

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES BREWSTER ARSENAULT,

Defendant-Appellant.

UNPUBLISHED

July 19, 2007

No. 269078

Oakland Circuit Court

LC No. 2005-203412-FH

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manufacturing 20 or more but less than 200 marijuana plants, MCL 333.7401(2)(d)(ii), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two concurrent 90-day jail terms for the marijuana convictions, and a consecutive two-year prison term for the felony-firearm conviction. We affirm.

I. Underlying Facts

The police had information that a two-story, single-family house at 200 Liberty in Pontiac was a site for a marijuana manufacturing operation. On March 9, 2004, a police officer conducted surveillance of the house and saw the 32-year-old defendant leave. The officer stopped defendant's car and found a small amount of marijuana. Defendant was taken into custody, and the police executed a search warrant at the house. After gaining entry, the police observed defendant's mother, codefendant Randi Powe, coming down the stairs with a dog. An officer also saw two or three people run from the kitchen into the basement. The police found a baggie containing about \$5 worth of marijuana on the kitchen table. In the living and dining area, the police found three film canisters containing marijuana cigarettes, and pipes used to smoke marijuana. The police also found a 12-month lease agreement in defendant's name, dated January 9, 2004, cosigned by defendant and his mother.

An officer testified that the smell of marijuana was apparent as he went upstairs. The upstairs had three bedrooms and a bathroom. The northwest bedroom was set up as a child's room. In the southwest bedroom, the police found a mattress, furniture, a television, men's clothes, photographs of defendant, correspondence addressed to defendant, and registrations for a boat and trailer in defendant's name. There was a closed, unlocked gun case on the floor at the foot of the bed containing an unloaded 12-gauge shotgun. Thirteen 12-gauge rounds of

ammunition were found loose on top of the television “within reaching distance” of the gun. On top of a dresser was a humidor with a baggie containing 5.6 ounces of marijuana and a bag of smoked marijuana cigarettes. In a dresser drawer, the police found a bag containing 3.4 ounces of marijuana.

The door of the southeast bedroom, which was directly across from defendant’s bedroom, was closed and padlocked. After forcefully gaining entry, the police observed that the bedroom was a marijuana growing room. On one table were five four-foot-tall potted marijuana plants under a grow light and a fan. On another table were three two-foot-tall potted marijuana plants under grow lights on a motorized track. Under that table were plastic tubs containing 58 smaller potted marijuana plants. There were digital thermometers in the room, a garbage can containing marijuana stems and clippings, and a shelving unit with gallon jugs of various concentrations of fertilizer and watering cans. On a table were pruning shears, growth chemicals, a book on how to grow marijuana, and a “High Times” magazine. A 2004 calendar on the wall was marked with a schedule of tasks relating to the plants’ care, and a 2003 calendar with similar markings was on the floor beneath the table. Inside the bedroom closet was a hydroponics growth system containing five-inch marijuana seedlings. On the shelf in the closet was paperwork for a lawn care business operated by defendant, and information regarding defendant’s mother. In total, the police found a total of 127 marijuana plants with a street value of approximately \$200,000.

II. Effective Assistance of Counsel

Defendant first argues that defense counsel was ineffective for failing to request a special jury instruction for the felony-firearm offense. Defendant alternatively argues that remand is necessary to enable him to develop this claim. We disagree.

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). “To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms” and that the representation so prejudiced the defendant that “there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *Id.*

Defendant argues that defense counsel should have requested a special instruction for the felony-firearm charge consistent with the holding in *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000), 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 in original.) Defendant argues that the jury should have been instructed that “not all forms of constructive possession will support a felony firearm conviction,” and that “the right to control a firearm while manufacturing marijuana is insufficient to find that the defendant possessed a firearm.” Defendant further argues that he did not possess a firearm while committing the offense because the firearm was a hunting weapon kept inside a latched case, and he was not in the house during the raid.

Burgenmeyer provides 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.”

Burgenmeyer, *supra* at 438, quoting *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Defendant has not provided any authority requiring a trial court to instruct a jury that some forms of constructive possession would not meet the possession requirement. Defense counsel cannot be considered to have provided ineffective assistance by failing to present a novel legal argument in this regard. See *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).

Furthermore, 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; 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 are ongoing, the issue would be whether defendant possessed a firearm during the timeframe when the underlying and ongoing felony took place. *Id.* at 439. In this case, the jury heard ample evidence that defendant’s home contained marijuana plants in various stages of development from seeds to five-foot-tall plants, and the defense admitted that defendant owned the firearm, which was in defendant’s bedroom directly across from the grow room. Even if defendant owned the firearm for hunting, it does not change the fact that the firearm was accessible and available to defendant inside the home where he was committing the offense of manufacturing marijuana.

Furthermore, even 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 where the evidence demonstrated that he had immediate access to the firearm while manufacturing marijuana plants. Therefore, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel’s failure to request a special instruction, the outcome would have been different. *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000).

For these reasons, we reject defendant’s claim that defense counsel was ineffective and are not persuaded that a remand is necessary.

III. Sufficiency of the Evidence

Defendant further argues that there was insufficient evidence to sustain his convictions of manufacturing marijuana and felony-firearm. We disagree.

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 any 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; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). 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).

A. Manufacture of Marijuana

The elements of unlawful manufacture of marijuana are: (1) defendant manufactured a controlled substance, (2) the manufactured substance was marijuana, and (3) defendant knew that he was manufacturing marijuana. MCL 333.7401(2)(d)(ii); CJI2d 12.1.

Defendant claims that there is insufficient evidence to “tie him to the grow room activities.” But viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was operating an extensive marijuana manufacturing operation in his home. The evidence showed that the police seized 127 marijuana plants at various stages of growth from the home. A 12-month lease agreement for the home was in defendant’s name, and cosigned by defendant and his mother. Although defendant’s mother’s name was on the lease agreement, the police did not find any female clothing in the house, and only defendant’s bedroom was set up for an adult. Further, defendant’s bedroom was directly across the hall from the grow room. Inside a closet in the grow room was paperwork for defendant’s lawn care business. In addition, bagged marijuana was in defendant’s bedroom drawer, and defendant had marijuana with him when the police stopped him immediately after leaving the house. From this evidence, a jury could reasonably infer that defendant had knowledge of, access to, and control of the grow room.

Although defendant asserts that the evidence linking him to the marijuana manufacturing operation was weak, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Furthermore, even if the marijuana plants could have also belonged to another person in the house, i.e., defendant’s mother, possession of a controlled substance may be joint. *Wolfe, supra* at 519-520. Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence defendant provides. *Nowack, supra*. In sum, sufficient circumstantial evidence was presented linking defendant to the marijuana manufacturing operation in his home to sustain defendant’s conviction.

B. Felony-firearm

Defendant argues that there was insufficient evidence that he had constructive possession of a firearm within the meaning of the felony-firearm statute because the firearm was cased and unloaded, and he stored it for hunting only, not to be used in the commission of a felony. The elements of felony-firearm are that defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). “[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Hill, supra* at 470-471.

Given that the firearm was in a gun case on defendant’s bedroom floor, the jury could reasonably infer that defendant knew its location and that the firearm was readily accessible. Also, the fact that defendant claims that the firearm was for hunting does not alter the fact that defendant knowingly possessed a firearm that was immediately accessible while manufacturing

marijuana. Contrary to defendant's claim, the fact that the firearm was not loaded is not dispositive. "Operability is not and has never been an element of felony-firearm." *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11 (1991); see also *People v Peals*, 476 Mich 636, 638, 650, 653-655; 720 NW2d 196 (2006). Further, the ammunition was "within reaching distance" of the firearm, and the firearm was within 10 to 12 feet of the door to the marijuana grow room. Because the proofs, when viewed in a light most favorable to the prosecution, established beyond a reasonable doubt that defendant manufactured marijuana and possessed a firearm simultaneously, there was sufficient evidence to support his conviction of felony-firearm.

IV. Sentence

We reject defendant's argument that the imposition of a consecutive sentence for felony-firearm was a violation of his due process rights because his 90-day jail sentence for the underlying felony was not a term of "imprisonment." The felony-firearm statute provides that a sentence for felony-firearm "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony." MCL 750.227b(2).

Initially, defendant's reliance on *People v Brown*, 220 Mich App 680, 683; 560 NW2d 80 (1996), is misplaced. In that case, the Court held that under the felony-firearm statute, a sentence of *probation* may not run consecutively to the two years' imprisonment mandated by the felony-firearm statute. Furthermore, our Supreme Court has held that a prison sentence and a jail term can be ordered to run consecutively. *People v Spann*, 469 Mich 904; 668 NW2d 904 (2003) ("the Legislature often has used the term 'imprisonment' to mean confinement in jail as well as confinement in prison) (citations omitted). Defendant has failed to cite any germane authority that in this case consecutive sentencing is proscribed. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

In sum, defendant's argument that a jail sentence is not a term of imprisonment for purposes of the consecutive sentencing provision of MCL 750.227b is without merit.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens