

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ADAM TORRES,

Defendant-Appellant.

UNPUBLISHED

March 22, 2011

No. 296025

Lenawee Circuit Court

LC No. 09-014276-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ADAM TORRES,

Defendant-Appellant.

No. 296026

Lenawee Circuit Court

LC No. 09-014277-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ADAM TORRES,

Defendant-Appellant.

No. 296027

Lenawee Circuit Court

LC No. 09-014288-FH

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted in a jury trial of two counts of manufacture/delivery of a controlled substance (cocaine), MCL 333.7401(2)(a)(iv) (less than 50 grams), possession with

intent to deliver a controlled substance (cocaine), MCL 333.7401(2)(a)(iv) (less than 50 grams), and maintaining a drug house, MCL 333.7405(d). Defendant was sentenced to 46 to 480 months' imprisonment for each of his manufacture/delivery of a controlled substance convictions, to 46 to 480 months' imprisonment for his possession with intent to deliver a controlled substance, and, as a second habitual offender, MCL 769.10, to 21 to 36 months' imprisonment for his maintaining a drug house conviction. He appeals as of right. Because we conclude that there were no errors requiring reversal, we affirm.

I. BASIC FACTS

This case concerns a number of drugs transactions between an informant and defendant in May 2008. Randi Carr, the informant, was arrested on May 9, 2008, and was charged with possession with intent to deliver Ecstasy, possession with intent to deliver cocaine, and possession with intent to deliver marijuana. Carr made a deal with the OMNI unit, the state police drug unit covering the city of Adrian and Lenawee County, to act as an informant in exchange for pleading guilty to one charge of possession of cocaine. Carr arranged to purchase cocaine from defendant, whom Carr previously had met through a friend and from whom Carr had previously purchased drugs.

On May 12, 2008, Carr went to defendant's house, located on Erie Street and obtained defendant's telephone number from defendant's cousin. Carr spoke with Police Investigator Gregory Walsh and then called defendant around 9:15 p.m. to see if she could buy drugs from him. Defendant told Carr that he would be home in 15 minutes and she could stop by then. Carr went to the state police department in Adrian where she was searched by the police and where she received some prerecorded money totaling \$120 from Walsh. Carr then drove her black Durango directly to defendant's house located at 811 Erie Street in Adrian. Walsh followed Carr to the scene. Upon arriving at defendant's house, Carr parked across the street. She got out of her car and went to the front door of defendant's house. Defendant let her in to his house, and Carr stood in defendant's living room until defendant gave Carr a baggie of drugs. In return, Carr gave defendant the money she received from Walsh. Carr left defendant's house, returned to her car and drove to the state police department. Carr gave the drugs she obtained from defendant to the police.

A couple days later, on May 14, 2008, Carr called defendant a second time to see if she could purchase additional drugs. Carr again went to the state police department in Adrian where she was searched and received prerecorded money, this time totaling \$220, from Walsh. Carr drove from the police department in her black Durango to defendant's house on Erie Street. This time, Carr parked directly in front of defendant's house. Again, Carr exited her car and went to defendant's front door. Defendant opened the door and accompanied Carr to his kitchen. Defendant handed Carr a baggie with cocaine in it in the kitchen, and Carr gave defendant the money she received from Walsh. Carr left and returned to her vehicle. Carr drove back to the state police department. After arriving at the police department, Carr gave the drugs she obtained from defendant to Walsh.

Following the second transaction between defendant and Carr, Walsh obtained a search warrant for defendant's house. On May 15, 2008, at 10:15 p.m., Walsh and other police officers searched defendant's house, pursuant to the warrant. They approached defendant's front door

and yelled, “Police. Search Warrant.” No one answered the door. They used a ram to open the door and entered defendant’s house. No one was in the house when the police entered and searched it. In the kitchen, they found a digital scale and, in a trash bin by the refrigerator, a bunch of baggies with the corners ripped off. According to Walsh, baggies with missing corners are evidence of drug manufacture. They also located a receipt in the garbage with defendant’s name on it, dated April 30, 2008. They further found an ounce of cocaine in baggies inside a vitamin container on the kitchen counter. Walsh discovered mail with defendant’s name on it and the address for his house, 811 Erie Street, on the dining room table. Walsh also found mail addressed to other people.

On June 14, 2008, defendant signed “an official document” affirming that he resided at 811 Erie Street in Adrian and had been living there for approximately one year. Moreover, Walsh verified that defendant’s address with the Secretary of State was 811 Erie Street in Adrian. Defendant was not the owner of the house, and Walsh was unable to find a lease with defendant’s name on it.

Walsh delivered the three packets of alleged cocaine obtained through the transactions with defendant and from 811 Erie Street to Michigan state police controlled substance analyst, Elaine Daugherty, who tested them. All three packets did contain cocaine. The first sample from May 12, 2008 weighed 3.52 grams; the second amount from May 14, 2008 weighed 6.56 grams; and the third sample from May 15, 2008 weighed 7.12 grams.

After the prosecution completed its proofs, defendant moved for a directed verdict on all four charges, which was denied. Defendant was convicted on all counts charged. Following his jury trial, a hearing was held regarding whether defendant was subject to a sentence enhancement. Defendant agreed that he had a prior conviction. Although recognizing that the punishment was “harsh[,]” the trial court decided to double the guidelines range for his controlled substances convictions and order defendant to serve the terms of imprisonment consecutively. Defendant now appeals.

II. JURY INSTRUCTIONS

Defendant argues on appeal that, with regard to what occurred on May 15, 2008, the trial court improperly instructed the jury on the elements of possession with intent to deliver a controlled substance, a crime for which he was not charged. We disagree.

As this issue was not preserved at the trial court, we review the issue for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A defendant must establish that the error was plain, and that the error affected the outcome of the proceedings. *Id.* at 763. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence. *Id.* at 774.

“A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.” *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010) (internal quotation marks omitted). “A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner.” *People v Waclawski*, 286 Mich App

634, 676; 780 NW2d 321 (2009). Jury instructions are reviewed “in their entirety to determine if error requiring reversal occurred.” *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009) (internal quotation marks omitted). Even if imperfect, reversal is not required if jury instructions “fairly present the issues to be tried and sufficiently protect the defendant’s rights.” *Id.* However, the omission of an element of the crime in the jury instructions is a constitutional error. *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006).

In his felony information, defendant was charged with “delivery/manufacture” of a controlled substance under MCL 333.7401(2)(a)(iv) for the events that occurred on May 15, 2008. With regard to May 15, 2008, the trial court instructed the jury as follows:

[D]efendant is charged with the crime of illegal possessing, with intent to deliver, 7.12 grams of a mixture containing controlled substance, cocaine. To prove this charge, the prosecutor must prove each of the following elements:

First, that . . . defendant knowingly possessed a controlled substance.

Second, that . . . defendant intended to deliver this substance to someone else.

Third, that the substance possessed was cocaine, and . . . defendant knew it was.

Fourth, that the substance was in a mixture and weighed 7.12 grams.

Fifth, that . . . defendant was not legally authorized to possess this substance.

Defendant argues that the trial court improperly instructed the jury on possession with intent to deliver a controlled substance, a crime for which he was not charged, instead of manufacture/delivery of a controlled substance, which appeared in the felony information, for what transpired on May 15, 2008. However, defendant does not allege that he was not aware of the nature and character of the crime for which he was accused or that he was unable to prepare a defense. MCL 767.45(1); *People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994) quoting *People v Adams*, 389 Mich 222, 243; 205 NW2d 415(1973) (The indictment or information must identify the charge sufficiently that the defendant's “acquittal or conviction [would] bar a subsequent charge for the same offense” and must notify the defendant “of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and permit the court to pronounce judgment[.]”) In fact, the statute under which defendant was charged, MCL 333.7401, prohibits a defendant from “manufactur[ing], creat[ing], deliver[ing], or possess[ing] with intent to manufacture, create or deliver a controlled substance[.]” MCL 333.7401(1).¹ In other words, MCL 333.7401 forbids both the act of delivering a controlled substance and the act of possessing a controlled substance with the intent

¹ Defendant was charged specifically under MCL 333.7401(2)(a)(iv). Section (2)(a)(iv) refers to the amount of controlled substance at issue: in this case, less than 50 grams. However, the acts prohibited with regard to that amount are delineated in MCL 333.7401(1).

to deliver. As a result, defendant was apprised, based on the statutory citation in the felony information, of the type of conduct that was proscribed.

Moreover, at trial, defendant was clearly aware that he was being tried for possession with intent to deliver for what occurred on May 15, 2008. The prosecutor stated in his opening:

The possession with intent to deliver cocaine charge, which is the third of these three incidents, occurring on May 15th of 2008, there is no sale, but the penalty—excuse me, the crime that is being alleged here is very similar in that they're saying [defendant] had this cocaine, it was in his possession, it was under his control, and he had it for purposes of selling it at a later point.

Defense counsel did not object to the prosecutor's opening statement. Indeed, during his motion for a directed verdict, defense counsel stated:

We move to the May 15th issues of *the possession with intent to deliver* and maintaining the drug house. Again, no indication outside of a couple of – we have testimony that, on official documents, [defendant] listed that as his residence from a period of July [20]07 to September, roughly, . . . 2008. But, again, no one putting him in the house roughly—the last time somebody put him in the house was two weeks before May 12th and nothing after that. Two mailings, one March 10th, and then a bill of some sort for February of 2008 and nothing closer in time to that except for a receipt, with no identification of an address, that was thrown in the garbage, dated April 30th, 2008, which roughly puts within that two weeks prior to May 12th. Nothing to indicate that [defendant] had knowledge of what was going on in that house or had possession of any kind of narcotics in that house. [Emphasis added.]

As a result, defendant was plainly aware that he was being tried for possession with intent to deliver a controlled substance for the events of May 15, 2008. Accordingly, the trial court did not err in instructing the jury on the elements of possession with intent to deliver.

In any event, any error in the information could have been cured through an amendment. “The court may *at any time* before, during or *after* trial amend the indictment in respect to any defect, imperfection or omission in for substance or of any variance with the evidence.” MCL 767.76 (emphasis added). As a result, defendant cannot show that the forfeited error affected the outcome of the proceedings.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends that his counsel was ineffective for failing to object to the instructions given to the jury. Because we conclude that any objection would have been futile, we disagree.

With regard to claims of ineffective assistance of counsel, we review the trial court's factual findings for clear error and its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). As defendant did not establish a testimonial record regarding the ineffective assistance of counsel claim, our review is limited to

mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A lawyer is not ineffective for failing to assert a futile objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008).

Defense counsel was not ineffective for failing to object to the jury instructions given by the trial court because the objection would have been futile. As discussed above, concerning May 15, 2008, defendant was charged under MCL 333.7401, which encompasses the act of delivering a controlled substance and the deed of possessing a controlled substance with the intent to deliver. Moreover, defendant was obviously informed during trial that he was charged with possession with intent to deliver as evidenced by the prosecutor's statement during his opening and defense counsel's argument during his motion for directed verdict regarding the charge of possession with intent to deliver. As a result, the trial court's instructions to the jury were proper and any objection to them would have been groundless. Consequently, defense counsel's performance was not deficient for failing to object, and defendant was not denied the effective assistance of counsel.

Even if defense counsel was deficient for failing to object to the jury instructions, defendant cannot show he suffered prejudice. Since the trial court can amend the information at any time, MCL 767.76, it could have amended the information to reflect a charge of possession with intent to deliver. Moreover, because, based on the evidence in the record, defendant had "not been misled or prejudiced by the defect or variance" in the information, since he was plainly aware of the charge of possession with intent to deliver, defendant would not have been entitled to a discharge of the jury. MCL 767.76.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant asserts that the prosecution presented insufficient evidence to convict him of manufacture/delivery of a controlled substance under MCL 333.7401 for the events occurring on May 15, 2008. However, as discussed above, defendant was tried and convicted of possession with intent to deliver a controlled substance for what occurred on May 15, 2008, and not manufacture/delivery of a controlled substance. As a result, we need not address whether there was sufficient evidence to convict defendant of manufacture/delivery of a controlled substance. To the extent that defendant is arguing that there was insufficient evidence for his possession with intent to deliver a controlled substance, we disagree.

When analyzing a claim based on insufficient evidence, we review the record de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We review the evidence in a

light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

To prove that a defendant possessed a controlled substance with intent to deliver, a prosecutor must show: (1) that the substance was a controlled substance, “(2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance with intent to deliver.” MCL 333.7401(1); *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Possession may be demonstrated through actual or constructive possession. *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). Constructive possession occurs “when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.” *Id.* “Intent to deliver may be inferred from the quantity of drugs possessed by a defendant[,]” and from prior instances of delivery. *McGhee*, 268 Mich App at 611.

There was sufficient evidence that defendant possessed with intent to deliver cocaine on May 15, 2008. The prosecution demonstrated that the substance found in defendant’s house on May 15, 2008, was cocaine and weighed 7.12 grams. Additionally, defendant was not authorized to have the cocaine. Moreover, sufficient evidence was presented that defendant constructively possessed the cocaine with intent to deliver. Defendant clearly lived at 811 Erie Street. Mail was discovered there with defendant’s name on it and the address 811 Erie Street; he used that address with the secretary of state; and he affirmed that he lived there on an official document. Further, Carr testified that she purchased cocaine from defendant at 811 Erie Street on May 12, 2008 and May 14, 2008. There was sufficient evidence that defendant had intent to deliver based on the amount of drugs found, the scale and baggies discovered in the kitchen, and the fact that Carr had previously purchased drugs from defendant. Viewing the evidence in the light most favorable to the prosecution, sufficient evidence was admitted to convict defendant of possession with intent to deliver cocaine for the events of May 15, 2008.

V. SENTENCING

Defendant’s final issue on appeal is that the trial court erred in enhancing defendant’s sentence and ordering defendant to serve the sentences consecutively. We disagree.

“The imposition of a sentence is reviewed for an abuse of discretion.” *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008). We review de novo issues of statutory interpretation on appeal. *People v Lowe*, 484 Mich 718, 720; 773 NW2d 1 (2009).

A person convicted of a second or subsequent controlled substance offense under Article 7 of the Public Health Code, MCL 333.7401 *et seq.*, “may be imprisoned for a term not more than twice the term *otherwise authorized* or fined an amount not more than twice that otherwise authorized, or both.” MCL 333.7413(2); *People v Davenport*, 205 Mich App 399, 401; 522 NW2d 339 (1994) (emphasis added). This sentence enhancement provision “allows a sentencing court to punish repeat drug offenders by doubling the . . . sentence otherwise authorized.” *Id.*

Enhancement of the sentence is discretionary with the sentencing court. *People v Green*, 205 Mich App 342, 347; 517 NW2d 782 (1994). This sentencing enhancement applies to the minimum sentence as calculated under the legislative guidelines scheme. MCL 777.18; *People v Williams*, 268 Mich App 416, 430; 707 NW2d 624 (2005).²

Additionally, a term of imprisonment for certain controlled substances offenses under MCL 333.7401 may be imposed consecutively to any term inflicted for the commission of another felony. MCL 333.7401(3); *Davenport*, 205 Mich App at 401. “Another felony” may include an additional controlled substances violation. *Id.* at 402. A defendant who is sentenced under the enhanced sentence provisions of the Public Health Code for controlled substances violations may also be sentenced to consecutive terms for those enhanced sentences. MCL 333.7401(3); MCL 333.7413(2); *Davenport*, 205 Mich App at 402.

The trial court did not err in enhancing defendant’s sentences and in ordering defendant to serve them consecutively. Defendant acknowledged that before this trial he had previously been convicted of possession with intent to deliver cocaine. Defendant then was convicted of three controlled substance offenses under MCL 333.7401(2)(a)(iv). As a result, each of those convictions is subject to the enhancement under MCL 333.7413(2) at the discretion of the trial court. Additionally, according to MCL 333.7401(3), each sentence may be served consecutively. Consequently, we cannot conclude that the trial abused its discretion in doubling the guidelines range for each of defendant’s controlled substance convictions and in ordering defendant to serve those sentences consecutively.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause

² If the sentence enhancement under MCL 333.7413(2) is applied, the general habitual offender statute does not apply. MCL 769.10(1)(c); *People v Wyrick*, 265 Mich App 483, 493; 695 NW2d 555 (2005), vacated in part on other grounds, 474 Mich 947 (2005).