STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2012
v	No. 303882 Bay Circuit Court
DOUGLAS WILLIAM JAMISON, Defendant-Appellant.	LC No. 09-010801-FH

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of manufacturing marijuana, MCL 333.7401(2)(d)(*iii*) (less than five kilograms or fewer than 20 plants); felon in possession of a firearm, MCL 750.224f; and two counts of possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 58 to 180 months' imprisonment for the controlled substance conviction and 58 to 300 months' imprisonment for the felon-in-possession conviction. Defendant also received concurrent terms of two years' imprisonment for each of the felony-firearm convictions (with credit given for 600 days served), to be served consecutively to the other sentences. We affirm.

In August 2009, two witnesses observed defendant shooting a firearm outside the house defendant shared with his mother in Williams Township.[1] During a subsequent search of the residence, officers found 65 firearms in a locked room, as well as marijuana growing in a utility shed. Although 32 marijuana plants were seized, only 18 had viable root systems.

Defendant argues that the prosecutor did not adequately prove that defendant possessed a firearm, so there was insufficient evidence to support the felon-in-possession and felony-firearm convictions. We disagree. We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution to determine whether "any rational trier of fact could

[1] Defendant contends that he lived in a motor home on the premises, but there was evidence that he lived in the house.

have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The felon-in-possession statute indicates that "a person convicted of a specified felony is prohibited from possessing a firearm until five years after he has paid all fines, served all terms of imprisonment, and completed all terms of probation or parole imposed for the offense." *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004). To convict defendant of felony-firearm, the prosecutor had to prove that "defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The possession can be actual or constructive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). "[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.

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence showing that defendant possessed the firearms. Two witnesses testified that they saw defendant shoot a gun outside the house. A police officer indicated that two firearms that were seized during the search matched descriptions that the witnesses had given. Defendant also admitted to an officer during the search that he had recently used a gun to put down a stray cat. This evidence showed that defendant had actual possession of a firearm, so there was sufficient evidence to support the felon-in-possession conviction and the felony-firearm conviction that was predicated on it.

There was also sufficient evidence showing that defendant had constructive possession of firearms while he was growing the marijuana. When officers executed the search warrant and found the marijuana, defendant admitted that there were a considerable number of firearms locked in an upstairs room. Defendant's keys were then used to unlock the room and any of the inside cabinets that were locked. A suitcase in the room contained papers, assorted items, and pill bottles, all of which belonged to defendant. Based on this evidence, a reasonable jury could have concluded that defendant was aware of the firearms and had reasonable access to them (indeed, it appears he did access them on at least one occasion). Therefore, there was sufficient evidence to support defendant's felony-firearm conviction that was predicated on manufacturing marijuana.

Next, defendant asserts that trial counsel was ineffective for failing to move for a mistrial when an officer testified that defendant had been incarcerated. In reviewing this argument, we are limited to the facts on the original record because no evidentiary hearing took place below with regard to the issue. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). To establish a claim of ineffective assistance of counsel, a defendant bears the heavy burden of showing that "counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). A defendant must also demonstrate that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Counsel is afforded broad discretion in the handling of cases. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "Declining to raise objections can often be consistent with sound trial strategy." *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). "[T]here are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995).

Although "[p]olice witnesses have a special obligation not to venture into . . . forbidden areas" that may prejudice the defendant, *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983), an answer by a police officer that ventures into a forbidden area does not require reversal in every instance, *People v Harvey*, 167 Mich App 734, 750; 423 NW2d 335 (1988); *People v O'Brien*, 113 Mich App 183, 209-210; 317 NW2d 570 (1982). The critical consideration is whether the defendant was denied a fair trial. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990).

The officer's comments occurred in response to the prosecutor's question about a conversation the officer had with defendant when the search warrant was executed.[2] While the officer should have refrained from indicating that defendant had recently been incarcerated, this minor irregularity would not have warranted a mistrial.[3] In addition, this is one instance where objecting may have caused harm and drawn attention to the disclosure. Trial counsel's decision not to move for a mistrial was sound trial strategy and did not deny defendant the effective assistance of counsel.

Finally, defendant argues that one of his felony-firearm convictions must be vacated and his judgment of sentence must be amended because of a deficiency in the felony information. Defendant bases his argument on the first amended information, which set forth a charge of manufacturing 20 or more but fewer than 200 marijuana plants, MCL 33.7401(2)(d)(*ii*), and indicated that one of the felony-firearm counts was based on manufacturing this marijuana.[4] The manufacturing charge was reduced to a charge of manufacturing marijuana of the lowest quantity, MCL 33.7401(2)(d)(*iii*), because only 18 of the marijuana plants had viable root structures. Trial counsel agreed to this reduction on the record and a second amended information was filed later that day. This information did not include the higher manufacturing charge, and it indicated that one of the felony-firearm convictions was predicated on "Manufacturing of Marijuana." Although the MCL citation pertaining to the predicate felony for the felony-firearm charge was inaccurate in that it listed MCL 33.7401(2)(d)(*ii*) instead of MCL 33.7401(2)(d)(*iii*), the second amended information was nonetheless adequate in light of (1) the language employed ("Manufacturing of Marijuana"), (2) the concession by counsel on the record

[2] The prosecutor did not specifically elicit the challenged information.

[3] We note that it was undisputed that defendant had a prior felony conviction, an element of the felon-in-possession charge.

[4] The other predicate felony was the felon-in-possession offense.

that a lower quantity of plants was in issue, and (3) the fact that the second amended information did not contain a separate charge for manufacturing 20 or more but less than 200 marijuana plants but only contained a charge for "manufacture [of] marijuana" under MCL 33.7401(2)(d)(*iii*). Defendant received sufficient notice that the prosecution intended to charge him for possessing a firearm while manufacturing marijuana. It was only the quantity that later changed in defendant's favor. Reversal is not warranted. See, generally, *Unger*, 278 Mich App at 221-222 (discussing unfair surprise or prejudice in the context of amending an information).

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter