STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND GONZALES,

Defendant-Appellant.

UNPUBLISHED
March 27, 1998

No. 197877
Oakland Circuit Court
LC No. 95-141990-FH

Before: Doctoroff, P.J., and Reilly and Allen*, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver between 50 and 224 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Following a jury trial, defendant was convicted of possession of between 50 and 224 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). The trial court sentenced defendant to ten to twenty years' imprisonment. Defendant now appeals as of right. We affirm.

First, defendant argues that the trial court abused its discretion by admitting expert testimony that was offered for no other proper purpose than to profile him as a drug dealer. According to defendant, the expert's opinion was tailored to fit the facts of the case at bar, and therefore, the expert was allowed to render an improper opinion as to defendant's guilt. The qualification of a witness as an expert, and the admissibility of his testimony, are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

In order to admit the testimony of an expert witness pursuant to MRE 702, the witness must in fact be an expert, there must be facts in evidence that require or are subject to examination and analysis by a competent expert, and there must be knowledge in a particular area that belongs more to an expert than an ordinary person. *Ray*, *supra* at 707. The court must determine whether such testimony will aid the factfinder in making the ultimate decision in the case. *Id*. However, the trial court is not required to

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

exclude expert opinion testimony simply because it embraces an ultimate issue to be decided by the trier of fact. *Id*.

In *People v Hubbard*, 209 Mich App 234, 241-242; 530 NW2d 130 (1995), this Court held that drug profile evidence was not admissible as substantive evidence of a defendant's guilt. Since profile evidence is usually presented to conform with the facts of a case, the profiles inevitably cover many innocent individuals. *Id.* In *Hubbard*, the expert testified to a number of characteristics which typically identify a drug dealer. This Court found that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *Id*. at 241 Furthermore, this Court determined that the reliability of drug profile evidence is suspect and its value to the trier of fact in deciding the ultimate issue of guilt is questionable. *Id.*

In *Ray, supra* at 707-708, this Court held that the trial court did not abuse its discretion by admitting the testimony of an expert to aid the jury's determination whether defendant had the intent to deliver narcotics. The expert testified that the quantity of crack cocaine found in the defendant's possession, the fact that the rocks of crack cocaine were evenly cut, and the selling price of crack cocaine on the street clearly indicated that the defendant intended to sell the drugs and not simply use the crack cocaine for personal consumption. *Id*. at 708. This Court determined that such information was not within the knowledge of a layman and that the expert's testimony aided the jury in determining the defendant's intent. *Id*. Although the testimony embraced the ultimate issue of intent to deliver, that fact did not render the evidence inadmissible. *Id*. See also *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993).

In the present case, defendant was arrested after police officers discovered 58.14 grams of cocaine on his person. An average juror who has no connection to the world of narcotics may not be able to determine whether 58.14 grams of cocaine is considered a large amount in the drug community. The average juror may not know how many grams of cocaine are typically used in one sitting by an individual. The testimony offered by the prosecution's expert was designed to aid a jury to evaluate whether the amount of cocaine discovered on defendant could be evidence of his intent to deliver. Therefore, we find that the trial court did not abuse its discretion by admitting the testimony of the prosecution's expert witness.

Next, defendant argues that the trial court erred by failing to grant his motion for a directed verdict at the close of the prosecution's case-in-chief. When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). This Court must consider the evidence presented by the prosecutor, up to the time the motion was made, in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *Id*.

To support a conviction for possession with the intent to deliver more than 50 grams, but less than 225 grams of cocaine, the prosecution must prove beyond a reasonable doubt: (1) that the recovered substance was cocaine, (2) that the cocaine was in a mixture weighing over 50 grams, but less than 225 grams, (3) that defendant was not authorized to possess the substance, and (4) that

defendant knowingly possessed the cocaine with the intent to deliver. *People v Lewis*, 178 Mich App 464, 468; 444 NW2d 194 (1989). Defendant argues that the prosecution failed to introduce evidence to support the requisite element of the intent to deliver the narcotic which was required for a conviction of the crime for which he was charged.

Circumstantial evidence and the reasonable inferences which arise from that evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Intent can be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Actual delivery of a controlled substance is not required to prove intent to deliver. *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748, amended 441 Mich 1201; 489 NW2d 748 (1992). Intent to deliver may be inferred from the quantity of narcotics in the defendant's possession, the manner in which the narcotics were packaged, and from other circumstances surrounding the arrest. *Id.*

Given the large quantity of cocaine possessed by defendant, coupled with the testimony of the prosecution's expert witness, a reasonable inference could have been drawn that defendant possessed an intent to deliver cocaine. Defendant possessed over 58.14 grams of cocaine which is approximately two ounces. According to the prosecution's expert witness, such a large quantity does not suggest personal use. The expert opined that, if an individual attempted to smoke over 50 grams of cocaine at one time, he would most likely overdose. Two ounces of cocaine has a street value of approximately $2,000. The typical price for a street purchase of crack cocaine is approximately $20 per rock. Furthermore, no drug paraphernalia was discovered on defendant's person or in the vehicle in which he was riding, which suggests no plan of immediate personal use. Therefore, we find that the trial court did not err in denying defendant's motion for a directed verdict.

Next, defendant argues that the trial court erred by instructing the jury on the lesser included offense of possession of a controlled substance. According to defendant, possession of cocaine is not a necessarily included offense of possession of cocaine with the intent to deliver because the penalties for the two offenses are exactly the same. We disagree.

In general, the duty of the trial court to instruct with regard to lesser included offenses is determined by the evidence. *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997). If evidence has been presented that would support a conviction of a lesser included offense, refusal to give a requested instruction regarding the lesser include offense is error requiring reversal. *Id.* When an offense is necessarily included, the evidence will always support the lesser offense if it supports the greater. *Id.*

Possession of cocaine is a necessarily included lesser offense of possession with intent to deliver the same amount of cocaine, because the only distinguishing characteristic is the additional element of the intent to deliver. *Id.* at 416-417. Because evidence exists on the record to support the charge of possession and this same evidence must be used to establish defendant's guilt of possession with intent

to deliver, the trial court did not err by instructing the jury on the elements of the necessarily included offense of possession of cocaine.

Defendant next argues that the trial court erred by refusing to deviate below the mandatory minimum sentence of ten years' imprisonment imposed by statute. Defendant's argument is without merit. The factual determination that there were substantial and compelling

reasons to deviate from the mandatory sentence is reviewed on appeal for clear error. *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994). Once the decision to depart has been made, the sentence imposed is subject to review for an abuse of discretion. *Id*. A sentencing court abuses its discretion if the sentence is not proportionate to seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

If substantial and compelling reasons exist to justify a departure, the sentencing court may deviate from the mandatory minimum sentence. MCL 333.7403(3); MSA 14.15(7403)(3). To determine whether substantial and compelling reasons exist, the court may consider the following factors: (1) the facts of the crime that mitigate the defendant's culpability, (2) the defendant's prior record, (3) the defendant's age, (4) the defendant's work history, (5) the defendant's cooperation with police following arrest, and (6) the defendant's criminal history. *Harvey*, *supra* at 448. This list is not exhaustive. *Id*.

In the case at bar, defendant was only twenty-two years of age at the time he was arrested. Although he had never been convicted of a felony, defendant's criminal record was far from unblemished. Defendant did not have a long history of stable employment, apart from defendant's assertions that he supported himself by completing odd jobs for his grandmother. Defense counsel pointed to the fact that defendant merely possessed drugs and never sold them to support his position that defendant deserves a more lenient sentence. However, *possession* of cocaine is a crime proscribed by MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii) and the Legislature clearly indicated that that an individual in violation of the statute *shall* be imprisoned for not less than ten years. Mandated sentences by the Legislature are presumptively proportionate. *People v Ealy*, 222 Mich App 508, 512; 564 NW2d 168 (1997). Because defendant failed to present sufficiently substantial and compelling reasons to justify a departure from the mandatory minimum sentence, the trial court did not abuse its discretion in sentencing defendant.

Finally, defendant argues that a police search violated his rights under the Fourth Amendment, and that he was denied the effective assistance of counsel by his trial counsel's failure to object to the admission of evidence seized during that search. We disagree.

To succeed on a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.* Defendant must then show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 687-688. Defense counsel is not required to raise a meritless objection. *Torres*, *supra* at 425. Because there was no *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

The Fourth Amendment to the United States Constitution, and the analogous provision of the Michigan Constitution, Const 1963, art 1, § 11, guarantee the right of the people to be free from unreasonable searches and seizures. *People v Champion*, 452 Mich 92, 97; 549 NW2d 849 (1996).

Searches and seizures conducted without a warrant are unreasonable per se, subject to several specific, well delineated exceptions. *Id.*, 98. One exception is that a police officer who reasonably believes that criminal activity may be afoot and that the persons with whom he is dealing may be armed and dangerous, may conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons. *Terry v Ohio*, 392 US1, 30; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *Champion, supra*, 452 Mich 99; *People v Taylor*, 214 Mich App 167, 169; 542 NW2d 322 (1995). The test of the validity of such a search is whether, based on the totality of the circumstances, a reasonably prudent person would be warranted in the belief that his safety or that of others was in danger. *Id.*, 170. The scope of a *Terry* search is strictly limited to that reasonably designed to discover guns, knives, clubs or other hidden instruments that could be used to assault an officer. *Champion, supra* at 99. The scope must be reasonably related to the circumstances that justified the search. *Id.* at 98.

In the present case, the police stopped the vehicle in which defendant was a passenger because the license plate was hanging half-way off, and a computer check of the plate indicated that the plate was improper for that vehicle. When the officers questioned defendant, he appeared to be very nervous. One of the officers noticed that defendant appeared to place something in his underwear. When questioned about it, defendant replied that he had dropped his phone. The officer asked defendant to get out of the car. He patted the area where he had seen defendant hide the object, and he felt a hard object between defendant's buttocks. Believing the object to be a weapon, the officer asked defendant what he had hidden. Defendant did not answer. While another officer helped to restrain defendant, the first officer reached into defendant's pants and retrieved a plastic bag containing a substance that appeared to be crack cocaine. Later tests proved that the substance was in fact cocaine. On this record, we find that, under the totality of the circumstances, the officers had a reasonable suspicion that defendant was involved in criminal activity and that he was armed. Furthermore, the scope of the search was limited to the area where the officer had seen defendant hide an object, and was, therefore, reasonably related to the circumstances that justified the search. Because the evidence was admissible under *Terry*, any objection by trial counsel would have been futile. Therefore, defendant was not denied the effective assistance of counsel. *Torres, supra* at 425.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maureen Pulte Reilly
/s/ Glenn S. Allen, Jr.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).