

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOANDO LEAIT GAINES,

Defendant-Appellant.

UNPUBLISHED

June 15, 2006

No. 259898

Calhoun Circuit Court

LC No. 04-002470-FH

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). He appeals of right. We affirm.

We review a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *Id.* We will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witness. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and the weight accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To support a conviction for possession of less than 25 grams of cocaine, the prosecution must prove that: (1) the substance is cocaine; (2) the cocaine is in a mixture weighing less than 25 grams; (3) the defendant was not authorized to possess the cocaine; and (4) the defendant knowingly possessed the cocaine. *Wolfe, supra*, at 516-517; MCL 333.7403(2)(a)(v).

Defendant argues that the prosecution failed to prove that he knowingly possessed the cocaine found near him in a vehicle. "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *Wolfe, supra* 519-520. When determining whether the defendant constructively

possessed the controlled substance, “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). “A person’s presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown.” *Wolfe, supra* at 520. Constructive possession exists when there is a sufficient nexus between the defendant and the contraband. *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). Generally, “a person has constructive possession if there is proximity to the article together with indicia of control.” *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Possession can be joint or exclusive. *Johnson, supra* at 500.

Here, cocaine was found in a clear plastic bag on the floor of the back passenger seat where defendant had been sitting. This fact, standing alone, would appear to indicate mere presence. However, the additional evidence shows a sufficient connection between defendant and the cocaine. Defendant’s initial action in moving toward the area where the cocaine was found was apparently what caught the arresting officer’s eye as he spoke with the front seat passenger. After the officer asked defendant what he was hiding, and asked him to move his foot, defendant looked down and placed his foot on the cocaine. Defendant’s own answers to whether he knew of the presence of the cocaine before the officer took it from the car were somewhat inconsistent. After the arrests, the search of the vehicle uncovered a plastic bag of cocaine on the floor by the back passenger seat and more cocaine and a crack pipe in the map pocket directly accessible to defendant. With respect to defendant, we find that this evidence, when viewed in a light favorable to the prosecutor, showed both proximity and indicia of control.

Defendant also argues that “furtive gestures” alone cannot serve as sufficient evidence of a nexus between the drugs and himself. However, the cases relied upon by defendant state that “furtive gestures” alone cannot serve as probable cause to search a vehicle or to arrest. *People v Young*, 89 Mich App 753, 761-762; 282 NW2d 211 (1979); *People v Hall*, 40 Mich App 329, 335; 198 NW2d 762 (1972). Defendant does not challenge the reasonableness of the search or the arrest. This is not a case where “furtive gestures” alone served as probable cause to search or arrest. Thus, we find the usefulness of the cited cases questionable. Defendant essentially argues that the cases stand for the proposition that testimony concerning “furtive gestures” should be viewed with suspicion in deciding the sufficiency of the evidence. However, the weight to be placed upon the testimony is properly one for the jury. *Hardiman, supra* at 428.

Viewed in the light most favorable to the prosecution, there was sufficient evidence to allow a rational trier of fact to find that defendant at least jointly constructively possessed the cocaine found on the floor of the vehicle.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter