

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JAMES III,

Defendant-Appellant.

UNPUBLISHED

September 30, 2008

No. 280086

Wayne Circuit Court

LC No. 07-005866-01

Before: O’Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of armed robbery, MCL 750.529, 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. Defendant was sentenced to concurrent terms of 12 to 20 years’ imprisonment for the armed robbery conviction and 2 to 5 years’ imprisonment for the felon-in-possession conviction, plus a consecutive term of two years’ imprisonment for the felony-firearm conviction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

First, defendant argues that the prosecution presented insufficient evidence of possession of a firearm to support his convictions of felon in possession of a firearm and felony-firearm. In reviewing a claim of insufficient evidence, we review the record de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We “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 Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). “Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense.” *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). We defer to the factfinder’s special opportunity and ability to determine the credibility of witnesses. *Wolfe, supra* at 514–515.

The elements of felon in possession of a firearm include a previous felony conviction and possession of a firearm. MCL 750.224f; *People v Perkins*, 473 Mich 626, 629–631; 703 NW2d 448 (2005). The required elements of felony-firearm are that the defendant carried or possessed

a firearm during the commission or attempted commission of a felony. MCL 750.227b; *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

Whether defendant possessed a firearm is a question of fact. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). To establish that defendant possessed a firearm, the prosecution must establish either actual or constructive possession of the firearm. *Id.* at 470. Possession may be sole or joint. *Id.* “A person has constructive possession if there is proximity to the article together with indicia of control.” *Id.* (citation omitted). Constructive possession of a firearm is established “if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.* at 470–471. Physical possession of the firearm is not necessary as long as the defendant has constructive possession. *Id.* at 471.

The parties stipulated that defendant has a prior felony conviction. In his statement to police and in his trial testimony, defendant indicated that he was riding in a van with three other men, two of whom were carrying guns; that the other men in the van discussed committing robberies, and that he acted as a lookout while the two armed men committed a robbery. From this evidence, a rational trier of fact could conclude that defendant knew the location of the firearms and had access to them. *Burgenmeyer*, *supra* at 438; see also *People v Jerry Moore*, 480 Mich 1152; 746 NW2d 300 (2008); *Hill*, *supra* at 470. Moreover, defendant indicated in both his statement to police and in his trial testimony that he had picked up and held onto a firearm used in the robberies, thus supporting a finding that he possessed a firearm.

Contrary to defendant’s assertion, there is no requirement in the felon-in-possession statute, MCL 750.224f, that possession of a firearm be more than “momentary.” The statute merely requires “possession” of a firearm, together with the additional elements of the offense to which defendant stipulated at trial. Because the offense of felon-in-possession of a firearm is a general-intent crime, defendant need only have knowingly possessed a firearm; his *purpose* for possessing the firearm is of no consequence. See *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 1; 728 NW2d 406 (2007) (because carrying a concealed weapon is a general-intent crime, the *mens rea* requirement for that offense “does not extend to the defendant’s purpose for carrying the concealed weapon”); *People v Fennell*, 260 Mich App 261, 266; 677 NW2d 66 (2004) (a general-intent crime requires only an intent to perform the physical act itself).

A person who violates the felon-in-possession statute is guilty of a felony. MCL 750.224f(3); *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Because the prosecution presented sufficient evidence to establish that defendant was in possession of a firearm during his commission of the predicate felonies, his conviction of felony-firearm must also be sustained. MCL 750.227b; *Burgenmeyer*, *supra* at 438.

Next, defendant argues that the trial court failed to properly instruct the jury on the essential elements of the offense of felon in possession of a firearm. Because defense counsel approved the jury instructions at trial, this issue is waived and any error is extinguished. *People v Carter*, 462 Mich 206, 215–216; 612 NW2d 144 (2000); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Moreover, we find no error in the jury instructions. The trial court adequately instructed the jury that defendant must have possessed a firearm to be convicted of this offense, and the court’s accurate statement that defendant had admitted that he had physically possessed a firearm constituted an appropriate comment on the undisputed evidence.

See MCL 768.29 (the trial court has the discretion to “make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require”).

Affirmed.

/s/ Peter D. O’Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher