

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KEVIN S. GAMBURD,

Defendant-Appellee.

UNPUBLISHED

May 29, 2001

No. 226389

Wayne Circuit Court

LC No. 98-012571

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court's order of probation, finding defendant guilty of possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), and sentencing defendant to eighteen months' probation. Defendant was charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), and following a bench trial, the trial court found him guilty of that offense. However, the trial court granted defendant's motion to vacate the conviction before a judgment was entered and reduced the conviction to possession of marijuana. We reverse and remand.

The prosecution first argues that the trial court erred in excluding Officer Burnside's testimony that nine pounds of suspected marijuana was taken from a refrigerator in defendant's storage unit and by not inferring that defendant was in possession of nine pounds of marijuana. However, the prosecution did not identify these issues in its statement of questions presented as required by MCR 7.212(C)(5). A party does not preserve an argument that it did not raise in its statement of the issues presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). The prosecution has, therefore, waived review of these issues.

The prosecution also argues that the trial court committed reversible error by amending its original verdict.¹ MCR 6.435(B) allows a trial court to correct substantive mistakes, provided the trial court has not yet entered judgment in the case. This Court, in *People v Carlos Jones*,

¹ This Court has jurisdiction over this issue because, if the prosecution prevails, the original verdict would be reinstated and if defendant prevails, the judgment will be affirmed. In either case, defendant will not be subject to a second trial and the Double Jeopardy Clause does not bar this Court's review. *People v Hutchinson*, 224 Mich App 603, 606-607; 569 NW2d 858 (1997).

203 Mich App 74, 80; 512 NW2d 26 (1993), defined substantive mistakes as “a conclusion or decision that is erroneous, because it is based on a mistaken belief in the facts or the applicable law.” However, the trial court may not simply reevaluate the evidence and come to a different conclusion. *Id.*

When it found defendant guilty of possession with intent to deliver marijuana, the trial court made the following statement:

The Court will find that the amount of the marijuana was at least 121.3 [sic]² grams. That that is a sufficient amount for the Court to infer that it was not solely for the purpose of personal use, and will find the defendant guilty of one count of possession of a controlled substance, same being marijuana, with the intent to deliver.

Pursuant to defendant’s motion to set aside or amend the verdict, the trial court corrected the finding of guilt for possession with intent to deliver because it found that it had made an error of law. The trial court made the following statement:

Based on the amount of marijuana that was admitted into evidence, which was limited to 121 [sic] grams, which is the equivalent of about four ounces, and given the *Kirchoof* [sic] case which says there is permissible presumption that one must look at the amount, and absent any other evidence in terms of the packaging or any transaction that had occurred, the Court will reduce the conviction from possession with intent to deliver to simple possession.

It appears that the trial court’s understanding of the law when it found defendant guilty of possession with intent to deliver was that 131 grams of marijuana was a large enough amount to infer intent to deliver and that, after the motion to vacate, the trial court’s understanding of the law was that 131 grams of marijuana was not a large enough amount to infer intent to deliver without other evidence of intent.

One of the elements of possession with intent to deliver less than fifty grams marijuana is that the defendant knowingly possess the controlled substance with the intent to deliver. *People v Wolfe*, 440 Mich 508, 517; 489 NW2d 748 (1992). “Actual delivery is not required to prove intent to deliver. Intent to deliver has been inferred from the quantity of narcotics in a defendant’s possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest.” *Id.* at 524. “Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence, just as it can be established by direct evidence.” *Id.* at 526.

Here there was no circumstantial evidence of intent to deliver other than the amount of marijuana found. In amending its verdict, the trial court cited *People v Kirchoff*, 74 Mich App 641, 647-649; 254 NW2d 793 (1977), and concluded that additional circumstantial evidence is

² The parties stipulated that the amount of marijuana actually tested by the laboratory was 131 grams.

required. However, the *Kirchoff* Court affirmed the trial court's denial of the defendant's motion for a directed verdict because there was evidence in addition to the amount of controlled substance found, from which an intent to deliver could be inferred. The *Kirchoff* Court did not *require* other evidence of intent. *Id.*

Likewise, *Wolfe* permits but does not require other circumstantial evidence of an intent to deliver beyond the quantity of narcotics found. *Wolfe, supra* at 526. Further, numerous other cases have held that intent to deliver can be inferred from the amount of controlled substance. *People v Ferguson*, 94 Mich App 137, 151; 288 NW2d 587 (1979); *People v Potter*, 115 Mich App 125, 130; 320 NW2d 313 (1982); *People v Catania*, 159 Mich App 57, 61; 406 NW2d 473 (1987); *People v Catanzarite*, 211 Mich App 573, 578; 536 NW2d 570 (1995). Because intent to deliver may be inferred from the amount of controlled substance possessed without other circumstantial evidence, the trial court abused its discretion in modifying defendant's conviction. The trial court was correct in its first understanding of the law and did not make an error of law that needed to be corrected via MCR 6.435(b).

Reversed. We remand for reinstatement of defendant's conviction for possession with intent to deliver marijuana and for resentencing. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ Patrick M. Meter