

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAXENDER TROWELL,

Defendant-Appellant.

UNPUBLISHED

November 23, 2010

No. 294421

Wayne Circuit Court

LC No. 09-010814-FH

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of possession with intent to deliver 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 judge sentenced defendant to concurrent terms of three years' probation for the possession with intent to deliver conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Officers discovered defendant while executing a search warrant for narcotics at a Detroit residence. During the search, officers recovered two marijuana stashes, materials used for measuring and packaging narcotics, and a firearm. On appeal, defendant argues that his convictions must be reversed because (1) the prosecution failed to present sufficient evidence that he possessed the marijuana and firearm found at the raided residence, and (2) the trial court's factual findings were clearly erroneous. We disagree with both contentions.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). We must determine whether the evidence presented at trial, when viewed in the light most favorable to the prosecution, would be sufficient to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The constitutional right to due process prohibits criminal convictions absent proof of each and every element of the crime charged beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 316; 99 S Ct 2781; 61 L Ed 2d 560 (1979). Reasonable inferences arising from circumstantial evidence may provide sufficient proof for conviction. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Contrary to defendant's assertion, the presence of a second individual at the raided residence does not render the evidence implicating defendant merely speculative because more than one individual may possess certain items at a given time. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748, mod 441 Mich 1201 (1992). Second, although defendant correctly asserts that his proximity to the items seized does not alone establish his possession of them, *id.*, here, there was more.

The Michigan Supreme Court outlined what is required to prove a defendant's possession of a controlled substance in *Wolfe*, 440 Mich at 519-520:

A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. . . . It is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown. [Citations omitted.]

To determine whether a sufficient connection between the defendant and the contraband existed, the ultimate question is whether the evidence established that the defendant exercised dominion and control over the substance. *Id.* at 521.

Here, the prosecution presented sufficient evidence that defendant possessed the marijuana found at the raided residence. Notably, the trial court convicted defendant of possession of less than five kilograms of marijuana. Therefore, the prosecution met its burden so long as it proved beyond a reasonable doubt that defendant possessed one of the packages containing marijuana. With respect to the marijuana recovered from the downstairs bathroom, an officer observed defendant throw a clear baggy into a hole in the bathroom wall, where two clear baggies were ultimately recovered, only one of which contained marijuana. In light of this evidence, defendant clearly knew the hiding place for contraband. From his position just steps away from the hole in the bathroom wall, defendant had access to and could exercise control over all items stored there, non-contraband and contraband alike.

With respect to the marijuana found in the upstairs bedroom closet, defendant correctly notes that the dwelling was divided into two parts, with an outside stairway providing the only access to the upstairs. However, reasonable inferences from the evidence indicated that someone operated the downstairs as a business and stayed upstairs after business hours, such that the two floors were related. Further, the scales and packaging materials found in plain view, as well as the fact that the marijuana found downstairs was packaged in a manner very similar to the marijuana recovered from the upstairs closet, provides further indication that the two floors were part of one operation.

Defendant next contends that the prosecution presented insufficient evidence that he possessed the shotgun found in the kitchen. An individual constructively possesses a firearm if he knows of its location and it is reasonably accessible to him. *People v Burgenmeyer*, 461 Mich

431, 438; 606 NW2d 645 (2000). For the purposes of the felony-firearm statute, “[t]he proper question . . . is whether the defendant possessed a firearm *at the time he committed a felony*.” *Id.* at 438-439 (emphasis in original). This inquiry is relatively straightforward for criminal offenses that, by their nature, occur within a short time frame—i.e., delivery of a controlled substance, which occurs at the time of delivery. *Id.* at 439. The question becomes more complex for crimes such as drug possession that “can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it.” *Id.*

Burgenmeyer involved a street purchase of cocaine by an undercover officer. *Burgenmeyer*, 461 Mich at 433. To fill the officer’s request for cocaine, the defendant walked to a residence a short distance away and returned to complete the sale. *Id.* In a later search of that residence, officers discovered two handguns within three feet from where the cocaine was stored. *Id.* at 432. In finding sufficient evidence to sustain the defendant’s felony-firearm conviction, the Court concluded that “[t]he drugs and the weapons were close enough that a jury reasonably could conclude that the defendant possessed both at the same time.” *Id.* at 440.

Here, the trier of fact could reasonably infer that defendant knew of the shotgun’s presence. Officers found the firearm in plain view, and defendant commented on it while being processed, professing to the officers that it was a toy that did not work. He also had reasonable access to the firearm. The officers recovered the shotgun from a location just 12 feet from where the officer observed defendant in the bathroom. The shotgun was leaning in a corner in the kitchen located adjacent to the dining room, where officers recovered materials used for measuring and packaging narcotics. Further, because drug possession can occur over an extended period, a rational trier of fact could conclude that defendant possessed it during the commission of the crime even though 12 feet stood between defendant and the shotgun at the time of his arrest.

Applying the *Burgenmeyer* approach to these facts, sufficient evidence existed that defendant possessed the firearm during the extended period that he possessed the contraband. Further, the prosecution need not show that the defendant played a role in obtaining the firearm or made it available during the commission of the felony to establish possession. Rather, a defendant possesses a firearm where, as here, he knows of and has reasonable access to it during the commission of the underlying felony. *Burgenmeyer*, 461 Mich at 438; *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989).

Finally, it is well established that a firearm need not be operable to sustain a felony-firearm conviction. *People v Peals*, 476 Mich 636, 638; 720 NW2d 196 (2006). Thus, the fact that the shotgun recovered from the kitchen was unloaded is irrelevant.

In his second argument on appeal, defendant challenges the trial court’s findings of fact as insufficient and clearly erroneous. For cases tried without a jury, MCR 2.517(A)(2) requires the court to make “[b]rief, definite, and pertinent findings and conclusions on contested matters . . . without overelaboration of detail or particularization of facts.” The rule’s requirements are met “so long as it appears from the court’s findings of fact that the trial court was aware of the issues in the case and correctly applied the law” *People v Fair*, 165 Mich App 294, 297-298; 418 NW2d 438 (1987). The trial court’s findings of fact are reviewed for clear error. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). A finding is clearly

erroneous where, although there exists evidence to support the finding, we are left with a definite and firm conviction that the trial court was mistaken. *Id.*

Defendant argues that the trial court ignored testimony that the residence had been divided into separate dwellings with no interior access between them. The trial court, however, need only articulate those facts pertinent to the issues presented. The trial court found that defendant possessed marijuana and was not required to particularize which stash.

Defendant next asserts that the court misidentified the officer who recovered the plastic bags from the bathroom wall. This minor misstatement, however, does not indicate that the trial court was unaware of the issues or misapplied the law to the facts. It is irrelevant which officer recovered the plastic bags from behind the bathtub because it has no bearing on whether defendant possessed the drugs found there.

Defendant further argues that the trial court inaccurately described the size of the plastic baggy that the officer saw defendant throw. How the court described the bag's size, however, does not warrant reversal. The officer saw defendant throw a baggy, whatever its dimensions, into a hole in the wall where a bag of marijuana was later recovered. Likewise, the trial court did not need to resolve whether defendant threw the baggy that contained contraband because defendant's knowledge of and close proximity to the hiding place provided sufficient evidence that defendant possessed both baggies ultimately recovered from that location.

Finally, defendant argues that the court did not articulate how defendant "possessed" the marijuana and shotgun. The trial court's findings of fact and conclusions of law regarding the element of possession, however, were adequate. The factual findings the court made include the following: (1) defendant threw a plastic bag into a hole in the wall, where marijuana was later recovered; (2) a plastic baggy containing marijuana was recovered from an upstairs closet; (3) a shotgun was found in the kitchen no more than 12 feet from where defendant was first observed; and (4) materials used for measuring and packaging drugs were found in the dining room. Applying the law to those facts, the trial court concluded that defendant constructively possessed the shotgun while possessing marijuana that he intended to deliver. As the above findings of fact indicate, the trial court did not rely solely on defendant's presence at the raided residence in rendering its decision.

The prosecution presented sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant possessed the marijuana and shotgun recovered from the raided residence. In addition, the trial court's findings of fact and conclusions of law are consistent with MCR 2.517(A)(2) and do not leave this Court with a definite and firm conviction that a mistake was made.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood