STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2007
v	No. 267372 Allegan Circuit Court
SHERI LYNN KERSEY, Defendant-Appellant.	LC No. 05-014204-FH

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right her bench-trial conviction of delivery or manufacture of marijuana, MCL 333.7401(2)(d)(iii). She was sentenced to six months in jail and three years' probation. We affirm. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

The charge against defendant arose after a federal postal inspector intercepted a package addressed to defendant's home. The agent suspected that the package contained marijuana. After a narcotics dog alerted to the package, the agent obtained a search warrant and opened the package. The package contained a substance in "brick" form that weighed two pounds. A field test determined that the substance was marijuana. The agent contacted a drug enforcement team and the team decided to conduct a controlled delivery. The agent installed a radio-tracking device in the package.

The agent and other officers tracked the package as it was delivered to an individual at defendant's home on April 25, 2005. A short while later, the tracking device indicated that the package was being moved from the residence. An officer subsequently stopped defendant, who was driving her car. The package was on the front seat next to her. Defendant admitted that she knew that the package contained marijuana. She maintained that she had been forced to deliver the package because her husband owed a drug debt to an individual from Texas who had threatened to hurt her family if she did not accept the package and deliver it. An officer also testified that, during a search of defendant's home, the police found a piece of paper on the dining room table. The paper contained names and numbers on it, and that "marijuana" was written on it twice.

Michigan State Police forensic scientist Susan Isley testified as an expert in drug detection and analysis. She conducted various tests, and concluded that the substance defendant was transporting was marijuana. She first performed a microscopic test, which she claimed is the primary test for detecting marijuana. A visual examination revealed leaf fragments, types of crystalline "hairs," patterns, and structures that were consistent with a marijuana plant. During cross-examination, she admitted that certain other plants have a similar structure. Isley also testified that she performed a Duquenois-Levine chemical test on the substance. She described the test as "highly selective" rather than "specific" in that it would detect the presence of various cannabinoids, including tetrahydrocannabinol (THC), the psychoactive ingredient of marijuana,[1] but was not specific for THC alone. Isley described the test procedure, with its "purple positive" result. She first stated that no other naturally occurring substance would produce this result, but then testified that one other plant out of 600 tested in a previous study produced a positive result from the test. Isley acknowledged that the presence of THC could be confirmed using a gas chromatography mass spectrometry test, but maintained that that test was not usually performed unless the sample involved small seedlings that did not have enough resin on which to perform a Duquenois-Levine test. She also acknowledged that THC could be removed from marijuana through the use of hexine. She opined that the sample contained THC because the only cases in which she had not found THC in a marijuana sample involved a seedling.

Defendant presented the testimony of Bradley Chote, the supervisor of the Michigan State Police's drug analysis unit. He testified that the Duquenois-Levine test and the microscopic examination were the tests currently used to identify marijuana. He testified that certain types of coffee could produce a positive result to the chemical test. He concurred with Isley's testimony that the chemical test was not THC specific. However, he testified that he had never encountered any other plant that had given a positive result. He maintained that the microscopic test was the best indicator to determine whether a substance was marijuana. Like Isley, Chote testified that seedlings would not necessarily produce THC. However, he also stated that he would expect all mature marijuana plants to contain THC. He testified that he had "never seen anything that looks like marijuana once it's under the microscope."

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that, because the prosecutor did not establish to an absolute certainty that the marijuana seized from her car contained tetrahydrocannabinol (THC), the evidence was insufficient to support her conviction. We disagree.

A. Standard of Review

When reviewing a challenge to the sufficiency of the evidence in a bench trial, we view the evidence presented in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. The trier of fact may make reasonable inferences from evidence in the record,

[1] See *People v Derror*, 475 Mich 316, 319; 715 NW2d 822 (2006); *People v Sinclair*, 387 Mich 91, 105-106; 194 NW2d 878 (1972).

but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Petrella*, 424 Mich 221, 268-270, 275; 380 NW2d 11 (1985); *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). Satisfactory proof of the elements of a crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

B. Analysis

MCL 333.7401(2)(d)(iii) prohibits the possession with intent to deliver less than five kilograms or 20 plants of "Marihuana or a mixture containing marihuana." In order to support defendant's conviction, the prosecutor was required to demonstrate the following elements beyond a reasonable doubt: (1) that defendant manufactured or delivered a controlled substance, (2) that the substance delivered or manufactured was marijuana, and (3) that defendant knew she was delivering or manufacturing marijuana. MCL 333.7401(2)(d)(iii); CJI2d 12.2.[2] The term "marijuana" is defined in MCL 333.7106(3) as follows:

> "Marihuana" means all parts of the plant Canabis sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

First, as noted by plaintiff, the statute does not require the prosecutor to establish the presence of THC in the marijuana sample. Moreover, even if we were to agree with defendant's contention that the prosecutor must show that the marijuana sample contains some level of THC to support a conviction under MCL 333.7401(2)(d)(iii), defendant could not prevail. Both the prosecutor's expert witness and defendant's expert witness testified that the combination of microscopic analysis and a Duquenois-Levine chemical reagent test were commonly used to determine whether a substance was marijuana. Such a combined analysis was used in the instant case to determine the identity of the substance seized from defendant. While both experts agreed that the chemical test was not "specific" for THC, but could also register a positive result in the presence of other related cannabinoids, they also maintained that they would expect to find the presence of THC in any marijuana sample subjected to further specific testing, possibly apart from immature seedlings. Given this testimony, as well as the discussion in case law that all marijuana contains some level of THC,[3] we find that the prosecutor established that the substance tested was marijuana, and that THC was present to a certainty sufficient to support the

[2] "Delivery" is defined as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1).

[3] *Sinclair*, *supra* at 105-106. See also *People v Riddle*, 65 Mich App 433, 436-437; 237 NW2d 491 (1975).

conviction. That the prosecutor must establish proof beyond a reasonable doubt does not equate to a showing of guilt to an absolute certainty. *People v Bowman*, 254 Mich App 142, 150; 656 NW2d 835 (2002). Nor was the prosecutor required to disprove defendant's theory that the THC was somehow removed with a solvent in an unspecified manner, or that this particular sample happened to be a "marijuana light" variation of the plant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

We have long rejected defendant's other argument, i.e., that the prosecution failed to introduce sufficient evidence to support the conviction because it did not show that the marijuana was specifically of the Cannabis sativa L. variety of the plant. *Riddle*, *supra* at 439-440; *People v Rodriguez*, 65 Mich App 723, 729; 238 NW2d 385 (1975).

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette