STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2007
v	No. 270879 Oakland Circuit Court
SHAWN CLIFFORD PRICE, Defendant-Appellant.	LC No. 2005-203779-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of seven months to eight years for the marijuana conviction and seven months to ten years for the felon in possession conviction, to be served consecutively to two concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

On August 21, 2004, Southfield police, responding to a report of a disoriented person, saw an elderly gentleman who fit the description provided. The man was pacing up and down the sidewalk. His name was Eugene Howell, he was in his eighties, and he was apparently suffering from dementia. As they drove Howell to his nearby residence, Howell gave some indication that his wife lived with him in his house. When they arrived at the large, three-bedroom, ranch-style home and knocked, no one answered. The officers walked around the house and saw that a window had been broken out from the inside. They assumed that Howell had left the house using that window. Through the window, the officers could see a bedroom containing a soiled mattress on the floor with only a blanket for covers; an overturned bucket that, with a toilet seat, had served as a makeshift toilet; and other items "thrown around." Concerned that someone might need assistance, and with the implicit consent of Howell, an officer entered the house through the broken window. Once inside, the officer discovered that the bedroom door was locked from the outside. The officer removed the bedroom door's hinges to open the door, and opened the front door so the other officer could enter. The officers proceeded to look in the other two bedrooms for another person.

In an unlocked bedroom that was across the hall from the first bedroom, the police observed a television, a PlayStation video game, and a bag of marijuana in plain view. A third

bedroom that was next to the first bedroom was secured with a padlock in the same manner as the first bedroom, and an officer forced the door open. Inside that bedroom, one of the officers observed two bags of marijuana in a closet in plain view, but did not find anybody there. An officer noted that the bags of marijuana were the same size as the bag found in the unlocked bedroom. The officers contacted the narcotics unit and someone to care for Howell. The officers found a list of contacts on the refrigerator, one of which was Howell's son, Keith Williams. Williams advised the police that he did not reside in the house, that defendant and another man cared for Howell, and that defendant lived there intermittently with Howell.

Defendant subsequently arrived and told the officers that he was Howell's caregiver and stayed in the house "on and off." He said that only he and Howell lived at the house, that he occupied the unlocked bedroom, and that the bag of marijuana found on the dresser in that bedroom belonged to him. Defendant was then arrested for possession of marijuana.

Afterward, two narcotics officers executed a search warrant at the Howell residence. Inside defendant's bedroom was a bed with sheets, a nightstand, dresser, television, clothing, personal belongings, and documents addressed to defendant containing a different address. A plastic Ziploc bag containing three quarters of a pound of marijuana was on the television stand. The police also found a loaded handgun hidden between defendant's mattress and box spring.

In the third bedroom, which had been locked, the police found two one-gallon Ziploc bags containing marijuana. The two Ziploc bags found in the third bedroom matched the Ziploc bag containing the marijuana found in defendant's bedroom. On shelves in the third bedroom, the police found shoe boxes inside shopping bags that contained "an entire crack cocaine cookware set," including a digital scale, baking soda, two measuring cups containing cocaine residue, two plates, a spoon, a boiler tin, two boxes of sandwich baggies, and a corner tie.

When an officer later asked defendant about the handgun, defendant responded, "I don't know nothing about that gun between the mattresses." The officer was surprised by defendant's statement because the firearm was discovered after defendant was in custody and away from the residence. Although defendant claimed that one of the other officers had told him about the gun, the two narcotics officers both testified that they were the only ones present when the gun was found, and they did not tell anyone where the gun was located.

In a written statement, defendant admitted ownership of the marijuana found in his bedroom, but denied any knowledge about the handgun. Defendant stated that the gun was found in the third bedroom, which was locked, not his room. He also stated that only Williams had a key to the third bedroom where the two bags of marijuana were found and that he saw Williams go into that bedroom a couple of days before this incident.

Defendant argues that the evidence was insufficient to sustain his convictions for felony-firearm and felon in possession of a firearm. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). When applying this deferential standard of review, "a reviewing court is required to draw all reasonable

inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues that there was insufficient evidence that he possessed the seized firearm, undermining both firearm convictions. We disagree. For purposes of demonstrating possession, it is enough that the prosecutor proves that the defendant knew of the firearm's location and had access to it. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

In this case, the evidence, viewed in a light most favorable to the prosecution, sufficiently demonstrated that defendant simultaneously possessed the handgun under his mattress and the marijuana on his dresser. See *id*. at 438-440. Defendant admitted that he stayed in the bedroom where the firearm and marijuana was found. He also admitted ownership of the bag of marijuana found in the bedroom. Although defendant denied any knowledge of the firearm, during a police interview, he spontaneously revealed the location of the gun. Because the firearm was found under defendant's mattress, the jury could reasonably infer that defendant knew its location and that the firearm was reasonably accessible to him. While defendant presented different accounts of who could have placed the firearm under his mattress, it was up to the jury to determine which account was credible. *Nowack*, *supra*. Given the proximity of the firearm to the bag of marijuana, the jury could reasonably find that defendant possessed these items simultaneously. See *Burgenmeyer*, *supra*.

Next, defendant argues that he is entitled to a new trial because he was denied the effective assistance of counsel at trial. We disagree.

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citations omitted.]

Defendant argues that defense counsel should have moved to suppress the items seized from the house because the initial seach was unlawful. Assuming arguendo that defendant has a legitimate privacy interest in marijuana and a loaded firearm kept at the home of his elderly client, the emergency aid exception to the search warrant requirement amply justifies the officer's actions in this case. "[P]olice may enter a dwelling without a warrant when they reasonably believe that a person within is in need of immediate aid." *People v Davis*, 442 Mich 1, 25; 497 NW2d 910 (1993). Here, Howell told one of the officers that his wife was inside the house. The state of Howell's room indicated that he had broken out of his own home after being locked in a relatively bare room and left unattended for a substantial period of time. These facts indicated that Howell's wife might be incapacitated or left seriously neglected somewhere else in the home and in need of immediate medical attention. From the officers' perspective, failing to conduct a prompt search for her could have resulted in tragedy. The record reflects that the officers stopped their search when it became obvious that nobody else was present in the home. Because the search was reasonable under the emergency aid exception to the warrant

requirement, see *id*., defense counsel was not ineffective for failing to file a meritless motion to suppress the properly discovered and seized evidence. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also argues that defense counsel was ineffective for failing to impeach Officer Brian Bassett with inconsistent statements from the preliminary examination and for failing to elicit inconsistencies in Officer Bassett's and Officer Cory Bauman's testimony. We disagree. The testimony, when taken in context, simply does not contradict any earlier testimony. *People v Johnson*, 113 Mich App 575, 579; 317 NW2d 689 (1982). Although Officer Basset's trial testimony contained certain facts about his investigation that he did not mention at the preliminary examination, his preliminary examination testimony was not inconsistent with the testimony he provided at trial. Instead, the earlier testimony merely lacked the detail offered at trial. Moreover, defendant fails to demonstrate how any of the minor inconsistencies he raises on appeal would have raised any significant doubt in the jury's mind. For example, according to defendant, Officer Bassett testified that Williams told him that defendant only resided with Howell intermittently, while Officer Bauman testified that Williams simply told him that defendant lived with Howell. In context, however, Officer Bauman's testimony was not contradictory, but merely incomplete, so it is pure speculation to argue that the isolated testimony misled the jury into believing that defendant permanently resided at the home. Given defendant's own admission that the marijuana found in the unlocked bedroom was his, and the documentation linking defendant to that bedroom, defendant fails to demonstrate any prejudice from the isolated testimony. See *Riley*, *supra*.

Defendant also argues that defense counsel should have objected to Officer Bassett's testimony about Howell's statements about his wife. Defendant argues that it is unclear if the disoriented Howell understood the question put to him and ambiguous whether his "uh-huh" was an affirmative response. Defendant also contends that this testimony was inadmissible hearsay. We disagree. At trial, Officer Bassett testified that Howell answered some questions appropriately, justifying a belief that he understood the question about another individual in the home. The officer's interpretation of Howell's response was within his competency as a lay witness, and his interpretation of Howell's "uh-huh" was subject to cross-examination. MRE 701. The testimony did not constitute hearsay, because it was introduced to explain why the officers entered Howell's home and searched it, not to prove that Howell lived with his wife. MRE 801(c). Because the statements were admissible, defendant fails to demonstrate any ineffective assistance regarding Howell's statements. *Snider*, *supra*.

Defendant claims that defense counsel was ineffective for failing to file a motion to quash his bindover on the felon in possession charge because there was insufficient evidence that he possessed the firearm. We disagree. The preliminary examination testimony indicated that the handgun was found under the mattress in the room where defendant's marijuana and personal items were found. Any motion to quash the bindover would have been meritless. *Snider*, *supra*.

Defendant further argues that defense counsel employed "bad trial strategy" when he decided to discuss Williams and Shelton not being charged in this case. Defendant has not overcome the presumption that defense counsel's decision was reasonable trial strategy, nor has he shown that the evidence that the strategy adversely affected the outcome of the proceedings. Defense counsel was attempting to discredit the police officers' investigation and to argue that others, including Williams and Shelton, could have possessed the firearm, larger stashes of

drugs, and cocaine equipment, making defendant merely the "fall guy" for the entire operation. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also argues that defense counsel should have moved to dismiss the charges because of a prearrest delay. The offenses occurred in August 2004, and a warrant was issued in March 2005. Defendant argues that this seven-month delay resulted in actual and substantial prejudice because Keith Williams, Nico Sheldon, and Bobby Ingram were unavailable to testify on his behalf. To warrant reversal of a defendant's conviction, the prearrest delay must have resulted in actual and substantial prejudice. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). Substantial prejudice means that the prearrest delay must have meaningfully impaired his defense, which likely affected the outcome of the trial. *Id.* "Proof of 'actual and substantial prejudice' requires more than just generalized allegations." *Id.*

Defendant has failed to show that the loss of the testimony resulted in any meaningful impairment of his defense. The unavailability of the witnesses alone is insufficient to show that defendant suffered actual and substantial prejudice from prearrest delay, because defendant has made no showing that any of the witnesses would have testified in a manner helpful to his defense. The prosecution was likely more prejudiced by the witnesses' absence in this case than defendant, because defendant could insinuate their involvement even though he had already confessed to owning the marijuana and staying in the bedroom where the handgun was found. There is no basis for believing that any of the witnesses would have admitted ownership of the firearm and marijuana or would have otherwise exonerated defendant. Defendant's mere assertion that the witnesses *could* have given testimony to exculpate him is too speculative to satisfy the threshold requirement of actual and substantial prejudice. Because there is no basis for believing that a motion to dismiss for prearrest delay would have been unsuccessful, defendant has not shown that counsel was ineffective in this regard. See *Snider*, *supra*.

Defendant argues that he is entitled to a new trial because the trial court allowed irrelevant and prejudicial testimony concerning items seized from the third bedroom. We disagree. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). When Officer Bauman testified that the third bedroom's closet contained two gallon-sized bags of marijuana and "an entire crack cocaine cookware set," defense counsel stipulated to the admission of the exhibits. The prosecutor noted that the stipulation would "speed things up," but that the officer, who had been qualified as an expert, would still explain some things to the jury. As the officer was testifying regarding the meaning of the various items to a crack manufacturer and dealer, defense counsel objected, noting that he had already stipulated to the items. The prosecutor responded that he had "to cover some of this." The trial court agreed that the prosecutor could explain the exhibits and how they related to the narcotics trade. Subsequently, when the prosecutor asked the officer about a corner tie, defense counsel objected, stating that he would stipulate that the owner of the marijuana had the intent to deliver it. The prosecutor accepted the stipulation and moved on. Until the prosecutor had received defendant's stipulation that all the marijuana in the home was possessed with the intent to deliver it, the other evidence that the home was used as a drug house was relevant to

that element of defendant's narcotics charge. Therefore, the trial court did not abuse its discretion by allowing the testimony. MRE 402.

Defendant argues that the prosecutor's comments during opening statement denied him a fair trial. We disagree. Because defendant failed to object to the prosecutor's remarks, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Absent a concurrent objection, we will only reverse a conviction for a prosecutor's comments "if a curative instruction could not have eliminated the prejudicial effect of the improper remarks or where our failure to review the issue would result in a miscarriage of justice." *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant contends that the prosecutor mischaracterized the evidence in the following comments during opening statement:

> You don't need to keep an old man in a house as a disguise for drug dealing in a house. And that's exactly what happened in this case.
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> * * *
>
> The police looked through the broken window. They see an overturned mattress. They see a bucket on the floor with a toilet seat over it to be used as a bathroom.

During trial, there was evidence that defendant lived in the residence and was involved in drug dealing, but there was no direct evidence that defendant was using Howell as a disguise for his activities. There also was no evidence that there was an overturned mattress or a toilet seat over a bucket, only that there was a heavily soiled mattress on the floor and a bucket near a toilet seat. Although the prosecutor's statements were only partially substantiated, defendant has failed to show substantial prejudice or miscarriage of justice from these minor, good-faith misstatements of the evidence. See *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). In this case, the jury instructions clarifying the role of attorney statements were more than sufficient to dispel any possible prejudice caused by the prosecutor's remarks. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant next raises several claims regarding his sentence. He first claims that the trial court abused its discretion in scoring OV 19 of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.*

MCL 777.49(c) provides that the trial court may score ten points under OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." Interfering or attempting to interfere with the administration of justice includes acts that constitute obstruction of justice, but is not limited to such acts. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). Providing a false name to the police may constitute an interference with the administration of justice that can be scored under OV 19. *Id.* at 288. In this case, there was evidence that defendant lied to a police officer about another police officer telling him the location of the firearm. The court also relied on defendant's written statement, in which

he made false statements about the location of the firearm. These deceptions were proved to be attempts to cast doubt into the investigation and lead investigators to issue conflicting reports that might divert suspicion onto others and away from him. The score is not defective simply because defendant's attempts to throw off an investigation are self-serving or fruitless. Attempts to interfere with justice by a guilty defendant often are. See *id*. Nor will we reward defendant for fabricating a version of events that was factually plausible, adding to its potential to thwart the investigation. Because the evidence supported a finding that defendant actively attempted to confuse, stall, and ultimately obstruct the investigation with red herrings and half-truths, the trial court did not abuse its discretion by scoring ten points for OV 19.

Defendant next argues that he should be resentenced because the trial court sentenced him to prison for the marijuana and felon in possession convictions. Defendant does not contend that the trial court was not authorized to sentence him to prison, but instead he argues that the trial court erroneously believed that it was required to do so and was unaware that it had discretion to sentence him to an intermediate sanction or depart downward from the sentencing guidelines range. However, it is well established that if there is "no clear evidence that the sentencing court believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). Given the parties' comprehensive sentencing memorandums and the extensive discussions at the sentencing hearing, there is no evidence that the trial court was oblivious of any of its sentencing options or its discretion to exercise them. *Id*.

Defendant's last argument is that, even if he was sentenced within the sentencing guidelines range, he is entitled to resentencing because his sentences are disproportionate. Defendant's sentences of seven months to eight years for the marijuana conviction, and seven months to ten years for the felon in possession conviction are at the lowest end of the sentencing guidelines range of seven to thirty-four months. Defendant has not demonstrated that the guidelines were erroneously scored or that the trial court relied on inaccurate information. Because the guidelines account for a defendant's criminal history and the crime charged, they are presumptively proportionate, and defendant fails to raise any peculiar circumstance that render the sentences disproportionately long in his particular case. See *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003).

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood