

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAMON D. FULLER,

Defendant-Appellant.

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UNPUBLISHED

May 21, 2002

No. 230134

Wayne Circuit Court

LC No. 00-004732

Before: Holbrook, Jr., P.J., and Jansen and Wilder, J.J.

PER CURIAM.

Following a bench trial, defendant was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced to two to twenty years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction, but remand for resentencing.

On March 30, 2000, Detroit Police Officer Don Eastman was assigned to the narcotics division and working an undercover assignment with another officer in the vicinity of Second Street and Alexandrine. Eastman approached Jerome Scott<sup>1</sup> and asked Scott if he knew where Eastman could "get a couple of dime rocks." Scott told Eastman that he could take him to a location where he could buy cocaine, and had Eastman drive him to the parking lot of a nearby market. At the market, Scott demanded \$25 from Eastman, and Eastman gave him \$25 in prerecorded funds.

Scott got out of the vehicle with the money and was met in the parking lot by defendant. Both Scott and defendant then went inside the vestibule of the market. Eastman, who was about 25-30 feet away from Scott and defendant, observed Scott extend his right hand toward defendant, and defendant appeared to retrieve something as Scott received an unknown object from defendant. Scott returned to Eastman's vehicle and handed Eastman two cellophane-wrapped blocks of what was later confirmed to be cocaine. Defendant was subsequently arrested on suspicion of delivery of cocaine.

Defendant first argues that the verdict was against the great weight of the evidence. However, although defendant's statement of the issue indicates that he is arguing that the verdict

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<sup>1</sup> Scott was charged as a codefendant.

is against the great weight of the evidence, the substance of his argument and the case law cited indicate that he actually is arguing that the evidence was insufficient to support the verdict.

When reviewing a challenge to the sufficiency of the evidence in a bench trial, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the elements of the charged offense were proved beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of an offense. *People v Noble*, 238 Mich App 647, 655; 608 NW2d 123 (1999).

The trial court found that defendant aided and abetted another person in the delivery of a narcotic substance. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). “Aiding and abetting” is a theory of prosecution, not a separate substantive offense. *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999).

To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds *Mass*, *supra* at 627-628.]

To establish commission of the crime of delivery of less than fifty grams of cocaine, the prosecution in this case had to show (1) delivery, (2) of less than fifty grams of cocaine, and (3) knowledge by the person delivering that he or she was delivering cocaine. See CJI2d 12.2; see also *Mass*, *supra* at 625-627.

Viewed in the light most favorable to the prosecution, the evidence was sufficient to permit the trial court to find, beyond a reasonable doubt, that defendant aided and abetted in the commission of the crime of delivery of less than fifty grams of cocaine. Officer Eastman testified that he approached Scott and asked him if he knew where Eastman could “get a couple of dime rocks.” Defendant accompanied Eastman to a location where Eastman gave defendant \$25 in pre-recorded funds. Eastman observed a transaction between Scott and defendant, and then Scott returned to Eastman’s vehicle and handed Eastman two cellophane-wrapped blocks of what appeared to be cocaine. Officer Ciers testified that he confiscated \$5 in pre-recorded funds from defendant when he was arrested. Finally, laboratory results received as evidence showed that the substance received by Eastman from defendant weighed 0.19 grams and contained cocaine. Although defendant testified that he received the \$5 found on him at the time of his arrest from one of two men at a pay phone just inside the market where he saw Scott, and denied possessing or selling any narcotics, the court clearly rejected defendant’s version of events. Determinations regarding the weight of evidence and credibility of witnesses are left to the trier of fact. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993), overruled in part on other

grounds *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998); *People v Chavies*, 234 Mich App 274, 290; 593 NW2d 655 (1999).

Defendant next argues that the trial court abused its discretion in failing to establish on the record substantial and compelling reasons for departing from the sentence guidelines range. Because the offense for which defendant was convicted occurred March 30, 2000, the statutory sentence guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). In reviewing a departure from the sentence guidelines range, existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000).

The sentence guidelines range established in this case was zero to eleven months. However, the trial court sentenced defendant, under MCL 333.7401(2)(a)(iv), to two to twenty years' imprisonment. MCL 769.35(4)(b) provides as follows:

If the offense is a violation of section 7401(2)(a)(iv) or 7403(a)(iv) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, and the upper limit of the recommended minimum sentence range is 18 months or less, the court shall impose a sentence of life probation absent a departure.

Because the upper limit of the guidelines range in this case was less than eighteen months, absent a departure, the court was required to sentence defendant to lifetime probation. MCL 769.35(4)(b). A court may depart from a recommended sentencing guidelines range only "if the court has a substantial and compelling reason for that departure and states on the record the reasons for the departure." MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001); *Babcock*, *supra* at 72. The factors relied on by the court must be objective and verifiable. *Id.* at 75.

We conclude that the trial court did not articulate substantial and compelling reasons for departing from the sentencing guidelines range. Deterrence is a factor in every sentencing scheme, and defendant's other convictions were already taken into account in the sentencing information report that established the guidelines range. A court may not base a sentence departure on a factor already taken into account in determining the appropriate sentence range, unless the court finds that the factor has been given inadequate or disproportionate weight under the facts of the particular case. MCL 769.34(3)(b). While the court in this case stated that it did not believe that probation was an adequate deterrent, it did not refer to any facts in the record to support its conclusion. In the absence of a statement of substantial and compelling reasons for a departure, *Hegwood*, *supra* at 440; *People v Pillar*, 233 Mich App 267, 269-270; 590 NW2d 622 (1998), the court was required to sentence defendant to lifetime probation. MCL 769.35(4)(b). Accordingly, defendant's sentence is vacated and this case is remanded for resentencing.

In light of our resolution of this issue, we need not address defendant's claim that his sentence was disproportionate, see *Babcock*, *supra* at 76-78, and constituted cruel and unusual punishment.

We affirm defendant's conviction, but vacate his sentence and remand for resentencing.  
We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder