

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GIFFORD OWENS,

Defendant-Appellant.

UNPUBLISHED

April 9, 1999

No. 203725

Jackson Circuit Court

LC No. 97-78923-FH

Before: Markman, P.J., and Hoekstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Immediately after conviction, the trial court sentenced defendant on count three, possession with intent to deliver marijuana, a misdemeanor, to 120 days in the county jail. One month later, the trial court sentenced defendant, a third habitual offender, to two years' imprisonment on the felony-firearm conviction, fifteen to forty years on the conviction for delivery of less than fifty grams of cocaine, and fifteen to forty years' imprisonment on the conviction for possession with intent to deliver less than fifty grams of cocaine. Each of these sentences are to run consecutively to one another. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction for possession of a firearm during the commission of a felony. We disagree. In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, modified 441 Mich 1201 (1992).

A conviction of felony-firearm requires proof that a 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). Possession may be actual or constructive and may be proved by

circumstantial evidence. *Id.* at 609. 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.* Based upon our review of the record, we conclude that sufficient evidence was presented to support defendant's felony-firearm conviction.

Defendant's conviction arose out of the use of a confidential police informant to execute a "controlled buy" of crack cocaine from defendant. The informant entered a home located at 1112 Cooper and went into a small bedroom where the controlled buy transpired. Immediately prior to the controlled buy, the informant saw defendant sleeping in the bedroom. She watched as another woman in the home, Kathy Slavin, woke defendant and handed him a bag of crack cocaine kept either under the bed or near it. Defendant took a quantity of crack from the bag, handed it to Slavin who then gave it to the informant. Another witness testified that defendant was still asleep in this bedroom several hours later. At the time of the police raid, defendant attempted to flee the house wearing only a pair of red boxer shorts and a shirt. Later, during a search of the home pursuant to a warrant, police found, among other things, a shotgun and a handgun. Both were found in the bedroom where the controlled buy occurred. The handgun was in a dresser drawer and the shotgun was in a box in the corner of the bedroom. An Ameritech telephone bill was also discovered which revealed that the telephone for the home was listed in defendant's name.

Because the firearms were in the same room with defendant at the time of the controlled buy, and the room was small, the jury could reasonably infer that the weapons were readily accessible to defendant. Further, the evidence was sufficient for the jury to conclude that defendant had knowledge of the location of the weapons. The shotgun was in the corner of the room in a box. With respect to the handgun in the drawer, there was enough circumstantial evidence that defendant had control over the bedroom that the jury could infer that defendant had knowledge of its contents. The closet and dresser contained men's clothing. Defendant had clearly made himself at home in the bedroom as well as the house as he was sleeping in the room and had been dressed that day in mid January only in red silk boxer shorts. Further, the criminal enterprise was operated out of the bedroom. Finally, the telephone in the home was in defendant's name. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to conclude that defendant had constructive possession of the firearms during the commission of the felony.

Next, defendant argues that the trial court erred when it sentenced defendant on the misdemeanor conviction without the benefit of a presentencing report and without trial counsel being afforded the right of allocution on defendant's behalf. We disagree. First, defendant's claim that he was denied allocution is unsupported by the record. Secondly, preparation of a presentence report prior to sentencing in a misdemeanor case, where the maximum sentence does not exceed one year, is within the discretion of the court. *People v Shackelford*, 146 Mich App 330, 335; 379 NW2d 487 (1985); MCL 771.14(1); MSA 28.1144(1). Under the facts of this case, we find no abuse of that discretion. Defendant did not request the preparation of a presentencing report. Both he and his attorney were offered the opportunity for allocution at which time defendant requested the court's mercy. In addition, the trial court had before it evidence of defendant's prior record. Indeed, the court questioned defendant to confirm the accuracy of the information. Under these circumstances, the trial

did not abuse its discretion when it proceeded to sentencing on the misdemeanor conviction without securing a presentence report.

Next, defendant argues that there was insufficient evidence to support his conviction for possession with intent to deliver less than fifty grams of cocaine. We disagree.

In order to sustain a conviction for possession with intent to deliver less than fifty grams of cocaine, the prosecution must prove four elements:

(1) the substance in question must be shown to be cocaine; (2) the cocaine must be in a mixture of less than fifty grams weight; (3) it must be shown that defendant was not authorized to possess the substance; and (4) it must be shown that the defendant knowingly possessed the cocaine with intent to deliver. [*People v Lewis*, 178 Mich App 464, 468; 444 NW2d 194 (1989).]

The only element contested in this appeal is the fourth element - that defendant knowingly possessed cocaine with the intent to deliver. Our Supreme Court in *Wolfe, supra* at 519, stated that “this element, knowing possession with intent to deliver, has two components, (1) possession and (2) intent.” Defendant argues that there was no evidence that he actually possessed the cocaine. We disagree.

The confidential informant testified that during the controlled buy, Slavin handed defendant a bag of cocaine from which he distributed a quantity to Slavin. Slavin then passed the cocaine on to the informant and two other female buyers in the room. Defendant clearly had possession and control over the contraband at that point. Further, Officer Markiewicz testified that when he chased defendant during the raid he saw defendant go to the northeast corner of the porch and throw something down. Similarly, Officer Kennedy testified that there was something in defendant’s hand at the time he hit the porch door, while trying to flee the scene. Kennedy reported that defendant went to the northeast corner of the porch. Later, in the northeast corner of the porch, officers found the drugs that supported the possession charge and a wallet which contained the “impress funds” and two checks made payable to defendant. Unlike other things on the porch which were frosted over due to the below-zero temperatures, the drugs and the wallet were warm to the touch. When defendant states that there is no direct evidence to support a finding of actual possession, defendant ignores the well settled rule that circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of a crime. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). From the officers’ testimony, a reasonable factfinder could conclude, beyond a reasonable doubt, that defendant actually possessed the drugs that formed the basis for his conviction.

Although defendant does not seriously contest the intent to deliver component of the offense, we conclude that sufficient evidence was presented on this element as well. In addition to the evidence that defendant had actually delivered cocaine earlier to the confidential informant and two others, we note that the cocaine found on the porch was packaged in small plastic baggies within a larger bag. From this, the jury could conclude that the cocaine was packaged for resale. Because sufficient evidence was presented, we affirm defendant’s conviction for possession with intent to deliver less than fifty grams of cocaine.

Defendant also contests the sufficiency of the evidence supporting his conviction for delivery to the confidential informant of less than fifty grams of cocaine. We have reviewed this issue and find it to be wholly without merit. The testimony of the confidential informant was, in itself, sufficient to support the conviction and to the extent that defendant attacks the informant's credibility, it is the function of the jury and not the reviewing court to judge the credibility of the witnesses. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

Next, defendant contends that he was denied the effective assistance of counsel. Defendant failed to move for a *Ginther*¹ hearing. Therefore, this Court's review is limited to mistakes apparent on the record. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must be prejudicial to the defendant. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant contends that his counsel was ineffective for failing to call on his behalf Slavin, the woman that passed defendant's drugs on to the confidential informant. Decisions as to what witnesses to call are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Barnett* 163 Mich App 331, 338; 414 NW2d 378 (1987). In any event, based upon the existing record, it would appear that trial counsel's decision to forego calling Slavin was sound. Prior to trial, defense counsel indicated that although he had subpoenaed Slavin, he did not intend to call her because, based upon a supplemental police interview taken at the time the subpoena was served, her testimony would have been detrimental to defendant. Moreover, defendant has not presented any evidence to establish that Slavin would have testified favorably at trial. In other words, defendant has failed to show that this witness's testimony would have affected the outcome of the trial, therefore, he has failed to meet his burden of establishing ineffective assistance of counsel.

Defendant also contends that his counsel was ineffective because he stipulated to striking Officers Albreck, Thomlin, Black and LaPort from the witness list. Once again, decisions with respect to who will be called at the time of trial are presumed to be matters of trial strategy. *Mitchell, supra* at 163. Additionally, defendant has failed to present any evidence with respect to how the testimony of these witnesses would have altered the results of the proceedings. Therefore, we cannot conclude that defendant was prejudiced by his counsel's actions.

Next, defendant contends that his counsel should have objected to the admission of several items recovered during the raid: the Ameritech bill, shotgun, handgun, marijuana and scales. Because defendant has not advanced any legitimate basis for excluding these pieces of evidence, we find no deficiency in trial counsel's representation. Trial counsel is not required to raise a meritless motion. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Finally, defendant contends that his trial counsel failed to effectively cross examine several police witnesses to illustrate inconsistencies between the witnesses' trial and preliminary examination testimony. Because the trial and preliminary examination testimony of these witnesses were substantially similar, we find no merit in defendant's claim.

For his next claim of error, defendant contends that he was denied the opportunity to cross examine the confidential informant regarding her history of drug addiction and prostitution and as a result, he was precluded from effectively challenging her credibility. Because the record does not support defendant's position, we find no merit in this argument. During the prosecution's direct examination, the informant was asked why she participated in the controlled buy. In response, the informant stated: "It's a long story." At that point, the court encouraged the witness to "try to boil it down here in about ten seconds." The witness then explained:

Well, me and my daughter went through a rape thing with a dealer and he was found not guilty, and I can't see them selling it to young kids.

After this response was given, the trial court instructed the prosecutor to ask the next question. During cross examination, defense counsel questioned the informant regarding the compensation she received for participating in the controlled buy, however, he did not inquire into her history of drug addiction or prostitution. Therefore, there was never an occasion for the court to restrict the scope of the examination of the informant. The record simply does not support defendant's contention that he was precluded from attacking the informant's credibility.

We decline to address defendant's argument that the informant's receipt of fifty dollars constituted an illegal bribe to give perjured testimony. This issue was not preserved for appeal because it was not set forth in defendant's statement of the questions involved. MCR 7.212(C)(5); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).

Lastly, defendant contends that his two sentences of fifteen to forty years, which run consecutively to one another, are disproportionate. We disagree.

A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich. 630, 636, 461 N.W.2d 1 (1990). A trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. *People v Hansford (After Remand)*, 454 Mich 320, 326, 562 NW2d 2d 460 (1997).

Defendant's argument that the consecutive nature of his sentence makes these sentences disproportionate is without merit. In evaluating the proportionality of consecutive sentences, each is to be considered separately for proportionality to the individual offense and the offender without consideration of the consecutive nature of the sentences. *People v Hill*, 221 Mich App 391, 397; 561

NW2d 862 (1997). Applying this principle to defendant's sentences, we find no abuse of discretion. Defendant has an extensive criminal record and a drug problem that has defied treatment. The sentences imposed on defendant, a third habitual offender, were appropriate.

Affirmed.

/s/ Stephen J. Markman

/s/ Joel P. Hoekstra

/s/ Brian K. Zahra

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1972).