

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE DESHAWN HOPKINS,

Defendant-Appellant.

UNPUBLISHED

March 15, 2012

No. 300693

Wayne Circuit Court

LC No. 10-003666-FH

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of cocaine, MCL 333.7403(2)(a)(iv) or (v),¹ felon in possession of a firearm, MCL 750.774f, and possession of a firearm during the commission of a felony, MCL 750.227. He was sentenced to concurrent prison terms of one to four years for the possession of cocaine conviction and one to five years for the felon-in-possession conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction.² He appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of clerical errors in the judgment of sentence.

¹ The jury was instructed to consider possession of cocaine as a lesser offense to an original charge of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). According to the record, the amount of cocaine involved was approximately 8.4 grams. Consistent with the evidence at trial, the trial court at sentencing stated that defendant was convicted of possession of less than 25 grams of cocaine, which is a violation of MCL 333.7403(2)(a)(v). However, the judgment of sentence cites MCL 333.7403(2)(a)(iv), which refers to possession of 25 or more but less than 50 grams of cocaine. The penalty for both possession offenses is the same (imprisonment for not more than four years or a fine of not more than \$25,000, or both).

² The judgment of sentence inaccurately lists a five-year maximum sentence for the possession of cocaine conviction and a four-year maximum sentence for the felon-in-possession conviction.

Defendant's convictions arise from the seizure of cocaine during the execution of a search warrant at a vacant or abandoned house in Detroit. According to the testimony of the police officers who participated in the execution of the warrant, the cocaine was observed lying in plain view on a countertop between the kitchen and dining areas of the house. Officers testified that defendant was standing in the kitchen next to the countertop, armed with a rifle, but dropped the rifle when the police entered the house. Defendant and other individuals, including a person who was standing on the other side of the countertop, were secured by police officers during the raid.

Defendant first argues that the prosecutor violated his constitutional right to confront witnesses by introducing the results of a fingerprint analysis of the rifle that was seized from the house. The rifle was examined by an employee of the Michigan State Police crime laboratory, who had retired before trial. The retired employee prepared a report of the results of his analysis, but did not testify at trial. Instead, another laboratory employee who did not perform the actual fingerprint analysis testified at trial, relying on the report of the retired employee. According to the testimony at trial, no latent prints of value were found on the rifle. Because defendant did not object to this testimony at trial, the issue is not preserved and defendant has the burden of showing a plain error (i.e., one that is clear or obvious) that affected his substantial rights (i.e., an error that is outcome determinative). *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him[.]” US Const, Am VI. The Michigan Constitution also affords a defendant this right of confrontation. Const 1963, art 1, § 20; *People v Fackelman*, 489 Mich 515, 525; 802 NW2d 552 (2011). The Confrontation Clause bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Forensic laboratory analyses prepared in aid of a police investigation are testimonial in nature. *Bullcoming v New Mexico*, 564 US ___ ; 131 S Ct 2705, 2717; 180 L Ed 2d 610 (2011). Where the prosecutor introduces a statement of a nontestifying scientific expert, the expert becomes a witness whom the defendant has the right to confront. *Id.* at 2716; *Fackelman*, 489 Mich at 530. The Confrontation Clause “does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.” *Bullcoming*, 131 S Ct at 2716.

While the degree of participation by a surrogate witness can affect the analysis under the Confrontation Clause, *United States v Moore*, 397 US App DC 148; 651 F3d 30, 71 (DC Cir, 2011), there is no indication in the record in this case that the laboratory employee who testified at trial participated in the fingerprint analysis of the rifle.³ Therefore, we agree that it was plain

³ She did offer some general testimony regarding factors that impact whether usable prints can be obtained from an item. It also appears that the weapon was displayed to the laboratory employee in the courtroom, whereupon she was asked whether there was anything about the rifle that would have made it easier or more difficult to lift a fingerprint. She answered that, as indicated

error for the prosecutor to introduce the witness's testimony that "there were no latent prints of value lifted from there."⁴

Nonetheless, defendant has not shown that the error affected his substantial rights. The witness did not provide any testimony that was harmful to defendant. On the contrary, her testimony established that no latent prints of value were found on the rifle. The witness defined the phrase "no latent print of value" to mean that "there was like a few lines, or there was something. That I can tell it was from the friction ridge skin, but I couldn't tell you anything further." In addition, her testimony indicated that she could not form an opinion regarding whether there was anything about the rifle that would make it easier or harder to lift a print for testing because in her view there were too many factors in play. Examined as a whole, the witness's testimony was, at most, neutral with respect to the evidentiary value of fingerprint testing on the rifle. The testimony established that the rifle could not be linked to defendant on the basis of any fingerprints. Because the testimony was not outcome determinative of whether defendant possessed the rifle, defendant's substantial rights were not affected by the prosecutor's introduction of the testimony.

We also reject defendant's claim that trial counsel was ineffective for failing to object to the laboratory employee's testimony. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*⁵ hearing, our review is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). To establish ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *Id.*

Here, it is apparent from defense counsel's closing argument that he used the laboratory employee's testimony regarding the absence of fingerprints on the rifle to support a defense that there was reasonable doubt whether defendant possessed the rifle. A defendant claiming ineffective assistance of counsel must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Considering defense counsel's use of the testimony, defendant has not overcome the presumption that counsel reasonably failed to object as a matter of trial strategy. Further, because the testimony was not harmful to defendant, defendant was not prejudiced by counsel's failure to object.

earlier in her testimony, many factors come into play, and she could not say "whether it was easier or harder to lift a print" off the rifle.

⁴ We note that midway during the trial, the parties stipulated to the admission of a laboratory report, but the record is not clear whether this particular report concerned the fingerprint analysis of the rifle. Of course, if the report dealt with the issue of fingerprints, any claim of error was effectively waived by the stipulation. However, given our ultimate ruling on the confrontation argument, we need not further explore whether the issue was waived.

⁵ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant also suggests that the retired employee who performed the fingerprint testing should have been called as a witness so that he could have been asked how thoroughly he examined the rifle, or questioned about the likelihood that defendant could have handled it without leaving latent fingerprints. In general, the failure to call a witness to testify may constitute ineffective assistance of counsel only where it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The defendant has the burden of establishing the factual predicate for his claim. *Carbin*, 463 Mich at 600. Here, defendant has not even established that the retired employee was available to testify. Further, it is not apparent from the record what testimony the retired employee would have provided. Thus, we are left with no basis for concluding that defense counsel's failure to call the retired employee was objectively unreasonable. Furthermore, what is apparent from the record is that the retired employee found nothing of evidentiary value to link defendant to the rifle. Under these circumstances, defendant has failed to establish that failure to call the retired employee deprived him of a substantial defense. Thus, his claim of ineffective assistance of counsel cannot succeed. *Seals*, 285 Mich App at 17; see also *Carbin*, 463 Mich at 600.

Defendant also argues that the evidence was insufficient to establish that he possessed the cocaine found on the countertop in the house. We disagree. In considering this issue, we must review the evidence in a light most favorable to the prosecution to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

Possession of contraband may be actual or constructive, and constructive possession may be sole or joint, with more than one person actually or constructively possessing a controlled substance. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Constructive possession of cocaine exists where the defendant had the right to exercise control over the cocaine and knew of its presence. *Id.* The totality of the circumstances is considered to determine if a sufficient nexus between the defendant and the cocaine exists to establish constructive possession. *Id.* at 521. Close proximity to cocaine lying in plain view is evidence of possession. *Id.*; see also *People v Cohen*, ___ Mich App ___; ___ NW2d ___ (Docket No. 298076, issued July 20, 2011, approved for publication August 30, 2011), slip op at 4.

Viewed in a light most favorable to the prosecution, the evidence showed that defendant, while armed with a rifle, was observed in close proximity to cocaine that was lying in plain view on the countertop of a vacant or abandoned house. This evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant had the right to exercise control over the cocaine and knew of its presence. Therefore, the evidence was sufficient to establish his constructive possession of the cocaine. *Wolfe*, 440 Mich at 520-521.

While we affirm defendant's convictions, we remand this case for the administrative task of correcting clerical errors in the judgment of sentence. Cf. *People Herndon*, 246 Mich App 371, 392-393; 633 NW2d 376 (2001). With respect to defendant's conviction for possession of cocaine, the judgment of sentence incorrectly contains the statutory citation for MCL 333.7403(2)(a)(iv) (possession of 25 or more but less than 50 grams of cocaine), instead of the correct citation of MCL 333.7403(2)(a)(v) (possession of less than 25 grams of cocaine). In addition, the judgment inaccurately lists a five-year maximum sentence for the possession of

cocaine conviction (instead of four years) and a four-year maximum sentence for the felon-in-possession conviction (instead of five years). Accordingly, we remand for correction of these clerical errors.

Affirmed and remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray