STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2010
v	No. 290970 Oakland Circuit Court
TODD ANTHONY DAVIS, Defendant-Appellant.	LC No. 2008-221250-FH

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), felon in possession of a firearm, MCL 750.224f, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as a third habitual offender, MCL 769.11, to prison terms of 15 to 40 years for the cocaine-related conviction, two to ten years for the felon in possession conviction, one to two years for the marijuana-related conviction, and two years for each felony-firearm conviction, to be served consecutive to a sentence defendant was serving while on parole. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court abused its discretion in denying his motion for a new trial with respect to the conviction of possession with intent to deliver cocaine. The trial court's ruling on a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A trial court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

Defendant lived at the apartment where the drugs at issue in this case were located and although he did not live alone, his roommate was not present at the time police officers executed a search warrant at the apartment. Just prior to the search, defendant had been seated at a table on which cocaine, packaging material, and a digital scale containing visible cocaine residue were sitting in plain sight. There was evidence that powdered cocaine had recently been "cooked" to make crack. A cell phone and a large amount of cash were found beneath a couch near where defendant hid when the police entered the apartment. The cell phone contained a text message requesting a quarter ounce of crack cocaine. This evidence was sufficient to prove that

defendant knowingly possessed the cocaine. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005); *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

Another man, Cedric Jackson, who was with defendant in the apartment, entered a guilty plea to the same offense. However, we disagree with defendant's argument that Jackson's admissions preponderate so heavily against the jury's verdict that a miscarriage of justice would result if the verdict was allowed to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). Jackson stated that he went to defendant's apartment and had 50 or more grams of cocaine with the intent to deliver it. This statement is ambiguous because Jackson could have meant either that he brought the cocaine with him to defendant's apartment or that he went to defendant's apartment and, while there, possessed the cocaine. Both meanings are consistent with the evidence. Even if Jackson meant that he brought the cocaine to defendant's apartment, the jury was not required to accept that as the truth; the jury is "free to believe or disbelieve, in whole or in part, any of the evidence presented at trial." *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976). Furthermore, even if the jury believed that Jackson brought the cocaine to the apartment, that would not preclude a finding that defendant knowingly possessed the cocaine because defendant need not own the cocaine to have possession of it, and defendant could have jointly possessed the cocaine with Jackson. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A rational juror could conclude from the evidence that Jackson and defendant were working together at defendant's apartment to convert cocaine into crack and sell it. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial with respect to the cocaine-related conviction.

Defendant next argues that the evidence was insufficient to support his convictions for the weapons offenses, because the evidence did not indicate that he possessed the weapon that was found on the premises. A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The crimes of felon in possession and felony-firearm both require proof that defendant possessed a firearm. MCL 750.224f(1) and (2); MCL 750.227b(1). The firearm need not be operable. *People v Peals*, 476 Mich 636, 638, 656; 720 NW2d 196 (2006). Further, defendant need not own the weapon to have possession of it. *People v Burgenmeyer*, 461 Mich 431, 436-438; 606 NW2d 645 (2000). Possession of a weapon may be actual or constructive and may be proven by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). "[A] person has constructive possession if there is proximity to the [firearm] together with indicia of control." *Id.* at 470. Thus, "a defendant has constructive possession of a firearm

if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.* at 470-471.

Defendant lived in the apartment where the gun was located. The evidence indicated that the gun was owned by defendant's roommate, Brandon Quinn, but Quinn was not home. Further, while a holster and a gun box were found in Quinn's bedroom, the gun was found beneath a cushion of the living room couch. Drugs and packaging material were sitting on a table in the adjoining dining room. Defendant had been sitting at the table just before the police entered the apartment and was subsequently found hiding behind the living room couch. Even though the firearm was not in plain view, the jury could reasonably have inferred that defendant was in knowing possession of the firearm based on its proximity to a quantity of controlled substances that defendant was intending to deliver, defendant's proximity to both the weapon and the controlled substances, and the relationship between drug dealing and the use of firearms as protection. *People v Rapley*, 483 Mich 1131; 767 NW2d 444 (2009). Therefore, the evidence was sufficient to support defendant's convictions for the weapons offenses.

Defendant next argues that his dual convictions of felon in possession of a firearm and felony-firearm violate the constitutional prohibition against double jeopardy. Defendant did not preserve this issue by raising it below. *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004). Unpreserved constitutional issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

We find no error. Michigan law is well settled that convictions of both offenses do not violate the prohibition against multiple punishments for the same offense. *People v Calloway*, 469 Mich 448, 451-452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Defendant's reliance on *White v Howes*, unpublished opinion of the United States District Court for the Eastern District of Michigan, decided March 24, 2008 (Docket No. 06-10707), is misplaced, because that decision has been reversed, *White v Howes*, 586 F3d 1025 (CA 6, 2009), and is not binding in any event. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

Defendant last argues that the trial court erred in denying him credit for time served against his sentences. Because defendant did not request credit for time served at sentencing or object to the trial court's decision not to award credit, this issue is not preserved. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). Unpreserved claims of sentencing error are reviewed for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763-764; *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003). We find no error. Michigan law is clear that the sentence credit statute, MCL 769.11b, does not apply to parolees who commit new crimes while on parole. *People v Idziak*, 484 Mich 549, 562-563; 773 NW2d 616 (2009); accord *People v Johnson*, 283 Mich App 303, 306-312; 769 NW2d 905 (2009); *People v Filip*, 278 Mich App 635, 641-642; 754 NW2d 660 (2008); *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006); *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder