

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD BERNARD ROGERS, a/k/a DAROLD  
ROGERS, a/k/a MICHAEL GRAHAM, a/k/a  
DARYL SPANISH,

Defendant-Appellant.

---

UNPUBLISHED

March 18, 2008

No. 276089

Wayne Circuit Court

LC No. 06-010620-01

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

W.H. ROGERS, JR.,

Defendant-Appellant.

---

No. 276395

Wayne Circuit Court

LC No. 06-010994-01

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

In Docket No. 276089, defendant, Richard Bernard Rogers, appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). Richard was sentenced, as a fourth habitual offender, MCL 769.12, to 3 to 20 years in prison for the possession with intent to deliver heroin conviction, and 3 to 15 years in prison for the possession with intent to deliver marijuana conviction. We affirm in part, reverse in part, vacate in part, and remand.

In Docket No. 276395, defendant, W.H. Rogers, Jr., appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. W.H. was sentenced, as a

second habitual offender, MCL 769.10, to 1 to 30 years in prison for each possession with intent to deliver conviction, 12 to 90 months in prison for the felon in possession conviction, and two years in prison for the felony-firearm conviction. We affirm.

### I. Sufficiency Of The Evidence

On appeal, both defendants argue that the evidence was insufficient to support their convictions of possession with intent to deliver. This Court reviews claims of insufficient evidence de novo, viewing the evidence in a light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). While our review is de novo, we must defer to the jury's role to determine what inferences may be drawn from the evidence, and what weight to afford those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Further, the jury is better situated to make credibility determinations with regard to witness testimony. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The elements of possession with intent to deliver are “(1) that the recovered substance is a narcotic, (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 intending to deliver it.” *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Possession with the intent to deliver requires both possession and intent. *Id.* Both defendants challenge the intent to deliver element.

“Actual delivery is not required to prove intent to deliver.” *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998). Intent may be proved from the facts and circumstances, and minimal circumstantial evidence is sufficient. *Id.* at 517-518. Intent to deliver can be inferred from the quantity and packaging of the drugs, as well as the circumstances of the arrest. *Hardiman*, *supra* at 422 n 5; *Fetterley*, *supra* at 518.

#### A. Richard

Defendants and another individual were observed making hand-to-hand drug transactions on the porch of their house. When police officers raided the house they confiscated drugs from both defendants. Richard had 2.78 grams of marijuana and .17 grams of heroin. He also had \$231 in cash. Both drugs were found in a plastic bag in Richard's pocket. The heroin was separated into four individual packets and the marijuana was loose in the bag. The officer who arrested Richard testified that the amount of heroin was consistent with either sale or use, but the packaging was consistent with sale. The officer also testified that it would be unusual to sell loose marijuana without individually packaging it. There were no other packaging materials found in the house. Defendants presented testimony from another brother and from two acquaintances averring that no drug transactions ever took place in this house.

The circumstances of the arrest suggest that the occupants of the house were engaging in drug sales from the house. A rational jury could conclude from the money and individual packets of heroin found in Richard's pockets that Richard possessed the heroin with the intent to deliver it. The marijuana, however, was not packaged for sale. Richard was observed passing an unseen object in a cupped hand, consistent with a drug transaction. He did not possess any

marijuana ready for such a hand-to-hand transaction. The small quantity of the marijuana and the absence of packaging or other paraphernalia consistent with selling marijuana further support the notion that Richard was selling heroin but not marijuana. *Hardiman, supra* at 422 n 5. Absent any evidence that this small amount of marijuana was intended for sale, a rational jury could not find, beyond a reasonable doubt, that Richard possessed it with the intent to deliver. Richard's conviction of intent to deliver marijuana is therefore reversed.

#### B. W.H.

W.H. had 1.55 grams of cocaine and .04 grams of heroin. The cocaine was loose and the heroin was in a paper packet. The officer who arrested W.H. testified that the amount of cocaine was not consistent with personal use because it is usually sold in .1 or .2 gram quantities. The estimated value of the chunk of cocaine was \$100. The packet in which the heroin was found was consistent with hand-to-hand sales of heroin. The surveilling officer observed W.H. engaging in drug transactions. W.H. was found with two kinds of drugs on him. The cocaine was of a quantity large enough to support an inference of the sale of drugs. *Fetterley, supra* at 518. The heroin, while of a smaller quantity, was packaged consistent with the sale of drugs. *Id.* Further, W.H. was found in a house with other individuals who possessed cash, drugs, or both, and he had a gun.

W.H. claims that the testimony of defendants' witnesses created reasonable doubt that anyone was selling drugs at the house in question. The jury was entitled to resolve any inconsistencies between the testimony of the officers and that of defendants' witnesses. *Hardiman, supra* at 428. The circumstances of his arrest, and the packaging and quantity of the drugs found in W.H.'s possession, are sufficient that a rational trier of fact could find beyond a reasonable doubt that he possessed cocaine and heroin with the intent to deliver it.

W.H. makes a similar argument that his motion for a directed verdict was improperly denied because the prosecutor did not present sufficient evidence to establish the elements of the crimes of possession with intent to deliver heroin and cocaine. Like claims of insufficient evidence, we review a trial court's decision on a motion for directed verdict de novo. *People v Martin*, 271 Mich App 280, 319-320; 721 NW2d 815 (2006). This Court must determine whether the prosecutor's evidence, when viewed in the light most favorable to the prosecutor, could persuade a rational jury that the elements of the crime have been proved beyond a reasonable doubt. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007); *Martin, supra* at 319-320. All conflicts in the evidence must be resolved in favor of the prosecutor. *Passage, supra* at 1. The elements of the crime may be proved by circumstantial evidence and any reasonable inferences. *Id.* This Court will not interfere with the role of the trial court in making credibility determinations and determining the weight of the evidence. *Id.*

We have already determined that there was sufficient evidence to support W.H.'s convictions at the close of the trial. The only evidence presented by defendants was intended to establish some reasonable doubt regarding the officers' description of the events. The evidence presented at the close of the prosecutor's case was sufficient to prove the elements of possession with intent to deliver.

W.H. also contends that there was insufficient evidence to prove his identity with regard to his prior conviction to support his convictions of felon in possession. The elements of felon in

possession of a firearm are, for the instant case: (1) the defendant possessed a firearm, (2) the defendant has a previous felony conviction, and (3) it is less than five years since the defendant's discharge from probation. *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004). W.H. contends that the prosecutor failed to prove that he has a prior felony conviction.

At trial, the prosecutor introduced a certified copy of W.H.'s previous judgment of sentence that was admitted into evidence with no objection from defense counsel. Further, a police officer testified that he confirmed W.H.'s prior criminal history by running a computer background check based on his fingerprints. The officer identified W.H. at trial as matching the photograph associated with the criminal history. Three officers testifying at trial indicated that they were aware that the Rogers brothers sometimes used each other's names. W.H. contends that this raises a reasonable doubt about whether the certified judgment of sentence proves that *he* was previously convicted of a felony.

W.H. has not presented any evidence to establish that the computer verification of his identity is faulty in any way. While it appears true that the Rogers brothers have caused confusion regarding their identities in the past, this was cleared up by the use of W.H.'s fingerprints and a photograph to confirm his identity. Any conflicts in the evidence must be resolved in favor of the prosecutor. *Id.* There was sufficient evidence for a rational jury to conclude that W.H. had a prior felony conviction.

## II. Richard's Sentencing Claims

### A. Attorney Fee Reimbursement

Richard argues that the trial court failed to consider his ability to pay when it ordered him to pay \$600 toward the expense of his court-appointed attorney. We agree. Richard did not raise this issue at sentencing so we review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).<sup>1</sup>

The prosecutor argues that Richard's objection to repayment is premature, relying on a statement in *Dunbar* that reads, "[I]n most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment." *Dunbar, supra* at 256. The statement in *Dunbar* is dictum and that Court did not even adhere to this qualification itself. *Id.* Further, our Supreme Court has issued orders consistent with the holding of *Dunbar*, requiring immediate consideration of ability to pay. See *Arnone, supra* at 908; *DeJesus, supra* at 996.

---

<sup>1</sup> Richard argues that the trial court did not issue an order separate from the judgment of sentence pertaining to the attorney fee reimbursement, citing *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004). Notwithstanding MCL 769.1K(1)(b)(iii), our Supreme Court has confirmed the ruling in *Dunbar* that the reimbursement order must be separate from the judgment of sentence. *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007); *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007). Nevertheless, the trial court satisfied this requirement when it issued an order separate from the judgment of sentence that specifies the reimbursement requirement.

Absent an objection by the defendant, and none was made here, a court does not need to make formal findings on the record regarding the defendant's ability to pay. *Dunbar, supra* at 254. The sentencing court, however, must provide some indication that it considered the ability to pay, which can be as little as a "statement that it considered the defendant's ability to pay." *Id.*

The trial court, here, said merely, "You'll pay \$600 for your court appointed attorney fees and \$60 for your crime victim assessment." There is no mention of Richard's ability to pay, and thus, there is plain error, *Carines, supra* at 763, as it is a violation of due process to require such reimbursement without some consideration of ability to pay. *Dunbar, supra* at 254. Thus, the order for reimbursement of attorney fees is vacated, and the case is remanded to the trial court to determine the question of attorney fee reimbursement considering Richard's ability to pay. *Arnone, supra* at 908; *Dunbar, supra* at 254-255.

### B. Credit For Time Served

Richard next argues that he should have been granted credit toward his sentence for time served in jail prior to sentencing. Richard was held on a parole detainer prior to sentencing for the instant offenses. He argues that because there is no evidence that his jail time was credited to his paroled sentence, the time must be credited toward his new sentence.

Ordinarily, a defendant who has served time in jail before sentencing is entitled to credit for that time. MCL 769.11b; *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006). However, when a parolee is arrested, he is held pursuant to a parole detainer, and not entitled to credit on a new offense. *Stead, supra* at 551-552. The defendant *is* entitled to credit against the previous, unfinished sentence for which he was paroled. *Id.* at 552.

Richard argues that he was not required to serve any additional time on his previous sentence, so there was no sentence to which to credit his time spent in jail before sentencing. MCL 769.11b requires that a defendant who is held in jail prior to sentencing "because of being denied or unable to furnish bond for the offense of which he is convicted," be given credit for the time served. Richard was held, however, on a parole detainer; he was neither granted nor denied bond. *People v Seiders*, 262 Mich App 702, 706-707; 686 NW2d 821 (2004). Thus, by the plain language of MCL 769.11b, he is entitled to credit only toward his paroled sentence. *Id.* at 707; *Stead, supra* at 552.

The record does not disclose whether Richard was required to serve more time on his paroled sentence. Nevertheless, he is only entitled to credit toward that sentence. The trial court did not err when it denied him credit toward his new sentence.

### III. W.H.'s Sentencing Claim

W.H. contends that his sentence is disproportionate and, thus, violates the guarantee against cruel and/or unusual punishment guaranteed by the United States and Michigan Constitutions. US Const, Am VIII; Const 1963, art 1, § 16. He argues that his sentences were disproportionate because the evidence presented against him was poor in quality. He further argues that the trial court erred in not adhering to the recommendations of his presentence report. We disagree.

The sentencing guidelines provide a minimum sentence range of 5 to 28 months for W.H. This range is a “straddle cell,” permitting the court to sentence the defendant to probation or a term of imprisonment. MCL 769.34(4)(c). He was subject to a mandatory two-year prison sentence for his felony-firearm conviction. The presentence report recommended probation for the other three convictions, noting the mandatory prison term.

Under the sentencing guidelines act, MCL 769.34, a minimum sentence within the appropriate guidelines range is not reviewable by this court absent a factual or constitutional error. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). While the court did not follow the recommendation of the presentence report, the minimum sentence is, nevertheless, within W.H.’s minimum guidelines range, as he acknowledges. Thus, defendant’s claim is limited to the constitutional claim of whether his sentence is cruel and/or unusual. *Conley*, *supra* at 316.

In determining whether a punishment is cruel or unusual, this Court must consider whether the penalty is proportionate to the gravity of the offense. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004); *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996). The Supreme Court has previously recognized that the Legislature subscribed to the principle of proportionality when it promulgated the sentencing guidelines. *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003). Therefore, a sentence that is within the guidelines range is presumptively proportionate. *Id.*; *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

W.H.’s primary argument is that the quality of the evidence against him was weak and that the court’s sentence was therefore disproportionate. W.H. misunderstands the notion of a criminal conviction as if it is registered on a sliding scale. The jury’s conviction is all-or-nothing and the quality of the evidence presented against a defendant may not be collaterally attacked by an attempt to mitigate the sentence imposed. This argument is meritless.

W.H. also argues that he is a drug addict and in need of compassion and rehabilitation. The sentencing guidelines range is presumptively proportionate, however. *Babcock*, *supra* at 263. W.H.’s need for rehabilitation does nothing to negate the gravity of his offenses or the presumption that his sentence is proportionate. Further, W.H. focuses on the fact that he was not sentenced to probation, but ignores the fact that he could have been sentenced to more than twice as long of a minimum sentence under the sentencing guidelines. Defendant’s sentence is proportionate and therefore not cruel or unusual. *Drohan*, *supra* at 92.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray  
/s/ Richard A. Bandstra  
/s/ Karen M. Fort Hood