

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 12, 2012

v

DEMOND KAHILL MARSHALL,

Defendant-Appellant.

No. 299869
Wayne Circuit Court
LC No. 10-000908-FH

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Demond Kahill Marshall appeals as of right his jury trial conviction of possession with intent to deliver 50 grams or more but less than 450 grams of cocaine.¹ Marshall was sentenced to 51 months to 20 years in prison with 51 days credit. We affirm.

This case arises from the execution of a search warrant at a residence in the city of Inkster, Michigan. Approximately 24 hours before the execution of the search warrant, Inkster police officer Christopher Kososki used a confidential informant (“CI”) to make a “controlled buy” from the residence. The CI bought crack cocaine and provided Kososki with the seller’s name and physical description. Kososki then used the information to obtain a search warrant for the residence. Marshall was in the residence when the search warrant was executed and was arrested.

On appeal, Marshall argues that the trial court abused its discretion by denying his motion for a mistrial after the prosecution elicited highly prejudicial and irrelevant hearsay testimony from Kososki, which violated his right to confront all witnesses against him. Specifically, Marshall contends that the prosecution improperly elicited testimony from Kososki regarding the CI’s identification of Marshall as the person that sold the CI cocaine during the controlled buy. We agree that the testimony was hearsay and violated Marshall’s right to confront all witnesses against him, but find that the error was harmless.

¹ MCL 333.7401(2)(a)(iii).

This Court reviews a trial court's decision to deny a motion for mistrial for an abuse of discretion.² "An abuse of discretion occurs when the [trial] court chooses an outcome that falls outside the range of reasonable and principled outcomes."³ This Court reviews the trial court's factual findings for clear error and questions of law de novo.⁴

A defendant has the constitutional right to be confronted with the witnesses against him during criminal proceedings.⁵ Under the Confrontation Clause, out-of-court testimonial statements are prohibited at trial "unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination."⁶ "A statement by a confidential informant to the authorities generally constitutes a testimonial statement."⁷ Testimonial statements, however, are not barred when offered for purposes other than establishing the truth of the matter asserted, such as showing the effect on the hearer.⁸ "Specifically, a statement offered to show why police officers acted as they did is not hearsay."⁹

Kososki testified that the CI described the individual that sold him cocaine during a controlled buy, and after confirming the identity of the seller with the CI, Kososki sought a search warrant. At this juncture, this information would not constitute hearsay as it provided background information regarding Kososki's decision to seek a search warrant for the residence.¹⁰ Kososki's testimony that he was looking for Marshall when executing the search warrant did constitute hearsay, as it was based on the CI's out-of-court statements to Kososki that Marshall was the seller of the contraband during the controlled buy. The search warrant did not include Marshall as a subject of the search warrant. The record shows that Kososki was looking for Marshall solely because the CI identified him as the seller. Contrary to the prosecution's assertion, we find that the testimony did not establish why Kososki sought the search warrant or demonstrate the effect of the CI's out-of-court statements on Kososki. Rather, the purpose of the testimony was to establish Marshall as the individual identified by the CI as the seller in the controlled buy. As such, Kososki's statement that he was looking for Marshall in executing the search warrant constituted inadmissible hearsay and violated Marshall's right to confront all witnesses against him.

² *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

³ *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

⁴ *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010).

⁵ *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011).

⁶ *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007).

⁷ *Id.*

⁸ *Id.* at 10-11.

⁹ *Id.* at 11.

¹⁰ *Id.*

That notwithstanding, we conclude that the error was harmless, and thus the trial court did not abuse its discretion in denying Marshall's motion for a mistrial. In reviewing claims of Confrontation Clause errors, this Court applies the harmless error test.¹¹ This Court must thoroughly review the record and "evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error."¹² After reviewing the record, we find that the jury verdict would have been the same without the error as the prosecution provided evidence beyond Kososki's hearsay statement that Marshall was guilty of possession with the intent to deliver 50 grams or more but less than 450 grams of cocaine. Additionally, the trial court instructed the jury to disregard Kososki's answer. There is a presumption that the jury follows its instructions and such instructions cure most errors.¹³ Because the error was harmless, the trial court's decision to deny Marshall's motion for a mistrial was not an abuse of discretion.¹⁴

Marshall next asserts that the trial court erred in denying his motion for a new trial brought on the ground that the verdict was against the great weight of the evidence. Specifically, Marshall contends that the trial court applied the incorrect standard in denying his motion for a new trial and failed to weigh all of the evidence. Marshall also argues that the prosecution failed to establish that he had a possessory interest in the residence or constructively possessed the cocaine located in the bedroom of the residence. We disagree.

This Court reviews a trial court's decision to either grant or deny a motion for a new trial for an abuse of discretion.¹⁵ In reviewing a motion for a new trial on the ground that the verdict was against the great weight of the evidence, the trial court must determine whether "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand."¹⁶ "Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence."¹⁷

While the trial court did not recite all of the evidence presented in making its ruling, we find that the trial court did not improperly apply the sufficiency of the evidence test or fail to consider Marshall's wife Beatrice Springer's testimony when deciding Marshall's motion for a

¹¹ *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005).

¹² *Id.*

¹³ *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

¹⁴ *Unger*, 278 Mich App at 217.

¹⁵ *Abraham*, 256 Mich App at 269.

¹⁶ *Unger*, 278 Mich App at 232.

¹⁷ *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

new trial. Considering all of the evidence, the jury's verdict was not against the great weight of the evidence.¹⁸

To convict a defendant of possession with the intent to deliver 50 grams or more but less than 450 grams of cocaine, in addition to the defendant possessing the requisite weight of cocaine, the prosecution must prove beyond a reasonable doubt that the defendant knowingly possessed cocaine and that the defendant intended to deliver the substance to someone else.¹⁹ The element of possession requires a showing that Marshall had "dominion or right of control over the drug with knowledge of its presence and character."²⁰ A defendant may be in actual or constructive possession and possession may be exclusive or jointly shared.²¹ "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband."²² "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of possession."²³ A defendant's mere presence at a location where contraband is located, without evidence of an additional connection between the defendant and the contraband, is insufficient to establish constructive possession.²⁴

Here, Marshall had a possessory interest in the residence. The record shows that Marshall indicated during post-arrest processing that his address was the residence's address. Additionally, a letter addressed to Marshall found at the residence and sent by a government agency dated near the time the search warrant was executed indicated that Marshall's address was the residence's address. Moreover, the Secretary of State database listed Marshall's address as that of the residence. While Springer testified that Marshall had lived at a different address since April 2008, she also testified that Marshall was at the residence every day and "the resolution of credibility questions is within the exclusive province of the jury."²⁵

As well as having a possessory interest in the residence, the evidence also supports that Marshall constructively possessed the cocaine.²⁶ When the search warrant was executed, Marshall was located in the basement bedroom in close proximity to cocaine, scales, money, and packaging materials, all of which were in plain view. In the same bedroom, in a closet that was near Marshall's location, a bag containing cocaine and a box with \$100 bills was found.

¹⁸ *Unger*, 278 Mich App at 232.

¹⁹ MCL 333.7401(2)(a)(iii); *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002).

²⁰ *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).

²¹ *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003).

²² *Johnson*, 466 Mich at 500.

²³ *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

²⁴ *People v Echavarria*, 233 Mich App 356, 370; 592 NW2d 737 (1999).

²⁵ *Lacalamita*, 286 Mich App at 470.

²⁶ *Johnson*, 466 Mich at 500.

Mailings located at a searched residence addressed to the defendant at that particular address, along with other factors, have supported findings of constructive possession by the defendant of contraband found at the residence.²⁷ As such, this evidence, together with admission by Marshall that he lived at the residence, is sufficient to show that Marshall constructively possessed the seized cocaine in the bedroom and the bedroom closet.²⁸ Therefore, the verdict was not against the great weight of the evidence and the trial court did not abuse its discretion by denying Marshall's motion for a new trial.

Marshall further contends that there was insufficient evidence to sustain his conviction for possession with intent to deliver 50 grams or more but less than 450 grams of cocaine, as the prosecution failed to prove possession or that he intended to deliver the contraband. We disagree.

In reviewing a sufficiency of the evidence challenge, this Court reviews the record de novo.²⁹ A conviction will be affirmed if it is determined, in viewing the evidence in a light most favorable to the prosecution, that the jury could have found that the elements of the crime were proven beyond a reasonable doubt.³⁰ In reviewing the record, this Court is "required to draw all reasonable inferences and make credibility choices in support of the jury verdict."³¹ It is irrelevant whether the evidence is direct or circumstantial, the same deferential standard is applied.³² Thus, the prosecution can establish the elements of a crime from circumstantial evidence and "reasonable inferences arising from that evidence[.]"³³ Should any conflict arise, this Court should resolve such conflicts in favor of the prosecution.³⁴

As explained above, the evidence supports that Marshall constructively possessed the cocaine.³⁵ There is also sufficient evidence to support the jury's conclusion that Marshall intended to deliver the cocaine to someone else. When the police executed the search warrant, Marshall was sitting on the bed near the closet and cocaine, scales, money, and packaging materials were present. A reasonable jury could infer that Marshall was engaged in selling cocaine, as paraphernalia routinely used by those selling drugs was found in Marshall's home,

²⁷ *People v Hardiman*, 466 Mich 417, 422-423; 646 NW2d 158 (2002); *Echavarria*, 233 Mich App at 370.

²⁸ *Id.*

²⁹ *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006).

³⁰ *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

³¹ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

³² *Id.*

³³ *Id.*

³⁴ *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

³⁵ *Johnson*, 466 Mich at 500.

and the items were in plain view and in close proximity to Marshall when the police searched his residence.³⁶ Further, there was evidence that crack cocaine was being sold out of the residence, as a CI had purchased the substance from the residence approximately 24 hours before the search. Therefore, viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence for a reasonable jury to conclude that Marshall was guilty of possession with the intent to deliver 50 grams or more but less than 450 grams of cocaine.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael J. Talbot

/s/ Deborah A. Servitto

³⁶ *Nowack*, 462 Mich at 400.