# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 18, 2010 |
| v | No. 290526<br>Oakland Circuit Court |
| DAVID ALEXANDER TREVINO,<br><br>Defendant-Appellant. | LC No. 2007-215306-FC |

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of 1,000 or more grams of cocaine, MCL 333.7403(2)(a)(i).[1] Defendant was sentenced to 10 to 30 years' imprisonment. We affirm.

## I. JURY INSTRUCTIONS

Defendant first argues that the trial court erred by instructing the jury on the lesser-included offense of possession of at least 1,000 grams of cocaine. We disagree. Defendant waived any alleged error by expressing satisfaction with the instructions.

Before the trial court instructed the jury, the following colloquy occurred:

*THE COURT:* All right, we'll go to final arguments. We have gone through the instructions, is that correct on behalf of the People?

*[PROSECUTOR]:* Yes, we're satisfied with the instructions.

*THE COURT:* On behalf of the –

*[DEFENSE COUNSEL]:* Yes, your Honor, *I'm satisfied* as well.

[1] Defendant was charged with possession with intent to deliver at least 1,000 grams of cocaine, MCL 333.7401(2)(a)(i), but was convicted of this lesser-included offense.

After the trial court instructed the jury, it again asked both counsels whether they were satisfied with the instructions:

> *THE COURT*: With the addition of the instructions that I added are the People *satisfied* with the instructions?
>
> *[PROSECUTOR]:* Yes, your Honor.
>
> *THE COURT:* Is the – are the – is the defense?
>
> *[DEFENSE COUNSEL]: Yes, your Honor*. [Emphasis added.]

Accordingly, because counsel's statement constitutes an "intentional relinquishment or abandonment of a known right," the alleged error has been extinguished. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks omitted). Defendant's claim fails.[2]

## II. SUFFICIENCY OF THE EVIDENCE

Defendant next maintains that there was insufficient evidence to support his conviction of possession of at least 1,000 grams of cocaine. Specifically, defendant claims that there was no evidence to show that he possessed any cocaine in Michigan. We disagree. We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must view all the evidence in a light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id*. (citation and quotation marks omitted). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (internal citations omitted).

The crime of unlawful possession of at least 1,000 grams of cocaine consists of the following elements: (1) the defendant possessed a controlled substance, (2) the substance possessed was cocaine, (3) the defendant knew he was possessing cocaine, and (4) the substance was in a mixture that was at least 1,000 grams. MCL 333.7403(2)(a)(i); see cf. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Further, because defendant was charged under an aiding and abetting theory, the prosecutor had to prove that "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time [the defendant] gave aid and encouragement." *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004) (quotation marks and citation omitted). One who procures, counsels, aids, or abets in the commission of an offense may be convicted and

[2] We note that even if we were to consider the substance of defendant's arguments, his claim would still fail. The evidence presented at trial, see *infra*, Issue II, supported the trial court's instruction.

punished as if the person directly committed the offense. MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). Thus, contrary to defendant's position on appeal, there is no requirement that evidence show that defendant himself possessed cocaine in Michigan.

Here, the jury could have concluded beyond a reasonable doubt that defendant aided and abetted his coconspirators, Andon Filipi and Anthony Gonzalez, in the unlawful possession of 1,000 or more grams of cocaine. First, the underlying crime was committed by the principles, Filipi and Gonzalez, because they knowingly transported 12 kilograms of cocaine from Illinois to Michigan. Second, defendant assisted Filipi in committing this crime by helping him procure and conceal the cocaine in Illinois before it was transported to Michigan. Although this form of assistance may seem attenuated from the actual commission of the crime, this Court has stated that "*any* type of assistance given to the perpetrator of a crime by words or deeds" is sufficient. *Moore*, 470 Mich at 63 (emphasis added). Thus, a jury could have reasonably found this element was proven beyond a reasonable doubt. Third, when defendant provided this aid and encouragement to Filipi, he knew that the cocaine was going to be transported to Michigan. As a result, a jury could have reasonably inferred that defendant had knowledge that Filipi intended to commit the offense in Michigan. The evidence was sufficient to support defendant's conviction.

Further, defendant's reliance on *People v Blume*, 443 Mich 476; 505 NW2d 843 (1993), for the proposition that he cannot be found guilty because any acts of assistance took place out-of-state, is misplaced. In *Blume*, the defendant's charged count of possession with intent to deliver cocaine, based on an aiding and abetting theory, was dismissed because the defendant lacked the requisite *mens rea*. *Id.* at 478-479, 494. The defendant was in Florida and sold cocaine to another person, who later brought the cocaine back to Michigan. *Id.* at 478-479. The defendant, however, only knew that the person he sold the cocaine to was from Michigan – he did not know specifically that the other person was intending to bring the cocaine back to Michigan. *Id.* at 487-493. Those facts are distinguishable from the present case because, here, defendant told police that he knew Filipi was intending to transport the cocaine to Michigan. Defendant's claim fails.

## III. SENTENCING

Defendant also argues that his sentence of 10 to 30 years' imprisonment constitutes cruel and/or unusual punishment and is prohibited by the Michigan and United States constitutions. We disagree. Defendant did not raise this issue below, and thus our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The United States Constitution prohibits states from administering cruel *and* unusual punishment, while the Michigan Constitution prohibits the state from meting out cruel *or* unusual punishment. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). A sentence that is proportionate is not cruel or unusual, *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004), and a sentence that is within the guidelines range is presumptively proportionate, *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Here, defendant was sentenced to a minimum term of 10 years, which was actually *less* than his guidelines range of 10 and 1/2 to 20 years. In support of the departure downward from the guidelines range, the trial court cited defendant's lesser degree of involvement than that of the other codefendants. Distilled to its essence, defendant is actually arguing that the trial court

abused its discretion in not imposing a larger downward departure because of defendant's background, instructional error, and paucity of evidence. However, there was no instructional error and there was sufficient evidence to sustain the conviction. Defendant does not contest that the downward departure was properly supported by a substantial and compelling reason. *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). The trial court did not abuse its discretion and we find no plain error in defendant's sentence.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly