

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WALLACE,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 197705

Muskegon Circuit Court

LC No. 96-139288 FH

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial judge sentenced defendant to three to twenty years of imprisonment for the possession with intent to deliver conviction and two years of imprisonment for the felony-firearm conviction. Defendant appeals as of right from his conviction and sentence. We affirm.

On April 4, 1996, a confidential informant purchased crack cocaine in a drug house located at 2209 Sanford Street in Muskegon Heights. Based on this purchase, the police obtained a search warrant for that house. On April 5, 1996, before the warrant was executed, another confidential informant purchased crack cocaine at the house to ensure that drugs were still inside the house. The warrant was subsequently executed. Inside the house, defendant and another person were arrested. The police found, among other things, three guns, two in a bedroom and one on the living room floor, seventeen rocks of crack cocaine, razor blades, and a programmable radio scanner. Additionally, the house was sparsely furnished, which, according to the testimony, indicates that the house is used to sell drugs.

Defendant first argues that there was insufficient evidence to support his felony-firearm conviction. We disagree. When reviewing a sufficiency of the evidence claim, this Court must consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution has proven the essential elements of the charged crime beyond a

reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). In order to establish the crime of felony-firearm, the prosecution must prove that defendant carried or possessed a firearm during the commission or attempted commission of a felony. *People v Williams*, 212 Mich App 607, 608; 538 NW2d 89 (1995). Accordingly, “defendant may attack the sufficiency of the evidence with respect to two elements: possession and time. . . . Possession may be actual or constructive and may be proved by circumstantial evidence.” *Id.*, 609. Constructive possession is established if the location of the firearm is known to defendant and if it is reasonably accessible to him. *Id.*

We find that there was evidence presented from which a reasonable juror could infer that defendant knew of the gun’s existence and that it was reasonably accessible to him, which establishes that defendant constructively possessed the shotgun during the commission of the felony. Defendant admitted that he saw the shotgun on the living room floor, even though he stated that he did not own or handle it. Further, although the shotgun was found on the living room floor and defendant was found in a bedroom, defendant admitted that he was in the living room before the police arrived. Clearly, the gun was accessible to him. In *People v Wolfe*, 440 Mich 508, 527; 489 NW2d 89 (1992), the court ruled that a defendant’s *presence alone* is insufficient proof of possession of a firearm during the commission of a felony. However, where, as here, the evidence shows that defendant knew the location of the firearm and that the firearm was reasonably accessible to him during the commission of a felony, constructive possession is established for purposes of the felony-firearm statute. *Williams, supra* at 609. This is not a case in which defendant’s presence was the only evidence linking him to the firearm.

Defendant next argues that the trial court erroneously admitted drug profile evidence. We disagree. Because defendant failed to object below to the admission of this evidence, this Court will review the issue only for manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Although drug profile evidence is not admissible as substantive evidence of guilt, testimony explaining the significance of seized contraband or other items of personal property is admissible. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). Here, the testimony with which defendant takes issue was merely an explanation regarding the significance of the condition of the house and the items that were seized within. Contrary to defendant’s contentions, it was not drug profile evidence.

Defendant also argues that the trial court erred by admitting evidence regarding the purchase of crack cocaine by the confidential informants. We disagree. Although defendant argued at trial that admission of this evidence violated his right to confront the witnesses against him, he did not argue that the evidence was not admissible under MRE 404(b). An appeal based on one ground is not preserved where the objection at trial was on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Defendant also argues that his sentence is disproportionate. We disagree. This Court’s review of a sentencing decision is limited to whether a particular sentence represents an abuse of discretion. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). Defendant was sentenced to three to twenty years’ imprisonment for the possession with intent to deliver cocaine conviction. The

recommended sentence guideline range was twelve to thirty months. Therefore, defendant's three-year minimum sentence is a six-month upward departure from the recommended range.

A sentence imposed must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Departures from the guidelines ranges are permitted, but are suspect and subject to careful scrutiny on appeal. *Id.*, 656-657. The sentencing court may deviate from the guidelines "where the guidelines do not adequately account for important factors legitimately considered at sentencing." MCR 6.425 (D)(1); *Milbourn, supra*. Our Supreme Court has held that "when the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to a willful, material, and flagrant perjury, and that such misstatements have a logical bearing on the prospect's for rehabilitation, the trial court may consider these circumstances in imposing sentence." *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988); See also *People v Houston*, 448 Mich 312, 324; 532 NW2d 508 (1995). We find, like the trial court, that defendant's perjured testimony regarding how he acquired the money used by the confidential informant to purchase crack cocaine at 2209 Sanford Street warrants a six-month upward departure from the recommended sentence guideline range.

Affirmed.

/s/ David H. Sawyer

/s/ William B. Murphy