

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ROMAN BOGAN,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 251312

Wayne Circuit Court

LC No. 03-000522-01

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant James Bogan appeals as of right from his jury convictions of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine¹ and possession with intent to deliver less than fifty grams of cocaine,² for which he was sentenced to concurrent prison terms of 5 to 20 years. We affirm Bogan's conviction of the greater offense but vacate his conviction and sentence on the lesser offense. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

On May 20, 2002, Detroit police officers executed a search warrant for a two-bedroom flat where they discovered cocaine in both bedrooms as well as a hall closet. In one of the bedrooms, police also found a rental receipt for the flat made out to Bogan, numerous articles of large-sized men's clothing, and several photographs of Bogan, one of which showed Bogan wearing some of the clothing found in the bedroom's closet. In the hall closet, besides the cocaine, police found two energy bills that were in Bogan's name as well as a digital scale. Bogan was charged with, and convicted of, intent to deliver less than 50 grams of cocaine based on 8.92 grams of cocaine found in the bedroom containing the pictures of Bogan, and intent to deliver 50-224 grams of cocaine based on 58.63 grams of cocaine found in the hall closet.

¹ MCL 333.7401(2)(a)(iii).

² MCL 333.7401(2)(a)(iv).

II. Judgment Notwithstanding The Verdict

A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence.³

B. Sufficiency Of The Evidence

Bogan contends that the evidence was insufficient to sustain the verdicts because the prosecutor failed to prove that he possessed the controlled substances. In reviewing the sufficiency of the evidence in a criminal case, this Court must view both direct and circumstantial 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 proved beyond a reasonable doubt.⁴ Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime.⁵ It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.⁶ All conflicts in the evidence are to be resolved in favor of the prosecution.⁷

“Possession is a term that ‘signifies dominion or right of control over the drug with knowledge of its presence and character.’”⁸ The defendant need not own or have actual physical possession of the substance to be found guilty of possession; constructive possession is sufficient.⁹ Constructive possession, which may be sole or joint, is the right to exercise control over the drug coupled with knowledge of its presence.¹⁰ Possession may be proved by circumstantial evidence and any reasonable inferences drawn therefrom.¹¹ When the drugs are found in a common area to which other persons in the house have access, constructive possession cannot be inferred solely from defendant’s presence or residency. Some additional factor linking defendant to the narcotics must be shown.¹²

³ *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

⁴ *Id.*; *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

⁵ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

⁶ *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

⁷ *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

⁸ *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000), quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977).

⁹ *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

¹⁰ *Id.* at 520.

¹¹ *Nunez, supra.*

¹² *People v Echavarria*, 233 Mich App 356, 370; 592 NW2d 737 (1999); *People v Davenport*, 39 Mich App 252, 257; 197 NW2d 521 (1972).

There was circumstantial evidence linking Bogan to the cocaine found in the flat. The southeast bedroom contained a rent receipt showing that Bogan had rented the lower flat of the duplex, men's clothing, and photographs of Bogan, one of which showed him wearing some of the clothing in the closet. The hall closet contained current utility bills in Bogan's name. Viewed in a light most favorable to the prosecutor, a rational trier of fact could reasonably infer that Bogan resided in the flat and had control over the contents of the bedroom and hall closet notwithstanding the fact that other persons may have had access to those areas.¹³

III. Double Jeopardy

A. Standard of Review

Bogan did not raise this alleged constitutional error before the trial court; therefore, it is unpreserved for appeal.¹⁴ We review unpreserved issues of alleged constitutional error for plain error.¹⁵

B. Bogan's Double Jeopardy Rights Were Violated

Bogan contends that his convictions of two counts of possession with intent to deliver violate the double jeopardy prohibition against multiple punishments for the same offense.¹⁶ The prosecutor concedes plain error and we agree. Bogan was convicted of two counts of possession with intent to deliver based on the constructive possession of different amounts of the same drug at the same time, the only difference being that the two amounts were found in different areas of the same house. "[I]f, factually, the convictions are based on proof of a single act, the separate crimes are held to consist of nothing more than a greater crime and certain of its lesser included offenses," in which case, "multiple convictions cannot be allowed to stand."¹⁷ The "appropriate remedy in a multiple punishment double jeopardy violation [is] to affirm the conviction of the higher charge and to vacate the lower conviction."¹⁸

We affirm Bogan's conviction of the greater cocaine possession offense; we vacate his conviction and sentence for the lesser possession offense.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen

¹³ *Hardiman, supra* at 422-423; *People v Richardson*, 139 Mich App 622, 625-626; 362 NW2d 853 (1984).

¹⁴ *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004).

¹⁵ *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

¹⁶ *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

¹⁷ *People v Fowlkes*, 130 Mich App 828, 832-833; 345 NW2d 629 (1983).

¹⁸ *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001).