

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH THOMAS,

Defendant-Appellant.

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UNPUBLISHED

July 15, 1997

No. 196029

Recorder's Court

LC No. 95-009292

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of delivery of heroin under fifty grams, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant to eight to twenty years' imprisonment. We affirm.

Defendant argues that the evidence presented at trial was insufficient to sustain his conviction for delivery of heroin. We disagree. When reviewing a claim of insufficiency of the evidence, this Court must view the evidence in the 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. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). To sustain a conviction for delivery of heroin in an amount less than fifty grams, the prosecution is required to show (1) that the defendant delivered a controlled substance; (2) that the substance delivered was heroin; (3) that the defendant knew he was delivering heroin; and (4) that the substance was in a mixture that weighed less than fifty grams. MCL 333.7401; MSA 14.15(7401); CJI2d 12.2. Delivery is defined as actual, constructive, or attempted transfer of a substance. MCL 333.7105(1); MSA 14.15(7105)(1).

The record indicates that defendant was seen standing on the street with a clear plastic bag. At least three times, he was approached by different individuals who spoke with him for a short while, then handed him some money. Defendant then handed each individual a small package of tissue paper, which type of paper was generally used to package heroin. The arresting officer observed a female approach defendant, talk to him for a while, and then count out numerous U.S. currency bills, which she handed to defendant. Defendant then handed the female vendee the clear plastic bag that he held,

which contained several of the tissue paper packages. When defendant was arrested immediately following the exchange, he swallowed three or four of these tissue paper packages. When the female vendee was arrested immediately following the exchange, the plastic bag that defendant handed to her was recovered, and the small tissue paper packages contained a mixture of heroin. We believe that a rational trier of fact could find from the above evidence that the essential elements of delivery of heroin were proven beyond a reasonable doubt.

Defendant next argues that the trial court made several errors regarding the admission of various testimony. We disagree. Because defendant either failed to object at trial or did not specify the same ground for objection on appeal that he asserted at trial, we conclude that defendant's claims of evidentiary error are unpreserved. MRE 103(a)(1); *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994). Therefore, we will review the issues only to the extent that a substantial right of defendant's may have been affected. MRE 103(a)(1); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Defendant's first claim of evidentiary error is that he was prejudiced by the admission of the arresting officer's testimony that he knew defendant as a prior narcotics seller. Our review of the record indicates that the officer did not provide such testimony. The officer testified that his attention was drawn to the area in which defendant was located because he noticed a person whom he recognized as a past drug seller. However, the officer indicated that there were two men present, only one of whom was defendant. The officer never identified defendant as the known drug seller. We find no substantial right affected by this testimony.

Defendant also argues that the trial court improperly admitted the arresting officer's testimony that defendant swallowed narcotics on prior occasions when the officer had attempted to arrest him. Our review of the record indicates that during cross-examination, defense counsel inquired of the officer regarding his prior attempts to arrest defendant. Specifically, defense counsel asked the officer whether he had ever found defendant in possession of narcotics prior to the present offense. The officer responded that defendant had swallowed the narcotics during each previous encounter. Defense counsel did not object to this answer or ask that it be stricken. We will not allow defendant to predicate error on an action that he deemed appropriate at trial. *Barclay, supra*.

Next, defendant claims that the arresting officer improperly provided opinion testimony on an ultimate issue when he testified that defendant possessed heroin because he swallowed tissue paper packages when he was arrested. We disagree. Our review of the record indicates that the officer never testified that defendant possessed heroin. The officer did testify that defendant swallowed three or four tissue paper packages at the time that he was arrested. The officer indicated that he suspected those packages contained heroin because he had seen such packages hundreds of times during his tenure as a police officer, and such packages were generally used to package heroin. The officer did not testify that defendant did in fact possess heroin. That issue was properly left to the jury to resolve. We conclude that the officer properly provided testimony only from his personal knowledge, consistent with the requirements of MRE 602.

Defendant also claims that the arresting officer testified to the ultimate issue that defendant delivered heroin, based on his observation of heroin on the vendee's person. Again, we find no support in the record for defendant's contention. The officer never testified that he believed that defendant delivered heroin. The officer merely testified that he saw defendant hand a plastic bag to the vendee that contained several small tissue paper packages, and that the vendee handed defendant U.S. currency. The officer also indicated that the vendee had that same plastic bag in her purse when he arrested her. Contrary to defendant's assertion, the officer did not testify to any conclusions of law or ultimate issues.

Defendant next claims that the prosecutor improperly argued during closing that defendant swallowed heroin when he swallowed the tissue paper packages at the time of his arrest. Defendant's argument is without merit. Prosecutors are free to relate the facts adduced at trial to their theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). We conclude that the prosecutor's argument was certainly supported by the facts presented at trial.

Finally, defendant claims that his sentence was disproportionate. A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). However, a sentence imposed within the applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant's eight-year minimum term was within the guidelines recommended range of five years to thirteen years, four months. Defendant has not presented any unusual circumstances to rebut the presumption that his sentence is proportionate. *Milbourn, supra* at 661.

We affirm.

/s/ Helene N. White  
/s/ Richard A. Bandstra  
/s/ Michael R. Smolenski