

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONDALE THOMAS CLARK,

Defendant-Appellant.

UNPUBLISHED

April 2, 2009

No. 281994

Wayne Circuit Court

LC No. 07-010747-FH

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of 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 (felony-firearm), MCL 750.227b. The trial court sentenced defendant to three years' probation for the possession with intent to deliver marijuana conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first contends that insufficient evidence supported his felony-firearm conviction. This Court reviews de novo a challenge to the sufficiency of the evidence, viewing the evidence in the light most favorable to the prosecution. We must 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 Tombs*, 260 Mich App 201, 207; 679 NW2d 77 (2003).

"To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis in original); MCL 750.227b(1). Specifically,

Michigan courts also have recognized that the term "possession" includes both actual and constructive possession. As with the federal rule, a person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Physical possession is not necessary as long as the defendant has constructive possession. [*Burgenmeyer, supra* at 438 (citations omitted).]

Actual or constructive possession “may be proved by circumstantial evidence.” *Id.* at 437. Defendant does not contest his felonious possession of marijuana. Rather, he challenges only that the evidence did not suffice to establish that he possessed the firearm recovered from the premises at the time of his arrest.

Contrary to defendant’s arguments, sufficient evidence existed to establish his constructive possession of the firearm. Defendant resided at the premises where police officers recovered both the marijuana and the firearm. Therefore, consistent with our Supreme Court’s holding in *People v Wolfe*, 440 Mich 508; 522; 489 NW2d 748, amended 441 Mich 1201 (1992), defendant was “in control of the premises where the drugs were found.” See also, *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002); *Burgenmeyer*, *supra* at 438. Officer Sean Harris pursued defendant to the back area of the home and observed defendant “discard” a plastic bag, which was later identified as containing marijuana. While in the home, Officer Myron Watkins observed an assault rifle propped in plain view against a wall in the living room. In light of the evidence that defendant had access to the firearm while in control of the premises and in possession of the drugs, the evidence sufficiently supported defendant’s felony-firearm conviction beyond a reasonable doubt. *Burgenmeyer*, *supra* at 440. Although defendant denied that officers recovered the firearm from his living area, and a defense witness testified that she observed an officer carrying the firearm into the home, it is solely within the jury’s purview to determine which witness’s testimony was most credible. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

Defendant also complains that prosecutorial misconduct denied him a fair and impartial trial. “Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (citations omitted). Because defendant failed to object to the prosecution’s allegedly improper closing remarks, appellate review is limited to plain error. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant specifically challenges the following comments made by the prosecutor in rebuttal closing argument challenging the credibility of defense witness Lolita Robinson:

Back to Ms. Robinson. She’s a professional liar. She comes in here with these fabulous stories. And Defense Counsel wants to tell you how she’s not used to testifying. She didn’t know what to do. She was overwhelmed. She was emotional. She was confused. She couldn’t keep her lie together.

It’s easy to sit there composed and get your story out when you’re telling the truth. It’s much harder to maintain a lie when you can’t even remember it from the day before when you practiced it. So it’s not about the fact that she’s not used to this. Because the truth remains constant. She couldn’t remember what that was though.

The prosecutor's argument directly responded to defense counsel's assertions regarding the Robinson's credibility. Throughout trial, the prosecutor emphasized Robinson's lack of credibility, based in part on the suspect language used by Robinson to describe an individual and the weapon recovered from the premises. In contrast, defense counsel challenged the police officers' credibility and argued that the jury should believe Robinson's testimony. For example, defense counsel attempted to explain during closing arguments Robinson's demeanor to the jury:

Now another one of the things that I'm sure you will do and you'll probably comment about is the testimony that you heard from Ms. Robinson. Somewhat combative. Somewhat agitated. Somewhat excited.

But you can imagine that perhaps she would be agitated and excited. Not being a professional testifier. Wanting to get their story out.

As discussed in *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007):

. . . [T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. The propriety of a prosecutor's remarks depends on all the facts of the case. A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel. [Internal citations and quotation omitted.]

In this case, the prosecutor's comments addressed defense counsel's prior argument regarding Robinson's credibility. As noted in *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995), "[p]rosecutors are accorded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." (Internal citations and quotation omitted). Furthermore, a "prosecutor [is] permitted to argue from the facts that defendant or defendant's witnesses were unworthy of belief." *Dobek, supra* at 67. Because the prosecutor's remarks directly replied to arguments by defense counsel concerning Robinson's credibility, they did not constitute misconduct. In addition, the trial court instructed the jury that the remarks of the attorneys did not constitute evidence.

Affirmed.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly