

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DUANE SUTGREY, a/k/a JAMES  
STURGEY,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2004

No. 247546

Wayne Circuit Court

LC No. 02-013279

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant was convicted of felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession with intent to deliver marijuana, MCL 333.7401(2)(d). Defendant was sentenced as a third habitual offender, MCL 769.11, to thirty-four months to ten years' imprisonment for the felon in possession of a firearm conviction, thirty-four months to eight years' imprisonment for the possession with intent to deliver marijuana conviction, and to a consecutive sentence of two years' imprisonment for the felony-firearm conviction. Defendant appeals by right. We affirm.

Defendant's sole issue on appeal is that there was insufficient evidence to support his convictions of felon in possession of a firearm and felony-firearm. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court reviews the evidence in the light most favorable to the prosecutor and determines 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 argues that the prosecutor failed to prove beyond a reasonable doubt that defendant possessed the handgun at the time of his arrest. Defendant claims circumstances occurring during the evening of his arrest make it impossible to determine who possessed the firearm. Police did not obtain defendant's fingerprints from the gun, no one saw defendant holding or touching the firearm, and an unidentified male escaped from the property during defendant's arrest. Defendant argues that his mere proximity to where the gun was discovered does not establish that he knew of the gun's existence or had possession of it. We disagree.

The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm; (2) the defendant had been convicted of a prior felony; and (3) less than five years had elapsed since the defendant had been discharged from probation. *People v Tice*, 220 Mich App 47, 50-54; 558 NW2d 245 (1996); MCL 750.224f. It was stipulated between the prosecution and defense that the second and third elements existed at the time of the alleged offense (prior felony and ineligibility to possess a firearm). The required elements of felony-firearm are that the defendant possess a firearm during the commission or attempted commission of a felony. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). The only disputed element of these two charges left for the jury to decide was whether defendant possessed a firearm.

The crux of the appeal centers on whether defendant had constructive possession of the loaded handgun a police officer found in the couch where defendant had been sitting just before his arrest. Our Supreme Court has upheld similar convictions when a jury has found a defendant to have constructive possession of a firearm. *People v Burgenmeyer*, 461 Mich 431; 606 NW2d 645 (2000). A defendant has constructive possession if there are circumstances demonstrating his proximity to the firearm and an indicia of control. *Id.* at 438. The critical question is whether the firearm is accessible to the defendant at the time the drugs are possessed. *Id.* at 438-439.

Defendant was found with drugs and a weapon close enough in proximity to each other for the jury to infer that defendant possessed both at the same time. Defendant was the only person observed sitting on the couch; his legs covered the cushion seam where the gun was discovered, making it impossible for the police officer to see the gun when he made his initial approach to the house. Because of the way in which the gun was positioned between the cushions, it would have been difficult for defendant not to either notice or feel the firearm. Given the extremely close proximity of defendant to the gun, a rational jury could have found that defendant had sufficient control of the gun at the same time he possessed the drugs.

The fact that the police officers failed to check the weapon for defendant's fingerprints is irrelevant. The officers testified they were merely following routine department procedure, i.e. that it was unnecessary to check the weapon for prints because the firearm was found immediately next to where defendant had been seated only moments before his arrest, wedged in the couch cushions with the handle sticking out so that defendant either felt it pressing against his leg or knew it was there. Nobody else had been seen sitting on the couch or observed in the front room where defendant was arrested. It is for a jury to weigh the evidence presented at trial. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Here, a rational trier of fact could have found that defendant was in possession of the firearm.

We affirm.

/s/ E. Thomas Fitzgerald  
/s/ Janet T. Neff  
/s/ Jane E. Markey