

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN MCCOMBS,

Defendant-Appellant.

UNPUBLISHED

August 25, 2011

No. 296564

Wayne Circuit Court

LC No. 09-021942-FH

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant appeals his convictions, and we affirm.

Defendant argues that the prosecutor presented insufficient evidence during the preliminary examination to bind him over for trial, and that the circuit court erred when it denied his motion to quash the bindover.

A circuit court's decision to grant or deny a motion to quash a felony information is reviewed de novo to determine if the district court abused its discretion in binding the defendant over on the charge. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). An appellate court will find an abuse of a trial court's discretion "only if an unprejudiced person, considering the facts upon which the trial court made its decision, would conclude that there was no justification for the ruling made." *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

The elements of felon in possession of a firearm are that "a person *convicted of a specified felony* may not possess, use, transport, sell, purchase, carry, ship, receive or distribute a firearm." *People v Tice*, 220 Mich App 47, 53; 558 NW2d 245 (1996), quoting MCL 750.224f. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007).

"Possession may be either actual or constructive." *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992). "Constructive possession exists when the totality of the circumstances

indicates a sufficient nexus between the defendant and the controlled substance.” *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005).

Defendant specifically claims that the prosecutor presented insufficient evidence that he possessed the gun. “A district court must bind over a defendant for trial when the prosecutor presents competent evidence constituting probable cause that a felony was committed and that the defendant committed it.” *Northey*, 231 Mich App 574. To establish probable cause, there must be “evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief in the defendant’s guilt.” *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). “Circumstantial evidence, as well as the inferences which can be drawn from that evidence, is sufficient to establish probable cause.” *Northey*, 231 Mich App 575.

Here, we hold that there was sufficient evidence of possession to bind defendant over for trial. Defendant complains that only one witness testified at the preliminary examination and the witness never saw defendant in possession of the gun. The witness, John Nance, is the boyfriend of defendant’s niece, Whitney McCombs, who lived in the apartment below defendant. Nance retrieved the gun from Whitney’s linen closet after Whitney directed him to that location. Nance testified that while he was helping calm defendant down, he heard defendant shout, “Give me my gun back. I want my gun back.” (Emphasis added.) This testimony provided a sufficient nexus between defendant and the gun to establish probable cause that defendant had possession of the gun at some point on July 17, 2009, and was shouting in an effort to regain possession of the gun. In addition, despite having been inside Whitney’s linen closet on several occasions prior to July 17, 2009 without ever seeing a gun, Nance retrieved the gun at issue from Whitney’s linen closet on the same day defendant was shouting “Give me my gun back. I want my gun back.” Thus, the evidence presented during the preliminary examination was sufficient to cause a reasonable person of ordinary prudence and caution to conscientiously entertain a reasonable belief that defendant had constructive possession of the gun on July 17, 2009 and bind defendant over for trial.

Moreover, any error with regard to the bindover was harmless because defendant did not challenge the sufficiency of the evidence presented during trial. “[A]n evidentiary deficiency at the preliminary examination is not ground[s] for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error.” *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990). Here, defendant does not allege that there was insufficient evidence presented during trial to support his convictions of felon in possession of a firearm and felony-firearm. Thus, any alleged error at the preliminary examination was harmless.¹

¹ Defendant also raised a sentencing error that has been resolved. On January 27, 2010, the trial court sentenced defendant to two years in prison for his felony-firearm conviction and 9 to 60 months in prison for his felon in possession of a firearm conviction. This Court remanded to allow defendant to file a motion for resentencing. *People v McCombs*, unpublished order of the Court of Appeals, entered November 15, 2010 (Docket No. 296564). The trial court granted

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher

defendant's motion for resentencing and, on January 18, 2011, defendant was resentenced to two years in prison for felony-firearm and five years of probation for felon in possession of a firearm. Accordingly, we need not further address this issue.