

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO LAMONT WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

January 17, 2008

No. 273401

Oakland Circuit Court

LC No. 2005-205314-FH

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to consecutive prison terms of 6 to 90 months for the felon in possession conviction and two years for the felony-firearm conviction. For the reasons set forth below, we affirm.

I. Facts

In April 2005, defendant was sentenced to probation for a March 29, 2005, conviction of attempted carrying a concealed weapon. On May 17, 2005, police officers and federal agents executed a search warrant at a residence leased by defendant and his wife in Oak Park. At the time, the Oak Park Police Department had custody of defendant for an outstanding traffic matter. Defendant's wife was also at the police department and she gave police officers her house keys after they advised her that entry by key could prevent property damage. The search team found numerous items in defendant's residence, including (1) a loaded .25 caliber handgun on a dresser, (2) a loaded .22 caliber rifle on top of the bed in the northeast bedroom, (3) tax papers underneath the rifle with defendant's name and the Oak Park address as well as a Detroit address, (4) a bank envelope addressed to defendant at the Detroit address, (5) a holster for a small caliber handgun, (6) other correspondence addressed to defendant, including mail with a time stamp as recent as May 16, 2005, (7) an expired identification card belonging to defendant and (8) .22-caliber ammunition.

After the search, Oak Park Police Officer Darryl Stewart returned to the police department to interview defendant. Defendant told Officer Stewart that he lived at the Oak Park residence with his wife and two children. Defendant also said that he obtained the rifle from his aunt. Defendant said that the handgun probably belonged to his father-in-law, but that his

fingerprints might be on the gun because he had handled it. After the interview, Officer Steward prepared a statement containing defendant's answers. Defendant reviewed the statement before signing it.

Defendant's father-in-law testified that he owned the handgun found in the Oak Park residence, but was mistaken when he testified at an earlier hearing that the holster was for the handgun. Defendant's mother testified that, when police executed the search warrant, defendant lived with her at the Detroit address because defendant and his wife were having problems.

II. Sufficiency of the Evidence

Defendant claims that the prosecutor failed to present sufficient evidence to prove the element of possession for each offense.¹ Under MCL 750.224f, a person convicted of a specific felony may not possess a firearm until the right of possession is restored and other requirements are satisfied. *People v Perkins*, 473 Mich 626, 629; 703 NW2d 448 (2005). MCL 750.227b prohibits a person from possessing a firearm during the commission of a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Although neither statute defines "possession," Michigan courts recognize that possession is not the same as ownership. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Possession of a firearm can be actual or constructive, and may be joint or exclusive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Constructive possession requires proximity to the firearm with indicia of control. *Burgenmeyer*, *supra* at 438; *Hill*, *supra* at 470. Stated otherwise, constructive possession exists when a person knows the location of and has reasonable access to the firearm. *Burgenmeyer*, *supra* at 438; *Hill*, *supra* at 470-471.

We agree with defendant that he could not have possessed a firearm while he was in custody at the Oak Park Police Department for traffic matters on May 17, 2005. But defendant was not charged with possessing a firearm while in custody. The specific charges, as set forth in

¹ "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The prosecution need not disprove every theory consistent with innocence. *Id.* at 400.

MCL 750.224f prohibits a person who has been convicted of a specific felony from possessing a firearm until the right of possession is restored, pursuant to MCL 28.424, and other requirements are satisfied. *People v Perkins*, 473 Mich 626, 629; 703 NW2d 448 (2005). MCL 750.227b prohibits a person from possessing a firearm during the commission of a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). It is immaterial whether the defendant possesses the firearm at the time of an arrest or police raid. *People v McKenzie*, 469 Mich 1043; 679 NW2d 69 (2004). "All that is required is that the defendant possessed a firearm at the time he committed a felony." *Id.* In cases where the underlying offense involves an element of possession, determining whether the defendant possessed a firearm at the time he committed the underlying felony can be difficult, because possession can take place over an extended period of time. *People v Burgenmeyer*, 461 Mich 431, 439; 606 NW2d 645 (2000). If this occurs, the focus is on offense dates specified in the information. *Id.* at 439. The commission of felon in possession of a firearm can serve as the underlying felony for a felony-firearm conviction. See *People v Calloway*, 469 Mich 448, 451-452; 671 NW2d 733 (2003).

the trial court's jury instructions, were that the crimes were committed on or about May 17, 2005. Where time is not an essential element of an offense, the date need not be proven beyond a reasonable doubt. *People v Naugle*, 152 Mich App 227, 235-236; 393 NW2d 592 (1986); see also *People v Dobek*, 274 Mich App 58, 82-83; 732 NW2d 546 (2007); MCL 767.45(1)(b) (information must contain time of offense "as near as may be," but "[n]o variance as to time shall be fatal unless time is of the essence of the offense"). The only essential time element in the case was that defendant possessed the firearm after his March 29, 2005, conviction for attempted carrying a concealed weapon and before he was taken into custody on May 17, 2005.

