STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISRAEL FLORES,

Defendant-Appellant.

UNPUBLISHED
February 26, 2002

No. 224415
Oceana Circuit Court
LC Nos. 98-000698-FH
98-000745-FH

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

In docket no. 98-000698, defendant was convicted by a jury of delivery of between 50 and 224 grams of cocaine, MCL 333.7401(2)(a)(iii), possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.224b. In docket no. 98-000745, defendant was convicted by a jury of delivery of marijuana, MCL 333.7401(2)(d)(iii), and possession of less than 25 grams of cocaine, MCL 333.7401(2)(a)(v). Defendant appeals as of right. We affirm.

Defendant's convictions stem from two undercover drug buys. In December 1998, a detective for the Mason County Sheriff's Department went to defendant's residence with Tony Hernandez, a life-long acquaintance of defendant. Hernandez was unaware that the detective was a police officer. The detective gave Hernandez $2,600, the serial numbers of which had been recorded, to purchase cocaine. After returning from defendant's residence, Hernandez directed the detective to go to two other residences. When they were unable to purchase cocaine at either of these two locations, the two returned to defendant's residence, and again Hernandez went inside. As the two were driving away, the detective asked for either the money or the cocaine. Hernandez then handed the officer two baggies containing a substance that was subsequently determined to be cocaine. Thereafter and in January of 1999, while defendant was out on bond for charges stemming from the December cocaine buy, a police confidential informant and another man purchased marijuana from defendant at his residence.

Defendant first claims that his convictions in docket no. 98-000698 were based on insufficient evidence. We disagree. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

At trial, Hernandez denied that he had obtained the cocaine from defendant. Hernandez testified that the cocaine was "fronted" to him by some unnamed other person. Hernandez also testified that he gave defendant the $2,600 as repayment for a loan. However, the jury also heard that Hernandez had admitted at his plea hearing on a charge of delivering cocaine that he had obtained the cocaine from defendant. Hernandez testified that he had lied at his plea hearing in order to get the reduced sentence being offered. As trier of fact and sole judge of witness credibility, the jury was free to disbelieve Hernandez's denials at trial. See *People v Lemmon*, 456 Mich. 625, 643; 576 NW2d 129 (1998). Additionally, evidence was presented that during a search of defendant's home the police found a scale and a substance often used as a cocaine cutting agent in defendant's bedroom. Viewing this evidence and the reasonable inferences that arise therefrom in a light most favorable to the prosecution, we believe that sufficient evidence was adduced at trial in support of the cocaine delivery charge.

We also conclude that sufficient evidence was also presented to convict defendant of possession of marijuana with intent to deliver. Actual delivery is not required to prove intent to deliver; rather, minimal circumstantial evidence is sufficient for a jury to properly infer intent. *People v Fetterley*, 229 Mich 511, 517-518; 583 NW2d 199 (1998). Although defendant claimed that the relatively large amount of marijuana was for his personal use, the scales, baggies, handgun, and cash found nearby provided the jury with enough circumstantial evidence to infer intent to deliver. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999).

Sufficient evidence was also presented to support the felony-firearm charge. To be guilty of this crime, defendant must have possessed the firearm at the time he committed or attempted to commit the underlying felony. *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000). Sufficient testimony was introduced to allow the jury to infer that defendant knew that the gun was in the paper bag in his bedroom and was therefore reasonably accessible to him, which establishes that defendant had constructive possession of the gun. *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). Defendant's insistence that the gun belonged to a friend is not exculpatory, because whether defendant owned the firearm is irrelevant under the statute, as is the type of firearm and whether it was loaded. *Burgenmeyer*, *supra* at 438; *Hill*, *supra* at 474.

We find merit in defendant's argument that evidence of a prior cocaine transaction was improperly admitted. The contested evidence was ostensibly admitted to impeach defendant's testimony. However, the impeached statement was elicited on cross-examination, and was not offered by defendant. It is well established that "a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial." *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994). See also *People v Kilbourn*, 454 Mich 677, 688; 563 NW2d 669 (1997). Nonetheless, given the weight of the properly admitted evidence, we conclude that defendant has not sustained his burden of demonstrating that it is more probable than not that a different outcome would have resulted without error. We therefore will not reverse on this ground. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant next argues that counsel's failure to present any mitigating factors at sentencing constituted ineffective assistance of counsel. We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the

defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *Stanaway, supra* at 687. Because defendant failed to move for either a new trial or a *Ginther*[1] hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Whether to address the court at sentencing is a tactical decision to be made by defense counsel. *People v Hughes*, 165 Mich App 548, 550; 418 NW2d 913 (1987). The record reveals that counsel pointed out to the court two errors in the presentence investigation report. Defendant does not mention, nor does the record reveal, any mitigating factors of which the sentencing court was not previously aware. Accordingly, we conclude that defendant has failed to establish either that counsel's performance fell below an objective standard of reasonableness or that counsel's performance so prejudiced him that he was denied a fair trial. *Stanaway, supra*.

Finally, defendant argues that the court failed to articulate reasons for the sentences he received, which defendant maintains were not individualized and were also disproportionate. Although the articulation was admittedly minimal, it addressed both the offender and the nature of the offense, and stated that it was consistent with the applicable statutes, which is sufficient to establish on review that the sentence was individualized. *People v Triplett*, 432 Mich 568, 442 NW2d 622 (1989); *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000).

We also reject defendant's contention that his sentences violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). It is clear from the record that defendant's sentences were enhanced under the subsequent offender provision of the controlled substances act, MCL 333.7413(2). Therefore, the sentencing guidelines do not apply. *People v White*, 208 Mich App 126, 135; 527 NW2d 34 (1994).

After reviewing the record, we conclude that given the circumstances, including defendant's status as a subsequent offender and the fact that he committed the crimes charged in docket no. 98-000745 while on bond for the crimes charged in docket no. 98-000698, the trial court did not abuse its discretion in imposing sentence.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).