STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED June 22, 1999
v	No. 206438 Oakland Circuit Court
JOSE A. MORALES, Defendant-Appellant/Cross-Appellee.	LC No. 93-123128 FH

Before: Doctoroff, P.J., and Markman and J. B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). The court sentenced defendant to ten to twenty years' imprisonment, to be served concurrently with a previous sentence for a criminal sexual conduct (CSC) conviction. The CSC offense was committed after the drug offense, but defendant was sentenced for the CSC conviction first. Defendant now appeals as of right, and the prosecutor cross-appeals. We affirm defendant's conviction and remand for resentencing and correction of the Judgment of Sentence.[1]

Defendant first argues that there was insufficient evidence to support his conviction. When a defendant appeals his conviction on this ground, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Quinn*, 219 Mich App 571, 573-74; 557 NW2d 151 (1996).

The elements of possession with intent to deliver between 50 and 225 grams of cocaine are: (1) that the substance recovered was cocaine, (2) that the mixture containing the cocaine weighed between 50 and 225 grams, (3) that the possession was unauthorized, and (4) that the accused possessed the cocaine knowingly and with intent to deliver. *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995). Defendant contests only part of the fourth element with regard to the sufficiency of

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

evidence issue; whether defendant was in knowing possession of the cocaine found in the basement pipe.

To be convicted of possession, an accused must either actually or constructively possess the cocaine, and the possession may be either exclusive or joint. *People v Fetterly*, 229 Mich App 511, 515; 583 NW2d 189 (1998). To establish constructive possession, the accused must have the right to exercise control over the cocaine, and must know that it is present. *Catanzarite*, *supra* at 577. If the totality of the circumstances indicates that there is a sufficient nexus between the accused and the contraband, there is constructive possession. *People v Wolfe,* 440 Mich 508, 521; 410 NW2d 733 (1987). Circumstantial evidence and reasonable inferences that arise from such evidence are sufficient to establish this element. *Fetterly, supra* at 515. Even in a case that is based on circumstantial evidence alone, the prosecutor "need not negate every reasonable theory consistent with the defendant's innocence." *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). Rather, the prosecutor need only introduce enough evidence to convince a rational jury of a defendant's guilt "in the face of whatever contradictory evidence the defendant may provide." *Id.*

In the case at bar, defendant admitted that he rented the house, and, therefore, he had dominion and control over the entire house. Considering that the cocaine was valued at about $3,500, it is reasonable to infer that it was not left behind by the previous tenant. Defendant argues that either someone broke into his house and put the cocaine in the pipe, or that it belonged to his nephew. Both of these options are within the realm of physical possibility. However, there was no evidence to contradict the prosecutor's evidence that only defendant and his wife exercised dominion and control over the house. There was no evidence that a break-in had occurred or that defendant had given his nephew access to his house. Again, the prosecutor need not negate every conceivable scenario of the defendant's if he otherwise provides sufficient evidence for a rational jury to find constructive possession. See *Konrad, supra* at 273 n 6.

There were several additional pieces of evidence that made it more probable that defendant knowingly possessed this cocaine. First, he admitted to selling small quantities of the same drug from the same house within the past two months, and second, he told police where they had found the cocaine before they told him. Despite this evidence, defendant contends that he did not know the cocaine was in the pipe and that there is no nexus between him and the cocaine. However, it is inconsistent with the normal use of a home for a person not to know that there is a drug scale in his kitchen and drug paraphernalia sitting openly on a desk in his basement. A rational jury could easily conclude that both the drug paraphernalia and the drugs found nearby belonged to defendant, or even that this was the same stash of cocaine from which defendant had sold only a few weeks earlier.

Viewing this evidence in the light most favorable to the prosecutor, the circumstances are such that a rational jury could have found that the prosecutor had established constructive possession beyond a reasonable doubt. See *Fetterly, supra* at 515. The evidence was sufficient to support the guilty verdict in this case.

Next, defendant argues that the trial court abused its discretion in allowing evidence to be admitted that defendant had sold small quantities of cocaine from his house previously, and that the

police had made several controlled buys from defendant's house in the days prior to the search in which they found the cocaine in the basement pipe. A trial court's decision to admit evidence will not be reversed unless there is a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

In order to be admissible, "other acts" evidence must meet the standard articulated in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). The evidence must be offered for a proper purpose under MRE 404(b), the evidence must be relevant under MRE 402 as enforced through MRE 104(b), the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403, and the court should generally give a limiting instruction upon request. *Id.* at 74-5.

In the case at bar, the prosecutor stated that it was introducing both pieces of disputed evidence for the purpose of establishing knowledge and intent, explaining that both defendant's statement that he had previously sold cocaine from the house, and the controlled buys that the police made from the house, made it more likely that defendant knew the hidden cocaine was there and that it was not in the home for personal use. Knowledge and intent are both proper purposes for prior acts evidence. MRE 404(b)(1).

The test for whether the evidence proves something other than bad character is whether the prosecutor can meet its burden of establishing that there is an intermediate inference-- other than the impermissible inference of character-- between the prior bad act evidence and the fact sought to be proved, such as knowledge or identity. *Crawford, supra* at 391. Both pieces of evidence in the instant case meet the *Crawford* test, in our judgment. Both are relevant because they tend to make the existence of a fact that is of consequence to the determination of the action, i.e., knowledge, intent, and/or identity, more probable than it would be without the evidence. See MRE 401; *VanderVliet, supra* at 55. With each piece of evidence, it is possible to construct a chain of logic that connects the prior act to the fact sought to be proved, without including the impermissible inference of bad character or propensity. See *Crawford, supra* at 391.

The chain of logic between defendant's statement that he had previously sold small amounts of cocaine from the house and the facts sought to be proved (knowledge and intent) can be established as follows: (1) defendant sold small quantities of cocaine from the house within two months of the search; (2) if he sold cocaine, he intended to sell it; (3) if he sold cocaine, he possessed some larger amount of cocaine from which he separated each smaller amount for sale, (4) defendant knowingly possessed some larger amount of cocaine in the house with intent to sell it no longer than two months before someone sold cocaine to the unwitting suspect who sold it to police in the instant case; (5) the cocaine found in the pipe consisted of three full baggies and one partially empty baggie; (6) the larger quantity of cocaine ultimately sold to police came from the same stash of cocaine from which defendant sold smaller quantities a short time before; and (7) therefore, the fact that defendant admitted to selling small quantities of cocaine from the house within the past two months tends to make it more probable that he knowingly possessed the larger amounts of cocaine found in the pipe with the intent to sell it.

The chain of logic between the evidence of controlled buys from the house and a material fact sought to be proved (identity, knowledge, and intent) can be established as follows: (1) someone sold cocaine from defendant's house to an unwitting suspect both one and three days before the search revealed the cocaine in the basement pipe; (2) a male and female sold the drugs to the unwitting suspect; (3) at the time of the sale, defendant was the only adult male who lived in the house; (4) at the time of the sale, defendant was the only adult male who had access to the house; (5) no other cocaine was found in the house; (6) defendant sold the cocaine to the unwitting suspect one and three days before the search; and (7) therefore, the fact that controlled buys were made from defendant's house one and three days before the cocaine was found in the basement pipe makes it more probable that defendant knowingly possessed the cocaine found in the pipe with intent to sell it.

We do not believe that this evidence unfairly prejudiced defendant's case. "Rule 403 does not prohibit prejudicial evidence, only evidence that is unfairly so. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. The evidence in the case at bar was far more than marginally probative, and was admitted for a proper purpose under MRE 404(b). Further, the court gave the jury a limiting instruction. Therefore, any prejudice that resulted from its admission was not unfair. The trial court did not abuse its discretion in allowing this evidence to be admitted at trial.

Finally, the prosecutor argues that the trial court erred as a matter of law when it imposed the drug sentence to be served concurrently, instead of consecutively, with a prior sentence for criminal sexual conduct. Statutory interpretation is a question of law that this Court reviews de novo on appeal. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). Concurrent sentencing is the norm in Michigan. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). However, there is an explicit statutory requirement that sentences for certain, enumerated drug offenses are to run consecutively with sentences for other felonies:

> A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(1)(i), (ii), (iii),or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. [MCL 333.7401(3); MSA 14.15(7401)(3).]

Defendant was convicted under subsection (2)(a) of MCL 333.7401; MSA 14.15(7401), and, therefore, the above statutory provision applies to his sentencing in this case. However, defendant argues that the statute does not mandate consecutive sentencing when the offender commits a subsequent, non-drug offense, because, under those circumstances, the legislative purpose of deterring drug crimes is not served.

When a court interprets a statute, its primary goal is to ascertain and give effect to the intent of the Legislature in enacting the provision. *Denio, supra* at 699. If the statutory language is clear and unambiguous, judicial construction is not permitted, and courts must apply the plain meaning of the statute. Provisions of the Public Health Code, which includes § 7401(3), are to be "liberally construed for the protection of the health, safety, and welfare of the people of this state." *Id.* (citing MCL 333.111(2); MSA 14.15(111)(2)).

The Legislature's purpose in enacting § 7401(3) was to deter drug offenses. *Denio, supra* at 703. The Michigan Supreme Court has held that § 7401(3) is unambiguous in its mandate that sentences for the listed drug offenses "must run consecutively with sentences imposed for other felonies." *Denio, supra* at 701. The Court has also stated that neither the words of § 7401(3) nor its legislative history contain any indication that the scope of the words "another felony" should be limited in any way, and declined to limit the meaning of the phrase. *People v Morris*, 450 Mich 316, 329; 537 NW2d 842 (1995). Although defendant does not frame his argument in this way, he is contending, in essence, that the Legislature meant to limit the meaning of "any term of imprisonment imposed for the commission of another felony" to "any sentence for another felony, as long as it was not committed subsequent to the enumerated drug offense but imposed first."

Although we are not oblivious to the defendant's "fairness" argument, we decline to limit the scope of § 7401(3) absent either (1) "a convincing indication that the Legislature meant [its terms] to be interpreted in a limited manner," or (2) "a convincing argument that limitation would advance the goal of the sentence enhancement provision." *Morris, supra* at 327-28.[2] Defendant has supplied neither. Instead of showing how limiting the scope of this statute would *advance* the goal of deterring drug crimes, defendant argues that *applying the statute as written* does not deter drug crimes under the particular circumstances of this case. It is the Legislature's function to determine whether the statute has failed in its purpose, and if so, to amend or rescind it.

The plain meaning of this statute dictates that the drug sentence in this case must be imposed consecutively with "any term of imprisonment imposed for the commission of another felony." MCL 333.7401(3); MSA 14.15(7401). Criminal sexual conduct is "another felony" and the sentence imposed for it is "any term of imprisonment" and, therefore, the sentence in the case at bar should have been consecutive.

Because the trial court erred when it did not order the sentence in this case to be served consecutively with the previous, criminal sexual conduct sentence, we remand this case for resentencing. See *People v Thomas*, 223 Mich App 9, 16; 566 NW2d 13 (1997). The trial court is also directed on remand to correct the judgment of sentence, which erroneously lists the conviction as possession with intent to deliver less than 50 grams of cocaine.

Defendant's conviction is affirmed, and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Stephen J. Markman
/s/ Joseph B. Sullivan

[1] The Judgment of Sentence erroneously lists the offense as possession with intent to deliver less than 50 grams of cocaine. This should be corrected on remand. Defendant was convicted of possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).

[2] Without suggesting that a contrary result would have been required had such been the case, we note that there is no indication in the record here that the prosecutor engaged in any tactics or strategy designed to ensure that defendant's sentencing in the instant case occurred subsequent to his sentencing in the CSC case.