

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD A. MICHALAK, JR.,

Defendant-Appellant.

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UNPUBLISHED

March 6, 2001

No. 218069

Oakland Circuit Court

LC No. 97-153737-FH

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). After the jury's verdict, defendant pleaded guilty to being a felon in possession of a firearm as a second habitual offender, MCL 750.224f; MSA 28.421f. Defendant was thereafter sentenced to two to ninety-six months' imprisonment for the possession with intent to deliver marijuana conviction<sup>1</sup>, six to ninety months for the felon in possession of a firearm conviction, consecutive to the mandatory two years for the felony-firearm conviction. Defendant appeals as of right and we affirm.

I

Defendant first argues that there was insufficient evidence presented by the prosecution to sustain his convictions of possession with intent to deliver marijuana and felony-firearm. When reviewing a sufficiency of the evidence claim, this Court must view the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences

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<sup>1</sup> Defendant was sentenced under MCL 333.7413(2); MSA 14.15(7413)(2), which provides that, for a second or subsequent offense, a defendant may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both.

arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

In order to support a conviction for possession with intent to deliver less than five kilograms of marijuana, the prosecution must prove four elements: (1) that the recovered substance is marijuana, (2) that the marijuana weighs less than five kilograms, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the marijuana with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992).

The only element at issue here is whether the prosecution presented sufficient evidence that defendant intended to deliver the marijuana. In *People v Fetterly*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998), this Court held:

Actual delivery is not required to prove intent to deliver. . . . An actor’s intent may be inferred from all of the facts and circumstances . . . and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient. . . . Intent to deliver can be inferred from the quantity of the controlled substance in the defendant’s possession and from the way in which the controlled substance is packaged.

The evidence adduced at trial showed that the Royal Oak police department received an anonymous tip that defendant was involved in the trafficking and sales of drugs from his home. Following a surveillance of the house, police officers obtained a search warrant and seized four individually packaged bags of marijuana (totaling 163.28 grams), three scales, four boxes of plastic sandwich bags, numerous roach clips, two bongos, a glass vial, a measuring spoon, a zigzag rolling machine, eight razor blades, five plastic trays, three mirrors with a white powdery substance on them, and a bag of marijuana seeds in defendant’s bedroom. There was also a .22-caliber rifle hanging in the bedroom closet, and a gun safe that contained six different guns, assorted ammunition, marijuana and marijuana seeds, and \$1,340 in cash.

Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence for the jury to reasonably infer that the marijuana found in defendant’s bedroom was not merely for defendant’s personal use as he claimed, but that he intended to deliver the marijuana. Accordingly, there was sufficient evidence presented to support defendant’s conviction of possession with intent to deliver marijuana.

With regard to the felony-firearm conviction, the prosecution must prove: (1) the defendant was in possession of a firearm; (2) while committing or attempting to commit a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). A defendant may have constructive possession of a firearm if the location of the firearm is known to the defendant and is reasonably accessible to him. Possession may also be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000).

The evidence adduced at trial showed that a .22-caliber rifle, which was loaded, was found hanging from the closet door jam in defendant’s bedroom. Defendant and his girlfriend were found in the hallway outside of defendant’s bedroom at the time the police officers

executed the search warrant. Defendant indicated in his statement to the police that he knew the .22-caliber rifle was loaded. Because defendant was immediately outside of the door to his bedroom, he was standing between the police officers and the loaded rifle. Consequently, the jury could reasonably infer that defendant had constructive possession of the rifle while being in possession of marijuana with intent to deliver. There was sufficient evidence at trial to sustain defendant's conviction of felony-firearm.

## II

Defendant next raises two issues relating to his sentences. He contends that he is entitled to resentencing because the trial court failed to indicate that defendant's enhanced sentences were discretionary, as opposed to mandatory, and that he is entitled to sentence credit for the time he served on electronic tether while on pretrial bond. We reject both arguments.

Defendant was sentenced for his conviction for possession with intent to deliver pursuant to MCL 333.7413(2); MSA 14.15(7413)(2), which provides that, for a second or subsequent offense, a defendant "may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both." (Emphasis supplied.) Defendant was sentenced for his conviction for felon in possession of a firearm pursuant to MCL 769.10; MSA 28.1082, which provides that a defendant may be imprisoned up to one and one-half times the original maximum sentence. Upon review of the sentencing transcript, we find that there was nothing to indicate that the sentencing judge was under the mistaken impression that the imposition of the enhanced sentences were mandatory, rather than discretionary. See *People v Alexander*, 234 Mich App 665; 599 NW2d 749 (1999); *People v Beneson*, 192 Mich App 469, 471, 481 NW2d 799 (1992).

Defendant next contends that his time spent on an electronic tether while on pretrial bond should have been credited toward his sentence. MCL 769.11b; MSA 28.1083(2) provides:

Whenever any person is hereafter convicted of any crime within this state and has served any time *in jail* prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing. [Emphasis supplied.]

Here, defendant was not denied or unable to post bond. *People v Whiteside*, 437 Mich 188, 196-197; 468 NW2d 504 (1991). He was on bond before trial, and the electronic tether was simply a condition of that bond. This Court has previously held that being on electronic tether is not the equivalent of being in jail under these circumstances. *People v Reynolds*, 195 Mich App 182, 183-184; 489 NW2d 128 (1992). Accordingly, defendant was not entitled to sentence credit for being on electronic tether before trial as a condition of his bond.

## III

Defendant next contends that the trial court abused its discretion in admitting evidence of the firearms found in the gun safe, which were not the basis of the felony-firearm charge. The trial court ruled that the evidence was relevant to demonstrate the totality of the circumstances.

The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Relevant evidence is that evidence that has any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Relevant evidence is generally admissible, MRE 402; however, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

Defendant argues that the admission of the firearms was unduly prejudicial and not relevant in that it allowed the jury to consider weapons that were not the basis of the felony-firearm charge in determining defendant's guilt with respect to that charge. In *People v Sholl*, 453 Mich 730, 741; 453 NW2d 730 (1996), our Supreme Court recognized, in the context of evidence concerning other bad acts, "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." Here, the presence of weapons was relevant to the issue of whether defendant possessed the marijuana with the intent to deliver. One police officer, who testified as an expert in drug enforcement, stated that people who deal in drugs often have firearms to protect the drugs, the money, and their houses. Consequently, the firearms found in the safe were relevant with respect to the charge of possession with the intent to deliver marijuana.

Further, we disagree with defendant's contention that the admission of the firearms was unfairly prejudicial with respect to the felony-firearm charge because the jury was allowed to consider numerous weapons in determining defendant's guilt or innocence. In ruling on the objection, the trial court gave a cautionary instruction to the jury which clearly stated that there is a constitutional right to possess firearms. Further, it was made clear to the jury by both parties that the basis of the felony-firearm charge was solely the .22-caliber rifle hanging from the door jam in the bedroom closet. Under these circumstances, the probative value of the evidence of the firearms was not substantially outweighed by the danger of unfair prejudice.

Accordingly, the trial court did not abuse its discretion in admitting evidence of the firearms that were not the basis of the felony-firearm charge.

#### IV

Lastly, defendant argues that the trial court erred in failing to instruct the jury that it was only to consider the .22-caliber rifle hanging in the closet for the felony-firearm offense. Where as here, the issue is unpreserved because the defendant failed to object to the instruction given, the defendant must demonstrate that plain error occurred and that the plain error affected defendant's substantial rights. *Carines, supra*, p 763. Although the trial court's instruction was in accord with CJI2d 11.34, the trial court did not specifically instruct the jury that the firearm that formed the basis of the felony-firearm charge was the .22-caliber rifle found in the bedroom closet. Since there were numerous other firearms introduced into evidence at trial, this could constitute plain error to not specify the firearm underlying the charge.

However, we find that any error was not prejudicial to defendant because it was made clear to the jury that the .22-caliber rifle found in the closet was the firearm underlying the felony-firearm charge. In the prosecutor's opening statement, he stated that the .22-caliber rifle was the only weapon accessible to defendant and the weapon upon which the felony-firearm charge was based. When defense counsel objected to the relevance of the weapons found in the safe, he reiterated that the only weapon relevant to the felony-firearm charge was the rifle found in the closet. In their closing arguments, both parties referred to the .22-caliber rifle found in the closet as the basis for the felony-firearm charge. The trial court's instruction of the jury included the definition of constructive possession which mandates that the firearm in question must be reasonably accessible.

In light of the full context surrounding the felony-firearm charge, we find that defendant was not prejudiced by the trial court's failure to specify the firearm underlying the felony-firearm charge, where several firearms were introduced into evidence at trial, because the jury was clearly aware of the firearm that formed the basis of the charge.

Affirmed.

/s/ Michael R. Smolenski

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald