STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK JULIUS FLOYD,

Defendant-Appellant.

UNPUBLISHED
June 7, 1996

No. 182254
LC No. 94-026249

Before: Taylor, P.J., and Murphy and E. J. Grant,* JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403(2)(a)(v), and his guilty plea of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced on the habitual-offender conviction to 30 to 120 months' imprisonment. We affirm.

Defendant first argues that the magistrate abused his discretion in binding him over on the charge of possession of less than twenty-five grams of cocaine and that the trial court subsequently erred in denying his motion to quash. We disagree. This Court reviews de novo a circuit court's decision that an examining magistrate had probable cause to bind a defendant over for trial, and must re-determine whether the magistrate committed an abuse of discretion in finding that there was probable cause to believe that the defendant committed the charged offense. *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994); MCL 766.13; MSA 28.931; MCR 6.110(E).

The arresting officer testified at the preliminary examination that he stopped defendant and another man for questioning. While processing the men, the officer saw a bundle about six inches from defendant's feet, which had not been on the ground before he told defendant to stand with his hands on the trunk. An eyewitness told the officer that he saw defendant drop something on the ground. The bundle contained a glass tube with burnt residue that later tested positive for cocaine. In light of this evidence, the magistrate did not abuse his discretion in finding probable cause that defendant possessed

* Circuit judge, sitting on the Court of Appeals by assignment.

the cocaine. *People v Hahn*, 183 Mich App 465, 468; 455 NW2d 310 (1989), vacated in part on other grounds 437 Mich 867 (1990).

Defendant further argues that there was insufficient evidence presented at trial to support his conviction of possession of less than twenty-five grams of cocaine. We disagree. Where the sufficiency of the evidence is challenged, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that all the elements of the crime charged were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Lee*, 212 Mich App 228, 258-259; 537 NW2d 233 (1995).

In order to obtain a conviction of possession for less than twenty-five grams of cocaine, the prosecution must show that (1) the substance in question was cocaine, (2) the cocaine was in a mixture of less than twenty-five grams, (3) the defendant was not authorized to possess the cocaine, and (4) the defendant knowingly possessed the cocaine. *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990); CJI2d 12.5. Here, the bundle containing the tube with the cocaine residue was found about six inches from defendant's right foot. The officer stated that it was not there when he placed defendant at the rear of the car. An eyewitness testified that he saw defendant throw something underneath the car. Looking at the evidence in the light most favorable to the prosecution, there was sufficient evidence to show that defendant possessed the drugs. *Lee*, *supra* at 258-259; *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

Defendant also argues that the trial court abused its discretion in allowing him to be impeached with a prior conviction for attempted breaking and entering. We disagree. The trial court's decision to allow impeachment with prior convictions is within its sound discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

A witness' credibility may be impeached with prior convictions, MCL 600.2159; MSA 27A.2159, but only if the convictions satisfy the criteria set forth in MRE 609. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). Theft crimes such as defendant's prior conviction are minimally probative and are thus admissible only if their probative value outweighs their prejudicial effect. *People v Allen*, 429 Mich 558, 595-596; 420 NW2d 499, amended 429 Mich 1216 (1988); *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). Defendant's prior conviction was fairly recent, was minimally probative, and was not similar to the crime charged. We find no abuse of discretion. *Cross*, *supra*. We reject defendant's claim that admission of the conviction was more prejudicial than probative because the cocaine was discovered while he was being questioned regarding the breaking and entering of a garage. This is of no moment because the arresting officer merely testified that he detained defendant as part of an investigation without identifying what he was investigating.

Defendant further argues that the trial court erred when it admitted the glass tube and chemical-analysis report into evidence because it was not listed on the prosecution's exhibit list. We disagree.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Clark*, 164 Mich App 224, 228-229; 416 NW2d 390 (1982).

When dealing with the prosecution's failure to comply with a discovery agreement or order, the trial court must balance the interests of the court, the public, and the parties. Exclusion of otherwise admissible evidence is a remedy to be used only in the most egregious situations. *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). See also MCR 6.201(I) (if a party fails to comply with the rule, the court, in its discretion, may order that the testimony or evidence be excluded, or may order another remedy). Here, defendant had knowledge of the existence of the glass tube and the lab report independent of any discovery. Defendant saw the glass tube on the night he was arrested, he knew that the police had it, and knew before trial that a chemical test on the residue had been conducted. Furthermore, the lab report had been filed with the trial court before trial and had been made part of the trial court record. As such, the prosecution's failure to list these two items on their exhibit list, while a violation of MCR 6.201(A)(6), did not prejudice defendant and did not constitute an effort by the prosecution to falsify evidence. *Clark*, *supra* at 229; *Taylor*, *supra* at 487-488. Therefore, the trial court did not abuse its discretion when it allowed the prosecution to amend its exhibit list and when it admitted into evidence the glass tube and the lab report.

Defendant also alleges that trial court erred when it refused to instruct the jury on the offense of use of a controlled substance. We do not agree. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

Here, there was no evidence to support the giving of an instruction on the use of a controlled substance. Although defendant possessed the crack pipe that had a burnt residue on it, there is no evidence that he himself smoked any crack cocaine. In fact, defendant denied possessing the cocaine and, in his testimony, stated that he had requested, but was denied, a urine test at the police station, presumably to show that he was not under the influence of any controlled substance. This gives rise to the inference that defendant did not use cocaine. Because the evidence did not support the giving of an instruction on the unlawful use of a controlled substance, the trial court did not err in refusing to give one. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant also argues that his sentence of 30 to 120 months was disproportionate. We disagree. When reviewing a sentence for proportionality, this Court's review is limited to whether the sentencing court abused its discretion by violating the principle of proportionality. A sentence must be proportionate to the seriousness of the offense and the conduct of the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 462 NW2d 1 (1990).

We review defendant's sentence without consideration of the sentencing guidelines, which do not apply to habitual offenders, *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995); *People v Gatewood*, 450 Mich 1021; ___ NW2d ___ (1996). Defendant had three prior

felonies on his criminal record and was on parole at the time of the instant offense. In light of defendant's criminal background, obvious recidivism, and the circumstances of the crime for which he was convicted, defendant's sentence was proportionate to both the offense and the offender. *Milbourn, supra* at 635-636, 654, 661. As such, the trial court did not abuse its discretion when it sentenced defendant to thirty to sixty months' imprisonment. *Id.*

Finally, defendant argues that he was improperly denied credit for time served. We disagree. Because defendant's pretrial incarceration was due to his violation of parole, and not to his inability to post bond, he was not entitled to any credit for time served. MCL 769.11b; MSA 28.1083(2); *People v Miller*, 182 Mich App 692, 693-694; 452 NW2d 882 (1990).

Affirmed.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant