

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
October 16, 2012

v

ROBERT SYLVESTER HARRIS,  
  
Defendant-Appellant.

No. 306619  
Ingham Circuit Court  
LC No. 11-000130-FH

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Before: RONAYNE KRAUSE, P.J., AND BORRELLO, AND RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to consecutive terms of 2 to 10 years for felon in possession of a firearm and two years for felony-firearm. Defendant was ordered to pay a crime victim rights fee of \$130. We affirm.

**I. FACTUAL BACKGROUND**

This case arises out of a domestic dispute between defendant and his wife. Defendant's wife called 911 and reported that he was drunk and pointing a gun at her and her child. When the police arrived at the residence, defendant exited the house and walked toward the police. Defendant was taken into custody and his wife consented to a search of the premise. During the search, the police discovered a loaded semiautomatic handgun in the tank of the toilet. Defendant's wife identified the gun as the one defendant pointed at her. The police also discovered several weapons on a shelving unit in the basement including shotguns and a bow and arrow. Defendant told the police that he had guns in the house because he liked to hunt, although he denied having the handgun. Defendant was convicted of felon in possession of a firearm and felony-firearm. Defendant now appeals.

## II. JURY INSTRUCTIONS

Defendant argues that the jury instructions were erroneous because an improper “possession” definition was given and the trial court failed to give a special unanimity instruction. Defendant has waived this issue.<sup>1</sup> When asked if there were any objections to the jury instructions other than ones already addressed, defendant replied “No, your Honor.” In *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011), defense counsel stated that he had no objections to the jury instructions, and the Michigan Supreme Court construed this as an approval of the jury instructions. The Court held that the defendant’s express statements that he did not object to the jury instructions meant that “defendant waived any objection to the erroneous instructions, and there is no error to review.” *Id.* Explicating further, the Court stated that “[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. When defense counsel clearly expresses satisfaction with a trial court’s decision, counsel’s action will be deemed to constitute a waiver.” *Id.* (internal quotations and citation omitted). Likewise in this case, defense counsel’s express satisfaction with the jury instructions constitutes a waiver of this issue, extinguishing any error for review. Furthermore, there was no manifest injustice because there was sufficient evidence supporting defendant’s conviction, as discussed below.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. Standard of Review

Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a “trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court’s factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

### B. Analysis

Defendant argues that he was denied effective assistance of counsel when his trial counsel failed to object to the erroneous jury instructions. We disagree. In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that “counsel’s representation fell below an objective standard of reasonableness,” which requires a showing “that counsel’s performance was deficient.” *Strickland v Washington*, 466 US 668, 687; 104 S

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<sup>1</sup> “Waiver is the intentional relinquishment or abandonment of a known right.” *People v Buie*, 491 Mich 294, 305; 817 NW2d 33 (2012) (internal quotations and citation omitted).

Ct 2052; 80 L Ed 2d 674 (1984). A defendant must then demonstrate that “the deficient performance prejudiced the defense,” which “requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial . . . .” *Id.* at 687. The Court has held that this second prong is asking whether “there was a reasonable probability that the outcome of the trial would have been different had defense counsel” adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

Even assuming that counsel’s behavior fell below an objective standard of reasonableness, defendant is unable to demonstrate that the outcome of the proceedings would have been different but for these alleged errors. A person is guilty of felony-firearm when he “carries or has a firearm in his possession when committing or attempting to commit a felony.” *People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004). Possession may be actual or constructive, and a defendant has “constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815, 818 (2011) (internal quotations and citation omitted). A defendant is guilty of felon in possession of a firearm if he possessed a firearm and has been convicted of a felony within the applicable time period. MCL 750.224f.

The evidence presented at trial established the elements of these two crimes beyond a reasonable doubt. Defendant’s wife reported that he pointed a gun at her and her child. A search of the house revealed the handgun, which she identified as the gun defendant pointed at her. The police also discovered a collection of firearms on a shelf in defendant’s basement, which defendant admitted to knowing about and that were reasonably accessible to him. Lastly, the prosecution admitted an exhibit of a certified conviction of sentence for defendant’s conviction of attempted uttering and publishing. Considering this evidence, defendant has failed to prove the outcome of the trial would have been different with alternate jury instructions.

#### IV. CRIME VICTIM RIGHTS FEE

##### A. Standard of Review

An issue is not preserved for appellate review if it is not raised before, addressed by, and decided by the lower court. *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). An unpreserved claim is reviewed only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

##### B. Analysis

Defendant argues that the imposition of a \$130 crime victim rights fee (CVRF) violates his constitutional right to be free from ex post facto laws because when he committed the offense, the CVRF was \$60. However, in *People v Earl*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 302945, issued June 19, 2012) (slip op at 5), this Court held that an assessment of the CVRF was not punitive in nature nor was it restitution. Thus, this Court held that the imposition of the \$130 CVRF for a crime that occurred when the CVRF was only \$60 is not a violation of the ex post facto doctrine. *Earl*, slip op at 6. Defendant has failed to demonstrate plain error affecting his substantial rights.

## V. CONCLUSION

Defendant has waived any objection to the jury instructions. He also failed to satisfy the test for ineffective assistance of counsel because he has failed to demonstrate the outcome of the trial would have been different but for counsel's alleged errors. Lastly, the imposition of a \$130 CVRF did not violate the ex post facto doctrine. We affirm.

/s/ Amy Ronayne Krause

/s/ Stephen L. Borrello

/s/ Michael J. Riordan