

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON MAURICE MCCRARY,

Defendant-Appellant.

---

UNPUBLISHED

May 21, 2002

No. 227963

Livingston Circuit Court

LC No. 00-011451-FH

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from a bench trial conviction of fourth-degree fleeing and eluding a police officer, MCL 750.479a(2), possession with intent to deliver more than 50, but less than 225, grams of cocaine, MCL 333.7401(2)(a)(iii), and resisting or obstructing a police officer, MCL 750.479. The trial court sentenced defendant to one to two years in prison for the fleeing and eluding conviction and a concurrent term of one to two years for the resisting or obstructing conviction. The court also sentenced defendant to a consecutive term of ten to forty-years in prison for the possession with intent to deliver conviction. We affirm.

I. Facts and Procedural History

On November 19, 1999, just after 1:00 a.m., while driving a marked police vehicle on eastbound I-96 in Livingston County, State Troopers Christopher Grace and Rene Gonzalez spotted a van swerving back and forth across three lanes of the freeway. Trooper Grace activated his emergency lights and siren and the driver of the van, later identified as defendant, slowly pulled over to the shoulder. Trooper Gonzalez approached on the passenger side of the van, Trooper Grace approached on the driver's side, and both officers shined flashlights into the windows of the van. As Trooper Grace asked for defendant's driver's license and registration, he observed that defendant's eyes were "glassy" and his speech was "very slurred." Trooper Grace asked defendant to step out of the van to perform sobriety tests and, using profanity, defendant declined.

Trooper Grace attempted to open the driver's side door, but defendant repeatedly pulled it shut and pushed the door lock down. During the struggle, Trooper Grace reached in through the open window to unlock the door and defendant began to close the window on the trooper's arm. To distract defendant and to allow Trooper Grace to free his arm, Trooper Gonzalez struck the

passenger window with his flashlight. Startled, defendant looked at Trooper Gonzalez, then placed the van in gear and began to drive away.

The troopers gave chase in their police vehicle and, one-half to two miles later, defendant drove onto a grassy median and through a ditch. Defendant then jumped out as the van continued moving at approximately forty miles per hour. The troopers pulled over and chased defendant on foot while yelling for him to stop. Trooper Gonzalez noticed defendant reach into his pocket. However, the troopers quickly tackled defendant and, after a brief scuffle, handcuffed him and placed him inside the police vehicle. During the foot chase, the van continued forward until it hit a tree, approximately one hundred feet from the freeway. After securing defendant, Trooper Gonzalez backed the van out to the shoulder of the road and, as he exited the vehicle, he noticed what appeared to be a bag of cocaine on the floor, protruding from under the driver's side seat.

Trooper Grace called the State Police canine unit and, shortly thereafter, a canine handler, Trooper Tim Johnson, arrived at the scene with his drug-sniffing dog. The dog searched the van and alerted Trooper Johnson to the presence of narcotics on the floor where Trooper Gonzalez saw the package. Trooper Grace removed the package from the van and noticed that the contents appeared to be "mushy," "soapy" and "wet." Scott Penabaker, a forensic chemist with the State Police crime lab, later tested the contents of the package and determined that it contained 119 grams of crack cocaine. The dog also indicated the presence of cocaine in a powdery residue on a table inside the van. Moreover, the dog found a cellular phone in the area where the foot chase occurred and the troopers confiscated the phone, along with \$2,166 in cash found on defendant. The cellular phone rang numerous times during the four hours after the troopers returned to their police post. Trooper Gonzalez answered the phone several times, but the caller did not speak and repeatedly disconnected the calls.

Defendant waived his right to a jury trial and, on March 21, 2000, the trial court convicted him of fourth-degree fleeing and eluding a police officer, possession with intent to deliver more than 50, but less than 225, grams of cocaine, and resisting or obstructing a police officer.

## II. Analysis

### A. Sufficiency of the Evidence

Defendant contends that the prosecutor presented insufficient evidence that he knowingly possessed the cocaine found in the van.

"The evidence in a bench trial is sufficient if, when viewed in the light most favorable to the prosecutor, a rational factfinder could determine that each element of the crime had been proved beyond a reasonable doubt." *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

To establish possession with intent to deliver cocaine, the prosecutor must prove that the defendant knowingly possessed cocaine and intended to deliver it to someone else. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998); see also *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999). As this Court explained in *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998):

A person need not have physical possession of a controlled substance to be found guilty of possessing it. [*People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1992).] Possession may be either actual or constructive, and may be joint as well as exclusive. *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). A person's presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown. *Wolfe, supra* at 520; *People v Vaughn*, 200 Mich App 32, 36; 504 NW2d 2 (1993). However, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991).

Further, as our Supreme Court observed in *Wolfe*, "constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe, supra* at 521.

Here, the prosecutor presented substantial circumstantial evidence to establish that defendant knowingly possessed the cocaine. Not only was defendant the only occupant of the van which contained the large package of cocaine, the bag of drugs was visible on the driver's side floor. After Trooper Gonzalez saw the cocaine and the dog identified it, Trooper Grace retrieved it and noted that the substance appeared to be wet. According to testimony from Penabaker, the forensic chemist, this consistency suggests that the cocaine was recently converted to crack. The drug-sniffing dog also found cocaine residue on a table in the van which indicates that narcotics were handled in that area. The troopers also discovered that defendant was carrying a beeper and a significant amount of cash in large denominations. During the foot chase, defendant also attempted to dispose of his cellular phone which, according to Trooper Grace, "rang non-stop for four hours" during the very early hours of the morning.

Furthermore, defendant's refusal to get out of the van and his attempts to prevent Trooper Grace from opening the driver's side door indicates that defendant was aware of the incriminating package near his feet and did not want the officer to see it. Defendant also attempted to flee the scene rather than open the door and "[i]t is well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001).

Viewed in a light most favorable to the prosecutor, this evidence was clearly sufficient to enable a rational trier of fact to conclude, beyond a reasonable doubt, that defendant knowingly possessed the cocaine.

## B. Prior Conviction

Defendant argues that the trial court abused its discretion by admitting evidence of his prior conviction.

Before the start of trial, the prosecutor moved to admit a plea agreement and information which indicated that, in 1990, defendant acknowledged he was selling cocaine and pleaded guilty to a charge of possession with intent to deliver. Defendant objected to its admission because, he

argued, the evidence constitutes improper propensity evidence under MRE 404(b). The trial court disagreed and ultimately admitted the evidence for the limited purpose of showing defendant's intent.

“The decision whether such evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion.” *Crawford, supra* at 383. Under MRE 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To determine the admissibility of other acts evidence under MRE 404(b), our Supreme Court set forth the following requirements in *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994):

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

Here, defendant's knowledge and intent were clearly “in issue” for purposes of establishing possession of the cocaine. *Crawford, supra* at 389. Further, unlike *Crawford*, the evidence was offered for a proper purpose and did not merely show that “the defendant has been around drugs in the past and, thus, is the kind of person who would knowingly possess and intend to deliver large amounts of cocaine.” *Id.* at 397. Defendant asserted at trial and argues on appeal that he had no knowledge that the cocaine was in the van and he lacked the requisite intent because he did not own the van and had no dominion or control over the cocaine. Contrary to defendant's assertions, the plea agreement established not merely the facts of his conviction, but that defendant acknowledged that he was in the business of selling drugs. As the prosecutor argued below, this evidence refutes his claim that he had no knowledge that the drugs were in the van or that he lacked any intent to possess or distribute them. Moreover, the evidence tends to show that defendant was familiar with cocaine which suggests he would have recognized it where, as here, it was visibly apparent on the floor of the van.

Also, contrary to *Crawford*, the relevance of the evidence was not substantially outweighed by the risk of unfair prejudice under MRE 403. In a bench trial, “the judge, sitting as factfinder, is presumed to possess an understanding of the law that allows him to understand the difference between admissible and inadmissible evidence . . .” and to consider the evidence only for a proper purpose. *In re Forfeiture of \$19,250*, 209 Mich App 20, 31; 530 NW2d 759 (1995). Here, the trial court admitted the evidence for a limited purpose and it is clear from the court's findings of fact that it only considered the evidence for that narrow purpose. Accordingly, the risk of unfair prejudice was minimal compared to its probative value.

Moreover, were we to find that the trial court erroneously admitted this evidence regarding his prior conviction, any error was clearly harmless. As discussed, the prosecutor presented ample evidence to establish each element of defendant's possession with intent to deliver conviction.

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Jessica R. Cooper