

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JONES,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 248745
Wayne Circuit Court
LC No. 03-000471-02

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve terms of imprisonment of two years for felony-firearm, consecutive to and followed by concurrent terms of twenty-three to 240 months for the cocaine offense, and twenty-three to forty-eight months for the marijuana offense. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant challenges the propriety of the trial court's instruction on "possession," and argues that defense counsel was ineffective for failure to object in the matter. While instructing the jury on felony-firearm, the court stated as follows:

Now possession does not necessarily mean ownership.

Possession means that either the person had actual physical control of the substance or thing as I do the pen I'm now holding or the person has the right to control the substance or thing even if it is in a different room or place.

Possession may be sold [sic] where one person alone possess the substance or thing. Possession may be joint where two or more people each share possession.

It is not enough if the defendant merely knew about the substance or thing. The defendant possessed the substance or thing only if he or she had control of it or the right to control it either alone or together with someone else.

Defendant argues that the instruction given was applicable for purposes of controlled substances, but overly broad in connection with felony-firearm. “Questions of law, including questions of the applicability of jury instructions, are reviewed de novo.” *People v Perez*, 469 Mich 415, 418; 670 Mich 655 (2003). However, defendant admits that defense counsel did not object to this instruction. Accordingly, we review this issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A person does not necessarily violate the felony-firearm statute “by committing a felony while merely owning a firearm.” *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Instead, “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.” *Id.* (emphasis in original). Thus, not all forms of constructive possession will support a felony-firearm conviction. In this case, the trial court’s instruction was indeed overbroad, allowing the jury to find defendant guilty of the possession element of felony-firearm upon concluding that he merely had some right to control a firearm while engaging in drug transactions.

However, a defendant pressing a preserved claim of nonconstitutional error “has the burden of establishing a miscarriage of justice under a ‘more probable than not’ standard.” *Carines, supra* at 774 (appendix), citing *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). In this case, police witnesses described finding the firearm in question in plain view during the drug raid, on a bed between defendant and his wife. That account was compelling circumstantial evidence that defendant had access to the weapon in the course of his drug activities. Defendant’s wife’s explanation that she had inherited the weapon from her father, and stored it, unloaded, under the mattress is of no avail. Even crediting defendant’s wife’s testimony over that of the police officers, defendant could still be regarded as having had constructive possession of the firearm for purposes of the statute, which requires only “proximity and reasonable accessibility” to a firearm in connection with felonious activity. *Burgenmeyer, supra* at 437. Accordingly, defendant fails to show that it is more probable than not that the imperfect instruction caused the jury erroneously to find him guilty of felony-firearm.

The same analysis defeats defendant’s claim of ineffective assistance of counsel. “In reviewing a defendant’s claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel’s performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel’s defective performance.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Showing prejudice for purposes of ineffective assistance means showing that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). In this case, because defendant was in at least constructive possession of a firearm according to both the prosecution’s and the defense’s view of the evidence, the imperfect instruction to which defense counsel failed to object neither prejudiced defendant, nor rendered the proceedings fundamentally unfair or unreliable.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski