

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM CLARENCE KOCH,

Defendant-Appellant.

UNPUBLISHED

April 22, 2010

No. 289948

Allegan Circuit Court

LC No. 08-015628-FH

Before: OWENS, P.J., AND SAWYER AND O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession of a chemical used for the manufacture of a controlled substance, MCL 333.7401c(1)(b), (2)(f), entered after a jury trial. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Celia Kehrberg testified that she, Jason Smith, and defendant smoked methamphetamine at her home. Thereafter, the three talked about purchasing Sudafed pills, drove in Kehrberg's car to another residence where Smith went inside and obtained money, and then drove to several stores. Kehrberg purchased the Sudafed pills. She stated that Smith supplied most of the money she used. Defendant may have given her a dollar or two; she could not recall specifically whether defendant contributed money for the purchases. Defendant sat in the back seat as the group drove from store to store. Kehrberg stated that she assumed that the pills would be used to manufacture methamphetamine. Kehrberg stated that when she entered a Meijer store to purchase Sudafed she realized that she did not have sufficient funds, so she returned to her car and took change from the center console. Defendant may have helped her look for or count change. Kehrberg denied telling the police that after she, Smith, and defendant smoked methamphetamine, they discussed going out to obtain more pills.

Law enforcement officials were informed that a group of persons in a particular vehicle was going from store to store purchasing Sudafed pills. A deputy sheriff responded to the Meijer store and located the car. He made contact with the car and observed Kehrberg and defendant counting change. Kehrberg gave consent for a search of her vehicle. A detective responded to the Meijer store, located Kehrberg's car, performed a cursory search, and located a box containing pseudoephedrine pills and empty pill boxes, as well as paraphernalia for smoking methamphetamine. The detective spoke with Kehrberg at Kehrberg's request, and she told him that Smith and defendant formulated the plan to buy the pills. She told him that defendant gave her money with which to make the purchases, and that defendant went into the house at which

they stopped to obtain more money. A second detective, who was qualified as an expert witness in the area of the manufacture of methamphetamine, testified that initially, defendant denied using methamphetamine or knowing anything about the purchase of Sudafed pills. Eventually, defendant admitted both that he and the others had smoked methamphetamine earlier that day, and that the group had visited several stores. He denied participating in the purchase of the pills.

At the close of the prosecution's proofs defendant moved for a directed verdict, arguing that the prosecution presented insufficient evidence of possession or knowledge. The trial court denied the motion, finding that the evidence would allow a rational trier of fact to find that defendant had knowledge of the plan to purchase the pills, participated in the purchase by helping to count change, and had collective possession of the pills.

At sentencing, defendant requested that the trial court depart below the guidelines, and allow him to complete a methamphetamine diversion program. The trial court responded:

I understand from reviewing this report that you've been through several programs before unsuccessfully. The Sentencing Guidelines here are as a fourth offender require prison. You were on parole at the time this occurred. Regardless of what excuse has been provided to me the Court can't ignore all of those factors. I am willing to go somewhat under the guidelines, looking at the fact that you have made some effort here. The Court does note however you exercised your right to a trial by jury which is certainly your absolute right, and I have no quarrel with that, but I guess what does bother me is that it wasn't until after that trial that you got serious about getting into the Meth Diversion Program and to me that speaks volumes about what your sincerity was, and I'm not at this point convinced that it isn't just being used as a tool to avoid further incarceration.

The trial court sentenced defendant to serve five to 20 years in prison.

On appeal, defendant argues that the trial court erred by denying the motion for a directed verdict and that the evidence was insufficient to support the verdict because the evidence did not establish beyond a reasonable doubt that defendant possessed a chemical that he knew or had reason to know would be used to manufacture a controlled substance. We disagree.

We review a trial court's decision on a motion for a directed verdict de novo. *People v Passage*, 277 Mich App 175, 176; 743 NW2d 746 (2007).

In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Bulls*, 262 Mich App 618, 623; 687 NW2d 159 (2004); *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

Defendant was convicted of knowingly possessing a chemical used to manufacture a controlled substance, contrary to MCL 333.7401c(1)(b). That statute provides:

(1) A person shall not do any of the following:

* * *

(b) Own or possess any chemical or laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.

Possession of a controlled substance exists when a defendant has dominion or control over the substance with knowledge of its possession or character. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). Possession of a controlled substance may be actual or constructive. The critical question is whether the defendant had dominion or control over the substance. Mere presence is insufficient. Some additional link between the defendant and the controlled substance must be shown. Circumstantial evidence and reasonable inferences drawn from the evidence are sufficient to prove possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Constructive possession may be sole or joint. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1998).

The evidence showed that defendant smoked methamphetamine with Kehrberg and Smith. Kehrberg's testimony, which the jury was entitled to accept, *Milstead*, 250 Mich App at 404, supported a finding that the group discussed purchasing more Sudafed pills, and drove to several stores to do so. From this evidence the jury was entitled to infer that defendant knew that the pills would be used to make more methamphetamine. *Vaughn*, 186 Mich App at 389-390.

No evidence showed that defendant ever had actual possession of the Sudafed pills. However, Kehrberg testified that defendant may have given her some money toward the purchase of the pills. She also testified that when she returned to her car to obtain more money to make a purchase at Meijer, defendant may have helped her count change for that purpose. Deputy Miller testified that he observed defendant counting change in the car. This evidence supported a finding that defendant had at least constructive, joint possession of the pills. *Wolfe*, 440 Mich at 519-520; *Fetterley*, 229 Mich App at 515.

The trial court did not err by denying defendant's motion for a directed verdict. The evidence, while not overwhelming, was legally sufficient to support defendant's conviction.

Next, defendant argues that he is entitled to be resentenced because the trial court improperly based its sentencing decision on defendant's assertion of innocence and his decision to have a jury trial. We disagree.

Defendant did not object to the trial court's remarks at sentencing. We review this issue for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A fair reading of the trial court's remarks indicates that the trial court did not base its decision to sentence defendant to prison rather than place him in a diversion program on either defendant's protestation of innocence or defendant's decision to have a jury trial. Rather, the trial court's remarks regarding defendant's belated request to enter a diversion program indicated

that the trial court believed that defendant was attempting to manipulate the system after failing to prevail at trial. Defendant has not shown that the trial court committed plain error.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell