

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASHAD SHAHEED,

Defendant-Appellant.

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UNPUBLISHED  
October 12, 1999

No. 206314  
Washtenaw Circuit Court  
LC No. 95-4431 FH

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald\*, JJ.

PER CURIAM.

Following a three-day jury trial, defendant was convicted of possession with intent to deliver cocaine in an amount of fifty grams or more but less than 225 grams, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), possession of cocaine in an amount of fifty grams or more but less than 225 grams, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2).<sup>1</sup> Defendant was sentenced to consecutive terms of ten to twenty years' imprisonment for each drug conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm the convictions for possession with intent to deliver and felony-firearm and vacate the conviction for possession of cocaine.

*I. Double Jeopardy*

Defendant contends his sentence for possession of cocaine violates the Double Jeopardy Clause of the Fifth Amendment and Const 1963, art 1, §15. We agree. The record in this case reflects that the drugs used to support the possession conviction were the same drugs used to support the conviction for possession with intent to deliver. Possession of a controlled substance is a necessarily included offense of possession with intent to deliver. *People v Lucas*, 188 Mich App 554, 581; 470 NW2d 460 (1991). Defendant cannot be punished for both the greater offense and a lesser included offense. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993). The usual remedy in situations where the defendant has been erroneously convicted under two separate statutes for a single offense is to affirm the conviction on the higher charge and vacate the lower charge. *Id.* Accordingly, we affirm defendant's conviction for possession with intent to deliver cocaine and vacate defendant's conviction for possession of cocaine.

\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

## II. Directed Verdict

Defendant next argues that the trial court erred in failing to grant his motion for directed verdict on the felony-firearm charge. Specifically, defendant contends that there was no evidence presented to establish that he possessed the guns that were found in the apartment. We disagree. We review a trial court's decision on a motion for directed verdict under the same standard applied by the trial court. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). The court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Possession of a firearm may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989); *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995). A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him. *Id.* In *People v Becoats*, 181 Mich App 722, 726; 449 NW2d 687 (1989), a case which is factually similar to this case, several guns were found throughout the defendant's home in close proximity to the room where the defendant was arrested. The *Becoats* Court held that the defendant, who was selling drugs from his home, could have possessed a firearm during the commission of a felony by having a firearm at his disposal should he need it. *Id.*

In this case, defendant was found in the living room of a two-story apartment. One of the guns was found on the stairway leading from the living room to the second floor. The other gun was found in the master bedroom upstairs, which appeared to be a man's bedroom. Defendant was the only man living in the apartment. Police also found cocaine on the kitchen table and upstairs in a safe that defendant admitted belonged to him.

Based on these circumstances, we cannot find that there was insufficient evidence presented by the prosecution to allow a rational trier of fact to conclude that the gun was reasonably accessible to defendant and he knew of its location. Therefore, we find no error in the trial court's denial of defendant's motion for directed verdict.

## III. Jury Instruction

Defendant contends that the trial court committed reversible error when it improperly instructed the jury on the definition of "possession" with regard to the felony-firearm charge. We disagree. Defendant failed to object to the instruction as given. In *People v Carines*, 460 Mich 750, 764; \_\_\_\_ NW2d \_\_\_\_ (1999), the Supreme Court extended the plain error rule, first adopted in *People v Grant*, 445, Mich 535, 520 NW2d 123 (1994), to claims of unpreserved constitutional error.

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of

prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” [*Carines*, *supra* at 763 (citations omitted).]

In this case, the jury requested clarification of instructions given by the trial court for “the elements of [felony-firearm], possession of a firearm during, and then define possession during.” The court suggested reading the instruction contained in CJI2d 12.7, pertaining to possession in drug cases. Constructive possession in drug cases requires only a right to control the drugs. However, the commentary to CJI2d 12.7 states that possession of a firearm in felony-firearm cases is different because it requires a showing that the defendant knew the location of the firearm and it was reasonably accessible to the defendant. *Williams*, *supra* at 609. Thus, the trial court erred in giving the “right to control” instruction for possession in drug cases.

Although defendant has established the first two requirements of the plain error rule, we find that defendant has failed to meet the third element set forth in *Carines* which requires that the plain error affect substantial rights of the defendant, i.e., affect the outcome of the lower court proceedings. *Carines*, *supra* at 763. The evidence presented at trial clearly established that defendant knew where the guns were located and that one or both of the guns were reasonably accessible while he sold drugs in the apartment. One of the guns was lying in plain view on the stairs leading from the living room (where defendant was found) to the second floor. There was cocaine in a safe upstairs and another gun in a closet of the master bedroom. Based on this evidence, we cannot conclude that the jury would have reached a different verdict if the court had given the proper instruction for possession of a firearm. Therefore, we find that this issue was forfeited.

#### *IV. Prosecutorial Misconduct*

Defendant contends that the prosecutor made four statements during closing argument which amounted to prosecutorial misconduct. We review claims of prosecutorial misconduct in the context in which they were stated to determine whether defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 183; 545 NW2d 18 (1996). However, unpreserved claims of prosecutorial misconduct, as in this case,<sup>2</sup> are waived unless a miscarriage of justice would result. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We have read the prosecutor’s statements in the context in which they were given and we cannot find that a miscarriage of justice would result. Therefore, we decline to review defendant’s claims of prosecutorial misconduct.

#### *V. Defendant’s Standard 11 Issues*

Defendant filed two Standard 11<sup>3</sup> briefs in which he raises five issues on appeal. Defendant contends that the trial court erred in refusing to allow a confidential informant to testify at the hearing on

his motion to suppress. We disagree. In determining whether to require that a confidential informant be ordered to testify, the court must determine if the informant's identity is essential to a fair determination of the cause. *People v Kinnebrew*, 75 Mich App 81, 86; 254 NW2d 652 (1977). This rule does not apply when a defendant wishes to challenge a collateral issue, such as the validity of a search warrant. *Id.* The testimony of a confidential informant in such cases is required only if the court believes that there is some doubt as to the officer's credibility regarding the existence of the informant. *People v Poindexter*, 90 Mich App 599, 610; 282 NW2d 411 (1979). We review the refusal to allow a confidential informant to testify for an abuse of discretion. *Id.*

Defendant filed a motion challenging the validity of the search warrant in which he claimed that Alex Cole, the alleged confidential informant, had spoken with defense counsel and denied that a controlled buy took place. After two evidentiary hearings on defendant's motion, the court concluded that it had no reason to disbelieve the testimony of police officers McQueen and Hill, and denied defendant's request to have Cole testify. Moreover, it appeared from the record that, if called, Cole would have asserted his right against self-incrimination. Under these circumstances, we cannot conclude that the trial court abused its discretion in denying defendant's request to have Cole testify at the hearing.

We also find no merit in defendant's remaining claims of error which were not preserved for appeal. *Grant, supra* at 546. Finding no miscarriage of justice, we decline to consider the defendant's remaining claims of error. *Stanaway, supra* at 687.

Affirmed as to the convictions for possession with intent to deliver cocaine and felony-firearm and vacated as to the conviction for possession of cocaine.

/s/ Donald L. Holbrook, Jr.  
/s/ Brian K. Zahra  
/s/ John F. Fitzgerald

<sup>1</sup> The judgment of sentence shows a conviction for delivery of a controlled substance. However, defendant was charged with, and convicted of, possession with intent to deliver a controlled substance. We presume that the misnaming of the offense on the judgment was the result of a clerical error.

<sup>2</sup> Defendant made no objection to three of the four statements which allegedly constitute prosecutorial misconduct. However, defendant's objection failed to preserve the fourth statement because the basis for the objection stated at trial relates to defendant's choice to remain silent, whereas, on appeal, defendant claims that the prosecutor argued facts not in evidence. Because defendant failed to state the correct basis for his objection, we find that the challenge to the fourth statement was unpreserved along with the other three.

<sup>3</sup> Administrative Order 1981-7, Standard 11.