STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 31, 2012
v	No. 299672 Wayne Circuit Court
DUANE S. DAVIS, Defendant-Appellant.	LC No. 10-003056-FH

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. Defendant was sentenced to two years' probation for the possession of less than 25 grams of cocaine conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that his convictions should be reversed because the prosecution failed to present sufficient evidence to prove the elements of possession of less than 25 grams of cocaine and felony-firearm. We disagree.

This Court reviews a claim of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing a claim that the evidence presented by the prosecution was insufficient to support the defendant's conviction, appellate courts must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). This Court will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses. *People v Kanaan*, 278 Mich App 594, 618-619; 751 NW2d 57 (2008). Circumstantial evidence and reasonable inferences which arise from it can constitute sufficient evidence of the crime. *Id.*

The prosecution presented sufficient evidence of possession of cocaine. To prove possession of cocaine, the prosecution must show that the defendant had dominion or control over the substance with knowledge of its presence and character. *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000). Possession of cocaine can be either actual or constructive, and may be proved by circumstantial evidence and reasonable inferences drawn from the

evidence. *Id*. The trial court in this case held that defendant constructively possessed the cocaine.

Constructive possession, which can be sole or joint, is the right to exercise control over the drug coupled with knowledge of its presence. *Wolfe*, 440 Mich at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the controlled substance. *People v Meshell*, 265 Mich App 616, 621-622; 696 NW2d 754 (2005). Close proximity to contraband in plain view is evidence of possession, but not necessary. *Wolfe*, 440 Mich at 521.

Defendant argues that there was an insufficient nexus between him and the cocaine; rather, that the only evidence of possession was his confession. On the contrary, the police recovered 3.3 grams of cocaine, individually packaged, along with a razor, spoon, and scale in the medicine cabinet of the bathroom. Further, the police recovered a paystub from the same medicine cabinet. On the paystub, defendant's employer listed defendant's name and address, the address of the home. The prosecution thus proved through circumstantial evidence that defendant had the right to exercise control over the cocaine, and through his confession and the location of the paystub, exhibited knowledge of the presence of the cocaine. Although defendant was not close to the cocaine at the time, close proximity is only evidence of possession. The evidence presented thus sufficiently established a nexus between defendant and the cocaine for the trial court to find that defendant constructively possessed it.

The prosecution also presented sufficient evidence to convict defendant of felony-firearm. 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, 178-179; 737 NW2d 790 (2007). The trial court in this case held that defendant constructively possessed the firearm found in the home.

A defendant can constructively possess a firearm for the purposes of felony-firearm. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). A person has constructive possession if there is proximity to the article, together with indicia of control. *Id*. A defendant as constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. *Id*. Defendant admitted to owning a loaded firearm in the residence. Although the police did not find a firearm on defendant's person they recovered a loaded firearm from the living room. Thus, the prosecution proved by reasonable inference through circumstantial evidence that defendant knew of the weapon in the residence and that the weapon in the residence was his.

The only question therefore was whether the weapon was readily accessible to defendant. In *People v Burgenmeyer*, 461 Mich 431; 606 NW2d 645 (2000), and *People v Becoats*, 181 Mich App 722; 449 NW2d 687 (1989), the two cases most relied upon by the prosecution in its brief, this Court held that the defendant's access to the weapon should not be determined solely by reference to where the firearm was at his arrest, but rather, should also rely upon his access to it when the crime was committed. *Burgenmeyer*, 461 Mich at 435; *Becoats*, 181 Mich App at 726. In this case, the police found defendant near the home, on the outside of it, and adjacent to it; the police found the cocaine in the bathroom cabinet and the firearm on a table in the living room.

This Court has upheld constructive possession where the firearms were in a different room of the home, but in the vicinity of the defendant. See *People v Johnson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 295664, issued June 14, 2011 (slip op at 2-6)). Viewing the evidence in the light most favorable to the prosecution, defendant's case closely resembles the facts in *Burgenmeyer*, in which the police confiscated cocaine after the defendant admitted in custody to its presence in his bedroom. *Burgenmeyer*, 461 Mich at 435. In that case, the police found firearms atop the dresser while searching for the cocaine. *Id*. The *Burgenmeyer* Court found this sufficient for the trier of fact to infer that the defendant possessed the firearm when he possessed the cocaine. *Id*. Likewise, defendant in this case admitted to the possession of the cocaine as well as the firearm. The firearm was found a few rooms down from the cocaine. If the trier of fact held that defendant constructively possessed the cocaine in the home, it could also reasonably infer that defendant constructively possessed the firearm at the same time.

Defendant raises the remaining issues in a Standard 4 brief filed on appeal. First, defendant argues that his trial counsel was ineffective for failing to challenge defendant's statement that the prosecution offered into evidence. We disagree.

Defendant failed to preserve his ineffective assistance of counsel claims, and therefore, review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This Court reviews whether defendant was deprived of his constitutional right to effective assistance of counsel de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

A defendant asserting deprivation of effective assistance of counsel bears the burden of demonstrating both deficient performance and prejudice, and thus he bears the burden of establishing the factual predicate for his claim. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008). The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. In reviewing a claim for ineffective assistance of counsel, this Court will not substitute its judgment for that of counsel regarding trial strategy, and that a strategy failed does not render counsel's assistance ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant alleges that his counsel was ineffective for failing to object at trial to the introduction of his statement into evidence. This Court has held that a decision not to object can be sound trial strategy. *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008). Defense counsel could have decided to attack the element of possession on the merits, as the record seems to reflect, seeing as there were a number of other individuals in the home at the time and the police found defendant outside and next to the home, rather than to pursue an objection to the admission of the confession itself. The fact that defense counsel was not successful does not overcome the presumption that defense counsel was engaging in a trial strategy. Defendant therefore fails to show that defense counsel's performance was deficient.

Defendant next argues that his defense counsel was ineffective for failing to call his mother to testify. We disagree.

Defendant fails in this assertion for lack of record support. To meet his burden, defendant must also establish that the record supports his claim. *People v Mitchell*, 454 Mich

145, 162-163; 560 NW2d 600 (1997). Defendant provides no support for his claim that his mother would testify that defendant did not live in the home or that the cocaine was found in a different area than where police officers testified. Because unpreserved ineffective assistance of counsel claims are limited to errors apparent on the record, defendant fails to make a valid claim. *Mitchell*, 454 Mich at 162; *Matuszak*, 263 Mich App at 48.

Further, even if defendant provided record support for his claim, he fails to show that counsel's actions in failing to call his mother deprived him of a substantial defense. This Court presumes that decisions regarding what evidence to present and whether to call or question witnesses are matters of trial strategy that a court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398-399; 688 NW2d 308 (2004). The failure to call a witness constitutes ineffective assistance of counsel only if the failure deprived the defendant if a substantial defense. *Id*.

Defense counsel cross-examined the police officers on the location of defendant when arrested and the number of people in the home at the time of the raid. During closing argument, defense counsel highlighted the distance between defendant and the cocaine and firearm and argued that the circumstances made possession by defendant unlikely. The failure to call defendant's mother does not constitute ineffective assistance of counsel as defendant was still provided a substantial defense. Defendant therefore fails to show deficient performance.

Finally, defendant fails to show prejudice. The paystub found in the cabinet, addressed to defendant at the residence, indicated that defendant lived in the residence. Further, defendant admitted to living in the residence, and the court admitted this statement into evidence. Therefore, defendant fails to show how the outcome would have been different had his mother testified.

Defendant next argues that his trial counsel was ineffective for failing to call the Source of Information (SOI) that provided the information forming the basis for the search warrant, and for failing to object to the prosecutor's introduction of evidence stemming from the SOI. Defendant claims that even if trial counsel was not ineffective, the prosecution deprived him of his Sixth Amendment right to confront the witnesses against him for failing to call the SOI.

First, defendant fails to provide record support for his claim. As stated previously, to meet his burden defendant must give record support. *Mitchell*, 454 Mich at 162-163. The SOI's description of defendant in no way indicated that the SOI had knowledge of where defendant lived as defendant claims the SOI could and asserts that the SOI could have testified accordingly. In fact, whether the SOI was indeed describing defendant in his statement has no bearing on where defendant resided. Therefore, defendant's argument that the SOI could have testified as he claims is devoid of record support.

Defendant also fails to show his defense counsel was ineffective for failing to call the SOI. This Court presumes that the failure to call witnesses, as stated in the previous issue, is a matter of trial strategy lest defendant can show he was deprived of a substantial defense. *Dixon*, 263 Mich App at 398-399. Defense counsel's failure to call the SOI, who provided only a general description of which defendant matched, and nothing else, constitutes sound trial strategy. Although defendant states that the SOI could have provided other relevant information,

the record does not indicate that the SOI had such information. Further, his counsel provided the defense discussed in the previous issue. Defendant therefore fails to show he was deprived of a substantial defense.

Further, if defense counsel had made a motion to call the SOI, the motion would have also been meritless. Defense counsel is not required to make a meritless motion. *People v Goodin*, 257 Mich App 425, 433-434; 668 NW2d 392 (2003). The informer's privilege protects SOIs; an SOI's identity is revealed only if, on balance, defendant can minimally show that the SOI's testimony impacts his ability to prepare his defense. *People v Stander*, 73 Mich App 617, 621-622; 251 NW2d 258 (1976). For the same reasons defendant fails to overcome the presumption of sound trial strategy, he would have failed to show that the SOI's testimony could have positively impacted his defense. Therefore, defense counsel was not required to make a motion to call the SOI to provide effective assistance of counsel; his failure to do so did not make his performance deficient.

Defendant's next contention is that his counsel was ineffective because counsel did not object to evidence stemming from the SOI. This Court has also held that decisions not to object can be sound trial strategy. *Horn*, 279 Mich App at 40. Trial counsel could have been trying not to highlight the fact that the SOI provided a description that bore substantial similarity to defendant. Defendant fails to show how the failure to object did not constitute sound trial strategy. Defendant therefore fails to overcome the necessary presumption for his claim.

Finally, defendant fails to show that he was denied his Sixth Amendment right to confrontation for the prosecution's failure to call the SOI. Defendant failed to preserve his constitutional claim; therefore, this Court considers this claim on appeal if a defendant shows that (1) an error occurred, (2) the error was plain, and (3) the error affected defendant's substantial rights. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000). To establish that the error affected substantial rights, a defendant must usually show that the error affected the outcome of the lower court proceedings. *Id*.

Defendant's right to confrontation is not denied by the failure of the prosecutor to call as a witness a person whom the defendant could have called to testify. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Defendant could have, as he argues above, called the SOI had he shown how the SOI impacted his defense. *Stander*, 73 Mich App at 621-622. Defendant failed to do so. The failure of the prosecutor to call a witness of whom defendant could not show was material to any fact at issue in the case was therefore not error. Defendant's constitutional claim therefore also fails.

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly