STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2009
v	No. 280293 Oakland Circuit Court
JARVIS FERRELL SPENCER, Defendant-Appellant.	LC No. 2007-212685-FH

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine within 1,000 feet of a school, MCL 333.7410(3), felon in possession of a firearm, MCL 750.224f, possession of a short-barreled shotgun, MCL 750.224b, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as a second habitual offender (MCL 769.10) to 2 to 60 years in prison for the possession with intent to deliver conviction, 1 to 7½ years in prison, each, for the felon in possession of a firearm and possession of a short-barreled shotgun convictions, and five years in prison for each of the felony-firearm convictions. Because there was sufficient evidence to convict defendant, he was not denied an impartial jury, and he was not denied the effective assistance of counsel, we affirm.

Defendant first argues that all of the weapons-related convictions must be vacated, as there was insufficient evidence to establish that he possessed a shotgun. We disagree.

To determine whether there was sufficient evidence to support a conviction, we review the evidence de novo, in the light most favorable to the prosecution, to decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising from that evidence may be satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

The elements of felon in possession of a firearm, are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) less than five years elapsed since the defendant's discharge from probation. *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004); MCL 750.224f(2). To prove that a defendant possessed a

short-barreled shotgun, the shotgun must have "1 or more barrels less than 18 inches in length or [must be] a weapon made from a shotgun, whether by alteration, modification, or otherwise, if the weapon as modified has an overall length of less than 26 inches." MCL 750.222(i). The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b.

Possession of a firearm may be actual or constructive. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). A defendant has constructive possession if the defendant knows the location of the firearm and if it is reasonably accessible to him. *Id.*

In the present matter, evidence was introduced at trial that during pre-raid surveillance, Officer Daniel Main observed defendant in an apartment parking lot, retrieving a long, thin object from underneath the driver's seat of a vehicle. According to Officer Main, defendant looked around, then carried the object inside the apartment building. Although Officer Main could not specifically identify the object, he observed light reflect off of it.

During the subsequent execution of a search warrant in the studio-type apartment, the police seized defendant in the living room. On a nearby couch, Officer Main observed clothing resembling that which Officer Main observed defendant wearing earlier. Officer Main also recovered a black, metal shotgun, similar in size to the object that defendant had carried, under one of the couch cushions. These facts serve as circumstantial evidence that defendant knew the shotgun was under the couch. *Burgenmeyer, supra,* p 437. Moreover, because defendant stood only a few steps from the couch when he was seized, the shotgun was reasonably accessible to him. *Id.* There was thus sufficient evidence for a trier of fact to find beyond a reasonable doubt that defendant possessed the shotgun. Although defendant claims that the other individuals present during the search may have possessed the shotgun, there is no evidence that any of them was seen with the shotgun or near the couch when the police entered the apartment.

Defendant next argues that he was denied the right to a fair trial because the trial court intimidated the venire members and foreclosed their disclosure of potential bias. Defendant's trial counsel failed to object to the trial court's voir dire and, after exercising peremptory challenges, expressly stated satisfaction with the jury. Therefore, his claim is waived. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000) (waiver by affirmative approval extinguishes any claimed error and precludes appellate review); *People v White*, 168 Mich App 596, 604; 425 NW2d 193 (1988).

Finally, defendant argues that trial counsel was ineffective on several grounds, each of which we will address in turn. Because defendant failed to preserve this issue by way of a motion for a new trial or *Ginther* hearing[1], our review of his claim of ineffective assistance of counsel is limited to the facts contained on the record. *People v Rodriguez,* 251 Mich App 10, 38; 650 NW2d 96 (2002).

[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The 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. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*, pp 484-485.

The applicable test for defendant's ineffective assistance of counsel claim was established by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Grant, supra*, p 485.[2] Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.*, p 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Id.* Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.*, p 303.

First, defendant maintains that trial counsel was ineffective because he failed to object during voir dire. Defendant cites a number of instances that allegedly foreclosed venire members' disclosure of potential bias. Examples includes the trial court's jokes that venire members would be sequestered for six weeks, its limitation of some questioning, and its apparent frustration with venire members attempting to avoid jury duty.

"The scope of voir dire is left to the discretion of the trial court. However, a trial court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges." *People v Taylor*, 195 Mich App 57, 59; 489 NW2d 99 (1992) (citations omitted). This Court reviews the trial court's comments in their entire context to determine if they were likely to unduly influence the jury. See *People v Paquette*, 214 Mich App 336, 340-341; 543 NW2d 342 (1995).

During voir dire, the trial court repeatedly articulated its goal to conduct a voir dire that would result in a fair and impartial jury. To this end, the trial court questioned venire members regarding their past experiences as jurors, with convicted felonies, or as victims or complainants in a criminal action. It also urged the venire members to explain any reasons that they could not be fair and impartial. In addition to its own questions, the trial court allowed the prosecutor and trial counsel opportunities to address the venire members. Finally, the trial court required the venire members to take an oath that they "truthfully and completely" would "answer all questions about [their] qualifications to serve as jurors." Venire members are presumed to follow their oath and be truthful. *People v King*, 215 Mich App 301, 303; 544 NW2d 765 (1996). Given this presumption and the thorough questioning of venire members regarding

[2] On appeal, defendant argues that prejudice should be presumed. However, there is no evidence that he was denied counsel at a "critical stage" of the proceedings or "'counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing.'" *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), citing *United States v Cronic*, 466 US 648, 659-622; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

impartiality, there is no indication that trial counsel's ability to develop a factual basis for the exercise of peremptory challenges was hampered by the examples defendant cites. *Taylor, supra* p 59. Consequently, any objection to the trial court's conduct would have been futile. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003) (counsel not ineffective for failing to raise futile objections). Therefore, trial counsel was not ineffective on this basis.

Second, defendant maintains that he was denied the effective assistance of counsel when his trial counsel failed to file a motion to suppress the evidence arising out of a search warrant lacking particularity.

The right to be free from unreasonable searches and seizures is personal and may not be invoked by third parties. *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999). To assert standing to challenge a search, an individual must have had "an expectation of privacy in the object of the search and seizure" and "the expectation [must be] one that society recognizes as reasonable." *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999).

In the instant matter, there was no evidence that defendant leased the apartment. Instead, Officer Mark Locricchio testified that defendant was known to visit the apartment and sell drugs. The mere fact that defendant occasionally had access to the apartment, without more, fails to confer on defendant a legitimate expectation of privacy in the residence. Because defendant, at best, was a mere visitor at the apartment, trial counsel reasonably concluded that he did not have standing to challenge the search. See, *People v Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1998). Had trial counsel filed the motion, it would have been denied. Thus, trial counsel's failure to file the futile motion was not ineffective. *Ackerman, supra*, p 455.

Defendant also claims that his trial counsel's statements to the trial court regarding the motion precluded its potential for success. Indeed, outside the presence of the jury, trial counsel explained that defendant requested the motion to suppress, despite a lack of standing, because he was "stupid," "real dumb," and "can't spell his own name." However, regardless of trial counsel's statements regarding defendant's intelligence, the outcome of such a motion to suppress would not have been different.

Defendant also maintains that his motion for directed verdict was thwarted by trial counsel, when explaining that he told defendant had no standing to file a motion to suppress, telling the trial court, "I was gonna say you were there to sell dope, but I didn't." While counsel's statement was perhaps inappropriate, only a complete concession of guilt will amount to ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Here, trial counsel did not make this statement to the jury and nothing in the record suggests that the trial court relied on trial counsel's statement about selling dope in ruling on the directed verdict motion. Rather, the evidence presented by the prosecutor could have persuaded a rational trier of fact that the essential elements of possession with intent to deliver charge were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001), citing *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). Thus, the outcome of the directed verdict motion would not have been different.

Finally, defendant maintains that his trial counsel was ineffective because he failed to compel res gestae witnesses to testify and investigate exculpatory video. Defendant claims that he was at the apartment to paint and lay carpet. He suggests that Mark Lipford, and a building

manager named Mike, would have confirmed this contract. Moreover, he claims that Nadia Lexis Walker, William Johnson and Christopher Culbertson were in the apartment during the execution of the search and would have testified that defendant had no knowledge of the drugs or weapons in the apartment. In addition, defendant claims that video recordings from a school across from the apartment building would have shown that he did not carry a shotgun inside the apartment. Aside from defendant's self-interested affidavit, there is no factual support in the record concerning these claims.

The failure to call witnesses or present other evidence is presumed to be a matter of trial strategy and can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Avant, supra*, p 508; *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Had trial counsel compelled the res gestae witnesses to testify and investigated the video recordings, it would not have made a difference in the outcome of the trial. Even if the witnesses testified that defendant was at the apartment to paint and lay carpet, when the police executed the search approximately six and one-half grams of cocaine fell from defendant's pant leg. Similarly, even if the video did not record defendant or the shotgun, Officer Main saw defendant carrying a long, thin object inside. Even if the proposed evidence were presented, then, there was still sufficient evidence to find beyond a reasonable doubt that defendant knew of and had access to the shotgun under the couch. Given these overwhelming facts, trial counsel's strategy did not deprive defendant of a substantial defense.

Affirmed.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly