

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH GAIL HAYES,

Defendant-Appellant.

UNPUBLISHED

September 17, 2009

No. 284924

Oakland Circuit Court

LC No. 2007-216615-FH

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of 3,4-methylenedioxymethamphetamine (ecstasy), with intent to deliver, MCL 333.7401(2)(b)(i), and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 51 months to 40 years' imprisonment for possession of ecstasy with intent to deliver; he was sentenced to 365 days' imprisonment for possession of marijuana.¹ We affirm, but remand for the ministerial task of correction of clerical errors in the judgment of sentence.

I. Sufficiency of the Evidence

Defendant first contends that there was insufficient evidence to support his convictions. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, we must construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

The offense of possession of a controlled substance requires a showing of knowledge of its presence and character and dominion or control over the substance. *People v McKinney*, 258

¹ The judgment of sentence contains inaccurate statutory citations with regard to defendant's conviction for marijuana possession, and with regard to defendant's sentence as an habitual offender. These inaccuracies should be corrected on remand.

Mich App 157, 165; 670 NW2d 254 (2003). Possession may be joint or exclusive and either actual or constructive. *Id.* at 166. “[C]onstructive possession exists where the defendant has the right to exercise control over the narcotics and has knowledge of their presence.” *People v Hardiman*, 466 Mich 417, 421 n 4; 646 NW2d 158 (2002). However, mere presence at a location where contraband is found is insufficient to establish constructive possession. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Instead, there must be a “sufficient nexus” between the defendant and the contraband based on the totality of the circumstances. *Id.* at 521. Circumstantial evidence and reasonable inferences drawn from that evidence can constitute proof of possession. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

In this case there was sufficient evidence to allow a rational jury to conclude beyond a reasonable doubt that defendant knowingly possessed marijuana. MCL 333.7403(2)(d). Defendant was the only adult at his girlfriend, Kenya Campbell’s, apartment when the police conducted a search and found a bag of marijuana on the table in the kitchen. Campbell testified that the marijuana belonged to defendant and that she and defendant smoked marijuana together. While defendant testified that he did not own or have knowledge of the marijuana, it is the province of the jury to determine the weight of the evidence and credibility of witnesses. *Wolfe, supra* at 513-516.

Similarly, we find there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant knowingly possessed ecstasy with intent to deliver, MCL 333.7401(2)(b)(i). “The element of knowing possession with intent to deliver has two components: possession and intent.” *People v Brown*, 279 Mich App 116, 136; 755 NW2d 664 (2008). Defendant does not contest that the pills found on the couch were ecstasy; the requisite evidence needed to show constructive possession is set forth above. See *Hardiman, supra*. To show intent to deliver, proof of actual delivery is not required. *Wolfe, supra* at 524. “An actor’s intent may be inferred from all of the facts and circumstances ... and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). “Intent to deliver has been inferred from the quantity of narcotics in a defendant’s possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest.” *Wolfe, supra* at 524.

In this case, circumstantial evidence showed that defendant had constructive possession of the ecstasy because he had knowledge of the contraband and the right to exercise control over it. *Hardiman, supra*. Defendant was the only adult at the apartment when police executed the search warrant, and police testified they found him sitting on a couch within “arm’s length” from where the ecstasy was located. The ecstasy was in packaging covered only by a throw blanket, and there was approximately \$560 on a coffee table approximately one foot in front of the couch. In addition, evidence showed that defendant either resided at the apartment or that he spent a significant amount of time there. Campbell testified defendant was at the apartment “four times per week” and that defendant was not inhibited in his use of the apartment. Police discovered a bag containing men’s clothing that appeared to be defendant’s size and found mail and a receipt with defendant’s name and the apartment’s address on it. A DTE Energy bill revealed that one of the utilities for the apartment was in defendant’s name. Defendant’s probation report was

found on the refrigerator, testimony showed that the marijuana in the apartment belonged to defendant, and Campbell was driving a vehicle registered in part in defendant's name.

Furthermore, the evidence would also allow a rational trier of fact to conclude beyond a reasonable doubt that defendant had intent to distribute the ecstasy. Here, approximately 40 ecstasy pills were discovered on the couch in close proximity to defendant, \$560 was on a coffee table nearby, and a digital scale was found in a closet. Defendant was the only person present. Two police officers testified that, in their experience with drug trafficking, the amount of drugs was consistent with an intent to distribute. See *Wolfe, supra* at 524 (the quantity and packaging of contraband can be indicative of intent). The evidence was sufficient to sustain the conviction.

II. Ineffective Assistance of Counsel

Next, defendant contends he was denied the effective assistance of counsel when defense counsel cross-examined a police officer about whether defendant was involved in a previous drug transaction that formed the basis for the search warrant on the apartment. Unexpectedly, the officer affirmed that defendant was involved in a prearranged sale to a police informant. Defendant failed to preserve this issue for review because he did not move for a new trial or a *Ginther*² hearing before the trial court; therefore our review is limited to mistakes apparent on the record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

In order to establish that he was denied the effective assistance of counsel, a defendant must show: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Even if we were to assume ineffective assistance of counsel, defendant cannot show that counsel's alleged deficient performance affected the outcome of the lower court proceedings. *Id.* Even without the evidence concerning the arranged purchase, there was significant evidence showing defendant had constructive possession of both the marijuana and the ecstasy, and that he had the intent to deliver the ecstasy. We cannot conclude that, but for the error, there is a reasonable probability that the outcome of trial would have been different. *Id.*

III. Defendant's In Propria Persona Issue

Defendant next raises an issue in propria persona. We have reviewed defendant's arguments and conclude that they are not based on relevant or binding law or are abandoned. See *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995) (where an issue is not discussed, explained or rationalized, it is abandoned).

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Affirmed and remanded with instruction to correct the clerical errors found in the judgment of sentence. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens