

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY SUE AMSDEN,

Defendant-Appellant.

UNPUBLISHED
February 10, 2009

No. 280194
Emmet Circuit Court
LC No. 07-002739-FH

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals her convictions for possession of less than 25 grams of a schedule 2 narcotic drug (methadone), MCL 333.7403(2)(a)(v), possession of a schedule 4 controlled substance (lorazepam), MCL 333.7218(1), and possession of a schedule 4 controlled substance (dextropropoxyphene), MCL 333.2718(1). For the reasons set forth below, we affirm.

While executing a search warrant at defendant's home, officers found numerous pills and pieces of drug paraphernalia. Visual inspections and chemical analysis confirmed that the pills were methadone, lorazepam and dextropropoxyphene. A police officer testified that, during his interview with defendant, she admitted she had a history of prescription drug abuse.

I. Evidence from Daughter's Room

Defendant claims the trial court should not have admitted evidence of drugs and drug paraphernalia found in her daughter's room because the evidence is irrelevant. She further argues that her attorney was ineffective for failing to object to the evidence. Because defendant failed to raise these arguments in the trial court, we review her claims for plain error affecting her substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Evidence is relevant if it has "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. This broad definition permits the admission of evidence that helps to shed any light on any material fact. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). The evidence from defendant's daughter's room was relevant because it

helped to identify a partial pill found near defendant's bed. The evidence was also relevant to help establish the prosecutor's theory that defendant exercised constructive control over the drugs found in her daughter's room.¹ Contrary to defendant's assertion, because the challenged evidence was relevant, the trial court did not abdicate its duty to admit only relevant evidence under MCR 6.414(B). And, because the evidence was clearly admissible, defense counsel had no obligation to object to it. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

II. Chain of Custody

Defendant also argues that the trial court should have suppressed certain pills and drug paraphernalia found inside a box because there were defects in the chain of custody.² If a satisfactory foundation is established, then deficiencies in the chain of custody go to the weight of the evidence rather than its admissibility. *People v White*, 208 Mich App 126, 132; 527 NW2d 34 (1994). Here, a proper foundation was established because two officers testified that they found the box in plain view next to defendant's bed. Accordingly, suppression was not warranted and it was for the jury to weigh any alleged defect in the chain of custody.³

III. Sufficiency of the Evidence

Defendant contends that the prosecution presented insufficient evidence to support her conviction. In reviewing a sufficiency of the evidence claim, we examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). Here, the prosecutor had to show that: (1) defendant had knowledge of the nature and presence of the controlled substance, and (2) defendant exercised control or had a right to exercise control over the substance. *People v Meshell*, 265 Mich App 616, 621; 696 NW2d 754 (2005).

The prosecutor presented evidence that numerous pills were found in defendant's bedroom, along with drug paraphernalia used for ingesting drugs. The pills and drug paraphernalia were within arms reach of defendant's bed and in plain view. Laboratory tests

¹ Defendant claims that evidence of drugs found in her daughter's room was unduly prejudicial. However, defendant does not explain how she was prejudiced by the admission of the evidence. An appellant may not merely announce her position and then leave it to this Court to discover and rationalize the basis for her claims. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Indeed, "where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Id.*, quoting *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

² Again, because defendant did not object to the evidence in the trial court, this issue is unpreserved, *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006), and we review it for plain error, *Carines*, *supra* at 763-764.

³ Defendant also maintains that the trial court should have excluded evidence of the contents of the box because a police officer failed to tabulate the contents on the warrant as required by MCL 780.655. However, exclusion of the evidence is not the appropriate remedy for a violation of a procedural statute. *People v Sobczak-Obetts*, 463 Mich 687, 711; 625 NW2d 764 (2001).

confirmed the presence of controlled substances, and defendant admitted to a history of drug abuse. This evidence supported the inference that defendant was aware of the presence of the substances and had a right to exercise control over them. See *Meshell, supra* at 622. Fingerprint evidence was not required to establish physical possession. Furthermore, the inability to chemically analyze the lorazepam found in defendant's room did not render the evidence insufficient where the substance was identified by comparing the unique markings on the pill against a national database compiled by the manufacturers of prescription drugs. When all the evidence is considered, the prosecutor introduced more than sufficient evidence to sustain defendant's convictions.

IV. Prosecutor's Closing Argument

Defendant also says that she is entitled to a new trial because, during closing argument, the prosecutor misstated the legal standard of possession. Because this is an unpreserved claim of prosecutorial misconduct, we review this allegation for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Moreover, when a prosecutor's remarks are challenged on appeal, we evaluate the comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

Defendant specifically complains that the prosecutor failed to make clear that knowledge and control are required to sustain a possession conviction. During his closing argument, when referring to the drugs, the prosecutor said that "anybody that laid in that bed at night or was around that, or went into that closet to get their clothes, knew the location of these things and, under the law, that would be possession." However, immediately before this remark the prosecutor stated that possession may be found if the person has knowledge and control over the drugs. In addition, the prosecutor later stated "that's what the law is in this case, is knowledge that [the controlled substances] were there and the right to control them at any time." Viewed in the context of the closing argument, the prosecutor's remarks accurately conveyed that both knowledge and control are required to sustain a conviction.⁴

Moreover, were we to fault the prosecutor's statement of the law, the trial court properly instructed the jury regarding the definition of possession, and instructed the jury that the lawyer's statements were not evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Therefore, any alleged error was rectified by the trial court's specific instruction to the jury.

V. Request for Probation

Defendant complains that the trial court abused its discretion in denying her request for probation under MCL 333.7411. Though defendant had no prior controlled substance convictions and thus is eligible for § 7411 treatment, use of the word "may" in the statute

⁴ Again, defendant was not denied the effective assistance of counsel because her attorney was not obligated to raise a meritless objection. *Kulpinski, supra* at 27.

indicates that the trial court has discretion. See *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). Accordingly, the trial court was under no obligation to apply MCL 333.7411 to defendant simply because she was eligible under the statute. And, contrary to defendant's assertions, the trial court appropriately considered the circumstances of her case before it reached its decision. The court noted that defendant had the support of her family and that this was a positive factor for her potential rehabilitation. However, the trial court was clearly concerned about defendant's long history of substance abuse, and the trial court also considered that defendant's drug use may have played a part in her daughter's current drug use. Under these circumstances, the trial court properly exercised its discretion and its decision not to apply § 7411 is within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2006).

Affirmed.

/s/ Henry William Saad

/s/ Alton T. Davis

/s/ Deborah A. Servitto