

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE LEMAR BUTLER,

Defendant-Appellant.

UNPUBLISHED

March 8, 2007

No. 267907

Wayne Circuit Court

LC No. 05-009455

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to nine months to four years in prison for marijuana possession, and to a consecutive two-year term for felony-firearm. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, a Detroit police officer testified that, on August 3, 2005, at 6:15 p.m., he was conducting surveillance in a neighborhood where the police had received a number of narcotics complaints. Defendant was seated in a chair in front of a home. Several other people were also present. The officer watched a car approach and stop in front of the house. Defendant approached the car, and the passenger handed defendant money. Defendant went to a white Monte Carlo parked approximately one foot from where he had been sitting. He opened the trunk, and removed a clear plastic baggie containing what the officer believed to be marijuana. Defendant handed the baggie to the passenger of the car, and the car drove away. Defendant remained in the middle of the street and counted the money. The officer further stated that he was approximately 15 feet from defendant during the exchange.

The officer notified his team, gave them a description of defendant and the Monte Carlo, and continued to wait nearby. Another customer walked up to defendant, and the officer witnessed a similar exchange of drugs for money. The officer noticed defendant and the others looking his way, and drove away. He returned after the other officers arrived, and identified defendant as the person he had seen selling the marijuana.

A second Detroit police officer testified that he saw defendant seated in a lawn chair when he arrived with the other officers. The officer had to use a tool to force open the trunk of

the Monte Carlo because the keyhole had been removed. Inside the trunk, he found a duffle bag. Inside the bag were eight large freezer bags containing marijuana, and one medium ziplock bag containing 15 small sandwich baggies full of marijuana.¹ He also found a loaded .357 magnum handgun and a loaded Ruger semiautomatic handgun in the trunk near the marijuana.

We review a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *Id.* However, we should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witness. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). We resolve all conflicts in the evidence in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant argues that the prosecutor failed to present sufficient evidence to support defendant's conviction for possession of marijuana with intent to distribute. This offense requires in the instant case that the prosecution prove beyond a reasonable doubt that: (1) the substance recovered was marijuana, (2) the marijuana weighed less than five kilograms, (3) defendant was not authorized to possess the marijuana, and (4) defendant knowingly possessed the marijuana with the intent to deliver it. *Wolfe, supra* at 516-517. Possession includes both actual and constructive possession. An individual has possession of contraband if he has knowledge of its nature, and has access to it under circumstances that show an indicia of control. *Id.* at 520-521; *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). "Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance." *Wolfe, supra* at 520.

Defendant maintains that the prosecutor failed to present direct evidence that he possessed marijuana or that he intended to deliver it. We disagree. Defendant's argument directly contradicts the initial investigating officer's testimony. The officer twice saw defendant take money from a purchaser, go to the trunk, open it, take out a baggie of what appeared to be marijuana, and provide it to the purchaser. Inside the same trunk, among other items, were other small baggies filled with marijuana. This testimony constitutes circumstantial evidence to establish that what defendant provided to the purchaser was, in fact, marijuana. This testimony also supports a finding that defendant possessed the remainder of the marijuana, and intended to sell it as well. *Carines, supra* at 757. The prosecutor was not required to disprove any other theory, such as a claim that what defendant furnished the purchasers was a legal substance that

¹ The parties stipulated that the marijuana in the larger bags weighed 3382.30 grams, and that the marijuana in the plastic baggies weighed 52.51 grams. Other officers testified that \$910 was found in defendant's possession at the time of his arrest.

just happened to be located in the same trunk as the marijuana. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We find that the prosecutor presented sufficient evidence to support this possession conviction.

Defendant also argues that the prosecutor did not present sufficient evidence to support the felony-firearm conviction. The elements of felony-firearm are: (1) the possession of a firearm, (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). As with contraband, possession of a firearm may be actual or constructive, and may be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). A person can have constructive possession if the firearm is known to the person and is reasonably accessible to him. *Id.*

Defendant maintains that the prosecutor presented insufficient evidence that he possessed the firearm, as opposed to others present outside the home at the time of the raid. He argues that the prosecutor did not present any direct evidence linking or connecting him to the guns found in the trunk, nor did any witness see him physically possess the guns.

We reject defendant's contention. A conviction of felony-firearm requires that the prosecutor prove that defendant possessed the firearm. But contrary to defendant's assertion, the ability to possess the weapon at the specific time of the search or raid is not dispositive as to whether this element has been satisfied. The *Burgenmeyer* Court stated that possession is not determined at the time of the raid or the arrest, but at the time that the felony is being committed. *Id.* at 438. The Court also noted that, "[a] drug possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it. In a case of that sort, the focus would be on the offense dates specified in the information." *Id.* at 439.²

Defendant cannot show that the evidence was inadequate simply because no officer saw him possess the firearms. Contrary to defendant's argument, the prosecutor's case was not based solely on the fact that he sat near the trunk of the car. At the least, during the time that defendant retrieved the marijuana to sell it to his customers, he had easy access to the handguns. The arresting officer testified that the guns were lying next to the duffle bag containing the drugs. This testimony provides sufficient support for a determination that defendant was aware of the weapons. Because the evidence presented supported a conclusion that defendant at least constructively possessed both the guns and the marijuana simultaneously at some point during the witnessed transactions, we uphold defendant's felony-firearm conviction.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder

² In this case, that date is August 3, 2005.