STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO SHELBY,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 194883
Recorder's Court
LC No. 95-004881

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant was convicted in a bench trial of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He was sentenced to one year in jail and lifetime probation. He appeals as of right. We affirm.

Defendant first argues that the trial court committed reversible error when it allowed a police officer to testify concerning defendant's response to a question posed regarding his address that was asked along with several other questions, including defendant's date of birth, social security number, and other basic information. Defendant claims that his response to the question regarding his address was incriminating because he replied that he lived at the residence where the heroin was found during a drug raid. Defendant claims that his statement should have been suppressed because he was not given a *Miranda* warning prior to these basic information questions. We disagree.

The findings of fact made by the trial court in overruling defendant's objection to the admission of the statement are reviewed under a clearly erroneous standard. MCR 2.613; *People v Matuszewski*, 32 Mich App 475, 478; 189 NW2d 109 (1971). Whether the trial court properly applied the law in overruling defendant's objection to the testimony concerning his pre-*Miranda* statements is a question of law. Questions of law are reviewed de novo. *Cardinal Mooney HS v MHSAA*, 437 Mich 75, 80; 467 NW2d 21 (1991).

In the case of *Pennsylvania v Muniz*, 496 US 582; 110 S Ct 2638; 110 L Ed 2d 528 (1990), a four justice plurality of the United States Supreme Court held that, although questions regarding name, address, height, weight, eye color, date of birth, and current age do qualify as "custodial interrogation,"

statements in response to such questions are nonetheless admissible because they fall into a "routine booking question" exception when they are asked merely to obtain biographical data for the booking or pretrial process. *Id.* at 601. The plurality explained that statements would not be admissible if they were in response to questions that were designed to elicit incriminatory admissions. *Id.* at 601, n 14.

In a concurring opinion by Justice Rehnquist, four other justices expressed the view that responses to routine booking questions are not testimonial and therefore do not fall within the protection of *Miranda*, and therefore did not need to reach the issue of whether there exists a "routine booking" exception. *Id.* at 608. Therefore, eight justices indicated that a defendant's responses to routine booking questions are admissible.

In the case at bar, the trial court made a finding of fact that the questions were not designed to elicit incriminatory responses based upon the officer's testimony that the question about the address was asked in conjunction with a number of other seemingly innocuous questions concerning such things as defendant's date of birth and social security number. We hold that the trial court's finding of fact was not clearly erroneous because it was supported by the officer's testimony concerning the context in which the questions were asked and the testimony that the questions were asked to obtain basic information and were not needed to make out the elements of the crime.

Defendant misconstrues the *Muniz* holding when arguing that his response should be excluded because it was incriminatory. The issue is not whether the response was incriminatory, but whether the question was designed to elicit incriminatory admissions. Relevant case law shows that even where the defendant's response was allegedly incriminatory, it may still be admissible. In *United States v Lopez*, 915 F Supp 891, 900 (ED Mich, 1996), the Court held that *Miranda* warnings were not required before routine booking questions even though the defendant claimed his statement concerning his identity was incriminatory because he had previously given the police incorrect information about his identity. In *United States v Broadus*, 7 F 3d 460, 464 (CA 6, 1993), the Court held that the defendant's allegedly incriminatory statements concerning his phone number were admissible because they were made in response to routine booking questions and because there was no evidence that the questions were designed to elicit incriminatory admissions. Therefore, we hold that the trial court did not commit error when it overruled defendant's objection to the officer's testimony concerning defendant's statement made in response to routine booking questions.

Defendant's next issue on appeal is that the evidence was insufficient to support his conviction of possession with intent to deliver less than fifty grams of heroin. We disagree.

When reviewing a sufficiency of the evidence argument, we must consider whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient for a rational trier of fact to find that the elements of the offense were proven beyond a reasonable doubt. *People v Ricky Vaughn*, 200 Mich App 32, 35; 504 NW2d 2 (1993). Possession of a narcotic may be actual or constructive. *People v Richardson*, 139 Mich App 622, 625; 362 NW2d 853 (1984). "Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *Id.* In *Richardson*, *supra*, this Court held that there was sufficient evidence of possession

of cocaine where cocaine was found in the drawer of a water bed to which persons other than the defendant had access, and where the drawer contained papers with the defendant's name on them. *Id*. The presence of the defendant's papers in the drawer supported a reasonable inference that the defendant possessed the cocaine. *Id*. at 625, 626.

We have held that there is sufficient evidence of possession of heroin with intent to deliver where the defendant was found in the bathroom of his home with two women, drugs were found in the residence, heroin cookers and foil papers were found in the defendant's attic, and a syringe was found in the defendant's pocket. *People v Tolbert*, 77 Mich App 162, 164-166 (1977). We stated that "this evidence indicates that one could reasonably infer that it was defendant, and not the other two women in the bathroom, who had possessed the heroin found there." *Id*.

In the case at bar, a rational trier of fact could infer that defendant possessed the heroin with the intent to deliver. During a raid, an officer found twenty-six packets of heroin on the ledge above the door to defendant's dwelling. When the officers entered defendant's apartment, he ran to the bathroom and put $631 into the toilet tank. He had an additional $239 and a beeper on his person. Defendant's argument that the residents of the downstairs apartment could have put the drugs on the ledge of the door to his dwelling and that there was therefore access by other adults ignores the *Richardson* case where there was also access by other adults but where we found sufficient evidence based upon additional evidence linking the defendant to the drugs. The additional evidence linking defendant to the drugs in this case is, when the police entered, defendant's behavior of running into the bathroom and placing a large amount of U.S. currency into the toilet tank, hardly an innocuous action. The presence of the beeper, a known tool of the drug trade, while not sufficient by itself, clearly supports the trial court's reasonable inference of possession in this case.

The intent to deliver can be inferred from the quantity and packaging of narcotics. *People v Kirchoff*, 74 Mich App 641, 648-649; 254 NW2d 793 (1977). In the case at bar, the fact that twenty-six packets of heroin were found on the ledge of the door to defendant's flat, combined with defendant's attempt to hide large sums of cash, support a reasonable inference of defendant's intent to deliver. We hold that the evidence is sufficient for a rational trier of fact to find that defendant committed the elements of the offense beyond a reasonable doubt.

Defendant's final argument on appeal is that the trial court improperly admitted into evidence a police officer's testimony concerning the presence of defendant's clothes and effects in the downstairs flat of the building in which defendant was found in the upper flat during the drug raid that is the subject of this case. Defendant's clothes and effects were earlier found in the downstairs flat during a prior raid. Defendant contends that the admission of the officer's testimony violates MRE 404(b) because it relates to prior crimes, wrongs, or acts of defendant. We disagree.

"The admission of similar acts evidence will not be reversed on appeal unless the trial court has abused its discretion." *People v Humble*, 108 Mich App 777, 778; 310 NW2d 878 (1981). MRE 404(b)(1) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

This issue came up when the trial court was questioning a police officer concerning his knowledge of defendant's address. When the officer testified that he had been in the downstairs flat at that location on a prior raid, defense counsel objected. In overruling counsel's objection, the trial court stated as follows:

> The rule doesn't bar this evidence. The rule bars evidence of one's prior misconduct, one that is offered to prove that the person is inclined to commit wrongful acts and therefore to get the trier of fact to infer from that that by reason of bad character it is more likely than not that he also committed a wrongful act at the time charged. This evidence is sought for the purpose of examining the witness's ability to know where the defendant lived at the time of the raid in question. . . . [A]nd I don't need to point out the obvious that he hasn't said that Mr. Shelby was the subject of the earlier action, whatever it was. But as of yet I don't know the full significance of the issue but I do know that this has been the subject of - the only evidentiary contest of any significance in this case and so if it turns out to be significant, the court should not be deprived of it by the wrongful application of a rule of exclusion.

The language of MRE 404(b) does not apply to the admitted testimony. There was no direct testimony concerning any "crimes, wrongs, or acts" committed by defendant in conjunction with this prior raid. As the trial court correctly points out, there has not been any testimony as to who was the subject of the raid. The only testimony was that defendant's clothes and effects were present at the lower flat and that the officer believed that defendant had used both flats as his address.

Under MRE 402, this evidence was properly admitted because it is relevant to the issue of possession of the narcotics. Defendant tried to argue that he did not possess the drugs because they were found in a common area of the building. If defendant had a connection to the building beyond the upper apartment, that could allow a trier of fact to find it more probable that the drugs found in the alleged common area were in the possession of defendant. MRE 401. The testimony is also relevant to the officer's credibility as a witness to testify competently as to defendant's address.

Defendant further argues that the testimony should have been excluded under MRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury." Since counsel failed to cite this specific court rule when he objected at trial, the trial court did not specifically rule with regard to this rule. However, there is no abuse of discretion in not excluding the evidence under MRE 403 in this

case because it is a bench trial, thus making the risk of prejudice or confusion of the issues minimal and the risk of confusing the jury nonexistent. The trial court specifically limited the purposes for which the testimony was being admitted when it overruled defendant's objection. We hold, therefore, that the trial court did not abuse its discretion in admitting the testimony.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy