STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 4, 2011
v	No. 297835 Ottawa Circuit Court
THOMAS NOLAN LOPEZ, Defendant-Appellant.	LC No. 09-034220-FH

Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In exchange for the reduction of pending drug charges, Eric Flores volunteered to become a confidential informant. After Flores participated in two controlled buys of marijuana from defendant, the police obtained a warrant to search defendant's apartment. Investigating officers found almost 20 pounds of marijuana in the apartment, much of it packaged for sale. Defendant soon realized Flores's role as confidential informer, and claimed that Flores played him for a patsy by storing the marijuana in defendant's apartment. Flores failed to appear at defendant's trial, despite having been served with a subpoena issued by defense counsel. Defendant now urges us to find that Flores' absence requires a new trial, and raises several other challenges to his conviction and sentence. We find no merit in any of defendant's arguments, and affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In November 2009, the Western Michigan Enforcement Team (WMET), a multi-county drug investigative unit, employed Flores as a confidential informant to conduct two controlled buys of marijuana from defendant. On Monday, November 9, Flores purchased ¼ pound of marijuana from defendant for $300. On Thursday, November 12, Flores engaged in a second controlled buy, after which he informed WMET Detective Kris Haglund that he observed one pound of marijuana in defendant's bathroom and an additional five pounds of marijuana in defendant's bedroom.

Haglund then secured a search warrant, which the WMET officers executed within two hours of the November 12 controlled buy. Upon entry into defendant's apartment, Haglund perceived a strong odor of fresh marijuana. The detectives discovered a 380-gram package (approximately one pound) and a 6.74-gram package of marijuana in the bathroom. In defendant's bedroom, the detectives found a large black garbage bag containing 19 gallon-size "ziplock" bags filled with a total of 8.4 kilograms, more than 19 pounds, of marijuana. The

detectives located two .38 caliber handguns in a laundry basket next to the closet, and ammunition on the closet shelf. In a linen closet, detectives observed two digital scales, as well as a "grinder" used to process marijuana. During the search, the officers found paraphernalia consistent with personal use only in defendant's roommate's quarters. Defendant was not home when the detectives first entered but returned in the midst of the search. Defendant admitted to Haglund that he avidly used marijuana and possessed the marijuana found in the bathroom. Defendant accused unnamed friends of storing the garbage bag and handguns in his bedroom.

The prosecution charged defendant with possession with intent to deliver marijuana and three firearm charges, but did not charge defendant with actual delivery based on the controlled buys, and planned to keep that evidence out of the trial. Despite the prosecution's silence regarding the pre-search investigation, defendant realized that his "good friend" Flores was an informant employed by the police. Defendant issued a subpoena to Flores, ordering his appearance at trial.

On the first day of trial, the prosecutor informed defense counsel that Flores had spoken to Haglund two days earlier, and revealed that Flores had discarded the subpoena and would not testify at trial. Defense counsel did not request the court's or the prosecutor's assistance in securing Flores's appearance. Instead, defense counsel bemoaned his inability to adequately establish the defense theory that Flores had stashed the garbage bag of marijuana in defendant's apartment. The prosecutor, in turn, indicated that she previously had not intended to introduce evidence regarding the controlled buys. However, if defendant opened the door, the prosecutor queried whether she would be allowed to introduce such evidence. The court did not resolve the evidentiary questions at that point, directing the parties to object as needed.

In his opening statement, defense counsel told the jury that the marijuana "was brought to my client's house by someone who we think is a confidential informant." Outside the presence of the jury, the prosecutor subsequently admitted that she believed Flores was the confidential informant. Defense counsel proceeded to cross examine every prosecution witness regarding their contact with the "confidential" informant during the investigation.

Haglund was the only witness who knew the informant's identity and he alone coordinated the controlled buys. On direct examination, the prosecutor elicited testimony regarding the procedures employed in the two controlled buys. Haglund recounted that Flores reported having seen one pound of marijuana in defendant's bathroom and another five pounds in defendant's bedroom. Defendant did not object to this testimony. On cross examination, defense counsel expressly asked Haglund if Flores was the confidential informant and the detective responded in the affirmative. Haglund indicated that Flores faced a charge of possession with intent to deliver less than eight ounces of marijuana, but the detective was uncertain whether the charge had been reduced or dismissed. Haglund confirmed that none of the funds used during the controlled buy were recovered during the search of defendant's apartment. Haglund further acknowledged that the officers had not conducted surveillance of Flores or defendant between the controlled buys and, therefore a theoretical possibility existed that Flores could have brought the marijuana into defendant's apartment in the interim.

On the second day of trial, defendant testified that he and Flores had been friends for several years. Defendant denied that Flores came to his apartment on Monday, November 9, the

date of the first controlled buy. Defendant claimed that Flores came to his apartment on Wednesday, November 11, and gave defendant a free pound of marijuana in exchange for defendant's agreement to store a large black garbage bag. Defendant asserted that he did not discover the bag's contents until later that evening. Defendant then contacted Flores and directed him to remove the bag from his house. Flores did not return to defendant's apartment until the next day. Flores took some marijuana from the garbage bag and told defendant that he would return for the rest. Defendant left the apartment with his girlfriend and returned to find the WMET officers searching his residence.

At the close of trial, defense counsel requested a "missing witness instruction," directing the jury to assume that Flores would have provided testimony favorable to the defense. Defense counsel argued that Flores was a *res gestae* witness because the prosecutor had submitted evidence regarding the two controlled buys. The prosecutor responded that she and defense counsel had both unsuccessfully tried to secure Flores's appearance. The prosecutor further noted that defendant never requested assistance in securing Flores's appearance, and the prosecution would not have been "able to do any better." The court rejected defendant's request for a special instruction, noting that the prosecution had no duty to produce Flores at trial.

In closing argument, the prosecutor focused on the items located in defendant's apartment during the search as evidence of possession with intent to deliver. The prosecutor further argued that defendant's intent to share his one-pound package of marijuana with his roommate amounted to intent to deliver. Assuming that defendant's version of events was accurate, the prosecutor argued that defendant's plan to return the marijuana to Flores showed intent to deliver as well. The prosecutor noted that the more reasonable interpretation of the situation was that defendant was a drug dealer who possessed a large quantity of marijuana, as well as processing equipment and handguns for protection. Defense counsel, on the other hand, argued at length that Flores's failure to appear and deny defendant's accusation was evidence that Flores was, in fact, the owner of the marijuana found in defendant's home.

The jury disbelieved defendant's version of events and convicted defendant of possession with the intent to deliver more than five but less than 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii); felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court sentenced defendant within the appropriate minimum sentencing guidelines ranges as a second habitual offender, MCL 769.10, to 24 to 126 months' imprisonment for his marijuana conviction and 24 to 90 months' imprisonment for the felon-in-possession conviction, to be served consecutive to two consecutive terms of 24 months' imprisonment for each felony-firearm conviction.

II. MISSING WITNESS

Defendant raises several appellate claims regarding Flores's absence at trial. Defendant has not established, however, any error prejudicing his defense or destroying the fairness of his trial. Accordingly, we reject defendant's claims.

A. FLORES WAS NOT A *RES GESTAE* WITNESS

First and foremost, we reject defendant's contention that Flores was a *res gestae* witness. A *res gestae* witness is one who witnesses "some event in the continuum of the criminal transaction" and whose testimony would aid "in developing a full disclosure of the facts at trial." *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). The prosecution has a continuing duty to disclose the identity of all *res gestae* witnesses to the defendant pursuant to MCL 767.40a.

The prosecution did not charge defendant with actual delivery of marijuana in connection with the controlled buys, an act to which Flores would have been a *res gestae* witness. Flores was not a *res gestae* witness to defendant's act of possessing marijuana with the intent to deliver. As Flores was not a *res gestae* witness to the charged offense, the prosecution had no statutory obligation to disclose Flores's identity. Rather, Flores was a witness essential to defendant's theory of defense. "While the prosecutor has certain obligations with respect to witnesses, it is not the prosecutor's responsibility to call any witnesses whom the defendant believes may support his defense in some way." *People v Lee*, 212 Mich App 228, 257-257; 537 NW2d 233 (1995).[1]

Defendant further challenges the court's failure to compel the prosecutor to produce Flores at trial. However, the prosecution has no duty to produce *res gestae* witnesses under MCL 767.40a. *People v Kevorkian*, 248 Mich App 373, 441-442; 639 NW2d 291 (2001); *People v Gadomski*, 232 Mich App 24, 36; 592 NW2d 75 (1998). Accordingly, even if Flores was a *res gestae* witness, defendant's contention would be misplaced.

B. THE PROSECUTION DID NOT WRONGFULLY CONCEAL THE IDENTITY OF A CONFIDENTIAL INFORMANT

As a general rule, the prosecution is not required to disclose the identity of confidential informants. *People v Cadle*, 204 Mich App 646, 650; 516 NW2d 520 (1994), overruled in part on other grounds *People v Perry*, 460 Mich 55, 64-65; 594 NW2d 477 (1999). "However, where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* (internal quotations and citations omitted).

Defendant cannot claim any injury arising from the prosecution's failure to disclose Flores's identity as defendant discovered this information independently well before trial. Moreover, the prosecution had no reason to believe that Flores's identity or the contents of his communications with the investigating officers were relevant or helpful to the defense.

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[1] As Flores was not a *res gestae* witness, defendant incorrectly assumes his counsel was ineffective for failing to further address this issue. Counsel is not ineffective for failing to raise meritless or futile motions and objections. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant told Haglund that an unnamed friend had stored the marijuana in his residence, but defendant did not inculpate Flores. Accordingly, the informer's privilege did not "give way."

Defendant's appellate challenge that the court should have ordered Flores's appearance and thereafter conducted an *in camera* hearing to discern the nature of his potential testimony is misplaced. When a defendant seeks to compel the prosecutor to reveal an informant's identity, the court must conduct an *in camera* hearing with the informant to determine if his identity and testimony would be "relevant and helpful to the defense" or "essential to a fair determination of a cause." *Cadle*, 204 Mich App at 650. Defendant knew the identity of the "confidential" informant. Accordingly, it would be unnecessary for the court to conduct an *in camera* hearing to determine whether the informant's identity should be disclosed.[2]

C. THE PROSECUTION DID NOT SUPPRESS EXCULPATORY EVIDENCE

"Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To establish a *Brady* violation, the defendant has the burden to show, not only that the prosecution withheld evidence favorable to the defense, but also "that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Schumacher*, 276 Mich App at 177, quoting *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

Defendant has failed to establish that Flores's identity and participation in the controlled buys was "exculpatory" evidence. To be exculpatory, the evidence must "clear[] or tend[] to clear [the defendant] from alleged fault or guilt." *Black's Law Dictionary* (6th ed), p 566. Here, Flores told investigating officers that defendant had large quantities of marijuana in his apartment and used marked bills to purchase marijuana from defendant on two occasions. Flores's statements were *inculpatory*, not exculpatory. In any event, defendant already knew that Flores had acted as a confidential informant and defendant issued a subpoena to Flores as a defense witness. The prosecution's failure to disclose Flores's identity simply had no effect on the outcome of the proceedings.

D. THE PROSECUTION AND THE COURT CANNOT BE HELD ACCOUNTABLE FOR FAILING TO SECURE FLORES'S PRESENCE AT TRIAL

The prosecution does not have a duty to produce any particular witness at trial. However, upon a defendant's request, the prosecutor and law enforcement are duty-bound to provide "reasonable assistance" in locating and serving process upon a witness. MCL 767.40a(5). Defendant did not request assistance to locate Flores, and therefore, the prosecutor had no duty

[2] As the court had no reason to conduct such a hearing, it would have been futile for defense counsel to enter such a request. Counsel is not ineffective for failing to raise futile motions. *Thomas*, 260 Mich App at 457.

to act. Moreover, the court had no reason to *sua sponte* compel the prosecutor to locate defendant's witness.

However, we note that the prosecutor was less than diligent in reporting Flores's intentions to defense counsel and the court. Two days before trial, Flores told Haglund that he had discarded defendant's subpoena and did not intend to appear at trial. Flores indicated that he was going to travel to Chicago and then to Florida. Had the prosecutor immediately informed the court and defense counsel that Flores was going to ignore the subpoena and leave the jurisdiction, defendant may have been able to prevent Flores's absence. We do not condone the prosecutor's actions, but if Flores had appeared, he likely would have provided greater details regarding the controlled buys and refuted the defense theory inculpating him. Accordingly, defendant was not ultimately prejudiced by the prosecutor's conduct.

We similarly reject defendant's assertion that his counsel was ineffective in failing to request assistance to secure Flores's presence at trial. To merit a new trial based on the ineffective assistance of counsel, a defendant must show prejudice, i.e., "that, but for counsel's error, the result of the proceedings would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). As noted, Flores's testimony would have been damaging to defendant, further evincing defendant's role in the charged offenses. Accordingly, defendant cannot establish prejudice.

E. DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS NOT VIOLATED

Defendant contends that the prosecution violated his constitutional right to confront the witnesses against him by eliciting testimony from Haglund regarding Flores's out-of-court statements. As defendant did not raise a timely objection, our review is limited to plain error affecting defendant's substantial rights. *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006). Reversal is required where the plain error results "in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with witnesses against him." US Const Am, VI; *Crawford v Washington*, 541 US 36, 42; 124 SCt 1354; 158 L Ed 2d 177 (2004). To that end, the Confrontation Clause requires exclusion "of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 53-54. Although, "[a] statement by a confidential informant to the authorities generally constitutes a testimonial statement," *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), the Confrontation Clause "does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 10-11, citing *Crawford*, 541 US at 59 n. 9. See also *United States v Cromer*, 389 F3d 662, 671 (CA 6, 2004) (reversing the defendant's conviction because the prosecutor presented evidence regarding a confidential informant's out-of-court testimonial statements to prove the truth of the matter asserted).

Haglund did testify regarding testimonial statements made by Flores. Flores identified defendant as a drug dealer, and informed Haglund about the quantity and location of marijuana in defendant's apartment. Flores's statements were clearly made with an eye toward prosecution. And, defendant did not have the opportunity to cross examine Flores regarding these statements. However, the prosecutor did not present these statements to establish the truth of the matters asserted. Rather, the prosecutor elicited this testimony as background information to explain why the WMET officers conducted a search of defendant's apartment. *Cromer*, 389 F3d at 676 (a defendant's confrontation right is not implicated when challenged "testimony was provided merely by way of background").

Defendant also challenges his counsel's effectiveness in failing to object to Haglund's testimony on hearsay or confrontation grounds or to file a preemptive motion to suppress the contents of Flores's statements. We find no error in counsel's failure to seek a preemptive motion to suppress. Defense counsel intended to call Flores to the witness stand and only learned on the day of trial that Flores would not be available. Had Flores testified as planned, counsel could not prevent the prosecution from cross examining him. Accordingly, a pretrial motion to suppress Flores's statements would have been futile. See *Thomas*, 260 Mich App at 457. Although inartfully argued, defense counsel did attempt to preclude evidence of Flores's statements at the onset of the trial. The court simply rejected this approach and instructed the parties to object as needed during the presentation of the testimony.

Defense counsel may have been successful if he raised a contemporaneous objection to Haglund's testimony regarding the content of Flores's communications because Flores clearly was not available for cross examination. However, we find no prejudice to defendant where the officers uncovered significant physical evidence within defendant's residence that more than sufficiently supported defendant's convictions. No error in this regard affected the outcome of defendant's trial.

III. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the prosecution presented insufficient evidence to establish his intent to deliver marijuana. Specifically, defendant argues that the evidence tends to prove that he was a drug user, not a dealer. When reviewing a defendant's challenge to the sufficiency of the evidence, we review "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). A prosecutor need not present direct evidence of a defendant's guilt. Rather, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Carines*, 460 Mich at 757. Moreover, when reviewing a sufficiency claim, we may not interfere with the fact finder's judgment regarding the credibility of the witnesses. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant was charged with possession with the intent to deliver between five and 45 kilograms of marijuana. To establish this offense, the prosecution bore the burden of proving that the defendant knowingly possessed marijuana, intended to deliver the marijuana to another person, and that the quantity of proven marijuana fell between five and 45 grams. *People v*

Crawford, 458 Mich 376, 389; 582 NW2d 785 (1998). Even if the marijuana belonged to Flores, as asserted by defendant, the prosecutor established the necessary elements of this offense.

"A person need not have actual physical possession of a controlled substance to be guilty of possessing it." *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1992). Rather, a person constructively possesses an item "if he 'knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. . . .'" *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989), quoting *United States v Burch*, 313 F2d 628, 629 (CA 6, 1963). While a person's mere presence in a location where narcotics are uncovered is insufficient to establish possession, the prosecution is not required to establish ownership of the narcotics. *Wolfe*, 440 Mich at 520-521.

Similarly, the prosecution need not prove actual delivery to establish the intent to deliver. Rather, "[i]Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Wolfe*, 440 Mich at 524. "Delivery" is defined in MCL 333.7501(1) as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." Under the plain language of the statute, delivery means a changing of hands, but not necessarily remuneration.

The WMET officers found over 19 pounds of marijuana in defendant's bedroom, packaged into smaller size bags. The officers also found two digital scales of the type used to measure out quantities of drugs for resale, and a "grinder," used to sort the marijuana leaves from their stems. Moreover, pit bull terriers protected defendant's apartment, two handguns were stashed in close proximity to the marijuana, and defendant carried two cellular telephones (a common habit of drug dealers). This evidence was sufficient for a jury to infer that defendant intended to deliver the marijuana.

Moreover, the marijuana was found in defendant's bedroom. Defendant's alleged ignorance that the garbage bag was filled with fresh marijuana is belied by the all-consuming odor inside the apartment. In fact, the prosecutor presented a single *sealed* bag of fresh marijuana during defendant's testimony and defendant admitted that the odor was quite strong. This evidence more than sufficiently substantiated the jury's finding of guilt on the possession with the intent to deliver charge.

The jury also convicted defendant of felony-firearm and felon in possession. The possession element of each offense may be established by showing that defendant knew where the weapon was located and that the weapon was readily accessible. *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000). The weapon must be readily accessible to the defendant while he is committing the underlying felony, not at the time of arrest. Possession of a controlled substance occurs over a span of time, and the prosecution need only prove that the weapons were ready accessible at some point during the commission of the offense. *Id.* at 439.

The prosecution averred that defendant possessed the firearms found inside the laundry basket on November 12, 2009, the same day on which he possessed the marijuana with the intent to deliver. Further, the firearms were in a laundry basket immediately outside the door to the closet where the marijuana was discovered. And, both the firearms and the marijuana were

found in defendant's bedroom. Our Supreme Court has deemed such proximity of time and location to be sufficient to establish possession of a firearm while committing a controlled substance possession offense. *Id.* at 439-440.

Moreover, a defendant need not own a firearm to have possession of it. *Burgenmeyer*, 461 Mich at 438 ("[P]ossession of a weapon is not the same thing as ownership of a weapon."). Defendant stipulated that he had previously been convicted of a felony for purposes of the felon in possession charge. Accordingly, the prosecution presented sufficient evidence from which the jury could find beyond a reasonable doubt that defendant possessed a firearm during the commission of a felony and was a felon in possession of a firearm.

IV. SENTENCING

Defendant further asserts that, although the court imposed a minimum sentence for the possession with intent to deliver charge within the appropriate guidelines range and correctly scored his guidelines variables, the court imposed a disproportionate sentence at the higher end of the minimum range. Defendant asserts that, as the evidence tends to support that he was a drug user but not a dealer, the court should have sentenced him at the lower end of the range. However, absent a scoring error or reliance on *inaccurate* information, we are statutorily bound to affirm a defendant's sentence imposed within the minimum guidelines range. MCL 769.34(10). The same evidence that supported the jury's conclusion that defendant intended to deliver the marijuana found in his possession was sufficient for the court to reach the same conclusion in imposing sentence. Accordingly, we affirm defendant's sentences.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens