

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS FREEMAN,

Defendant-Appellant.

UNPUBLISHED

November 30, 2004

No. 250232

Wayne Circuit Court

LC No. 01-013247

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of attempted possession with intent to deliver less than fifty grams of cocaine, MCL 750.92; MCL 333.7401(2)(a)(iv), and attempted possession with intent to deliver less than fifty grams of heroin, MCL 750.92; MCL 333.7401(2)(a)(iv). He was sentenced to two years' probation, with the first five months to be served at the William Dickerson Facility. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's first claim on appeal is that there was insufficient evidence to establish beyond a reasonable doubt his guilt of attempted possession with intent to deliver cocaine and heroin. We disagree.

When reviewing a claim that the evidence was insufficient to support a defendant's conviction, this Court reviews the evidence presented in the light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of attempt are: "(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

The elements of possession with intent to deliver less than fifty grams of a controlled substance are: (1) the recovered substance is the illegal narcotic that it purports to be, (2) the mixture weighs less than fifty grams, (3) the defendant was not authorized to possess the substance, and (4) the defendant knowingly possessed the substance with intent to deliver.

People v Gonzalez, 256 Mich App 212, 225-226; 663 NW2d 499 (2003). With regard to the “intent to deliver” element, the prosecution need not show actual delivery to prove intent to deliver. *Id.* at 226. “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.” *Id.* (internal citations and quotation omitted). In regards to the “knowingly possessed” element, constructive possession will suffice. *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). “Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband.” *Id.*

With regard to the cocaine charge, the parties entered into a stipulation that there were sixty-two clear, zip-lock baggies, each containing an off-white, lumpy material. Seven of those baggies were opened for analysis, and the analysis revealed that those seven baggies contained .70 grams of material containing cocaine. Additionally, the evidence clearly suggested that defendant was not authorized to possess the cocaine. Moreover, although the police did not actually find the cocaine on defendant’s person, an officer saw defendant toss a plastic bag to the ground, he went and picked up that plastic bag, and tests later revealed that it contained cocaine. Therefore, the totality of the circumstances indicates a sufficient nexus between defendant and the contraband, and thus, constructive possession can be found. Finally, since a large amount of cocaine was found, it was divided into sixty-two individual baggies, and defendant was in an abandoned house that was known for receiving narcotics complaints, a rational trier of fact could reasonably infer an intent to deliver.

With regard to the heroin charge, both parties entered into a stipulation that a folder contained one plastic, zip-lock bag, which, in turn, contained sixteen folded paper packets. Two of the sixteen packets were opened for analysis, and the analysis demonstrated the existence of .07 grams of a material containing heroin. The evidence clearly suggests that defendant was not authorized to possess the heroin. Moreover, an officer actually found the heroin on defendant, and thus, defendant had actual possession of the substance. Finally, because a large amount of heroin was found, it was divided into sixteen folded paper packets, and defendant was in an abandoned house that was known for receiving narcotics complaints, a rational trier of fact could reasonably infer an intent to deliver.

Because the facts establish the elements of possession with intent to deliver, a rational trier of fact could conclude beyond a reasonable doubt that the elements of attempted possession with the intent to deliver were satisfied. Therefore, there was sufficient evidence to convict defendant.

Defendant’s final claim on appeal is that the verdict was against the great weight of the evidence. We disagree. A guilty verdict is against the great weight of the evidence if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

Even though the defense provided testimony that defendant was only scrapping metal and that he never had any drugs, this Court must afford deference to the trier of fact’s special opportunity and ability to determine the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Thus, deference shall be given to the judge’s decision to believe the prosecution’s evidence that suggests defendant was guilty of the heroin and cocaine charges.

The evidence demonstrated that a police officer saw defendant toss a bag, which was later determined to have contained cocaine. Another officer found a bag, which was later determined to have contained heroin, in defendant's right sock. Defendant was seen in a vacant dwelling, cash was found on his person, and the illegal substances were divided into individual baggies of cocaine and individual packets of heroin. Defendant has provided no evidence regarding why the police officers' testimony was not credible or that it was contrary to any physical evidence. The evidence does not preponderate heavily against the verdict.

Affirmed.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Bill Schuette