

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL OVERTON,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 246929

Wayne Circuit Court

LC No. 02-006386-01

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); possession of a firearm by a felon, MCL 750.224(f); possession with intent to deliver more than 50, but less than 225, grams of marijuana, MCL 333.7401(2)(d)(iii); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to thirty-eight months to twenty years' imprisonment for the possession with intent to deliver cocaine conviction, three to five years' imprisonment for the possession of a firearm by a felon conviction, two to four years' imprisonment for the possession with intent to deliver marijuana conviction, and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but remand for proceedings consistent with this opinion.

Defendant first contends that the trial court erred in admitting into evidence testimony that a pistol and a rifle were found in defendant's apartment. We disagree.

This issue was not preserved for appeal. MRE 103; *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Generally, this Court reviews evidentiary rulings for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Here, however, because defendant failed to properly preserve the issue for appeal, our review is for plain error affecting defendant's substantial rights. *Bulmer*, *supra* at 35, citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

At trial, Sergeant Andrew White testified that he found a .380 pistol and a .22 rifle inside the closet in one of the bedroom closets. Sergeant White also testified that defendant had a .38 revolver on his person. Officer Michael Bryant testified that he found a 9 millimeter handgun on the bed in the same room. Defendant first maintains that the admission of this evidence was irrelevant. "Relevant evidence" means evidence having any tendency to make the existence of

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. As part of this argument, defendant asserts that there was no positive link between the charged offenses and the guns found in the closet. We disagree. “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.” *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995) reversed in part on other grounds 461 Mich 431 (2000). Here, defendant was charged with being a felon in possession of a firearm, as well as felony-firearm. Therefore, because these weapons were reasonably accessible to defendant, the existence of these guns was relevant to the firearm charges, as the evidence tends to make it more probable that defendant possessed a firearm.

Defendant also fails to show how the relevance of the evidence was outweighed by any unfair prejudice. MRE 403. “Unfair prejudice” does not mean “damaging.” *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). In *Mills*, *supra* at 75, our Supreme Court further explained:

All evidence offered by the parties is “prejudicial” to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded. [Emphasis in original.]

In *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998), our Supreme Court noted that “evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” Here, because the evidence at issue satisfies an element of two charges against defendant, it can hardly be said that this evidence was only marginally probative. Moreover, because this case was tried by the trial court, as opposed to by a jury, there is little likelihood that this evidence received undue or preemptive weight. “A judge, unlike a juror, possesses an understanding of the law which allows him to ignore [evidentiary] errors and to decide a case based solely on the evidence properly admitted at trial.” *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). Therefore, even if the admission of this evidence was improper, any error associated with it would be harmless.¹

Defendant next contends that he was denied the effective assistance of counsel because his trial counsel failed to object to the testimony mentioned above, and failed to seek a mistrial. We disagree. Defendant’s allegations of ineffective assistance of counsel have no merit.

When reviewing defendant's claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

¹ Defendant also couches this issue in terms of prosecutorial misconduct in seeking to admit this evidence. However, because there was no error associated with the admission of this evidence, there can be no prosecutorial misconduct in seeking to elicit the testimony. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999)(“Prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence”).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id.* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

As provided above, the evidence of the firearms was relevant, and there was no basis for suppressing it. An attorney is not ineffective for failing to object to admissible evidence. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). And, an attorney is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Similarly, there was no reason for trial counsel to move for a mistrial. "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996), citing *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Here, defendant identifies no irregularity warranting a mistrial because admission of the evidence was proper. Therefore, a motion for a mistrial would have been futile. Based on the record, upon review de novo of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *LeBlanc*, *supra* at 579.

Defendant next argues that the trial court erred in fashioning his sentence by making his felony-firearm sentence run consecutively to his felon in possession of a firearm sentence. The prosecution concedes error. We agree.

Defendant's felony information shows that the predicate felonies were various controlled substance charges. However, rather than making defendant's sentence for felony-firearm consecutive to the sentences for those convictions, the trial court erroneously made the sentence consecutive to the sentence for the felon in possession of a firearm conviction. MCL 750.227b(2); *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). We direct that the judgment of sentence be corrected to reflect that the felon in possession of a firearm sentence and the felony-firearm sentence are to run concurrently.

Defendant next alleges that the trial court erred in amending his sentence without giving him credit for 199 days he served in jail awaiting trial on the instant offenses. Our review of the facts surrounding defendant's allegations reveals that at the sentencing hearing, the trial court discussed the issue of defendant receiving credit for this time. The trial court ruled that defendant would not receive credit for this time if he was on parole at the time of the instant crimes; however, the trial court ruled that defendant would receive credit if he was not on parole. The record reflects that the trial court never made a determination as to whether defendant was on parole. When the Department of Corrections communicated with the trial court that defendant's sentences did not specify whether they were to be made concurrent or consecutive to defendant's earlier sentences, the trial court entered an amended judgment of sentence. However, just as with the first judgment of sentence, the amended judgment of sentence did not reflect that a determination was made as to whether defendant was on parole at the time of the earlier offenses.

Defendant claims the trial court erred as a matter of law. We conclude that the trial court did not err as matter of law as its statements were an accurate statement of the law. See MCL

768.7a(2). But the trial court's failure to indicate whether defendant was on parole at the time of the instant offenses warrants clarification. We are unable to determine, based on the record before us, whether defendant was on parole, or whether defendant should receive credit for the 199 days. On remand, we direct the trial court to clarify and make adjustments if necessary.

Defendant next raises several issues in a standard 11 brief. To the extent defendant raises any new issues, they are meritless. Defendant first alleges that he was convicted of a misdemeanor, but was sentenced for a felony. Defendant's argument is based on the trial court's erroneous statement that defendant was convicted of simple possession of marijuana. Although defendant is correct that this charge is a misdemeanor, MCL 333.7403(2)(d), our review of the record reveals that defendant was charged with, convicted of, and sentenced on a charge of possession with intent to deliver marijuana. There is no doubt that this charge is a felony. MCL 333.7402(2)(d)(iii); MCL 777.13. Therefore, we reject this argument. But, on remand, we direct the trial court to properly list defendant's conviction as possession with intent to deliver marijuana, instead of mere possession.

Defendant also contends that there was no underlying felony for defendant's felony-firearm conviction because his marijuana conviction was actually a misdemeanor. However, as discussed above, defendant's marijuana conviction is a felony. Therefore, this argument is without merit.

Defendant generally asserts that there was insufficient evidence to support a conviction for felony-firearm, as the prosecution failed to present evidence that the police were aware defendant had a firearm on his person. In reviewing such a challenge, case law is clear that this Court must view the evidence in the light most favorable to the prosecutor and determine whether 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, 723; 597 NW2d 73 (1999). Defendant's argument ignores the testimony of Sergeant White, who testified that he discovered a Smith & Wesson .38 caliber revolver on defendant. Here, the trier of fact could conclude beyond a reasonable doubt that defendant possessed a firearm at the time of this offense.

Defendant next alleges that the trial court erred in convicting defendant of an uncharged offense when it sentenced defendant for possession with intent to deliver less than fifty grams of cocaine. Defendant is correct that he was not originally charged with this offense. Rather, he was originally charged with possession with intent to distribute more than fifty grams, but less than 224 grams of cocaine. During trial, the attorneys stipulated to amending defendant's charges to reflect a lesser amount of cocaine. Because defense counsel agreed to amend the information, defendant has waived any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 114 (2000). In any event, defendant can show no error, as he was put on notice of the charges against him. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993) (stating that the relevant interests when considering whether to amend charges against defendant are "unfair surprise, inadequate notice, or insufficient opportunity to defend").

Finally, defendant asserts that he was denied the effective assistance of appellate counsel for failing to raise the issues he raises in his standard 11 brief. However, defendant shows no prejudice as his arguments have no merit, and because defendant actually presented those issues by way of his standard 11 brief. See *Pratt, supra* at 430-431.

We affirm defendant's convictions, but remand this case to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Jessica R. Cooper