

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUIS A. REYES,

Defendant-Appellant.

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UNPUBLISHED

April 27, 1999

No. 204809

Oakland Circuit Court

LC No. 94-133414 FH

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver more than 225 grams but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). The trial court sentenced defendant to twenty to thirty years' imprisonment with credit for 403 days served. Defendant appeals as of right. We affirm.

**I. Basic Facts And Procedural History**

At trial in this matter,<sup>1</sup> Oakland County Sheriff's Department Deputy Gary McClure testified that, in early 1994, the department's Narcotics Enforcement Team ("NET") investigated 57 Putnam Street, Pontiac, as a possible drug house. The house was rented to Eva Garcia<sup>2</sup> by her brother; she lived there with her children and defendant stayed there frequently.

In early April of 1994, according to Deputy McClure, NET officers went through two bags of trash mistakenly collected from a house one block from the Putnam Street address but actually containing mail addressed to defendant and Garcia at 57 Putnam Street, as well as a prescription container with the name of Eva Garcia. According to Deputy McClure, the trash included "numerous" baggies with cocaine residue and pulled out corners, an empty container of mannitol, and a piece of paper Deputy McClure characterized as a drug tally sheet or ledger with "Eva" written on it. Deputy McClure testified that the corners of baggies are commonly used to package cocaine into "corner ties" and that mannitol is used to cut cocaine. McClure also testified that, in his experience, it was not unusual to find trash moved to a different address in order to hide evidence of drug trafficking. Another

NET officer, State Police Lieutenant and crew supervisor Christopher Lanfear, also testified that drug traffickers move their trash to avoid detection.

According to their testimony, one day later Deputy McClure and Lt. Lanfear drove to the Putnam Street area. They saw two individuals park their car at a nearby abandoned house and walk to 57 Putnam Street. Defendant let the men into the house. Deputy McClure and Lt. Lanfear both testified that, in their experience, drug houses try to prevent heavy traffic at the house to avoid detection.

Again according to their testimony, on the same day Deputy McClure and other NET officers obtained and executed a warrant to search 57 Putnam Street. Defendant, Garcia, and four children were inside the house. Deputy McClure testified that he found two paper bags in the basement. One of these paper bags contained three plastic bags and each of the three plastic bags held approximately 123 grams of cocaine. The other paper bag contained two plastic bags each holding approximately twenty-eight grams of cocaine and a third bag holding thirteen grams of cocaine. On the second floor, in the master bedroom closet, officers found a bag containing a postage scale and two baggies of cocaine weighing 2.2 grams and 12.6 grams. Defendant's fingerprints were on the bag. Two loaded unregistered handguns were found in the bedroom, one between the mattress and box spring and one in a laundry bag with additional ammunition. \$910.00 was found on a dresser in the bedroom. Another dresser held \$400.00 or \$500.00. An item characterized by Deputy McClure and Lt. Lanfear as a drug ledger was found in the kitchen. Another NET officer, Oakland County Sheriff's Department Sergeant Michael Searing, found two bottles of mannitol in a linen closet, along with several documents addressed to defendant at the Putnam Street address and other addresses. Defendant had a pager and a "corner tie" containing cocaine in his pocket.

While still at the Putnam Street house and before he was arrested, defendant, who spoke to the NET officers in Spanish, gave a statement to Lt. Lanfear through an interpreter. Defendant told Lt. Lanfear that he had an ongoing association with a man named "Kuzo"<sup>3</sup> or "William." Defendant allowed Kuzo to store cocaine in the basement and, in exchange, defendant was paid in cocaine for his own use and to sell to friends in small amounts. Defendant told Lt. Lanfear that Kuzo and another individual brought the cocaine and mannitol to the Putnam Street house that day. The two men took the cocaine down to the basement and then left. Defendant said that the cocaine in the bedroom closet was his and was from Kuzo. Defendant also said that he and Kuzo communicated with each other by pager.

At trial, defense counsel stipulated to Lt. Lanfear's qualification as an expert in narcotics investigation. Lt. Lanfear testified that it is common for people involved in drug trafficking to keep multiple addresses and to have unregistered guns available. According to Lt. Lanfear, it is not unusual for drug dealers to keep their drugs at the house of a trusted person. Lt. Lanfear stated that the amount of cocaine in the basement and the way it was packaged left "no doubt at all in my mind" that this was a very high level delivery operation. Lt. Lanfear testified that he was convinced 57 Putnam Street was defendant's primary residence given the presence of defendant's important papers and his child, as well as a statement made by Garcia.

Defendant moved for a directed verdict at the close of the prosecution's proofs and the trial court denied that motion. Defendant then presented his defense case to defendant's jury only; that case

consisted of the testimony of Rosa Reyes, who is defendant's mother, Garcia, and defendant. Reyes stated that defendant lived with her, but came and went. She stated his papers were at Garcia's house because he took them to Garcia to translate. Garcia testified that Kuzo would come to her house once or twice a week and that he went into the basement with another man on April 8, 1994. According to Garcia, defendant would occasionally go downstairs with Kuzo but would not allow her to go into the basement when Kuzo was there. Garcia stated that defendant used cocaine with friends, but she never saw him with large amounts. She also testified that Kuzo had a key to the house that he got before she moved in, but defendant did not have a key. Additionally, she testified that the guns found in the bedroom belonged to her and a cousin.

Defendant testified that, in 1994, he was selling \$20.00 packets of cocaine to his friends. He said that the cocaine found upstairs was his, but the cocaine in the basement belonged to Kuzo, who would go to the basement "all the time." Defendant stated that he knew the cocaine was in the basement, but that he did not put it there and he was not allowed to take any of it. Defendant further testified that he had no control over the cocaine in the basement and had nothing to do with it. However, he also stated that he did not allow Garcia to go into the basement. Defendant also denied that the drug ledgers were his.

## II. Standard Of Review

### A. Motion For Directed Verdict

When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). "When reviewing a trial court's ruling on a motion for a directed verdict, this Court tests the validity of the motion by the same standard as the trial court." *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998).

### B. Double Jeopardy

A trial court's determination of a double jeopardy issue is a question of law that this Court reviews de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

### C. Profile Testimony And Testimony On Possession Of Handguns

A decision as to whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close

evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

### III. Motion For Directed Verdict

Defendant argues that the trial court erred in denying his motion for a directed verdict because there was insufficient evidence to prove that he had constructive possession of two bags of cocaine seized from the basement of the Putnam Street house. Viewing the evidence in a light most favorable to the prosecution, we are satisfied that a rational trier of fact could find that constructive possession was established. *Wolfe, supra* at 515.

“A person’s presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown.” *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Viewed in a light most favorable to the prosecution, however, the evidence established that the Putnam Street house was defendant’s primary residence. There was evidence that defendant knew that “Kuzo” left two paper bags containing a total of over 350 grams of cocaine in the basement of the house. Defendant exercised control over the basement; he forbade Garcia from going downstairs. Defendant told the police that he had an ongoing association with Kuzo in which he allowed Kuzo to store cocaine in the basement and, in exchange, he was paid cocaine for his own use and to sell to friends in small amounts. From this evidence, the jury could infer that this was essentially a bailment arrangement in which Kuzo entrusted defendant to hold and protect the cocaine until it was ready to be delivered. We hold that, under the totality of the circumstances, there was a sufficient nexus between defendant and the cocaine to establish constructive possession, *Wolfe, supra* at 523-524, and hence to justify the trial court’s denial of defendant’s motion for directed verdict.

### IV. Double Jeopardy

Defendant contends that the charge against him should have been dismissed when his conviction in a previous trial on the same charge was set aside because of tainted jury deliberations. In support of his claim, defendant relies on *People v Dawson*, 431 Mich 234, 256-257; 427 NW2d 886 (1988), which held that the federal Double Jeopardy Clause bars a retrial when the prosecution engages in intentional misconduct to provoke a defendant into moving for a mistrial. Unlike *Dawson*, however, defendant’s first trial did not end in a mistrial. Instead, the jury in the first trial reached a verdict and the conviction was later set aside. The double jeopardy clause does not preclude the retrial of a defendant whose conviction is set aside because of any error in the proceedings leading to conviction other than insufficiency of the evidence to support the verdict. *People v Torres*, 452 Mich 43, 74; 549 NW2d 540 (1996); *People v Jones*, 203 Mich App 74, 79-80; 512 NW2d 26 (1993); *People v Langley*, 187 Mich App 147, 149-150; 466 NW2d 724 (1991). We hold, therefore, that a second trial under the circumstances of this case was the appropriate remedy. See *People v Clark*, 220 Mich App 240, 244-246; 559 NW2d 78 (1996).

### V. Profile Testimony

Defendant claims that the trial court erroneously overruled his objection to two police officers' expert testimony regarding common characteristics of drug dealers on the basis that the testimony constituted inadmissible profile evidence. The testimony defendant objected to was that traffickers generally keep large amounts of packaged cocaine while users do not. This was not profile evidence, but admissible expert testimony explaining the significance of the seized cocaine. *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). Officers can provide expert testimony that the quantity and packaging of seized drugs is indicative of an intent to deliver, since that information is not within a layperson's common knowledge and is useful to a jury. *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993); *People v Williams (After Remand)*, 198 Mich App 537, 541-542; 499 NW2d 404 (1993); *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991). We hold that the trial court did not abuse its discretion in admitting the testimony. Defendant did not object to the remaining portions of the officers' opinion testimony on the basis that it constituted inadmissible profile evidence. The challenge to its admissibility is therefore not preserved. *Stimage*, *supra* at 30.

## VI. Testimony On Possession Of Handguns

Defendant argues that the trial court abused its discretion in allowing evidence that the police found two loaded, unregistered handguns in the house on the ground that this evidence was irrelevant. Evidence that a defendant illegally possessed a weapon when the defendant was not charged with a weapons offense may be admissible under MRE 401 if it has some relevance to an issue in the case. *People v Hall*, 433 Mich 573, 575, 580-584 (Boyle, J.), 589 (Brickley, J.); 447 NW2d 580 (1989). The firearms in this case were relevant as evidence associated with an intent to distribute cocaine, rather than an intent to merely possess and use cocaine. *United States v Savinovich*, 845 F2d 834, 837 (CA 9, 1988). We hold that the trial court did not abuse its discretion in admitting the handguns at issue in evidence.

Affirmed.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ William C. Whitbeck

<sup>1</sup> This was the second trial in this matter. At the first trial, defendant was convicted of the charge. However, after this conviction, it was discovered that the jury found, in a box of exhibits sent to the jury room, a note addressed to defendant's attorney from the officer in charge of the case. The note from the officer accused the defense attorney of lying to the jury. The trial court set aside defendant's conviction but refused to dismiss the charge. Defendant's interlocutory application for leave to appeal the denial of his motion to dismiss was denied by this Court. (Docket No. 189545). The Michigan Supreme Court also denied leave. *People v Reyes*, 451 Mich 865 (1996).

<sup>2</sup> Defendant and a co-defendant, Eva Garcia, were jointly tried by separate juries. Garcia was defendant's girlfriend and the mother of his child.

<sup>3</sup> The police were never able to determine Kuzo's identity.