# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 14, 2012 |
| v | No. 303750<br>Wayne Circuit Court |
| KEITH MOORE,<br><br>Defendant-Appellant. | LC No. 10-011562-FH |

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant, Keith Moore, was convicted of possession with intent to deliver 50 grams or more, but less than 450 grams, of cocaine, MCL 333.7401(2)(a)(*iii*). He was sentenced to 5 to 20 years' imprisonment. Defendant appeals as of right. Because we find that there was sufficient evidence to support defendant's conviction and defense counsel was not ineffective, we affirm.

On appeal, defendant argues that there was insufficient evidence to show he possessed and intended to distribute the cocaine.

We review a claim of insufficient evidence de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could find the elements of the crime were proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). We will not disturb the factfinder's determinations of the credibility of witnesses or the weight of the evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

"To convict a defendant of possession with intent to deliver, the prosecution must prove (1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Defendant challenges only the fourth element, knowing possession with intent to deliver.

"Possession is either actual of constructive." *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010). Constructive possession may be proved when "'the evidence establishes a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised a dominion and control over the substance.'" *People v Wolfe*, 440 Mich 508, 521; 489

NW2d 748 (1992), amended 441 Mich 1201 (1992), quoting *US v Disla*, 805 F2d 1340, 1350 (CA 9, 1986). Mere presence is insufficient; a more substantial nexus must be shown. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002), quoting *Wolfe*, 440 Mich at 519-520. "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of possession." *McGhee*, 268 Mich App at 623. Proof that defendant knew the character of the substance is also required to establish constructive possession. *Id.* at 610. Specific intent to distribute must also be shown. *Id.*

In this case, Police Sergeant David Hansberry observed defendant exit the house at 12836 Downing Street in Detroit twice on March 2, 2010. Hansberry watched defendant get into multiple vehicles that pulled up a few houses away, stay inside the vehicle for two to three minutes, and then return to the house. Based on Hansberry's experience as a narcotics sergeant, he believed these were narcotics transactions. A Law Enforcement Information Network (LEIN) check showed defendant resided at the Downing Street home, and Hansberry matched the photograph under defendant's name on the LEIN check to the individual he saw make the transactions.

Subsequently, police executed a search warrant at the Downing Street home. They found defendant's brother, Kevin Moore, in one of the home's three bedrooms. A second bedroom contained women's clothes and had feminine décor. No one was in the third bedroom, which, in addition to other furniture, contained a crib and a baby mattress. Defendant has a two-year-old son and a one-year-old daughter. In this room, police found $7,610 hidden under the baby mattress and four baggies of cocaine in the closet next to a digital scale. Police Officer Jaime Ibarra, who found the cocaine and the scale, testified these types of scales are often used by drug dealers. The police also found paperwork, bills, and a notice of intent to shut off service from DTE Energy in the same closet where the cocaine and scale were discovered. Defendant's name was on the paperwork, bills, and notice. A social security statement with defendant's name and address on it and a judgment for child support with defendant's name were also discovered in the closet. A laboratory report showed that at least 117.29 grams of cocaine was found in the closet which, if made into crack rocks, could be sold for as much as $7,200. Some of the cocaine had already been turned into crack. This evidence, when viewed in the light most favorable to the prosecution, could allow a reasonable jury to find beyond a reasonable doubt that defendant exercised control and dominion over the cocaine and intended to distribute it.

In a Standard 4 brief, defendant argues that defense counsel was ineffective because he failed to investigate three potential witnesses who were present at the home when the search warrant was executed and because he failed to move to suppress the evidence recovered from execution of the search warrant on the ground that the affidavit underlying the warrant did not establish probable cause.

Defendant maintains that all three witnesses would have refuted the police testimony and testified that the police did not knock and announce their presence before entering the home or produce a warrant, that the police came out of the kitchen, rather than the bedroom, with the cocaine, and that Hansberry found the money right before leaving the house instead of earlier during the search, as he testified. Defendant submitted affidavits from these witnesses and himself on appeal. However, "parties cannot enlarge the record on appeal by the use of affidavits." *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000), and

unpreserved claims of ineffective assistance are "limited to mistakes apparent on the record," *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In support of his argument regarding lack of probable cause for the warrant, defendant cites the warrant used in this case to execute the search and its underlying affidavit. These two documents are similarly not part of the lower court record; defendant has simply attached them to his brief on appeal. Defendant cannot enlarge the lower court record by including these materials for the first time on appeal. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), aff'd in part, rev'd in part on other grounds 462 Mich 415; 615 NW2d 691 (2000). The lower court record does not reference the contents of the supporting affidavit in the lower court record. Accordingly, this Court has no basis upon which to decide this issue.

We stress that defendant made no effort to expand the record by moving to remand or for a new trial or evidentiary hearing below, nor does he suggest these remedies on appeal. Defendant, therefore, has failed to establish ineffective assistance of counsel.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra