STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 285642 Saginaw Circuit Court
MIGUEL SPAIN ROSS, Defendant-Appellant.	LC No. 06-028150-FH

Before: Borrello, P.J., and Whitbeck and K. F. Kelly, JJ.

PER CURIAM.

Defendant Miguel Ross appeals as of right his jury convictions of maintaining a drug house,[1] possession with intent to deliver marijuana,[2] felon in possession of a firearm,[3] and two counts of possession of a firearm during the commission of a felony (felony-firearm).[4] The trial court sentenced Ross as a second habitual offender,[5] to concurrent prison terms of 24 to 36 months for maintaining drug house, 24 to 72 months for possession with intent to deliver marijuana, and 24 to 80 months for felon in possession of a firearm. Ross also received a consecutive two years' imprisonment for each felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

In June 2005, police assigned to the Bay Area Narcotics Enforcement Team (BAYANET) discovered marijuana in a vehicle occupied by Michelle Medina and her boyfriend Calvin Turner. Medina told the officers where the marijuana had been purchased and rode along with officers to identify the house, which was located at 3703 York Street. At trial, Medina testified that Turner had purchased the marijuana from Ross while she waited in the car. Medina acknowledged that she did not actually see money or drugs change hands when Turner met with

[1] MCL 333.7405(1)(d).

[2] MCL 333.7401(2)(d)(*iii*).

[3] MCL 750.224f.

[4] MCL 750.227b.

[5] MCL 769.11.

Ross in the front yard, but maintained that when Turner returned to the vehicle he had marijuana, which he did not have prior to meeting with Ross.

Thereafter, BAYANET member Detective Kenneth Campbell obtained a search warrant for the York Street address. The police executed the warrant on June 28, 2005, at approximately 11 p.m. The police gave verbal notice of warrant, but the door to the house remained closed and the officers entered using a battering ram. Once inside, the officers secured three adult males, including Ross; one adult female; and four small children. The officers then searched the premises in accordance with the search warrant.

The police found several firearms, including two handguns and one shotgun, in the master bedroom where they found Ross. The police also found several different kinds of ammunition, both loose and in a box, in the master bedroom. In addition, the police found three baggies containing marijuana on top of a dresser in plain sight, next to two digital scales. Officers also found $329 cash on top of the dresser near the marijuana, a box of sandwich bags in the dresser, and a bulletproof vest between the mattress and box springs of the bed. Finally, the police found a Nextel bill with Ross's name as the account holder and the York Street address as the billing address in the kitchen. The police later tested several of the seized items for latent fingerprints, but they found no identifiable prints.

Ross denied living at the York Street address, maintaining that it was the home of the mother of his children, whom he would often visit. Ross testified that he lived with his mother and other family members on Bloomfield Avenue, which is located only a short distance from the York Street house. Ross produced a copy of a Michigan identification card, which showed his address as 1417 Bloomfield Avenue. Ross explained that the reason the Nextel bill identified his address as York Street was because he had obtained the phone on behalf of Nicole Hatter, his children's mother, who did not have the credit to obtain a phone on her own, and that he had the bills sent to the York Street address because Hatter had promised to pay them.

The prosecutor cross-examined Ross about several traffic tickets he had received over a number of years that identified Ross's address as the York Street address. The prosecutor also introduced a printout of Ross's current driver's license, which also identified Ross's address as York Street. Ross denied knowledge of how or why the York Street address would have been listed for him. He also stated that he never saw the marijuana, guns, or the vest that the police confiscated.

II. Sufficiency Of The Evidence

A. Standard Of Review

Ross argues that there was insufficient evidence to support his convictions. We review de novo sufficiency of the evidence claims.[6] In reviewing a sufficiency challenge, we examine the evidence in a light most favorable to the prosecution and determine whether a rational trier of

[6] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

fact could find that the essential elements of the crime were proven beyond reasonable doubt.[7] Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof.[8]

B. Possession With Intent To Deliver Marijuana Conviction

Ross argues that there was insufficient evidence to sustain his conviction for possession with intent to deliver marijuana. In order to substantiate this charge, the prosecution must "prove beyond a reasonable doubt that (1) defendant knowingly possessed a controlled substance, (2) defendant intended to deliver the controlled substance to someone else, (3) the substance possessed was marijuana and defendant was aware that it was, and (4) the marijuana was in a mixture that weighed less than five kilograms."[9] Here, Ross challenges the sufficiency of the evidence as it pertains to the first and second elements.

"Possession may be actual or constructive, and may be joint or exclusive."[10] Constructive possession is established when "the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband."[11] Ross concedes that the police found him in the bedroom where they recovered marijuana, but he asserts that he was only visiting when the raid occurred and contends there was no evidence that he lived in the house. Ross denied that he lived at the York Street address. However, "[i]t is the province of the jury to determine questions of fact and to assess the credibility of witnesses."[12] Additionally, the prosecutor introduced a Nextel bill identifying Ross's address as the York Street house, as well as a copy of Ross's current driver's license and several traffic tickets identifying the York Street address as his residence. This was sufficient evidence to establish "a sufficient nexus between the defendant and the contraband."[13]

Ross's argument that the prosecutor failed to establish the requisite intent is based on a portion of Detective Kenneth Campbell's testimony in which the detective conceded that the amount of marijuana recovered was not substantial and was consistent with personal use. However, Ross fails to acknowledge Detective Campbell's additional testimony that, while quantity is an important factor in determining whether the marijuana is for personal use or intended for delivery, other factors are also helpful, such as the presence of scales, packaging

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[7] *Id*.

[8] *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

[9] *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005); see MCL 333.7401(2)(d)(*iii*).

[10] *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005) (citations and quotations omitted).

[11] *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

[12] *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[13] *Wolfe*, *supra* at 520.

materials, cellular phones, currency, and firearms. Detective Campbell also testified that police look for marijuana pipes, the makings for a marijuana cigarette, or a burnt marijuana butt to indicate that marijuana is intended for personal use. The police did not find this type of drug paraphernalia the York Street house. In addition, the police recovered three baggies next to digital scales that had approximately one ounce of marijuana in each, a standard weight for sale.

C. Maintaining A Drug House Conviction

Ross also argues that there was insufficient evidence to sustain his conviction for maintaining a drug house. MCL 333.7405(1)(d) provides that a person "[s]hall not knowingly keep or maintain . . . a dwelling . . . that is frequented by persons using controlled substances, or that is used for keeping or selling controlled substances." Ross reiterates his argument that there was no evidence that he lived at the York Street address and also asserts that the prosecutor failed to establish the "continuity" necessary to establish that he "kept or maintained" a drug house.[14] We have already rejected the former contention and now reject the latter in light of the evidence at trial.

Specifically, Medina testified that she and her boyfriend had been to the York Street address on numerous occasions to purchase drugs and that the drugs were purchased from Ross. Ross denied ever selling drugs to Medina's boyfriend, but we will not interfere with a jury's credibility determinations.[15]

D. Felon In Possession and Felony-Firearm Convictions

Ross also argues that his convictions for felon in possession and two counts of felony-firearm cannot be sustained because the element of possession was not established, a required element of both charges.[16] He also asserts that it was necessary to establish that he was "armed" in order to convict him of the charged firearm offenses. However, both actual and constructive possession, described as proximity coupled with indicia of control, can be used to support a conviction for felon in possession and felony-firearm.[17]

Again, Ross's argument is based on the premise that he did not live at the York Street residence. As discussed above, there was sufficient evidence to lead a reasonable jury to conclude that Ross lived at the York Street address. Moreover, "[e]ven though the firearm was not in plain view . . . , the jury could reasonably have inferred that the defendant was in knowing possession of the firearm based on its proximity to a quantity of controlled substances that the

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[14] See *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007).

[15] *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004) ("This Court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses.").

[16] *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Parker*, 230 Mich App 677, 684-685; 584 NW2d 753 (1998).

[17] *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

defendant was intending to deliver, the defendant's proximity to both the weapon and the controlled substances, and the well-known relationship between drug dealing and the use of firearms as protection."[18] Taken as a whole and viewed in a light most favorable to the prosecution, the evidence below and the reasonable inferences stemming from that evidence was sufficient to support defendant's convictions.

III. Double Jeopardy

Ross asserts that his convictions for felony-firearm and felon in possession of a firearm predicated on possession of the same gun violate double jeopardy unless there is a separate felony to support the felony-firearm conviction. However, in *People v Calloway*,[19] the Michigan Supreme Court considered whether these convictions could coexist and ruled that because the plain language of the felony-firearm statute does not enumerate felon in possession as an underlying felony exception in the statute, the Legislature has clearly conveyed its intent that felon in possession may serve as the underlying felony for a felony-firearm offense. Despite Ross's protestations, *People v Smith*[20] does not undermine the authority of *Calloway*.

IV. Due Process

A. Standard Of Review

Ross argues that the trial court violated his due process rights when it allowed a police officer to offer testimony related to whether the marijuana recovered was intended for personal use or delivery. It is clear from Ross's argument that although he only refers to a single witness in his brief, he is actually challenging the testimony of two police officers. Because Ross failed to object to the testimony at trial, we review this claim for plain error affecting a defendant's substantial rights.[21]

B. Analysis

This Court has repeatedly held that expert testimony from experienced police officers regarding an inference of intent to deliver based on the circumstances of the drugs found is admissible.[22] Ross asserts that there was no showing that the witnesses were trained in making evaluations based on reliable principles and methodology. However, Ross stipulated that

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[18] *People v Rapley*, 483 Mich 1131; 767 NW2d 444 (2009).

[19] *People v Calloway*, 469 Mich 448, 451-452; 671 NW2d 733 (2003).

[20] *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007).

[21] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[22] See, e.g., *People v Williams* (*After Remand*), 198 Mich App 537, 541-542; 499 NW2d 404 (1993) ("The officer was qualified because of his training and experience. The information was not within the layman's common knowledge and was useful to the jury in determining [the] defendant's intent at the time he possessed the drugs."); *People v Ray*, 191 Mich App 107; 479 NW2d 1 (1991).

Detective Campbell is an expert in the area of marijuana trafficking and all of Detective Campbell's testimony cited by Ross (regarding circumstances and objects that Detective Campbell looks for when determining intent behind a particular marijuana possession) falls squarely within this area of expertise. The other police officer, Officer Morse, testified that he had worked as an officer for the Saginaw Township Police Department for 15 years and has worked on drug cases in the past. Moreover, the only portion of Officer Morse's testimony that Ross cites is Officer Morse's statement that "in the drug world," scales like those found on the dresser are "commonly used to weigh narcotics . . . , whatever weight that they sell the narcotics in." This evidence, given by a witness qualified by his particular experience, could assist the jury in considering the matter of intent.[23]

V. Other Bad Acts Testimony

A. Standard Of Review

Ross argues that the trial court denied him a fair trial by allowing Medina to testify that she had witnessed a drug sale between Ross and her boyfriend prior to the execution of the search warrant. We review for an abuse of discretion a trial court's decision to admit or exclude evidence.[24]

B. Legal Standards

MRE 404(b) permits the introduction of other bad acts so long as it does not "'risk impermissible inferences of character to conduct.'"[25] Permissible uses of other acts evidence includes "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident."[26] MRE 404(b) is a rule of inclusion rather than a rule of exclusion.[27]

C. Applying The Standards

Here, Medina's testimony was relevant to show Ross's intent to distribute the marijuana the police found at the residence. This is a proper purpose under 404(b).[28] Further, without regard to MRE 404(b), the evidence was admissible as part of the res gestae of the crime. Evidence of other acts is admissible as part of the res gestae of the offense if the other acts are

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[23] MRE 401.

[24] *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

[25] *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001), quoting *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

[26] MRE 404(b).

[27] *People v Katt*, 248 Mich App 282, 303; 639 NW2d 815 (2001).

[28] See *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

"so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime."[29]

Ross also argues that trial court erred in refusing his request to introduce court records that identified an alternate address for him. The trial court was willing to allow Ross to introduce the requested evidence. However, the trial court refused to admit the evidence unless the charges related to the documents came in as well. Other than citing MRE 403, Ross provides no citation to authority to support his contention that he should have been allowed to introduce only that part of a document that was helpful to his case. In any event, he has not shown that the probative value of the evidence was so substantially outweighed by the danger of undue prejudice that the document could not have been admitted, particularly if a limiting instruction was given.

VI. Jury Instructions

A. Standard Of Review

Ross argues that he was denied a fair trial when the trial court failed to instruct the jury on simple possession, on the definition of possession or being armed for purposes of the felony-firearm charges, and on continuity with respect to maintaining a drug house. Ross also argues that the trial court made numerous other instructional errors. However, he waived all but the assertion of error based on the denial of his request for an instruction on the lesser offense of simple possession.[30] We review de novo this preserved claim of instruction error.[31]

B. Legal Standards

"[J]ury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence."[32] In addition, the Michigan Supreme Court has held that instruction on an inferior offense is required where "it is impossible to commit the greater without first having committed the lesser."[33] Because it is impossible to commit the offense of possession with intent to deliver without first committing the offense of simple possession, the latter is a lesser-included offense of the former. However,

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[29] *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978) (quotation marks and citation omitted).

[30] See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002) ("By expressly approving the instructions, [the] defendant has waived the issue on appeal.").

[31] *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).

[32] *People v McKinney*, 258 Mich App 157, 162-163; 670 NW2d 254 (2003).

[33] *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001) (quotation marks and citation omitted).

an instruction on a lesser offense need only be given if a rational review of the evidence indicates that the element distinguishing the lesser offense from the greater offense is in dispute.[34]

C. Applying The Standards

Here, the instruction was not required because it was not supported by the evidence, particularly Ross's denial of knowledge on how or why the York Street address would have been listed for him, his clear statement that he never saw the marijuana, guns, or the bulletproof vest that were confiscated by the police, as well as his assertion that he never saw anyone smoking marijuana in the York Street house. Moreover, witness testimony established that at least one prior sale had occurred before execution of the search warrant.

VII. Prosecutorial Misconduct

A. Standard Of Review

Ross argues that he was denied a fair trial due to numerous instances of prosecutorial misconduct. We review de novo preserved and unpreserved claims of prosecutorial misconduct to determine whether the defendant was denied a fair trial.[35] However, unpreserved claims of prosecutorial misconduct must also withstand scrutiny under the plain error rule.[36] To avoid forfeiture under the plain error rule, a defendant must establish that (1) an error occurred, (2) the error was plain, and (3) the error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings.[37] Moreover, even if all three requirements are satisfied, reversal is only warranted in cases where the error resulted in the conviction of an actually innocent defendant or the error seriously compromised the fairness, integrity, or public reputation of the judicial proceedings.[38]

B. Legal Principles

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.[39] Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context.[40]

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[34] *People v Cornell*, 466 Mich 335, 352; 646 NW2d 127 (2002).

[35] *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

[36] *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

[37] *Carines*, *supra* at 763.

[38] *Id*.

[39] *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

[40] *Thomas*, *supra* at 454.

"Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.'"[41] Nevertheless, a prosecutor may not engage in conduct or make an argument that rises to the level of denying defendant a fair and impartial trial.[42] "A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence."[43]

C. Inference Of Guilt

Ross first takes issue with the prosecutor's statement during closing argument (actually, a remembrance of what was said during opening argument) that "we'd like to know who he delivered it to so the police can take other actions." Ross asserts that this constituted an impermissible inference that he and the police believed him to be guilty. However, the trial court properly instructed the jury that a defendant is presumed innocent, that the verdict should be based on the evidence adduced, that it was sole judge of the facts, and that it should not convict Ross unless the prosecutor met his burden on each of the elements. The trial court stated that "the fact that the defendant is charged with a crime and is on trial is not evidence," nor are "[t]he lawyers' statements and argument." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors."[44]

D. Search Warrant Testimony

Ross's next claim of prosecutorial misconduct relates to testimony that a search warrant was obtained and he asserts that this indicated to the jury that he was already "somewhat guilty." Ross has provided no authority to support his claim that this testimony prejudiced him in any way. In any event, admission of such evidence, even in the absence of a motion to suppress, is within the range of principled outcomes.[45] Indeed, without it, the jury would be left to speculate on whether the police had legally entered the York Street house and seized the numerous items from the residence admitted at trial.

E. Bulletproof Vest Testimony

In addition, Ross argues that testimony related to the purpose and use of a bulletproof vest recovered from the York Street house was improperly elicited as it was irrelevant. "This is especially true," he asserts, "since the officers admitted that the vests could be purchased by private individuals." However, and critically, Ross indicated that he had no objection to admission of the vest into evidence.

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[41] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980) (alteration by *Bahoda* Court).

[42] *Dobek*, *supra* at 63.

[43] *Id.* at 76.

[44] *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

[45] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) (stating that an abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes).

F. Jury Selection

Ross also claims that the prosecutor's statements during jury selection constituted misconduct. Ross specifically takes issues with the prosecutor's comments related to lying. Ross contends that the prosecutor told jurors that when a person looks down that means he is lying. In point of fact, the prosecutor's statement indicated that looking at the floor while making a statement could have an impact on the determination of whether that person was telling the truth. Despite Ross's contention that this constituted argument on facts not in evidence, the prosecutor's comments were similar to those the trial court made during final instructions to the jurors that they could consider how a witness looks and acts when making credibility determinations. In addition, the trial court instructed the jury that it should decide the case on the evidence, which did not include the attorney's statements. As noted above, jurors are presumed to follow their instructions.[46]

G. Prior Bad Acts

Ross's final claim of prosecutorial misconduct relates to the introduction of testimony related to a prior drug sale. As discussed above, the contested evidence was properly admitted.

VIII. Ineffective Assistance Of Counsel

A. Standard Of Review

Ross argues that he was denied effective assistance of counsel. In order to preserve a claim for ineffective assistance of counsel, a defendant must make a motion for a new trial or request an evidentiary hearing in the trial court.[47] Ross did not request a new trial or an evidentiary hearing after the trial. Thus, the issue is unpreserved. We limit our review of unpreserved claims of ineffective assistance of counsel to mistakes apparent on the record.[48]

B. Legal Standards

In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable.[49] A defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy.[50]

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[46] *Abraham*, *supra* at 279.

[47] *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

[48] *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

[49] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

[50] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

C. Applying The Standards

Ross specifically argues that he was denied effective assistance by his counsel's failure to object to the scoring of offense variables (OVs) 2, 14, and 15. Ross was assessed five points for OV 2. Five points are properly assessed under OV 2 if "[t]he offender possessed or used a pistol, rifle, shotgun or knife, or other cutting or stabbing weapon[.]"[51] Ross asserts that when OV 1 and OV 2 are read together there is an indication that someone must have been endangered by the possession or use of the weapon in order to assess points for OV 2. However, the plain and unambiguous language of the statute requires an assessment of points if the offender "possessed or used," rather than "possessed or used to threaten or endanger a person." Each offense variable is intended to address different aspects of the sentencing offense, although there is obviously some overlap. OV 1 takes into account whether a person was threatened with a weapon, while OV 2 accounts for the heightened danger of an offense when a weapon is used, even if not used directly on a victim. These are separate concerns that can overlap when a person is so threatened, but this does not mean that the Legislature has not provided for their separate consideration given the separate concerns they address. The Legislature could have directed that OV 2 not be scored if points are scored for OV 1,[52] and its decision to forgo such a restriction is instructive.

In the alternative, Ross argues that the points should not have been assessed under OV 2 because he did not possess the weapons found at the house as there was no evidence that he knew the weapons were there and they were not found on his person. This argument must fail when there was sufficient evidence to establish that Ross possessed a firearm, as discussed in detail above.

Ross also challenges the trial court's decision to assess ten points under OV 14. Ten points must be assessed under OV 14 when the trial court determines the offender "was a leader in a multiple offender situation[.]"[53] Here, there was a multiple offender situation, as Ross points out in his brief, given that his girlfriend was also convicted of maintaining a drug house. However, the evidence at trial established that Ross was the one who actually conducted the sales in the front yard of the residence. This was sufficient evidence to support the trial court's scoring decision.

Ross was also assessed five points for OV 15. OV 15 requires assessment of five points if "[t]he offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking[.]"[54] Trafficking is defined as "the sale or delivery of controlled substances . . . on a

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[51] MCL 777.32(1)(d).

[52] See, e.g., MCL 777.41 and MCL 777.42.

[53] MCL 777.44.

[54] MCL 777.45(1)(g).

continued basis to 1 or more individuals for further distribution."[55] Ross argues that the trial court erred in assessing these points because there was no evidence of trafficking as defined by the statute. Ross's assertion that evidence of trafficking is required in order to assess points under this statute would result in impermissible surplusage in the language of the statute.[56] Instead, a more reasoned interpretation of the language results in the conclusion that the points should be assessed when (1) the offense involves the delivery or possession with intent to deliver drugs, or (2) if the offense involved possession of drugs having a value or under such circumstances as to indicate trafficking. Here the points were properly assessed because the offense meets the first prong.

Because the offense variables were properly scored, defense counsel was not required to object. Therefore, Ross's claim of error cannot succeed based on a failure to raise a meritless objection.[57] We also cannot fault counsel for failing to object to the asserted instances of prosecutorial misconduct, for, as discussed above, the prosecutor did not engage in misconduct. The trial court also did not err in instructing the jury regarding possession, and we cannot fault counsel cannot for failing to take further any further action in this regard.[58]

IX. Sentencing

Ross's arguments that his sentences are invalid and that he entitled to resentencing were waived at trial; thus, we need not address them.[59]

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

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[55] MCL 777.45(2)(c).

[56] *People v Perkins*, 473 Mich 626, 638; 703 NW2d 448 (2005).

[57] *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000) ("Defense counsel is not required to raise a meritless objection.").

[58] *Id*.

[59] *Carines*, *supra* at 762-763 n 7 ("[W]aiver is the intentional relinquishment or abandonment of a known right.") (citation and quotation omitted).