STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2002
v	No. 228722 Kent Circuit Court
VONTE GARDEJAVONO SHAW, Defendant-Appellant.	LC No. 99-003905-FH

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of possession of a controlled substance over 650 grams ("simple possession"), in violation of MCL 333.7403(2)(a)(i), and maintaining a drug house, in violation of MCL 333.7405(1)(d). Defendant was sentenced as a second felony offender, MCL 769.10, to consecutive sentences of twenty to fifty years' imprisonment on the simple possession conviction and twenty-four to thirty-six months' imprisonment on the maintaining a drug house conviction. Defendant appeals by right. We affirm.

On January 13, 1997, a search warrant was executed at 2419 Ansonia in Grand Rapids. There was no one home at the time of the search. The search warrant was obtained based on information from a confidential informant. Seized from the residence were cell phones, various electronic equipment, men's clothing, digital scales, razor blades, bills and other paperwork, over $1,400 in cash, and 923.1 grams of cocaine. Some of the cocaine was found in a bedroom, and the remainder was in bags above a ceiling tile in the hall.

Defendant argues that the trial court misled the jury by instructing it that simple possession was a lesser included offense of possession with intent to deliver a controlled substance over 650 grams ("PWID"). However, at trial, defendant indicated that he had no objections to the classification. An indication of satisfaction with the jury instructions constitutes waiver of instructional issues, and the instructions are not subject to appellate review. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Because defendant waived the objection, there is no error to review. *Id*. at 216.

Defendant also argues that he was denied effective assistance of counsel when his trial counsel failed to object to the trial court's characterization of simple possession as a lesser included offense of PWID. We disagree. Because defendant did not timely request an

evidentiary hearing on this claim of ineffective assistance of counsel, the appellate court's review is limited to the existing record[1]. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). Constitutional questions are reviewed de novo. *People v Herndon*, 246 Mich App 371, 382-383; 633 NW2d 376 (2001).

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, sec 20, is the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant, *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987), or by showing a failure to meet a minimum level of competence, *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980).

Defendant argues that the trial court's characterization of simple possession as a lesser offense of PWID misled the jury because simple possession cannot be a lesser offense of PWID because it carries a harsher penalty than PWID.

Jury instructions are reviewed as a whole to determine if the trial court made an error requiring reversal. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Even if imperfect, jury instructions "do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id.*, quoting *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

In giving the jury its instructions, the trial court stated,

> The principal charge against the defendant is that [sic] illegal possession with intent to deliver a mixture containing the controlled substance cocaine in an amount over 650 grams. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendant knowingly possessed a controlled substance.
>
> Second, that the defendant intended to deliver this controlled substance to someone else.
>
> Third, that the substance was cocaine and the defendant knew it was.

[1] On April 8, 2002, defendant moved to file a pro per supplemental brief and a motion to remand for an evidentiary hearing. After receiving his motions we declined to grant either.

Fourth, that the substance was in a mixture that weighed over 650 grams.

Now, with respect to that charge, the jury may also consider some lesser offenses in its deliberations. One of those offenses is that the defendant possessed more than 650 grams of cocaine. To prove the charge of possession over 650 grams of cocaine the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant possessed a controlled substance.

Second, that the substance possessed was cocaine.

Third, that the defendant knew he was possessing cocaine.

And, fourth that the substance was in a mixture that weighed over 650 grams.

In *People v Torres (On Remand)*, 222 Mich App 411, 416-421; 564 NW2d 149 (1997), this Court held that simple possession was a necessarily included lesser offense of PWID despite the fact that, at that time, the two offenses carried the same penalty and cited *People v Gridiron (On Rehearing)*, 190 Mich App 366, 369; 475 NW2d 879 (1991), amended 439 Mich 880 (1991). A necessarily included lesser offense contains all the elements of the greater offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). It is impossible to commit the greater offense without also committing the necessarily included lesser offense. *Id.*

MCL 768.32(1) provides that the factfinder may find a defendant guilty of a "degree of that offense inferior to that charged in the indictment . . . ." The defendant in *Torres* argued that in order for an offense to be "inferior," its penalty must be less than the greater offense. *Torres, supra* at 419. However, the *Torres* Court held that where simple possession and PWID had the same penalty, simple possession was still a lesser included offense of PWID. *Id.* at 421. The Court reasoned that MCL 768.32(1)'s use of the word "inferior" did not refer to the "inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense." *Id*. at 420.

Therefore, we conclude that even though simple possession carried a harsher penalty than PWID, the trial court was not in error when it labeled simple possession as a "lesser offense" of PWID. Because there was no error, we hold that defendant was not denied effective assistance of counsel. An attorney is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Lastly, defendant argues that there was insufficient evidence to prove that he constructively possessed the cocaine. Again, we disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Mass*, 464 Mich 615, 622; 628 NW2d 540 (2001).

Possession of a controlled substance can be actual or constructive. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550

(2000). For constructive possession, the issue is whether the defendant had dominion or control over the substance. *Id*. "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences from the evidence can be sufficient to establish possession. *Nunez, supra* at 615-616.

Defendant argues that the holding of *People v Lewis*, 178 Mich App 464, 468; 444 NW2d 194 (1989), where the Court found that there was insufficient evidence to prove that the defendant constructively possessed the cocaine, is instructive in this case. However, *Lewis* is distinguishable in that there was no evidence presented in *Lewis* that the defendant had control over the house in which the cocaine was found, contrary to the instant case. *Id.* at 468-469.

We hold that plaintiff presented sufficient evidence to establish defendant's control over the residence and, therefore, defendant had control, i.e., constructive possession, over the cocaine located within the house. See *People v Richardson*, 139 Mich App 622, 625-626; 362 NW2d 853 (1984). Defendant admitted to living at the residence and that most of the clothing and bills seized at the house belonged to him. Also, a witness testified that in the months before the search, defendant lived in the residence primarily by himself. Additionally, the paperwork and mail found with defendant's name at the residence were dated from August 1996 to January 1997.

Defendant argues that because his brother more closely matched the informant's description and that others had access to the residence, these facts precluded a finding that defendant constructively possessed the cocaine. However, possession can be found even when the defendant is not the owner of the controlled substance. *Wolfe, supra* at 520. Additionally, possession can be sole or joint. *Id*. Therefore, even if the jury believed that someone other than defendant was the owner of the cocaine, it was not precluded from also finding that defendant possessed the cocaine. Furthermore, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515.

We affirm.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray