STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 299398 Wayne Circuit Court
ARTHUR WALLACE SAFFOLD, Defendant-Appellant.	LC No. 10-002205-FH

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(*iii*), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Because defendant received effective assistance of counsel at trial, the trial court properly instructed the jury, and sufficient record evidence supports defendant's convictions, we affirm.

Officer James Kisselburg is a police officer with the Narcotics Division of the Detroit Police Department. On January 18, 2010 at approximately 5:00 pm, Kisselburg was working with a raid crew of five or six officers executing a narcotics search warrant at a small single family house located at 19622 Runyon in Detroit. Kisselburg was the shotgun man and was the first person through the door of the target address. Kisselburg encountered two doors on the house, an outer grate that was closed but unlocked and an inner door that was open so he did not have to force entry. As he approached the house and stepped onto the porch he was wearing his raid uniform and yelled "police, search warrant." On entering the house, Kisselburg saw defendant and co-defendant James Manuel Sharp sitting on chairs pulled up to a small makeshift table (a board or door sitting on crates) in the front room, one man facing the front door and one man with his back to the front door. As soon as defendant and Sharp saw Kisselburg they jumped up from the table and ran to the rear of the house down a hallway to a bedroom where they dove out a window. Kisselburg pursued the men to the back of the house but could not

[1] Defendant was tried jointly with co-defendant James Manuel Sharp. He is not a party to this appeal.

leave the house through the window because he had to secure the location for the safety of the raid crew. Kisselburg found no one else present in the house. Eventually police detained defendant and Sharp outside the house.

Kisselburg stated that the house appeared to be a vacant dwelling because the basement was flooded up to the first step of the basement and there were no appliances or furniture inside the house except for the makeshift table that was in the front room of the house. Officer Kathy Singleton was also a police officer with the Narcotics Division of the Detroit Police Department, and took part in the raid and search warrant execution at 19622 Runyon. Singleton stated that the house looked vacant because there was no furniture other than the table and two chairs and there was trash on the floor. The house had an illegal electrical hook-up from outside the house that was powering a lamp in the front room of the house. There was a sheet or blanket covering the front window to the house.

On the table, there was a handgun, a small radio, and a Swisher cigar box that contained marijuana and money. Singleton recovered all the evidence found in the house. She placed the handgun, the Swisher cigar box that contained marijuana and money ($25 - one $10 bill and three $5 bills) into evidence as well as a small scale, and two packages of Ziplock bags that were also on the table. There was also a rifle in the corner of the living room within two to three feet of the table. Singleton testified that the handgun was a Rohm revolver that was loaded with six live rounds. Singleton also testified that the presence of the Ziplock bags, the small scale, and small bills, together with the marijuana indicate distribution because marijuana packages of the size found are generally sold for between $5 and $10.

Sergeant David Hansberry is the supervisor of the Detroit Police Department, Narcotics Enforcement Unit, Western Team. He was also the officer in charge of the raid. Hansberry received an anonymous complaint about drugs being sold at 19622 Runyon. As a result of that complaint, Hansberry performed undercover surveillance at 19622 Runyon on the morning of the raid and was also the affiant on the search warrant application and affidavit. During the preliminary surveillance on the property the morning of the raid, he witnessed what he believed to be two separate narcotics transactions at the location from his car that was parked on the street. Hansberry witnessed an individual walk past his vehicle leaving the subject house with a sandwich bag containing marijuana. Hansberry also approached what appeared to be a prospective buyer and asked the individual if narcotics were available for sale at 19622 Runyon by asking "Are they on?" The individual gave Hansberry information that meant the house was a drug house.

Later that afternoon, Hansberry was the raid commander of the search warrant execution and was the last person entering the premises. As he was entering the premises, he received information from his team that someone was running outside the location. Hansberry ran north around the house and saw defendant descending out a window of the house. Defendant went over a four foot gate and continued to run but there was snow and ice on the ground and he only made it about one house over before police detained him. At this point Sharp also came through the window and immediately began to fall because of the icy conditions and Hansberry apprehended him. Hansberry did not see any other person leave the building during the raid.

Hansberry searched both defendant and Sharp. Defendant had $90 (three $20 bills, one $10 bill, two $5 bills, and ten $1 bills) on him. Sharp had $210 (one $100 bill, five $20 bills, one $5 bill, and five $1 bills) in his pants pocket and also a key ring that had two keys on it that fit the front door of 19622 Runyon. Hansberry opined that the currency recovered was significant because of the denominations of the bills themselves since the marijuana being sold was packaged in $5 bags.

Scott Penabaker, a forensic scientist with the Michigan State Police Department, testified that he received a lock-sealed evidence folder containing a plastic Ziplock bag that in turn contained 57 small packets of plant material and a Swisher Sweets Cigarillo box. Penabaker inventoried the contents of the Ziplock bag and then randomly selected one packet of plant material for testing. Penabaker determined that the packet contained 1.01 grams of marijuana. Penabaker did not find it necessary to test each individual packet because they are all "microscopically . . . consistent" and "[t]hey all look like marijuana."

Sergeant Thomas Flowers of the Michigan State Police Forensic Science Division testified that he was not able to find any identifiable fingerprints on the revolver, the rifle, or any bullets found at the scene. He was able to locate some "ridge structure" which are small portions of fingerprints, but nothing identifiable.

Shirley Burns, aged 62, testified for the defense at trial. Burns lives at 19641 Runyon Street in Detroit which is across the street and to the left of the target house. On the day of the raid Burns was in her kitchen when her grandson reported to her that there was a police raid happening at a house across the street. Burns looked outside from her door to see what was going on when she saw three males running from the back of the house and jumping the fence. Separate from the three people running, she also saw police in chase. Burns saw police apprehend and handcuff one of the men running but she did not see what happened to the other two men she saw running.

Burns knew defendant because he grew up with her daughter who is now 37 years old. Burns testified that she could not tell if defendant was one of the men running. Burns suspected that the house that was raided was a drug house because she saw people going in and out of the house and it had a reputation for being a drug house. Burns stated that she had not seen defendant going in and out of the house. She never reported the drug house to police because she believed it was not any of her business.

Defendant testified on his own behalf at trial. Defendant testified that he resides at 19781 Runyon in Detroit. Defendant testified that on the day of the raid he woke up at home and got up and went to work as a roof framer. Defendant stated that he drove to work with his boss, Jeff Wise, and that they worked at a church in Ypsilanti for about nine hours that day. Defendant testified that he gets paid in cash and he had $90 on him that afternoon. After he returned home from work he went to the Hoover Market and purchased a forty ounce of Budweiser beer and a Swisher Sweet cigar and then headed to 19622 Runyon to purchase marijuana to make a blunt out of the cigar.

When he arrived at 19622 Runyon he did not have any marijuana on his person. He knocked on the door and a person named Dave Willer opened the door and let defendant into the

house. Another person named Diarre Jones was also inside the house as well as a third person that defendant did not know. Defendant testified that he was in the house for about two minutes when his co-defendant Sharp arrived at the house. Defendant testified that he was going to buy a $20 bag of marijuana to help with his back pain and carpal tunnel. Defendant testified that he has been smoking marijuana for over ten years even though he knows it is "wrong."

Defendant testified that he was just at the house to purchase marijuana, and had only been there about seven to 15 minutes, when the police arrived and raided the house. Defendant had been talking to the men at the table and had not actually purchased the marijuana at that point. Defendant stated he was talking to Willer and Jones when Willer yelled "police" and then all five men ran. Defendant admitted that he ran from the police raid because he was "in the house buying marijuana" and he was "scared" and "panicked" because police have guns. Defendant stated that when he got to a window it was already open and he jumped through it, went over a gate, and landed in the next yard where Hansberry apprehended him.

Defendant testified that the other three men got away. Defendant testified that the bags of marijuana on the table were Jones and Willer's property and not his property. Defendant testified that the guns in the house were not his guns, that he never touched them, and he did not even see them when he walked into the house. Defendant also testified that he does not own any guns. Defendant stated that the target house was on the next block from his house on Runyon and was the closest drug house to his house and most convenient.

The jury found defendant guilty of possession with intent to deliver less than five kilograms, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant now appeals as of right.

Defendant first argues that he was denied effective assistance of counsel at trial when counsel failed to object to erroneous and confusing jury instructions on the charges. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882, (2008). In this case, because defendant did not move for a new trial or a *Ginther*[2] hearing below, our review of the claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant specifically contends that his counsel was ineffective for failing to ensure that the trial court properly instructed the jury. A trial court must instruct the jury concerning the law applicable to the case and must fully and fairly present the case to the jury in an understandable manner. MCL 768.29; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995) modified on other grounds 450 Mich 1212 (1995); *People v Jones*, 419 Mich 577, 579; 358 NW2d 837 (1984). Jury instructions should be considered in their entirety, rather than extracted piecemeal, to determine whether there was error requiring reversal. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*.

Here, defendant argues that as a result of the trial court's jury instructions, the jury was confused with regard to the charge of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(*iii*). Defendant specifically contends that the trial court created an inconsistency that confused the jury when it labeled the offense: "Controlled Substance—Delivery/Manufacture of Marijuana" in both the jury instructions and on the jury verdict form instead of referring to the offense clearly as "possession with intent to deliver marijuana." Defendant continues in his brief on appeal that if defendant was charged actually with "Controlled Substance—Delivery/Manufacture of Marijuana" it was therefore error for the trial court not to instruct the jury with CJI2d 12.2, "Unlawful Delivery of a Controlled Substance."

Defendant's argument ignores the record and lacks merit. It was clear from the start of proceedings that defendant was charged with possession with intent to deliver marijuana in accordance with MCL 333.7401(2)(d)(*iii*). When the trial court introduced the case to the prospective jurors the trial court stated as follows:

> This is a criminal case involving the charges brought against the Defendant . . . Arthur Wallace Saffold as follows: Count number one, possession with intent to deliver marijuana. It's alleged that the Defendant[] did possess with intent to deliver a controlled substance marijuana, contrary to MCL 333.7401(2)(d)(*iii*), on January 18, 2010 at 19622 Runyon, in the City of Detroit, County of Wayne, State of Michigan.

The prosecutor and defendant's counsel both repeatedly announced and informed the jury during their opening statements and closing statements that defendant was charged with possession with intent to deliver marijuana and discussed the elements.

After the close of the proofs, during jury instructions, the trial court described the jury verdict form as follows:

> Count I gives you two options. First option has a little block and the phrase next to it that reads, not guilty of controlled substance, deliver, manufacture of marijuana. Second option has a little block and the phrase next to it that reads, guilty of controlled substance, deliver, manufacture of marijuana.

The trial court stated that defendant was charged with "controlled substance delivery, manufacture of marijuana." Shortly thereafter, the trial court explained the charge and the elements of the charge as follows:

> . . . Defendant is charged with the crime of illegally possessing with intent to deliver a controlled substance to; to-wit marijuana. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the Defendant knowingly possessed a controlled substance. Second, that the Defendant intended to deliver the substance to someone else. Third, that the substance possessed was marijuana and the Defendant knew it was and, fourth, that the Defendant was not legally authorized to possess the substance.

The trial court's instructions to the jury clearly tracked CJI2d 12.3, "Unlawful Possession of a Controlled Substance with Intent to Deliver."

Again, a trial court must instruct the jury concerning the law applicable to the case and must fully and fairly present the case to the jury in an understandable manner. MCL 768.29; *Mills*, 450 Mich at 80; *Jones*, 419 Mich at 579. While somewhat inartful as a result of two different titles or labels used interchangeably to describe the same charge, when we read the jury instructions in their entirety there is no doubt that "the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Bell*, 209 Mich App at 276. There is no requirement that the trial court must render "perfect" instructions. See *id*. The trial court accurately explained the elements of the crime charged and defendant has not established any reason why the jury would have been confused by the instructions as given. Because defendant has not established error, trial counsel was not ineffective for failing to object. Counsel need not make futile and meritless objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant raises the same argument with regard to the trial court asserting in particular that the trial court's instructions deprived him of a fair trial. This argument fails for two reasons. First, because while the jury instructions may have been slightly imperfect, defendant has not established error with regard to the substance of the jury instructions as the trial court presented them to the jury. Second, because defense counsel assented to the instructions at trial. A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App. 670, 688; 660 NW2d 322 (2002). A party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter*, 462 Mich 206, 215; 612 NW 2d 144 (2000). Defendant has not shown error.

Finally, defendant argues that insufficient evidence supported his convictions. We review a defendant's allegations regarding insufficiency of the evidence de novo. *People v*

Herndon, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing this claim, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*. The standard is deferential, therefore, we must draw "all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992) amended on other grounds 441 Mich 1202 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To establish the crime of possession with intent to deliver less than five kilograms of marijuana, the prosecution must show that the defendant knowingly possessed a controlled substance and intended to deliver it to someone else, that the substance possessed was marijuana and the defendant knew it was marijuana, and that the marijuana was in a mixture that weighed less than five kilograms. MCL 333.7401(2)(d)(*iii*); *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005).

Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992). Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id*. at 521. Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). "Intent to deliver can be inferred from the quantity of the controlled substance in the defendant's possession and from the way in which the controlled substance is packaged." *Id*. at 518.

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found defendant guilty beyond a reasonable doubt. See *Hardiman*, 466 Mich at 421. Detroit police executed a search warrant at a vacant house located at 19622 Runyon in Detroit in January 18, 2010. On their arrival the raid team found the house uninhabitable because it was flooded to the top of the stairs, there were no appliances, no furniture except for a makeshift table and two chairs, and an illegal electrical hook-up powering only a lamp despite the fact that it was the middle of a Michigan winter. Kisselburg saw defendant and co-defendant Sharp sitting on chairs pulled up to the table in the front room. As soon as defendant and Sharp saw Kisselburg they jumped up from the table and ran to the rear of the house where they each dove out the window and tried to escape. Eventually police apprehended both defendant and Sharp outside the house. Kisselburg and Hansberry both testified that they did not see anyone other than defendant and Sharp in the house or trying to escape from the house during the raid. On the small table in the house where defendant and Sharp had been seated were a loaded revolver, a small radio, a Swisher cigar box that contained marijuana and money ($25 - one $10 bill and three $5 bills), a small scale, and two packages of Ziplock bags. There was also a rifle in the corner of the living room within two to three feet of the table. Singleton testified that the presence of the Ziplock bags, the small scale, and small

bills, together with the marijuana indicate distribution because marijuana packages of the size found are generally sold for between $5 and $10.

The prosecution presented eye-witness testimony that only defendant and Sharp were in the vacant house at the time of the raid. Both men were sitting at a small table on which sat pre-packaged bags of marijuana, a loaded gun, a stack of small bills in a cigar box, as well as a scale and plastic bags used for the packaging and sale of marijuana. When police arrived and announced the raid both men immediately jumped up and attempted to escape through a bedroom window. Defendant had $90 (three $20 bills, one $10 bill, two $5 bills, and ten $1 bills) on him when he was arrested. Based on this combination of direct and circumstantial evidence, the jury could reasonably infer that defendant possessed the marijuana found on the table. *Fetterley*, 229 Mich App at 515. Additionally, the jury could also infer, from his proximity to the marijuana while seated at the small table, the small bills found on defendant's person, the scale and baggies also on the table as well as both the revolver and the rifle within defendant's reach, that defendant was directly connected to a drug dealing operation. The direct and circumstantial evidence presented by the prosecution was sufficient for a rational jury to conclude that defendant had possession and control over the marijuana as well as the intent to deliver. See *Hardiman*, 466 Mich at 421-422; *Fetterley*, 229 Mich App at 515

Next, defendant argues that there was insufficient evidence to support his felony-firearm conviction. The felony-firearm statute, MCL 750.227b, provides, in part, that "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony . . . ." The elements of felony-firearm, MCL 750.227b, are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony—here, possession with intent to deliver marijuana. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession may be actual or constructive, and it may be sole or joint. See *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). A person has constructive possession if there is proximity to the article together with indicia of control. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). A defendant has constructive possession of a firearm if he knows where the weapon is and it is reasonably accessible to him. *Id*. A defendant need not physically possess the firearm as long as he has constructive possession. *Id.*

In the present matter, the police saw defendant sitting at a small table on which sat a loaded revolver. There was also a rifle sitting in the corner of the room in plain view and within arm's reach of the area where defendant had been seated. The evidence supports the conclusion that the firearms were either in defendant's control or shared by defendant and Sharp. Based on the facts presented, a rational jury could reasonably infer that defendant constructively possessed both the handgun and the rifle, in violation of MCL 750.227b. Because there was sufficient evidence to support defendant's underlying felony conviction, and there was sufficient evidence

that defendant possessed the firearms, the jury properly convicted defendant of the felony-firearm charge.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio