

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SYLVESTER MCCRARY,

Defendant-Appellant.

UNPUBLISHED

March 30, 2004

No. 246028

Wayne Circuit Court

LC No. 01-012168

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

PER CURIAM.

Defendant appeals as of right from a nonjury conviction of possession of less than fifty grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv), for which he was sentenced to lifetime probation. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that he did not validly waive his right to a trial by jury. Because defendant failed to raise this issue below, it has not been preserved for appeal. Therefore, defendant must establish plain error affecting his substantial rights before relief may be granted. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A review of the record shows that the court advised defendant of his right to a trial by jury and explained briefly what that right entailed. Defendant clearly and unequivocally stated that he understood and agreed to waive that right of his own free will. The trial court did not clearly err in finding that defendant validly waived his right to a jury trial. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997); *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). The requirements imposed on the federal district courts by *United States v Delgado*, 635 F2d 889, 890 (CA 7, 1981), is not a constitutional requirement, *United States v Sammons*, 918 F2d 592, 596-597 (CA 6, 1990), and the failure to comply with those requirements does not require reversal unless the error was not harmless. *United States v Rodriguez*, 888 F2d 519, 528 (CA 7, 1989). Moreover, the advice required under *Delgado* is not required by state law. *Leonard, supra* at 595-596; *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992). Accordingly, we find that this unpreserved error does not entitle defendant to relief.

Defendant next contends that the trial court erred in denying his motion for a directed verdict.

In ruling on a motion for a directed verdict, the trial court must consider in the light most favorable to the prosecutor the evidence presented by the prosecutor up to the time the motion is made and determine whether a rational trier of fact could have found that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). In deciding the motion, the trial court is not permitted to determine the credibility of witnesses, no matter how inconsistent or vague that testimony might be, *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997), because questions regarding the witnesses' credibility are for the trier of fact to determine. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified in part 457 Mich 885 (1998). This Court applies the same standards in reviewing the trial court's ruling. *Schultz, supra*.

The elements of possession with intent to deliver cocaine are (1) defendant knowingly possessed a controlled substance, (2) defendant intended to deliver the substance to someone else, (3) the substance possessed was cocaine and defendant knew it was cocaine and (4) the substance was in a mixture that weighed less than fifty grams. Cf. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

"Possession is a term that 'signifies dominion or right of control over the drug with knowledge of its presence and character.'" *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000), quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977). The defendant need not own or have actual physical possession of the substance to be found guilty of possession; constructive possession is sufficient. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Constructive possession, which may be sole or joint, is the right to exercise control over the drug coupled with knowledge of its presence. *Id.* at 520. "[P]ossession may be found even when the defendant is not the owner of the recovered narcotics." *Id.* Possession may be proved by circumstantial evidence and any reasonable inferences drawn therefrom. *Nunez, supra*.

Actual delivery of the controlled substance is not necessary to prove intent to deliver. *Wolfe, supra* at 524. Intent to deliver may be inferred from all of the facts and circumstances, including the amount of narcotics and the way in which they are packaged, and minimal circumstantial evidence is sufficient. *Id.*; *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

The evidence showed that defendant was standing on a street with a man named Bailey. Bailey had a bag containing several dozen small Ziploc bags of cocaine hidden nearby and kept a few of those items on his person. Defendant had a tiny object hidden in his mouth, not the usual place for the storage of personal possessions. He transferred that item to another person in exchange for what looked like cash, which he then gave to Bailey. In return, Bailey gave defendant another small item, which defendant inserted in his mouth. Although defendant did not have that item in his possession when he was arrested, he told the police officer that he had swallowed it. From such evidence, one could reasonably infer that defendant and Bailey had joint possession of the bag of cocaine under the rock and that the cocaine was packaged for sale.

Defendant was the salesman, who held one packet at a time and hid it from sight pending a sale, and Bailey was his assistant. The trial court did not err in denying defendant's motion.

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Bill Schuette