

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH ANDERSON,

Defendant-Appellant.

---

UNPUBLISHED

April 1, 2008

No. 275080

Wayne Circuit Court

LC No. 06-000925-01

Before: Servitto, P.J., and Hoekstra, and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 1 to 20 years' imprisonment for the possession with intent to deliver less than 50 grams of cocaine conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because his trial attorney failed to interview or call a specific witness to testify on defendant's behalf. We disagree.

A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Kevorkian*, 248 Mich App 373, 410; 639 NW2d 291 (2001). An abuse of discretion exists where the trial court's decision results in an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Defendant's underlying ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, and we review de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim. *Id.*

Both the United States Constitution and the Michigan Constitution protect the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. It is presumed that a defendant received the effective assistance of counsel; to prevail, a defendant bears the heavy burden of proving that counsel was ineffective. *LeBlanc*, *supra* at 578. A defendant must establish that: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been

different and the result that did occur was fundamentally unfair or unreliable.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defense counsel is afforded wide discretion with regard to trial strategy, and this Court recognizes that counsel may need to take calculated risks in order to provide an effective defense. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). “There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy.” *Odom, supra* at 415. Moreover, “this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

The failure to call a witness constitutes ineffective assistance of counsel only where it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). When claiming that defense counsel failed to reasonably investigate the case, the failure to interview a witness does not, standing alone, establish inadequate preparation; additionally, a defendant must demonstrate “that the failure resulted in counsel’s ignorance of valuable evidence which would have substantially benefited the accused.” *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990).

Here, on the basis of the testimony that homeowner Eugene Pearson offered at the *Ginther*<sup>1</sup> hearing, the trial court concluded that defense counsel exercised her professional judgment in declining to call Pearson as a witness at defendant’s trial. Defendant has failed to demonstrate that the trial court’s finding of fact in this regard was clearly erroneous. Further, defendant cannot demonstrate that his trial attorney’s alleged neglect in failing to interview Pearson affected the outcome of the trial. Moreover, the decision of defense counsel to not interview Pearson did not deprive defendant of a substantial defense at trial.

Defendant elected to testify at his trial regarding his theory that he was merely present at a place where drugs were discovered, and defense witnesses, LaNaye Williams and Darryl Early, corroborated defendant’s testimony to the extent that defendant claimed that he was at the Detroit address to perform construction work only. Defendant supported his theory that he was merely present with his testimony that he needed the keys the police confiscated from him to drop off building material at the house; he also explained that he carried an unusual amount of cash because he had recently collected rent from tenants. That Pearson would have testified differently at trial from how he had at the *Ginther* hearing is speculative at best. Pearson, when he did eventually testify, claimed to know nothing about anybody selling drugs and refused to implicate Marvin Pete; consequently, he did not offer any appreciable evidence tending to exonerate defendant. Instead, at the hearing, Pearson offered only cumulative testimony regarding the ownership of the residence. Accordingly, defendant cannot demonstrate that his attorney’s failure to interview Pearson “resulted in counsel’s ignorance of valuable evidence which would have substantially benefited the accused.” *Caballero, supra* at 642.

---

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Because defendant failed to demonstrate that his trial counsel's decision not to interview Pearson as a potential witness was so detrimental to his position that the error affected the outcome of his trial, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. Accordingly, defendant is not entitled to appellate relief on his ineffective assistance of counsel claim.

Defendant next argues that there was insufficient evidence to sustain his convictions for possession with intent to deliver less than 50 grams of cocaine and felony-firearm. Again, we disagree.

This court reviews the record de novo when presented with a claim of insufficient evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *Id.* This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution's favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

The elements of possession with intent to deliver less than 50 grams of cocaine are: "(1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver." *Wolfe, supra* at 516-517. "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).

"Possession may be either actual or constructive, and may be joint as well as exclusive." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Constructive possession of cocaine exists where direct or circumstantial evidence shows that defendant had "dominion and control" over it and may be found where the defendant had the power to dispose of the substance. *Wolfe, supra* at 521. Constructive possession of a firearm exists when the defendant knows the location of the weapon and it is reasonably accessible to the defendant. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

The trier of fact may infer the element of criminal intent from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Minimal circumstantial evidence is sufficient to prove intent because of the difficulty of proving an actor's state of mind. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). Thus, reasonable inferences arising from circumstantial evidence can be sufficient evidence to sustain a criminal conviction. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant argues that the evidence demonstrates that he was merely present in an area where cocaine and a handgun were found, and that this is insufficient to support his conviction under this Court's holding in *People v Lewis*, 178 Mich App 464; 444 NW2d 194 (1989).

Although it is true that proximity alone to contraband, will not suffice, here additional evidence supported a nexus between defendant, the cocaine, and the pistol.

Here, when viewed in a light most favorable to the prosecution, Sergeant Roy Harris, Jr., the officer in charge of executing the search warrant at the Detroit address, testified that he recovered “a total of five keys which opened the doors to the premises which were also on [defendant’s] person.” These keys recovered from defendant’s person constituted additional evidence from which a rational trier of fact could conclude that defendant was in a position to exercise dominion and control over the contents of the house, including the gun and the drugs. Moreover, Harris testified that he confiscated \$786 in cash from defendant. A rational jury could draw the reasonable inference from this additional evidence that defendant garnered this income from narcotics sales.

Regarding the felony-firearm conviction, there was testimony that a handgun was found in plain view on the basement floor about eight feet from where defendant was arrested. There was additional testimony that defendant was the only person found in the basement. From this evidence, a rational jury could conclude that the weapon was reasonably accessible to defendant. A rational jury could conclude under the facts of this case that defendant, who was alone in the basement at the time, knew the location of the loaded pistol discovered in plain view about eight feet from him. Moreover, because the police discovered the pistol and cocaine in close proximity to each other, a rational trier of fact could infer that defendant, alone in the basement at the time of his arrest, constructively possessed the gun and drugs simultaneously. See *Bergenmeyer, supra* at 440.

A rational trier of fact could find beyond a reasonable doubt that defendant committed the charged crimes. Viewing the evidence in a light most favorable to the prosecution, resolving all conflicts in the prosecution’s favor, and deferring to the jury’s role as fact-finder, we conclude there was sufficient evidence to convict defendant of possession with intent to deliver less than 50 grams of cocaine and felony-firearm.

We affirm.

/s/ Deborah A. Servitto  
/s/ Joel P. Hoekstra  
/s/ Jane E. Markey