

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DASHAWN SHERIFF HEAD,

Defendant-Appellant.

UNPUBLISHED
February 22, 2007

No. 265844
Genesee Circuit Court
LC No. 05-015545-FH

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for possession with intent to deliver heroin less than 50 grams, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and maintaining a drug house, MCL 333.7405(d). He was convicted following a joint trial with his codefendant Gerald McDougal. We affirm the convictions relative to marijuana possession, heroin possession with intent to deliver, felony-firearm, and felon in possession, as there was sufficient evidence to support those convictions. We reverse, however, the drug house conviction because the prosecution failed to present sufficient evidence in support of that charge. Given our reversal of the conviction for maintaining a drug house, it is unnecessary to address defendant's sentencing issue, which related solely to the drug house conviction.

On December 30, 2004, Flint police officers executed a search warrant at an alleged drug house. They seized heroin, marijuana, a loaded AK-47 type rifle, and a loaded .357-caliber pistol. When police entered the house, defendant was sitting on a sofa in the living room, watching television with two other men. Police found McDougal upstairs in one of the two bedrooms. A plastic baggie containing marijuana was found under a living room coffee table in front of defendant's feet. The police also found another plastic baggie containing marijuana in the living room, along with two small baggies containing heroin, one of which was located on the bottom shelf of a living room end table and the other on the living room floor in front of either the sofa or a loveseat. A magazine for a Smith and Wesson .40-caliber handgun was removed from the living room loveseat.

In an upstairs southeast bedroom, the police discovered 29 packets of heroin, a large baggie containing 19.76 grams of heroin, a digital palm scale, a baggie of marijuana, Michigan lotto tickets and slips used in packaging the drugs, butter knives, and a pair of broken scissors. The 29 heroin packets had a street value of \$580, and the large heroin chunk in the baggie had a street value of approximately \$8,000. While there was some evidence indicating that McDougal used and stayed in the southeast bedroom, the police also found three pairs of shorts inside a dresser drawer in the room, and each of the shorts had a professional cleaning tag attached with defendant's name on it. In the upstairs northeast bedroom, police found the AK-47 type weapon, which was loaded, but there was no specific evidence connecting defendant with this particular bedroom or weapon. In a closet at the top of the stairs, police discovered a loaded .357-caliber Smith and Wesson pistol, which was partially tucked into the mattress of a rollaway cot and clearly visible. In that same closet, an officer located a Western Union money order receipt on a shelf, and the receipt was from an individual to defendant for \$544.

Defendant's license had an address for a residence that was different from that of the home searched in the raid, but defendant told police that he did not live at the address on his license; rather, he lived on Cleo Road, which is not the street where the drug raid took place. However, defendant could not provide a street number, apartment complex name, or even an apartment number with respect to his current address. Defendant did not have drugs or contraband on his person when searched. But, he was found to possess \$530 in cash, which included a twenty-dollar bill from a controlled drug buy that occurred earlier in the day.¹

Defendant argues that the evidence was insufficient to support the convictions. We review claims of insufficient evidence *de novo*. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution 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, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Aside from the drug house offense, defendant's sufficiency argument boils down to a claim that the evidence did not show that he possessed the marijuana and heroin, nor that he possessed any firearms.

¹ The evidence at trial indicated that McDougal was the individual involved in the controlled buy; however, the marked twenty-dollar bill found its way to defendant's pockets.

For purposes of the penal statutes, a defendant does not need to own the controlled substance or have actual physical possession of it to have “possession;” the controlled substance may be *constructively* possessed or *jointly* possessed. *Wolfe, supra* at 519-520 (emphasis added). A defendant’s mere presence, in and of itself, at a location where drugs are found is insufficient to establish constructive possession; rather, some additional connection between the illegal narcotics and the defendant must be established. *Id.* at 520. We find instructive the following passage from *Wolfe*:

Any one of various factors may be sufficient under given circumstances to establish [the] connection [between contraband and the defendant]. For example, constructive possession of cocaine was shown . . . , where, in addition to the defendant’s presence at the location where the cocaine was found, traces of cocaine were discovered on shirts stored in his pickup truck. In [another case], constructive possession was shown where the defendant was found in a sparsely furnished apartment that contained cocaine packets and large sums of money lying about in plain view. In [yet another case], constructive possession of cocaine was established when the defendant drove a codefendant to a location where cocaine was being processed and then remained at that location despite the obvious and nauseating smell of ether, which is an integral component in the processing of cocaine. As these cases suggest, constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. [*Id.* at 520-521 (citations omitted).]

Here, given the totality of the circumstances and viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence connecting defendant to the marijuana and the heroin. Marijuana and heroin were found in plain view in the living room where defendant was sitting when the police entered the premises, including one bag of marijuana resting at defendant’s feet. Further, heroin and marijuana, along with a digital scale and packaging materials, were found in plain view in a bedroom in which defendant kept some of his clothing in a dresser. Moreover, defendant had a sizeable sum of money on his person, including a marked twenty-dollar bill from a previous undercover drug transaction between police and McDougal. Additionally, there were cleaning and money order receipts in the home containing defendant’s name, there were visible firearms in the home, there was a firearm magazine in the living room where defendant was seated, and defendant was unable or refused to state with specificity where he resided. Considering the circumstantial evidence, the reasonable inferences arising therefrom, the totality of the circumstances, and resolving all evidentiary conflicts in favor of the prosecution, there was sufficient evidence to show that defendant constructively possessed the drugs, as well as sufficient evidence to establish all of the requisite elements with respect to the offenses of marijuana possession and possession of heroin with intent to deliver. While the evidence might also connect the others in the home to the drugs, including McDougal, “possession may be joint, with more than one person actually or constructively possessing a controlled substance.” *Wolfe, supra* at 520.

Defendant’s next argument on appeal is that there was insufficient evidence presented to prove the offenses of felony-firearm and felon in possession because the element of possession

was not established. The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or an attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of felon in possession of a firearm are that the defendant (1) possessed a firearm, (2) he or she has been convicted of a prior specified felony, and (3) less than five years has passed since the defendant successfully completed probation or parole, completed a term of imprisonment, and paid all fines with regard to the underlying felony. MCL 750.224f; *People v Parker*, 230 Mich App 677, 684-685; 584 NW2d 753 (1998).

As with drug offenses, possession of a firearm may be actual or constructive. *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000), quoting *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). Additionally, “possession may be joint as well as exclusive,” and possession may be proven by circumstantial evidence. *Hill*, *supra* at 469-470. A defendant has constructive possession of a firearm when the location of the weapon is known and the weapon is reasonably accessible to the defendant. *Burgenmeyer*, *supra* at 438, quoting *Hill*, *supra* at 470-471. “[A] person has constructive possession if there is proximity to the [firearm] together with indicia of control.” *Hill*, *supra* at 470. With respect to possession and felony-firearm, the time of the offense or felony is what controls, not the time of the arrest or search. *Burgenmeyer*, *supra* at 439. When possession of a controlled substance is the underlying felony, the offense may take place over an extended period of time, during which the defendant is variously in proximity to the firearm and at a distance from the weapon. *Id.* In such cases, the focus is on the offense dates specified in the information. *Id.*

While this is a close call, we find that the evidence was sufficient to show possession with regard to defendant and the loaded .357-caliber Smith and Wesson pistol, which was partially tucked into the mattress of a rollaway cot in a closet at the top of the stairs. The closet was open, and the butt of the gun and part of the barrel, to the trigger and back sights, were visible, protruding from the mattress. Considering that a large quantity of drugs were located nearby in the bedroom in which defendant kept some clothing, that the closet door was open and the loaded weapon was visibly positioned for quick and easy removal and use, that the firearm was reasonably accessible from the upstairs bedroom in which there was evidence of defendant’s presence, that the gun, given its position, could also be utilized in short fashion even by a person in the living room, and that a money order receipt belonging to defendant was located in the closet, permitting an inference that defendant had been in the closet with the weapon, we hold that the possession element of felony-firearm and felon in possession was sufficiently supported. We decline to interfere with the jury’s verdict under these facts as the weight of the evidence was for the jury to evaluate, not us.

Defendant next argues on appeal that there was insufficient evidence to support his conviction for maintaining a drug house. We agree. A conviction for maintaining a drug house requires the prosecution to prove that (1) the defendant exercised authority or control over the house, (2) for the purpose of making it available for using, keeping, or selling proscribed drugs, and (3) he or she did so continuously for an appreciable period of time. MCL 333.7405(1)(d); *People v Griffin*, 235 Mich App 27, 32; 597 NW2d 176 (1999). Here, we find that the evidence was simply insufficient to show that defendant exercised authority or control over the home that was the subject of the executed warrant, nor was the evidence sufficient to show that defendant

undertook drug-related activities continuously for an appreciable period of time. See *id.*; *People v Bartlett*, 231 Mich App 139, 152; 585 NW2d 341 (1998).

Because we find that defendant's conviction for maintaining a drug house is not supported by the evidence, it is unnecessary to address defendant's final argument on appeal that the trial court imposed a sentence for the drug-house conviction that departed from the statutory guidelines without articulating a substantial and compelling reason for the departure.

We affirm in part, and reverse in part. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter