

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW MARCEL RAPELJE,

Defendant-Appellant.

UNPUBLISHED
October 23, 2012

No. 306059
Mackinac Circuit Court
LC No. 2010-003318-FH

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

PER CURIAM.

Following a jury trial, defendant was found guilty of manufacturing marijuana, MCL 333.7401(2)(d)(iii), maintaining a drug house, MCL 333.7405(1)(d), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ Defendant was sentenced to 12 months' imprisonment for the manufacturing conviction, 12 months' imprisonment for the drug house conviction, and 2 years' imprisonment for the felony-firearm conviction. The felony-firearm sentence was to be served consecutive to and preceding the manufacturing and drug house sentences, which were to be served concurrently. Defendant appeals by right. We affirm.

I. FACTUAL BACKGROUND

On August 23, 2010, an Army National Guard helicopter pilot noticed a fenced-in area containing marijuana during a reconnaissance flight and notified law enforcement. After obtaining a search warrant, the officers directed to the scene found 14 marijuana plants growing outside of the residence, marijuana in Mason jars in the master bedroom, and a small sandwich baggie of marijuana in both the living room and kitchen areas. The officers also found a .22 long gun and a .44 revolver in the kitchen, shell casings for a rifle lying on the upstairs floor, a 20-gauge shotgun and a bolt action rifle in the upstairs closet, and three revolvers, a .22 rifle, a 12-gauge shotgun, and loose ammunition in the master bedroom. A detective with the Michigan

¹ Defendant was acquitted of several other charges, including two additional counts of felony-firearm. With respect to the felony-firearm charge upon which defendant was convicted, the underlying felony was manufacturing marijuana.

State Police testified that defendant told him that defendant and his wife were both involved in cultivating the marijuana for personal use.

At trial, defendant testified that he owned the house and lived in it, but that, while he knew his wife grew marijuana and stored it inside the home, defendant never participated in the cultivation or growing of marijuana. Defendant denied telling the detective he cultivated the marijuana. Defendant testified that there were firearms in the house and that most of them were his firearms, which he used for hunting, for protection while cutting wood, and to protect his chickens. Defendant testified extensively as to the types of locations of the firearms. Defendant admitted he possessed the firearms while maintaining the house. The trial court instructed the jury on felony-firearm:

In Count V, a felony firearm, in that the Defendant did carry or have in his possession a pistol or rifle at the time he committed or attempted to commit a felony, to wit: Manufacturing marijuana.

* * *

To prove these charges the Prosecutor must prove each of the following elements beyond a reasonable doubt:

. . . that at the time the Defendant committed or attempted to commit the crimes that he knowingly and willingly carried or possessed a firearm

After instructing the jury, the trial court asked if counsel had any questions. Defense counsel responded, "Defense is satisfied."

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied his right to effective assistance of counsel when trial counsel failed to request a jury instruction on constructive possession specific to the felony-firearm charge. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error and reviews de novo whether those facts constitute a violation of defendant's constitutional right to effective assistance of counsel. *Id.* When a defendant has failed to move for a new trial or evidentiary hearing on the basis of ineffective assistance of counsel, this Court's review is limited to mistakes apparent from the record. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

A defendant was denied the effective assistance of trial counsel if (1) his trial counsel's performance fell below an objectively reasonable standard, and (2) had his counsel not erred, it is reasonably probable that the results of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In showing that trial counsel's performance fell below an objectively reasonable standard, the defendant must overcome the "strong presumption" that trial counsel's conduct was reasonable. *LeBlanc*, 465 Mich at 578. When determining whether counsel's strategy was objectively reasonable, this Court recognizes that defense counsel has "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The Michigan Supreme Court has indicated that a failure to request a specific jury instruction can be a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). Counsel is not ineffective for failing to request a jury instruction that is inconsistent with the evidence. *Id.*

Defendant argues that trial counsel's failure to ask for an instruction on constructive possession for felony-firearm was unsound trial strategy because it lowered the prosecutor's burden of proof in this case. Defendant's argument is premised on the mistaken assumption that when a defendant is arrested outside of his home, he cannot be convicted of felony-firearm because the firearms were not available and accessible to him. The Michigan Supreme Court has overruled this line of reasoning in *People v Burgenmeyer*, 461 Mich 431; 606 NW2d 645 (2000). Under present felony-firearm jurisprudence, "[t]he proper question . . . is whether the defendant possessed a firearm *at the time he committed a felony*. The fact that the defendant did not possess the firearm at the time of arrest, or at the time of the police raid, is not relevant" *Id.* at 439 (emphasis in the original).

In this case, the prosecution was not required to prove that the firearms were accessible to defendant at the time of his arrest. Consistent with *Burgenmeyer*, the trial court instructed the jurors that they should find defendant guilty of felony-firearm if they found that "at the time the Defendant committed or attempted to commit the crimes that he knowingly and willingly carried or possessed a firearm." Defendant testified that there were firearms in the house and that most of them were his firearms, and he admitted that he possessed the firearms while maintaining the house. A reasonable jury could conclude from this evidence that defendant had actual possession of the firearms while manufacturing marijuana. The manufacturing of the marijuana was of course an ongoing criminal act spanning the entire time devoted to cultivating or growing the marijuana, as opposed to a momentary criminal transaction that swiftly passed. And there is no dispute that defendant resided in his house, with accessible firearms scattered throughout the home, during the time that the marijuana was being cultivated and grown. Under these circumstances, an objectively reasonable attorney could determine, as a matter of trial strategy, not to draw additional attention to defendant's admitted possession of the firearms with a further instruction on constructive possession. Possession of a firearm can be joint or exclusive and actual or constructive, and constructive possession is shown when a person has proximity to the firearm together with an indicia of control, or, stated otherwise, when the person knows of the firearm's location and the weapon is reasonably accessible to him or her. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). A reasonable attorney could conclude that an instruction on "constructive" possession might make it *more likely* that the jury would return a guilty verdict than if the jury merely had the instruction given here by the trial court. Defendant has not overcome the presumption that trial counsel acted reasonably.

Defendant also has not shown that it is reasonably probable that the results of the proceeding would have been different had the court instructed the jury on constructive possession specific to the felony-firearm charge. Once again, a defendant constructively

possesses a firearm if the location of the weapon is known and reasonably accessible to the defendant. *Burgenmeyer*, 461 Mich at 438. Here, defendant acknowledged that he owned the house and lived in it. Defendant acknowledged there were firearms in the house and that most of them were his firearms. Defendant not only testified that he knew the locations of the weapons and had access to them, but testified extensively as to the types and locations of the firearms. Defendant admitted that he had the ability to control or possess the handguns in the house. Defendant admitted that he was in possession of the firearms while maintaining the house. In light of the extensive evidence that defendant knew the locations of the firearms and had access to them, it is not reasonably likely that the jury would have concluded that defendant did not constructively possess the firearms.²

Defendant has not demonstrated that his counsel acted in an objectively unreasonable manner, and has not demonstrated that the results of the proceeding would have been different even if trial counsel had requested a constructive possession instruction specific to the felony-firearm charge. Defendant has not overcome the presumption that he was effectively assisted by counsel.

II. IMPROPER JURY INSTRUCTIONS

Defendant next argues that he was denied a fair trial because the jury was improperly instructed. Defendant has waived this issue. Even were this issue not waived, we disagree.

“[A]n affirmative statement that there are no objections to the jury instructions constitutes express approval of the instructions, thereby waiving review of any error on appeal.” *People v Kowalski*, 489 Mich 488, 505 n 28; 803 NW2d 200 (2011). Specifically, counsel waives any error by affirmatively expressing satisfaction with jury instructions, including by indicating that the defense is “satisfied” with instructions. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation omitted).

In this case, defense counsel affirmatively expressed the defense’s satisfaction with the jury instructions with the statement “[d]efense is satisfied” in response to the court’s inquiry if there were any comments on the jury instructions.

Even had defendant not waived this argument, we are not convinced the trial court erred. Defendant first argues that a constructive possession instruction specific to felony-firearm was necessary to the elements of the felony-firearm charge. For reasons we have previously stated,

² In the context of defendant’s ineffective assistance claim, his brief often reads as if he is instead making an argument that the evidence was insufficient to support the felony-firearm conviction. Based on the record discussed by us above, and viewing the evidence in a light most favorable to the prosecution, the evidence was more than sufficient to establish that defendant possessed a firearm during the commission of a felony, i.e., the manufacture of marijuana. See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992).

this argument does not warrant reversal. See also CJI2d 11.34. Defendant also argues that the trial court erred when it instructed the jury on “constructive possession” as it related to a drug possession charge, where the jury likely used that instruction in convicting defendant on the felony-firearm charge. Defendant complains that the instruction on constructive possession relative to a drug charge is broader than one pertaining to a felony-firearm charge. On our review of the transcript, the trial court instructed the jury on constructive possession specifically as it related to drug possession, well after the court had finished the felony-firearm instruction. The court’s constructive possession instruction referenced the difference between actual physical control of “the substance” and “marijuana,” but did not once reference “firearm” or any related term. Reversal is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra