STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN R. PAYNE,

Defendant-Appellant.

UNPUBLISHED
September 18, 1998

No. 202461
Recorder's Court
LC No. 95-008803

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of more than 50 but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). Defendant was sentenced to ten to twenty years' imprisonment. He now appeals as of right. We affirm.

Defendant first argues that he was denied effective assistance of counsel when defense counsel's mistake provided an element of the charged offense that was otherwise lacking from the prosecution's case. To establish a denial of effective assistance of counsel, a defendant must demonstrate that counsel's performance was objectively deficient and that the deficiency was prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

On cross-examination, defense counsel elicited testimony from the prosecution's chemist that provided the exact weight of the cocaine, 61.30 grams, seized at defendant's residence. Defendant argues that up until that point, the prosecution had not established the exact weight – a crucial element of the crime charged – and that counsel committed an error in eliciting such testimony. We disagree.

Our review of the record reveals that prior to the expert's testimony, the police officer who seized the cocaine from defendant's premises testified, during direct examination by the prosecutor, that the amount of cocaine seized was 61.30 grams. Therefore, defendant's claim that his trial counsel brought forth this evidence for the first time during his cross-examination of the expert is without merit. Accordingly, defendant's trial counsel was not ineffective.

Defendant next argues that there was insufficient evidence presented at trial to convict him of possession because he shared his home with more than one other adult. We disagree. We review an issue challenging the sufficiency of the evidence for whether a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find the elements of the crime to have been proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458; 502 NW2d 177 (1993).

In order to find a defendant guilty of possessing more than 50 but less than 225 grams of cocaine, the prosecutor must show that the defendant had actual or constructive possession of the cocaine. *People v Richardson*, 139 Mich App 622, 625; 362 NW2d 853 (1984); see also CJI2d 12.5. A defendant need not have actual physical possession of the cocaine to be guilty of possession because the law holds that possession may be actual or constructive. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992). Even in the absence of direct evidence, possession may be established by showing that the defendant controlled or had the right to exercise control over the illegal substance and knew the substance was present. *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990). However, it is not enough that the prosecution show merely that the defendant was at the location where the drugs were found. *Wolfe, supra*, 440 Mich 520. Rather, there must be additional evidence linking the defendant to the substance – "constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521.

In the case at bar, the cocaine was found in the kitchen of the home on the window sill above the kitchen sink. Defendant claims that the sink was a "common area" of the home that he shared with others. In his statements to police, defendant denied knowing how the cocaine came to be in the kitchen. Defendant also presented the testimony of Dewayne Pinkard, who stated that he and two other individuals lived at the home as well. Pinkard testified that he saw the other individuals sell drugs, but never saw defendant sell drugs. The police, however, observed defendant at the home during the their two-day surveillance of the premises and, other than defendant's girlfriend, observed no other adults living on the premises. Further, defendant admitted that he had lived at the house for approximately four years, and officers found a set of house keys that defendant admitted were his. Also, two pieces of mail were found in the house that bore defendant's name and were further proof of residence. Finally, when questioned by police, defendant at no time claimed that anyone other than his girlfriend lived at the home.

Under the totality of the circumstances, we conclude that there exists a sufficient nexus linking defendant with the narcotics, and that, therefore, when viewing the evidence, and the reasonable inference arising from it, in a light most favorable to the prosecution, a rational trier of fact could have found, beyond a reasonable doubt, that defendant possessed the cocaine.

Defendant's final argument is that the trial court abused its discretion in allowing certain evidence to be admitted at trial. We disagree. We review a trial court's decision to admit evidence for abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Prior to trial, defendant moved in limine to suppress evidence seized during the search of his home. Defendant did not argue that the evidence was illegally seized but, rather, that the items

recovered – $1,786 in cash, a handgun, a pager, and two cellular phones – were irrelevant and highly prejudicial to defendant. Defendant maintained that the evidence was not relevant because no rational trier of fact could reasonably conclude that because defendant's home contained such items, defendant must be in the business of selling drugs. The trial court denied defendant's motion and concluded that the seized items were relevant because they were of the type generally related to the drug business. The court pointed out that the amount of cocaine in this case, over fifty grams, was not small and evidence of the items seized may assist the jury in determining defendant's guilt. Defendant claims, however, that the evidence was wrongfully admitted because each item, standing on its own, was innocuous, but the jury was led to believe that because defendant had these items in his home, he must be guilty of the crime charged.

If evidence has any tendency to make more or less probable a fact of consequence to the case, then it is relevant and generally admissible. MRE 401; MRE 402; *People v VanderVliet*, 444 Mich 52, 60-61; 408 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). A piece of evidence is "logically relevant," even if not highly probative standing alone, so long as the evidence affects "the balance of probabilities" in some way relating to a material fact in dispute. *VanderVliet, supra*, 444 Mich 60 n 8. Evidence does not necessarily have to relate to the elements of the crime, but must at least be in issue and relate to a controversy within the litigation. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). However, even evidence that is relevant may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Michigan Courts have acknowledged that there are some items that are typically related to the drug business. In *People v Carter*, 194 Mich App 58, 62; 486 NW2d 93 (1992), this Court stated, "we would be ignoring the wisdom of our own experience as appellate judges if we refused to acknowledge that drug dealers often use paging devices and coded documents to facilitate their trade." As the trial court in this case indicated, defendant was charged with possessing more than fifty grams of cocaine. The evidence was relevant in showing that defendant, in fact, possessed such a large amount of cocaine. That is, jurors could infer that defendant's possession of such items meant that he was active in the drug business. While defendant was not charged with possession with intent to deliver, his activity in the drug business would be relevant in finding that defendant possessed a large amount of cocaine. Thus, the trial court did not abuse its discretion when it admitted the gun, the pager, and two cellular phones seized from defendant's home into evidence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White