

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAWN RENEE FISHER,

Defendant-Appellant.

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UNPUBLISHED

February 1, 2007

No. 262961

Tuscola Circuit Court

LC No. 03-008959-FH

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from her jury convictions of maintaining a drug house, MCL 333.7405(1)(d); possession of marijuana, MCL 333.7403(2)(d); and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant claims the trial court erred by answering a jury question by simply referring the jury to its written instructions and that counsel was ineffective. We affirm.

I. Basic Facts And Procedure

During a search of defendant's home, officers found marijuana paraphernalia and marijuana plants in various stages of development (from seed to processed marijuana) in every room except for the bathroom and kitchen. Officers also found a firearm in defendant's bedroom, which defendant admitted belonged to her for the past eight or nine years. Defendant denied possessing or growing marijuana in the home, but testified that she suspected her husband had been growing marijuana in the home. Defendant was charged with delivery/manufacture of a controlled substance, MCL 333.7401(2)(d)(ii), maintaining a drug house, possession of marijuana, and felony-firearm. After instructing the jury, the trial court also provided each juror with a written copy of all the elements of the crimes charged.

During deliberations, the jury asked the trial court whether possession of marijuana would automatically require a conviction for maintaining a drug house. The trial court directed the jurors to consider the written elements of the crime that had been provided to them. The jury eventually found defendant not guilty of delivery/manufacture of a controlled substance but guilty of the other charges.

## II. Analysis

### 1. Jury Instructions

“Claims of instructional error are reviewed de novo.” *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). “Jury instructions should be considered as a whole rather than extracted piecemeal to establish error. Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights.” *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999) (citations omitted). However, “[t]he decision to provide additional instructions at the request of the jury is a matter within the discretion of the trial court.” *People v Fisher*, 166 Mich App 699, 714; 420 NW2d 858 (1988), citing *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974).

We hold that the trial court did not abuse its discretion when it referred the jury to the written instructions in response to the question because the instructions “fairly presented the issues to be tried and sufficiently protected the defendant's rights.” *Henry*, *supra* at 151. Defendant argues “[t]he jury found that the marijuana plants ... were for personal use.” There is, though, nothing in the record to support this claim, making it speculative at best. Moreover, even assuming the jurors believed the marijuana was kept exclusively for personal use, the jury still could have found her guilty of maintaining a drug house because the plain language of MCL 333.7405(1)(d) prohibits one from “knowingly ... maintain[ing] a ... dwelling ... that is used for *keeping* or selling controlled substances in violation of this article” (emphasis added). See *People v Mattoon*, 271 Mich App 275, 278; 721 NW2d 269 (2006) (holding that “if the statutory language is plain and unambiguous, then no judicial interpretation is necessary or permitted”).

Defendant also argues that “[a] drug house is a place one goes to buy and use drugs” and implies that MCL 333.7405 requires a finding that the dwelling was used by others to either buy or use drugs. However, this requirement is not contained in the plain language of the statute, so defendant’s interpretation must fail. See *People v Spann*, 250 Mich App 527, 532; 655 NW2d 251 (2002) (holding that “nothing will be read into a statute that is not within the manifest intention of the Legislature as gathered from the act itself.”)

### 2. Effective Assistance Of Counsel

Defendant next argues that defense counsel was constitutionally ineffective for failing to request a supplemental jury instruction for the felony-firearm charge. We disagree.

To be preserved for appellate review, a claim of ineffective assistance of counsel should be raised in a motion for new trial or an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because defendant did not move for a *Ginther*<sup>1</sup> hearing or new trial, this Court’s review is limited to errors apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

(1996).<sup>2</sup> “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel’s performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that but for counsel’s ineffective assistance the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that defense counsel should have requested special instructions for the felony-firearm charge because *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000), held that “a person does not violate MCL 750.227b ... by committing a felony while merely owning a firearm. To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony.” [Emphasis original.] Defendant argues that the jury therefore should have been instructed that “not all forms of constructive possession will support a felony firearm conviction.” Defendant further argues that she did not possess the firearm while committing the crime of maintaining a drug house because the firearm was found in her personal bedroom, which did not contain any marijuana, and she inherited the firearm years before the incident.<sup>3</sup> However, *Burgenmeyer* provided that “Michigan courts ... have recognized that the term ‘possession’ includes both actual and constructive possession.... [A] defendant has constructive possession of a firearm if the location is known and it is reasonably accessible to defendant.” *Id.* at 439, quoting *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Accordingly, we find no merit in defendant’s argument that defense counsel should have requested an instruction that some forms of constructive possession would not meet the possession requirement. Counsel is not ineffective for failing to advance a meritless argument. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Further, our Supreme Court has held that “it is irrelevant whether defendant possessed a firearm at the time of arrest or at the time of a police raid. All that is required [under the felony-firearm statute] is that the defendant possessed a firearm at the time he committed a felony.” *People v McKenzie*, 469 Mich 1043, 1043; 679 NW2d 69 (2004), citing *Burgenmeyer*, *supra* at 438-439. *Burgenmeyer* also distinguished between offenses that could be completed quickly, such as delivery of a controlled substance, and offenses occurring over an extended period of time, noting that with crimes that were ongoing, the issue would be whether defendant possessed a firearm during the timeframe when the underlying and ongoing felony took place. 461 Mich at 439. The jury heard ample evidence that the home contained marijuana plants in various stages

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<sup>2</sup> Defendant’s alternative request in her appellate brief for a *Ginther* hearing is not a timely *motion* for remand as required by MCR 7.211(C)(1).

<sup>3</sup> Notably, an officer testified the marijuana was found in every room of the home except for the kitchen and bathroom. Defendant testified there was no marijuana in the bedroom that she was aware of. In any event, the issue is not whether marijuana was found in the room containing the firearm but whether defendant ever possessed the firearm while maintaining a drug house.

of development from seeds to fully processed plants, and defendant admitted she inherited the gun about eight or nine years before arrest, and she kept it in her bedroom. Thus, assuming that not all forms of constructive possession will support a felony-firearm conviction, defendant has not explained how the form of constructive possession in this case would fail to support the conviction because the evidence demonstrates that she had immediate access to the firearm while maintaining a drug house. *Burgenmeyer, supra* at 439.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Richard A. Bandstra  
/s/ Brian K. Zahra