

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK LEANDRE WILLIAMS a/k/a
GREGORY PRUITT,

Defendant-Appellant.

UNPUBLISHED
November 17, 2011

No. 293552
Wayne Circuit Court
LC No. 09-000734-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SHAWN GILLYARD,

Defendant-Appellant.

No. 294237
Wayne Circuit Court
LC No. 09-000734-FH

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

In these consolidated appeals, defendants Derrick Williams and Michael Gillyard appeal as of right from their convictions, by jury in a joint trial, of possession with intent to deliver five kilograms or more, but less than 45 kilograms, of marijuana, MCL 333.7401(2)(d)(ii); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced each defendant to probation for the marijuana conviction and to two years' imprisonment for the felony-firearm conviction. For the reasons stated in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

On April 10, 2008, the Detroit Police conducted a raid on a house located at 863 Atkinson Street in Detroit. Upon arriving at the house, the officers observed two individuals standing on the sidewalk directly in front of the house. The individuals were ordered to the

ground and the officers approached the front of the residence. The officers entered through the front door, which was open, and announced their presence. Upon entering, the officers noticed three other individuals, one of whom was Gillyard, located on the main level of the house. Officers also saw a fourth individual, Williams, on the stairway leading to the second story of the house. Williams ran down the stairs and proceeded down the stairway leading to the basement. The officers pursued Williams and found him hiding in a crawl space in the basement. After Williams was secured, he was brought back up to the main level of the house.

A search of the house revealed four bedrooms. Three bedrooms were located on the second floor, and one bedroom was located on the third floor. Upon entering the second floor, the officers noticed a strong smell of marijuana emanating from one of the bedrooms. The officers entered the bedroom and saw 27 large zip-lock bags containing marijuana on top of the bed. The officers also discovered \$8,475 located on the bed, in an armoire, and in an Absopure water container. A shotgun was discovered in the bedroom closet. The bedroom was furnished, contained men's clothing, and appeared to be occupied. No mail or other identifying items were found in the bedroom.

The other two other bedrooms on the second floor appeared to be unoccupied. No furniture or clothing was found in these bedrooms. The officers found wood and power tools in these bedrooms, and it appears that they were under construction.

The third floor bedroom was furnished, contained men's clothing, and appeared to be occupied. Upon searching the third floor bedroom, officers discovered a rifle lying against a wall. A small quantity of cocaine was also discovered in the bedroom. No mail or other identifying items were found in the bedroom.

During the search, officers confiscated two keys—one from Williams and one from Gillyard. Both keys worked on the front door of the house. Officers confiscated \$400 from Williams. Officers also confiscated a Michigan identification certificate from Gillyard. The identification certificate had the name Michael Gillyard on it and listed his address as 863 "Arkinson."

Williams and Gillyard were each charged with (1) possession with intent to deliver 25 grams or more, but less than 50 grams, of cocaine, MCL 333.7401(2)(a)(iv); (2) possession with intent to deliver five kilograms or more, but less than 45 kilograms, of marijuana, MCL 333.7401(2)(d)(ii); (3) possession of 25 grams or more, but less than 50 grams, of cocaine, MCL 333.7403(2)(a)(iv); and (4) felony-firearm, MCL 750.227b. After the preliminary examination, the district court dismissed count three, possession of cocaine. The case then proceeded to a joint jury trial on the remaining three charges.

After a two-day jury trial, Williams and Gillyard were convicted of possession with intent to deliver five kilograms or more, but less than 45 kilograms, of marijuana. Williams and Gillyard were also convicted of felony-firearm; however, they were acquitted on the remaining cocaine charge. Williams and Gillyard now appeal their convictions. Both defendants argue that there was insufficient evidence to show they possessed the marijuana and the firearms. Additionally, Gillyard argues that the prosecutor made an improper statement during closing arguments and that his attorney was ineffective for failing to object to the statement.

II. SUFFICIENCY OF THE EVIDENCE

“When reviewing a claim that the evidence presented was insufficient to support [a] defendant’s conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime.” *People v Kissner*, ___ Mich App ___; ___ NW2d ___ (2011) (Docket No. 296766), slip op p 4. “In applying this standard, ‘a court must draw all reasonable inferences and make credibility choices in support of the jury verdict.’” *People v Cameron*, ___ Mich App ___; ___ NW2d ___ (2011) (Docket No. 293119), slip op p 8, quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Indeed, questions of credibility are for the trier of fact. *Kissner*, *supra*, slip op p 5.

Gillyard and Williams were each convicted of felony-firearm, MCL 750.227b, and possession with intent to deliver five kilograms or more, but less than 45 kilograms, of marijuana, MCL 333.7401(2)(d)(ii). The elements of felony-firearm are that a “defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b.

To convict a defendant of possession with intent to deliver, the prosecution must prove (1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it. [*People v McGee*, 268 Mich App 600, 622; 709 NW2d 595 (2005); see also MCL 333.7401(2)(d)(ii).]

Gillyard and Williams only challenge the possession element of their convictions. “Possession is a term that ‘signifies dominion or right of control over the drug with knowledge of its presence and character.’” *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000), quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977). Possession can be proven by circumstantial or direct evidence and is a factual question for the trier of fact. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Additionally, “[a]ctual possession is not required to meet the possession element.” *People v Brown*, 279 Mich App 116, 136; 755 NW2d 664 (2008). Rather, “possession may be either actual or constructive.” *Id.* “Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband.” *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). “Circumstantial evidence that a defendant had the exclusive control or dominion over property on which contraband narcotics are found is sufficient to establish that the defendant constructively possessed the narcotics.” *Brown*, 279 Mich App at 137.

We disagree with the arguments of Williams and Gillyard that there was insufficient evidence to show that they constructively possessed the marijuana and the firearms. When viewing all the evidence in the light most favorable to the prosecution, *Kissner*, *supra*, slip op p 4, there was sufficient evidence from which a reasonable juror could conclude that Williams and Gillyard had constructive possession. Both Williams and Gillyard were found at the house during the raid, and both Williams and Gillyard had working keys to the house. The house contained four bedrooms; however, only two of the bedrooms appeared to be occupied, and they each contained men’s clothing. The possession of working keys is circumstantial evidence that

Gillyard and Williams had dominion and control over the premises, which is circumstantial evidence that they constructively possessed the narcotics. See, generally, *Brown*, 279 Mich App at 137. Further, the evidence that the two other bedrooms appeared to be unoccupied is circumstantial evidence that Williams and Gillyard were the only individuals living at the house.

Although two other individuals were found at the premises, their presence does not negate a finding that Gillyard and Williams constructively possessed the marijuana and the firearms. When police searched the house they found over \$8,000 in the first bedroom on the second floor. The money was found on the bed, in the armoire, and in an Absopure water container. This implies that the marijuana was not unknowingly brought into the house by another individual. Rather, this indicates that the house was being used as a distribution center to package and sell marijuana. The marijuana in the bedroom was in plain view, and officers also testified that there was a strong smell of marijuana emanating from the bedroom, which would support an inference that Williams and Gillyard knew it was there. See, generally, *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *United States v Perez-Paredes*, 678 F Supp 259, 263 (SD Fla, 1988). The rifle from the third-floor bedroom was also in plain view.

Moreover, Williams tried to flee when the police arrived, and after he was apprehended police found \$400 on his person. This evidence supports an inference that Williams was connected to the drugs and firearms. In regards to Gillyard, police recovered a Michigan identification certificate from Gillyard. The identification certificate bore Gillyard's name and listed the location of the raid as his residence (although it appears the street name was misspelled). This evidence, taken together with his presence in the house, the odor of marijuana, the key, and the facts that the marijuana in one occupied bedroom and the rifle in the other occupied bedroom were in plain view, supports a finding that he also had dominion and control over the marijuana and the firearms.

When all the evidence is viewed together, there was sufficient evidence from which the jury could find that Gillyard and Williams constructively possessed the marijuana and firearms. “[P]ossession may be either joint or exclusive.” *Johnson*, 466 Mich at 500. As stated in *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002):

[W]hen reviewing sufficiency of the evidence claims, courts should view all the evidence--whether direct or circumstantial--in a light most favorable to the prosecution to determine whether the prosecution sustained its burden. It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.

III. PROSECUTORIAL MISCONDUCT

Gillyard argues that the prosecutor made improper statements during closing arguments. Gillyard did not object to the statements; therefore, this issue is unpreserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting a defendant's substantial rights. *Brown*, 279 Mich App at 134. “In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative.” *People v*

Watson, 245 Mich App 572, 586; 629 NW2d 411 (2001). In addition, “[r]eversal . . . is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *People v Abraham*, 256 Mich App 265, 274-275; 662 NW2d 836 (2003).

“Generally, [p]rosecutors are accorded great latitude regarding their arguments and conduct.” *People v Bahoda*, 448 Mich 261; 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980), overruled on other grounds by *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). “A prosecutor may not make a statement of fact to the jury that is unsupported by evidence” *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). “However, [prosecutors] are generally free to argue the evidence and all reasonable inferences from the evidence as [they relate] to their theory of the case.” *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

During closing arguments, the prosecutor made the following statement regarding the identification certificate police confiscated from Gillyard during the search:

Officer—or Lieutenant Brown confiscated from the defendant, Gillyard, State ID, and you can look at the State ID and look [at] that card that was issued to Mr. Gillyard, and what’s the location? 863 Arkinson, Detroit, Michigan 48202. Or is that really 863 Atkinson? You know, there’s individuals who do illegal things quite often misrepresent to law local law officials and authorities, names etc., things like that; that’s not uncommon, it’s not unusual.

We agree with Gillyard that the prosecutor’s statement was not a reasonable inference from the evidence submitted. The only evidence submitted in relation to Gillyard’s identification certificate was the information contained in it. The officers never testified that it was common for individuals to misrepresent their identities or addresses. Therefore, the prosecutor’s statement was not supported by the facts.

However, we conclude that no relief is warranted in this case, in accordance with the plain-error doctrine. In light of the evidence introduced regarding Gillyard’s culpability, we simply cannot conclude that the prosecutor’s brief improper statement affected the outcome of the trial. Additionally, the trial court instructed the jury that the “[t]he lawyers statements and arguments are not evidence.” This mitigates against finding outcome-determinative error, because a jury is presumed to follow the trial court’s instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Gillyard argues that he was denied affective assistance of counsel because his trial attorney failed to object to the prosecutor’s statement regarding his identification certificate. This Court reviews unpreserved ineffective-assistance counsel claims for errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The right to counsel is guaranteed by the United States Constitution and the Michigan Constitution. Where the issue is counsel’s performance, a defendant must show that (1) counsel’s performance was below an objective

standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. [*People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).]

Gillyard's attorney should have objected to the prosecutor's statement because it was not supported by the evidence. However, there is no "reasonable probability that, if not for counsel's errors, the result would have been different" *Id.* Thus, Gillyard cannot show that he was denied effective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher