

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SOFRONZO ERIC HORNE,

Defendant-Appellant.

UNPUBLISHED

May 7, 2009

No. 284070

Wayne Circuit Court

LC No. 07-014448-FH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant was convicted at a jury trial of possession of a firearm by a felon, MCL 750.224f, possession of less than 25 grams of a controlled substance (to wit: cocaine), MCL 333.7403(2)(v), and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. Defendant was sentenced to five years' probation for the felon in possession of a firearm and possession of a controlled substance convictions and five years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On September 2, 2007, police officers, through a confidential informant, made a controlled purchase of narcotics from a home in the City of Detroit. Based on that purchase, the officers requested and obtained a search warrant. The officers executed the search warrant on September 3. After knocking and announcing their presence, the police entered the house. Defendant was emerging from a bedroom as the police entered the house. Defendant later admitted that it was his bedroom. A search of that bedroom resulted in the discovery of cocaine in plain view and two handguns in the console of an entertainment center.

Defendant first contends that the trial court erred by denying his motion for a directed verdict due to the insufficiency of the evidence. We disagree.

This Court reviews a trial court's decision on a motion for directed verdict based on a sufficiency of the evidence challenge de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). This Court does not consider whether any evidence existed that could support a conviction, but instead determines whether a rational trier of fact could have found that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended

441 Mich 1201 (1992). Under this deferential standard, the resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Defendant's sufficiency argument boils down to a claim that the evidence did not show that he possessed the cocaine or the firearms. For purposes of the penal statutes, a defendant does not need to own the controlled substance or have actual physical possession of it to have "possession;" the controlled substance may be *constructively* possessed or *jointly* possessed. *Wolfe, supra* at 519-520. A defendant's mere presence, in and of itself, at a location where drugs are found is insufficient to establish constructive possession. Rather, some additional connection between the illegal narcotics and the defendant must be established. *Id.* at 520.

Here, given the totality of the circumstances and viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence connecting defendant to the cocaine. The cocaine, along with a scale and packaging materials that defendant conceded were his, was found in plain view in the bedroom that defendant was occupying when the police entered the premises. Further, defendant and his grandmother (the owner of the house) admitted that it was defendant's bedroom. Considering the circumstantial evidence, the reasonable inferences arising therefrom, the totality of the circumstances, and resolving all evidentiary conflicts in favor of the prosecution, there was sufficient evidence to show that defendant constructively possessed the drugs, as well as sufficient evidence to establish the requisite elements with respect to the offense of cocaine possession. Even if the evidence might also connect the others in the home to the drugs, "possession may be joint, with more than one person actually or constructively possessing a controlled substance." *Wolfe, supra* at 520.

Defendant next argues that there was insufficient evidence presented to prove the offenses of felony-firearm and felon in possession because the element of possession was not established. The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or an attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of felon in possession of a firearm are that the defendant (1) possessed a firearm, (2) he or she has been convicted of a prior specified felony, and (3) less than five years have passed since the defendant successfully completed probation or parole, completed a term of imprisonment, and paid all fines with regard to the underlying felony. MCL 750.224f; *People v Parker*, 230 Mich App 677, 684-685; 584 NW2d 753 (1998).

As with drug offenses, possession of a firearm may be actual or constructive. *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000); *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). Additionally, "possession may be joint as well as exclusive," and possession may be proven by circumstantial evidence. *Hill, supra* at 469-470. A defendant has constructive possession of a firearm when the location of the weapon is known and the weapon is reasonably accessible to the defendant. *Burgenmeyer, supra* at 438. "[A] person has constructive possession if there is proximity to the [firearm] together with indicia of control." *Hill, supra* at 470.

With respect to possession and felony-firearm, the time of the offense or felony is what controls, not the time of the arrest or search. *Burgenmeyer, supra* at 439. When possession of a controlled substance is the underlying felony, the drug possession offense may take place over an

extended period of time, during which the defendant is variously in proximity to the firearm and at a distance from the weapon. *Id.*

The evidence in this case was sufficient to show that defendant possessed the firearms, which were in the console of the entertainment center located in his bedroom. Considering that cocaine was also located in defendant's bedroom, which he had recently been present in along with the firearms, the possession element of felony-firearm and felon in possession was sufficiently supported.

Defendant also argues that the trial court erred by issuing the search warrant due to lack of probable cause. Because defendant failed to make a pretrial motion to suppress the evidence resulting from the search, and the trial court did not address the propriety of the search during a separate evidentiary hearing, there is no record to review on this question. Accordingly, this issue is not properly preserved for appellate review. This Court reviews unpreserved issues under the plain error doctrine set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal should occur only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Generally, if evidence is unconstitutionally seized, it must be excluded from trial. Exclusion of improperly obtained evidence serves as a deterrent to police misconduct, protects the right to privacy, and preserves judicial integrity. *Terry v Ohio*, 392 US 1, 12-13; 88 S Ct 1868; 20 L Ed 2d 889 (1968). “[P]robable cause to search must exist at the time the search warrant is issued and . . . probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched.” *People v Russo*, 439 Mich 584, 606-607; 487 NW2d 698 (1992) (citations omitted). In other words, “probable cause to issue a search warrant exists where there is a ‘substantial basis’ for inferring a ‘fair probability’ that contraband or evidence of a crime will be found in a particular place.” *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000).

Because of the strong preference for searches conducted pursuant to a search warrant, a magistrate's decision regarding probable cause should be paid great deference. *Russo, supra* at 604, citing *Illinois v Gates*, 462 US 213, 236-237; 103 S Ct 2317; 76 L Ed 2d 527 (1983). “Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a ‘fair probability that contraband or evidence of a crime will be found in a particular place.’ ” *Russo, supra* at 604, quoting *Gates, supra* at 238.

The affidavit in support of a search warrant may be based on information supplied to the affiant by another person. If the other person is not named, the affidavit must contain affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information provided and that the informant is credible or his information is reliable. MCL 780.653(b). The search warrant and underlying affidavit are to be read in a commonsense and realistic manner. *Russo, supra* at 604.

In this case, there is no evidence regarding the circumstances preceding the application for and issuance of the warrant. However, the informant participated in a controlled purchase of cocaine at defendant's house earlier on the same day that the search warrant was issued. It is well established that a controlled purchase of narcotics is “sufficient to establish probable cause

to permit [a] magistrate to issue [a] warrant.” *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995). A confidential informant’s reliability may be established by the success of the controlled buy alone. *Id.* Therefore, the police officer properly used a controlled buy as a method of supporting the search warrant affidavit in this case. Finally, giving due deference to the decision of the magistrate, *Gates, supra*, 462 US at 236-237, we hold that the magistrate did not err in issuing the search warrant.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens