

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MICHAEL HENDERSON,

Defendant-Appellant.

UNPUBLISHED

March 28, 1997

No. 189239

Genesee Circuit Court

LC No. 94-050964

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of conspiracy to deliver less than fifty grams of heroin, MCL 333.7401 (2)(a)(iv); MSA 14.15(7401)(2)(a)(iv); MCL 750.157(a); MSA 28.354(1), possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to five to twenty years on the conspiracy conviction, three to four years on the possession conviction, and a two-year mandatory term on the felony-firearm conviction. We affirm defendant's convictions but vacate defendant's sentence for the possession conviction and remand to the trial court for the imposition of a thirty-two-month minimum sentence for that conviction.

Defendant first argues that the trial court erred in failing to sua sponte give the jury a cautionary instruction on Demps' testimony as an accomplice. We disagree. A defendant is not entitled to a new trial if the instructions sufficiently protected the rights of the defendant and fairly presented to the jury the issues to be tried. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994); *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

The cautionary accomplice instruction, CJ2d 5.6, instructs the jury to examine an accomplice's testimony closely and with greater care and caution than the testimony of ordinary witnesses. *People v Russell*, 190 Mich App 722, 723; 476 NW2d 504 (1991), rev'd on other grounds 439 Mich 921; 479 NW2d 351 (1992), citing *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974). Although

no request was made for the instruction, the Supreme Court has noted that, if the issue is closely drawn, it may be error requiring reversal to fail to give cautionary accomplice instructions even in the absence of a request. *People v Reed*, 453 Mich 685; 556 NW2d 858 (1996); *Russell, supra*; *McCoy, supra*. This Court must determine whether the issue of defendant's participation was "closely drawn." A case is closely drawn and instructions should be given where there are no independent witnesses and the question comes down to whom to believe, the defendant or the accomplice, *Russell, supra*; *People v Jackson*, 97 Mich App 660, 666; 296 NW2d 135 (1980), and where the trial becomes a credibility battle between the accomplice and the defendant. *Russell, supra*; *People v Smith*, 158 Mich App 220, 229-230; 405 NW2d 156 (1987); *People v Fredericks*, 125 Mich App 114, 121-122; 335 NW2d 919 (1983).

We conclude that defendant's participation in the heroin trafficking was not closely drawn. Although Demps provided a majority of the testimony linking defendant to the sale of heroin, the trial was not a credibility battle between Demps and defendant. Winch testified that the twenty dollar bill used as "buy money" was found in one of the bundles located in the white plastic grocery type bag in Demps' bedroom. Defendant told Winch that he had \$1,600 in a plastic bag in the upstairs bedroom. Defendant called out to Neville and specifically told him that all of the money located in the bedroom was his. The testimony offered by Winch and Neville provide a substantial amount of circumstantial evidence of defendant's involvement in the heroin trafficking independent of Demps' testimony. Therefore, reversal is not warranted.

Even if we were to find that defendant was entitled to a cautionary instruction upon a timely request, we conclude that any potential error by the trial court was harmless beyond a reasonable doubt. The trial court instructed the jury on various factors to consider when evaluating the credibility of a witness, including the bias, prejudice, or personal interest of a witness, the existence of any promises, threats, suggestions, or other influences on a witness, and the potential existence of any special reason whether to tell the truth. The jury was cautioned to carefully weigh all of the witnesses' testimony.

Defendant next argues that insufficient evidence was presented to sustain his felony-firearm conviction. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, the Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979), cert den 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980).

A conviction under the felony-firearm statute requires proof that the defendant carried or possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; MSA 28.424(2); *People v Williams*, 212 Mich App 607, 608; 538 NW2d 89 (1995). Possession may be actual or constructive and may be proven by circumstantial evidence. *Williams, supra* at 609, citing *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him. *Id.* This Court has previously noted that, "The mere fact that a felon has a firearm at

his disposal, should he need it, creates a sufficient enough risk to others that it is within the state's power to punish its possession." *People v Elowe*, 85 Mich App 744, 748-749; 272 NW2d 596 (1978).

We hold that, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant had constructive possession of the firearm during the commission of a felony. Smith first observed defendant leaned over on the bed and turned at the waist. His right hand was near the floor, and he was raising it back up toward the bed. Defendant then sat up on the bed. After securing defendant, Demps, and the children, the officers searched the bedroom. Found there were various packages of heroin, bundles of money stored in different hiding places, and two guns armed with live ammunition. Smith searched the area where he saw defendant's hand come from underneath the bed and saw a semi-automatic handgun. The gun was underneath the pillow portion of the side of the bed under the bed where defendant was seated. The barrel of the gun was pointed towards the inside of the bed and was laying on its side. Defendant acknowledged to Winch that he might have handled the gun which was underneath the bed one time, just before the police came in on the night of the raid. Defendant stated that he picked up the gun and threw it farther underneath the bed to keep the kids in the house from gaining access to it. The above evidence suggests that defendant knew the location of the weapon and it was reasonably accessible to him up to the time of his arrest by Smith. Therefore, there was sufficient evidence to support defendant's felony-firearm conviction.

Defendant argues that his sentence of five to twenty years for the conspiracy to deliver less than fifty grams of heroin conviction was disproportionate. We disagree. Defendant's five-year minimum sentence was within the guidelines' minimum sentence range of eighteen to sixty months. Therefore, it is presumed proportionate absent unusual circumstances. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). At sentencing, defense counsel failed to raise any circumstances which could be considered unusual. Defendant has an extensive criminal history, including three prior felonies, and was recently on probation for a carrying a concealed weapon conviction. Furthermore, the facts presented in this case support the sentence imposed. Defendant was arrested in Demps' bedroom in the presence of Demps and her three children. Found in Demps' bedroom were numerous packets of heroin, large amounts of cash, and guns armed with live ammunition. Demps testified that she and defendant sold heroin to various people, and that defendant supplied her with the heroin to sell. Because defendant has failed to overcome the presumptive proportionality of his sentence, we conclude that the court did not abuse its sentencing discretion.

However, we conclude that defendant's sentence of three to four years on the possession of less than twenty-five grams of heroin conviction violated *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), which provides that a minimum sentence may not exceed two-thirds of the length of the maximum sentence. The appropriate remedy for a violation of the *Tanner* rule is to reduce the minimum sentence to two-thirds of the maximum sentence. *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994). The invalid sentence is to be set aside only in respect to the unlawful excess. *Id.*

Two-thirds of four years is thirty-two months, or 2.67 years. Therefore, in accordance with the long-standing practice of both this Court and the Supreme Court in dealing with *Tanner* cases, we vacate that part of defendant's sentence for the possession of less than twenty-five grams of heroin conviction and remand to the trial court for imposition of a thirty-two-month minimum term of imprisonment for this offense. *People v Vansickle*, 450 Mich 854; 538 NW2d 684 (1995).

Defendant's convictions are affirmed. Defendant's sentence for possession of less than twenty-five grams of heroin is vacated, and remanded to the trial court. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Barbara B. MacKenzie

/s/ Clifford W. Taylor