

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAREN ELIZABETH COLLINS,

Defendant-Appellant.

UNPUBLISHED
February 16, 2016

No. 325131
Oakland Circuit Court
LC No. 2014-249745-FH

Before: CAVANAGH, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v), two counts of possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b, felon in possession of a firearm (“felon-in-possession”), MCL 750.224f, and possession of marijuana, MCL 333.7403(2)(d).

The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 30 months’ to 15 years’ imprisonment for the possession of a controlled substance conviction, 1 to 15 years’ imprisonment for the felon in possession of a firearm conviction, 2 years’ imprisonment for both felony-firearm convictions (to be served consecutive to her possession of heroin and felon in possession of a firearm convictions), and 32 days in jail for the possession of marijuana conviction. We affirm.

I. FACTUAL BACKGROUND

On March 4, 2014, at approximately 9:00 a.m., police officers executed a search warrant for the upper unit of a duplex apartment home in Pontiac, Michigan. No one answered the door when the police knocked, so they entered the residence using a battering ram. When they entered the unit, the officers found defendant lying in bed in a bedroom. Police handcuffed defendant, took her into the bathroom, seated her on the toilet with the lid closed, and advised her of her *Miranda*¹ rights. Defendant waived those rights. The police then proceeded to question defendant.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant was asked if there were any drugs in the house, and she answered affirmatively, stating that there was marijuana in a drawer in her bedroom. Consistent with defendant's answer, officers located a small amount of marijuana in a dresser in the bedroom.

The officers also asked defendant if there was a gun in the apartment, and she answered that there was a gun in a drawer in her bedroom. In response to additional questioning, defendant confirmed that she was a felon and that she was ineligible to possess a firearm. In light of defendant's responses, officers searched her bedroom and discovered a .22-caliber revolver in the bottom drawer of a nightstand located on the right of the bed. At trial, Detective Daniel Main testified that the nightstand was close to the bed, so it would have been "a matter of a couple feet" for defendant to access the gun while in bed. Main stated that the gun was loaded with six rounds and that he found two additional .22-caliber rounds in the top drawer of the same nightstand along with 14 other .22-caliber rounds in the top drawer of another dresser in the bedroom. Police also detected a digital scale in the upper left drawer of the nightstand.

Upon further questioning, defendant admitted that there was money in the apartment, but she was not aware of the exact amount. When police asked defendant if there was any heroin in the apartment, she paused and eventually replied that there was none. Officers ultimately found a half-open lotto-fold containing .2665 grams of heroin with several other lottery tickets nearby.² After finding the heroin, police confronted defendant with it, and defendant responded, "Well, it's just a pack." Additionally, officers found \$1,800 in cash hidden in between the wooden shelf and a support slat in defendant's closet as well as \$11,560 in cash hidden in a felt shoe bag located behind an access panel for the bathtub in the bathroom.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecution presented insufficient evidence to prove the possession element of her firearm convictions beyond a reasonable doubt. We disagree.

A. STANDARD OF REVIEW

We review a challenge to the sufficiency of the evidence *de novo*. *People v Henderson*, 306 Mich App 1, 8-9; 854 NW2d 234 (2014). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013) (quotation marks and citation omitted). "Circumstantial evidence and reasonable inferences arising [from the evidence] may constitute proof of the elements of the crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). In reviewing a challenge to the sufficiency of the evidence, we do not interfere with the fact-finder's determinations regarding the weight and credibility of the witnesses or the evidence. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

² One of the officers confirmed that lottery tickets are commonly used to create "lotto folds" for packaging heroin.

B. ANALYSIS

The elements of felon-in-possession are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a specified felony, and (3) less than five years had lapsed since defendant completed all terms of imprisonment, was discharged from probation or parole, and paid all applicable fines, and he had not formally regained eligibility to possess a firearm under MCL 28.424.³ See *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004), abrogated in part on other grounds by *People v Smith-Anthony*, 494 Mich 669 (2013), citing MCL 750.224f(2). “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007) (quotation marks and citation omitted); see also *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011) (“One must carry or possess the firearm when committing or attempting to commit a felony.”).

On appeal, defendant only contests the possession element of the firearms offenses. In particular, defendant argues that even though the record indicates that she knew that there was a gun in the drawer in the bedroom, and knew that she was ineligible to possess a firearm due to a previous felony conviction, her knowledge of the firearm did not establish that she had control over it. Defendant also asserts that her mere presence at the scene of a crime, even if she was aware that a crime was being committed, was insufficient to convict her of the firearm offenses. We reject defendant’s claims.

“Possession of a firearm can be actual or constructive, joint or exclusive.” *Johnson*, 293 Mich App at 83. “[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.” *Id.* (quotation marks and citation omitted; alteration in original). Thus, “[t]he essential question is one of control.” *People v Strickland*, 293 Mich App 393, 400; 810 NW2d 660 (2011). Likewise, for purposes of felony-firearm offenses, “a person does not violate MCL 750.227b . . . by committing a felony while merely owning a firearm. 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).

The record reflects that there was sufficient evidence to prove beyond a reasonable doubt that defendant possessed the firearm for purposes of her felony-firearm and felon-in-possession offenses. In light of the lack of male items found in the apartment, and the exclusive presence of items that appeared to belong to defendant or her late mother, the prosecution presented substantial evidence that defendant lived alone in the apartment. Even so, as stated *supra*,

³ “The prosecutor must prove that the defendant’s right to possess a firearm has not been restored only if the defendant produces some evidence that his right has been restored.” *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004), abrogated in part on other grounds by *People v Smith-Anthony*, 494 Mich 669 (2013).

possession of a firearm can be joint. *Johnson*, 293 Mich App at 83. Further, when asked by the police if there was a firearm in the home, defendant answered that there was a gun located in *her* bedroom in a drawer. Consistent with defendant's response, the police found a loaded .22-caliber revolver in the bottom drawer of a nightstand located to the right of the foot of the bed. Correspondence and bills were found in the same nightstand addressed to defendant at the Pontiac address. Most significantly, the nightstand was located just a few feet away from the bed in which defendant was lying alone at the time of the search.

Given this evidence, it is overwhelmingly apparent that "the location of the weapon [was] known [to her] and it [was] reasonably accessible to . . . defendant" during the relevant offenses. *Johnson*, 293 Mich App at 83. Likewise, given defendant's admissions to the police, it is clear that defendant had control over the firearm. See *Strickland*, 293 Mich App at 400. We reject defendant's claims regarding the weight and reliability of a defense witness's testimony and defendant's admissions, as we will not disrupt the fact-finder's conclusions regarding the weight and credibility of the evidence. *Dunigan*, 299 Mich App at 582.

Thus, viewed in the light most favorable to the prosecution, the prosecution presented sufficient evidence of constructive possession to support defendant's felon-in-possession and felony-firearm convictions. See *id.*

III. SCORING OF OFFENSE VARIABLE 15

Defendant next argues that the trial court erred in assessing five points for Offense Variable ("OV") 15 because the prosecution presented no evidence that defendant was involved in drug trafficking. We disagree.

A. STANDARD OF REVIEW

In general, "[u]nder the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (footnotes omitted). However, defendant failed to preserve this claim by raising it "at sentencing, in a motion for resentencing, or in a motion to remand filed in the Court of Appeals." *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013), citing MCL 769.34(10). Thus, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

To demonstrate such an error, defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 763. Even if a defendant establishes a plain error that affected his substantial rights, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (quotation marks and citation omitted; second alteration in original).

B. ANALYSIS

OV 15 provides for an assessment of points for “aggravated controlled substance offenses.” Pursuant to MCL 777.45(1)(h), a trial court shall assess five points when “[t]he offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking.” “Trafficking” is defined as “the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for further distribution.” MCL 777.45(2)(c).

Defendant contends that the facts of this case clearly indicate that there was no intent to deliver heroin. However, defendant ignores the plain language of the statute, which permits an assessment of five points if “[t]he offense involved . . . [the] *possession of control substances* . . . having a value or under such circumstances as to indicate trafficking.” MCL 777.45(1)(h) (emphasis added). Additionally, contrary to defendant’s claims, the circumstances of defendant’s possession of the heroin indicated trafficking. While the police found only a small amount of heroin in defendant’s apartment, the police also found \$13,360 in cash separated and well-hidden in the bathroom and bedroom, a digital scale commonly used in the drug trade, and a loaded handgun with extra ammunition. Further, the heroin discovered by the police was wrapped in a “lotto fold”—which is a commonly used method of packaging drugs—together with several unfolded lotto tickets. While no single fact conclusively established that defendant was engaged in trafficking, the totality of the circumstances supported the inference that defendant was involved in drug trafficking as defined by MCL 777.45(2)(c). *People v Maben*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 321732); slip op at 3 (“The trial court may rely on reasonable inferences arising from the record evidence to support a particular [OV] score.”).

Therefore, the trial court properly assessed five points for OV 15 because there was a preponderance of evidence in the record to support a finding that defendant’s drug possession conviction occurred under circumstances indicative of trafficking. See MCL 777.45(1)(h); *Hardy*, 494 Mich at 438.⁴

⁴ We recognize that the Michigan Supreme Court recently held that Michigan’s sentencing guidelines are unconstitutional to the extent that they “*require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range” *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015). However, defendant has not raised a claim under *Lockridge*. In addition, a trial court still is required to calculate and consider the sentencing guidelines when imposing a sentence, *id.* at 365, and *Lockridge* “[did] nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not,” *id.* at 392 n 28. Thus, we need not consider the effect of *Lockridge* in this case. Cf. *People v Maben*, ___ Mich App ___, ___ n 1; ___ NW2d ___ (2015) (Docket No. 321732); slip op at 1 n 1.

IV. CONCLUSION

Defendant has failed to establish that her firearm convictions were supported by insufficient evidence, or that the trial court erred in assessing five points for OV 15.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Michael J. Riordan

/s/ Michael F. Gadola