

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PETE CANNON, SR.,

Defendant-Appellant.

UNPUBLISHED

October 1, 2002

No. 232529

Saginaw Circuit Court

LC No. 99-017633-FH

Before: Markey, P.J., and Cavanagh and R. P. Griffin*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), conspiracy to possess with intent to deliver less than fifty grams of cocaine, MCL 750.157a, maintaining a drug house, MCL 333.7405(1)(d), felony-firearm, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced to 2½ to 20 years' imprisonment for the conspiracy count and each of the two cocaine counts, 2 years' imprisonment for the felony-firearm conviction, 16 to 48 months' imprisonment for maintaining a drug house, and 15 to 24 months' imprisonment for possession of marijuana. Defendant appeals his convictions as of right. We affirm in part, vacate in part, and remand for correction of defendant's judgment of sentence.

Defendant's convictions resulted from two raids by police officers: one at a house on North Fifth Street and one at a house on Boxwood, both in Saginaw. The North Fifth house was raided after a controlled buy occurred there. The police found suspected cocaine and related paraphernalia in one room, three people in another room, a fourth person in one bedroom, and defendant in another bedroom. Defendant had in his pockets a Veterans Administration card with his name and the Boxwood address on it, a pager, and a Consumers Energy bill for the North Fifth house in the name of Dameka Woods, defendant's daughter, the owner of the house. She testified that the house was supposed to be vacant. The police then raided the Boxwood property, and there found a jar of cocaine in the garage, and a handgun, a rifle, a shotgun, nearly \$3,000 in cash, and suspected marijuana in a bedroom of the house. Also found at that house were a tax bill for the North Fifth house addressed to Dameka Woods, a Consumer's Energy bill for the North Fifth house addressed to Pete Woods, a cable television bill addressed to defendant at the Boxwood house, and a photograph of defendant and his girlfriend, Janice Coleman. The

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

only person found there was Coleman, who said she was there to use the laundry facilities. Only defendant and one other person at the North Fifth house were arrested and charged.

Defendant first argues there was insufficient evidence to support his convictions. A challenge to the sufficiency of the evidence is reviewed by viewing the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

The elements of unlawful possession with intent to deliver less than fifty grams of a controlled substance, MCL 333.7401(2)(a)(iv), are: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, mod on other grounds 441 Mich 1201 (1992). Possession requires control over the substance; mere knowledge of it is not enough. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); *People v Harrington*, 396 Mich 33, 43-44; 238 NW2d 20 (1976). However, actual physical possession is unnecessary; constructive possession will suffice when there is a sufficient nexus between the defendant and the contraband. *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002); *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). In general, “a person has constructive possession if there is proximity to the article together with indicia of control.” *Burgenmeyer, supra*. Various factors may be sufficient to establish this connection; constructive possession may be shown where the defendant has the power to dispose of the drug or the ability to produce the drug, where the defendant has the exclusive control or dominion over property on which contraband narcotics are found, or where the defendant participates in a joint venture to possess a controlled substance. *Wolfe, supra* at 520-521, quoting *United States v Disla*, 805 F2d 1340 (CA 9, 1986). Circumstantial evidence and reasonable inferences drawn from it can be sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Taken in its entirety, the evidence could have allowed the jury rationally to conclude that defendant was sufficiently in possession and control of the North Fifth house on March 24, 1999, to actually or constructively possess the cocaine found there. *Konrad, supra* at 271; *Fetterley, supra* at 515. A co-defendant testified that the house belonged to defendant and that he gave her cocaine to sell; her testimony alone, if believed, was sufficient to allow the jury to find that defendant possessed and intended to sell the cocaine. *People v Taylor*, 18 Mich App 381, 384-385; 171 NW2d 219 (1969). Although defendant presents reasons why the co-defendant’s testimony should be disregarded, that addresses credibility and is not for this Court, nor the trial judge, to weigh. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Furthermore, defendant’s daughter, who owned the house, testified that she called him and asked him to go to the North Fifth house and get the people there to leave; if believed, her testimony provided grounds for the jury to conclude that defendant was the only one in control of the premises. Evidence regarding the weight and identity of the cocaine was provided by a police expert who testified that the substance seized at the North Fifth house was cocaine and weighed less than fifty grams. Therefore, the jury’s conclusion regarding this count of possession with intent to deliver a controlled substance was adequately supported by evidence. *Wolfe, supra* at 515.

With regard to conspiracy to violate MCL 333.7401(2)(a)(iv), the elements are that (1) defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirator possessed the specific intent to deliver the statutory minimum as charged, and (3) defendant and his coconspirator possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). The co-defendant's testimony that defendant had supplied her with crack cocaine to sell by bringing it to her at the North Fifth house almost daily for several months, combined with the proof of possession with intent to deliver, was sufficient to enable the jury to find defendant guilty of this offense. *Taylor, supra* at 384-385.

However, the evidence produced to show that defendant possessed the cocaine found in the garage of the Boxwood house is insufficient to prove defendant's guilt, even when taken in the light most favorable to the prosecutor. We "must consider not whether there was *any* evidence to support the conviction but whether there was *sufficient* evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *Wolfe, supra* at 513-514, quoting *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979), cert den 449 US 885 (1980) (emphasis added). There must be indicia of *control* to establish the nexus between the defendant and the contraband required to prove constructive possession. *Wolfe, supra* at 520; *Burgenmeyer, supra* at 438.

In this case, the only proof presented by the prosecutor showed that defendant had a two-year-old Veterans Administration card bearing the Boxwood address, that cable television for the house was in defendant's name, that there was a photograph of defendant and Coleman at the house, and that the house contained a utility bill for the North Fifth house in the name of "Pete Woods." Coleman, the defendant's girlfriend, testified that she and defendant had lived at the Boxwood address but both had moved out two years earlier. The handgun was tested for fingerprints, but none were found; none of the other physical evidence was tested for fingerprints. In short, there is no evidence showing that defendant owned, rented, lived at, or otherwise exercised control over the Boxwood house at the time of the raid. A defendant's presence alone is insufficient to prove constructive possession, and in this case, the defendant was not present at the house when the cocaine was found, and the person present, Coleman, was not charged. *Id.* Finding the evidence of possession insufficient with respect to cocaine found in the Boxwood garage, we vacate defendant's conviction for one count of possession with intent to deliver less than fifty grams of cocaine.

To be guilty of felony-firearm, MCL 750.227b, a defendant must carry or possess a firearm while committing or attempting to commit a felony. *Burgenmeyer, supra* at 438. A person does not violate MCL 750.227b by committing a felony while merely owning a firearm. *Id.* When the underlying felony is possession of a controlled substance, the element of possession may be satisfied by constructive possession if the firearm is found "close enough" to the drugs to allow a factfinder to infer that the defendant "possessed both at the same time." *Id.* at 438, 440. In *Burgenmeyer*, the defendant constructively possessed both the weapon and the drugs at the same time because the drugs were found in a dresser drawer and the guns were on top of the dresser. *Id.*, 440. In the present case, however, the cocaine found at the Boxwood address was discovered in a detached garage, and the firearms were found in the house. Because the firearms and the cocaine were in separate structures on the Boxwood property, they do not satisfy the *Burgenmeyer* "close enough" test, even if it could be said that defendant possessed the

cocaine at that address. Therefore, we vacate defendant's conviction for felony-firearm because the evidence, even when viewed in the light most favorable to the prosecution, was insufficient to allow a rational factfinder to conclude defendant possessed both the firearms and the cocaine at the same time. *Reid, supra* at 466; *Burgenmeyer, supra* at 438, 440.

With regard to possession of marijuana, MCL 333.7402(2)(d), the elements are knowledge that the substance was marijuana and either "dominion and control" over the marijuana (i.e., "power and intention to exercise dominion or control over [it] either directly or through another person"), or proximity to the marijuana and control over it. *Burgenmeyer, supra* at 439 n 12. The evidence that was insufficient to support defendant's constructive possession of the cocaine in the Boxwood house also precludes an inference he constructively possessed the marijuana found therein, and we likewise vacate this conviction.

Defendant next argues that rebuttal testimony was improperly admitted. A trial court's decision to admit rebuttal evidence is reviewed for clear abuse of discretion. *People v Figures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The purpose of rebuttal evidence is to directly refute evidence or a theory introduced by the opponent. *Id.* at 399. Rebuttal evidence must relate to a substantive, rather than a collateral matter, and contradictory rebuttal evidence must directly disprove specific testimony. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). Facts revealing a witness' bias or prejudice are not collateral. *People v Rosen*, 136 Mich App 745, 758-759; 358 NW2d 584 (1984).

Defendant called as a witness an admitted crack cocaine user who was present when defendant was arrested. Her testimony was that she had not seen defendant with any drugs and had never seen defendant give drugs to his co-defendant. The prosecution then called a detective who testified on rebuttal (1) that defendant's witness had told him she had seen defendant with crack cocaine on multiple occasions, (2) that she had seen him cutting the drug at the North Fifth house on the night of his arrest, (3) that the co-defendant had obtained her crack cocaine from defendant, and (4) that she had "taken a case," or accepted blame, in the past for something defendant had done. The first three items in the detective's testimony were proper rebuttal testimony because they directly contradicted the testimony of defendant's witness regarding defendant's possession of cocaine. *Vasher, supra* at 504. The last item was also proper rebuttal because it addressed the witness' potential bias in favor of defendant. *Rosen, supra* at 758-759. Therefore, the trial court did not clearly abuse its discretion in admitting the challenged testimony. *Figures, supra* at 399.

Defendant's appeal does not substantively contest his conviction for maintaining a drug house, MCL 333.7405(1)(d). A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Furthermore, a review of the record finds no error on this issue. A defendant convicted of this crime must have exercised authority or control over the property for purposes of making it available for keeping or selling proscribed drugs, and to do so continuously for an appreciable period. *Griffin, supra* at 32. A person may be deemed to keep and maintain a drug house if that person has the ability to exercise control or management over the house. *People v Bartlett*, 231 Mich App 139, 152; 585 NW2d 341 (1998). In this case, there was evidence that defendant exercised control over the North Fifth house. The co-defendant's testimony that defendant had used that house to provide her with drugs to sell over a period of several months provides sufficient support for his conviction. *Taylor, supra* at 384-385.

We affirm defendant's three convictions related to the North Fifth house and vacate the convictions related to the Boxwood house.

Affirmed in part, vacated in part and remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin