

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARWIN LAMONT ODEN,

Defendant-Appellant.

UNPUBLISHED

October 23, 2003

No. 240948

Wayne Circuit Court

LC No. 00-013883-01

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM

Defendant Darwin Lamont Oden appeals as of right from the trial court’s judgment of sentence and from his conviction after a jury trial of possession of more than 225 grams but less than 650 grams of cocaine.¹ We affirm.

I. Basic Facts And Procedural History

In the early evening of October 25, 2000, Michigan State Police Trooper Christopher Harris saw a vehicle driving erratically. Trooper Harris attempted to stop the vehicle but it sped away. Trooper Harris and Van Buren Township Police Detective Fred Sweet followed. When the vehicle finally stopped, Detective Sweet saw someone jump out. Trooper Harris caught up to the vehicle, then saw the rear door open and someone running away. Trooper Harris described the runner as someone in black clothing with reflective tennis shoes and “something white in the upper head area.” Detective Sweet was “struck” by the fact that the person who jumped out of the car had been wearing a white neck brace, and he identified the person as Oden. Trooper Harris noticed nothing in the person’s hands, but Detective Sweet saw the runner carrying a white plastic bag. Trooper Harris and Detective Sweet eventually caught the runner and took him into custody; however, both officers apparently lost sight of the runner for at least a few seconds. The runner wore entirely black clothing and a “white neck brace C-spine type collar.” Detective Sweet recognized the runner by “the neck brace, the braids, the dark clothes” and was certain that the person apprehended was the same person who ran from the vehicle. Trooper Harris identified the runner as Oden.

¹ MCL § 333.7403(2)(a)(ii).

Detective Sweet told Detroit Police Detective Marvin Redmond that Oden had a “white grocery type bag” when he left the vehicle, but no longer had it when taken into custody and did not have it after the five-second time period during which Detective Sweet lost sight of him. Detective Redmond found a white bag, which he photographed and then opened. The bag contained between 496 and 498 grams of a substance containing cocaine. The State Police Laboratory determined that the amount of cocaine in the bag was worth \$13,500 to \$14,000. No identifiable fingerprints were found.

At closing arguments, the prosecutor stressed that the case was very straightforward and that Oden “got out of a Lincoln, carrying a bag full of cocaine, ran from the police, dropped it so he wouldn’t get caught, and got caught.” Oden, on the other hand, referred to the case as “total and complete fabrication.” Nevertheless, the jury found Oden “guilty of unlawful possession of a controlled substance, cocaine, in an amount of 225 grams or more but less than 650 grams.”

II. Jury Instructions On Identification

A. Standard Of Review

Oden argues that, despite the fact that his identification was at issue in this case and despite the fact that he requested it, the trial court refused to give the jury CJI2d 7.8. We review de novo claims of instructional error.²

When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction. However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court’s failure to give the requested instruction resulted in a miscarriage of justice. The defendant’s conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative.^[3]

B. CJI2d 7.8

Oden’s position is that identity was at issue in this case, and therefore a jury instruction with respect to identity was required. The use note to CJI2d 7.8 states that it is to be given whenever identity is at issue. In this case, however, Oden has failed to demonstrate that identity was at issue. Therefore, we conclude that the trial court did not err by failing to instruct on CJI2d 7.8.

The cases discussing CJI2d 7.8 and its predecessor, CJI 7.7.01, are concerned with “eyewitness identification testimony and the factors that may affect an eyewitness’s

² *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

³ *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002) (internal citations omitted).

identification of defendant.”⁴ Oden cites *People v Storch*⁵ as basis for requiring a jury instruction regarding identification. We conclude, however, that *Storch* is not relevant. In *Storch*, the victim of a rape identified entirely different assailants based on a photograph, physical lineup, and voice lineup.

Here, all three eyewitnesses were police officers, and their identifications of defendant showed no such inconsistencies. Oden attacks a number of minor details, many of which are inconsequential or not inconsistent. The only real question with respect to identity seems to come from the fact that the pursuing officers lost track of Oden in the woods for a few seconds. However, Officer Sweet indicated that the person he caught up to in the woods was the same person he had followed in, and he based that conclusion on a number of Oden’s identifying features, including his neck brace and clothing. Oden claims to have impeached Officer Sweet’s opportunity to observe him, but the transcript indicates he was fewer than two feet away when he actually “ran across the front of [Officer Sweet’s] bumper.”

CJI2d 7.8 was relevant in *Storch* because of the inconsistencies in the eyewitness identifications in that case.⁶ Because there were no inconsistencies in the present case, we conclude that the evidence did not require the trial court to give CJI2d 7.8.

C. Miscarriage Of Justice

Even if we assume that CJI2d 7.8 was required, reversal requires a showing of a “miscarriage of justice.”⁷ Oden attempts to show this by inference. During deliberations, the jury requested the videotape from Trooper Harris’s police car and “a four head VCR, so we can view the paused screen clearer,” as well as the transcript. The jury later requested “some direction” because they were “unable to reach a unanimous decision.” Oden argues that

the second note [requesting direction] speaks volumes and speaks for itself as its meaning is objectively evident without interfering with the province of the jury. The very direction that the jury requested is the guidance that the law mandates be given and for which the Defendant so diligently sought and the trial court refused to give.

The logic behind this conclusion escapes us. Oden apparently argues that the jury’s requests for evidence and for direction necessarily meant that the jury needed guidance regarding his identification. However, as noted above, Oden has not shown that identification was at issue in this case. Further, even if identification was at issue, Oden has not given any reason why the jury would be more confused about identification than any other issue in the case. Therefore, even if the trial court erred in failing to give CJI2d 7.8 to the jury, we conclude that Oden has not

⁴ *People v Young*, 146 Mich App 337, 339; 379 NW2d 491 (1985).

⁵ *People v Storch*, 176 Mich App 414, 417-420; 440 NW2d 14 (1989).

⁶ *Id.* at 419.

⁷ *Riddle, supra* at 124.

shown “that it is more probable than not that the error was outcome determinative.”⁸ Therefore, even if the trial court erred when it refused to give CJI2d 7.8 to the jury, Oden has not shown a miscarriage of justice requiring reversal.

III. Jury Instructions On Possession

A. Standard Of Review

Oden argues that the trial court abused its discretion by giving the jury CJI2d 12.7, which concerns not only actual possession, but also joint or shared possession. We review de novo claims of instructional error.⁹ “Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.”¹⁰ “It is error for the trial court to give an erroneous or misleading jury instruction on an essential element of the offense,” even if that jury instruction is one of the standard jury instructions.¹¹

B. CJI2d 12.7

The parties apparently agree that the prosecution was “not required to prove a particular type of possession.” Neither MCL 333.7403(2)(a)(ii), under which Oden was convicted, nor MCL 333.7401(2)(a)(ii), under which he was originally charged, requires any particular sort of “possession.” Oden has not alleged that CJI2d 12.7 is an inaccurate statement of the law. Oden contends only that CJI2d 12.7, without any editing, did not conform to the evidence, and its use by the trial court therefore prejudiced him.

It appears to us from his brief that Oden’s allegation of error has nothing to do with the instruction at all. That brief states:

In the instant case the Defendant conceded the elements of actual possession and specific intent to deliver to which the People concurred. That is, the jury knew that someone may have been in actual possession of the controlled substance and that person had the specific intent to deliver. The only issue is [sic] dispute was the identity of that person as being the defendant as the People had alleged.

The implication of this is that Oden made a tactical decision during trial to base his defense on the prosecution’s inability to prove that he was the person who had the cocaine. If Oden conceded possession, especially where none of the crimes involved required a particular kind of possession, he could not possibly be prejudiced if the jury then determined that there was, in fact, possession.

⁸ *Id.* at 125.

⁹ *Kurr, supra* at 327.

¹⁰ *Id.*

¹¹ *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

Oden also contends that the jury based its verdict on its ability, under the unedited version of CJI2d 12.7, to consider a definition of possession broader than actual possession. In support of this assertion, Oden cites generally to *People v Johnson*,¹² the student edition of a textbook not attached to defendant's appeal, and the 1972 "First Report of the National Commission on Marihuana and Drug Abuse."

First, we do not see how *People v Johnson* is relevant. Second, we have been unable to locate the textbook. Third, although the report was not attached to Oden's brief, our online review of the report¹³ revealed no legal support for Oden's position. Oden argues that because constructive possession could have occurred before actual possession, the jury could have convicted him of "the lesser crime of possession . . . without determining that the crime occurred on the date and time alleged." Even if this were a possibility, Oden has not established "that it is more probable than not that the error was outcome determinative."¹⁴ Further, a defendant may not "simply . . . announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. Failure to brief a question on appeal is tantamount to abandoning it."¹⁵ We conclude that Oden has not shown any error or prejudice and is not entitled to relief on this issue.

IV. Jury Instructions On Possession With Intent To Deliver And Possession

A. Standard Of Review

Oden claims that although he was charged only with possession with intent to deliver, the jury was instructed both as to possession with intent to deliver and possession. According to Oden, not only did this fail to provide him notice as to what allegations he must defend, it is also contrary to MCL § 768.32. Oden argues that, because the jury found him not guilty of the offense under which he was originally charged but guilty of the offense under which he was not charged, he conclusively suffered prejudice. This argument is entirely legal in nature. We review de novo questions of law.¹⁶

B. MCL 768.32

MCL 768.32 states, in relevant part:

(1) Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury . . .

¹² *People v Johnson*, 187 Mich App 621; 468 NW2d 307 (1991).

¹³ Available at <http://www.druglibrary.org/schaffer/library/studies/nc/ncmenu.htm>.

¹⁴ *Riddle, supra* at 125.

¹⁵ *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

¹⁶ *People v Watkins*, 468 Mich 233, 238; 661 NW2d 553 (2003).

may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment

(2) Upon an indictment for an offense specified in section 7401(2)(a)(i) or (ii) or section 7403(2)(a)(i) or (ii) . . . the jury . . . may find the accused not guilty of the offense in the degree charged in the indictment but may find the accused guilty of a degree of that offense inferior to that charged in the indictment only if the lesser included offense is a major controlled substance offense. A jury shall not be instructed as to other lesser included offenses involving the same controlled substance The jury shall be instructed to return a verdict of not guilty of an offense involving the controlled substance at issue if it finds that the evidence does not establish the defendant's guilt as to the commission of a major controlled substance offense involving that controlled substance

Oden concludes that the plain language of this statute precludes the trial court from instructing the jury with respect to MCL 7403(2)(a)(ii), possession of between 225 and 650 grams of cocaine, as a lesser included offense of MCL 7401(2)(a)(ii), possession of with intent to deliver between 225 and 650 grams of cocaine. However, *Torres*¹⁷ is directly on point and directly contrary to Oden's position. In that case, the defendant was charged under MCL 333.7401(2)(a)(i) but convicted by a jury under MCL 333.7403(2)(a)(i). Other than involving "an amount of 650 grams or more" instead of "an amount of 225 grams or more, but less than 650 grams," the charged and convicted offenses in *Torres* were identical to the charged and convicted offenses here.

This Court in *Torres* found that "[u]nder MCL 768.32(1); MSA 28.1055(1), an offense may be inferior to another even if the penalties for both offenses are identical" because

[t]he controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense [T]he defendant's due process notice rights are not violated because all the elements of the lesser offense have already been alleged by charging the defendant with the greater offense.^[18]

The Court went on to state that "the right to due process of law merely requires that a defendant cannot be convicted of an offense unless each element of the offense has been proved beyond a reasonable doubt," and concluded that the jury instructions "with regard to the lesser included offense of possession" had not only been appropriate but required.¹⁹ Therefore, Oden's contention that the possession with intent to deliver charge did not provide him with adequate notice of the possession charge is simply incorrect.

¹⁷ *Torres, supra* at 411.

¹⁸ *Id.* at 419-420.

¹⁹ *Id.* at 421.

In *Torres*, this Court did not specifically address MCL 768.32(2). However, Oden does not explain how his reference to subsection (2) applies to the present matter. That subsection clearly allows the jury to “find the accused guilty of a degree of that offense inferior to that charged in the indictment,” so long as “the lesser included offense is a major controlled substance offense.” Oden presumably relies on the language “a jury shall not be instructed as to other lesser included offenses involving the same controlled substance.” A reading of the statute suggests “other” refers to any offense that is not “a major controlled substance offense.” That does not mean the jury cannot be instructed with respect to lesser included offenses altogether. Therefore, we conclude that this argument fails on its merits.

V. Sentencing

A. Standard Of Review

Oden claims that the trial court imposed a minimum sentence outside the appropriate sentence range but did not place any substantial and compelling reasons for doing so on the record. Therefore, according to Oden, the trial court abused its discretion and Oden is entitled to remand for resentencing.

If the trial court’s sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant’s sentence. However, if the sentence is not within the guidelines range, the Court of Appeals must determine whether the trial court articulated a substantial and compelling reason to justify its departure from that range.^[20]

B. Oden’s Sentence

The trial court sentenced Oden to 20 to 30 years’ imprisonment. The judgment of sentence indicates that Oden was charged under MCL 333.7403(2)(a)(ii), which reads:

(2) A person who violates this section as to:

(a) a controlled substance classified in schedule 1 or 2 that is a narcotic drug described in section 7214(a)(iv) and:

* * *

(ii) which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.

²⁰ *People v Babcock*, ___ Mich ___, 666 NW2d 231 (Docket No. 121310, decided July 31, 2003).

Therefore, it would appear that Oden was sentenced to exactly the statutorily mandated time period. However, under MCL 769.34(3):

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in [MCL 777.1 *et seq.*] if the court has a substantial and compelling reason for that departure and states on the record the reasons for the departure. [Emphasis added.]

As the Michigan Supreme Court recently explained,

In 1998, the Legislature enacted statutory sentencing guidelines, M.C.L. 777.1 *et seq.* . . . Because the new guidelines are the product of legislative enactment, a judge’s discretion to depart from the range stated in the legislative guidelines is limited to those circumstances in which such a departure is allowed by the Legislature. Under the statutory sentencing guidelines, a departure is only allowed by the Legislature if there is a “substantial and compelling reason” for doing so.^[21]

Under MCL 777.13, Oden’s conviction is a Class A offense with a statutory maximum of thirty years. However, MCL 777.62 specifies in months the “minimum sentence ranges” for Class A offenses after scoring. The presentence investigation report indicates that Oden had a prior record score of zero points and an offense variable score of twenty points. According to the chart in MCL 777.62, Oden’s minimum sentence range would therefore be 27 to 45 months, although he claims it should only be 21 to 35 months. It is not necessary for us to decide which contention is correct. The trial court’s sentence of 20 years is outside of *both* ranges and the minimum sentence imposed “must presumptively be within the appropriate sentence range.”²²

Oden is therefore correct in stating that the trial court exceeded the sentencing guidelines without, under MCL 769.34(3), placing on the record substantial and compelling reasons. However, MCL 769.34(2)(a) provides an applicable exception to this requirement:

If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section.

As discussed, MCL 333.7403(2)(a)(ii) provides a statutory minimum sentence of 20 years. The trial court imposed a minimum sentence of 20 years. Under MCL 769.34(2)(a), therefore, the sentence imposed by the trial court “is not a departure.” This is consistent with this Court’s statement that “we believe that it is inappropriate to rely on the recommended minimum sentence under the guidelines as a substantial and compelling reason to depart from the mandatory

²¹ *Babcock, supra*, ___ Mich at ___.

²² *Babcock, supra*, ___ Mich at ___ n 7.

minimum terms prescribed by the statute.”²³ Therefore, despite the recommended sentence range under MCL 777.62, we conclude that the trial court did not depart from the appropriate sentence range by imposing the statutory minimum sentence of 20 years.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey

²³ *People v Izarraras-Placante*, 246 Mich App 490, 498; 633 NW2d 18 (2001).