# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 12, 2002 |
| v | No. 230299<br>Macomb Circuit Court |
| NICHOLAS PAUL HYATT,<br><br>Defendant-Appellant. | LC No. 00-001262-FH |

Before: K. F. Kelly, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). The trial court sentenced defendant to six to twenty years' imprisonment. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant arrived at a house, that police had under surveillance, with Ricardo Valleriani, a targeted drug trafficker. After police arrested Valleriani inside the house, they surrounded Valleriani's car, in which defendant and another passenger were sitting. Detective Mitchell Berlin opened the passenger-side door of the car and reached in for defendant, who sat in the back seat. Defendant picked up a clear baggie off the car seat and threw it out the door directly in Berlin's direction. Defendant then fumbled around on the seat to his left side. Berlin instructed defendant to put his hands above his head. Defendant complied. Berlin discovered that the object on the seat next to defendant was a second clear sandwich baggie. Both baggies contained cocaine. The first baggie contained twenty-seven grams, and the two bags together contained a total of fifty-eight grams of cocaine. Defendant admitted to Berlin that the baggie of cocaine he threw from the car belonged to him. He told Berlin that he did not own the second baggie of cocaine.

The prosecution offered testimony of police officers regarding the quantity of cocaine seized. They testified that the amount of cocaine—fifty-eight grams—was inconsistent with personal use. The witnesses testified that this amount of cocaine could not be consumed by a person over the course of one day and night without serious injury or death. The witnesses also testified that no drug paraphernalia consistent with personal use had been recovered from the car or defendant. The officers indicated that possession of that amount of cocaine is consistent with an intent to deliver.

Defendant requested the trial court to instruct the jury on the lesser offense of possession with intent to deliver less than fifty grams of cocaine, relying on his statement to police that he did not own the second baggie of cocaine, but only owned the first baggie. The prosecution argued that the evidence demonstrated that defendant possessed both bags of cocaine. The trial court denied defendant's request.

Defendant argues that the trial court erred in failing to instruct the jury on the offense of possession with intent to deliver less than fifty grams of cocaine. We agree.

The trial court must instruct the jury on a cognate offense if the evidence would support a conviction of that offense. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). If there is a dispute in the evidence that would support a conviction of the cognate offense, the instruction is required. *Id*. Possession with intent to deliver less than fifty grams of cocaine is a cognate offense of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine. *People v Marji*, 180 Mich App 525, 531; 447 NW2d 835 (1989).

Defendant told police that he owned one of the baggies of cocaine, but not the second. The jury could have believed this statement and found that defendant possessed only the first baggie of cocaine. While the prosecution presented evidence upon which the jury could conclude that defendant possessed both bags, where the evidence supporting a conviction of a cognate offense is disputed, the trial court must give the instruction on the lesser offense. *Lemons*, *supra*. Because the evidence in this case is disputed and can be used to support a conviction of the lesser offense, the trial court erred in failing to instruct the jury as to possession with intent to deliver less than fifty grams of cocaine.

We must consider whether this instructional error was harmless. *People v Mosko*, 441 Mich 496, 501-502; 495 NW2d 534 (1992), citing *People v Beach*, 429 Mich 450; 418 NW2d 861 (1988). An "error in instructing the jury is of constitutional magnitude." *People v Tate*, 244 Mich App 553, 567; 624 NW2d 524 (2001), citing *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). The standard for determining whether this preserved constitutional error is harmless is whether the error is harmless beyond a reasonable doubt. *Id*. at 774, citing *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994). The jury may have believed defendant's statement that he owned only the first baggie of cocaine and that he therefore possessed only one bag of cocaine, which contained less than fifty grams of cocaine. Therefore, we find that the trial court's failure to give the instruction on possession with intent to deliver less than fifty grams of cocaine was not harmless beyond a reasonable doubt.

Next, defendant argues that the trial court erred in excluding a police officer's testimony regarding an alleged hearsay statement by Valleriani, which defendant argues exculpates him. We find no error.

The trial court's decision as to the admission of evidence is reviewed for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Where the decision regarding the admissibility of evidence involves a preliminary question of law, the decision is reviewed de novo. *Id*.

MRE 804 allows for the admission of certain hearsay statements where the declarant is not available. In particular, the rule allows the admission of a statement that, when made, was so

far contrary to the declarant's pecuniary interest or tended to subject the declarant to civil or criminal liability that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. MRE 804(b)(3). The trial court erroneously excluded the hearsay testimony on the basis that the declarant was not on trial in this case. This is not a requirement of MRE 804. However, defendant failed to demonstrate that the declarant, Valleriani, was unavailable as required by MRE 804(a). Thus, defendant has not demonstrated that the trial court erred in excluding the testimony.

Finally, defendant argues that the prosecution failed to present sufficient evidence to support his conviction. We disagree.

To determine whether the prosecution presented sufficient evidence of guilt to sustain a conviction, this Court must consider the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have concluded that all the elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992). The elements of the offense may be proven by circumstantial evidence and reasonable inferences arising from that evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). To prove possession with intent to deliver less than 50 grams or more but less than 225 grams of cocaine, the prosecution must establish that (1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver it to another; (3) the substance was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture weighing 50 grams or more but less than 225 grams. See *Crawford*, *supra*.

The evidence allowed the jury to infer that defendant possessed both the first and second bag of cocaine. The jury could also conclude from the police officers' testimony that the amount of cocaine and absence of paraphernalia for personal use of the cocaine was consistent with an intent to deliver. Thus, the evidence was sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that defendant possessed with the intent to deliver 50 or more grams but less than 225 grams of cocaine.

Reversed.

/s/ Kirsten Frank Kelly
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh