STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2001
v	No. 221485 Oakland Circuit Court
ANDRE DESHAWN HARRIS, Defendant-Appellant.	LC No. 98-162105-FH

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In defendant's first trial of this matter, the jury was hung on the charge 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), but found defendant guilty of possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). In a subsequent trial for possession with intent to deliver less than fifty grams of cocaine, defendant was found guilty of the lesser offense of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant pleaded guilty as a fourth habitual offender, MCL 769.12; MSA 28.1084, and was sentenced to one to fifteen years in prison for the possession of less than twenty-five grams of cocaine conviction and one year for the possession of marijuana conviction. The sentences are to be served consecutively to defendant's parole violation. Defendant appeals by right. We affirm.

Defendant first argues that the trial court abused its discretion in admitting evidence that defendant was in possession of marijuana at the time of arrest when defendant had already been convicted for possession of marijuana by a jury in an earlier trial. The decision to admit evidence is within the trial court's discretion and should only be reversed if there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant, a backseat passenger in a truck that ran a stop sign, was patted down because police officers had noticed his furtive movements while inside the vehicle and feared that defendant had a weapon. During the pat down, the officer found a bag of marijuana in defendant's shirt pocket, and defendant was arrested. The officer then searched the area of the truck where defendant was seated and found a baggy of cocaine under the seat on the floorboard where defendant's feet had been. The truck contained two other people - the driver and a front

seat passenger - neither of whom made any furtive movements or possessed weapons or contraband at the time of the stop.

At trial, the prosecution attempted to elicit testimony from a witness regarding the marijuana found on defendant. Defendant objected based on relevance, stating, "[t]his case isn't about marijuana any longer." The prosecution then stated, "it's my argument that if an individual is found to be in possession of one controlled substance, it's more likely that they would be in possession of another." The court overruled defendant's objection, concluding that the marijuana was part of the totality of the circumstances. The court then gave a cautionary instruction to the jury. Later, when the prosecution moved to admit the marijuana as an exhibit, defendant again noted his objection. The court then provided a second cautionary instruction to the jury.

Defendant argues that the marijuana evidence was not relevant, that it was unfairly prejudicial, and that it was offered for the impermissible purpose of showing defendant's criminal propensity to possess drugs and his conformity therewith. We agree.

All relevant evidence is admissible and irrelevant evidence is not. MRE 402. Evidence is relevant if it tends to make the existence of a fact of consequence to the action more or less probable. MRE 401. However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403. MRE 404(b) governs the admission of evidence of bad acts, and provides as follows:

> (1) 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 the case.

The Michigan Supreme Court has set forth a test for determining whether bad acts evidence is admissible under MRE 404(b):

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

In an order modifying its opinion, the Court pointed out that the prosecution is required to give pretrial notice of its intent to introduce other acts evidence and articulate its theory for admissibility. *VanderVliet*, *supra*, 445 Mich 1205. If the evidence is only relevant to character or the defendant's propensity to commit the crime, the evidence must be excluded. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). If the evidence "tends to prove some fact other than character, admissibility depends upon whether its probative value outweighs its

prejudicial effect, taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence." *Id.*

In this case, the prosecution failed to articulate a permissible purpose for admission of the marijuana evidence at trial. The prosecution stated, "it's my argument that if an individual is found to be in possession of one controlled substance, it's more likely that they would be in possession of another." Further, the prosecution failed to show how possession of marijuana is relevant to the elements of the charged crime of possession with intent to deliver cocaine. Therefore, the evidence was more prejudicial than probative. For these reasons, the trial court abused its discretion in admitting the marijuana evidence.

Although the court improperly admitted the bad act evidence, the error was harmless. MCR 2.613(A) provides:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. [See, also, MCL 769.26; MSA 28.1096.]

The effect of the error is assessed in light of the strength and weight of the untainted evidence to determine "whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity,* 460 Mich 484, 495; 596 NW2d 607 (1999); see, also, *People v Mateo,* 453 Mich 203, 215; 551 NW2d 891 (1996). The error is presumed to be harmless and the defendant bears the burden of showing that the error resulted in a miscarriage of justice. *Lukity, supra*.

In this case, defendant has not shown that it is more probable than not that a different outcome would have resulted without the error. The prosecution presented several facts linking defendant to the cocaine. Additionally, jury confusion was avoided by adequate limiting instructions provided by the court. Therefore, although the evidence was improperly admitted, the effect was harmless in light of the weight and strength of the untainted evidence.

Defendant's second argument is that there was insufficient evidence to convict defendant of possession of cocaine. We disagree. "Due process requires that the prosecutor introduce sufficient evidence that could justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt." *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). "When reviewing a claim of insufficient evidence following a bench trial, this Court must view the evidence in a light most favorable to the prosecution 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 Hutner,* 209 Mich App 280, 282; 530 NW2d 174 (1995).

The elements of possession of less than twenty-five grams of cocaine are: (1) the defendant possessed cocaine and was not authorized to possess the substance, (2) the defendant knew he possessed cocaine, and (3) the substance was in a mixture weighing less than twenty-five grams. See *People v Wolfe,* 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich

1201 (1992). A person need not have actual physical possession of a controlled substance; possession may be actual or constructive. *Id*. at 519-520.

In this case, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. First, the prosecution presented evidence linking defendant to the cocaine, thereby showing constructive possession. Defendant's movements inside the truck were furtive and consistent with placing the cocaine where it was discovered. Neither the driver nor the front seat passenger were seen making any movements, nor were any weapons or contraband found on either of them. Upon stepping out of the truck, defendant immediately reached for the seat and pulled it back into position. The cocaine was found under the seat on the floorboard where defendant's feet had been. This was also the place the officer saw defendant reach and place something.

Second, the prosecution presented circumstantial evidence that defendant knew that the substance in the baggy was cocaine. Defendant stated, "[t]hat's not mine. You didn't find it on me." Defendant also gave a false name during his arrest and booking procedure. Third, the prosecution presented expert testimony that the substance in the baggy was 4.98 grams of cocaine. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction.

We affirm.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey