STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 23, 2008
v	No. 281504 Kalamazoo Circuit Court
DOUGLAS ARNELL PRUDE, Defendant-Appellant.	LC No. 07-000712-FH

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), and consumption of alcoholic beverages by a minor, MCL 436.1703(1)(a). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that he was denied the effective assistance of counsel because counsel failed to move for an involuntary dismissal of the charges after the close of the prosecution's proofs. He contends that, given the trial court's decision that defendant's testimony was crucial in deciding that defendant was guilty of the offenses, the outcome of trial would have been different if not for counsel's error. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is "limited to mistakes apparent on the record." *Id*. "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing on this ground before the trial court, our review of his ineffective assistance claim is limited to mistakes apparent on the record. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id*.

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id*. "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id*.

MCR 6.419(C) provides:

> (C) Bench Trial. In an action tried without a jury, after the prosecutor has rested the prosecution's case-in-chief, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact.

Generally, in determining whether a directed verdict is appropriate, we review the record de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). "Considering all the evidence presented by the prosecution in the light most favorable to the prosecution, a directed verdict is inappropriate where a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt." *Id*., citing *People v Jo*lly, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant cannot show counsel provided ineffective assistance because the evidence presented was sufficient to permit a rational trier of fact to conclude that the elements of the charged crimes were proven beyond a reasonable doubt. "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1202 (1992). When determining whether the defendant constructively possessed the controlled substance, "the essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "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). Generally, "a person has constructive possession if there is proximity to the article together with indicia of control." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

The prosecution presented the testimony of Kalamazoo Public Safety Officer Hoyt. Hoyt responded to a complaint concerning a convenience store patron. When he arrived at the store, he saw defendant and others in the parking lot. He entered the store and spoke with the cashier, who informed him that defendant had tried to sneak around the counter. The clerk had chased defendant out of the store and called the police when defendant did not leave the area. Hoyt examined defendant's identification, smelled alcohol, and asked defendant how much he had had

to drink. Defendant replied that he had had "a few." Hoyt asked what had occurred in the store. Defendant replied that he had tried to get around the counter to get away from another person who had entered the store and displayed a gun to defendant. Defendant accepted Hoyt's offer of a ride home, and asked Hoyt to lock defendant's car. As Hoyt opened the driver's door to lock the car, he detected a strong odor of dried marijuana. Hoyt began to search the vehicle. On the floor in front of the driver's seat Hoyt found marijuana "shake", or crumbs. On the driver's seat, Hoyt found a torn open knotted plastic baggie that appeared to have had marijuana in it. In the glove compartment, Hoyt found another baggie of approximately $10 worth of marijuana and a baggie containing a number of rocks of crack cocaine totaling 8.11 grams. Hoyt testified that the amount of cocaine was consistent with the intent to distribute i.e. it was not for personal use only.

The evidence presented indicated that defendant had a sufficient proximity to the marijuana and cocaine in his car, and sufficient control over it, to support the convictions. Defendant relies on the trial court's assessment that, had defendant not testified and created a number of inconsistencies, it would not have been able to find beyond a reasonable doubt that there was knowing possession. In hindsight, the trial court's comments appear to support defendant's position. Still, it is speculative to assume that the trial court would have reached the same conclusions about the prosecution's evidence had defendant not testified. In any event, trial counsel would not have known the trial court's possible conclusions at the close of the prosecution's proofs. It is not a requirement for trial counsel to routinely move for an acquittal on the chance that the defendant would receive a favorable ruling. Nor do we agree with defendant's underlying argument that counsel should have somehow saved him from the consequences of his own falsehoods. Under the circumstances, defendant cannot show counsel provided ineffective assistance.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder