

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DENNIS D. LEE, a/k/a DENNIS THOMAS, a/k/a
DEMOND THOMAS,

Defendant-Appellant.

UNPUBLISHED

June 29, 2004

No. 243338

Wayne Circuit Court

LC No. 01-011777-01

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and possession with intent to deliver marihuana, MCL 333.7401(2)(d)(iii). Defendant was sentenced to three to twenty years' imprisonment for the possession with intent to deliver cocaine conviction, and to two to four years' imprisonment for the possession with intent to deliver marihuana conviction, the two sentences to run concurrently. Defendant received an enhanced sentence, pursuant to MCL 769.12, as a fourth habitual offender. We affirm.

On appeal, defendant argues that there was insufficient evidence to support his conviction. Specifically, he contends that the prosecution did not offer sufficient evidence that he knew the substances found in a bag in a heating duct at the house at which he was present were cocaine and marihuana, and that even if there was sufficient evidence on this point, the prosecution produced insufficient evidence that he "possessed" those substances. We disagree.

"The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." [*People v Gonzalez*, 468 Mich 636, 664; NW2d 159 (2003), quoting *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).]

The prosecution presented sufficient evidence to justify a rational trier of fact in finding defendant guilty beyond a reasonable doubt of possession with intent to deliver marihuana and cocaine. In order to support a conviction for possession with intent to deliver marihuana, the

prosecution must prove four elements: (1) that the recovered substance is marihuana, (2) that the marihuana is in a mixture weighing less than five kilograms, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the marihuana with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992).

Our Supreme Court also stated in *Wolfe*, *supra* at 516-517:

to support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver.

"Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence, just as it can be established by direct evidence." *People v Gonzalez*, 256 Mich App 212, 226; 663 NW2d 499 (2003) (citing *Wolfe*, *supra*, at 526). Actual physical possession is unnecessary for a conviction of possession with intent to deliver; constructive possession will suffice. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). In determining whether a defendant constructively possessed a controlled substance, "the essential question is whether the defendant had dominion or control over the controlled substance." *Id.* "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). As a general rule, "a person has constructive possession if there is proximity to the article together with indicia of control." *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). "The purpose of the constructive possession doctrine is to expand the scope of possession statutes to encompass those cases in which actual possession at the time of arrest cannot be shown, but 'where the inference that there has been possession at one time is exceedingly strong.' Hence, 'constructive possession' refers to prior actual physical possession that can be inferred from the circumstances surrounding an arrest." *Konrad*, *supra*, at 280 (internal citations omitted).

In the present case, the prosecution presented sufficient evidence to allow a reasonable trier of fact to conclude beyond a reasonable doubt that defendant had constructive possession. A police officer saw defendant standing on a step ladder that was two or three feet high and moving his arms downward from a location that was 7 to 7 ½ feet from the basement floor. Above him was the open heating duct in which the drugs in question were later found. The police officer who found the drugs testified that the bag containing the drugs was not warm, despite being in the heating duct. He also testified that heat was flowing out of the duct, though he did not think that the furnace was on. From this testimony, the trier of fact could have reasonably inferred that defendant had just placed the bag of drugs into the heating duct immediately before the police took him into custody. Such an inference would establish the "prior actual physical possession that can be inferred from the circumstances surrounding an arrest" necessary to establish constructive possession. *Konrad*, *supra* at 280.

The evidence was also sufficient to permit a reasonable trier of fact to conclude that the defendant “knowingly” possessed the drugs. *Wolfe, supra* at 516-517. The officer who found the drugs in the heating duct also testified that the drugs were packaged as they are typically packaged for illegal sale. The trier of fact could have concluded both that the drugs were intended for illegal sale and that because defendant was observed attempting to hide the packages, he had knowledge that the packages contained drugs. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

Affirmed.

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