Order

Michigan Supreme Court
Lansing, Michigan

November 28, 2023

162954

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 162954
COA: 350952
Monroe CC: 19-245078-FH

BRANDON RASHARD THORNTON,
Defendant-Appellant.

_____/

By order of September 24, 2021, the application for leave to appeal the February 11, 2021 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Posey* (Docket No. 162373) and *People v Stewart* (Docket No. 162497). On order of the Court, *Posey* having been decided on July 31, 2023, 512 Mich ___ (2023), and *Stewart* having been decided on July 31, 2023, 512 Mich ___ (2023), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals to the extent that it is inconsistent with our decision in *Posey* and REMAND this case to that court for reconsideration in light of *Posey*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

s1120

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 28, 2023

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON RASHARD THORNTON,

Defendant-Appellant.

UNPUBLISHED
February 11, 2021

No. 350952
Monroe Circuit Court
LC No. 19-245078-FH

Before: CAVANAGH, P.J., and SERVITTO and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of three counts of delivery of less than 50 grams of cocaine, MCL 333.7403(2)(a)(*iv*), and one count of conspiracy to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*); MCL 750.157a. Defendant was sentenced to concurrent terms of 46 to 480 months' imprisonment, second or subsequent offense, MCL 333.7413(1), for each conviction. We affirm.

I. FACTS

At trial, Melissa Ramsey testified that she arranged to buy cocaine from defendant on three separate occasions in November 2018 while working as a confidential informant. On each occasion, Ramsey called defendant asking to buy cocaine from him, and defendant directed her to an apartment in the Greenwood Apartment complex. Ramsey testified that, on November 16, 2018, defendant gave her cocaine in exchange for $100. A few days later, Ramsey went to the same apartment and a woman in the apartment gave Ramsey cocaine in exchange for $100. The woman told Ramsey that defendant had left the cocaine there for her. On November 28, 2018, Ramsey went back to the apartment, and the same woman gave Ramsey cocaine in exchange for $100. Ramsey testified that she worked as a confidential informant in order to work off some of her own previous drug charges.

Felicea Ivey testified that she owned the apartment where each of these transactions occurred. According to Ivey, Ramsey came to Ivey's apartment to meet defendant on November 16, 2018, but Ivey did not know why. Ramsey came to Ivey's apartment again a few days later; this time, defendant told Ivey that Ramsey was coming over to get cocaine. Ivey testified that she

let Ivey into her apartment that day, but did not interact with her further. On November 28, 2018, Ivey gave Ramsey cocaine in exchange for $100. According to Ivey, she conducted this exchange after a conversation with defendant earlier in the day. From that conversation, Ivey understood that she was supposed to sell Ramsey cocaine for defendant. Defendant brought the cocaine to Ivey's apartment, Ivey conducted the exchange, and then Ivey gave defendant the money. Ivey testified that she had criminal charges pending against her at the time of defendant's trial and that she had been promised lesser changes in exchange for testifying.

Detective Leland Jordan of the Monroe County Sheriff's Office testified that he accompanied Ramsey to conduct controlled drug buys on three occasions in November 2018. On each occasion, Ramsey went into the same apartment and returned a short time later with a clear plastic bag filled with a substance Detective Jordan suspected to be cocaine. Detective Jordan testified that he sent two of these three bags to the crime laboratory for testing. The prosecution presented all three bags to the jury.

The trial court recognized Jeffrey Aguzzi, a forensic scientist and drug identification expert with the Michigan State Police Crime Laboratory, as an expert "in the field of Drug Identification and Drug Testing." Aguzzi testified that he tested the contents of two of the three baggies—one was 0.7905 grams of "material containing cocaine" and the other was 0.0805 grams of "material containing cocaine."

At defendant's sentencing hearing, the prosecution told the court that the minimum sentencing guidelines range for each of defendant's convictions was 10 to 23 months' imprisonment. The trial court had the discretion to enhance the minimum sentencing guidelines range pursuant to MCL 769.11, the third-offense habitual offender statute, or MCL 333.7413, the controlled substance second or subsequent offense penalty statute. However, the trial court could not apply both enhancements. The trial court chose to enhance defendant's sentence pursuant to the controlled substance second or subsequent offense penalty statute, which allowed the court to double the minimum sentencing guideline ranges. The trial court sentenced defendant to 46 to 480 months' imprisonment for each of his four convictions, to be served concurrently.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues there was insufficient evidence for a jury to find him guilty beyond a reasonable doubt of three counts of delivery of less than 50 grams of cocaine. We disagree.

A defendant's challenge to the sufficiency of the evidence is reviewed de novo. *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). When reviewing a claim of insufficient evidence, we review the evidence "in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the crime's elements beyond a reasonable doubt." *Id.* "[I]t is the role of the jury, not this Court, to determine the weight of the evidence or the credibility of witnesses." *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012) (quotation marks and citation omitted). Therefore, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018) (quotation marks, citation, and emphasis omitted).

Pursuant to MCL 333.7401(2)(a)(*iv*), the elements of delivery of less than 50 grams of cocaine are: (1) defendant delivered; (2) less than 50 grams; (3) of cocaine or a mixture containing cocaine; (4) with knowledge that the substance was cocaine.[1] See *People v Mass*, 464 Mich 615, 626; 628 NW2d 540 (2001) ("[T]he amount and nature of controlled substances are elements of a delivery offense under [MCL 333.7401]."") (emphasis omitted); *People v Dickinson*, 321 Mich App 1, 12; 909 NW2d 24 (2017) (applying these elements to the delivery of less than 50 grams of heroin). "Deliver or delivery means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." *Dickinson*, 321 Mich App at 12 (quotation marks and citation omitted). "[A] defendant constructively delivers a controlled substance when the defendant directs another person to convey the controlled substance under the defendant's direct or indirect control to a third person or entity." *People v Plunkett*, 281 Mich App 721, 728; 760 NW2d 850 (2008), rev'd on other grounds 485 Mich 50 (2010).

The prosecution presented sufficient evidence for a rational trier of fact to find defendant guilty of three counts of delivery of less than 50 grams of cocaine beyond a reasonable doubt. First, the prosecution presented sufficient evidence for the jury to find that defendant delivered cocaine on three different occasions. Ramsey testified that, on November 16, 2018, defendant gave her cocaine in exchange for $100. Ramsey further testified that she arranged to buy drugs from defendant again a few days later, and defendant directed her to Greenwood Apartments to conduct the exchange. According to Ramsey, defendant did not conduct the delivery himself; rather, a woman at the apartment told Ramsey that defendant left cocaine for her, and the woman gave Ramsey cocaine in exchange for $100. Ivey testified that, a few days after November 16, 2018, she let Ramsey into her apartment, and defendant told her that Ramsey was coming to the apartment to get cocaine. Ramsey testified that, on November 28, 2018, defendant told her to meet him at the same apartment complex to again buy cocaine from him. According to Ramsey, at the apartment, the same woman as before gave her cocaine in exchange for $100. Ivey testified that, on November 28, 2018, she conducted the exchange with Ramsey. Ivey further testified that, based on a conversation she had with defendant earlier that day, Ivey believed she was supposed to give Ramsey cocaine in exchange for $100. Ivey stated that defendant provided Ivey with the cocaine she gave to Ramsey. From this testimony, a reasonable juror could find that defendant actually delivered cocaine to Ramsey on November 16, 2018, either actually or constructively delivered cocaine to Ramsey a few days later, and constructively delivered cocaine to Ramsey on November 28, 2018.

Second, the prosecution presented sufficient evidence that the deliveries each contained less than 50 grams of cocaine or a mixture containing cocaine. Detective Jordan testified that he accompanied Ramsey on three separate occasions to conduct controlled drug purchases. Detective

[1] MCL 333.7401(2)(a)(*iv*) prohibits a person from delivering less than 50 grams of a controlled substance. This prohibition applies to any "controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(*iv*) . . . ." MCL 333.7401(2)(a), citing MCL 333.7214(a)(*iv*). Cocaine is a schedule 2 drug described in MCL 333.7214(a)(*iv*). *People v Schultz*, 435 Mich 517, 521 n 5; 460 NW2d 505 (1990). Therefore, MCL 333.7401(2)(a)(*iv*) applies to the delivery of cocaine.

Jordan further testified that, on each occasion, Ramsey gave him a clear plastic bag containing a substance he suspected to be cocaine. According to Detective Jordan, he gave two of these three bags to the crime laboratory for testing. Aguzzi testified that he tested these two items; one contained 0.7905 grams of "material containing cocaine" and the other contained 0.0805 grams of "material containing cocaine." The prosecution submitted all three bags into evidence. Although only the contents of two of the three bags were weighed and tested, a reasonable juror could infer that all three bags contained similar amounts of the same substance.

Finally, the prosecution presented sufficient evidence that defendant knew the substance was cocaine. Ramsey testified that defendant repeatedly agreed to sell her cocaine. Ivey testified that defendant told her Ramsey was coming to the apartment complex to buy cocaine. Ivey further testified that, on November 28, 2018, she came away from a conversation with defendant with the understanding that she was supposed to give Ramsey cocaine in exchange for money. Defendant brought cocaine over to Ivey's apartment that same day. Viewing all of this evidence in a light most favorable to the prosecution, a rational juror could reasonably find beyond a reasonable doubt that defendant delivered less than 50 grams of cocaine to Ramsey on three separate occasions. See *Miller*, 326 Mich App at 735.

Defendant also argues there was insufficient evidence for a jury to find him guilty of conspiring to deliver less than 50 grams of cocaine beyond a reasonable doubt. We disagree.

Pursuant to MCL 750.157a, "Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . ." *Mass*, 464 Mich at 629, quoting MCL 750.157a. To prove a defendant conspired to deliver less than 50 grams of cocaine, the prosecution must prove that (1) the defendant possessed the specific intent to deliver less than 50 grams of cocaine, (2) the defendant's coconspirators possessed the specific intent to deliver less than 50 grams of cocaine, and (3) the defendant and the coconspirators possessed the specific intent to combine to deliver less than 50 grams of cocaine to a third person. *Id*. at 629-630, 633; *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).

"The gist of conspiracy lies in the illegal agreement; once the agreement is formed, the crime is complete." *People v Seewald*, 499 Mich 111, 117; 879 NW2d 237 (2016) (quotation marks and citations omitted). "Conspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *Mass*, 464 Mich at 629. "Thus, there must be proof showing that the parties specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011) (quotation marks and citation omitted). "Direct proof of a conspiracy is not required; rather, proof may be derived from the circumstances, acts, and conduct of the parties." *Id*. (quotation marks and citation omitted).

The prosecution presented sufficient evidence for a rational trier of fact to find defendant guilty of conspiring to deliver less than 50 grams of cocaine beyond a reasonable doubt. First, the prosecution presented sufficient evidence that defendant possessed the specific intent to deliver less than 50 grams of cocaine. Ramsey testified that defendant agreed to sell her cocaine on three different occasions. Ivey testified that, on one occasion, defendant told her Ramsey was coming to the apartment to get cocaine. Second, the prosecution presented sufficient evidence that

defendant's coconspirator, Ivey, possessed the specific intent to deliver less than 50 grams of cocaine. Ramsey testified that Ivey gave Ramsey cocaine in exchange for money on two occasions. Although Ivey testified that she only conducted the exchange on one occasion, she stated that she knew Ramsey was coming to her apartment on a separate occasion to get cocaine. Ivey further testified that she gave Ramsey cocaine in exchange for money on one occasion; she knew from an earlier conversation with defendant that she was giving Ramsey cocaine.

Finally, the prosecution presented sufficient evidence that defendant and Ivey possessed the specific intent to combine to deliver less than 50 grams of cocaine. Ramsey testified that defendant directed her to the same apartment each time. The apartment belonged to Ivey. Ivey testified that defendant told her Ramsey was coming over to Ivey's apartment on one occasion to get cocaine. Ivey also testified that, on November 28, 2018, she had a conversation with defendant and agreed to give Ramsey cocaine in exchange for money. Ivey testified that defendant gave Ivey the cocaine before the exchange, and Ivey gave defendant the $100 Ramsey paid for the cocaine. "What the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do." *People v Lowery*, 274 Mich App 684, 693; 736 NW2d 586 (2007), quoting *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002) (quotation marks omitted). Viewing this evidence in a light most favorable to the prosecution, a rational juror could reasonably find that defendant conspired with Ivey to deliver less than 50 grams of cocaine beyond a reasonable doubt. See *Miller*, 326 Mich App at 735.

Defendant claims that the prosecution presented insufficient evidence to prove all four convictions beyond a reasonable doubt because the bulk of the testimony from which the jury could have found him guilty on each count came from Ramsey and Ivey. According to defendant, both women were self-motivated to implicate defendant in the deliveries. However, the jury was aware of Ramsey and Ivey's potential motivations. Ramsey testified that she worked as a confidential informant in this case in order to work off prior drug charges. Ivey testified that she had criminal charges pending against her at the time of defendant's trial and that she had been promised lesser charges in exchange for testifying. The jury was free to determine the credibility of each witness's testimony and the weight to give each piece of evidence. See *Eisen*, 296 Mich App at 331. "[T]his Court must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

III. SENTENCING

Defendant argues that each of his minimum sentences are unreasonable because they violate the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree.

We are "required to review for reasonableness only those sentences that depart from the range recommended by the statutory guidelines." *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). "[W]hen a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *People v Posey*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket Nos. 345491, 351834, and 346039); slip op at 8 (quotation marks and citation omitted).

MCL 333.7413(1) provides, in relevant part, "an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized . . . ." This statute allows a trial court to double both a defendant's minimum and maximum sentences. *People v Lowe*, 484 Mich 718, 726; 773 NW2d 1 (2009).[2] Pursuant to MCL 333.7413(1), a trial court can double both ends of the minimum sentencing guidelines range, and a sentence that falls within that doubled range does not constitute a departure from the minimum sentencing guidelines range. See *Lowe*, 484 Mich at 724 n 9 ("Because [MCL 333.7413(1)] specifically allows the court to double the guideline range, as long as the minimum sentence of the enhanced term is within the doubled range, we conclude that there is also no departure from the guideline range when such a sentence is imposed."); *People v Williams*, 268 Mich App 416, 430-431; 707 NW2d 624 (2005) (holding that the defendant's minimum sentence did not depart from the minimum sentencing guidelines range because "the minimum sentence of 38 months fell within the range as permissibly increased by [MCL 333.7413(1)], i.e., 10 to 46 months from the original range of 5 to 23 months").[3]

Here, defendant does not dispute that the base minimum sentencing guidelines range for each of his convictions was 10 to 23 months' imprisonment. Defendant had a previous controlled substance conviction for possession of marijuana, MCL 333.7403(2)(d), at the time the trial court sentenced him. Accordingly, the trial court exercised its discretion and doubled the base minimum sentencing guidelines range pursuant to MCL 333.7413(1). The enhanced minimum sentencing guidelines range was 20 to 46 months, and the trial court sentenced defendant to a minimum of 46 months' imprisonment for each conviction. Defendant's minimum sentences of 46 months' imprisonment fall within the minimum guideline range, as enhanced by MCL 333.7413(1), and defendant does not claim that his sentences were based on a scoring error or that the trial court relied on inaccurate information when sentencing him. "[W]hen a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *Posey*, ___ Mich App at ___; slip op at 8 (quotation marks and citation omitted). Therefore, we must affirm defendant's sentences.

Defendant also argues that his minimum sentences violate both the United States Constitution's ban against cruel and unusual punishment and the 1963 Michigan Constitution's ban on cruel or unusual punishment. We disagree.

Defendant did not preserve this argument for appeal. We "review unpreserved constitutional issues for plain error affecting substantial rights." *Id*. at ___; slip op at 3. "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *People v Lockridge*, 498 Mich 358, 392-393; 870 NW2d 502 (2015). "An error affects

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[2] In *Lowe*, our Supreme Court analyzed the former version of this statute, MCL 333.7413, as amended by 1988 PA 12. *Lowe*, 484 Mich at 719. Although some portions of former MCL 333.7413 differ from the current version, the language the court considered is substantively the same.

[3] *Williams* also considers former MCL 333.7413. *Williams*, 268 Mich App at 430.

substantial rights when it impacts the outcome of the lower court proceedings." *Posey*, ___ Mich App at ___; slip op at 3. "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independently of the defendant's innocence." *Lockridge*, 498 Mich at 392-393.

"The Michigan Constitution prohibits cruel or unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel and unusual punishment, US Const Am VIII. If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011) (quotation marks and citation omitted). "A sentence within the guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual punishment." *Posey*, ___ Mich App at ___; slip op at 9. "A defendant can only overcome the presumption by presenting unusual circumstances that would render a presumptively proportionate sentence disproportionate." *Id*. "[T]here is a distinction between proportionality as it relates to the constitutional protection against cruel and unusual punishment, and proportionality as it relates to reasonableness review of a sentence, which is not constitutional in nature." *Id*.

Here, defendant cannot demonstrate that the trial court erred by imposing a 46-month minimum sentence for each of his convictions. See *Lockridge*, 498 Mich at 392-393 ("To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights."). The applicable minimum sentencing guidelines range, as enhanced by MCL 333.7413(1), was 20 to 46 months. The trial court sentenced defendant to a minimum of 46 months' imprisonment for each of his four convictions. Defendant's sentences therefore fall within the guidelines range and are presumptively proportionate. See *Posey*, ___ Mich App at ___; slip op at 9. Defendant fails to present "unusual circumstances" that overcome the presumption that his in-guideline sentences are proportionate. *Id*. Although defendant claims that his age—32 years—renders his sentences cruel or unusual, a defendant's age is "insufficient to overcome the presumption of proportionality of his sentences . . . ." *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013). Because defendant's sentences are presumptively proportionate, they are not cruel or unusual under the Michigan Constitution. See *Posey*, ___ Mich App at ___; slip op at 9. Accordingly, defendant's sentences also are not cruel and unusual under the United States Constitution. *Benton*, 294 Mich App at 204.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Thomas C. Cameron