

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL KEITH PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
November 10, 2011

No. 298959
Kent Circuit Court
LC No. 09-011549-FH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). He was sentenced as an habitual offender, fourth offense, to 1 to 15 years' imprisonment. On appeal, defendant argues his constitutional right to due process was denied because there was insufficient evidence to show possession of the cocaine. We affirm.

On October 19, 2009, the Grand Rapids Police Department was conducting surveillance for drug activity on the parking lot of the Family Pantry Party Store on the 700 block of Stocking in Grand Rapids. The parking lot is a high drug traffic area. Officers observed defendant arrive at the parking lot with his 14-year-old stepson. Defendant made brief contact with three different individuals, had a hand-to-hand transaction with one, and went into the store briefly twice. After observing defendant, an officer made contact with him. When the officer approached, defendant was standing by some pay telephones. His stepson was standing about ten feet away in one direction and a third individual with whom defendant had made contact was standing about ten feet away in another direction. All three individuals were searched, and nothing significant was found on them. However, two rocks of crack cocaine were found at the base of the pay telephones where defendant had been standing. The cocaine weighed a total of .28 grams and was worth approximately \$40.

When the officer approached, defendant was the only individual close enough to the telephones to have dropped or thrown the cocaine in the place it was found. Throughout the surveillance, defendant's stepson and the third individual were not in the pay telephones area. After defendant was placed in the back of a police car, he yelled that the police planted the cocaine and it was not his.

The prosecution presented expert testimony on street level drug trafficking. While observing a parking lot, officers look for individuals who do not go into the business and leave

but loiter and make contact with others, hand movements, and nervous behavior. It is uncommon for crack cocaine to be abandoned.

Claims of insufficient evidence are reviewed de novo. *People v Harverson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 293014, issued December 28, 2010), slip op at 3. “In short, when determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (citations omitted). Additionally, “[t]he standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To support a conviction of possession with intent to deliver less than 25 grams of cocaine, the prosecution must show: (1) the substance is cocaine, (2) the cocaine is in a mixture weighing less than 25 grams, (3) defendant was not authorized to possess cocaine, and (4) defendant knowingly possessed cocaine. MCL 333.7403(2)(a)(v); *Wolfe*, 440 Mich at 516-517. In this case, only the element of possession is disputed.

Actual physical possession of a controlled substance is not required for a person to be guilty of possessing it. *Wolfe*, 440 Mich at 519-520. Possession may be actual or constructive. *Id.* at 520. Defendant may not be the owner of recovered narcotics and still be in possession of them. *Id.* Possession may be joint with another person. *Id.* However, “a person’s presence, by itself, at a location where drugs are found is insufficient to prove constructive possession.” Instead, there needs to be an additional connection between the defendant and the controlled substance. *Id.* Constructive possession is found “when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.” *Wolfe*, 440 Mich at 521.

In this case, we find there is sufficient evidence to infer defendant had possession of the cocaine. Defendant was the only individual who could have dropped the cocaine when the officer arrived. Defendant’s stepson and the other individual were never in the area of the pay telephones, where the cocaine was found, during the surveillance. Defendant’s behavior matched typical drug transaction behavior because he was loitering, making contact with individuals, and there was a hand-to-hand transaction. Additionally, it is uncommon to find cocaine abandoned. The evidence and reasonable inferences support that defendant possessed the cocaine, had the opportunity to drop it by the telephones, and did so.

The totality of the evidence, when viewed in a light most favorable to the prosecution, was sufficient for the jury to find that the elements of the crime, including possession, were proven beyond a reasonable doubt.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Douglas B. Shapiro