STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2001
v	No. 220552 Wayne Circuit Court
ERNEST W. CAPPS, Defendant-Appellant.	LC No. 98-011152

Before: K.F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and resisting and obstructing an officer in discharge of duty, MCL 750.479; MSA 28.747. Defendant was sentenced to six months to two years' imprisonment for the resisting and obstructing conviction and two to forty years' imprisonment for the possession with intent to deliver conviction, which was enhanced on the basis of the trial court's finding that defendant was a third habitual offender, MCL 769.11; MSA 28.1083. We affirm.

Defendant's first argument on appeal involves the response to a jury question concerning information contained in a stipulated chemist report. The chemist report indicated that eighty packets containing a white, lumpy material were received and that one of the packets was analyzed. The report further indicated that the analyzed packet contained 0.05 grams of cocaine. During deliberations, the jury inquired as to the total weight of the packets. The parties agreed to respond to the inquiry by reading the stipulated information from the chemist report. Although the prosecution read the information, the jury indicated that it did not understand and the trial court commented on the contents of the stipulated information. Defendant's first contention is that the prosecution's reading of the stipulated report was essentially a reopening of the proofs because it was not identical to the recitation provided during trial. However, because defendant specifically approved the trial court's response to the jury's request to review evidence, he has waived the issue, and we will not address it on appeal. *People v Carter*, 462 Mich 206, 213-216; 612 NW2d 144 (2000).

Defendant's second claim of error is that the trial court's statements regarding the stipulated information was tantamount to unsworn testimony. We disagree. This issue implicates the constitutional right to confront witnesses, *People v Ellison*, 133 Mich App 814,

820; 350 NW2d 812 (1984), which is reviewed de novo on appeal. *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000). Pursuant to MCL 768.29; MSA 28.1052, "[a] trial judge may comment on the evidence as justice requires, . . . but such comments must be limited to remarks regarding evidence presented at trial." *Ellison, supra* at 820. Where the trial court's comment exceeds the scope of the evidence presented at trial, the comment is new evidence and amounts to testimony by the trial court. *Id*.

After a careful review of the record, we conclude that the trial court's summary of the information in the chemist report was merely a comment on the stipulated evidence and not unsworn testimony. Because the jury indicated that it did not understand the information from the chemist report, the trial court's review of the evidence was an attempt to assist the jury in its deliberations. Although the trial court's statement that "there were eighty separate rocks of cocaine" differs from the exact wording in the chemist report, the trial court's characterization of the contents of the packets does not exceed the scope of the evidence that was presented. The stipulated report indicated that all the packets contained a white, lumpy material, and that one of the packets was tested and revealed cocaine. There is no indication that the tested packet differed in any way from the seventy-nine unanalyzed packets. Accordingly, the trial court's summary of the information in the chemist report was merely a comment on the evidence. Furthermore, a trial court's comments only warrant reversal when they unduly influence the jury and deprive a defendant of his right to a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The record does not support such a finding in this case.

Defendant's next argument is that he was denied his due process rights when the trial court failed to provide an instruction on the lesser included offense of possession of more than twenty-five grams but less than fifty grams of cocaine. We disagree. While a jury must be instructed on the applicable law, a verdict will not be set aside, as a result of the trial court's failure to instruct the jury on a point of law, unless the instruction was requested by the defendant. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994), citing MCL 768.29; MSA 28.1052. In this case, the defense did not request an instruction on possession of more than twenty-five grams but less than fifty grams of cocaine and, therefore, the trial court had no obligation to provide such an instruction.

Defendant also argues that his conviction for possession with intent to deliver less than fifty grams of cocaine is constitutionally infirm because it is not supported by sufficient evidence. Defendant specifically challenges the element of intent, contending that the jury could not have inferred an intent to deliver because only one of the eighty packets was shown to have contained cocaine. We disagree.

When considering a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proved beyond a reasonable doubt. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). In reviewing a sufficiency of the evidence question, "this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses." *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000).

A similar argument to the case at bar was made to this Court in *People v Williams*, 188 Mich App 54; 469 NW2d 4 (1991). In *Williams*, the defendant and another man, Fielder, were inside an abandoned house when they were discovered by the police. *Id*. at 56. The defendant was spraying lighter fluid into a can that was placed on the floor and Fielder was sitting on a crate, holding matches. *Id*. When the police entered the room, a plastic bag believed to contain cocaine fell from Fielder's lap. *Id*. Thirty-four similar packets were recovered from the can on the floor. *Id*. The contents of one of the thirty-five packets were tested and found to be cocaine. *Id.* On appeal of his conviction for possession of less than fifty grams of cocaine, the defendant argued that the prosecution failed to prove that he possessed the cocaine because the packets in the can were combined with the packet that fell from Fielder's lap and not separated. *Id.* at 57. The *Williams* Court disagreed with the defendant's contention that there was insufficient evidence of possession, reasoning as follows:

> . . . the laboratory analysis stipulated to by defendant states that the evidence envelope contained thirty-five packets, each containing a lumpy, off-white material. There is no indication that the one packet from Fielder's lap was anything but a part of this larger lot. Here, a sample of thirty-five indistinguishable packets was tested and found to contain cocaine. An inference that the entire lot contained cocaine was appropriate, regardless of whether the tested packet came from Fielder's lap or the can on the floor. [*Id.*]

The facts of the present case are substantially similar to the facts presented in *Williams*. As in *Williams*, the stipulated report indicated that the eighty individual packets contained a white, lumpy material and that one of the eighty, seemingly indistinguishable, packets was tested and revealed cocaine. Furthermore, there was no indication that the tested packet was anything but a part of the remaining seventy-nine packets. In light of the reasoning employed in *Williams*, it was proper to infer from the laboratory analysis of one packet that the remaining seventy-nine packets contained cocaine.

We further conclude that the prosecution presented sufficient evidence to support a conviction for possession with intent to deliver less than fifty grams of cocaine. The crime requires that the prosecution prove: (1) that the substance was cocaine; (2) that the substance weighed less than fifty grams; (3) that the defendant was not authorized to possess the cocaine; and (4) that the defendant knowingly possessed the substance with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, mod 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Crawford*, 232 Mich App 608, 616; 591 NW2d 669 (1998). A defendant's intent to deliver can be inferred from the facts, the circumstances, the quantity of the controlled substance possessed, and the manner in which the controlled substance is packaged. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

Viewing the evidence in the light most favorable to the prosecution, the evidence established that defendant was standing outside the driver's door of a Cadillac when the police began to approach the vehicle, at which point defendant tossed a plastic bag through the front window of the vehicle and started to leave the scene. Eighty small packets of what appeared to be cocaine were scattered about the interior of the vehicle. An officer on the scene testified that

he had previously seen cocaine packaged in the same way. One of the packets was subsequently determined to contain 0.05 grams of cocaine. Given this evidence, and the permissible inference that all the packets contained cocaine, the prosecution presented sufficient evidence to establish the elements of the crime of possession with intent to deliver less than fifty grams of cocaine.

Defendant's next argument on appeal is that defense counsel's failure to respond to the errors previously alleged resulted in the deprivation of his right to the effective assistance of counsel. We disagree. To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy and (2) that this deficient performance prejudiced him to the extent that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, ___ Mich __; 623 NW2d 884 (Docket No. 114799, issued 4/3/2001), slip op, p 13. We conclude that this issue is without merit in light of the conclusions reached in the previous issues and the fact that the existing record does not demonstrate that defense counsel's performance was deficient.

As determined in the preceding issues, any objections to the alleged reopening of the proofs, the trial court's unsworn testimony, or the jury instructions would have been meritless and defense counsel was not required to raise such objections. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Nor was defense counsel required to move for a directed verdict when there was sufficient evidence to defeat the motion. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Defendant has failed to show that his counsel's performance was deficient or that the representation prejudiced him to the extent that the results of the proceedings would have been different. Consequently, defendant was not denied the effective assistance of counsel.

Lastly, defendant argues that he is entitled to resentencing because the trial court acted under the mistaken belief that enhancement of the maximum sentence was mandatory, rather than discretionary. We disagree. "Provided permissible factors are considered, appellate review of sentencing determinations is limited to whether the sentencing court abused its discretion." *Fetterley*, *supra* at 525. An abuse of discretion occurs when there is no justification for the trial court's ruling in light of the facts presented. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Under the habitual offender statute, a trial court has the discretion to enhance a sentence, but that enhancement is not mandated. *People v* Alexander, 234 Mich App 655, 673-674; 599 NW2d 749 (1999); People *v Coffee*, 151 Mich App 364, 375; 390 NW2d 721 (1986). "[A] defendant is entitled to resentencing where a sentencing court fails to exercise its discretion because of a mistaken belief in the law." *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994).

Defendant's argument is not supported by the transcripts from the sentencing hearing or his motion for resentencing. During the sentencing hearing, the prosecution presented defendant's prior convictions for selling controlled substances and then stated:

> . . . and in light of those circumstances and in light of the fact that the Court has discretion on the habitual, we would ask the Court to exercise its discretion, first to go to the top of the guidelines on the underlying. The guidelines don't apply to the habitual and we trust the Court's sentencing discretion on the habitual.

The trial court imposed a maximum sentence of twenty years' imprisonment on the charge of possession with intent to distribute less than fifty grams of cocaine, but subsequently enhanced this sentence, noting that it was satisfied that defendant was an habitual offender. The trial court stated that the enhanced sentence was two to twenty years, and the prosecution noted that the maximum sentence under the enhancement was forty years. The trial court acknowledged and corrected the error, thereby enhancing defendant's maximum sentence from twenty to forty years' imprisonment. During the subsequent hearing on defendant's motion for resentencing, defense counsel attempted to characterize the trial court's enhancement of defendant's sentence as an indication that the trial court was unaware that it had discretion. However, the trial court disagreed with defense counsel's contention. In denying defendant's motion for resentencing, the trial court responded:

> With respect to the sentencing, I do recall the exchange that took place after I had vacated the initial sentence and given what I had thought was the enhanced sentence I had increased the minimum. At that time, I recall, I was not aware that I could also increase the maximum. The prosecutor suggested that it could go to 40, [sic] years but it's my recollection that at that time that did not indicate to me that it was a maximum possible sentence that was mandated. And I was aware I did have some discretion. But it was then once I knew that I had the ability to go to doubling the maximum, I did. So I think that the sentence was valid. And I will stand by it.

In light of the record, it is clear to this Court that the trial court was aware that it had discretion to enhance defendant's sentence and the trial court acted in accordance with that discretion. Furthermore, there is no clear evidence that the trial court incorrectly believed that it lacked discretion, and the presumption that the trial court knew the law must prevail. See *People v Knapp*, 244 Mich App 361, 389; __ NW2d ___ (2001). Therefore, the trial court correctly exercised its discretion when it enhanced defendant's sentence and the sentencing was not based on a misconception of the law.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper