

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYANT ROBERT KEY,

Defendant-Appellant.

UNPUBLISHED
February 21, 2013

No. 307663
Oakland Circuit Court
LC No. 2011-237701-FH

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f; possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii); and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 1 to 15 years each for the felon-in-possession and possession of marijuana convictions, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. We affirm.

I. FACTS AND PROCEEDINGS

In May 2011, officers assigned to the Oakland County Sheriff's Narcotics Enforcement Team ("OCNET") received a report from a police detective in Arizona that a package found to contain marijuana was being sent to "Jason Proctor" at an apartment in Southfield. OCNET Officer Paul Kinal learned from the apartment manager that the apartment was leased in the name of "Preston Jackson." Officer Kinal arranged for the apartment manager to hold the package when it arrived. When the package arrived, Officer Kinal presented it to a drug-sniffing dog, which responded in a manner indicating that it contained a controlled substance. Officer Kinal obtained a search warrant to open the package, at which time he discovered that it contained two compressed bricks of marijuana. Officer Kinal then resealed the package for delivery and obtained a conditional search warrant authorizing an apartment search if the recipient picked up the package and brought it back to his apartment.

While the officers conducted surveillance, the manager contacted the apartment listed on the package and notified "Jackson" that his package had arrived. Defendant came to the office and identified the package as his. After defendant returned to his apartment, the officers executed the search warrant. As the officers entered the apartment, they observed defendant

running through the living room, past a couch, and onto the apartment's terrace, where he threw something over the rail. When the officers searched the parking lot below the terrace, they found the two bricks of marijuana. After defendant was arrested, the officers searched the apartment and found the packaging that the marijuana had been wrapped in, and also found a handgun wedged between the cushions of the living room couch.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel at trial. Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or a request for a *Ginther*¹ hearing in the trial court, our review of this issue is limited to errors apparent from the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish ineffective assistance of counsel, defendant must demonstrate both that trial counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). To establish prejudice, defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Defendant must overcome the presumption that trial counsel's actions may be considered sound trial strategy. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

Defendant argues that defense counsel was ineffective for (A) failing to challenge Officer Kinal's warrantless seizure of the package, (B) failing to assert an entrapment defense, (C) failing to object to testimony regarding the Arizona detective's out-of-court statements, (D) failing to object to testimony that the recovered firearm was stolen, and (E) failing to object to testimony that defendant had a business card for a parole agent in his wallet. We will address each argument in turn.

A. FAILURE TO CHALLENGE THE WARRANTLESS SEIZURE OF THE PACKAGE

Defendant argues that Officer Kinal's warrantless seizure of the package was per se unreasonable and that defense counsel was ineffective for failing to move to suppress the evidence as the fruit of that unlawful seizure. See *United States v Leon*, 468 US 897, 906; 104 S Ct 3405; 82 L Ed 2d 677 (1984), and *People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999).

"The United States and the Michigan Constitutions both prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11." *People v Earl*, 297 Mich App 104, 107; 822 NW2d 271 (2012). Generally, warrantless searches are "'per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Id.*, quoting *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009). "The lawfulness of a search or seizure depends on its reasonableness[.]" and a warrantless search "is unreasonable unless there exist both probable cause and a circumstance

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

establishing an exception to the warrant requirement.” *People v Snider*, 239 Mich App 393, 406-407; 608 NW2d 502 (2000).

We disagree with defendant’s contention that Officer Kinal’s initial warrantless seizure of the package and presentation of the package to a drug-sniffing dog was improper. “A temporary detention of mail for investigative purposes is not an unreasonable seizure when authorities have a reasonable suspicion of criminal activity.” *United States v Lux*, 905 F2d 1379, 1382 (CA 10, 1990). See also *United States v Jacobsen*, 466 US 109, 121-122; 104 S Ct 1652; 80 L Ed 2d 85 (1984), and *United States v Van Leeuwen* 397 US 249; 90 S Ct 1029; 25 L Ed 2d 282 (1970). Here, Officer Kinal had already received information from an Arizona law enforcement official that the package had been opened pursuant to a search warrant and was found to contain marijuana, after which the package was resealed for delivery to the addressee. This information provided Officer Kinal with reasonable suspicion that the package contained illegal contraband, thus permitting its temporary detention for further investigation. The pre-warrant canine sniff did not constitute a search under the Fourth Amendment. *People v Jones*, 279 Mich App 86, 93; 755 NW2d 224 (2008). The dog’s positive response indicating the presence of a controlled substance provided probable cause that the package contained illegal drugs, following which a search warrant was obtained and the package was opened pursuant to that warrant. Thus, there was no Fourth Amendment violation. “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Accordingly, defense counsel was not ineffective for failing to challenge the validity of the seizure.

B. FAILURE TO ASSERT AN ENTRAPMENT DEFENSE

“Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). “A substantial defense is one that might have made a difference in the outcome of the trial.” *Id.* (citation and internal quotation marks omitted.). Entrapment is an affirmative defense which the defendant must prove by a preponderance of the evidence. *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002). “Entrapment occurs if (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances or (2) the police engage in conduct so reprehensible that the court cannot tolerate it.” *People v Fyda*, 288 Mich App 446, 456; 793 NW2d 712 (2010). “Reprehensible conduct alone, without police instigation, can constitute entrapment.” *Id.*

Here, defendant contends that he had a viable entrapment defense under the reprehensible conduct theory, but the only reprehensible conduct he identifies is Officer Kinal’s allegedly improper seizure and search of the package. As discussed in section II(A), *supra*, however, the record does not support defendant’s contention that the seizure was illegal. There is no indication that the officers did anything to induce defendant to receive the drugs unwillingly or unknowingly. Rather, defendant’s use of false names to receive delivery of the package and to rent an apartment, his acknowledgment that the package was his despite the discrepancy in the names, his attempt to track the package to determine when it would arrive, and his complaint about the delayed delivery show that defendant was expecting the package and knew what it contained. Because the record does not factually support an entrapment defense, defense counsel cannot be deemed ineffective for failing to raise that defense. *Ericksen*, 288 Mich App at 201.

C. FAILURE TO OBJECT TO THE ARIZONA OFFICER'S OUT-OF-COURT STATEMENTS

Defendant next argues that defense counsel was ineffective for failing to object to Officer Kinal's testimony regarding the information he received from the Arizona police detective. Defendant contends that the Arizona detective's statements were inadmissible hearsay and that the admission of the statements violated his rights under the Confrontation Clause of the United States and Michigan Constitutions. We disagree.

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Hearsay is not admissible except as provided by the rules of evidence. MRE 802; *McLaughlin*, 258 Mich App 651.

The Arizona detective's statements were not hearsay because they were not offered to prove the truth of the matters asserted. The purpose of the statements was to explain Officer Kinal's actions. "[A] statement offered to show why police officers acted as they did is not hearsay." *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). Further, because the statements were not offered for their truth, they were not barred by the Confrontation Clause. *Id.* Because any objection on these grounds would have been futile, defense counsel was not ineffective for failing to object. *Ericksen*, 288 Mich App at 201.

D. FAILURE TO OBJECT TO TESTIMONY THAT THE FIREARM WAS STOLEN

In response to a jury question asking whether the recovered firearm was registered, Officer Kinal testified that the firearm was determined to have been stolen during a home invasion. After this testimony, the trial court asked to see counsel at the bench, following which questioning continued on another subject. Defendant contends that this testimony may have led the jury to believe he was a "bad" man or given some inference of his character and counsel should have objected to the testimony. However, defense counsel reasonably may have decided not to object to the testimony as a matter of trial strategy.

An objection may have drawn attention to the matter and risked creating the impression that defense counsel was attempting to keep the jury from learning that defendant was somehow linked to the theft of the firearm. Where the officer's testimony was brief and did not suggest that defendant was involved in the home invasion, or provide any indication that defendant knew that the firearm was stolen, it was not unreasonable for counsel to refrain from objecting and to allow the questioning to continue on another subject. Trial counsel's decisions regarding which defense theories to pursue or not pursue are matters of trial strategy, which this Court will not second-guess or assess with the benefit of hindsight. *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999). Defendant has failed to overcome the presumption that defense counsel did not object as a matter of sound strategy.

E. FAILURE TO OBJECT TO TESTIMONY THAT DEFENDANT HAD A BUSINESS CARD FOR A PAROLE AGENT IN HIS WALLET

During questioning by the prosecutor, a police officer described the contents of defendant's wallet, which included a State of Michigan Department of Corrections parole agent

business card. There was no objection to this testimony. Defendant argues that he was prejudiced by this evidence because it permitted the jury to find him guilty because of his bad character. Although evidence that defendant was in contact with a parole agent revealed that defendant had a prior criminal record, defendant was charged with felon in possession of a firearm and the parties had already stipulated that defendant had a prior felony conviction that made him ineligible to possess a firearm. Therefore, defendant was not prejudiced by the brief reference to the parole agent business card and counsel's failure to object did not constitute ineffective assistance of counsel.

