

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL KELVIN ROSS,

Defendant-Appellant.

UNPUBLISHED

January 15, 2009

No. 280310

Berrien Circuit Court

LC No. 2007-402223-FH

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for possession with intent to deliver less than 50 grams of a mixture containing a controlled substance, MCL 333.7401(2)(a)(iv), and maintaining a drug house, MCL 333.7405(1)(d). We affirm.

I. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence for both convictions. When reviewing a challenge to the sufficiency of the evidence, we review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-269; 380 NW2d 11 (1985). On review, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

To prove that defendant committed the crime of possession with intent to deliver less than 50 grams of heroin, the prosecution was required to prove that (1) defendant knowingly possessed heroin, (2) defendant intended to deliver the heroin to someone else, (3) the substance possessed was heroin and defendant knew it was heroin, and, in this case, (4) the mixture containing the heroin weighed less than 50 grams. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Defendant only challenges the element of possession.

Possession may be actual or constructive, and it may be joint. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). A defendant constructively possesses narcotics if he has a right to control them and knows of their presence. *Id.* at 421 n 4, citing *People v Wolfe*, 440

Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The defendant's mere presence at the location where the drugs are found is, however, insufficient to prove constructive possession. An additional connection between the defendant and the contraband must be shown. *Hardiman*, *supra* at 421, citing *Wolfe*, *supra* at 520.

We find that the prosecution proved more than defendant's mere presence at 234 Lormar. The evidence and reasonable inferences drawn from that evidence were sufficient to prove that defendant constructively possessed the heroin. He had the right to control it and knew of its presence. At the preliminary examination, Kristen Horne, defendant's girlfriend, testified that defendant sold heroin and that she only sold heroin when defendant told her to. She testified that in the past, defendant had threatened her and struck her for refusing to sell it.¹ Moreover, the evidence at trial established that defendant lived at the home where the heroin was located and came into contact with the heroin at issue. The plate of heroin upon which the possession charge was based was found in defendant's bedroom closet with his fingerprint on it. The lottery slips, yellow seals and plastic baggies with heroin residue were found in the open area of the basement where defendant sometimes slept. Documents belonging to defendant were found in defendant's bedroom and in the open area of the basement. These facts prove that defendant had use of and control over the two areas of the house where the incriminating evidence was found. In addition, before defendant's arrest, Horne sold heroin to a police informant. Money from the controlled purchase was found in defendant's pants pocket at the time of his arrest. This fact corroborated Horne's testimony that she sometimes sold heroin when defendant told her to and that she would then give the money to defendant. Viewing the evidence in a light most favorable to the prosecution, it is reasonable to infer that defendant constructively possessed the heroin.

To prove that defendant committed the crime of maintaining a drug house, the prosecution was required to prove that (1) defendant knowingly kept or maintained a dwelling, (2) this dwelling was used for illegally keeping controlled substances or used for illegally selling controlled substances, and (3) defendant knew that the dwelling was frequented or used for such illegal purposes. The prosecution was also required to prove that defendant kept or sold drugs out of the house on more than one isolated occasion. To "keep or maintain" requires "some degree of continuity." *People v Thompson*, 477 Mich 146, 154; 730 NW2d 708 (2007).

The first and second elements are undisputed. And, viewed in a light most favorable to the prosecution, there is no question that defendant knew the dwelling was frequented or used for illegal purposes. The plate of heroin was found in defendant's bedroom with his fingerprint on it. The lottery slips, yellow seals, and baggies with heroin residue were found in the open area of the basement where Horne and defendant sometimes slept. Documents belonging to defendant were found in the same area of the basement. The controlled purchase money was in defendant's pants pocket. Reasonable inferences from this evidence are that defendant had control over those portions of the house where the heroin was located or packaged and knew that the heroin was being kept in his house. Horne's preliminary examination testimony additionally supports these inferences.

¹ At trial, pursuant to MRE 801(d)(1), most of the videotape of Horne's testimony at the preliminary examination was played for the jury and admitted as substantive evidence.

The prosecution also presented sufficient evidence to prove “some degree of continuity.” Because the amount of heroin found would constitute about 20 to 25 doses and there were a large quantity of lottery strips, a reasonable inference would be that defendant was packaging and selling many individual doses. Further, Horne testified that defendant had been packaging and selling heroin for about two weeks. And, a controlled buy had taken place, yet there was additional quantities of heroin that could have been sold.

II. Offense Variable 14

Defendant next argues that the scoring of offense variable (OV) 14, MCL 777.44, was in error as the prosecution failed to meet its burden of proof.² We disagree. Where the sentence imposed is within the sentencing guidelines, a trial court’s scoring of the OVs will be upheld if there is any evidence to support the score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

If the offender is a leader in a multiple offender situation, OV 14 can be scored at ten points. MCL 777.44(1)(a). When scoring this variable, the entire criminal transaction should be considered. MCL 777.44(2)(a).

We find that the record sufficiently supports the trial court’s scoring of OV 14. First, this case was a multiple offender situation. Horne admitted selling the heroin to the confidential informant and she pled guilty to possession of heroin. At the preliminary examination, she testified that the heroin belonged to defendant, defendant packaged and sold the heroin, and she occasionally sold the heroin for him because he told her to do so. The heroin was kept in defendant’s bedroom closet and Horne often stayed with defendant at his house. In addition, both of their fingerprints were found on the plate containing the heroin and defendant had the controlled purchase money in his pants pocket. Thus, the trial court was within its authority, based on the evidence presented, to find that a multiple offender situation existed.

The trial court was also within its authority to find that defendant was the leader. Horne testified that defendant packaged and sold the heroin. The heroin was in his bedroom. Horne also testified that she made sales at defendant’s request because he had threatened her and struck her in the past. The controlled purchase money found in defendant’s pants pocket corroborated Horne’s testimony that she only sold the heroin pursuant to defendant’s orders. In addition, at the time of sentencing, Horne had pled guilty as charged to perjury for her false testimony given at trial wherein she testified that the heroin belonged to her and she sold it. We find that the

² Defendant also argues that even if there was enough evidence in the record to support the scoring, he should be resentenced because the trial court failed to properly articulate those facts upon which it based the scoring. However, because defendant’s sole support for this argument is *United States v Spears*, 197 F3d 465 (CA 10, 1999), which is inapplicable because it involved the federal sentencing guidelines and the case has no precedential value in this Court, we decline to address this argument.

record contains adequate evidence to score OV 14 at ten points.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly