

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORONALD LOPEZ ALTON,

Defendant-Appellant.

UNPUBLISHED

December 18, 2007

No. 272251

Wayne Circuit Court

LC No. 06-004697-01

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of two counts of identity theft, MCL 445.67, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to consecutive prison terms of 18 months to five years for the felon in possession conviction and two years for the felony-firearm conviction. In addition, he was sentenced to serve two years' probation for each count of identity theft, to be served concurrently with his prison term for felon in possession. We affirm.

During a February 15, 2006, search of defendant's apartment, postal inspectors discovered personal identity information belonging to at least three individuals and a stolen gun hidden under the mattress in a bedroom containing items of defendant's personalty. On the day of the search, defendant spoke with Inspector Vitale by cell phone and stated that he resided in that apartment. A warrant for defendant's arrest was issued. On March 20, 2006, defendant telephoned Inspector Vitale. When she read the charges against him, defendant stated that during the search agents had missed \$1,000 in cash hidden behind the bathtub and noted that he usually kept the gun behind the bathtub, but must have been lazy and inadvertently left it under the mattress the night before the search. Defendant also stated that he sold a rental car he had driven home from Chicago to his cousin Willie.

Defendant first claims lack of sufficient evidence to convict him of the two gun-related charges because the prosecution failed to establish the corpus delicti of those offenses by evidence independent of defendant's inculpatory statement that he possessed the gun. Michigan's corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of defendant's inculpatory statements, establish (1) the occurrence of a specific injury and (2) criminal agency as the source of the injury before such statements may be admitted into evidence. See *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996).

Because defendant objected to the admission of his statements only on grounds not raised on appeal and his trial counsel clearly opened the door to testimony from Inspector Vitale about the gun, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

No error occurred in this case. The offenses of felon in possession of a firearm and felony-firearm were established independent of defendant's inculpatory statements. The elements of felon in possession of a firearm are that defendant is a felon whose right to possess a firearm has not been reinstated and that defendant possessed, used, transported, sold, purchased, carried, shipped, received, or distributed a firearm in this state. MCL 750.224f. The statute focuses on the criminal status of the possessor, and its purpose is to keep guns out of the hands of those most likely to use them against the public. *People v Dillard*, 246 Mich App 163, 170; 631 NW2d 755 (2001). In light of this purpose, mere constructive possession of a firearm by a felon is sufficient to establish the offense. The parties stipulated to the fact that defendant was a felon whose right to possess a firearm had not been reinstated. The gun was found in a room where defendant's possessions were located, and thus, there was circumstantial evidence to fulfill the elements of the offense. Therefore, there was circumstantial evidence of the offense independent of defendant's inculpatory statements, and the corpus delicti rule was not violated.

The elements of felony-firearm are that defendant was in possession of a firearm while committing or attempting to commit a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Both of those elements were also established independent of defendant's inculpatory statements.

It is well settled in Michigan that possession may be actual or constructive, joint or exclusive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Constructive possession exists when the defendant knew the gun's location and the gun was reasonably accessible to him. *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000). The evidence showed that defendant exercised dominion over the apartment, particularly the bedroom in which agents found the gun, defendant's Department of Corrections identification card, and defendant's personalty. The fact that defendant's girlfriend also resided in the apartment and may have "owned" the stolen gun did not negate constructive possession by defendant because possession may be joint, and possession is not the equivalent of ownership. *Id.* at 438. Finding the gun under the mattress in defendant's bedroom supports a finding that defendant knew where the gun was and that it was readily accessible to him. See *People v Davis*, 101 Mich App 198, 203; 300 NW2d 497 (1980). Therefore, independent evidence established that defendant was a felon and had constructive possession of a gun.

In addition, the evidence showed that defendant possessed the gun during the commission of two felonies: felon in possession of a firearm, which is discussed above and may be used as the underlying felony for felony-firearm, see *People v Calloway*, 469 Mich 448, 450-452; 671 NW2d 733 (2003), and identity theft, MCL 445.67, an ongoing crime from the date listed on the information, the evidence of which consisted of victims' personal identity information and other documents found in defendant's apartment.

Defendant argues that his conviction for felony-firearm was not in accord with the intent of the statute because he did not increase the risk of physical harm to bystanders and victims by possessing a firearm during the nonviolent commission of identity theft. However, the purpose

of the statute is also to reduce the possibility of injury to police officers investigating the offense and to deter the underlying felony itself. *Dillard, supra* at 170. In addition, defendant's status as a felon increased the risk that a gun accessible to him posed a risk of danger to others.

Sufficient evidence of both gun-related charges was established independent of defendant's inculpatory statement that he usually placed the gun behind the bathtub, but left it under the mattress the day prior to the search. Therefore, the corpus delicti rule was not violated and his inculpatory statements to Inspector Vitale, as well as his statement that he had purchased the gun "from some guy," were admissible and showed defendant's actual possession of the gun. The evidence was sufficient to show that a rational trier of fact could have found that the essential elements of both gun-related charges were proven beyond a reasonable doubt.

Defendant next asserts that his right to a properly instructed jury was violated. However, defendant acquiesced to the jury instructions as presented by the trial court, and therefore did not preserve this issue for review. When reviewing an unpreserved instructional error, this Court reviews for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96 (2002).

Defendant argues two instances of error in the jury instruction as presented: (1) the trial court failed to state that the gun must have been "readily accessible" to defendant to find that defendant possessed it, and (2) the trial court used "along" instead of "alone" in instructing that possession may be individual or joint. A "ready accessibility" instruction was not required because that concept relates only to constructive possession of a firearm. *Burgenmeyer, supra* at 437-438. Since the corpus delicti rule was not violated and defendant's inculpatory statements were admissible, the evidence showed that defendant had actual possession of the gun and had moved it from place to place in the apartment. An imperfect instruction regarding constructive possession made no difference to the outcome of defendant's case.

Assuming that "along" was the word used by the judge, and not merely a typographical error in transcription, others of which are present in the transcripts, the word at issue is only one word and the sentence structure of the instruction indicated to the jury that the appropriate word was "alone." Even if jury instructions are somewhat imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). The instruction as presented by the trial court fairly presented the issue that defendant need be only one person having a right to control the gun in order for the jury to find that he possessed it, evidence beyond a reasonable doubt established the offenses, and reversal is not warranted.

Lastly, defendant asserts that he was not sentenced based on accurate information. A defendant may not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless he has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Defendant acquiesced at sentencing to the scoring of Prior Record Variable (PRV) 7 and did not raise any objection to the scoring of Offense Variable (OV) 9. Therefore, he waived appellate review of the trial court's scoring of PRV 7 and forfeited appellate review of the scoring of OV 9. He preserved appellate review of

the trial court's scoring of OV 16 by noting that an amount for restitution had not yet been determined.

A defendant is entitled to be sentenced by a trial court on the basis of accurate information. MCL 769.34(10); *People v Francisco*, 474 Mich 82, 88-89; 711 NW2d 44 (2006). With regard to OV 16, MCL 777.46(1)(c) provides that five points should be scored if the property had a value of \$1,000 or more but not more than \$20,000. There was no indication in the lower court record whether the trial court held the restitution hearing it intended to schedule, but the trial court was allowed to consider all evidence presented at trial when calculating scores under the sentencing guidelines. *People v Dewald*, 267 Mich App 365, 380; 705 NW2d 167 (2005). One of the victims testified that he incurred \$6,000 in charges due to defendant's use of credit obtained with his personal identity information. That evidence alone supports the trial court's score of OV 16 at five points.

Although not preserved for review, we note that the trial court properly scored PRV 7 at 20 points because, not including felony-firearm, which is excluded under PRV 7, defendant was convicted of two counts of identity theft, bringing the number of felonies concurrent with felon in possession to two or more. MCL 777.57(1). The trial court also properly scored OV 9, MCL 777.39, at ten points because there were between four and 19 persons in danger of injury or loss of life as victims.¹ The evidence adduced at trial showed three individuals and one rental car agency in Chicago as victims, bringing the total to at least four.

In a supplemental brief filed in propria persona, defendant asserts that counsel's refusal to allow him to enter into a plea agreement with the prosecutor constituted ineffective assistance of counsel and resulted in a sentence of incarceration instead of probation. To establish a claim of ineffective assistance of counsel, the defendant is required to show (1) that his attorney's performance was prejudicially deficient, and (2) that under an objective standard of reasonableness, the attorney made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

The evidence on the record showed that defendant either had little information to exchange or decided on his own, and not solely on advice of counsel, that he was not willing to go to the extent necessary to obtain enough information to aid postal inspectors in the investigation of others. Therefore, the failure of a plea agreement to come to fruition was not due to counsel's deficient performance, but to defendant's late offer of assistance that was of little value. Defendant was not denied effective assistance of counsel.

¹ Financial injury was not specified in the version of MCL 777.39 in effect at the time of defendant's sentencing, but at that time this Court had concluded that the statute included the danger of financial as well as physical injury. *People v Knowles*, 256 Mich App 53, 62; 662 NW2d 824 (2003), overruled by *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006).

Affirmed.

/s/ Kathleen Jansen

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood