

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLYDE E. SHIRLEY,

Defendant-Appellant.

UNPUBLISHED

October 14, 2008

No. 277618

Wayne Circuit Court

LC No. 01-006863-01

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for possessing less than 25 grams of a controlled substance, MCL 333.7403(1), (2)(a)(v), and possessing a firearm during the commission of a felony, MCL 750.227(b)(1). Defendant was sentenced to 5 months to 4 years' imprisonment for his possessing a controlled substance conviction and 2 years' imprisonment for his felony-firearm conviction. We affirm.

On December 14, 2000, following two days of surveillance that revealed activity consistent with drug trafficking, a team of police officers from Detroit's Narcotics Bureau raided a house in execution of a search warrant. Inside, defendant sat at the dining room table, facing the front door. Before the officers entered, one officer observed defendant pull an object from the front waistband of his pants and toss it into a nearby bedroom. A gun was later found in that location.

Once inside, the officers secured defendant and another occupant. On the dining room table, the officers found a small, digital, titanium scale; a Pyrex measuring cup with a powdery residue along its sides and bottom; a knife and fork inside the measuring cup that exhibited a similar powdery residue; and a large Ziploc bag with several, empty, 1" x 1" Ziploc bags inside. The officers also seized \$685 in cash from defendant. Following analysis, the residual powder common to the measuring cup, fork, and knife was revealed to be .25 grams of cocaine. The cup, fork, and knife were then placed in a locked vault before being taken to the Police Department's property office.

Defendant argues that there is insufficient evidence that he knowingly possessed the cocaine recovered by police. He argues that, because presence alone is insufficient to prove possession, his conviction should be reversed. We review claims of insufficient evidence de

novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Evidence is viewed in a light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All reasonable inferences and credibility determinations are made in support of the jury verdict, and we decide whether a rational trier of fact could conclude that the elements of a crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of unlawful possession of less than 25 grams of a controlled substance are: (1) that the defendant possessed a controlled substance, (2) which weighed less than 25 grams, (3) and which the defendant knew was a controlled substance. MCL 333.7403. On appeal, defendant challenges only the “possession” element. The element of possession, whether actual or constructive, “requires a showing of dominion or right of control over the drug with knowledge of its presence and character.” *People v McKinney*, 258 Mich App 157, 165-166; 670 NW2d 254 (2003). A defendant’s presence where drugs are found is insufficient to establish constructive possession; instead, the totality of circumstances must show a sufficient nexus between defendant and the drugs. *Wolfe, supra* at 520-521. “[C]ircumstantial evidence and reasonable inferences arising from the evidence are sufficient” in this regard, where those inferences may be premised on defendant’s “proximity to the substance together with indicia of control.” *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998); *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991).

While defendant rightly notes that presence alone is insufficient to demonstrate possession, the jury “determines what inferences may be fairly drawn from the evidence.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *Wolfe, supra* at 520-521. The evidence enabled the jury to conclude that the totality of the circumstances surrounding defendant’s arrest established a sufficient nexus between defendant and the substance. Defendant was not merely present in the place where the drugs were recovered. He was seated at a table with drugs and drug paraphernalia at hand. He was facing the door where customers entered and exited. He had \$685 in cash, and a loaded gun in his pants. The reasonable inference is that he had control over the recovered cocaine. Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact found that the element of possession, as well as the other elements of possessing less than 25 grams of a controlled substance, were proved beyond a reasonable doubt. *Nowack, supra* at 400.

Next, defendant argues on appeal that, because the evidence of the residual cocaine was destroyed, and defense counsel did not move to dismiss the charges in response to its destruction, he received ineffective assistance of counsel. Because defendant did not move for a *Ginther*¹ hearing or a new trial, the issue of effective assistance of counsel is not preserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Therefore, our review is limited to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

¹ *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973).

To prevail on a claim of ineffective assistance of counsel, a defendant must show “that counsel's performance was deficient” and “that the deficiency was so prejudicial that . . . but for counsel's unprofessional errors the trial outcome would have been different.” *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant’s argument is premised on defense counsel’s statement, made during his opening statement, that physical evidence of the residual cocaine was destroyed. However, nothing else in the trial court record supports defense counsel’s statement that the evidence was destroyed; this claim is purely speculative. According to testimony, the residual cocaine was brought to the Police Department’s property office after the analysis was completed. “[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because he has not done so, we reject defendant’s argument that his representation at trial was deficient.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot