STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 17, 2004
v	No. 249024 Wayne Circuit Court
JOSE ALBERTO ROLON TORRES, Defendant-Appellant.	LC No. 01-179429-FH

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than fifty grams of cocaine, MCLA 333.7401(2)(a)(iv). The trial court sentenced him to two to twenty years' imprisonment as a habitual offender, MCLA 769.12. Defendant appeals as of right. We affirm.

I. Basic Facts and Proceedings

An unnamed person informed police that he had bought cocaine on two separate occasions from a woman at 48 Marquette Street in the city of Pontiac. Police officers executed a search warrant on the house. When police entered the house, they found defendant and his wife sitting on the living room coach. Notably, defendant's wife physically matches the description of the woman in the search warrant. Police found three grams of cocaine inside a sock in the living room closet, and a plate with cocaine residue and a razorblade in the laundry room.

After police found the cocaine, Sergeant Miller advised defendant of his *Miranda*[1] rights, which defendant then expressly waived in writing. When Sergeant Miller asked defendant if he took responsibility for the cocaine, defendant stated, "yes."

II. The Voluntariness of Defendant's Statements to Police

Defendant argues that his statements to police were involuntary because (1) police impliedly threatened to arrest his wife for possession/distribution of the found cocaine, and (2)

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1062; 16 L Ed 2d 694 (1966)

defendant, who primarily spoke Spanish, could not have voluntarily waived his *Miranda* rights without the aid of an interpreter.[2] We disagree.

With respect to a *Walker*[3] hearing, this Court will defer to the trial court's ability to view the evidence and will not disturb the court's findings unless they are clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). A decision is clearly erroneous if the reviewing court is left with a firm and definite conviction that a mistake has been made upon review of the entire record. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000).

A confession must be made without intimidation, coercion, or deception to be voluntary. *Daoud*, *supra* at 633. In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court set forth several factors that should be considered in determining the voluntariness of a statement:

> [T]he age of the defendant; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the defendant before he gave the statement in question; the lack of any advice to the defendant of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the defendant was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the defendant was deprived of food, sleep, or medical attention; whether the defendant was physically abused; and whether the defendant was threatened with abuse.

No single factor is conclusive. *People v Atkins*, 259 Mich App 545, 564-565; 675 NW2d 863 (2003). The admissibility of the statement depends upon the totality of the circumstances. *Id.*

We conclude that the trial court did not clearly err in finding that police did not impliedly threaten to arrest defendant's wife for possession/distribution of the found cocaine. The record reflects that before Sergeant Miller informed defendant of his *Miranda* rights, he asked defendant who lived in the house. Defendant mentioned his wife and children. Sergeant Miller then told defendant that the cocaine found in the house where he and his family live is a "very serious matter." After reading defendant his *Miranda* rights, Sergeant Miller again asked him who lived in the house. Defendant claims that Sergeant Miller, by twice asking him who lived in the house and stressing the seriousness of the situation, implicitly threatened to arrest his wife and thus coerced defendant into taking responsibility for the cocaine. However, Sergeant Miller's questions were objectively innocuous, and without additional evidence, simply cannot give rise to an inference that they caused defendant to confess. Moreover, only after defendant took responsibility for the cocaine did Sergeant Miller directly ask him whether his wife was

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[2] We note that defendant's claim that police threatened to arrest his wife would indicate that he understood English.

[3] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965)

involved with the cocaine. Thus, the trial court's finding that Sergeant Miller's questions were not coercive is not clearly erroneous. Further, not one *Cipriano* factor is implicated to suggest that defendant's statement was involuntarily made. Therefore, the trial court properly admitted defendant's statement.

We also conclude that the trial court did not clearly err in finding that defendant, who primarily spoke Spanish, voluntarily waived his *Miranda* rights. A defendant must have knowingly and intelligently waived his Fifth Amendment rights for a confession to be admissible. *Miranda*, *supra* at 444. A confession must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Daoud*, *supra*. Determining whether a defendant's waiver was knowingly and intelligently made requires an inquiry into his level of understanding, irrespective of police behavior. *Id.* at 636. This determination depends on the circumstances of each case, including defendant's age, experience, education, background, intelligence, and capacity to understand warnings given. *Id.* at 634.

Before Sergeant Miller began his interrogation, he advised defendant of his *Miranda* rights and defendant expressly waived those rights. Sergeant Miller testified that defendant understood English. Specifically, Sergeant Miller testified that in 1995, he and officer Wendy Keelty brought defendant to Michigan from Puerto Rico under an extradition writ. Both Sergeant Miller and Keelty testified that they had several conversations with defendant in English during the trip. In addition, Detective Maggie Martinez testified that defendant could understand and answer in English based on several interactions she had with him beginning in 1996. Further, Sergeant Miller testified that defendant understood English based on his demeanor and his responses to questions during the interrogation. This testimony was corroborated by several police officers that were present during the interrogation. Indeed, defendant never asked for explanations of Sergeant Miller's questions, and he answered the questions as a person who understood English would.

While Detective Martinez testified that defendant does not understand English one-hundred percent and that he had difficulty answering in complete sentences, this evidence is not inconsistent with the testimony of several police officers, including Detective Martinez, that defendant understood and knowingly waived his *Miranda* rights. Moreover, given defendant's previous dealings with the criminal justice system, there is evidence that defendant was fully aware of both the nature of the right being abandoned and the consequences of the decision to abandon it. Thus, the trial court did not clearly err in finding that defendant voluntarily and knowingly made his statements.

III. The Aiding and Abetting Jury Instruction

Defendant argues that the trial court abused its discretion in giving the aiding and abetting jury instruction. We disagree. This Court reviews a trial court's decision to give a specific jury instruction for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *People v Jackson*, 467 Mich 272, 277; 650 NW2d 665 (2002).

The mere presence jury instruction states that, "[m]ere presence, even with knowledge that an offense is about to be or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." CJI2d 8.5; *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). Here, defendant's request for the mere presence instruction entitled the prosecution to request an instruction on aiding and abetting. Therefore, it cannot be said that the trial court abused its discretion.

Sufficient evidence was presented at trial to instruct the jury on a theory of aiding and abetting. An aiding and abetting instruction is proper where there is evidence that (1) more than one person was involved in the commission of a crime, and (2) the defendant's role in the crime may have been less than direct participation. *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). Defendant may not have been the only one involved in the distribution of cocaine. Defense counsel asserted that defendant was not the person that sold the cocaine from the house, and that police were actually looking for a Hispanic female. The primary target of the search warrant was a female, and defendant's wife met the physical description of the woman listed in the search warrant. Because of this evidence and defendant's admitted responsibility for the found cocaine, there is sufficient evidence indicating that more than one person may have been involved in the distribution of cocaine. In addition, defendant may have been less than a direct participant, based on evidence that someone else in the house was directly involved in distribution of cocaine. Thus, the trial court did not abuse its discretion in giving the aiding and abetting instruction.

IV. Sufficiency of the Evidence

Defendant argues that the evidence presented at trial was not legally sufficient to justify a finding of guilt beyond a reasonable doubt. We disagree. When reviewing a sufficiency of evidence challenge, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *People v Wolfe* (*Amended Opinion*), 440 Mich 508, 515-516; 441 Mich 1201; 489 NW2d 748 (1992).

The Due Process Clause of the Fourteenth Amendment "protects an accused person against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed2d 368 (1970); US Const, Am XIV. To sustain a conviction for this particular possession crime, the prosecution must show that (1) the required substance was cocaine; (2) the cocaine was a mixture weighing less than fifty grams; (3) the accused was not authorized to possess the cocaine; and (4) the accused knowingly possessed the cocaine with the intent to deliver it. *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995). Possession can be actual or constructive. *Wolfe*, *supra* at 520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 521. Actual delivery of narcotics is not required to prove intent to deliver. *Id.* at 524. Intent to deliver can be inferred from the quantity of narcotics in a defendant's possession, the way in which those narcotics are packaged, and other circumstances surrounding the arrest. *Id.*

To convict defendant of being an aider or abettor, the prosecution must prove that: (1) the crime charged was committed by defendant or some other person; (2) the defendant performed

acts or gave encouragement which aided and assisted the commission of the crime; and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid. *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999). Mere presence is insufficient to establish that a defendant aided in the commission of the crime. *Wilson*, *supra*.

Although defendant did not have actual possession of the cocaine, there is sufficient evidence that defendant constructively possessed the cocaine. Police discovered three grams of cocaine at defendant's home. Defendant was at home when it was discovered, approximately ten feet away from where he sat. Defendant answered "yes" when Sergeant Miller asked him whether he took responsibility for the cocaine. While defendant maintains that he only confessed to protect his wife, defendant's reasons for making the confession do not prevent it from being admitted and used against him. See *Daoud*, *supra* at 639; *People v Swetland*, 77 Mich 53, 60-61; 43 NW 779 (1889). Thus, defendant's admission provides a sufficient nexus between defendant and the contraband to prove that he had constructive possession of it.

There is also sufficient evidence that defendant intended to deliver or assist in delivery of the cocaine. In spite of the absence of typical distribution paraphernalia found at defendant's house, other circumstantial evidence shows defendant had the requisite intent. Cocaine had been sold from defendant's house just two days before the execution of the search warrant. Defendant admitted that he had sold cocaine from the house in the past, including the week before the search. This evidence shows that defendant not only intended to possess the cocaine, but to distribute it to others. Such circumstantial evidence, when viewed in the light most favorable to the prosecution, shows that defendant either directly or indirectly intended to assist someone in delivery of cocaine. Based on this evidence, a rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. Thus, the trial court did not err in finding sufficient evidence to convict defendant.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Brian K. Zahra