Viewed in a light most favorable to the prosecution, and although it was necessary that the prosecution prove possession of only one firearm, there was sufficient circumstantial evidence for the jury to find beyond a reasonable doubt that defendant, during the relevant time period, had constructive possession of both the rifle found on top of the bed and the handgun found on the dresser at the Oak Park residence. The evidence that defendant's tax papers, which contained both Oak Park and Detroit addresses, were found with the rifle supports a reasonable inference that defendant had knowledge of and access to the firearm. This was corroborated by defendant's written statement in which defendant indicated that he was living at the Oak Park address and that the ".22 rifle was over my bed." The handgun was found in plain view in the same bedroom, and Officer Stewart's testimony indicated that defendant admitted that he handled that handgun.

While some evidence suggested that defendant separated from his wife in early 2005, defendant's landlord testified that he saw or heard defendant at the Oak Park residence during the two weeks preceding May 17, 2005. The landlord also testified that defendant dropped off a receipt for a water bill while he was working on an adjacent house. Although the landlord could not remember defendant's exact words, based on his discussion with defendant, he was left with a clear impression that defendant had moved back to the Oak Park residence. On another occasion, the landlord heard defendant in the yard at the Oak Park residence.

Examined as a whole, the prosecutor presented sufficient evidence to prove the element of possession beyond a reasonable doubt.

III. Assistance of Counsel – Impeachment

Defendant claims that defense counsel was ineffective because he failed to impeach Officer Stewart with his testimony from defendant's first trial. Defendant seeks a new trial or remand for a *Ginther*² hearing regarding this claim. This Court previously denied defendant's motion to remand for failure to demonstrate, by affidavit or an offer of proof, the facts to be developed on remand pursuant to MCR 7.211(C)(1)(a)(ii). We also are not persuaded that a remand is warranted.

A defendant claiming ineffective assistance of counsel must show that (1) "counsel's performance fell below an objective standard of reasonableness under prevailing professional

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

norms” and (2) “a reasonable probability that, but for counsel’s errors, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original). A defendant must overcome a strong presumption that counsel’s assistance was sound trial strategy. *Avant, supra* at 507-508. The questioning of witnesses is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Ineffective assistance will be found only if the failure to present evidence deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

We agree with the prosecution’s argument that the testimony in question, examined in context, is not inconsistent. Officer Stewart’s testimony at defendant’s first trial, that he never saw defendant at the Oak Park residence before the execution of the search warrant, occurred after the prosecutor had objected that the relevant date was May 17, 2005. In context, the testimony reasonably could be viewed as referring only to Officer Stewart’s observations on May 17. On cross-examination by defense counsel at defendant’s second trial, Officer Stewart testified that he never saw defendant at the Oak Park residence on May 17, but that he saw him pull a vehicle into the driveway one or two days earlier while conducting surveillance.

Moreover, defense counsel’s comments at sentencing reflect that he was aware of Officer Stewart’s testimony at the first trial when he cross-examined him at the second trial. Specifically, defense counsel stated that it caught him by surprise when Officer Stewart testified at the second trial that he previously saw defendant at the Oak Park residence. Defense counsel stated, “[I]f I was really on top of my game your Honor, I would have looked at the Affidavit for the search warrant where it never says that Officer Stewart . . . saw my client at the residence.”

Defendant has failed to overcome the presumption that, when confronted with Officer Stewart’s testimony at the second trial regarding his surveillance activities, defense counsel made a strategic decision not to pursue the issue in an attempt to show that it was inconsistent with his testimony at the first trial. “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *Rockey, supra* at 76-77.

Were we to find that defense counsel performed deficiently by failing to cross-examine Officer Stewart about his prior testimony, defendant has not shown prejudice. First, for the reasons stated, we do not agree that the prior testimony was actually inconsistent. Further, there is no indication how Officer Stewart would have testified if confronted with his prior testimony. Moreover, ample other evidence linked defendant to the residence during the relevant time period, including the landlord’s testimony and items found inside the Oak Park home. Accordingly, defendant has not shown that defense counsel’s failure to cross-examine Officer Stewart with his prior testimony deprived him of a substantial defense. Therefore, we reject defendant’s request for reversal.

IV. Assistance of Counsel – Jury Instructions

Defendant further argues that defense counsel was ineffective for failing to request nonstandard or special jury instructions regarding the meaning of possession and the elements of

felony-firearm, based on principles from *Burgenmeyer, supra*. Defendant argues that the trial court gave overly broad instructions that misstated the law applicable to the facts of this case.

The use of standard criminal jury instructions is not required and trial judges are encouraged to examine them for accuracy and appropriateness to the case at hand. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). “Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury.” *Dobek, supra* at 82.

Here, the trial court used the possession instruction, CJI2d 12.7, with some modification, and the felony-firearm instruction, CJI2d 11.34. The trial court instructed the jury that “possession doesn’t necessarily mean ownership” and may be found based on actual physical possession. Though the trial court did not use the phrase “constructive possession,” the court explained that possession can be found from a “right to control the thing, even though it’s in a different room or place.” The court further instructed the jury that mere knowledge is not enough and that the jury could find that “defendant possessed the rifle or pistol only if he had control of it or a right to control it, either alone or together with someone else.” Additionally, the jury was required to find that defendant carried or possessed the firearm at the time he committed the crime of felon in possession of a firearm, which required proof of both possession of the firearm and defendant’s prior conviction of the felony.

We hold that the instructions adequately informed the jury that mere ownership of a firearm does not constitute possession.³ Viewed as a whole, the instructions were sufficient to protect defendant’s rights and fairly present the issues to the jury. *Dobek, supra* at 82. Therefore, defense counsel was not ineffective for failing to object to the trial court’s jury instructions. *Rodgers* at 714-715.

V. Jury Notes

Defendant maintains that the trial court erred by acting or refusing to act on jury notes during jury deliberations, without affording defense counsel an opportunity to address the notes

³ Furthermore, ownership was not a material issue in this case. The prosecutor took the position that, regardless of ownership, defendant had a right to control the firearms because they were found in his bedroom. Further, the instructions plainly informed the jury that, to find defendant guilty of felony-firearm, defendant must have possessed the firearm at the time he committed the underlying felony, felon in possession of a firearm. Because the felon in possession of a firearm charge was predicated on the same act of possession as the felony-firearm charge, the jury instructions were more than adequate to protect defendant’s rights. We are not persuaded that the trial court was required to use the phrase “constructive possession” in the jury instructions and, specifically, to instruct the jury that “not all forms of constructive possession will support a felony-firearm conviction.”

in open court. Defendant also claims that the court denied him his constitutional right to be present and have the assistance of counsel during a critical stage of the proceedings.⁴

Our review of defendant's claim in this case is limited because defendant failed to make a record in the trial court, by motion or objection, to support his claim of error. We review unpreserved claims under the plain error standard in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must show a plain error affecting his substantial rights. *Id.* at 763. Absent a structural error requiring automatic reversal, defendant must show prejudice, i.e., error affecting the outcome of the proceeding. *Id.* at 763; see also *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000). If these requirements are satisfied, an appellate court must then exercise its discretion in deciding whether to reverse. *Id.* at 763. "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

⁴ A trial court has discretion to give additional instructions, as appropriate, after the jury begins deliberations. MCR 6.414(H). If the jury "requests review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. . . ." MCR 6.414(J). But a trial court may not communicate with a deliberating jury without notifying the parties and permitting them to be present. MCR 6.414(B). "The court must ensure that all communications pertaining to the case between the court and jury or any juror are made part of the record." MCR 6.414(B). A violation of this rule does not require automatic reversal. *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990).

A defendant's right to be present at trial and his right to counsel at all critical stages present distinct constitutional issues. A defendant has a due process right under the Fifth Amendment to be present at all stages of trial if his absence might frustrate the fairness of the proceeding. *United States v Barnwell*, 477 F3d 844, 850 (CA 6, 2007). In some situations, the right of presence can be adequately protected by the presence of counsel. *United States v Frazin*, 780 F2d 1461, 1469 (CA 9, 1986) and 479 US 844; 107 S Ct 158; 93 L Ed 2d 98 (1986). Any violation of the right is subject to a harmless error analysis. See *United States v Berger*, 473 F3d 1080, 1096 (CA 9, 2007) (applying harmless beyond a reasonable doubt standard), cert pending; *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977) (adopting "any reasonable possibility of prejudice" standard to determine if a defendant's absence requires reversal).

A defendant also has a Sixth Amendment right to counsel at all critical stages of the proceedings, including the trial stage. *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004). It is only when there is a complete denial of counsel that prejudice will be presumed. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). In some situations, however, a trial court's communications with a deliberating jury in the absence of counsel has been found to be a critical stage entitled to a presumption of prejudice because it has significant consequences for an accused. See *Valentine v United States*, 488 F3d 325, 335 (CA 6, 2007) (trial court's note conveying scheduling information not a critical stage); see also *French v Jones*, 332 F3d 430 (CA 6, 2003) (supplemental instruction to deadlocked jury constituted critical stage); *Hudson v Jones*, 351 F3d 212, 217-218 (CA 6, 2003) (repeating instructions, at jury's request, not a critical stage).

Limiting our review to the record, defendant has not established any plain error warranting reversal of his convictions. The trial court instructed the jury before deliberations began that two forms of communication would be used if any questions arose during deliberations:

If it's a type of question I can answer by written note I'll send you back a note. If it's the type of question where I cannot answer it by written note, I'll have you back into this courtroom and try to answer your questions here in Court with everybody present.

Three jury notes were filed in the lower court record after defendant's trial, but only one note, asking "Do we have to be unanimous on both counts," indicates that it was received by the trial court. Written on the note was the answer, "Yes" and the statement, "You may find the Defendant guilty of both counts, not guilty of both counts or guilty of one count and not the other, but you must be unanimous." While the statement was not a verbatim repetition of an earlier instruction, it was substantively the same. Earlier, the trial court instructed the jury that "a verdict in a criminal case must be unanimous" and "[y]ou must find the Defendant guilty of all, or any one of these crimes, or not guilty."

As the prosecution argues on appeal, the answer to the jury's note does not involve a critical stage of trial because, in substance, it constitutes a mere repetition of the court's previously approved instructions. *Hudson, supra*. But we need not reach this issue because, limiting our review to the record, we cannot determine whether the trial court discussed the note with counsel, there is no indication in the record that the trial court actually gave the answer written on the note to the jury, or that it acted contrary to its earlier instructions by having some off-the-record discussion with the jury, without the parties present. A plain error is a clear or obvious error. *Carines, supra* at 763. On the record before us, defendant has failed to establish a plain error under MCR 6.414, or the Fifth Amendment or Sixth Amendment. The mere fact that three jury notes were filed in the lower court record is insufficient to establish a plain error. And while we note that the prosecution is not opposed to remanding this case to the trial court for clarification of the record, we find no justification for a remand because defendant failed to make a proper offer of proof in support of his claim of error. See MCR 7.211(C)(1)(a)(ii).

VI. Cocaine Residue

Defendant further claims that a police witness's testimony that cocaine residue was found at the Oak Park residence deprived him of a fair trial. Because defendant did not object to the testimony, the issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. MRE 103(d); *Jones, supra* at 355.

Defendant's reliance on MRE 404(b) is misplaced because "[t]his rule permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *People Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); see also *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Here, there is no indication that the prosecutor attempted to introduce evidence that defendant used cocaine, let alone to show that defendant acted in conformity with any character for cocaine use. The record indicates only that, during direct examination about defendant's interview after the search, Officer Stewart volunteered testimony that police found cocaine residue at the Oak Park residence.

Though a police officer's testimony should be scrutinized to ensure the officer does not venture into forbidden areas, *People v Holly*, 129 Mich App 405, 425; 341 NW2d 823 (1983), the jury never heard how defendant responded to Officer Stewart's question because his testimony was cut off by the prosecutor. The only evidence of defendant's drug use was the statement, "I smoke weed [sic] my wife smoke cocaine," in Officer Stewart's written statement of defendant's answers. Defense counsel affirmatively stated that he had no objection to the admission of the written statement, although he later questioned its accuracy in closing argument.

Examining the record as a whole, it is not apparent that Officer Stewart interjected the testimony that cocaine residue was found at the Oak Park residence for an improper purpose. Evidence of other acts can be admissible to provide the jury with the full context in which disputed events took place. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Further, defendant has not shown that he was prejudiced by the brief testimony. Because defendant failed to show any plain error affecting his substantial rights, we reject his request for a new trial.⁵

Affirmed.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

⁵ The doctrine of cumulative error does not aid defendant's position because only actual errors are aggregated to determine the cumulative effect. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).