

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN DUPREE COWANS,

Defendant-Appellant.

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UNPUBLISHED

June 15, 2004

No. 248976

Jackson Circuit Court

LC No. 01-003888-FH

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a controlled substance of twenty-five grams or more but less than fifty grams, MCL 333.7403(2)(a)(iv), and felony-firearm, MCL 750.227b. Defendant was sentenced to two to four years' imprisonment on the possession conviction to be served consecutive to a two-year sentence for the felony-firearm conviction. Defendant's delayed application for leave to appeal was granted. We affirm defendant's convictions and sentences.

Defendant first argues that there was insufficient evidence to support his convictions. In particular, defendant asserts that there was no evidence that defendant constructively possessed the cocaine in the attic or the guns in various locations of the house, other than his presence in the home, which is insufficient as a matter of law. We disagree.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Whether the evidence is sufficient to support a conviction is a question we review de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Johnson, supra*. However, this Court should not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

There is no dispute that defendant did not actually possess the drugs or guns. But possession may also be constructive where the defendant knew the contraband was present and had the right to exercise control over it. *Wolfe, supra* at 520. "It is well established that a

person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Id.*; citations omitted. Therefore, "constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521.

In this case, defendant contends that the evidence did not show a sufficient nexus between himself and the drugs and guns because defendant was not the leaseholder of the home, a known drug dealer had left the home within the hour before the home was searched, there was no testimony or physical evidence to connect defendant to the drugs and guns, and no evidence was presented to show that defendant had control over the entire house as opposed to being a mere guest. But in the house the police recovered a policy from an automobile insurance company addressed to defendant at that address in which defendant was listed as the insured. And defendant was present in the house when the search was conducted. This was indicative of the home being defendant's residence. Also, defendant admitted to the police that the "eight ball" of cocaine, an eighth of an ounce or 3.5 grams, in the living room was his. No drugs were located in the living room; however, 4.9 grams of cocaine were found in the master bedroom.<sup>1</sup> It was reasonable for the jury to infer that this was the "eight ball" defendant admitted owning.

In reviewing the sufficiency of the evidence presented in a criminal case, an appellate court must draw all reasonable inferences in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Being that the "eight ball" was found in the master bedroom combined with the presence of defendant's mail at the home, it was logical for the jury to infer that defendant lived at the house, and thus, had control over its contents. See *People v Hardiman*, 466 Mich 417, 423; 646 NW2d 158 (2002). Inferences built on inferences are permissible. *Id.* at 428.

The larger quantity of cocaine, 47.3 grams, was found in a hidden floor compartment on the far side of an empty room across the hall from the master bedroom. The evidence also showed that a known drug dealer frequented the house and was seen leaving the house in the hour before the search. The home's front door was equipped with a video surveillance camera outside and a monitor on the inside. Furthermore, it is common for a drug user to allow a drug dealer to store and/or sell drugs in his house, in order for the dealer to avoid prosecution. Payment to the drug user is usually in drugs and/or money. Defendant admitted to owning an eight ball of cocaine in the house. Based on these facts, the jury could infer that defendant knew of the existence of the larger quantity of cocaine, even if he did not own it. Ownership is not a prerequisite to a finding of constructive possession. *Wolfe, supra* at 520. And, furthermore, constructive possession may be joint. *Id.*

Circumstantial evidence and reasonable inferences arising from the evidence can constitute sufficient proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). When we view the evidence and its reasonable inferences in the light most

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<sup>1</sup> A short staircase led from the living room to the second floor where the master bedroom was located just to the right.

favorable to the prosecution, we find that there was sufficient evidence to support defendant's conviction for possessing more than twenty-five but less than fifty grams of cocaine.

Defendant's argument regarding the sufficiency of the evidence pertaining to his felony-firearm conviction is essentially the same; the prosecution did not prove that defendant constructively possessed any of the firearms. A person who carries or has in his possession a firearm when he commits or attempts to commit a felony is guilty of felony firearm; possession at the time of arrest is irrelevant. The critical determination is whether the defendant possessed a firearm during the commission of another felony, i.e., possession of a controlled substance in this case. *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000).

In *Burgenmeyer*, after police searched the defendant's bedroom, cocaine was found in a dresser drawer and firearms were found on the dresser. The Court held, "The drugs and the weapons were close enough that a jury reasonably could conclude that the defendant possessed both at the same time, as the prosecutor had charged." *Id.* at 440. The reasoning is similar in this case. A rock of crack cocaine near to the size of a piece defendant admitted owning was found in the master bedroom.<sup>2</sup> Combined with the presence of defendant's mail in the home, the jury could reasonably infer that the master bedroom was defendant's room, and thus, defendant had control over the home's contents. *Hardiman, supra* at 423. A semi-automatic rifle was found in the master bedroom closet and a loaded magazine for the rifle was found on top of the dresser. Additionally, three guns and corresponding ammunition were found in the hidden floor compartment with the larger quantity of drugs. In both situations, the guns were located in such a close proximity to the drugs that a jury could reasonably infer that defendant possessed them at the time he committed the drug possession offense. *Burgenmeyer, supra*. Therefore, viewing this evidence in the light most favorable to the prosecution, we find that there was sufficient evidence to support the jury's verdict.

Defendant also argues that the trial court erred in instructing the jury on the lesser cognate offense of possession of a controlled substance of twenty-five grams or more but less than fifty grams,<sup>3</sup> of which he was convicted, because the charge was not supported by the evidence. Defendant has waived review of this issue, as opposed to merely forfeited review, because he affirmatively expressed his satisfaction with the specific jury instruction he now alleges was error, and with the jury instructions as a whole after the instructions were given to the jury. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

Next, defendant argues that the court erred in sentencing defendant to a prison term for the possession conviction based on its reasoning that it "made no sense" to sentence defendant to probation because he was already going to be in prison for his felony-firearm conviction. Defendant asserts that the trial court misunderstood the law by failing to recognize the consecutive nature of felony-firearm sentences. Additionally, defendant argues that the trial

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<sup>2</sup> Testimony did not reveal the precise location in the master bedroom where the cocaine was found.

<sup>3</sup> Defendant was charged in the information with possession with intent to deliver fifty grams or more, but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii).

court lacked a substantial and compelling reason to depart from the sentencing guidelines where the court's sole reason for departure was defendant's prior probation violations. We address these two issues together.

At sentencing, the court stated:

The guidelines for the possession of 25 to 50 grams of cocaine as a second offense under the public Health Code call for a minimum sentence of 0 to 17 months. The Court is deviating over the guidelines. You have to go to prison for the following reasons. You have to go to prison, anyway, on Count II for a flat two years as prescribed by statute for the possession of a firearm in the commission of a felony. It makes no sense to the Court to be on probation at the same time that you're going to prison.

The guidelines, also, in the Court's opinion, do not consider that you were on probation two separate times in the past and violated probation each time, resulting in discharge without improvement each time and, thus, you're not a candidate for probation, in the Court's opinion.

Accordingly, the court departed upward from the guidelines and sentenced defendant to 2 to 4 years' imprisonment on his possession conviction.

Recently, in *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), our Supreme Court clarified the appellate procedure for reviewing sentencing departures. We review for an abuse of discretion a trial court's determination that a particular objective and verifiable factor constitutes a substantial and compelling reason to depart from the guidelines. *Id.* at 274. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* If a trial court's sentencing departure is not proportionate to the seriousness of the defendant's conduct and criminal history, the departure "is necessarily not justified by a substantial and compelling reason." *Id.* at 264. A substantial and compelling reason must "keenly" or "irresistibly" grab our attention and be of considerable worth in deciding the length of a sentence.<sup>4</sup> *Id.* at 272.

Because defendant's possession offense was a violation of MCL 333.7403(2)(a)(iv) and the upper limit of defendant's guidelines range was less than eighteen months, the court was required to sentence defendant to life probation, absent a departure. MCL 769.34(4)(b). Defendant contends that because the court believed it made "no sense" for defendant "to be on probation *at the same time* that you're going to prison," the court did not understand the consecutive nature of a felony-firearm sentence, and thus, erroneously rejected probation as a sentencing option. Were this the sole reason the court gave for its departure, we would agree that the court's sentencing departure was erroneous. Merely because serving a probation

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<sup>4</sup> A substantial and compelling reason must also be objective and verifiable. *Id.* at 272. There is no dispute that defendant violated his probation on two separate occasions with regard to two separate sentences.

sentence concurrent with a prison term did not “make sense” to the court, is not a substantial and compelling reason for a departure.<sup>5</sup>

But we do not believe that this comment was indicative of the court misunderstanding the impact of its sentencing departure. Where probation is the sentence for the underlying felony, the mandatory felony-firearm sentence is served concurrent with the term of probation. *People v Brown*, 220 Mich App 680, 682-684; 560 NW2d 80 (1996). The consecutive sentencing requirement of the felony-firearm statute only applies where the sentence for the underlying felony is a term of imprisonment. *Id.* at 682-683. The court understood both these points of law as evidenced by its statement that defendant would serve a probation sentence “at the same time” as the felony-firearm sentence, and, after imposing a prison sentence for the possession conviction, noted that it would be served consecutive with the felony-firearm sentence.

We must next consider whether the court’s second articulated reason constitutes a substantial and compelling reason for its upward departure of seven months. The court departed from the sentencing guidelines because they “do not consider that defendant was on probation 2 times prior and violated each time, resulting in discharge without improvement each time, and thus, not a candidate for probation.” The probation sentences were the result of separate misdemeanor offenses committed in 1997 and 1998. The court is correct; the sentencing guidelines do not take into consideration probation violations.

But does this justify an upward departure? We find that it does. Absent a departure, the court was required to sentence defendant to life probation. Defendant had a proven track record not only of failing to improve himself while on probation, but also of not being able to successfully complete a probation sentence. One previous probation sentence was for six months and the other was for two years, both for drug-related offenses. The reason for the first probation violation is uncertain, but the second violation was for use of marijuana and failing to participate in a court-ordered substance abuse treatment program. Based on these violations and defendant’s prior criminal history, there is no indication that defendant would be successful if sentenced to life probation in this case, yet another drug-related offense. Under these circumstances, we find that the court articulated a substantial and compelling reason for the imposition of a prison sentence. Furthermore, we do not believe that a term of two years’ imprisonment is disproportionate. Defendant has a history of drug-related misdemeanor offenses spanning most of his adult life, and this current conviction represents an escalation of criminal activity in that it is a felony drug-related offense. Additionally, defendant has proven to be non-rehabilitative on probation. Therefore, we find that the trial court did not abuse its discretion

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<sup>5</sup> Based on its second cited reason for departing, that defendant had twice before violated probation, we are convinced that the trial court would have departed from the guidelines even if irrespective of this first reason. Therefore, we need not remand for rearticulation or resentencing based on this one invalid reason for departing. *People v Babcock*, 469 Mich 247, 258-259; 666 NW2d 231 (2003).

when it sentenced defendant to two to four years' imprisonment on his possession of a controlled substance conviction.

We affirm.

/s/ Michael R. Smolenski

/s/ Helene N. White

/s/ Kirsten Frank Kelly