

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JENNIFER RENEE MORGAN,

Defendant-Appellant.

UNPUBLISHED

November 17, 2009

No. 278401

Macomb Circuit Court

LC No. 2006-004751-FH

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of a controlled substance (cocaine), MCL 333.7401(2)(a)(iv), possession of a controlled substance, less than 25 grams (morphine), MCL 333.7403(2)(a)(v), and maintaining a drug house, MCL 333.7405(1)(d). Defendant appeals as of right. We affirm.

I. Sufficiency of the Evidence

Defendant argues that her convictions are not supported by sufficient evidence. Specifically, defendant claims that because the only evidence linking her to the cocaine and the morphine was the fact that she resided in the same house as Ferrell Davis, a self-admitted drug trafficker, the evidence was insufficient to find that she possessed either the cocaine or the morphine. In determining whether sufficient evidence was presented to support a conviction, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). We will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.*

Possession of a controlled substance may be exclusive or joint, and actual or constructive. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "Constructive possession exists if the defendant knew that the substance was present and had the right to exercise control over it. Put differently, constructive possession exists if the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *People v Williams*, 268 Mich App 416, 421; 707 NW2d 624 (2005) (internal citation and quotation omitted). "The essential question is whether the defendant had dominion or control over the controlled substance." *Konrad, supra* at 271. Constructive possession may be established by circumstantial evidence

and the reasonable inferences that arise from the evidence. *People v Brown*, 279 Mich App 116, 136-137; 755 NW2d 664 (2008).

The cocaine and morphine were found in the upstairs bedroom of the house that defendant shared with Davis, her boyfriend. Numerous pieces of furniture, including a queen size bed, a dresser, a crib, and a toddler's bed, were in the bedroom. Adult male and female clothing and children's clothing were also in the bedroom. The cocaine and the morphine were found in the dresser, which had no locks or restraints. Detective Michael Notoriano testified that prescription morphine is generally in pill form and that liquid morphine is used in hospitals. A Detroit Medical Center identification badge belonging to defendant was found in the bedroom. Also found in the bedroom was mail addressed to defendant and a checkbook belonging to defendant and Davis. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant knew of the cocaine and morphine and that she had the right to exercise control over the controlled substances.

The evidence was also sufficient to enable a rational trier of fact to find that defendant possessed the cocaine with the intent to deliver. Notoriano testified that the amount of the cocaine, 35.86 grams, along with it being found on a plate next to razor blades and near a scale, plastic baggies, and three piles of cash, was indicative of drug trafficking. See *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (intent to deliver may be inferred from the quantity of narcotics, the way in which the narcotics are packaged, and other circumstances).

Likewise, the evidence was sufficient to enable a rational trier of fact to find that defendant kept or maintained a drug house. “[T]o ‘keep or maintain’ [a drug house] requires some degree of continuity and . . . the prosecution is required to prove . . . something more than a single, isolated instance of the proscribed activity.” *People v Thompson*, 477 Mich 146, 155; 730 NW2d 708 (2007) (quotations and citation omitted). A plastic baggie with cocaine residue was found in a trash bag outside defendant's house; other plastic baggies with cocaine residue were found in the dresser. Notoriano testified that because of the large amounts of cocaine residue in the baggies, he believed that, at some point, each baggie held a large quantity of cocaine. Unused “coin size ziplock baggies” were found in the dresser, and these baggies appeared to be for “packaging smaller quantities for sale[.]” The evidence of the baggies, along with the other evidence indicating narcotic trafficking, was evidence of some degree of continuity.

II. Great Weight of the Evidence

Defendant argues that her convictions are against the great weight of the evidence for the same reasons that the convictions are not supported by sufficient evidence. For the same reasons that we reject defendant's sufficiency argument, we reject defendant's claim that her convictions are against the great weight of the evidence. Defendant's convictions stand on more than the fact that she resided in the same house as Davis.

III. Expert Testimony

A. Morphine

Defendant claims that Notoriano's testimony regarding prescription morphine and liquid morphine was not admissible because Notoriano was not qualified to give expert testimony regarding the dispensation of morphine. We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A witness, to be qualified as an expert witness, must have knowledge, skill, experience, training, or education in a particular area. MRE 702; see also *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007). "[D]rug-related law enforcement is a recognized area of expertise." *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993).

Defendant does not dispute that Notoriano, based on his experience and education, was qualified to testify as an expert regarding drug trafficking. Rather, without any explanation, she asserts that Notoriano was not qualified to provide expert testimony regarding the different forms of morphine. The record establishes that Notoriano was experienced and educated in narcotics. At the time of trial, Notoriano had been a police officer for 13 years, and for three and one-half years, he had been assigned to the St. Clair Shores Police Department's narcotics division as an undercover detective. When assigned to that position, Notoriano attended an 80-hour course taught by the Drug Enforcement Administration "that covered all aspects of narcotic investigation." Notoriano attended numerous other classes involving the investigation of narcotics. According to Notoriano, as an undercover detective, he was involved in "several hundred narcotics investigations." Nothing in the record suggests that Notoriano's experience and education in narcotics investigations did not provide him with the knowledge necessary to testify about the different forms of morphine. Accordingly, there was no plain error in the admission of Notoriano's testimony that liquid morphine is generally used only by hospital staff and trained medical personnel.¹

Defendant also argues that she was denied the effective assistance of counsel when counsel failed to object to Notoriano's testimony. To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation omitted).

As already stated, nothing in the record suggests that Notoriano's experience and education in narcotics investigations did not provide him with the knowledge necessary to testify about the different forms of morphine. Accordingly, defendant has not shown that an objection to Notoriano's testimony would have resulted in the exclusion of the testimony. In addition,

¹ Because defendant has not shown that Notoriano's testimony was inadmissible, we reject defendant's claim that the prosecutor committed misconduct when he elicited the testimony. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

defendant has not established that a reasonable probability exists that the exclusion of the testimony would have resulted in a different outcome. Contrary to defendant's assertion, Notoriano's testimony that liquid morphine is used in hospitals was not the only evidence linking defendant to the morphine. The morphine was found in the upstairs bedroom, which defendant admitted was her bedroom. Although defendant claimed that she was not sleeping in the bedroom, adult female clothing was found in the bedroom. Mail addressed to defendant was also found in the bedroom, as was a checkbook belonging to defendant and Davis. Defendant's belongings, as well as items belonging to her children, in the bedroom linked defendant to the morphine.

B. Cocaine

Defendant argues that drug profile evidence was used as substantive evidence of her guilt. We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *Carines, supra*.

"Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit" *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Drug profile evidence is not admissible as substantive evidence of a defendant's guilt. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). However, in controlled substance cases, a prosecutor may elicit expert testimony from police officers to explain the significance of items seized in order to aid the jury's understanding of the evidence. *Murray, supra* at 53; see also *People v Ray*, 191 Mich App 706, 708; 749 NW2d 1 (1991) (police officer's testimony that the quantity of cocaine in the defendant's possession and the fact that cocaine rocks were evenly cut indicated that the defendant intended to sell the cocaine was admissible to aid the jury in determining the defendant's intent).

Notoriano explained that the amount of the "golf ball size wad" of crack cocaine was indicative of drug trafficking because when cocaine is made into crack cocaine, it is manufactured into a large ball or chunk and then cut into small pieces for distribution. He testified that a piece of crack cocaine used for personal use is generally the size of a rock or a pea. Notoriano also explained that the fact that the cocaine was found on a plate next to razor blades and near a scale and unused plastic baggies was indicative of drug trafficking because a plate is a nonporous cutting board and a scale allows a person to control the amount of cocaine that is put into the plastic baggies and sold. Notoriano further explained that the three piles of money found in the dresser was indicative of drug trafficking because sellers often separate their money into piles for personal and business use. Notoriano's testimony did not constitute impermissible drug profile evidence. He did not testify, and the prosecutor did not argue during closing arguments, that because defendant exhibited certain innocuous characteristics, defendant was trafficking cocaine. Rather, Notoriano's testimony explained the significance of items seized, and such testimony was permissible. *Murray, supra*; *Ray, supra*. Accordingly, there was no plain error in the admission of Notoriano's testimony.

Because defendant has not established that Notoriano's testimony was impermissible drug profile evidence, we reject her claim that counsel was ineffective for failing to object to the admission of Notoriano's testimony. Counsel is not ineffective for failing to raise a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). In addition, because

Davis testified that he was selling cocaine, a limiting instruction that the jury could only consider Notoriano's testimony as background evidence would not have affected the outcome of trial.

IV. Prosecutorial Misconduct

Defendant argues that numerous instances of prosecutorial misconduct during closing arguments denied her a fair trial. We review defendant's unpreserved claims of prosecutorial misconduct for plain error affecting her substantial rights. *Brown, supra* at 134.

Defendant first claims that the prosecutor improperly shifted the burden of proof on the possession of morphine charge when the prosecutor emphasized that defendant had not provided a valid prescription for the morphine. We find no merit to defendant's claim. "[T]he operative words [of MCL 333.7403(1)] defining the elements of the crime are 'A person shall not knowingly or intentionally possess a controlled substance'" *People v Pegenau*, 447 Mich 278, 292; 523 NW2d 325 (1994) (opinion by Mallett, J.). The subsequent language in the statute concerning a prescription refers to an exemption rather than an element of the crime, and, pursuant to MCL 333.7531, the defendant bears the initial burden to produce evidence of a valid prescription. *Id.* at 292-293, 300 (opinion by Mallett, J.).² Because defendant did not produce any evidence of a valid prescription for the morphine, the prosecutor's comment was not clearly and obviously improper.

Defendant next claims that the prosecutor misstated the law regarding possession and aiding and abetting. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002).

Regarding the element of possession, the prosecutor told the jury, "If you know it's there, you have the ability to control. . . . You possess it. . . . If she knew it was upstairs, she controlled it." However, possession requires more than mere knowledge of the controlled substance; it requires dominion or the right to control the controlled substance. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000); see also CJI2d 12.7. Regarding the elements of aiding and abetting, the prosecutor stated, "You cannot turn a blind eye and say, 'Well, I didn't know.' . . . That's not good enough. . . . [A]ll she had to know was her boyfriend was selling the drugs. She knew that, she's guilty." A person is not guilty of aiding or abetting a crime unless it is shown, in part, that "the defendant performed acts or gave encouragement that assisted the commission of the crime, and . . . the defendant intended the commission of the crime or had knowledge that the principle intended its commission at the time he gave aid and

² There was no majority opinion in *Pegenau*, but no justice disagreed that, pursuant to MCL 333.7531, a defendant has the initial burden to produce evidence of a valid prescription. Then-Chief Justice Cavanagh believed that the defendant had met the burden of production, *Pegenau, supra* at 307-309 (Cavanagh, C.J., concurring in part, dissenting in part), and Justice Boyle believed that MCL 333.7531 shifted the burden of production and the burden of persuasion to the defendant, *id.* at 309-310 (Boyle, J., concurring).

encouragement.” *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (quotation omitted). To the extent that the prosecutor’s remarks were erroneous,³ the errors were harmless. The trial court instructed the jury that it was to take the law as given by the court and if a lawyer said something different about the law, it was to follow what the court said. Thereafter, the trial court correctly instructed the jury on the element of possession and the elements of aiding and abetting. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (“It is well established that jurors are presumed to follow their instructions.”); *Grayer*, *supra* at 358-359 (the trial court’s instructions on third-degree fleeing and eluding corrected the prosecutor’s misstatements).⁴

Finally, defendant argues that the prosecutor, when he stated that “an ID to [defendant’s work] was upstairs,” misstated a crucial fact because defendant testified that the badge was from an earlier time when she was a nursing student. “A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.” *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). An identification badge belonging to defendant was found in the upstairs bedroom, and the prosecutor argued that the presence of the badge in the same room that the cocaine and morphine was found was circumstantial evidence that defendant knew of and had control over the controlled substances. The prosecutor’s comment was not improper.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

³ We note that, despite the above statements, the prosecutor did state the correct definitions of possession and aiding and abetting in his closing argument.

⁴ Similarly, the trial court’s proper instructions on possession with intent to deliver cured any misstatements by the prosecutor on the elements of the offense.