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises two additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence did not support his felony-firearm convictions because there was insufficient evidence to establish his possession of the firearm, particularly as it relates to his conviction for possession with intent to deliver marijuana. We review a challenge to the sufficiency of the evidence by reviewing the evidence de novo, viewing 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. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

“To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony.” *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis in the original). “[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.*, quoting *People v Hill*, 433 Mich 464, 471; 446 NW2d 140 (1989).

Viewed in a light most favorable to the prosecution, the evidence supported an inference that defendant possessed the marijuana when he ran through his apartment after the police entered, during which he ran past the couch in his living room and then threw the marijuana from his terrace onto the ground below. The firearm was discovered wedged between the cushions of the couch. This evidence was sufficient to prove that defendant constructively possessed the firearm at the time he possessed the marijuana in his apartment, at which time he was also ineligible to possess a firearm. Thus, the evidence was sufficient to support defendant's felony-firearm convictions.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for stipulating to the removal of a portion of the jury instructions from the package of written instructions that were provided to the jury during deliberations. The portion that was removed discussed the concept of possession. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to errors apparent from the record. *Mack*, 265 Mich App 122, 125.

Defendant complains that defense counsel's stipulation left the jury without a basis for properly considering the concept of possession, particularly the concept of constructive possession, which defendant contends was a critical issue in the case because he did not actually physically possess the gun at the time of his arrest. We disagree with defendant's contention that the stipulation left the jury without a basis for considering possession. The problem with the jury instructions was that the trial court verbally gave the jury two different sets of instructions regarding possession. The court struck only the second set, which apparently was never intended to be given to the jury in the first instance and was inadvertently included with the original instructions. The first set of instructions, which included an instruction addressing the concept of constructive possession, was not stricken, and those instructions were also included with the package of written instructions that were later provided to the jury. It was not objectively unreasonable for defense counsel to agree to the removal of a second set of instructions discussing possession where another set of instructions addressing that concept remained available to the jury.

Defendant points out that the omitted instructions included an instruction explaining that, to prove possession, the prosecution must prove that "the firearm or firearms were reasonably accessible to defendant during the time in which he committed the felony." The instructions that were provided to the jury did not specifically refer to the "reasonably accessible" requirement, but instead referred to "the right to control the substance and/or thing even though they are in a different room or place." The latter instruction is arguably inaccurate as applied to a felony-firearm charge. In *Burgenmeyer*, 461 Mich at 431, the Supreme Court reaffirmed that a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. But the Court further explained

that possession of a weapon is not the same thing as ownership of a weapon. Thus, a person does not violate [the felony-firearm statute] by committing a felony while merely owning a firearm. To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony. [*Id.* at 438 (emphasis in the original).]

The trial court's felony-firearm instruction properly informed the jury that, to be guilty of felony-firearm, defendant must have knowingly carried or possessed a firearm "at the time the defendant committed [the underlying] crimes." However, the "possession" instruction informing the jury that possession includes "the right to control the substance and/or thing even though they are in a different room or place" was arguably incorrect as applied to a felony-firearm charge because it conveyed that the jury could find defendant guilty of felony-firearm if, at the time he committed an underlying felony, he merely had the "right to control" a firearm located in a different room or place, even if the weapon was not reasonably accessible at the time he committed the felony. Nevertheless, defendant was not prejudiced by any deficiency in the instruction because the evidence did not create a factual issue concerning whether the firearm was reasonably accessible at the time defendant committed the other charged felonies. According to the testimony at trial, the gun was discovered wedged between two couch cushions. The testimony at trial indicated that when the police entered the apartment, defendant passed in front of the couch as he ran toward the balcony. An officer testified that defendant "ran right in front of the couch," one or two feet away, and close enough that he "could have just turned around and sat down on the couch." There was no evidence suggesting that the gun was found in

a different location or that defendant was not in the vicinity of the couch when he fled through the apartment. Because the jury was not presented with a factual issue concerning whether the firearm was reasonably accessible, there is no reasonable probability that the outcome of the trial would have been different if defense counsel had not agreed to the omission of the “reasonably accessible” instruction. Thus, defendant was not prejudiced by the removal of that instruction. Accordingly, defendant’s ineffective assistance of counsel claim cannot succeed.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause