STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2002
v	No. 224307 Monroe Circuit Court
ERIC DUSHAN CRISP, JR., Defendant-Appellant.	LC No. 98-029506-FH

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 225 or more, but less than 650 grams, of cocaine, MCL 333.7401(2)(a)(ii). Defendant was sentenced as a second habitual offender, MCL 769.10, to twenty-four to forty-five years' imprisonment. He appeals as of right. We affirm.

The police obtained information from an informant that defendant would be arriving at the Detroit Metropolitan Airport and that he would be carrying a large quantity of cocaine. Based on this information, the police set up surveillance and followed defendant as he left the airport in a car being driven by Derrick Mitchell. Eventually, Trooper Carlson pulled the car over for exceeding the speed limit and having a cracked windshield. During the traffic stop, the police officer obtained consent from Mitchell and defendant to search the car and the black duffle bag in the trunk.

After a cursory search of the vehicle and defendant's luggage, Trooper Carlson requested a narcotics search dog. The narcotics search dog alerted to defendant's luggage and the front floor boards on the passenger side of the car.[1] Trooper Carlson asked defendant to remove his shoes and socks. The dog bit into one of the shoes and white powder began seeping out of it. Trooper Carlson removed the insoles from defendant's shoes and located a clear plastic bag of white powder in each of the hollowed-out heels. The shoes in defendant's black bag were also searched and a total of eight bags were found.

[1] During trial, Toro, the narcotics search dog, was described as an "aggressive alert dog." According to Officer Michael Corbett, Toro's handler, Toro bites or scratches at an object to indicate the presence of narcotics.

I. Derrick Mitchell

Defendant argues that he was denied his Sixth Amendment right of confrontation when the trial court declined his request to call Derrick Mitchell, who was revealed during trial to be the police informant, to testify. Further, defendant claims that the trial court erred by refusing to give an instruction to the jury that Mitchell refused to testify. We disagree. Because this argument implicates defendant's Sixth Amendment right of confrontation, we apply review de novo. *People v Beasley*, 239 Mich 548, 557; 609 NW2d 581 (2000). However, to the extent defendant's claim involves matters of evidentiary error, we review the trial court's decision for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

A. Defendant's Right of Confrontation

In *People v Gearns*, 457 Mich 170; 577 NW2d 422 (1998), overruled on other grounds in *Lukity*, *supra* at 494, a majority of justices concurred with the following principles set out in Justice Brickley's opinion:

> A defendant has the constitutional right to confront witnesses against him, primarily secured by the right to cross-examination. In the instant cases, there was no testimony given by the witnesses on which the defendants could have cross-examined them. . . .
>
> [T]he principal protection provided by the Confrontation Clause to a criminal defendant is the right to conduct cross-examination. Moreover, the Confrontation Clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."
>
> * * *
>
> Implicit in the Supreme Court's Confrontation Clause jurisprudence is that a witness must put forth *some testimony* before the defendant's right of confrontation comes into play. A defendant has no right to confront a witness who does not provide any evidence at trial. A mere inference is simply insufficient for a Confrontation Clause violation.
>
> . . . A defendant is only guaranteed an opportunity for cross-examination; however, there must first be something of substance to cross-examine. We agree with the Colorado Supreme Court that, where a witness does not testify about matters beyond preliminary information, i.e., matters that have no bearing on the outcome of the case, there is nothing for the defendant to cross-examine, and the policies underlying this constitutional right do not come into play. Thus, before a defendant can be denied effective cross-examination, some substantive testimony or its equivalent must come to pass in order for the right to confrontation arise. [*Gearns, supra* at 185-187 (citations omitted).]

In the case at bar, the prosecution downplayed Mitchell's role and referred to him only to the extent that he was the informant who provided the information that led to the surveillance and stop of defendant. Indeed, the prosecution never called Mitchell as a witness. Rather, to prove its case the prosecution relied on the evidence gathered during the stop of the vehicle, Trooper Carlson's testimony, testimony from the dog handler, and testimony about defendant's post-arrest confession.

It was only at defendant's request that Mitchell was produced at trial outside of the jury's presence. Nonetheless, when questioned regarding his involvement, Mitchell adamantly refused to testify on the grounds that he was in fear for his life. Indeed, Mitchell stated this sentiment repeatedly and without any indication that he was going to change his mind and testify. Because Mitchell refused to testify, there was no substantive testimony or its equivalent upon which defendant could cross-examine him. See *Gearns, supra* at 185-187. Thus, defendant was not denied his right of confrontation and his claim that Mitchell was a key to conviction is unsupported by the record. *Id.*

B. Evidentiary Error

At the very least, defendant argues that he should have been allowed to call Mitchell to the stand so that the jury could hear his refusal to testify. Defendant's contention that he had the "right to compel the witness to testify, however limited that testimony might be, even if that testimony only consisted of a statement that the witness was fearful of law enforcement" is unsupported by any authority. An appellant may not merely announce his position and leave it to this Court to rationalize the basis for his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Thus, this issue is not properly presented for appeal.

We note, nevertheless, that defendant's argument presents a claim of evidentiary error. See *Gearns, supra* at 193. However, there is no authority supporting defendant's position that he is entitled to call a witness to the stand, knowing that the witness will refuse to testify. In *People v Dyer*, 425 Mich 572, 580-582; 390 NW2d 645 (1986), the Court held that neither the defense nor the prosecution could call a witness solely to have him assert his Fifth Amendment privilege in front of the jury. While defendant agrees with this argument, he claims that the Fifth Amendment privilege was never asserted in this case and that the jury should have been allowed to hear Mitchell's refusal to testify.

In *Gearns, supra*, a majority of justices agreed that the validity or invalidity of the privilege being asserted by a witness did not change the analysis of whether the jury should hear a witness' refusal to testify:

> [T]he matter should be treated without the presence of the jury, and, if the court determines that the privilege is not valid, it should be determined outside the jury's presence whether the witness will continue to refuse to testify. If the witness does refuse, contempt of court and removal should also take place outside of the jury's presence.
>
> Thus, the judge must hold a hearing outside the jury's presence to determine if the witness' privilege is valid, explaining the privilege to the witness. If the court concludes the privilege is not valid, it must determine whether the

> witness intends to proceed with asserting an invalid privilege. If the witness does so intend, then the witness may not be called. [*Id.* at 202.]

Mitchell's explanation that he would not testify on the grounds that he feared for his life, as opposed to invoking the Fifth Amendment, is an invalid reason for refusing to testify. Regardless, silence should not be allowed to support an inference for either the prosecution or the defense. *Dyer, supra* at 581. The Court in *Gearns, supra* at 202, clearly states that if a witness refuses to testify on the basis of an invalid privilege then the witness may not be called. Moreover, defendant fails to explain how Mitchell's testimony was relevant to any determination the jury was asked to make. See MRE 401; MRE 402. The fact that Mitchell felt threatened does not have a tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence. Therefore, the trial court did not abuse its discretion when it precluded the jury from hearing Mitchell.

C. Jury Instruction

Defendant further argues that the trial court should have instructed the jury that defense counsel put a witness on the stand to testify "on behalf" of defendant and that the witness "simply refused to testify." However, there was no evidence that Mitchell would have testified "on behalf" of defendant. Contrary to defendant's argument, the Court in *Gearns* did not indicate that such an instruction should be given. In *Gearns, supra* at 202-203, the Court realized that where "a party does not produce or call a codefendant or a witness to substantiate a claim of innocence or guilt, the jury may draw an adverse inference from the absence of this evidence." Therefore, a neutralizing instruction, explaining that the jury may not draw an inference from the absence of certain witnesses or speculate about the possible nature of their testimony "should be given *when requested*." *Id.* In this case, defendant did not request a neutralizing instruction. Moreover, defendant's requested instruction would improperly imply that testimony favorable to him was not heard. Thus, the trial court properly refused to give the instruction.

II. Instructional Errors

Defendant also alleges that the trial court committed several instructional errors. It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

> We review jury instructions in their entirety to determine if error requiring reversal occurred. The instructions must not be "'extracted piecemeal to establish error.'" Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights. . . . With regard to unpreserved claims of instructional error, this Court reviews such claims for plain error that affected substantial rights. [*People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001) (citations omitted).]

A. Specific Intent

Defendant claims that the trial court erred when it refused to give CJI2d 3.9, the standard specific intent instruction, upon defendant's request. We agree that CJI2d 3.9 was applicable to this case because intent was a disputed issue.[2] Thus, prudence would dictate that the specific intent instruction should have been given. Nonetheless, we do not find that reversal is required. In this case, the jury was instructed that defendant could not be convicted unless it determined beyond a reasonable doubt that defendant knowingly possessed cocaine, that he *intended* to deliver it to a third person, and that the cocaine was in a mixture that weighed 225 grams or more, but less than 650 grams. The trial court also instructed the jury that "delivery means that the defendant transferred or attempted to transfer the substance to another person knowing that it was cocaine and intending to transfer it to that person." Reading the instructions as a whole, the jury could not have convicted defendant unless they found that he specifically intended to transfer it to a third person. Because the jury instructions substantially covered the requisite intent for the crime, they adequately protected defendant's rights and there was no error requiring reversal. See *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2001); *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). "[F]airness, not perfection, is the standard for jury instructions." *People v Wilson*, 242 Mich App 350, 361; 619 NW2d 413 (2000).

B. Lesser Offenses

Defendant also requested that the jury be instructed on the lesser included offense of possession with intent to deliver 50 or more, but less than 225 grams, of cocaine, MCL 333.7401(2)(a)(iii). Delivery of a lesser amount of cocaine is a cognate lesser offense. *People v Marji*, 180 Mich App 525, 530-531; 447 NW2d 835 (1989). "When the lesser crime in question is a cognate offense, the court must examine the evidence presented and give the instruction when the evidence adduced would support a conviction for the lesser offense." *Id.* at 530. In this case, there was no evidence that defendant possessed less than 225 grams of cocaine. Defendant failed to argue or present evidence that the cocaine discovered in his luggage did not belong to him. Rather, the evidence at trial, including defendant's confession, demonstrated that all the cocaine recovered was in defendant's possession. Thus, the trial court properly refused to instruct on the requested lesser offense.

C. Reasonable Doubt

Defendant further contends that the standard reasonable doubt instruction given by the trial court mandates reversal because it was structural error.[3] Specifically, defendant contends that the instruction lacked the required "moral certainty" language or "hesitate to act" language. This argument is meritless. As recognized by this Court in *People v Snider*, 239 Mich App 393,

---

[2] We note the use of standard criminal jury instructions is not mandatory. *People v Stephan*, 241 Mich App 482, 496; 616 NW2d 188 (2000).

[3] We note that defendant failed to preserve this issue for appeal.

420-421; 608 NW2d 502 (2000), the standard jury instruction, CJI2d 3.2, properly and sufficiently conveys the concept of reasonable doubt.

III. Suppression of Evidence

Defendant next alleges that the cocaine seized was the "fruit" of an illegal search and that the trial court clearly erred in denying his motion to suppress. In particular, defendant claims that the police officer's search of his shoes and duffle bag was improper and without probable cause. We disagree. We review the trial court's finding that defendant validly consented to the search for clear error. *People v Goforth*, 222 Mich App 306, 310; 564 NW2d 526 (1997). However, the trial court's ultimate decision to deny defendant's motion to suppress is reviewed de novo. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001).

The right against unreasonable search and seizures is protected by both the state and federal constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "The lawfulness of a search or seizure depends on its reasonableness." *Snider, supra* at 406. A warrantless search is generally considered unreasonable absent both probable cause and a situation establishing an exception to the warrant requirement. *Id*. at 407. However, "[o]ne established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent." *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

Whether consent to search is freely and voluntarily given is a question of fact based on the totality of the circumstances. *Id*. An individual's knowledge of the right to refuse consent is one factor to consider but is not necessarily a prerequisite for consent to be valid. *Id.* However, "the presence of coercion or duress normally militates against a finding of voluntariness." *Id.* Coercive tactics, either from police questioning or conduct, or the existence of a coercive atmosphere are relevant to determining if consent was voluntary. *People v Klager*, 107 Mich App 812, 816-817; 310 NW2d 36 (1981). To this extent, courts must consider whether police conduct would suggest to a reasonable person that he was free to decline their search request and leave the area. See *People v Bloxson*, 205 Mich App 236, 242-243; 517 NW2d 563 (1994). The scope of defendant's consent is based on objective reasonableness or what a reasonable person would have understood by the exchange between defendant and the police. *People v Frohriep*, 247 Mich App 692, 703; 637 NW2d 562 (2001).

In the instant case, defendant purports that his consent to the search was involuntary because it was coerced. Defendant claims he was isolated from public contact and informed that he could not leave. Additionally, defendant argues that the police did not advise him that he had the right to decline their requests. Regardless, defendant contends that the police officers' search exceeded the scope of his consent.

The testimony at trial revealed that defendant was the passenger in a vehicle that was legitimately stopped by the police for speeding and defective equipment. The driver of the vehicle was arrested on outstanding warrants and agreed to a search of his vehicle. While defendant could not drive the vehicle away because he was unlicensed, the police informed him that he would be taken to the nearest exit, per police procedure, after the traffic stop was

completed. Thereafter, defendant consented to the police officer's request to search his person and belongings. This consent was given without hesitation and defendant does not deny that he agreed to the search. There is no evidence that defendant was unaware of his right to refuse the police officer's request or that he failed to possess sufficient intelligence to understand that he was consenting to a search.[4] Further, there is nothing in the record to suggest that defendant was threatened or that he was under duress.

Based on the totality of the circumstances, we conclude that the trial court properly denied defendant's motion to suppress on the grounds that defendant validly consented to the search.

IV. Cumulative Errors

Defendant also argues that his conviction should be reversed because of cumulative error. Because we find that there were no errors, the cumulative error doctrine is inapplicable.

V. Sentencing

Finally, defendant claims that the trial court abused its discretion when it sentenced him to a twenty-four year minimum term. Defendant argues that the trial court should have made a downward departure from the statute's mandatory twenty-year minimum sentence. We disagree. This Court reviews sentencing decisions for an abuse of discretion. *People v Compaeu*, 244 Mich App 595, 598; 625 NW2d 120 (2001). There is no abuse of discretion if the sentence is proportionate to the seriousness of the offense and the defendant's prior record. *Id*. "If an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limit is proportionate." *Id*. at 599.

According to MCL 333.7401(2)(a)(ii), the trial court was authorized to impose a minimum sentence of *not less than* twenty or *more than* thirty years' imprisonment. Thus, contrary to defendant's claim, the twenty-four year minimum sentence in this case is within the permissible range and not an upward departure. Moreover, defendant's status as a habitual offender, MCL 769.10, permits sentence enhancement. *People v Fetterly*, 229 Mich App 511, 540; 583 NW2d 199 (1998). In *People v Primer*, 444 Mich 269, 271-275; 506 NW2d 839 (1993), our Supreme Court held that a minimum sentence falling within the *statutory range* was proper and that a maximum sentence, greater than the statutory maximum, was permissible where a defendant was sentenced as an habitual offender.

We also note that there is no merit to defendant's argument that he was entitled to a downward departure. While this may be defendant's first drug offense, the objective and

[4] We note that there was evidence presented of defendant's previous exposure to the criminal system.

verifiable evidence in this case does not present substantial and compelling reasons warranting a downward departure. See MCL 333.7401(4), *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995). Indeed, defendant's past criminal history included a serious assault conviction for which he was on parole at the time he committed the instant offense.

Furthermore, we conclude that the sentence is proportional because it accurately reflects the seriousness of the crime and defendant's criminal history. Defendant admitted to involvement in gang activity and his prior assault conviction stemmed from a gunfight that culminated in a seven-year-old child being shot. At twenty-eight years of age, defendant lacked any "real" employment history and was on "high risk" parole status at the time of the instant crime. Moreover, the crime in this case involved a large quantity of cocaine that defendant hid in a devious manner with the intent to deliver. Thus, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Jessica R. Cooper
/s/ Harold Hood
/s/ Kirsten Frank Kelly