STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2001
v	No. 215247 Oakland Circuit Court
HARDY M. LABOWITCH, Defendant-Appellant.	LC No. 98-158181-FH

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA 28.424(2), for which he received a mandatory two-year prison term. The conviction arose after defendant pleaded guilty to possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(d)(iii), and manufacturing two to two-hundred marijuana plants, MCL 333.7401(2)(d)(ii); MSA 14.15(7401)(d)(ii). The police found various firearms in the house where the marijuana was found. We affirm.

Defendant first argues that the trial court denied him a fair trial by refusing to instruct the jurors that in order to find him guilty of felony-firearm, they had to find that a firearm was reasonably accessible to him when the police raided his house. There is a question regarding whether defendant properly preserved this issue for appellate review.[1] Nevertheless, even assuming that defendant did properly preserve the issue, we find no basis for reversal.

This Court reviews jury instructions in their entirety to determine whether an error requiring reversal occurred. *People v Mass*, 238 Mich App 333, 339; 605 NW2d 322 (1999), lv gtd in part 462 Mich 877 (2000). Reversal is unwarranted if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*.

[1] While defense counsel did not object to the jury instructions on the record, the prosecutor acknowledged at a later hearing that defense counsel had requested an instruction on "reasonable accessibility" and that the trial court denied the request.

Defendant relies on *People v Williams*, 212 Mich App 607; 538 NW2d 89 (1995),[2] overruled in part sub nom *People v Burgenmeyer*, 461 Mich 431 (2000), in arguing that a conviction in this case required that a firearm was reasonably accessible to defendant at the time of the police raid. Defendant emphasizes that "he was at the front door at the time of his arrest and he was immediately placed in custody; the weapons recovered were all found in the bedroom which was upstairs and possibly some of them were in a locked box."

In *People v Burgenmeyer*, 461 Mich 431, 438-440; 606 NW2d 645 (2000), the Supreme Court clarified the analysis to be employed in felony-firearm prosecutions involving drug possession offenses. In doing so, the Court explicitly overruled the part of *Williams* on which defendant relies in making his appellate argument. *Id*. at 440. The *Burgenmeyer* Court stated:

> 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.
>
> The *Williams* Court concluded that, because Mr. Williams was not home when the police found drugs and a firearm, he could not be convicted of possessing the firearm. The panel's error lay in its focus on the time of the raid. In *Williams*, the Court of Appeals treated the statute as though it prohibits possession of a firearm when a person is arrested for a felony, or when the police locate proof that a person has committed a felony. That is not what the statute says. The proper question . . . is whether the defendant possessed a firearm *at the time he committed a felony*. The fact that the defendant did not possess a firearm at the time of arrest, or at the time of the police raid, is not relevant in the circumstances of this case.
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> * * *
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> A drug-possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it. In a case of that sort, the focus would be on the offense dates specified in the information. [*Burgenmeyer, supra* at 439 (emphasis in original and footnote omitted).]

The Court ruled that in *Burgenmeyer*, because the defendant admitted to possession of the drugs on the date charged, and because the drugs and weapon were found in close proximity to each other, the jury "reasonably could conclude that the defendant possessed both at the same time." *Id.* at 439-440. Accordingly, the Court ruled that the defendant's conviction was supported by

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[2] In *Williams*, police found cocaine and a gun in the defendant's house while the defendant was not at home. *Williams, supra* at 608. This Court held that there was insufficient evidence to support the defendant's felony-firearm conviction because the defendant was "far away from the location of the firearm" at the time the police found the cocaine. *Id*. at 609-610. The Court made a distinction between drug possession, which does not require reasonable accessibility, and firearm possession for purposes of a felony firearm conviction, which does require reasonable accessibility. *Id*. at 609.

sufficient evidence. *Id*. at 435, 440. Implicit in *Burgenmeyer's* holding is that in order for a drug possessor to be convicted of felony-firearm, the firearm must have been reasonably accessible to the person at the time he possessed the drugs.[3]

In the instant case, defendant was bound over on a complaint and warrant alleging that defendant possessed and manufactured marijuana and possessed a firearm on December 4, 1997, at his residence in Walled Lake. At trial, the trial court instructed the jury as follows regarding possession:

> To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:
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> First, that the Defendant committed the crimes of Possession With Intent to Deliver Marijuana and Manufacturing More Than 20 But Less Than 200 Marijuana Plants.
>
> It is not necessary, however, that the Defendant be convicted of those crimes.
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> Second, that at the time the Defendant committed those crimes, he knowingly carried or possessed a firearm. It does not matter whether or not the gun was loaded.
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> * * *
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> Possession does not necessarily mean ownership. Possession means that either the person has actual physical control of the firearm, as I do the pen I am now holding, or the person has the right to control the firearm even though it is in a different room or place.
>
> Possession may be so [sic] where one person alone possesses the firearm. Possession may be joint where two or more people each share possession.
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> It is not enough that the Defendant merely knew about the firearm. The Defendant possessed the firearm only if he had control of it or the right to control it, either alone or together with someone else.

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[3] Indeed, it does not appear that *Burgenmeyer* overturned the requirement that in order to be convicted of felony-firearm, a defendant must have had a firearm reasonably accessible to him while committing or attempting to commit a felony. See, e.g., *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). *Burgenmeyer* merely clarified that to convict a defendant of felony-firearm associated with a drug possession offense, the weapon need only be reasonably accessible to the defendant *at some point* while he possessed the drugs (and not necessarily when the police found the drugs or arrested the defendant for the drug possession). See *Burgenmeyer*, *supra* at 438-439.

> The evidence must convince you beyond a reasonable doubt that the crime occurred on or about December 4, 1997 within Oakland County.

Under the circumstances of this case, and in light of *Burgenmeyer*, these instructions provide no basis for reversal, even though the court did not explicitly give an instruction on "reasonable accessibility." As stated in MCL 769.26; MSA 28.1096, "[n]o . . . verdict shall be set aside . . . on the ground of misdirection of the jury . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." Here, the jurors were instructed that in order to find defendant guilty, they had to find that defendant possessed a firearm on the date charged, while possessing and manufacturing marijuana. Defendant stipulated at trial that he possessed and manufactured the marijuana in question, and there was no evidence that the weapons were found anywhere other than in the house where the marijuana was located. In fact, the uncontradicted evidence showed that several guns were located in a closet with twenty-two marijuana plants. Defendant admitted during his trial testimony that there were rifles and marijuana in the closet. During closing argument, defense counsel merely emphasized the fact that the weapons were not readily accessible to defendant *when the police arrived*. Under these circumstances, it does not affirmatively appear to us that the trial court's instructions resulted in a miscarriage of justice. Indeed, in light of the evidence introduced at trial, the jury, in concluding that defendant possessed a firearm while possessing and manufacturing marijuana, implicitly found that the firearm was reasonably accessible to defendant while he possessed and manufactured the drugs. MCL 769.26; MSA 28.1096. Reversal is unwarranted.

Moreover, we note that defendant's appellate argument focuses solely on the assumption that in order for him to be convicted in this case, a firearm must have been reasonably accessible to him at the time he came into contact with the police.[4] As indicated in *Burgenmeyer, supra* at 438-440, this is not a proper interpretation of the felony-firearm statute. Accordingly, given the way defendant frames the issue, he is not entitled to appellate relief.[5]

Defendant next argues that

> [i]f objection to failure to give [the] requested jury instruction is required to preserve defendant's right to appeal, defendant was denied his constitutional right to effective assistance of counsel due to counsel's failure to effectively preserve the issue of proper instruction to the jury regarding the definition of possession of a weapon during the commission of a felony.

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[4] As noted earlier, defendant states that "he was at the front door at the time of his arrest and he was immediately placed in custody; the weapons recovered were all found in the bedroom which was upstairs and possibly some of them were in a locked box."

[5] We further note that defendant does not set forth on appeal the instruction he contends that the trial court should have read to the jury; he merely states that the jury "was not instructed on the elements of reasonable accessibility." Defendant does not make a reasoned argument regarding exactly what these elements are.

Because we have assumed, for purposes of deciding this appeal, that defendant's jury instruction argument was indeed preserved, defendant's ineffective assistance of counsel argument is without merit. Moreover, to establish ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and that the deficient performance caused prejudice. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Even assuming that counsel failed to address the jury instructions at all, defendant cannot show resulting prejudice, as demonstrated in our earlier discussion regarding the instructions.

Defendant next argues that his due process rights were violated because the prosecution threatened to charge defendant with other crimes (in addition to possession with intent to deliver less than five kilograms of marijuana, manufacture of twenty to two-hundred marijuana plants, and felony-firearm) if defendant sought an entrapment hearing regarding his possession and manufacture of marijuana.[6] Defendant contends that "an evidentiary hearing on the issue of entrapment should, therefore, be ordered with the restriction that there be no additional charges brought no matter what the outcome of defendant's entrapment hearing." We find no basis on which to order this relief. Indeed, defendant did not raise this issue below and therefore has not adequately preserved it for appellate review. Accordingly, reversal is warranted only if a clear or obvious error occurred that affected the outcome of the lower-court proceedings. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We disagree that a *clear* or *obvious* error occurred in this case, because it appears from the record that the prosecutor had a valid reason for bringing additional charges only if an entrapment hearing were held.[7] Moreover, we note that defendant *stipulated* at his trial on the felony-firearm charge that he possessed and manufactured marijuana, and defendant does not address the effect of this stipulation. A party may not leave it up to this Court to rationalize his claims or elaborate his arguments. *People v Mackle*, 241 Mich App 583, 604, n 4; 617 NW2d 339 (2000); *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998). Relief is unwarranted.

Finally, defendant argues that the trial court abused its discretion by permitting the prosecutor to question the potential jurors about the definition of possession during voir dire and then preventing defendant from doing so. This Court reviews a trial court's decision regarding voir dire for an abuse of discretion. See, generally, MCR 6.412(C)(1).

As stated in *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996):

> The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. *People v Brown*, 46 Mich App 592, 594; 208 NW2d 590 (1973)

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[6] Defendant does not contend that he was entrapped into possessing a firearm.

[7] Specifically, the prosecutor indicated that an entrapment hearing would reveal the identity of the confidential informant involved in the case and that therefore the additional charges, the prosecution of which would involve the disclosure of the identity of the confidential informant, could be brought without any additional ill effect (i.e., the identity of the confidential informant would have already been revealed at the entrapment hearing).

> [aff'd 393 Mich 174 (1974)]. In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994); MCR 6.412(C). What constitutes acceptable and unacceptable voir dire practice "does not lend itself to hard and fast rules." *Id*. at 623. Rather, trial courts must be allowed "wide discretion in the *manner* they employ to achieve the goal of an impartial jury." *Id*. (Emphasis in original.)

Given the trial court's broad discretion regarding the manner in which voir dire is conducted, we find no error requiring reversal in the court's allowing the prosecutor to question the jurors about the definition of possession and then curtailing substantially similar questions by defendant. Finally, we note that contrary to defendant's perfunctory argument, the trial court's instruction to defense counsel to "move on" during voir dire was not so belittling to counsel that a new trial is warranted.

Affirmed.

/s/ William C. Whitbeck
/s/ Patrick M. Meter

I concur in result only.

/s/ Joel P. Hoekstra