STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2009
v	No. 281865 Wayne Circuit Court
KEVIN RAPLEY, Defendant-Appellant.	LC No. 07-003577-FH

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), possession with intent to deliver ecstasy, MCL 333.7401(2)(b)(i), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm, second offense), MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 36 to 96 months for possession with intent to deliver marijuana, 67 months to 40 years for possession with intent to deliver less than 50 grams of cocaine, 67 months to 40 years for possession with intent to deliver less than 50 grams of heroin, 67 months to 40 years for possession with intent to deliver ecstasy, three to ten years for the felon in possession of a firearm conviction and five years' imprisonment for the felony-firearm conviction. We affirm in part, reverse in part, and remand.

Defendant first argues that the evidence was insufficient to support his felon in possession of a firearm and felony-firearm convictions. We agree.

A challenge to the sufficiency of the evidence is reviewed de novo, viewing the evidence in the light most favorable to the prosecution. The evidence is sufficient if "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 207; 679 NW2d 77 (2003) (quotations and citations omitted).

MCL 750.224f(2) provides:

> A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive or distribute a firearm in this state until all of

> the following circumstances exist: (a) The expiration of 5 years after all of the following circumstances exist: (*i*) The person has paid all fines imposed for the violation. (*ii*) The person has served all terms of imprisonment imposed for the violation. (*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation. (b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to [MCL 28.424].

Thus, to prove felon in possession of a firearm, the prosecution must prove defendant was convicted of a prior felony and in possession of a firearm. *People v Perkins*, 473 Mich 626, 629-631; 703 NW2d 448 (2005). The parties stipulated that defendant was previously convicted of a "specified felony," and defendant had not regained the legal right to possess a firearm as of the date that police officers searched the premises located at 14048 Auburn Street.

"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." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis in original); See, also, MCL 750.227b.

Defendant was convicted of possession with intent to deliver marijuana, possession with intent to deliver less than 50 grams of cocaine, possession with intent to deliver less than 50 grams of heroin, and possession with intent to deliver ecstasy – all felony offenses. Defendant's felon in possession of a firearm and felony-firearm convictions depend upon the conclusion that defendant possessed a firearm contemporaneous with his felonious possession of narcotics. The defense claims that there was insufficient evidence to establish that defendant was in possession of the firearm recovered from the bedroom at 14048 Auburn Street because there was no evidence that he knew it was located between the mattresses of the bed he was sitting on when the raid occurred.

"Possession may be actual or constructive and may be proved by circumstantial evidence." *Burgenmeyer*, *supra* at 437 (quotation and citation omitted). "Physical possession is not necessary as long as the defendant has constructive possession." *Id*. at 438 (quotation and citation omitted). "A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him. . . . [T]he possession requirement of the felony-firearm statute has been described in terms of ready accessibility." *Id*. at 437 (citations omitted).[1]

Whether defendant was in constructive possession of the firearm recovered from underneath the mattress depends upon whether defendant's admitted knowledge of the narcotics recovered from the surface of the mattress was sufficient to support an inference that defendant also had knowledge of the firearm underneath the mattress. In cases "relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Hardiman*, 466

[1] Both parties premise their arguments on *Burgenmeyer*.

Mich 417, 423-424; 646 NW2d 158 (2002), quoting *People v Konrad*, 449 Mich 263, 273; 536 NW2d 517 n 6 (1995). A jury must be able to conclude that the defendant is "guilty beyond a reasonable doubt" on the basis of the "total evidence, including reasonable inferences. . . . If enough pieces of a jigsaw puzzle fit together the subject may be identified even though some pieces are lacking." *Hardiman, supra* at 425-426 quoting *Dirring v United States*, 328 F2d 512, 515 (CA 1, 1964).

The Supreme Court has found the evidence sufficient to establish constructive possession in cases where it was determined that the defendant was either a resident or a person with control over the premises where the firearms or narcotics were found, and the firearms were in plain view. See *Hardiman supra,* at 421; *Burgenmeyer*, *supra* at 438; *People v Wolfe*, 440 Mich 508, 522; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

In *Burgenmeyer,* the defendant was a resident of the house from which narcotics and firearms were recovered. Undercover police officers purchased two ounces of cocaine from the defendant's roommate in exchange for $2,300 in marked bills, and then recovered $700 in marked bills from the defendant. *Burgenmeyer*, *supra* at 433. Officers searched defendant's bedroom and recovered firearms and cocaine, *id*. at 432, and during the interrogation defendant stated that "he knew [his roommate] was selling cocaine out of his house . . . ." *Id*. at 433. At trial the defendant testified "he was a hunter who owned firearms for legitimate purposes." *Id*. at 434.

In *Wolfe*, the defendant was "in control of the premises where the drugs were found." *Wolfe, supra* at 522. The defendant invited out of town guests to the premises, and arranged a meeting therein. *Wolfe, supra* at 522-524. The defendant was the "only person found to have a key to the apartment." *Id.* at 522. The defendant fled and attempted to conceal the contraband. *Id*. at 522-523. The defendant was involved in a "controlled sale" of narcotics earlier the same evening. *Id*. at 523. The defendant was "found in possession of the two $5 bills that were used to purchase the cocaine." *Id*.

Unlike *Wolfe* and *Burgenmeyer*, in this case the prosecution did not offer evidence to establish that defendant was in control of, or a resident of, 14048 Auburn Street. In fact, testimony established that defendant did not reside therein. Instead, the only evidence was that Regina Boyd and Velma Miller were the only permanent residents, and Boyd testified that the southwest bedroom that defendant was found in was a guest bedroom, sometimes occupied by her nieces and nephews. Defendant was allegedly a friend of the family who did not maintain even a transient residence at 14048 Auburn Street.

As in *Burgenmeyer*, defendant acknowledged the existence of narcotics. However, unlike in *Burgenmeyer*, where the firearm was in plain view on top of the dresser, in this case the narcotics were in plain view, but the firearm was concealed between the mattress and box spring. The firearm was "easily reachable" by defendant while seated on the bed; however, no evidence allowed the jury to infer defendant had knowledge of its location. Defendant denied having any knowledge of the firearm.

The prosecution did not produce evidence relevant to defendant's control, residence, or familiarity in relation to the premises. In the absence of such evidence, or evidence that the firearm was in plain view, a reasonable jury could not infer that defendant had knowledge of the

location of the firearm.[2] Where the prosecution failed to establish defendant's knowledge, an essential element of constructive possession, there was insufficient evidence to support defendant's felon in possession and felony-firearm convictions.

Defendant also argues that the trial court erred in sentencing defendant as a third habitual offender because the prosecution did not provide notice pursuant to MCL 769.13. We disagree.

"In order to properly preserve an issue for appeal, a defendant must raise objections at a time when the trial court has an opportunity to correct the error . . . ." *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006) (quotation and citation omitted). "Counsel may not harbor error as an appellate parachute." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). In contrast to forfeiture, waiver is "the intentional relinquishment or abandonment of a known right." *Id*. at 215. Waiver extinguishes all error, whereas forfeiture does not. *Id*. "A defendant may not waive objection to an issue before the trial court and then raise it as an error on appeal." *Id*. at 214.

At the sentencing hearing, defense counsel emphasized that the third "[h]abitual [offender sentence enhancement] was added at the circuit court arraignment." The trial court articulated its intention to "sentence within the guidelines" regarding defendant's convictions. At the conclusion of the hearing, defense counsel requested "clarification of [the third] habitual [offender sentence enhancement]." Defense counsel stated, "[defendant] keeps saying that he's not a [t]hird [h]abitual [offender]." Defense counsel asked defendant if that was his "position?" Defendant replied, "I'm good," and the hearing concluded.

Defendant's response constituted a waiver of his opportunity to raise the very issue that he asserts on appeal. Consequently, the issue of whether the trial court erred in sentencing defendant as a third habitual offender because the prosecution did not provide notice pursuant to MCL 769.13 is not subject to review.

Affirmed in part, reversed in part, and remanded only for vacating defendant's convictions of felony firearm and felon in possession of a firearm. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[2] The prosecution has provided no case law upholding the ability of a jury to infer knowledge of the firearm's location absent some ownership or control of the area where it was found, it being in plain view, or there being some other indicia of ownership.