STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER LOVELL DUDLEY,

Defendant-Appellant.

UNPUBLISHED
February 25, 1997

No. 192441
Kent Circuit Court
LC No. 95-001009-FH

Before: Sawyer, P.J., and Neff and A.L. Garbrecht,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was sentenced as an habitual offender to 1-1/2 to 15 years' imprisonment. We affirm.

Defendant was arrested on January 12, 1995, after two police officers recovered a crack cocaine pipe, containing cocaine residue, which had been discarded by defendant. Grand Rapids police officers, Smalla and Ditmar, were speaking with two individuals in front of a known "crack house" in the 100 block of Logan, S.E. in Grand Rapids when defendant approached them. The officers testified that defendant surreptitiously discarded several items from his pocket as he walked past the police officers, and then attempted to flee. One of the officers noticed a shiny object among the items discarded by defendant and heard a metal object strike the ground. The officers apprehended defendant and recovered the discarded items, which included a metal crack cocaine pipe.

At trial, defendant denied throwing any items to the ground and denied attempting to flee from the police. Defendant testified that the officers had approached him and requested identification and permission to search defendant. When defendant refused to allow a search, the officers tackled and arrested him. Defendant denied ownership of the pipe.

Julianne Chan, who works in the forensic services laboratory of the Grand Rapids Police Department, performed three different tests on the residue contained in the pipe. All three tests showed

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

that there was cocaine residue in the pipe. Chan testified that she was able to see residue in the pipe both at the time she ran the tests and at the time of trial.

I

Defendant first contends that there was insufficient evidence to support the finding that defendant intended to possess cocaine. Defendant argues that the cocaine residue found in the pipe was invisible to the naked eye and, therefore, insufficient to support his conviction. Defendant also argues that there were no surrounding facts which might establish defendant's knowing possession of cocaine. In *People v Hunten*, 115 Mich App 167, 171; 320 NW2d 68 (1982), this Court held that "[t]he mere presence of a minute quantity of a controlled substance which is invisible to the naked eye, standing alone, is insufficient to support an inference of criminal scienter." However, in such a case, "other facts and circumstances might be established from which criminal scienter may be inferred." *Id.*

Defendant's argument fails for two reasons. First, our Supreme Court has stated that possession of residue which is apparent to the naked eye is sufficient to show a defendant's intent to possess a narcotic. *People v Harrington*, 396 Mich 33, 49; 238 NW2d 20 (1976). In this case, as in *Harrington*, there was testimony that even at the time of trial the pipe contained visible residue. Therefore, the residue found in defendant's pipe was sufficient to support the inference that defendant intentionally possessed cocaine.

Second, even if the cocaine residue was invisible to the naked eye, other facts and circumstances established at trial were sufficient to infer defendant's intent. When viewed in the light most favorable to the prosecution, the evidence showed that defendant was passing by a known drug house when he saw two police officers and then threw a crack cocaine pipe to the ground and began to run. Such facts and circumstances are sufficient to infer that defendant intentionally possessed cocaine.

On the basis of Chan's testimony that cocaine residue was visible at the time of trial, and the police officers' testimony regarding defendant's actions in discarding the pipe and fleeing when he saw the police officers, we find that there is sufficient evidence for the jury to find beyond a reasonable doubt that defendant intentionally possessed cocaine.

II

Defendant next argues that the trial court abused its discretion in allowing testimony that defendant was seen at a crack house one week after defendant was arrested for discarding a crack cocaine pipe in front of that same house. Defendant states that such evidence was improperly admitted for the purpose of showing defendant's propensity to carry a crack cocaine pipe. Specifically, defendant complains of the admission of the following testimony:

> *Q. [Prosecutor]:* Did—when you saw the defendant a week later after the incident, did he say something to you?

A. [Keizer]: He said, you remember me from that one night last week that we both got arrested? And I said, yes and he goes—he still—then he kind of—I don't know exact what he said, but he said he swore up and down that wasn't his pipe and that was pretty much it and I just walked right [past] him. I had nothing to say to him. I didn't know him. I didn't really care.

[Prosecutor]: Your Honor, I would submit at this point that there's been evidence submitted that the defendant has denied the—any connection with this crack pipe. Therefore, the fact that he's at a crack house a week later, I submit, is—is more relevant than it was before that evidence was submitted and I would ask at this point based on that piece of evidence, the denial of possession of the pipe, that I be allowed to bring out the fact that he was at a crack house a week later. That has probative value to the issue whether or not the crack pipe that he allegedly threw down a week before was his or not. A person being at a crack house will be more likely to be in possession of a crack pipe than a person that was not.

[The Court]: Seems to me that we've now thrashed this thing out three times in the presence of the jury and—and moreover, we now have out the fact that on this subsequent meeting the defendant made a statement relating back to the incident of January 12. That statement, it seems to me, is germane and since the prosecution has put into evidence the context and circumstances may be allowed to flesh it out.

MRE 404(b) governs the admission of evidence of bad acts. To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) the evidence must be relevant to an issue other than propensity; (2) the evidence must be relevant to an issue or fact of consequence at trial; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Vander Vliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994). Relevant other acts evidence does not violate the rule unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity with it. *Id.* at 64.

Application of the *Vander Vliet* test reveals that evidence of defendant's presence at a crack house, subsequent to the incident at issue at trial, was properly admitted. First, the evidence was relevant to an issue other than defendant's criminal propensity. The trial court stated that it was allowing admission of the evidence to show the context and circumstances of a statement made by defendant. Second, because defendant was charged with possession of cocaine based on the pipe found by the police, defendant's statement denying ownership of the pipe was an issue of consequence at trial. Third, because defendant himself testified that he had used drugs in the past, that he was on parole at the time of this incident, and that he had been previously convicted of larceny, breaking and entering, and larceny from a person, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Evidence of defendant's presence at a crack house was admitted for a proper purpose in accordance with MRE 404(b)(1), it was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice. Therefore, we find that the trial court did not abuse its discretion in admitting the evidence.

Affirmed.

/s/ David H. Sawyer
/s/ Allen L. Garbrecht

I concur in the result only.

/s/ Janet T. Neff