STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2004
v	No. 243960 Oakland Circuit Court
GREGORY ARNOLD WHITE, Defendant-Appellant.	LC No. 02-183419-FH

Before: Neff, P.J. and Wilder and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of less than twenty-five grams of cocaine, MCL 333.7401(2)(a)(v) for which the trial court sentenced him as a third habitual offender, MCL 769.11 to one to eight years in prison. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree.

This Court reviews a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *Id.* However, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witness. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Circumstantial evidence and reasonable inferences that arise therefrom can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Further, it is for the trier of fact, not this Court, to determine what inferences can be fairly drawn from the evidence and the weight accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To support a conviction for possession of less than twenty-five grams of cocaine, the prosecution must prove four elements: (1) the recovered substance is cocaine; (2) the cocaine is in a mixture weighing less than twenty-five grams; (3) the defendant was not authorized to possess the cocaine; and (4) the defendant knowingly possessed the cocaine. *Wolfe, supra* at 516-517; MCL 333.7403(2)(a)(v).

Defendant argues that the prosecution failed to prove the first element--that defendant knowingly possessed the cocaine found by the police. "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *Wolfe, supra* at 519-520. When determining whether the defendant constructively possessed the controlled substance, "the essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad,* 449 Mich 263, 271; 536 NW2d 517 (1995). "A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Wolfe, supra* at 520. Constructive possession exists when there is a sufficient nexus between the defendant and the contraband. *People v Johnson,* 466 Mich 491, 499-500; 647 NW2d 480 (2002). Generally, "a person has constructive possession if there is proximity to the article together with indicia of control." *People v Burgenmeyer,* 461 Mich 431, 438; 606 NW2d 645 (2000).

Here, the direct and circumstantial evidence presented, viewed in the light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find that defendant constructively possessed the drugs found in the vehicle. The drugs were found in a clear plastic bag on the floor of the front passenger seat where the defendant had been sitting. Although this, standing alone, appears to be mere presence, additional evidence shows a sufficient connection between defendant and the drugs. Pontiac Police Officer David Stone was on routine patrol in a full uniform and a fully marked police vehicle when he noticed a vehicle parked in a parking lot in an area known for drug trafficking. After noticing that the vehicle remained parked for several minutes, Officer Stone pulled up to the vehicle which slowly pulled into an alley. Officer Stone followed the vehicle noting that it turned twice without signaling and that the passengers were not wearing seatbelts. While following the vehicle, Officer Stone also saw defendant move "towards his foot area, down toward the floor board of the vehicle . . . ." Officer Stone stopped the vehicle and arrested the driver who failed to produce his driver's license. After the arrest, his search of the vehicle uncovered a plastic bag of cocaine on the floor by the front passenger seat. With respect to defendant, this evidence showed both proximity and indicia of control.

Defendant argues that contradictory evidence "negates the inference that [defendant] knowingly possessed the cocaine." Despite such contradictory evidence, the trial court did not err in denying defendant's motion for directed verdict. With regard to a directed verdict motion, conflict must be resolved in favor of the prosecution. The trier of fact, not this Court, must determine what inferences can be fairly drawn from the evidence and the weight accorded to those inferences. *Hardiman, supra* at 428.

Defendant also argues that "furtive gestures" alone cannot serve as sufficient evidence of a nexus between defendant and the drugs. But the cases relied upon by defendant state that "furtive gestures" alone cannot serve as probable cause to search a vehicle or to arrest. *People v Young,* 89 Mich App 753, 761-762; 282 NW2d 211 (1979); *People v Hall,* 40 Mich 329, 335; 198 NW2d 762 (1972). Here, Officer Stone effectuated a traffic stop because the vehicle, that had been parked for several minutes in a parking lot known for drug trafficking, turned twice without a signal and because the passengers were not wearing seatbelts. As he drove behind the vehicle, he noticed defendant making furtive gestures. After making the stop, Officer Stone arrested the driver because he could not produce his driver's license. Then, after conducting a search of the vehicle, Officer Stone found the drugs in a clear plastic bag on the floor near where

defendant was seated. Based on these circumstances, this is not a case where "furtive gestures" alone served as probable cause to search or arrest.

Defendant also argues that his gestures could not be construed as furtive because a "furtive gesture" is one in response to a "fear of getting caught by the police." Defendant argues that because the gesture was made before the traffic stop, it could not be a response to such a fear. But, based on the evidence presented, it would have been reasonable for the trier of fact to conclude that the movement was in response to such a fear because it was made after Officer Stone's marked vehicle approached the vehicle and after the vehicle began to drive away while being followed by Officer Stone.

Viewed in the light most favorable to the prosecution, there was sufficient evidence to allow a rational trier of fact to find that defendant constructively possessed the drugs found in the vehicle. Therefore, reversal is not warranted.

Defendant also argues that the trial court erred in denying his request for CJI2d 8.5 on "mere presence." We disagree.

We review this claim of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). A trial court's instructions must include all the elements of the charged offenses and "must not omit material issues, defenses, and theories if the evidence supports them." *Id.* We review jury instructions as a whole, rather than piecemeal. *Id.* Even if somewhat imperfect, instructions are not grounds for reversal if they fairly presented the issue to be tried and sufficiently protected the defendant's rights. *Id.* at 143-144.

CJI2d 8.5 states, "Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it." The trial court did not err in denying defendant's request to read this instruction. First, the placement of CJI2d 8.5 in the jury instructions within the aiding and abetting chapter and its specific language indicate that the instruction applies to defendants accused of assisting another person - that is, aiding and abetting, which was not at issue here. Second, the instruction given by the court, which included definitions of constructive possession, sufficiently instructed the jury on the applicable law. Therefore, the trial court did not err in denying defendant's request for CJI2d 8.5.

Defendant also argues that the trial court erred in failing to conduct a hearing regarding the impartiality of a juror. We disagree.

It was during the sentencing hearing that defendant first informed the trial court that juror number six "Ms. Jefferson" was his ex-fiancée's aunt. Defendant asserted that during voir dire, when Jefferson was asked if she knew anyone related to the case, she answered "no."[1] Defendant stated that he informed his attorney of this, but did not state when he did so. He did state, however, that he did not realize who Jefferson was until the end of trial. Defendant

[1] More accurately, when the trial court asked "Did any of you recognize the name of any of the witnesses that were read?", Jefferson did not respond that she did (Tr I, pp 17-18).

indicated that his ex-fiancée and her family were "probably still upset with [him]" because of the way he broke off the engagement. Defendant also indicated that he had not seen Jefferson since 1989. The trial court did not grant a mistrial, but informed defendant of his right to appeal. Defendant did not request a hearing on this matter. Therefore, the issue presented on appeal was not preserved for appellate review. This Court reviews unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *Carines, supra* at 763-764.

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1 § 20. A defendant is entitled to relief from a verdict when information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn if the defendant can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause. *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998), citing *People v Hannum*, 362 Mich 660; 107 NW2d 894 (1961), and *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948). "[A] defendant is denied his right to an impartial jury when a juror removable for cause is allowed to serve on the jury. In some circumstances, this is true even when the information justifying the juror's removal is not discovered until after the trial." *Id.* at 7-9.

Here, defendant stated for the first time at his sentencing hearing that Jefferson was the aunt of his ex-fiancée. Defendant did not present any evidence to corroborate this fact. Plaintiff argues that the trial court should have conducted a hearing to determine Jefferson's partiality. But defendant never requested such hearing. Thus, it appears that on appeal defendant is suggesting that the trial court should have ordered a hearing *sua sponte*. Because there was no evidence that defendant's statement regarding Jefferson was true, plaintiff has failed avoid forfeiture of this issue because he has not shown plain error affecting his substantial rights.

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly