

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

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
February 25, 2014

v

No. 309028  
Wayne Circuit Court  
LC No. 09-030206-FH

LONNEL ANTWINE,  
Defendant-Appellant.

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

v

No. 313826  
Wayne Circuit Court  
LC No. 09-030206-FH

LONNEL ANTWINE,  
Defendant-Appellee.

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Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals arising from a police search of a condemned house, defendant appeals as of right his jury conviction of possession of 25 grams or more, but less than 50 grams of cocaine, MCL 333.7403(2)(a)(iv), and the prosecution appeals by leave granted the trial court's order setting aside defendant's jury conviction of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. Defendant was sentenced to time served for the cocaine possession conviction, and to two years' imprisonment for the felony-firearm conviction before it was dismissed.

**I. DEFENDANT'S APPEAL**

On appeal, defendant argues that defense counsel provided ineffective assistance of counsel for several reasons. We disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move, in the trial court, for a new trial or a *Ginther*<sup>1</sup> hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Failure to do so limits this Court’s review to errors apparent on the record. *Id.* While defendant requested a *Ginther* hearing at the same time he filed his motion for a new trial, the parties stipulated that the evidentiary hearing would be stayed pending the prosecution’s appeal of the trial court’s order dismissing defendant’s felony-firearm conviction. Accordingly, this Court can address only those ineffective assistance claims that are supported by the record. *Id.* “Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a circuit court’s findings of fact. We review de novo questions of constitutional law.” *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). “To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Defense counsel is “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Vaughn*, 491 Mich at 670. “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (quotation and citation omitted).

In several subarguments, defendant contends that defense counsel failed to introduce evidence to support his theory that another person owned the rifle that police recovered from the back porch of the condemned house at which the officers found defendant. Specifically, defendant asserts that defense counsel had letters that had been sent to defendant at an address different from the condemned house and information that the co-owner of the condemned house had a history of involvement with narcotics, but failed to obtain the admission of that evidence.

The record before us shows that while defense counsel did not formally introduce the letters to which defendant refers, he cross-examined an officer about them and addressed the letters, over the prosecution’s objection, during closing argument. Further, defense counsel elicited testimony from an officer about the fact that defendant’s name was one of two on the deed to the house. The officer specifically told the jury that Maurice Swift was also listed as an owner on the deed. Moreover, outside the presence of the jury, defense counsel sought to admit the registers of actions in two Wayne Circuit Court cases involving a defendant named Maurice Swift, the same name that appeared on the quitclaim deed to the condemned house. The trial

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

court excluded that evidence, remarking that even if defendant established that the person in those two cases was the co-owner of the house, the court would still exclude the records as improper character evidence under MRE 404(b).

Based on this record, defendant cannot satisfy his burden of proof on the first element of a successful ineffective assistance claim, that “counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms,” *Uphaus*, 278 Mich App at 185, because it appears that defense counsel attempted to make the same arguments that, on appeal, defendant accuses him of failing to make. Further, decisions regarding what evidence to present are presumed to be matters of trial strategy, and this Court will not “second-guess counsel on matters of trial strategy . . . .” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Thus, even if defense counsel affirmatively declined to present the evidence defendant now argues should have been admitted, defendant still could not show that counsel’s performance was objectively unreasonable.

Additionally, even if defense counsel’s performance was deficient, defendant cannot demonstrate that he was prejudiced by defense counsel’s error because even if Swift owned the rifle, ownership is not relevant to the jury’s resolution of the question whether defendant constructively possessed the rifle. In order to find constructive possession, the jury was required to conclude only that “the location of the weapon [was] known and it [was] reasonably accessible to the defendant.” *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). “Possession of a firearm can be actual or constructive, joint or exclusive.” *Id.* Given the definition of possession provided to the jury,<sup>2</sup> we conclude that the evidence defendant argues should have been admitted would not have affected the outcome of the trial.

Next, defendant argues that defense counsel erroneously advised him not to testify, and that the record contained no waiver of his right to testify. Defendant maintains that if he had been allowed to testify, he would have said that he had no knowledge of the rifle on the back porch and that other people left their property at the condemned house.

A defendant has the right, under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, to testify in his own defense, and defense counsel must advise a defendant of that right. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). However, Michigan law does not require that there be an on-the-record waiver of a defendant’s right to testify, and a trial court is not required to determine whether a defendant made a knowing and intelligent waiver of that right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

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<sup>2</sup> Discussion of the prosecution’s appeal, *infra*, contains a more detailed discussion of the elements and jury instructions for felony-firearm, MCL 750.227b.

Initially we note that there is no record evidence regarding the content of any discussion between defendant and his attorney about defendant's right to testify.<sup>3</sup> Moreover, we conclude, based on the record before us, that defendant cannot demonstrate prejudice resulting from his failure to testify. Even assuming defendant would have testified that he did not own the rifle, there is no reasonable probability that the jury would have altered its finding regarding possession because actual ownership is not required for constructive possession. *Johnson*, 293 Mich App at 83. Moreover, defendant has not demonstrated that testimony from him that he had no knowledge of the gun on the back porch would have changed the outcome of the proceedings. It is likely that the jury would not have found testimony from defendant that he had no knowledge of the gun credible in light of the fact that in finding defendant guilty of felony-firearm, it necessarily found the circumstantial evidence proved defendant's constructive possession of the gun beyond a reasonable doubt.

Defendant also argues that defense counsel rendered ineffective assistance by failing to object to the admission of a police officer's testimony that a field test revealed the presence of cocaine on the digital scale recovered from the condemned house at which defendant was found. Defendant contends that the field test was "made without any protocol and therefore no basis for reliability."

The record in this case shows that while defense counsel did not object to the officer's testimony that a field test indicated that the residue found on the scale was cocaine, defense counsel did cross examine the officer regarding the reliability of the test, noting that the officer failed to prepare a report regarding his findings. Moreover, the parties stipulated to admission of a laboratory report confirming that 35.89 grams of cocaine was discovered inside the home and to the admission of the actual cocaine that was recovered by police. Thus, defense counsel's decision not to object to the testimony but to instead use the circumstances of the field test to question the credibility of the officer's testimony was reasonable trial strategy. Moreover, defendant has failed to demonstrate that defense counsel's decision not to object to the testimony affected the outcome of the trial in light of the fact that the existence of cocaine in the home was undisputed. Even if the jury never would have heard testimony that the scale had cocaine residue on it, it still would have heard testimony that a scale, typically used for weighing narcotics, was located in an area of the home where defendant was apparently living, and that actual cocaine was located under the stairs. Accordingly, we conclude that defendant has failed to demonstrate ineffective assistance of counsel.

Finally, defendant argues that defense counsel failed to obtain a jury instruction on the concept of "dominion," by which he apparently means possession, an error he claims resulted in the jury receiving no guidance on the question whether the prosecution proved the elements of felony-firearm.

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<sup>3</sup> The only reference to whether defendant would testify came up during a discussion about whether defendant would testify as part of an offer of proof outside the presence of the jury regarding the identity of Maurice Swift.

“A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.” *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). The trial court’s instructions must clearly present the case and the applicable law to the jury. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). “The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence.” *Id.* However, a defendant’s conviction “will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative.” *Riddle*, 467 Mich at 124-125.

While the trial court did not separately instruct the jury on the definition of possession for the purpose of the felony-firearm charge, it was not required to do so since the definition is identical to the one that had already been read to the jury in connection with the cocaine possession charge. Effective assistance does not require counsel to make a futile argument. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008). Moreover, had the jury heard the instruction defendant argues was erroneously omitted, it would have heard the same definition twice. Thus, defendant has failed to demonstrate that defense counsel’s failure to request an instruction on possession in the context of the felony-firearm charge would have affected the outcome of the proceedings.

## II. THE PROSECUTION’S APPEAL

The prosecution argues that the trial court erred when it set aside defendant’s felony-firearm conviction on the basis that there was insufficient evidence that defendant constructively possessed the rifle recovered from the back porch of the condemned house. We agree.

In criminal cases, due process requires that the evidence prove the defendant’s guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id.*

The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. Possession of a firearm can be actual or constructive, joint or exclusive. A person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Possession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact. [*Johnson*, 293 Mich App at 82-83 (internal quotations, footnotes, and punctuation omitted).]

The prosecution argues that the trial court erred by overturning the jury verdict finding defendant guilty of felony-firearm, MCL 750.227b, because there was sufficient evidence to prove beyond a reasonable doubt that defendant constructively possessed the rifle recovered from the back porch. Defendant responds that, because the prosecution did not formally request that the jury be instructed regarding constructive possession, it necessarily considered only the

question whether defendant actually possessed the rifle, and concluded that he did. Since there was no dispute that defendant did not actually possess the rifle, defendant's argument continues, the verdict finding him guilty of felony-firearm was not supported by sufficient evidence to the extent it was premised on defendant's having actually possessed the rifle.

Contrary to defendant's argument, the trial court did instruct the jury on the concept of constructive possession. The trial court instructed the jury that:

Possession does not mean ownership. Possession means that either the person had actual physical control of the substance, as I do the pen I'm now holding . . . , or the person had the right to control the substance, even though it is in a different room or place. Possession may be sole, where one person, alone, possesses the substance; or, possession may be joint, where two or more people each share possession. It is not enough if the defendant merely knew about the substance. The defendant possessed the substance only if he had control of it, or the right to control it, either alone or together with someone else.

As suggested by the use of the word "substance," the trial court read from CJI2d 12.7, which defines possession for the purpose of narcotics offenses. CJI2d 11.34a, which defines possession for the purpose of felony-firearm, MCL 750.227b, is essentially identical and provides:

Possession does not necessarily mean ownership. Possession means that either:

- (1) the person has actual physical control of the thing as I do with the pen I am now holding, or
- (2) the person knows the location of the firearm and has reasonable access to it.

Possession may be sole where one person alone possesses the firearm. Possession may be joint where two or more people share possession. [CJI2d 11.34a.]

Further, in addition to the instructions from the court about possession, counsel for both the prosecution and the defense relied on the same definition of possession when making their opening and closing arguments regarding the cocaine possession charge and the felony-firearm charge. Thus, the arguments of both parties assumed that possession was defined the same way in both contexts. Because the definitions of possession within both instructions—felony-firearm and narcotics offenses—are identical for all relevant purposes, reading the instruction defining possession in connection with the felony-firearm charge would have been unnecessarily repetitive. Moreover, even assuming it was error for the trial court not to repeat the possession instruction, it did not constitute error requiring reversal because the jury was given an accurate possession instruction. *Riddle*, 467 Mich at 124-125. Because jurors are presumed to follow their instructions, *Unger*, 278 Mich App at 235, we presume that the jurors in this case considered the question whether defendant constructively possessed the rifle found on the porch.

Further, when constructive possession is considered, we conclude that there was legally sufficient evidence to support the jury's verdict finding defendant guilty of felony-firearm. This Court's decision in *Johnson* is instructive. In *Johnson*, this Court found that there was sufficient evidence to convict the defendant of felony-firearm under a theory of constructive possession:

The evidence indicated that the police seized the rifles from the corner of the front room of the house, in the vicinity of where Johnson was seated behind the table that contained marijuana. Johnson admitted that he had been selling marijuana from the house for a month. He contends that there was no evidence that the weapons were in plain sight and no proof that they were his. However, the sizes of the rifles and the testimony describing their location in the corner of the front room, coupled with the fact that Johnson had admittedly been selling drugs from the house for a month, were sufficient to enable the jury to rationally find that he was aware of the rifles and that they were reasonably accessible to him. Thus, there was sufficient evidence that Johnson constructively possessed the rifles to support his felony-firearm conviction. [*Johnson*, 293 Mich App at 83.]

One officer testified that the defendant was not “sitting next to the guns” and two others said they did not see him physically possessing the rifles. *Id.* at 81-82.

In this case, as in *Johnson*, none of the officers saw defendant possess the rifle; one said that he recovered the gun from the enclosed back porch “under a piece of drywall and some debris that was on the floor,” approximately 10 steps from the back door. He admitted that the rifle, which was contained in a bag, was not in plain view, and that no usable fingerprints were found on the gun. He also said, based on his experience, that “guns are used to protect the dope and the person that’s holding or utilizing the dope.” This was sufficient evidence for a rational trier of fact to have found that defendant constructively possessed the rifle found on the back porch. Defendant owned the house at which the gun was found about 10 steps from the back door, suggesting that “the location of the weapon [was] known and it [was] reasonably accessible to” defendant, *id.* at 83, and there was evidence that defendant was using the house to operate a narcotics business, which, the officer testified, are routinely protected by firearms. The rifle appeared to have been deliberately hidden from view, and it was rational for the jury to infer that an owner of the house did so, especially considering that the back porch may have provided the only ingress and egress from the house, as the front door was padlocked.

Defendant argues that “it was also irrational for a jury to infer constructive possession” because “there was evidence that the residence was also owned by another individual.” However, this argument is unavailing because it ignores the fact that constructive possession may be joint. The trial court’s instruction to the jury that “possession may be joint, where two or more people each share possession” and that defendant possessed the substance if he had control of it “either alone or together with someone else,” was a proper statement of the law. *Id.*

Because a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt, *Harverson*, 291 Mich App at 175, the trial court erred when it found that there was insufficient evidence to convict defendant of felony-firearm.

We reverse the trial court's order dismissing defendant's felony-firearm conviction and remand for reinstatement of that conviction and sentence. Defendant's cocaine possession conviction and sentence are affirmed. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray

/s/ Michael J. Riordan