STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2007
v	No. 270895 Muskegon Circuit Court
DAVID MAURICE JONES, Defendant-Appellant.	LC No. 06-052888-FH

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver 450 grams or more, but less than 1000 grams, of cocaine, MCL 333.7401(2)(a)(ii), and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

On appeal, defendant first argues that the trial court erred in ruling that defendant possessed a firearm during the commission of a felony without finding that he controlled or had the right to control a firearm. We disagree.

This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial, examining the evidence in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). We review the trial court's factual findings in a bench trial for clear error. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2005). Further, in reviewing whether a trial court's factual findings are sufficient to support a conviction, we must determine whether the trial court was aware of the factual issues and correctly applied the law to the facts. *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990).

Possession of a firearm may be actual or constructive, and it may also be joint or exclusive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). A person has constructive possession of a firearm if there is proximity to the firearm and an indicia of control, or, stated otherwise, constructive possession exists when the location of the weapon is known and it is reasonably accessible to the defendant. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000), quoting *Hill, supra* at 470-471.

The evidence reflected that defendant completed a drug transaction with an undercover detective, exchanging approximately two ounces of cocaine for $1,200.[1] Defendant was subsequently apprehended in the rear of his residence, near the kitchen and a back stairway leading to the basement. In the basement, the money from the drug transaction and a firearm were recovered. The money and firearm were within six feet of each other. In the front room of the residence, the police recovered more than 450 grams of cocaine. Also, in the front room in a drawer of a small table, there were two other firearms, defendant's old driver's license, and a piece of mail addressed to defendant at that residence. Further, there was testimony that defendant obtained firearms for himself and his associate and that defendant always took a firearm when conducting drug sales in hotel rooms.

The trial court found that the multiple firearms were constructively possessed by defendant on the basis of the facts and law recited above. The court specifically stated that the firearms were readily accessible to defendant. It is clear from the language in *Burgenmeyer* and *Hill* that the indicia of control mentioned therein is satisfied by a showing that the defendant knew the location of the firearm and that the firearm was readily or reasonably accessible to the defendant. Under the facts presented at trial, there was sufficient evidence to support the felony-firearm conviction, and there was no clear error in the court's finding that defendant possessed firearms during the commission of a felony. Moreover, the record reveals that the trial court was aware of the factual issues and correctly applied the law to the facts.

Next, defendant raises several issues in his standard 4 supplemental brief, all of which lack merit. First, defendant argues that his waiver of a jury trial in favor of a bench trial was coerced because he was under the impression that he would be forced to wear prison garb, shackles, and handcuffs in front of the jury, which would prejudice his defense. We have reviewed the colloquy between the trial court and defendant in which defendant waived his right to a jury trial, and the discussion reflects that the court clearly and carefully explained to defendant his rights. The record indicates that defendant voluntarily and knowingly waived his right to a jury trial and that the court complied with MCR 6.401, MCR 6.402(B), and MCL 763.3. The trial court's determination that defendant validly waived his right to a jury trial was not clearly erroneous. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). There is no indication whatsoever in the transcript of the proceedings that defendant was coerced or that defendant was under the impression that he would be made to wear prison attire, shackles, and handcuffs during a jury trial. If defendant indeed did have that impression, as claimed in his self-serving affidavit attached to his appellate brief, he had every opportunity to mention the issue to the trial court, which, according to the transcript, was polite and patient in addressing defendant's waiver.[2] Moreover, defendant has not cited any authority in support of his

[1] There was evidence of multiple drug transactions between defendant and the undercover detective.

[2] We note that the file includes an "advice of rights" form that was signed by defendant, and the form informs defendant that at trial he is presumed innocent and that if he has any questions about his rights he can ask the judge. We further note that defendant's cursory affidavit makes no assertion that anyone told him that he would have to wear prison garb, shackles, and handcuffs during a jury trial.

argument. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Reversal is unwarranted. With respect to defendant's accompanying argument that counsel was ineffective for failing to explain to him his right to be free from restraints during a jury trial, the record lacks any rational basis to find that counsel's performance was deficient. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).[3]

Defendant next argues that he was deprived of a fair trial when testimony was improperly elicited regarding a prior consistent statement made by the prosecution's chief witness at the preliminary examination relative to evidence concerning a statement made by defendant to the witness that defendant had 17 ounces of cocaine. The witness is a detective who was working undercover when defendant made the statement about the cocaine. The detective forgot to include the conversation about the 17 ounces of cocaine in his police report, yet he was adamant at trial that the conversation took place, and the prosecution attempted to bolster that testimony by eliciting evidence that the detective testified at the preliminary examination in a manner consistent with his trial testimony. Assuming, without deciding, that the trial court erred in allowing the testimony or that the prosecution acted in bad faith in eliciting the testimony, see *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), reversal is unwarranted because any presumed error was harmless, MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). The detective was unequivocal in his position that defendant stated that he had 17 ounces of cocaine, regardless of the omission in the police report, and the trial court, in making a credibility determination, chose to believe the detective as to his testimony about defendant's statement and his testimony regarding why it was left out of the police report. The detective's testimony at the preliminary examination clearly had no bearing on the court's findings.[4] Additionally, and importantly, another detective heard defendant's admission about the 17 ounces of cocaine and testified to the matter at trial. There was no prejudice to defendant, and for this same reason, defendant's accompanying argument of ineffective assistance of counsel, which requires a showing of prejudice, also fails. *Carbin, supra* at 599-600.

Finally, defendant argues that he was denied a fair trial when the trial court admitted inaudible audiotape recordings. Defendant failed to provide us with the audiotape recordings or transcripts. As the appellant below, defendant bore the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Moreover, defendant's argument that the audiotape recordings were inaudible is self-serving and speculative. There is no

[3] We note that defendant's affidavit lacks any claim that he even bothered to ask his attorney about restraints and attire at a jury trial.

[4] As noted by this Court in *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001), judges, unlike jurors, possess "an understanding of the law which allows [them] to ignore [evidentiary] errors and to decide a case based solely on the evidence properly admitted at trial." To the extent that defendant is also arguing error on the basis that he was tried by the trial judge in prison attire, shackles, and handcuffs, the distinction in *Taylor* between bench and jury trials supports affirmance as the trial court understood the presumption of innocence and gave no weight or consideration to defendant's attire and restraints.

indication in the record that the trial court was troubled by any sound quality issues. Further, the subjects of the recordings, defendant and the detective discussed above, both testified at trial. As the trier of fact, the trial court was able to pose questions to both witnesses. Additionally, the trial court did not reference the recordings in its ruling. Reversal is unwarranted. Moreover, defendant's accompanying claim of ineffective assistance of counsel on this issue lacks merit for failure to show deficient performance and prejudice. *Carbin, supra* at 599-600.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter