

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 11, 2018

v

RAYSHAWN JOHNSON,

Defendant-Appellant.

No. 336314
Ottawa Circuit Court
LC No. 16-040053-FH

Before: METER, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), following a bench trial. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 270 days in jail.¹ We affirm.

This case arose out of an altercation that occurred during the early morning hours of February 21, 2016, in Grand Haven. Defendant and three other individuals called for a taxi around 4:50 a.m. after they had been at a bar in downtown Grand Haven. Christopher Lee Retherford, a taxi driver for Rich's Taxi Service, testified that, after the group got in his vehicle, "things got a little hectic" and defendant became "belligerent." When Retherford asked defendant to exit the taxi, Retherford testified, defendant punched him. In contrast, defendant testified that Retherford attempted to choke him and that defendant had to use his arms to get Retherford off of him.

After defendant and his friends exited the taxi, Retherford called the police and defendant and his friends departed. Grand Haven Department of Public Safety Sergeant Joshua Tomes received information that the name of the alleged attacker was "Rayshawn," and Sergeant Tomes thought that the person could be defendant, whom he knew from the past. Sergeant Tomes then observed a person on a road near the area at issue and witnessed him coming out of a wooded area and then brushing off his chest, torso, and upper thighs. Sergeant Tomes testified that even

¹ The trial court also sentenced defendant to 73 days in jail for assault and battery, MCL 750.81. However, in this appeal defendant challenges only the sufficiency of the evidence supporting his possession conviction.

though it was dark out, he could see “fairly easily” due to streetlights and a well-lit parking lot in the area. Sergeant Tomes then observed the person begin to run, and he saw the person run up a driveway. Once Sergeant Tomes exited his vehicle, he observed the person, whom he now recognized as defendant, standing near a front porch area at 1516 South Despelder. Defendant soon turned and started walking toward Sergeant Tomes while smoking a cigarette.

Defendant initiated a conversation. Sergeant Tomes placed defendant in handcuffs. Sergeant Tomes testified that defendant was not argumentative but was trying to explain his side of the assault story.

Once Officer Justin Canan arrived at 1516 South Despelder, Sergeant Tomes went to look around the area. Sergeant Tomes testified that, in his training and experience with individuals who flee from police, individuals will often discard contraband while fleeing. Sergeant Tomes indicated that he found it odd that defendant had run from him originally, stopped, and then walked back to him. Sergeant Tomes testified that he wanted to make sure no contraband had been discarded in the area where defendant had appeared to stop. No other individuals were observed in the area other than Officer Canan and a third police officer.

While searching the area, Sergeant Tomes observed what appeared to be a bag of cocaine on the porch or landing area of 1516 South Despelder. Susan Isley, a Michigan State Police forensic scientist, verified that the bag found contained 8.74 grams of cocaine. Witnesses testified that the value of the cocaine was between \$600 to \$874. Sergeant Tomes testified that the bag did not appear to have been there a long time because it was not “weathered” in any way, it was not frozen, and “[t]here was no condensation on it.”

The owner and the renter of 1516 South Despelder testified that the residence was vacant at the time in question.

On appeal, defendant argues that the prosecution did not present legally sufficient evidence for the court to find defendant guilty of possession of cocaine.

This Court reviews de novo a defendant’s challenge to the sufficiency of the evidence. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing such claims, this Court views the evidence 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 were proven beyond a reasonable doubt. *People v Nowak*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This Court must “draw all reasonable inferences and make credibility choices in support of the jury verdict.” *Id.* at 400.

MCL 333.7403 provides, in pertinent part:

(1) A person shall not knowingly or intentionally possess a controlled substance, a controlled substance analogue, or a prescription form unless the controlled substance, controlled substance analogue, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner’s professional practice, or except as otherwise authorized by this article.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv), and:

* * *

(v) That is in an amount less than 25 grams of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$25,000.00, or both.

Cocaine is a Schedule 2 narcotic drug. MCL 333.7214. Accordingly, to establish a violation of MCL 333.7403(2)(a)(v), a prosecutor must establish that (1) the defendant possessed a controlled substance, (2) the substance that the defendant possessed was cocaine, (3) the defendant knew he was possessing cocaine, and (4) the substance was in a mixture that weighed less than 25 grams. MCL 333.7403(2)(a)(v); see also *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Possession of a controlled substance may be actual or constructive, as well as joint or exclusive. *Wolfe*, 440 Mich at 519-520. Constructive possession occurs “when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.” *Id.* at 521. A defendant does not have to be the owner of the controlled substance to be found in possession of it and “a person’s presence, by itself, at a location where drugs are found is insufficient to prove constructive possession.” *Id.* at 520. “[S]ome additional connection between the defendant and the contraband must be shown.” *Id.* Constructive possession may be shown by direct or circumstantial evidence that the defendant had the power to dispose of the drugs. *Id.* at 521. The *Wolfe* Court used, as an example of constructive possession, a situation in which “the defendant was found in a sparsely furnished apartment that contained cocaine packets and large sums of money lying about in plain view.” *Id.*

In this case, there was sufficient evidence presented for a rational trier of fact to conclude that defendant was in possession of less than 25 grams of cocaine.²

The trial court ruled, in pertinent part, as follows after the bench trial:

As Sergeant Tomes approached in his police car up Despelder from a couple blocks away, he saw the defendant run up the driveway at 1516 Despelder Street and disappear out of sight. As the officer came closer and eventually arriv[ed] at the address on Despelder, the defendant was holding a cigarette at the time, turned around, and started walking toward Sergeant Tomes. At that moment the defendant was about two feet from the front porch at 1516 South Despelder. The porch -- more accurately actually a landing in front of the front door [--] is

² We note that it is not disputed that the bag contained cocaine in a mixture that weighed less than 25 grams.

concealed from the street view by a partial brick wall. Given defendant's unusual response of initially running and going out of site [sic] at the Despelder address and then turning around and approaching Sergeant Tomes as he arrived, Sergeant Tomes went to where the defendant had been to look to see if defendant may have discarded some contraband. On the [entryway] previously described . . . , Sergeant Tomes spotted a plastic baggie which contained a powdery substance. It was in open view. . . . The bag did not appear to be weathered in any way. It wasn't dirty or dewy or in any other sense appeared [sic] to have been on the porch for any length of time. . . . The residence at 1516 South Despelder was vacant at the time because the renters were an elderly couple and were wintering in Arizona. There is no reason for any passerby or any stranger or any other occupant to have been in the area of the front porch where the drugs were found.

The court stated that it was not finding defendant guilty "beyond any doubt" but it was finding him guilty beyond a reasonable doubt; it stated that "any doubt that exists is . . . not based on reason and [common sense]." In reaching its finding of guilt, the court specifically emphasized that (1) defendant was the only person close to the cocaine before it was discovered by police, (2) it was 5:00 a.m. at the time in question and there was no reason for anyone else to be around, (3) the high value of the drugs suggested that "the owner would not discard or abandon the cocaine unless it was necessary to avoid detection," (4) defendant was seen running toward the location, (5) defendant stopped running near the porch, and (6) "[t]here was no effort to conceal the drugs more on the porch[,] indicating an act of someone who was under the pressure of discovery by the approaching police."³ We find this reasoning persuasive, and the trial court's statements were supported by the evidence. This was not a case of "mere presence"; an "additional connection between defendant and the contraband" was shown by circumstantial evidence. *Wolfe*, 440 Mich at 520. The specific circumstances and inferences as emphasized by the trial court, along with Sergeant Tomes's statement about the dewless appearance of the baggie, adequately supported a finding of possession.

³ Defendant takes issue with the court's noting that defendant did not present any witnesses to support his claim that he was "checking to see if the lights were on in one of the four-plex apartments occupied by an acquaintance," but stops short of making a separate appellate issue based on what defendant refers to as a shifting of the burden of proof. His sole issue on appeal is: "Whether the circuit judge erred in finding the defendant guilty of possession of cocaine when no reasonable trier of fact could have concluded beyond a reasonable doubt that defendant was guilty just based on his relatively close proximity to where the cocaine was found on the ground." Moreover, we note that, in general, when a defendant testifies at trial, commentary on the failure to corroborate an advanced theory is not improper. *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995). At any rate, we decline to rely on this particular statement by the court in resolving the sufficiency issue.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra