# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 18, 2008 |
| v<br><br>GREGORY LEROY HAWKINS,<br><br>Defendant-Appellant. | No. 275841<br>Wayne Circuit Court<br>LC No. 06-010460-01 |

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v<br><br>VICTOR MAURICE LINDSEY,<br><br>Defendant-Appellant. | No. 275842<br>Wayne Circuit Court<br>LC No. 06-010460-02 |

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Codefendants, Gregory Leroy Hawkins and Victor Maurice Lindsey, were tried together for multiple narcotics and firearm offenses. In Docket No. 275841, Hawkins was convicted of possession with intent to deliver ecstasy, MCL 333.7401(2)(b)(i), possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. Hawkins was sentenced to 3 to 20 years' imprisonment for the possession with intent to deliver ecstasy conviction, 30 to 48 months' imprisonment for the possession with intent to deliver marijuana conviction and to two years' imprisonment for the felony-firearm conviction. In Docket No. 275842, Lindsey was convicted of possession with intent to deliver ecstasy, MCL 333.7401(2)(b)(i), possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Lindsey was sentenced to 50 to 240 months' imprisonment for the possession with intent to deliver ecstasy conviction, 30 to 48 months' imprisonment for the possession with intent to deliver marijuana conviction, 40 to 60 months' imprisonment for the

felon in possession of a firearm conviction and to two years' imprisonment for the felony-firearm conviction. Both defendants appeal as of right. We affirm.

Hawkins argues on appeal that there was insufficient evidence to convict him of possession with intent to deliver ecstasy and felony-firearm. We disagree. This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Osantowski*, 274 Mich App 593, 612-613; 736 NW2d 289 (2007).

It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences that arise from it can establish elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The elements of possession with intent to deliver a controlled substance generally include (1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it. *People v McGhee*, 268 Mich App 600, 622-623; 709 NW2d 595 (2005). However, where the controlled substance is ecstasy, its weight is irrelevant. See MCL 333.7401(2)(b). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b.

Actual physical possession of a controlled substance or a firearm is not required; rather, constructive possession may be sufficient to establish guilt. *People v Burgenmeyer*, 461 Mich 431, 437-439; 606 NW2d 645 (2000); *McGhee*, *supra* at 622-623. Constructive possession includes the knowledge of the presence of the substance or firearm coupled with the right to control it. *Burgenmeyer*, *supra*; *People v Meshell*, 265 Mich App 616, 621-622; 696 NW2d 754 (2005).

To establish constructive possession of a controlled substance, there must be some connection, or a "sufficient nexus," between the defendant and the contraband other than his mere presence or physical proximity to where the substance was found. *Meshell*, *supra*; see also *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992); *US v White*, 932 F2d 588, 589 (CA 6, 1991). Possession of a controlled substance can be joint, and "constructive possession may be found even if the defendant is not the owner of the controlled substance." *People v Williams*, 268 Mich App 416, 421; 707 NW2d 624 (2005); see also *Wolfe*, *supra*. Constructive possession of a firearm can be established by showing that the defendant knew the location of the weapon and that it was "reasonably accessible" to the defendant or at his disposal. *Burgenmeyer*, *supra* at 437.

Hawkins specifically argues that the evidence was insufficient to show that he possessed the ecstasy or the firearms found in the raided house. He contends that he was not a resident of the raided house and "constructive possession 'should not be lightly imputed to one found in another's apartment or home.'" *US v Dunlap*, 28 F3d 823, 826 (CA 8, 1994) (quoting *US v Johnson*, 952 F2d 1407, 1411 (CA DC, 1992)). He observes that there were other people in the

raided house that could have possessed the ecstasy and firearms. In addition, police did not see Hawkins handle those items. Finally, Hawkins argues that there was no evidence that he had any role in obtaining the firearms and he did not attempt to use the AK-47 assault rifle or even reach for it when police entered the house.

Considering that Hawkins confessed to possessing and selling the marijuana and was observed by police sitting at the table containing the marijuana and the ecstasy, we find that a sufficient nexus exists between the ecstasy and Hawkins such that a jury could infer that he possessed the ecstasy. While Hawkins was not a resident of the raided house, police testified that it was a drug house and Hawkins admitted to selling drugs out of it. In addition, a jury could infer that Hawkins had constructive possession of the AK-47 assault rifle because he would have known the location of the rifle, a mere five to eight feet from the table at which Hawkins admittedly sat packaging marijuana, and he had reasonable access to it. Contrary to Hawkins's argument, to prove possession of a firearm, it is not necessary to show that the defendant obtained the firearm or attempted to use it. Consequently, viewing the evidence in the light most favorable to the prosecutor, we hold that a rational trier of fact could find that the essential elements of possession with intent to deliver ecstasy and felony-firearm were proven beyond a reasonable doubt. *Osantowski, supra.*

Hawkins also argues on appeal that the trial court improperly instructed the jury by failing to adequately define the "right to control" when defining "possession" for the charged offenses of possession with intent to deliver marijuana and ecstasy and of possession of a firearm during the commission of a felony. We disagree. This Court reviews an unpreserved claim of instructional error for plain error affecting defendant's substantial rights. *People v Hawthorne*, 474 Mich 174, 176 n 1; 713 NW2d 724 (2006); *Carines, supra* at 763-764.

Jury instructions are read in their entirety to determine if error occurred. *McGhee, supra* at 606. The trial court must clearly present the case and the applicable law to the jury. *Id.* "[E]ven 'if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights.'" *Osantowski, supra* at 611 (quoting *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003)). "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *McGhee, supra*. When a word or term is not defined by statute, "this Court presumes that the word is subject to ordinary comprehension and there will be no error warranting reversal as a result of a trial court's failure to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension." *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006).

"Possession" is not defined in any of the statutes Hawkins was convicted of violating. However, the trial court read the standard instruction on possession to the jury on five occasions. When asked to define "right to control" in the context of that instruction, the trial court instructed the jurors to use their own common sense and experience. We hold that the term "right to control" is susceptible to ordinary comprehension. Therefore, the trial court did not commit error warranting reversal by declining to define it. *Martin, supra*.

Lindsey argues on appeal that he was denied his right to a unanimous verdict. We disagree. The Michigan Constitution provides that a criminal jury be composed of 12 jurors and a criminal verdict must be unanimous. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275

(1994); Const 1963, art 1, § 14; see also MCR 6.410. The original trial transcript indicates that only 11 jurors were polled regarding their guilty verdicts. However, the prosecutor asked the court reporter to investigate her notes to determine whether that transcript was accurate. In response, the court reporter provided a corrected transcript, which indicates that, indeed, 12 jurors were polled, and that they reached unanimous guilty verdicts. Thus, Lindsey was properly convicted.

We affirm.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood