STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY C. SIMMONS,

Defendant-Appellant.

UNPUBLISHED
October 7, 1997

No. 193658
Oakland Circuit Court
LC No. 95-141239-FH

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and MCL 750.157a; MSA 28.354(1), delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403) (2)(a)(v). Defendant was also convicted, following a separate trial, of being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). He was sentenced to two to twenty years' imprisonment for the conspiracy conviction, two to twenty years' imprisonment for the delivery conviction, one to four years' imprisonment for the possession conviction, and one to five years' imprisonment for the felon-in-possession conviction. The trial court subsequently found that defendant was a habitual offender, second offense, MCL 769.10; MSA 28.1082. As a result, his initial sentences were vacated and he was sentenced to two to thirty years' imprisonment, two to thirty years' imprisonment, one to six years' imprisonment, and one to seven years' imprisonment, respectively, to run consecutively. Defendant appeals as of right. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

This case arises from defendant selling slightly less than two grams of cocaine to a member of the Oakland County Narcotics Enforcement Team (NET). Two days prior to the sale, an undercover police officer approached codefendant Cheryl Quibell,[1] a bartender at Boney Maroney's in Keego Harbor, about purchasing three grams of cocaine. Quibell and the officer agreed on a price of $50 per gram. She told the officer to come back later in the week. When the officer returned, Quibell told him that her boyfriend would be there shortly with the drugs. When defendant arrived, he told the officer

that he would go get the three grams of cocaine and return to the bar. After waiting for some time, the officer gave Quibell $150 and said that he would return for the cocaine. When the officer returned, Quibell gave him directions to a house in Pontiac. She returned the $150 to the officer and asked him to deliver a small amount of marijuana to defendant.

When the officer arrived at the Pontiac address, he gave defendant the marijuana and the money. In return, defendant gave the officer a package containing approximately 1.7 grams of cocaine, claiming that he was only able to get two grams with the money. The officer left with the cocaine. NET officers ultimately arrested defendant and found the $150 and the marijuana in defendant's pocket. A subsequent search of the home disclosed a rock of crack cocaine, 1.3 grams of powder cocaine, and a loaded shotgun. Defendant claimed that the cocaine and the shotgun found in the house belonged to Quibell. Quibell testified that she kept the shotgun for protection, and asserted her rights under the Fifth Amendment when asked if the cocaine was hers.

Defendant first argues on appeal that he is entitled to resentencing because the trial court incorrectly imposed consecutive sentences for his convictions for conspiracy and possession of less than 25 grams of cocaine. We review this issue de novo as a question of law. *People v Cannon*, 206 Mich App 653, 655; 522 NW2d 716 (1994).

A consecutive sentence may not be imposed unless specifically authorized by statute. *People v Hunter*, 202 Mich App 23, 25; 507 NW2d 768 (1993). MCL 333.7401(3); MSA 14.15(3) provides:

> A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. An individual subject to a mandatory term of imprisonment under subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall not be eligible for probation, suspension of that sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life, and shall not receive a reduction in that mandatory term of imprisonment by disciplinary credits or any other type of sentence credit reduction. [footnote omitted.]

The Michigan Supreme Court has specifically held that conspiracy offenses are included in this consecutive sentencing provision. *People v Denio*, 454 Mich 691, 694-695, 700-705; 564 NW2d 13 (1997).

In this case, defendant's conspiracy and delivery convictions clearly were subject to consecutive sentencing. The trial court, however, erred in concluding that defendant's possession conviction was also subject to consecutive sentencing. MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v) simply is not one of the enumerated offenses subject to consecutive sentencing. *Hunter*, *supra*. In addition, there is no mandate that the felon-in-possession sentence be consecutive to the drug-related sentences. We therefore vacate the judgment of sentence and remand for resentencing. *People v Thomas*, 223 Mich App 9; 566 NW2d 13 (1997).

Defendant next raises several challenges to the validity of his felon-in-possession conviction. He first claims that this conviction was improper because his prior conviction was for an attempted felonious assault, which is a misdemeanor. The felon-in-possession statute does apply only to "a person convicted of a felony." MCL 750.224f(1); MSA 28.421(6)(1). Defendant, however, fails to recognize that the term "felony" is specifically defined in the statute:

> As used in this section, "felony" means *a violation of a law of this state,* or of another state, or of the United States *that is punishable by imprisonment for 4 years or more,* or *an attempt to violate such a law*. [MCL 750.224f(5); MSA 28.421(6)(5). Emphasis added.]

Defendant was convicted of attempted felonious assault, MCL 750.82; MSA 28.277, which is punishable by imprisonment for up to 4 years. Accordingly, he was guilty of "an attempt to violate" a law "punishable by imprisonment for 4 years or more." We find no error.

Defendant further claims that there was insufficient evidence that he possessed the weapon. When reviewing a sufficiency of the evidence claim, this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466, 502 NW2d 177 (1993).

We agree with defendant that MCL 750.224f; MSA 28.421(6) does not define the term "possession." However, when a statute fails to define an operative term, the term is defined in accordance with the Legislature's intent. *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994). The felon-in-possession statute "is aimed at protecting the public from guns in the hands of convicted felons." *People v Mayfield*, 221 Mich App 656, 662; 562 NW2d 272 (1997). Based on the aim of the statute, we conclude that the word "possession" necessarily includes constructive possession. See *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). A defendant may have constructive possession of a firearm if the location of the weapon is known to the defendant, it is reasonably accessible to the defendant, and there is an element of control. *Id.*, 470-471.

In this case, the trial court instructed the jury that "[d]efendant possessed the gun only if he had control of it or the right to control it either alone or together with someone else regarding control." Here, defendant essentially admitted that he knew where the gun was located. He also admitted that he had access to the gun. These admissions, combined with the evidence that defendant lived in the house and had access to the gun over an extended period of time, when viewed in the light most favorable to the prosecution, constitute sufficient evidence from which a rational juror could infer both knowledge and control beyond a reasonable doubt.

Defendant further claims that the felon-in-possession statute violates his constitutional right to bear arms, contrary to the Michigan Constitution, Const 1963, art l, § 6.[2] This Court recently addressed this issue in *People v Swint*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 191572;

192493, issued 9/12/97), slip op pp 2-10. After a lengthy discussion, this Court concluded that there is no absolute constitutional right of an individual to possess a firearm. *Id.*, slip op p 9. Rather, the *Swint* Court found that MCL 750.224f; MSA 28.421(6), which has for its purpose protecting the public from guns in the hands of convicted felons, is a reasonable exercise of the state's police power to protect the health, safety and welfare of its citizens. *Id.* We therefore conclude that the felon-in-possession statute, MCL 750.224f; MSA 28.421(6), is constitutional as a reasonable exercise of the police power of the state. *Id.*, slip op p 10.

Defendant also claims that because the felon-in-possession statute, MCL 750.224f; MSA 28.421(6), which became effective October 13, 1992, was not in effect at the time of his original March 1992, conviction, the law violates the Ex Post Facto Clauses of the United States and Michigan Constitutions. We disagree.

"A statute that affects the prosecution or disposition of criminal cases involving crimes committed before the effective date of the statute violates the Ex Post Facto Clauses if it increases the punishment for the crime." *People v Tice*, 220 Mich App 47, 50; 558 NW2d 245 (1996). The *Tice* Court recently ruled that the application of MCL 750.224f; MSA 28.421(6) to a person who is a convicted felon as a result of a conviction of a felony committed before the date that statute took effect does not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions. *Id.*, 51. The Court explained that the felon-in-possession statute does not punish the initial felony, but the subsequent possession of a firearm. *Id.* Because defendant was being punished for conduct which occurred after the effective date of the felon-in-possession statute, it is not an ex post facto law as applied to defendant. Defendant's conviction for being a felon-in-possession is valid.

Defendant also argues that the prosecutor injected improper, prejudicial non-record evidence into the proceedings when he questioned defendant about the habits of drug dealers. The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). We have reviewed defendant's claims of misconduct and conclude that the prosecutor's allegedly improper questions did not deny defendant a fair and improper trial.

Defendant also argues that the trial court abused its discretion by permitting the prosecutor to introduce an officer's testimony as impeachment on a collateral matter. The prosecutor called an officer as a rebuttal witness, who testified that after he read defendant his *Miranda*[3] rights, defendant said that he was involved in the transport and sale of multiple kilos of cocaine. This statement conflicted with defendant's testimony at trial.

We will not disturb an admission of rebuttal evidence is absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). Generally, a witness may not be contradicted regarding collateral matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). However, after a matter has been placed at issue by the defense, it is no longer collateral. *People v Sutherland*, 149 Mich App 161, 166; 385 NW2d 637 (1985).

The record reveals that defendant admitted during direct examination that he sold cocaine to the undercover officer. During further questioning regarding the sale, defendant volunteered that "it's not normal practice for me to, you know, do something like that." On cross-examination, defendant again indicated that selling cocaine was not his "normal practice." Under these circumstances, this issue was no longer collateral. The prosecutor was properly allowed to introduce rebuttal testimony on this point. *Id.*

We also reject defendant's related claim that the prosecutor baited defendant into denying that he ever sold cocaine so that the prosecutor could introduce the rebuttal testimony. We are convinced that the prosecutor's questions did not raise a new issue, but simply "served as the basis for a thorough and proper exploration regarding the veracity of defendant's prior testimony." *Figgures, supra* at 401. We find no error.

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ Joel P. Hoekstra

[1] Quibell pleaded guilty to charges stemming from this incident, and was not tried with defendant.

[2] "Every person has a right to keep and bear arms for the defense of himself and the state." Const 1963, art 1, § 6.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).