

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 19, 2012

v

PENO DERONN WASHINGTON,
Defendant-Appellant.

No. 300630
Oakland Circuit Court
LC No. 2010-231214-FH

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of 50 or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 99 months to 20 years for the cocaine conviction and 25 days for the marijuana conviction. He appeals as of right. We affirm, but remand for correction of the sentencing information report.

Defendant's convictions arise from the seizure of cocaine and marijuana during the execution of a search warrant at a 900-square foot, one-story, two-bedroom house in Pontiac. Defendant did not own the house, had a different residence, and was not the person named in the search warrant. During pre-raid surveillance, officers observed numerous short-term visits by different unidentified individuals. When the police entered the house, defendant was the sole occupant and was found in the front living room where the cocaine and marijuana were discovered hidden in a sectional sofa. The prosecutor's theory at trial was that defendant constructively possessed the cocaine and marijuana. The defense argued that defendant did not live in the house and had no knowledge of the concealed drugs.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence that he possessed the drugs found inside the home. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748,

amended 441 Mich 1201 (1992). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury’s verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant challenges only the possession element of the two drug offenses. Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe, supra* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 520. A person’s presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id.* Instead, some additional connection between the defendant and the contraband must be shown. *Id.* “The essential question is whether the defendant had dominion or control over the controlled substance.” *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Viewed in a light most favorable to the prosecution, the circumstantial evidence established a sufficient nexus between defendant and the contraband discovered in the home. During pre-raid surveillance, law enforcement officers observed numerous short-term visits by different individuals, which officers explained was indicative of drug trafficking. Defendant was not observed entering or leaving the premises during the hours of surveillance. When the search warrant was executed, defendant was the only person inside the relatively small house and he was in the same room—the living room—where 73.4 grams of cocaine and 26 grams of marijuana were hidden inside a sectional sofa. While the drugs were not in plain view, an expert in street level narcotics trafficking testified that drug dealers regularly hide their inventory to avoid theft or arrest and that furniture is a common place to conceal their supply. Defendant had \$1,125 in his pockets, including 48 twenty-dollar bills. According to the expert testimony, there is a typical quantity of crack cocaine, referred to as a “twenty,” that is sold for \$20. Drug packing materials, including a digital scale, plastic baggies, and multiple boxes of baking soda (used to make crack cocaine), were found in the kitchen, which was directly adjacent to where defendant and the contraband were found.

Although defendant had a different residence, an expert explained that it is normal for drug dealers to sell drugs from vacant houses or houses belonging to their customers to avoid suspicion at their actual residences. Defendant repeatedly claimed that the house was owned by his aunt, but he did not know her last name and admitted that she was not his actual aunt. The police determined that the registered owner of the house died in 2007. The expert further explained that, given the amount and street value of the seized contraband, it would be “extremely uncommon” and “very unusual” for a drug dealer to have left that inventory alone and unguarded in a Pontiac house. When the warrant was executed, defendant was in his stocking feet or bedroom slippers, and his size 12 boots were on the living room floor. In the master bedroom, officers found additional pairs of size 12 shoes, as well as size 3XL and 4XL clothing, which was consistent with defendant’s large physique and with the size of the tee-shirt he was wearing.

The reasonable inferences arising from this evidence, considered together, are sufficient to support a finding that defendant was not simply present in the house, but was staying there and

had control of the contraband that was found there. The same challenges to the weight and credibility of the evidence that defendant raises on appeal were made to the jury during trial. We will not interfere with the jury's role of determining issues of weight and credibility. *Wolfe*, 440 Mich at 514. Rather, we must draw all reasonable inferences and make credibility choices in support of the jury's verdict, and our deferential standard of review "is the same whether the evidence is direct or circumstantial." *Nowack*, 462 Mich at 400. Accordingly, the evidence was sufficient to support defendant's convictions.

II. REQUESTED JURY INSTRUCTION

We reject defendant's next claim that the trial court erred by denying his request to instruct the jury on "mere presence" in accordance with CJI2d 8.5. We review a trial court's decision whether an instruction is applicable to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). A criminal defendant has the right to have a properly instructed jury. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). "[J]ury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000) (citation omitted). "Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction." *Id.*

The requested jury instruction was not applicable to the facts of this case. The placement of CJI2d 8.5 in the jury instructions within the aiding and abetting chapter and its specific language indicate that a mere presence instruction is appropriate when a defendant is accused of assisting someone else in the commission of a crime. *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995); see, also, the use notes for CJI2d 8.5. Defendant was not charged under an aiding and abetting theory and there is no evidence that he was assisting anyone in possessing the drugs as contemplated by CJI2d 8.5. The prosecutor's theory at trial was that defendant, the only person in the house, constructively possessed the contraband. The defense asserted that defendant did not live in the house and had no knowledge of the presence of drugs, i.e., that defendant had no connection to the alleged crime. Thus, aiding and abetting was not an issue at trial.

Further, the trial court's instructions, which included definitions of constructive possession and intent, fairly presented the applicable law to the jury, protected defendant's rights, and encompassed defendant's general claim that he was "merely present" in the home. The court specifically instructed the jury that it "is not enough if the defendant merely knew about the cocaine and/or marijuana," and that defendant possessed the drugs "only if he had control of them or the right to control them either alone or together with someone else." Under these circumstances, reversal is not warranted.

III. THE SCORING OF OV 13

Defendant lastly argues that the trial court erred in scoring 10 points for offense variable (OV) 13 of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular

score.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision “for which there is any evidence in support will be upheld.” *Id.* (citation omitted).

A score of 10 points is appropriate for OV 13 when “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43. The parties agree that defendant has only one conviction that can be considered for purposes of OV 13, that being his conviction for the instant offense, and that the trial court therefore erred in scoring OV 13 at 10 points. However, as defendant concedes, the scoring error does not affect the appropriate guidelines range, so defendant is not entitled to resentencing. See MCL 769.34(10); *People v Francisco*, 474 Mich 82, 89-90 n 8; 711 NW2d 44 (2006). Therefore, we will not disturb defendant’s sentence. As requested by defendant, however, we remand this case to the trial court for the ministerial task of correcting the sentencing information report to reflect a score of zero points for OV 13.

Affirmed and remanded for correction of the sentencing information report in accordance with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra