STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADFORD PAUL STORTI,

Defendant-Appellant.

UNPUBLISHED
January 29, 2002

No. 224082
Marquette Circuit Court
LC No. 96-032343-FH

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of delivery of a controlled substance (marijuana) to a minor, MCL 333.7410(1). The trial court sentenced him to five to eight years' imprisonment. We affirm.

Defendant first contends that the trial court erred by sentencing him to five to eight years' imprisonment. We review sentencing decisions for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). "'[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *Id*., quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We discern no abuse of discretion here. As well as a juvenile record, defendant had a prior misdemeanor conviction and two prior felony convictions. In addition, after committing the instant offense, defendant was found guilty of the federal offense of transmitting child pornography. According to the trial testimony, the instant offense involved defendant providing marijuana to three minor girls, and one girl was only eleven years old. Under these circumstances, no abuse of sentencing discretion occurred.[1]

[1] Defendant also suggests that the trial court relied on inaccurate information in sentencing. However, defendant does not provide any case law relating to a situation in which a court allegedly relies on inaccurate information in sentencing. Accordingly, defendant has waived the issue for appellate review. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 421 (2001). At any rate, in light of defendant's record and the instant offense, we find no error with regard to the trial court's conclusion that defendant was "a menace to little girls."

Next, defendant argues that the trial court erred by refusing to give an instruction on the misdemeanor of possession of marijuana. We review for an abuse of discretion a trial court's decision to deny a lesser-included misdemeanor instruction. *People v Spencer*, 154 Mich App 6, 19; 397 NW2d 525 (1986). "'Whenever an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence adduced at trial, the trial judge shall give the requested instruction unless to do so would result in a violation of due process, undue confusion, or some other injustice.'" *People v Steele*, 429 Mich 13, 18; 412 NW2d 206 (1987), quoting *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982).

The *Stephens* case enunciated a five-condition test to determine if a misdemeanor instruction was appropriate. *Stephens*, *supra* at 261-265. The third condition is that the requested misdemeanor must be supported by a rational view of the evidence adduced at trial. *Id*. at 262. In the instant case, no rational view of the evidence adduced at trial supports a finding of misdemeanor possession of marijuana instead of delivery of a controlled substance to a minor. See generally *id*. at 262-263. Indeed, three girls testified that defendant provided them with marijuana. One of the girls tested positive for marijuana use, and there was no indication that the marijuana derived from anyone other than defendant. At trial, defendant presented no witnesses and argued a general denial in his closing statement. Under these circumstances, we cannot conclude that the court *abused its discretion* by denying the requested instruction.[2]

Next, defendant argues that the trial court erred by refusing to admit, for lack of foundation, the results of defendant's allegedly negative drug test. In the alternative, defendant argues that the prosecutor should have been required to produce the purported foundation witness, Dr. Catherine Kroll, who was listed on the prosecutor's witness list.

With regard to defendant's brief suggestion that the trial court should have admitted the drug test results in the absence of Kroll's testimony, we note that defendant cites no case law in support of this argument and fails to adequately develop the argument. Accordingly, he has waived the issue for appellate review. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 421 (2001). At any rate, we find no abuse of discretion under the circumstances. See *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998) (setting forth the standard or review). Indeed, because Kroll, whose laboratory analyzed the results of the drug test at issue, did not testify, defendant attempted to introduce the results through cross-examination of the arresting officer. The testimony sought by defendant was hearsay, and thus the trial court did not abuse its discretion by excluding it.

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[2] Moreover, we conclude that the second *Stephens* condition – that there be an "appropriate relationship between the charged offense and the requested misdemeanor – also was not met in this case. See *Stephens*, *supra* at 262. Indeed, we do not believe that marijuana possession and delivery of a controlled substance to a minor relate to the protection of the same interests. See *id*. The statute prohibiting delivery of controlled substances to minors is intended to protect minors from drugs and to punish adults who provide drugs to minors for contributing to, or causing, the delinquency of a minor, see generally *People v McCrady*, 213 Mich App 474, 485; 540 NW2d 718 (1995), while the statute prohibiting possession is intended to criminalize possession of a drug for personal use.

With regard to defendant's argument that the trial court should have required the prosecutor to produce Kroll, we note that defendant failed to raise this issue in the trial court. Because the issue was not preserved, it is forfeited unless defendant establishes a clear or obvious error that affected the outcome of the case. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, even if an error occurred, we cannot conclude that it likely affected the outcome of the case. Defendant's crime was delivery of marijuana to a minor, and defendant's use of marijuana was not an element of that crime. See MCL 333.7410(1). Moreover, even though the test might have rebutted the girls' testimony that defendant smoked marijuana on the day in question, the rebuttal would have been of marginal value, considering that, according to Corporal Dale Akerley's notes, the drug test was not a witnessed test. We conclude that defendant has not sufficiently met the standard for reversal set forth in *Carines, supra* at 763.

Defendant also claims his defense counsel was ineffective for failing to subpoena Kroll and by failing to argue to the trial court that the prosecutor was required to produce the witness. Initially, we note that defendant waived this claim by affirmatively stating below that he did not wish to raise the issue of ineffective assistance of counsel. See *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Moreover, we cannot conclude that the absence of the drug test evidence likely affected the outcome of the case, and thus defendant has failed to establish ineffective assistance of counsel. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Finally, defendant argues that the trial court erred by allowing the case officer to remain in the courtroom. However, defendant did not object to the presence of the case officer; rather, he objected to the presence of another non-witness officer at the prosecutor's table. In fact, defendant expressly stated that the case officer could sit at the prosecutor's table. Under these circumstances, this issue is waived. *Carter, supra* at 214-215. Moreover, defendant did not demonstrate that a clear or obvious error occurred with respect to the case officer remaining in the courtroom or that the officer's presence likely affected the outcome of the case. *Carines, supra* at 763.

Affirmed.

/s/ Richard Allen Griffin
/s/ Jane E. Markey
/s/ Patrick M. Meter