STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 21, 2013
v	No. 310185 Hillsdale Circuit Court
EDWARD ANDREW PERCY, Defendant-Appellant.	LC Nos. 11-352618-FH; 11-352629-FH

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his convictions in (a) LC No. 11-352618-FH, for possession of methamphetamine, MCL 333.7403(2)(b)(*i*), second offense, MCL 333.7413(2), and possession of marijuana, MCL 333.7403(2)(d), second offense, MCL 333.7413(2); and in (b) LC No. 11-352629-FH, for possession of methamphetamine, MCL 333.7403(2)(b)(*i*), second offense, MCL 333.7413(2), possession of marijuana, MCL 333.7403(2)(d), second offense, MCL 333.7413(2), and maintaining a drug house, MCL 333.7405(1)(d), as well as the resulting sentencing. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

An arrest warrant for defendant was outstanding on September 16, 2011. At around 9:54 a.m., Deputy Kevin Bradley of the Hillsdale County Sheriff's Department, acting on a tip, arrested defendant at the corner of US 127 and M 34. Bradley searched defendant's person, and discovered a marijuana cigarette in defendant's chest pocket. Bradley and another officer then performed an inventory search of defendant's motorcycle. In a compartment near the handlebars, Bradley found a pill bottle with several wadded coffee filters that contained a trace amount of white residue.

Bradley obtained a search warrant for defendant's residence. Later that day, Bradley and several other officers went to defendant's apartment in Hillsdale County. The officers encountered a woman and her two adolescent sons at the apartment; the woman told the officers she occasionally stayed over at the apartment. The officers found two partially burnt marijuana cigarettes and a Red Bull energy drink can that featured a false lid and secret compartment. The can contained a blue glass bottle with 0.04 grams of methamphetamine, aluminum foil, and a plastic pill bottle. A brown "purse" was also found on the bedroom closet's floor, which contained charred pen tubes, coffee filters, and torn plastic baggies.

Several days later, Bradley performed a more thorough search of defendant's motorcycle, and found a magnetized container holding 1.01 grams of methamphetamine in the gas tank, and a bag of marijuana inside the lockable rear trunk. Defendant's blood was drawn after his arrest and found to contain amphetamine, methamphetamine, pseudoephedrine, and carboxy THC. At trial, testimony established that coffee filters are often used in methamphetamine manufacture, and they can then be placed in coffee to leach out trapped methamphetamine for consumption. Officers also testified that aluminum foil and pen tubes were used to consume methamphetamine by smoking it. Defendant offered some evidence and testimony alleging that the narcotics had been planted on his motorcycle, and that there was little foot traffic to or from his apartment.

II. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant first argues that there was insufficient evidence to support his conviction for maintaining a drug house because the prosecution failed to establish that defendant engaged in more than an isolated instance of possession. We disagree.

We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the 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 a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). However, we do not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

MCL 333.7405(1)(d) provides in relevant part:

> A person . . . [s]hall not knowingly keep or maintain a . . . dwelling . . . or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

In *People v Thompson*, 477 Mich 146, 154-155; 730 NW2d 708 (2007), the Michigan Supreme Court interpreted the meaning of "keep or maintain" for purposes of the statute, and held that "to 'keep or maintain' [a drug house] requires some degree of continuity and . . . the prosecution is required to prove . . . something more than a single, isolated instance of the proscribed activity." The Court further ruled that "some degree of continuity . . . can be deduced by actual observation

of repeated acts or circumstantial evidence, such as perhaps a secret compartment or the like, that conduces to the same conclusion." *Id.*

In this case, viewed in a light most favorable to the prosecution, the evidence established that defendant knowingly kept or maintained the apartment as his dwelling. The owner of the apartment complex testified that defendant had lived there for two years; additionally, Bradley testified to the discovery of a utility bill addressed to defendant in the apartment. The discovery of methamphetamine and marijuana indicates that controlled substances were present in the apartment for some minimal period of time. Further the presence of the fake Red Bull can with a hidden compartment suggests at least that methamphetamine was stored there. This evidence establishes that the apartment was used for keeping controlled substances. The charred pen tubes and other paraphernalia discovered by police indicated prior use in the apartment, and when defendant was arrested earlier that day, his blood contained both marijuana's active ingredient and methamphetamine. Similarly, coffee filters consistent with methamphetamine use were found both in defendant's motorcycle and the apartment. Because "minimal circumstantial evidence will suffice to establish the defendant's state of mind," this supports an inference that defendant knew the apartment was used for drug consumption. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

Moreover, the number and varying types of drug paraphernalia, including a can with the hidden compartment storing drugs, indicates some continuity in the proscribed activity. The strongest evidence of continuity is the fake can in which the blue bottle of methamphetamine was found. In *Thompson*, 477 Mich at 155, the existence of "a secret compartment" was used by our Supreme Court as an example of circumstantial evidence that would support a finding of continuity. This type of evidence is precisely what the police found in this case. Thus, we conclude that there was sufficient evidence to support defendant's conviction for maintaining a drug house.

III. DOUBLE JEOPARDY

Next, defendant argues that he suffered a double jeopardy violation because the amounts of methamphetamine and marijuana should have been aggregated into only two counts of possession, one for each type of controlled substance. We disagree.

Defendant did not argue that he suffered a double jeopardy violation below; thus, his claim is unpreserved. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). However, because "a double jeopardy issue presents a significant constitutional question," it "will be considered on appeal regardless of whether the defendant raised it before the trial court." *People v Cain*, ___ Mich App ___; ___ NW2d ___ (2012), slip op at 6, citing *McGee*, 280 Mich App at 682. A double jeopardy challenge presents a question of constitutional law that we review de novo on appeal. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). However, because defendant's claim is unpreserved, we will reverse the trial court only "for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings." *McGee*, 280 Mich App at 682 (footnotes omitted).

The Double Jeopardy Clause provides three related protections: the first two are protection from a second prosecution for the same offense after acquittal or conviction, while the

third is protection "against multiple punishments for the same offense." *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007) (citations omitted). This third protection "is commonly understood as the 'multiple punishments' strand." *Id.* If the Legislature has not clearly intended to impose multiple punishments, the same-elements test is used to determine if multiple punishments are permissible. See *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993); *Cain*, ___ Mich App at ___, slip op at 6; *Smith*, 478 Mich at 296.

In *People v Green*, 196 Mich App 593, 595-596; 493 NW2d 478 (1992) (citations omitted), this Court held:

> It is clear from the language employed in [MCL 333.7403] that the Legislature intended the imposition of criminal liability to turn on the consideration of two separate factors. The first factor is *the amount* of a controlled substance possessed, as evidenced by the . . . increasingly severe punishments as the amount of controlled substance possessed increases. The second factor is *the type* of controlled substance possessed. [*Id*. (emphasis added).]

This conclusion is in line with *People v Cortez*, 131 Mich App 316, 331-332; 346 NW2d 540 (1984), remanded on other grounds 423 Mich 855 (1985), which held that a defendant found hiding in a closet with a bag of cocaine, and in possession of another amount on a nearby table, was properly convicted for possession of the combined quantity of cocaine.

However, while *Green* recognizes that the amount of a controlled substance is a factor affecting criminal liability, and while *Cortez* recognizes prosecutorial discretion to aggregate closely-linked quantities of a possessed substance, we decline to read *Green* and *Cortez* as *requiring* a prosecutor to aggregate all amounts of a controlled substance possessed by a defendant, at least under the facts of this case. In this case, defendant was convicted of two counts of possession of methamphetamine, MCL 333.7403(2)(b)(*i*), second offense, MCL 333.7413(2), and two counts of possession of marijuana, MCL 333.7403(2)(d), second offense, MCL 333.7413(2), spread across two case files that were tried together. The facts reveal that defendant possessed separate quantities of marijuana and methamphetamine at two separate locations. Defendant had actual possession of the marijuana and methamphetamine recovered from his motorcycle, and constructive possession of the marijuana and methamphetamine recovered from his dwelling. See *People v Wolfe*, 440 Mich 508, 521-522; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (quotation omitted) (The question is "whether . . . the evidence establishes a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised a dominion and control over the substance.")

The intent behind MCL 333.7403 is to punish the illegal possession of controlled substances. See *Green*, 196 Mich App at 595-596. Where the facts show that the quantities of drugs are possessed separately, separate offenses may be shown. See, e.g., *People v Bartlett*, 197 Mich App 15, 17-18; 494 NW2d 776 (1992) (holding that double jeopardy protection against multiple punishments did not bar two convictions under MCL 333.7401 (possession with intent to deliver) where the facts showed that two different deliveries were separately bargained and paid for). We therefore conclude that defendant was properly convicted of two separate possession offenses.

This does not mean that a prosecutor may infinitely subdivide controlled substance amounts in order to increase the number of charges against a defendant. This Court has stated that a prosecutor "is not authorized to charge for each unit of the same drug." *People v Hadley*, 199 Mich App 96, 104-105; 501 NW2d 219 (1993). Thus, by way of example, were a defendant to be found in actual possession of ten morphine pills, the prosecutor could not arbitrarily charge him with ten violations of MCL 333.7401. *Id.*

However, we hold that, under the facts of this case, where proof of one set of methamphetamine and marijuana charges required evidence of *actual* possession, and proof of the second set required evidence of *constructive* possession, and where each conviction thus was supported by different evidence concerning the substance, the location, and defendant's acts, defendant's protection from double jeopardy was not violated.

IV. PRIOR RECORD VARIABLES

Finally, defendant claims that he is entitled to resentencing. He cites *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010), in support of his claim. In that case, the trial court assessed 20 points under prior record variable (PRV) 7, MCL 777.57, for concurrent convictions that were vacated on appeal. *Id*. at 792. MCL 777.57(a) provides that 20 points will be scored in PRV 7 if "[t]he offender has 2 or more subsequent or concurrent convictions . . . ." Because the defendant's concurrent convictions were vacated, our Supreme Court held that "assessing defendant 20 points under PRV 7 resulted in a sentence based on inaccurate information," and the defendant was entitled to resentencing. *Id*. at 793 ("Had [the] defendant been correctly assessed zero points instead of 20 under PRV 7, his minimum sentence range would have been" lower.)

In this case, however, 20 points were properly scored in PRV 7 because there are five concurrent convictions: two counts of possession of methamphetamine, two counts of possession of marijuana, and one count of maintaining a drug house. The trial court thus did not sentence defendant based on an inaccurate guidelines range and resentencing is not required.

We affirm defendant's convictions and sentencing.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra