STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2009
v	No. 281198 Wayne Circuit Court
LUCIAN SFARCIOC, Defendant-Appellant.	LC No. 06-007392-01

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of two counts of possession with intent to deliver Ecstasy,[1] MCL 333.7401(2)(b)(*i*), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent terms of 18 months to 20 years in prison for the possession-with-intent-to-deliver convictions, to be served consecutively to a mandatory two-year sentence for the felony-firearm conviction. We affirm defendant's convictions and his felony-firearm sentence, but we vacate his sentences for possession with intent to deliver Ecstasy and remand for resentencing consistent with this opinion.

Defendant and his codefendant were arrested on outstanding warrants after police stopped the vehicle defendant was driving, in which the codefendant was a passenger. Incident to the arrest, officers performed a pat-down search of defendant and recovered a knotted up sandwich bag in his pocket containing marijuana and approximately $1,300. The officers then searched the vehicle and recovered three additional sandwich bags, each containing 100 Ecstasy tablets, and a lease agreement that indicated defendant was the leaseholder of the vehicle. During a search of the home shared by defendant and the codefendant, officers recovered approximately 6,000 Ecstasy tablets, over $92,000, a loaded pistol, a drug ledger, and a scale. They then recovered an additional $150,000 from a vehicle in the driveway. Although the home was rented in the codefendant's name, the evidence presented at trial demonstrated that defendant assisted the codefendant in locating the home to rent, that defendant had a key to the

[1] "Ecstasy" is the commonly used name for methylenedioxymethamphetamine (MDMA). Ecstasy is a schedule 1 controlled substance. MCL 333.7212(1)(g).

home, that defendant had paid rent to the landlord in cash from his pocket on two occasions, that defendant had been frequently observed at the home, and that defendant had informed the arresting officers that other individuals were present at the home and that a loaded gun was in the back bedroom.

Before defendant's trial commenced, the codefendant pleaded guilty to one count of possession with intent to deliver Ecstasy. As a factual basis for his guilty plea, he admitted that he possessed "some Ecstasy" and was "going to deliver it to someone."[2] In a pretrial motion, defendant sought to introduce the codefendant's plea testimony as a statement against interest under MRE 804(b)(3), arguing that the codefendant's plea testimony was exculpatory evidence that showed the Ecstasy had not been in defendant's possession. The trial court denied defendant's motion.

Defendant first challenges the court's decision to exclude his codefendant's guilty plea testimony from evidence. We review the trial court's determination to exclude evidence for an abuse of discretion. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996). Errors in the admission of evidence do not warrant reversal so long as the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). We review constitutional questions de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

Defendant contends that the court erred by excluding the codefendant's admission that he possessed the Ecstasy, depriving him of a fair trial and the right to present a defense. A defendant has a constitutional right to present exculpatory evidence in his defense. *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). However, this right is not absolute, and the defendant must still comply with established rules of procedure and evidence. *People v Hayes*, 421 Mich 271, *279*; 364 NW2d 635 (1984). Therefore, in order for the codefendant's statement to be admissible as substantive evidence against defendant, "the statement must be admissible under the Michigan Rules of Evidence." *People v Dhue*, 444 Mich 151, 157; 506 NW2d 505 (1993), abrogated on other grounds *People v Taylor*, 482 Mich 368 (2008). Generally, "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible." MRE 402. '"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Further, hearsay is not admissible as substantive evidence unless an exception applies. MRE 801(c); MRE 802; see also *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998).

While we agree with defendant that the codefendant's guilty plea was not barred from evidence as hearsay because it met the requirements of a statement against penal interest under MRE 804(b)(3), it was inadmissible for want of relevancy to the determination of defendant's possession of the Ecstasy under the circumstances of this case. MRE 401 and 402. The

[2] The record does not support defendant's assertion on appeal that the codefendant pleaded guilty to possession of the Ecstasy located on the passenger side of the vehicle in which defendant and the codefendant were stopped.

codefendant's plea testimony was very vague and general, the extent of which merely indicated that he possessed "some Ecstasy" and "was going to deliver it to someone." Although it could be inferred, based on the court's questioning, that the codefendant admitted to possessing "some Ecstasy" found in the home, his plea did not specify which quantity of Ecstasy he admitted to possessing. The statement made at the plea hearing did not indicate whether the codefendant had possessed the entire quantity of Ecstasy found in the home or only the Ecstasy found in his bedroom, whether he possessed it solely or exclusively, or any other circumstances of his possession that would have tended to exculpate defendant. Given the lack of specificity surrounding the circumstances of the codefendant's possession, it cannot be said that the plea testimony had any tendency to make defendant's possession of the Ecstasy in the home or in his vehicle more or less probable. MRE 401.

This is especially so given the circumstantial evidence in this case linking defendant to the Ecstasy recovered from both sources, which strongly supported his convictions under a theory of joint or constructive possession or a theory of aiding and abetting. *People v Wolfe*, 440 Mich 508, 519-520, 526; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence clearly established more than defendant's mere presence in the location where the Ecstasy was found. It also established defendant's dominion and control over the home and vehicle where the Ecstasy was recovered, his participation in and awareness of the large-scale drug operation, and his close association with the codefendant, sufficient to link him to the Ecstasy. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); see also *Wolfe*, 440 Mich at 519-522, 524. The same evidence supported defendant's conviction as an aider and abettor, i.e., that he assisted the codefendant in possessing the Ecstasy and in its intended delivery. *Carines*, 460 Mich at 757-758. In light of this evidence, which strongly supported defendant's constructive or joint possession and also indicated that defendant aided and abetted in the drug offenses, the codefendant's admission that he possessed "some Ecstasy" and was "going to deliver it to someone" would not have made defendant's possession any less probable. See *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). In fact, the codefendant's guilty plea would have likely tended to inculpate defendant. Therefore, the trial court did not abuse its discretion by excluding the plea testimony from evidence; nor did its exclusion infringe upon defendant's constitutional right to present a defense.

