple possession under MCL 333.7403(b), as opposed to possession under MCL 333.7403(2)(a)(ii)(the statute under which defendant was convicted),[1] defendant also had to possess the cocaine before he could possess with the intent to deliver. Accordingly, this was a necessarily included lesser offense, and defendant had sufficient notice. Moreover, the evidence supported the instruction. Regardless of whether the evidence supported possession with intent or whether this charge was the focus of the prosecutor's primary theory, the jury was free to conclude that there was insufficient evidence of intent to deliver. However, defendant's identification, mail and fingerprint were connected to the cocaine, which would have supported a finding that defendant, as opposed to others at the residence, possessed it. Nothing in the record supports the assertion that defendant was found guilty of possession as a compromise by the jury.

Defendant next argues that the prosecutor improperly denigrated the defense theory and suggested that defendant and his attorney were using improper tactics. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001), and may not denigrate the defense. *People v Dalessandro,* 165 Mich App 569, 578-580; 419 NW2d 609 (1988) (defense was called a sham). Based on our review of the subject comments, we conclude that the prosecutor was vigorously pointing out the obvious – that defendant would have no credible defense unless the jury

[1] On rehearing in *Gridiron II*, the Court determined that the lesser offense instruction should not have been given because MCL 768.32(2) allowed lesser included offense instructions for controlled substances violations only for "major controlled substance offenses." The defendant in *Gridiron* was convicted of possession under MCL 333.7403(2)(b), which was not a major controlled substance offense. Defendant in the instant case was convicted of possession under § 7403(2)(a)(ii), which is a major controlled substance offense.

believed that the officers lied and that defendant had not confessed. This did not rise to the level of misconduct.

However, defendant also asserts that the prosecutor interjected a civic duty argument into the proceedings with the following argument:

> Ladies and gentlemen, I just want to – I want to leave you with this. You know, when you think about the credibility of certain officers, of these particular officers or any narcotics officers, you know what they – when they are on that job they do that work everyday. They kick these doors in with their guns drawn and they do not know what's behind that door. And they sacrifices [sic] themselves everytime that they do that. Every raid that they go on that's what they do. These people have families just like everybody else and this is their sacrifice. I am only trying to control the drug trade in Wayne County. And it is so disheartening to hear trial after trial that these narcotics officers must be lying. You're the judges of that.

These comments had nothing to do with the officers in question and would apply to officers generally, regardless of whether they were credible. These references, the reference to other cases, and the reference to the prosecutor's role in trying to control the drug trade injected issues beyond the scope of this case. *People v Bahoda*, 448 Mich 261, 276, 282; 531 NW2d 659 (1995); *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, defendant did not object. We conclude that the harm caused by the improper arguments could have been addressed with a curative instruction. Moreover, we are not convinced that the comments affected the outcome of the proceedings, resulting in the conviction of an innocent person or seriously affecting the fairness, integrity or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003). Accordingly, defendant is not entitled to any relief.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette