STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2009
v	No. 283998 Wayne Circuit Court0
OMAR JOHNSON, Defendant-Appellant.	LC No. 07-013701-FH

Before: Borrello, P.J., and Murphy and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction for possession with intent to deliver between 50 and 449 grams of cocaine, MCL 333.7401(2)(a)(iii). Defendant was sentenced as a third habitual offender, MCL 769.11, to 78 months to 20 years' imprisonment. For the reasons set forth in this opinion, we affirm.

Defendant first argues that the evidence was insufficient to support his conviction. Defendant admits that the quantity and packaging of the cocaine would support a finding that whoever possessed the cocaine had an intention of selling. Therefore, defendant's argument on appeal is predicated on the theory that the prosecution failed in its burden of proving that defendant possessed the cocaine. Defendant argues that his mere presence in a flat owned and leased by others was insufficient to show that he possessed the cocaine. However, possession may be actual or constructive and may be proven by circumstantial evidence and reasonable inferences drawn from such evidence. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005); *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000). Constructive possession includes knowledge of the illegal substance and the right to control it. *McGhee*, *supra* at 622; *Nunez*, *supra* at 615. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

"A claim of insufficient evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

There was sufficient evidence to support defendant's conviction. Two police officers arrived at the home where the cocaine was seized based on a citizen's complaint that narcotics were being sold there. While the officers did not notice any illicit activity when they arrived, they both noted that defendant separated himself from the group of individuals in the driveway and clearly hoped to avoid contact with the officers. Defendant dropped a packet containing cocaine on the back porch of the home. When the first officer arrived in the flat, he found defendant in a bedroom. Defendant was ordered out of the room. As he was complying, defendant kicked an Enfamil can to an open heating vent in the bedroom floor. His actions indicated that he had possession of both the cocaine found on the porch and the cocaine found in the Enfamil can. The officers also found more than $800 on defendant after they searched his person. In addition to quantity and packaging of the cocaine, the officers seized a scale that was commonly used to weigh and measure cocaine for distribution. Defendant's girlfriend testified that she was leasing the flat and that defendant did not live there. She testified that she was holding the cocaine for someone else. The jury was best qualified to judge her credibility. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). See also, *People v Lemmon*, 456 Mich 625,636-637; 576 NW2d 492 (1992). ("The historic division of functions between the court and the jury needs no citation of authority. It is the province of the jury to determine questions of fact and assess the credibility of witnesses. 'As the trier of fact, the jury is the final judge of credibility'".) (internal citations omitted). Also noteworthy was the fact that defendant's grandmother was a co-lessee, further evidence that defendant likely lived in the flat. Viewed in a light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe*, *supra* at 515; *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

Defendant next argues that the trial court erred when it instructed the jury that possession of cocaine was a specific intent crime. In addition to the charge of possession with intent to distribute cocaine, defendant was also charged with "mere possession" under MCL 333.7403(1), which provides that "[a] person should not *knowingly or intentionally* possess a controlled substance." The trial court instructed the jury that:

> The crime of possession of a controlled substance requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that he did the acts with the intent to cause a particular result.
>
> For the crime of possession of a controlled substance, this means that *the prosecution must prove that the defendant actually knowingly or intentionally possessed the cocaine*. The defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence. [Emphasis added.]

The trial court's instruction to the jury mirrored the language of the statute. The additional instruction that possession was a specific intent crime was superfluous where the statute itself included language that the defendant *knowingly or intentionally* possessed the controlled substance. The trial court was under no obligation to distinguish the crime as one of specific intent or general intent as long as the jury was properly instructed that defendant had to have

acted with knowledge or intent. See *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004).

Finally, defendant argues that he was denied the effective assistance of counsel at trial because defendant based his decision not to testify on the erroneous advice of counsel that defendant's prior convictions could be used as impeachment evidence. Defendant did nothing in the trial court to preserve this argument. Following his appeal as of right to this Court, defendant moved to remand under *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973), but that motion was denied by this Court. Where a defendant has failed to preserve the issue for appellate review by moving for a *Ginther* hearing in the trial court, review by this Court is limited to errors apparent on the record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Defendant's motion to remand to develop a record regarding his claim of ineffective assistance of counsel was accompanied by an affidavit sworn by defendant, stating, "that during our pre-trial discussions my Trial Attorney informed me that if I took the stand and testified the Prosecution would be able to put before my jury my prior convictions. That his advice in this regard is the only reason that I did not testify at my trial." Because this document was not part of the lower court record, we decline to consider it as evidence. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008); *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001).

Still, giving the benefit of doubt to defendant and assuming he received such erroneous evidence, defendant has still failed in his burden of demonstrating that the result of the trial would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Odom*, *supra* at 417; *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Although defendant would have liked an opportunity to testify regarding his version of events, it is not as though he was denied a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). Defendant presented his girlfriend as a witness. She testified that defendant did not live in the flat and that the drugs belonged to her. During his cross-examination of witnesses and during his closing arguments, defense counsel made it clear that his theory of the case was that defendant did not live in the flat and that he did not possess the drugs. On appeal, defendant does not make an offer of proof regarding what his testimony would have been. In keeping with his general defense, defendant would have likely testified that many other individuals shared the flat and had access to the contents therein. While we cannot be sure of all of counsel's reasons for not wanting defendant to testify, there is nothing that precludes us from assuming that the decision was based on sound trial strategy, which we will not second-guess. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Defendant has failed to demonstrate to this Court that trial counsel's performance fell below an objective standard of reasonableness or that, but for counsel's decision to not call defendant as a witness, the result of the trial would have been different.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly