

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS ANTHONY ECCLES,

Defendant-Appellant.

UNPUBLISHED

March 23, 2004

No. 244939

Oakland Circuit Court

LC No. 01-177874-FH

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii). Following a jury trial, he was convicted of simple possession, MCL 333.7403(2)(a)(ii), for which he was sentenced as a second offender, MCL 333.7413(1), to life in prison. Defendant appeals his conviction as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that the trial court erred in denying his request for an instruction on mere presence. CJI2d 8.5. This Court reviews a claim of instructional error, including the question of the applicability of a particular instruction, de novo on appeal. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

The trial court "is required to give requested instructions only if the instructions are supported by the evidence or the facts of the case." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). If an applicable instruction was not given, the defendant must show that the court's failure to give the requested instruction resulted in a miscarriage of justice. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Id.* at 124-125.

A mere presence instruction is appropriate where the defendant is charged as an aider and abettor. A defendant's "[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999). It may also be appropriate where the defendant is charged with a controlled substance

offense. The defendant's mere presence at a place "where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *People v Echavarria*, 233 Mich App 356, 370; 592 NW2d 737 (1999). Mere presence "implies not only an absence of criminal intent but also passivity and nonparticipation in the actual commission of [the] crime." *People v Moldenhauer*, 210 Mich App 158, 160; 533 NW2d 9 (1995).

In this case, the cocaine was found in defendant's residence. Defendant admitted that he had cocaine, which he kept in the linen closet in the bathroom, and had sold some of it, but denied that he owned it. It was not defendant's theory that the owner stored the drugs in his house and that he had no interest or control over them. Rather, he contended that because he did not own the drugs, he did not possess them. However, "possession may be found even when the defendant is not the owner of recovered narcotics." *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). It is sufficient that he has the right to exercise control over the drug and has knowledge of its presence. *Id.* at 520. The fact that defendant kept the cocaine in his house and sold some of it showed that he exercised control over it with knowledge of its character and presence and thus was sufficient to prove possession. *Id.*; *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). Because defendant was not charged with being an aider and abettor and the evidence did not show that defendant had no connection to the cocaine or the place where it was found, the instruction on mere presence was not supported by the evidence. Therefore, the trial court did not err in refusing to give the requested instruction.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette