

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 20, 2012

v

SUZANNE FAY LAFOUNTAIN,

Defendant-Appellant.

No. 306858
Cheboygan Circuit Court
LC No. 10-004267-FH

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Defendant appeals by right from her conviction on one count of operating or maintaining a methamphetamine lab involving a firearm, MCL 333.7401c(2)(e). We affirm.

I. FACTS

Defendant was arrested and charged with five crimes stemming from her involvement in a methamphetamine laboratory operated out of the house where she was living. The charges included possession of methamphetamine, maintaining a drug house, operating or maintaining a methamphetamine laboratory involving a firearm, operating or maintaining a methamphetamine laboratory in the presence of a minor, and operating or maintaining a methamphetamine laboratory involving hazardous waste.

Prior to trial, defendant filed a motion to quash and/or dismiss two of the three counts under MCL 333.7401c on double jeopardy grounds. The trial court permitted all three counts under MCL 333.7401c to be submitted to the jury, but held that defendant would only be sentenced on whichever charge carried the highest penalty if the jury returned guilty verdicts on more than one count.

At trial, the prosecution presented evidence that defendant had resided in the house for five years and that the room she shared with her boyfriend had contained methamphetamine “cooking” paraphernalia. Further, the prosecution presented evidence that the room across the hall was used as a bedroom for defendant’s children, and that the room contained three unloaded firearms. Defendant’s boyfriend testified at trial that the guns had been in the home prior to the commencement of the methamphetamine-related activities.

At the conclusion of the trial, the jury returned a verdict of guilty on all counts except maintaining a drug house. All of the convictions were subsequently vacated by the trial court with the exception of operating or maintaining a methamphetamine laboratory involving a firearm.

II. ANALYSIS

First, defendant argues that there was insufficient evidence to support her conviction for operating or maintaining a methamphetamine laboratory involving a firearm. We disagree. In reviewing a challenge to the sufficiency of the evidence, this Court examines the evidence in the light most favorable to the prosecution to see if there was sufficient evidence to permit a rational juror to find proof beyond a reasonable doubt of each element of the crime. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991). Unpreserved constitutional errors are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under MCL 333.7401c(2)(e), a defendant guilty of operating or maintaining a methamphetamine laboratory faces an enhanced sentence “[i]f the violation involves the possession, placement, or use of a firearm or any other device designed or intended to be used to injure another person[.]” While the statute in question does not define “possession, placement, or use,” the meaning of “possession” in firearm contexts has been extensively considered in cases involving the felony-firearm statute, MCL 750.227b. In those cases, actual dominion over the firearm need not be demonstrated, but proximity to the firearm and “some objective indicia of control” must be shown to establish constructive possession of a firearm. *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). To establish such an objective indicia of control, the prosecution must show that the defendant knew where the firearm was located. *Id.*

In the instant case, both proximity and objective indicia of control were established by the prosecution at trial. First, the firearms were located in the bedroom across the hall from defendant’s room, which establishes proximity. Second, there was ample circumstantial evidence that defendant knew of the location of the firearms: they were in a room where defendant’s children slept, defendant’s boyfriend testified that the firearms had been there for some time, and defendant herself testified that she had been in the room to check on her children. Given this evidence, there were sufficient grounds for a rational jury to conclude that defendant had constructive possession of the firearms in question.

Defendant also argues, however, that even if she did have constructive possession of the firearms, those firearms were not “involved” with the operation or maintenance of the methamphetamine laboratory. Defendant bases her argument on the notion that something more than possession of a firearm is required under MCL 333.7401c(2)(e), and that the prosecution is charged with establishing that the possession, placement, or use of the firearm must be a necessary accompaniment to the operation or maintenance of the methamphetamine lab. No such requirement, however, is found in the plain language of the statute. MCL 333.7401c(2)(e) prohibits the possession of a firearm as part of the operation of a methamphetamine lab, not just the use of a firearm. There is no question that a methamphetamine lab was being operated inside the house, nor is there any question that firearms were inside the house. Therefore, there was

sufficient evidence to permit a rational jury to conclude that defendant was guilty of operating or maintaining a methamphetamine laboratory involving a firearm.

Next, defendant argues that the trial court erred by scoring Prior Record Variable 7 (“PRV 7”) at ten points, and that defendant is entitled to resentencing. We disagree.

Under PRV 7, ten points are scored when “the offender has 1 subsequent or concurrent conviction.” MCL 777.57(1)(a), (b). Further, a sentencing court has discretion in determining the number of points to be scored, “provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Here, defendant was convicted of four felonies following her trial by jury. As such, there is evidence of record to support the trial court’s discretionary scoring of ten points for PRV 7. While three of defendant’s convictions were subsequently vacated by the trial court, there is nothing in the statutory language to suggest that this action would invalidate a conviction for the purposes of scoring PRV 7. We note that in *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010), our Supreme Court held that a sentence was based on inaccurate information when PRV 7 was scored for convictions subsequently vacated on appeal. However, here the convictions at issue were vacated by the sentencing court itself. We note that in *Jackson* the Court explicitly held that the sentencing court was free to affirm the sentence at issue on remand, despite the vacated convictions, but had to consider the “new information.” *Id.* at 792, n 24. Accordingly, it appears that *Jackson* stands for the proposition that sentencing courts should review sentences that were calculated with convictions in mind that were later vacated by subsequent courts. Here, no such review is necessary, as the sentencing court was well aware of the status of the vacated convictions at the time of sentencing, and would be faced with no new information on remand that would alter its sentencing calculations.

Finally, defendant argues that she is entitled to a correction of her presentence investigation report. We disagree.

Defendant did not preserve this issue by objecting at the time of sentencing. See *People v Bailye (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). In the absence of such an objection, a correction is only warranted if the report contains plain error affecting substantial rights. *Carines*, 460 Mich 774.

Here, the report states that defendant was convicted of four crimes when three of those four convictions were vacated. However, in *People v McCrady*, 244 Mich App 27, 32; 624 MNW2d 761 (2001), the Court held that a plain error in a presentencing report, which referred to the conviction as first-degree premeditated murder instead of first-degree felony murder, did not affect the defendant’s substantial rights. Because any error in the presentence investigation report did not erroneously alter defendant’s sentence or otherwise affect any substantial right of defendant, defendant is not entitled to a remand for correction of the report.

Affirmed.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens