

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERCY MORTON,

Defendant-Appellant.

UNPUBLISHED

October 12, 2004

No. 249420

Wayne Circuit Court

LC No. 02-009522-01

Before: Kelly, P.J., Gage and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver five or more, but less than forty-five kilograms of marijuana, MCL 333.7401(2)(d)(ii); and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to six to eighty-four months' imprisonment for his possession with intent to deliver marijuana conviction, to be served consecutive to two-years' imprisonment for his felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts and Proceedings

On November 14, 2000, Michigan State Trooper Phillip Duplessis and Detroit Police Department Sergeant William Anderson were working semi-undercover for the Detroit Violent Crimes Task Force, looking for murder suspect in a tan or gold 2000 Cadillac Escalade in the Southfield Freeway/Joy Road area. Trooper Duplessis and Sergeant Anderson observed a matching Escalade traveling at a high rate of speed and identified the driver as the murder suspect. They attempted to follow the vehicle in their unmarked car, but lost sight of it. Trooper Duplessis and Sergeant Anderson testified that there was more than one occupant in the Escalade.

About fifteen minutes later, Trooper Duplessis and Sergeant Anderson saw an identical Escalade traveling in the opposite direction. This Escalade was not the same Escalade they had earlier seen, but both Trooper Duplessis and Sergeant Anderson testified that they believed it was the same vehicle. Apparently, the Escalades were the same year, make and model. Trooper Duplessis and Sergeant Anderson followed the vehicle for three to four blocks until it turned onto Brace Street and backed into a driveway. Trooper Duplessis then radioed Trooper Andrew Ambrose and his partner, Trooper James Grub, who were in a marked police car nearby, and

asked them to make contact with occupant(s) of the Escalade. Trooper Duplessis and Sergeant Anderson testified that they could not see how many occupants were in the vehicle.

When Trooper Ambrose arrived, he saw defendant in the driver's seat of the Escalade talking on a cell phone. Trooper Ambrose approached the vehicle on the passenger's side and saw defendant's hand move between the driver's door and driver's seat. The trooper then asked defendant to step out of the vehicle, and conducted a pat-down search because of the furtive hand gesture and nature of the investigation. While conducting the search, Trooper Ambrose detected an odor of fresh marijuana coming from the vehicle. He asked defendant to step away from the vehicle and searched between the driver's door and driver's seat. He lifted up the window control panel on the driver's side and found a semi-automatic handgun.

After placing defendant under arrest, the troopers continued their search of the vehicle. In the center console, Trooper Ambrose found \$13,683 in various denominations. Trooper Ambrose also found on the floor cellophane wrapper containing apple peels, which, in his experience, were used to mask the smell of marijuana. Trooper Ambrose continued to smell a strong odor of marijuana and opened the trunk, which was accessible from inside the car. There were two duffel bags in the trunk containing some 9,083.2 grams of marijuana. Also, Trooper Ambrose found \$1,200 on defendant. The Escalade was registered to defendant's mother.

II. Sufficiency of the Evidence

A. Standard of Review

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*, 440 Mich 508, 515; 441 Mich 1201; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); 489 NW2d 748 (1992); *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003).

B. Possession with Intent to Deliver Marijuana

Defendant first argues that the prosecution failed to present sufficient evidence to support his conviction for possession with intent to deliver marijuana. We disagree.

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 068; 25 L Ed2d 368 (1970); US Const, Am XIV. To sustain a conviction for possession for this offense, the prosecution must prove beyond a reasonable doubt that: 1) the recovered substance is marijuana; 2) defendant was not authorized to possess the marijuana; 3) the defendant knowingly possessed the marijuana with the intent to deliver it; and 4) the substance was in a mixture that weighed no less than five kilograms and no more than forty-five kilograms. MCL 333.7403(2)(d)(ii). The offense of possession with intent to deliver a controlled substance requires proof that a defendant has actual or constructive possession of the substance. *Wolfe*, *supra* at 520. While it is true that mere presence of an individual at a location where drugs are found is not sufficient to sustain a conviction, constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at

520-521. Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *Id.*

Defendant specifically argues that did not have knowledge of the marijuana in the vehicle. However, it is not within the province of this Court to interfere with the factfinder's role in determining weight of evidence or credibility of witnesses. *Wolfe, supra*, at 514-515. Viewed in the light most favorable to the prosecution, sufficient evidence was presented to convict defendant of possession with intent to deliver the marijuana. Defendant was caught sitting in a vehicle that several law enforcement officers unequivocally maintained smelled strongly of marijuana, notwithstanding evidence that an attempt was made to conceal the odor. Further, although defendant was not actually seen driving the vehicle, he was sitting in it after it had just been driven and still possessed the keys to the vehicle. Further, a rational factfinder could have concluded beyond a reasonable doubt that defendant was selling the marijuana given the \$1,200 found on his person, the \$13,683 inside the car, and the accessible handgun. Accordingly, the prosecution presented sufficient evidence for a rational jury to conclude that defendant possessed the marijuana with intent to deliver it.

C. Felony-Firearm

Defendant next argues that prosecution failed to present sufficient evidence to support his felony-firearm conviction.

To prove a defendant guilty of felony-firearm, the prosecution must prove beyond a reasonable doubt that defendant 1) had a firearm in his or her possession; 2) during the time he or she commits or attempts to commit a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Defendant specifically contends that there is insufficient evidence to sustain a conviction for the underlying felony, possession of marijuana with intent to deliver, and therefore, the felony-firearm conviction must be vacated. However, because we conclude, *supra*, that sufficient evidence was presented that defendant possessed the marijuana with intent to deliver it, defendant's claim is without merit. Further, defendant admitted to Sergeant Anderson that he possessed the handgun, stating "And I just carry that heat for just in case. I ain't trying to beef with nobody or nothing. I mean, I was carrying all that money." Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to convict defendant of felony-firearm.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra