

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN PAUL ELWART,

Defendant-Appellant.

UNPUBLISHED

December 14, 2001

No. 223302

Sanilac Circuit Court

LC No. 98-004927-FH

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of manufacture of marijuana, MCL 333.7401(2)(d)(iii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), maintaining a drug house, MCL 333.7405(d), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of twenty to forty-eight months' imprisonment for the manufacture and possession convictions and one to two years' imprisonment for the drug house conviction to be served consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant was accused of using a knife to assault an individual. Police arrived at defendant's home and arrested him. Defendant denied their request to enter the home to search for the weapon. Police were also advised that drugs may be present in the home, but the information could not be verified to provide a basis for a search warrant. The next day, police returned with a search warrant for the assaultive weapon. Marijuana plants were found growing in the home. Additionally, marijuana plants were visible in the corn fields because their height exceeded the growth rate of the corn. Dried marijuana, a scale, packaging baggies, firearms, and lights, designed to increase growth rate, were also discovered in the home.

Defendant first argues that the trial court erroneously denied his motion for a directed verdict because the prosecution failed to establish identification. We disagree. When reviewing a claim based on the denial of a directed verdict motion, we view the evidence, up to the time the motion was made, in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Welch*, 226 Mich App 461, 462; 574 NW2d 682 (1997). Identification may be established by direct or circumstantial evidence. *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998). The identification of defendant during voir dire did not excuse the identification element of the prosecutor's case. *People v Kern*, 6 Mich App 406,

410; 149 NW2d 216 (1967). However, the context of the testimony of the witnesses established that references were to the criminal acts of defendant. *Id.* Police executed a search warrant of defendant's residence following the assault complaint and discovered mail and other documentation with defendant's name. The operable vehicle on the premises was registered to defendant. Accordingly, this claim of error is without merit.¹

Defendant next argues that the trial court erroneously denied his motion for directed verdict of the felony-firearm charge. We disagree. The drugs and weapons were proximately located such that a reasonable jury could conclude that defendant possessed both at the same time. *People v Burgenmeyer*, 461 Mich 431, 439-440; 606 NW2d 645 (2000). The general rule of retroactive application is warranted because the *Burgenmeyer* decision did not overrule clear and uncontradicted case law. *People v Neal*, 459 Mich 72, 80; 586 NW2d 716 (1998).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff

¹ Even if the trial court had concluded that there was insufficient evidence of identification, it would have the discretion to reopen the proofs. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 532; 560 NW2d 651 (1996). In any event, we note that the prosecutor was able to elicit defendant's identification on cross-examination of the neighbor.