STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2016
v	No. 324884 Wayne Circuit Court
CEDRIC DARNELL MCFOLLEY, Defendant-Appellant.	LC No. 14-005730-FH

Before: TALBOT, C.J., and WILDER and BECKERING, JJ.

PER CURIAM.

Defendant, Cedric McFolley, appeals by right his jury trial conviction of possession with intent to deliver 50 to 449 grams of heroin, MCL 333.7401(2)(a)(*iii*). The trial court sentenced him as a fourth habitual offender, MCL 769.12, to 10 to 20 years' imprisonment. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first contends that, while it is clear he possessed heroin, the evidence was insufficient to prove that he intended to deliver the heroin to any other person. He argues that the prosecutor presented only speculation, as the two police officers who testified at trial merely gave their opinions; they did not observe defendant sell drugs. Thus, he was denied due process of the law requiring proof beyond a reasonable doubt. We disagree.

When reviewing a claim of insufficient evidence, we review the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecutor proved the elements of the charged offense beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). This Court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as . . . intent," the jury's resolution of such issues can be supported by even "minimal circumstantial evidence" and may be inferred from the evidence. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). This Court will not interfere with the fact finder's role in weighing the evidence and judging the credibility of witnesses. *Id.* at 619. Intent to deliver can be inferred from the quantity of the controlled substance in the defendant's possession and from the way in which the substance is packaged. *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748, amended 441 Mich 1201 (1992).

Here, the prosecutor presented evidence at trial to establish that defendant was walking along the street when three police officers approached him due to a bulge protruding from the front of his t-shirt, which the officers initially suspected to be a gun. As the officers drew near, defendant removed a clear plastic sandwich bag from his pants pocket and dropped it on the ground. Inside the bag were 40 foil packs containing what was later confirmed to be heroin. The officers arrested and searched defendant; they found that the bulge underneath defendant's t-shirt was a banker's bag containing 25 individually filled and knotted clear plastic packages of heroin, a clear baggie containing four "kind of big" chunks of heroin, and a digital scale. Defendant also had over $700 cash on his person, with bills of various denominations.[1] In total, defendant had 55 grams of heroin in block form and 65 packets of heroin in his possession. Two police officers testified that, based on their years of experience in dealing with controlled substances crimes, it was their opinion that the amount of heroin, the variety of heroin, and the packaging in foil packets and knotted packets were all indicative of an intent to deliver, rather than for purely personal consumption. The circumstantial evidence presented, as well as the opinions of witnesses knowledgeable about drug trafficking, constituted more than sufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that defendant intended to deliver heroin.

II. CRUEL OR UNUSUAL PUNISHMENT

Defendant also contends that his sentence of 10 to 20 years in prison violated the constitutional guarantee against cruel or unusual punishment because his age—he was 38 years old at sentencing—and the "questionable reliability" of the conviction makes the sentence disproportionate. We disagree. Defendant did not raise this issue in the lower court, and it is unpreserved. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). Therefore, he must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

First, as we addressed above, there was sufficient evidence to establish that defendant intended to deliver heroin. Hence, there is no merit to defendant's contention that the conviction was of questionable reliability. Furthermore, a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). "'In order to overcome the presumption that a sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate.'" *Bowling*, 299 Mich App at 558. "Unusual circumstances," for purposes of overcoming the presumption of proportionality, do not include employment, a minimal criminal history, or an adult defendant's age. *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997); *People v Benton*, 294 Mich App 191, 205; 817 NW2d 599 (2011); *People v Daniel*, 207 Mich App 47,

[1] Defendant's claim of an evidentiary discrepancy in the amount of money he had on his person appears to be due to a typographical or transcriptional error regarding the number of $20 bills he had (i.e., "none" versus "nine)"; nevertheless, the discrepancy is immaterial in light of all of the other evidence presented, and it does not undermine the police officer's opinion testimony regarding defendant's intent to deliver.

54; 523 NW2d 830 (1994). A defendant's age is insufficient to overcome the presumptive proportionality of a sentence that is established on the basis of the defendant's criminal record and the gravity of the offense. *Lemons*, 454 Mich at 258-259; *Bowling*, 299 Mich App at 558-559. Here, it is uncontested that defendant's sentence falls within the recommended minimum sentencing range under the legislative guidelines. Defendant did not object to the scoring of the sentencing guidelines. Because his sentence is within the recommended guidelines range, defendant's sentence is presumptively proportionate. And given the absence of unusual circumstances, he has failed to demonstrate a plain error that affected his substantial rights in the sentence imposed by the trial court.

III. HABITUAL OFFENDER NOTICE

In a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4, defendant argues that this case should be remanded for resentencing because the prosecutor failed to timely file a notice of intent or proof of service for the supplemental information charging defendant as a fourth habitual offender as required by MCL 769.13. We disagree.

MCL 769.13 provides in pertinent part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

The record shows that the prosecutor timely filed a notice of intent to enhance defendant's sentence as a fourth habitual offender. However, there is no proof of service in the lower court record. Nevertheless, where the record makes it apparent that the defendant had actual notice of the prosecutor's intent to seek sentence enhancement, and the defendant cannot show that he was in any way prejudiced by the prosecutor's failure to file a proof of service, the error is deemed to be harmless. *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999).

The transcripts of the hearings in this case reflect that defendant's being charged as a fourth habitual offender was discussed on the record at more than one hearing when defendant

was present. As early as at the preliminary examination, the court stated that defendant "is served with habitual offender fourth offense notice" and defendant did not object. There were several discussions between the prosecutor and defendant concerning plea bargains, which included offers to drop the fourth habitual offender charges. At the final conference, the prosecutor's plea offer was discussed on the record, at which time the trial court twice noted that the offer included dismissal of the habitual fourth enhancement notice, which was verified and expressly restated by the prosecutor. Defendant's counsel confirmed that he had discussed the offer with defendant, and that defendant was declining the offer. Defendant then expressly confirmed he was choosing instead to go to trial. It is apparent from the record that defendant had actual notice of the prosecutor's intent to seek an habitual fourth sentence enhancement. Defendant has not shown that he was prejudiced in any way by the prosecutor's failure to file a proof of service with the clerk of the court. Defendant did not challenge the trial court's representation on the record that defendant had been served with the habitual offender fourth offense notice, and he does not argue on appeal that he had any viable challenge to the habitual offender enhancement. On these facts, the prosecution's failure to file a proof of service constituted harmless error. Defendant is not entitled to resentencing.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also asserts in his Standard 4 brief that his trial counsel rendered ineffective assistance by failing to object to the admission of any evidence found through an illegal search and seizure, failing to file a motion to dismiss the case based on lack of sufficient evidence, and failing to raise the "Jurisdictional Defect which eliminates the Court from having the power to adjudicate the case." Defendant fails to elaborate on any of his claims, other than to say that there were no witnesses to illegal conduct and he had no gun, which was the officers' original suspicion about the bulge underneath his t-shirt when they approached him, and thus, everything discovered on his person "becomes inadmissible." First, we point out that as the officers walked up to defendant, defendant tossed a baggie filled with what appeared to be—and was later verified as being—heroin packets on the ground. Probable cause existed at that time to arrest him. Secondly, defendant failed to cite any legal authority to support his cursory arguments on appeal, and thus, he has abandoned his ineffective assistance of counsel claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he only give cursory treatment with little or no citation of supporting authority.").

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Jane M. Beckering