STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2009
v MARIA ROMAS CARROLL, Defendant-Appellant.	No. 286422 Oakland Circuit Court LC No. 2008-218509-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ROY LEE PORTIS, Defendant-Appellant.	No. 286423 Oakland Circuit Court LC No. 2007-217512-FC

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

PER CURIAM.

Following a joint trial before separate juries, defendants Maria Carroll and Roy Portis were each convicted of possession with intent to deliver 450 or more but less than 1,000 grams of cocaine, MCL 333.7401(2)(a)(ii), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Carroll was sentenced to concurrent prison terms of 115 months to 30 years for the cocaine conviction, 65 days for the marijuana conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant Portis was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 186 months to 30 years for the cocaine conviction, 192 days for the marijuana conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendants appeal as of right. We affirm.

I. Basic Facts

On October 12, 2007, Pontiac police executed a search warrant at a two-story house, located at 58 Nelson. When the officers entered the house, defendant Carroll was at the top of

the stairs holding defendant Portis's four-year-old child and defendant Portis was exiting the master bedroom.

In the master bedroom, the officers found a digital scale with cocaine residue, a corner tie plastic bag containing more than three grams of marijuana, and a pipe on top of a dresser. A Metro PCS cellular telephone was also on the dresser.[1] The top drawer of the dresser contained 14 loose nine-millimeter rounds, an empty nine-millimeter shell box, and a Metro PCS receipt in the name of "William Sullivan" that corresponded with the cellular telephone found on top of the dresser.[2] In the top drawer of a nightstand, the officers discovered 12 individually wrapped rocks of cocaine. On top of another nightstand was an opened Ajax false bottom can that contained two corner tie bags of crack cocaine; one bag had one rock of cocaine and the other had 13 individually wrapped rocks of crack cocaine. Inside that nightstand were several forms of correspondence to defendants Portis and Carroll. "Just inside" the bedroom closet, the officers found a nine-millimeter highpoint rifle with eight rounds in the magazine that were consistent with ammunition found in the dresser drawer. A brick of cocaine in a gallon-size Ziploc bag wrapped in duct tape and a corner tie bag containing three individually wrapped rocks of cocaine were also in the closet.

Large male clothing, along with size 13 male shoes, and petite female clothing were found in the master bedroom. According to one of the officers, the large male clothing was consistent with defendant Portis's quite larger physique and the petite female clothing was consistent with defendant Carroll's smaller size. In the pocket of a 5XL sweatshirt, the officers found a corner tie of crack cocaine. A framed photo of defendant Portis sat on top of one of the dressers.

II. Docket No. 286422 (Defendant Carroll)

A. Effective Assistance of Counsel

Defendant Carroll argues that defense counsel was ineffective for failing to object or have her jury removed when codefendant Portis's counsel questioned an officer about a statement that defendant Carroll allegedly made to the police during the execution of the search warrant. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

[1] An officer monitored the cellular telephone that was confiscated from the master bedroom. When the telephone rang, the caller asked for "Jay" and requested narcotics.

[2] An officer explained that it is not difficult to obtain a Metro PCS cellular telephone using a false name, because it can be paid for in cash and no identification is required. The officer further explained that individuals involved in drug trafficking often use this method to prevent their cellular telephones from being traced back to them.

Effective assistance of counsel is presumed and 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, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A defendant must overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

According to an officer, during the execution of the search warrant, defendant Carroll directed the police to the drugs and gun in the master bedroom. The officer did not include the statement in the police report, or disclose it to the prosecutor until shortly before trial. The statement was discussed at a court hearing on defendant Carroll's motion to sever the defendants' trials. During the discussion, the prosecutor acknowledged that the statement was not admissible as substantive evidence, but argued that it could be used for impeachment if defendant Carroll testified and denied any knowledge of the drugs and gun. Defense counsel sought to have the statement excluded for any purpose, arguing that it was not mentioned in the police report and not disclosed until just before trial. The prosecutor responded that defendant Carroll was presumed to know the content of her own statement and that it was admissible for impeachment purposes. The trial court ruled that the statement could be considered for impeachment at the appropriate time.

Subsequently, the officer testified in the prosecution's case-in-chief, before defendant Carroll testified in her own defense. In cross-examining the officer about the police investigation, codefendant Portis's counsel asked him about defendant Carroll's statement, his failure to include it in the police report or to timely disclose it, and whether he had withheld other pertinent information. Defense counsel did not object and, during his cross-examination of the officer, continued challenging the propriety of the police investigation and the credibility of the police and the statement. For example, defense counsel questioned the officer about his academy training and whether he was trained regarding the importance of police reports and that they should be "fair, complete and accurate." When the officer indicated that he did not include it because it was not admissible, defense counsel asked if he was a lawyer or an expert in the field. In response to defense counsel's questions, the officer admitted that had he written down defendant Carroll's exact wording, he would know better what defendant Carroll actually stated. The officer also acknowledged that he was wrong in failing to include the statement in his report. Defense counsel went on to cross-examine a second officer about leaving the statement out of the police report, the importance of keeping an accurate record, and the decision to withhold the information until trial. During defendant Carroll's testimony, she denied any knowledge of the drugs and gun, and denied making a statement to the police about the items.

Defendant Carroll has not overcome the presumption that defense counsel's handling of this issue was reasonable trial strategy. The record indicates that the defense strategy was for defendant Carroll to testify and deny any awareness of the drugs and gun in her home. Therefore, her statement directing the police to the drugs and gun would have been admissible

for impeachment. See *Harris v New York*, 401 US 222, 223-226; 91 S Ct 643; 28 L Ed 2d 1 (1971) (statements that are inadmissible because they violate *Miranda*[3] may be admitted to impeach the defendant's testimony at trial).

Given that defendant Carroll intended to testify, thereby opening the door to the admission of the challenged statement as impeachment evidence, attacking the reliability of the statement became a crucial part of the defense strategy. Defense counsel attempted to use the facts surrounding the statement to discredit the police officers and their investigation, thereby raising questions about their claim that defendant Carroll told them about the drugs and gun. Thus, defense counsel's decision to discuss the statement in this context, during the officers' testimony, had a purpose of both removing the sting of the statement and of undermining the reliability of the police investigation. See, e.g., *People v Rodgers*, 248 Mich App 702, 715-716; 645 NW2d 294 (2001). Under the circumstances, defense counsel's strategy was not unreasonable. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id*.

B. Sentence

Defendant Carroll also argues that she is entitled to be resentenced because her 115-month minimum sentence constitutes cruel or unusual punishment, contrary to US Const, Am VIII, and Const 1963, art 1, § 16.[4] Defendant Carroll was sentenced near the middle of the sentencing guidelines range of 81 to 135 months. Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence, neither of which is alleged to have occurred here, this limitation on review is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). But a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), and a sentence that is proportionate is not cruel or unusual punishment, *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). The factors raised by defendant Carroll do not overcome the presumption of proportionality in this case. Therefore, defendant Carroll has failed to overcome the presumptive proportionality of her sentence and, accordingly, her sentence does not constitute cruel or unusual punishment.

III. Docket No. 286423 (Defendant Portis)

A. Sufficiency of the Evidence

Defendant Portis argues that the evidence was insufficient to sustain his convictions because there was no evidence that he possessed the controlled substances or weapon found in codefendant Carroll's home. We disagree.

[3] *Miranda v Arizona,* 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] Defendant Carroll argues that her sentence is cruel or unusual because of her family support, employment history, and lack of a prior criminal record.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

At trial, the prosecutor advanced the theory that defendant Portis was guilty as a principal or as an aider or 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) (quotation 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." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation omitted). "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 or abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *Carines, supra* at 757-758.

Defendant Portis challenges only the possession element of the two drug offenses. Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe*, *supra* at 520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 521. A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id*. at 520. Instead, some additional connection between the defendant and the contraband must be shown. *Id.* "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). "[C]ircumstantial 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).

Viewed in a light most favorable to the prosecution, the circumstantial evidence established that defendant Portis had constructive possession of the drugs or assisted codefendant Carroll in possessing the drugs. Defendant Portis concedes that the evidence established that he had a domestic relationship with codefendant Carroll, the listed owner of the house. Defendant Portis was present in the house, along with his four-year-old son, when the search warrant was

executed. The drugs were found in the master bedroom, and defendant Portis was coming out of that bedroom when the search warrant was executed. A digital scale with cocaine residue and a bag of marijuana were in plain view on top of a dresser in the master bedroom. On top of a nightstand in plain view was an opened Ajax false bottom that contained two bags of crack cocaine. Inside that nightstand was a document belonging to defendant Portis. On the closet floor was a corner tie bag containing three individually wrapped rocks of cocaine. While the bag of cocaine was not in plain view, an officer was able to see the bag when he walked into the closet and bent down. In addition, very large male clothing and shoes were found in the master bedroom; the only other clothing present in the room was consistent with codefendant Carroll's petite size. In the pocket of a 5XL sweatshirt that was between the bed and the wall was a corner tie bag of crack cocaine that was consistent with the other cocaine rocks found in different places in the bedroom. In addition, framed photographs of defendant Portis and his son were in the home. This evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to reasonably infer that defendant Portis was not merely present in the home, but stayed there and had constructive possession of the drugs found there. *Nowack, supra.*

Although defendant Portis claims that codefendant Carroll alone possessed the drugs, a jury could reasonably infer from his domestic relationship with codefendant Carroll, the proximity of his personal items to the drugs found throughout the master bedroom, and the fact that he had just left the bedroom containing the contraband that he had joint constructive possession of the drugs found in the home. Defendant Portis notes the different address on his license, but an expert in narcotics trafficking explained that it is normal for a drug dealer to have a different address on his driver's license to prevent a search of his actual residence if he is stopped. The evidence was sufficient to sustain defendant Portis's convictions for possession with intent to deliver 450 or more but less than 1,000 grams of cocaine and possession of marijuana.

With respect to the felony-firearm conviction, for purposes of this offense, "the term 'possession' includes both actual and constructive possession. . . . [A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000), quoting *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989).

Viewed in a light most favorable to the prosecution, the same evidence that enabled the jury to conclude that defendant Portis had constructive possession of the drugs also established a basis for the jury to conclude beyond a reasonable doubt that he possessed the weapon. There was testimony that the firearm was found in the master bedroom "just inside" the closet. While the firearm was not in plain view, the evidence showed that it was not so hidden that defendant Portis did not have access to it. An officer indicated that when he walked into the closet, he could see the firearm. Again, there was evidence that clothing consistent with defendant Portis's large size was in the master bedroom. Given the location of the firearm, defendant Portis's proximity to the closet where the firearm was found, and the proximity of his belongings to the firearm and ammunition, the jury could reasonably infer that he knew of the firearm's location and that the firearm was reasonably accessible to him. *Nowack*, *supra*. The evidence was sufficient to sustain defendant Portis's conviction for felony-firearm.

B. Prosecutor's Conduct

Defendant Portis also argues that he was denied a fair trial because the prosecutor impermissibly argued facts not in evidence. We disagree. This Court reviews preserved claims of prosecutorial misconduct case by case, examining the challenged remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

Defendant Portis argues that during closing argument the prosecutor argued facts not in evidence and violated the trial court's earlier order when he argued that defendant Portis's nickname is "J" or "Jay." During the questioning of an officer regarding the confiscated cellular telephone and the calls intercepted after defendant Portis was arrested, an officer testified that the callers asked for "J" and asked to purchase narcotics. The officer also testified that, through his experience, he knew the identity of "J". Defense counsel objected on hearsay grounds to the officer testifying about the identify of "J" and how he learned the identity. Outside the jury's presence, the prosecutor made an offer of proof regarding a confidential informant and the court heard arguments. The court ruled that the officer could not identify defendant Portis as "J", and that the evidence should come in through the confidential informant or codefendant Carroll who would testify that she knew defendant Portis only as "J". The prosecutor chose not to reveal the confidential informant; thus, there was no testimony that defendant Portis is known as "J".

Subsequently, during closing argument, the prosecutor made the following argument:

> The cell phone from the dresser received calls to buy drugs. Again, he's claiming because it's in someone else's name, it's not his. He was leaving the room right as the officers approached. The cell phone was on the dresser and um - - I believe they were asking for J. Remember, he's a junior. Sometimes with street names or nicknames you have to look at reasons. Sometimes the reasons are something silly they did in their past. Sometimes the reasons relate to the person's size or characteristics. And sometimes it's abbreviations for the name. In this case he's a junior so J makes sense.

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). Here, however, viewed in context, the prosecutor's remarks were not improper. Defendant Portis contends that the charging document did not identify him as a junior, and there was no evidence at trial that he is a junior. While that is true, the jury was aware of defendant Portis's status as a result of defense counsel presenting him to the jurors as "Roy Portis, *Jr*.," and indicating to them that he may be calling "Roy Portis, *Jr.* himself" and "Roy Portis, *Sr*." (emphasis added). Further, the prosecutor did not state that there was direct evidence that defendant Portis is J and that the cellular telephone belonged to him, but noted the evidence and urged the jury to use its common sense and everyday experiences when considering the evidence that reasonably supported those inferences. The prosecutor was free to argue the evidence and all reasonable inferences arising from it as they related to his theory of the case. See *Bahoda*, *supra* at 282.

Defendant Portis also contends that the prosecutor argued facts not in evidence when he repeatedly referred to the male clothing found in the house as "his clothing" and "his dresser" during closing and rebuttal arguments.

Defendant Portis objected to the prosecutor's use of the term "his" when referring to the clothing and dresser, and the court overruled the objections. As aptly stated by the trial court, the remarks constituted "[the prosecutor's] theory. This is his argument." We agree that the prosecutor's remarks constituted proper argument based on the evidence and reasonable inferences arising from it as they related to the prosecutor's theory. See *Bahoda*, *supra*.

Furthermore, although the challenged remarks were not improper, we note that defendant Portis's right to a fair trial was also protected when, in response to the prosecutor's objection during defense counsel's closing argument, the court instructed the jury as follows:

> Ladies and Gentlemen, just it's been kind of going both ways. And that happens sometimes. Just remember these are arguments of Counsel both that the Prosecutor made his closing and opening, same thing with [defense counsel]. These are arguments of Counsel. You'll be the Judges of what the facts are and what the evidence was in the case, okay?"

The court also instructed the jury in its final instructions that the lawyers' comments are not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was required to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

C. Curative Instruction

We disagree with defendant Portis's claim that the trial court erred in denying his request for a curative instruction regarding the prosecutor's remarks that he is "J." Instead, we agree with the trial court that the requested instruction was unnecessary because the prosecutor's remarks were part of a permissible argument. Also, the jury was properly instructed on evaluating the attorneys' arguments during defense counsel's closing argument and the court's final instructions. For the same reasons, defendant Portis was not entitled to a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) ("A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.") (internal citation omitted).

D. Sentence

Defendant Portis argues that he is entitled to be resentenced because of errors that occurred at sentencing. We disagree.

Defendant Portis first argues that the trial court failed to properly resolve his challenges to inaccurate information in his presentence report. The trial court's response to a challenge to the accuracy of the presentence report is reviewed for an abuse of discretion. *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). A court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes. *Id*.

At sentencing, a party may challenge the accuracy of any information contained in the presentence report. MCR 6.425(E)(1)(b); *People v Hoyt*, 185 Mich App 531, 533-534; 462 NW2d 793 (1990). The information is presumed to be accurate, but when presented with a challenge to the factual accuracy of information, a court has a duty to resolve the challenge.

People v Grant, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *Uphaus (On Remand)*, *supra* at 182. When the accuracy of the presentence report is challenged, the trial court must allow the parties to be heard and must make a finding regarding the challenge or determine that a finding is unnecessary because the court will not consider the challenged information during sentencing. MCR 6.425(E)(2). If the challenged information did not affect the sentencing decision, resentencing is not required. *People v Thompson,* 189 Mich App 85, 88; 472 NW2d 11 (1991).

At sentencing, defendant Portis disputed information in the presentence report that he had an outstanding warrant for a probation violation in Wayne County, a juvenile felony conviction, and two prior juvenile misdemeanor convictions for retail fraud. Defense counsel indicated that defendant Portis had said he was not convicted in those cases. In disputing the information, defense counsel acknowledged that "[a]ll of those corrections don't affect the guidelines." The prosecutor argued that the information was accurate and urged the trial court to rely on the probation officer's review of the records:

> One of the things the court can take into consideration is a probation officer's review of the records and listing in the PSI the convictions that exist. While I agree that I did not proceed on the count [from Wayne County for habitual offender] because I did not have a certified conviction therefore I could not proceed, I believe the probation's evaluation of it is accurate. There is in fact a felony conviction. Again, it does not affect the guidelines but we agree with probation.

A probation department representative added that "defendant's lien shows an outstanding warrant[.]" After listening to the parties' arguments, the trial court ruled that the convictions were accurate and adopted the prosecutor's reasoning. Based on the record, the trial court did not abuse its discretion.

Defendant Portis also argues that the following emphasized comments by the trial court at sentencing indicate that the court improperly considered his failure to admit guilt when it sentenced him in the middle of the sentencing guidelines range rather than at the lower end:

> The court has considered what has been placed on the record here today as well as everything that's been in the presentence investigation and what occurred during the trial; the court took judicial notice of same.
>
> In reviewing this case before today the court also read and considered Latesha Jefferson's letter and defendant's mother's letter and that will be available to counsel if either of them wish to see it at any point. And I have written here the court should take some consideration for the sake of the defendant's loved ones *if the defendant's words at sentencing merit it and defendant has elected not to.* I am very sorry for the loved ones, sir, for your loved ones and I could have seen fit to grant some leniency for lack of a better word for their sake, not for yours, *if you could demonstrate that -- if you could supply the tools to do so.* I can't supply it. *You've elected not to* so I am very sorry for their sake, I can't do it accordingly. [Emphasis added.]

"Resentencing is warranted if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did." *Conley*, *supra* at 314 (quotation omitted). Here, the challenged comments indicate that the court merely acknowledged that defendant Portis had not provided any reasons to support a lower sentence. The court did not ask defendant Portis to admit guilt or offer him a lesser sentence if he did. Consequently, defendant Portis is not entitled to resentencing.

Because we have concluded that resentencing is not warranted, it is unnecessary to consider defendant Portis's claim that this case should be reassigned to a different judge for resentencing.

Affirmed.

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