

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WENDELL ELLIS,

Defendant-Appellant.

UNPUBLISHED
October 12, 1999

No. 212739
Wayne Circuit Court
Criminal Division
LC No. 97-010055

Before: Griffin, P.J., and Zahra and S.L. Pavalich*, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, the prosecution presented evidence that defendant participated in a narcotics transaction by handing a rock of crack cocaine to another person, who sold it to an undercover officer. Defendant was arrested when police executed a search warrant for the apartment at which the sale took place. Cocaine was found in the apartment, but not on defendant's person. Defendant testified that he had gone to the apartment to smoke crack cocaine. He admitted taking a rock from a bag with the intent to smoke it. Defendant denied participating in or having knowledge of any narcotics transaction.

The court instructed the jury on the charge of possession of less than fifty grams of cocaine, MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv), as a lesser included offense of the charge of possession with intent to deliver less than fifty grams of cocaine. The jury found defendant guilty as charged. Subsequently, the court sentenced defendant to concurrent terms of five to twenty years in prison, with the sentences to be served consecutive to the sentence defendant was serving when he committed the instant offenses.

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

If a defendant requests an instruction on a cognate lesser included offense and the evidence supports it, the trial court must give the instruction. *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998). Failure to request an instruction or to object to jury instructions waives any claim of error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Manifest injustice occurs when an omitted instruction pertained to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

Defendant argues that the trial court erred by refusing to instruct the jury on possession as a lesser included offense of the charge of delivery. We disagree and affirm. The instruction on simple possession as a lesser included offense of the charge of possession with intent to deliver was appropriate because it was supported by the evidence, provided by defendant's own testimony, that he possessed cocaine for the purpose of smoking it. Simple possession is a necessarily included lesser offense of possession with intent to deliver. *People v Gridiron*, 185 Mich App 395, 400-401; 460 NW2d 908 (1990), vacated on other grounds 190 Mich App 366; 475 NW2d 879 (1991), amended 439 Mich 880 (1991). The instruction on simple possession was requested by a party; therefore, the trial court was required to give it. *Torres, supra*, 416. However, simple possession is a cognate lesser included offense of delivery. *People v Kamin*, 405 Mich 482, 497-498; 275 NW2d 777 (1979). Nothing on the record before us indicates that defendant requested an instruction on simple possession as a lesser included offense of delivery. Moreover, defendant's failure to object to the instructions as read waives appellate review absent manifest injustice. MCL 768.29; MSA 28.1052; *Van Dorsten, supra*. The omission of an instruction on possession as a lesser included offense of delivery did not result in manifest injustice. *Torres, supra*, 423.

Affirmed.

/s/ Richard Allen Griffin

/s/ Brian K. Zahra

/s/ Scott L. Pavlich