Defendant next claims that his convictions of two counts of possession with intent to deliver Ecstasy violated the constitutional protection against double jeopardy. Defendant's first conviction of possession with intent to deliver resulted from the Ecstasy recovered from defendant's vehicle during the traffic stop. The second conviction resulted from the Ecstasy recovered during the subsequent search of defendant's home. The Ecstasy recovered from both sources was of the same type and was packaged in a similar manner, i.e., in baggies containing 100 tablets, suggestive of delivery. Defendant argues that the possession with intent to deliver the Ecstasy found in the vehicle and the possession with intent to deliver the larger quantity of Ecstasy later found in the home involved a "single continuing transaction," thereby constituting the same offense for double jeopardy purposes. We disagree.

A double jeopardy challenge presents an issue of law, which we review do novo. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996). "The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense." *People v Bartlett*, 197 Mich App 15, 17; 494 NW2d 776 (1992); see also US Const, Am V;

Const 1963, art 1, § 15. This protection "includes protection from both successive prosecutions for the same offense and from receiving multiple punishments for the same offense." *Bartlett*, 197 Mich App at 17. "Whether a defendant has received multiple punishments for the same offense is determined by looking to the legislative intent behind the statutes violated." *Id.* "That is, whether a defendant may be twice convicted depends upon whether the Legislature intended that two convictions might result under the statute in question under the circumstances of that case." *Id.*

The plain language of MCL 333.7401, prohibiting several kinds of drug-related activities, indicates a legislative intent to punish each separate drug-related act, despite the fact that the narcotics may have originated from the same source. See *id*. The evidence in this case established that defendant possessed two separate quantities of Ecstasy in separate locations (at his home and in his vehicle), which were recovered in two different contexts (during traffic stop and a search of the home). We find that defendant's possession of the 300 Ecstasy tablets in his vehicle, which were packaged for immediate delivery, constituted a separate and distinct transaction from the possession of the 6,000 additional Ecstasy tablets found in the home, which were apparently intended for future distribution or delivery. These two factually distinct offenses support defendant's dual convictions. "[T]he Legislature intended that defendant be subject to prosecution for each [intended] delivery as a separate offense." *Bartlett*, 197 Mich App at 17-18. Moreover, a double jeopardy violation does not occur "if one crime is complete before the other takes place, even if the offenses share common elements . . . ." *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). Under the circumstances of this case, the constitutional prohibition against double jeopardy did not preclude defendant's separate convictions of possession with intent to deliver Ecstasy.

Defendant lastly argues that he is entitled to resentencing for his convictions of possession with intent to deliver Ecstasy because the court declined to impose an intermediate sentence without articulating substantial or compelling reasons. We agree. Possession with intent to deliver Ecstasy, MCL 333.7401(2)(b)(*i*), is a Class B offense for purposes of the legislative guidelines. MCL 777.13m. The sentencing court must impose a minimum sentence within the guidelines range unless there exist substantial and compelling reasons to depart from the guidelines. MCL 769.34(3). Defendant's minimum guidelines range for the possession-with-intent-to-deliver offenses in this case was zero to 18 months. Consistent with that range, the court sentenced defendant to concurrent terms of 18 months to 20 years in prison.

However, "[w]hen the upper and lower limits of the recommended minimum sentence range meet certain criteria, a defendant is eligible for an intermediate sanction." *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007). If the upper limit of the minimum sentence range is 18 months or less, as it was in this case, the cell containing the range is an "intermediate sanction cell." *Id.* at 617. Under these circumstances, MCL 769.34(4)(a) provides that

> the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

"MCL 769.31(b) defines 'intermediate sanction' as 'probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of' several options, including probation with any conditions authorized by law, probation with jail, treatment for substance abuse or mental health conditions, and other options such as house arrest and community service." *Harper*, 479 Mich at 618.

Even though the 18-month minimum actually imposed did not exceed the upper end of the range established by the sentencing guidelines, MCL 769.34(4)(a) was applicable under the facts of this case. The 18-month minimum prison sentence was a departure from the 12-month maximum jail sentence required by MCL 769.34(4)(a). Accordingly, the trial court was required to sentence defendant to an intermediate sanction unless it articulated a substantial and compelling reason for a departure. MCL 769.34(4)(a). But the court, in imposing the 18-month prison sentence, did not set forth any substantial and compelling reasons. Therefore, we must vacate the possession-with-intent-to-deliver sentences and remand for resentencing. *People v Alspaugh*, 480 Mich 919 (2007); *Harper* 479 Mich at 637; see also *People v Johnigan*, 265 Mich App 463, 477-478; 696 NW2d 724 (2005) (observing that we may not affirm a sentence merely because we can speculate as to possible substantial and compelling reasons to justify the departure). On remand, the trial court shall either sentence defendant to an intermediate sanction, or state on the record a substantial and compelling reason for sentencing defendant outside the framework of MCL 769.34(4)(a).

We affirm defendant's convictions and his sentence for felony-firearm, but we vacate his sentences for possession with intent to deliver Ecstasy and remand to the trial court for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood