

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY RONALD JACKSON,

Defendant-Appellant.

UNPUBLISHED

October 11, 2002

No. 228720

Kent Circuit Court

LC No. 99-010195-FH

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 12-1/2 to 25 years for the delivery conviction and three to ten years for the felon in possession conviction, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from his involvement in the sale of 68.15 grams of cocaine to an undercover officer. The transaction took place in a motel room. During the transaction, defendant removed a digital scale from a duffle bag that was in the room. A gun was later found inside the duffle bag. Defendant admitted selling the cocaine to the police officer and also admitted that the duffle bag and gun was his.

On appeal, defendant first argues that the evidence was insufficient to support his felony-firearm conviction because the evidence failed to show that he possessed a firearm at the time he committed another felony. We disagree. The test for determining whether evidence was sufficient to establish an element of a crime is to view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the element was proven beyond a reasonable doubt. *People v Mass*, 464 Mich 615, 622; 628 NW2d 540 (2001).

Here, the evidence established that a fully-loaded gun was found inside the duffle bag in defendant's motel room. Defendant and the police officer were sitting in close proximity to the duffle bag during the drug transaction and, at one point, defendant went over to the bag and removed a digital scale. Defendant testified that he carried the weapon for protection because

dealing drugs is a “dangerous business.” Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the gun was “reasonably accessible” to defendant during the drug transaction. This was sufficient to establish the element of possession. See *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989); see, also, *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Further, defendant was not denied a fair trial by the trial court’s jury instruction on felony-firearm. The court’s modified instruction on the element of possession was sufficient to cure any prejudice caused by the erroneous earlier instruction and adequately informed the jury of the applicable law. See *Burgenmeyer, supra*; *Hill, supra*.

Defendant also claims that he is entitled to a new trial because the trial court allowed evidence of prior drug transactions and other activity between defendant and the undercover officer. However, as the trial court observed, defense counsel opened the door to such evidence by attempting to portray defendant as an unwilling target of a deliberate police strategy to induce suspects to deal in larger quantities of cocaine. See *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994). The evidence of defendant’s “bad check scam” was likewise relevant to explain the nature of the relationship between the undercover officer and defendant. Although defendant complains that he did not receive advance notice that the prosecutor would introduce evidence of prior bad acts, MRE 404b(2) permits waiver of the notice requirement if, during trial, good cause is shown. Here, the fact that defense counsel opened the door to the challenged evidence was sufficient good cause to waive the notice requirement. Defendant also has not demonstrated that the items in his possession at the time of the offense were unfairly prejudicial or otherwise inadmissible. See MRE 403; *Pickens, supra* at 336. Accordingly, we are not persuaded that the trial court abused its discretion by allowing this evidence. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Furthermore, even if we were to conclude that some of the evidence was erroneously admitted, reversal would not be warranted. Defendant admitted delivering 2-1/2 ounces of cocaine to the undercover officer and also admitted both ownership and possession of the duffle bag where the gun was located. Given defendant’s admissions and his testimony that he sold cocaine on a regular basis (albeit to support his own habit), it is not likely that the outcome would have been different without the evidence. See *id.* at 495.

We also reject defendant’s claim that the prosecutor committed misconduct by introducing the evidence discussed above. Defendant has not demonstrated a prosecutorial pattern of eliciting inadmissible testimony. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Next, defendant argues that trial counsel was ineffective. We disagree. Even if counsel failed to adequately argue for suppression of defendant’s bank robbery conviction in accordance with *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997), and *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997), defendant cannot demonstrate that he was prejudiced by any error. Considering that the prior conviction was unrelated to the principal charged crime of delivery of cocaine, that defendant admitted being a drug user, and also admitted delivering the cocaine to the undercover officer and possessing the duffle bag where the firearm was located, there is no reasonable probability that the outcome would have

been different but for counsel's alleged error. See *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

Defendant also complains that counsel was ineffective for failing to object to the evidentiary matters discussed above. We disagree. First, defense counsel did object to some of the matters in question. Second, as discussed previously, the evidence in question did not affect the outcome of the proceeding and, therefore, defendant was not prejudiced by any deficiency by counsel. Defendant also complains that counsel did not object to evidence that the police found marijuana and needles at defendant's home and that defendant had a needle in his hand when he was arrested. Defendant contends that such evidence unfairly painted him as a "bad person." Again, however, considering that defendant admitted being a drug user who injected cocaine, there is no reasonable probability that defendant was prejudiced by this evidence.

Next, defendant raises several sentencing issues. Although defendant contends that his 12-1/2 year minimum sentence is disproportionate, it is within the range recommended by the statutory sentencing guidelines. Defendant does not allege a scoring error or assert that the sentence was based on inaccurate information. Accordingly, we must affirm defendant's sentence. See MCL 769.34(10); *People v Babcock*, 244 Mich App 64, 77-78; 624 NW2d 479 (2000). We find no merit to defendant's claim that his sentence is unconstitutionally cruel and unusual. See *People v Bullock*, 440 Mich 15, 30, 34, n 17; 485 NW2d 866 (1992); *People v Northrop*, 213 Mich App 494, 499; 541 NW2d 275 (1995). We also reject defendant's claim that the Legislature may not constitutionally limit a court's imposition and review of a defendant's sentence. See *People v Hegwood*, 465 Mich 432, 437, 439-440; 636 NW2d 127 (2001), *Babcock*, *supra* at 71-72.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh