

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAFIKI EKUNDU DIXON,

Defendant-Appellant.

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UNPUBLISHED

June 12, 2014

No. 315276

St. Clair Circuit Court

LC No. 12-002405-FH

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), possession of a firearm by a felon (felon-in-possession), MCL 750.224f, resisting or obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 3 to 25 years for the felon-in-possession conviction and 3 to 15 years each for the possession-with-intent-to-deliver and resisting-or-obstructing convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant was arrested pursuant to an outstanding warrant when the police confronted him a few blocks from his residence. When officers exited their vehicles and identified themselves, defendant fled on foot, ignoring the officers' commands to stop. Defendant was apprehended after unsuccessfully attempting to jump over or through a fence covered in foliage. After defendant was in custody, the police discovered two clear plastic sandwich baggies, each containing seven individually wrapped packages of marijuana, within a few feet of where defendant was attempting to go through the fence.

After defendant was in custody, police officers went to his residence on Cedar Street and made contact with his girlfriend, Lindsey Langolf, who was the sole lessee of the premises. Langolf gave the police written consent to search the premises. During their search, officers discovered (1) a bag with 39 clear plastic baggies with the corners cut off, commonly known as "dealer ends," next to the bed in the master bedroom, (2) a Ball glass jar with suspected marijuana residue next to the bed in the master bedroom, (3) an American Eagle box containing a box of sandwich bags, two digital scales, an envelope with \$640, and a \$50 savings bond in the master bedroom closet, (4) a shoe box containing a photo of defendant and a piece of mail with

defendant's name on it in the master bedroom closet, and (5) an unloaded Remington 870 shotgun under a pile of clothes and a blanket on the floor just outside the master bedroom closet.

## I. MOTION TO SUPPRESS

Defendant first argues that the trial court erred by refusing to suppress the evidence obtained during the warrantless search of the Cedar Street residence. Defendant argues that the search was invalid because the police lacked probable cause to search the premises, and because Langolf's consent to search the premises was not voluntarily given. Defendant preserved his argument that the search of Langolf's premises was improper because there was no probable cause for the search by raising this issue in a motion to suppress filed before trial. However, defendant did not challenge the validity of Langolf's consent in his motion to suppress, leaving that issue unpreserved.

This Court reviews de novo a trial court's ruling on a motion to suppress. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005); *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011). Although this Court engages in a de novo review of the entire record, it will not disturb the trial court's factual findings unless those findings are clearly erroneous. *Williams*, 472 Mich at 313. This Court reviews unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is per se unreasonable, subject only to a few specifically established and well-delineated exceptions. *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973); *People v Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975). The prosecution has the burden to show that a warrantless search or seizure was justified by a recognized exception to the warrant requirement. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003); *People v Wade*, 157 Mich App 481, 485; 403 NW2d 578 (1987). One of the specifically established exceptions to the warrant requirement is a search conducted pursuant to consent. *Schneckloth*, 412 US at 219.

Although defendant argued in his motion to suppress that the police did not have probable cause to search the premises, the trial court properly ruled that probable cause is not necessary when a search is conducted pursuant to lawful consent. See *Schneckloth*, 412 US at 219 (holding that "[i]t is equally well settled that one of the specifically established exceptions to the requirements of both a warrant *and probable cause* is a search that is conducted pursuant to consent") (emphasis added). Defendant's reliance on *People v White*, 392 Mich 404; 221 NW2d 357 (1974), is misplaced because that case did not involve the consent exception to the warrant requirement. Because defendant did not dispute that Langolf had consented to a search of the premises, and the officers' search did not require a showing of probable cause, the trial court did not err by denying defendant's motion to suppress.

On appeal, defendant questions for the first time the validity of Langolf's consent. As previously indicated, defendant did not contest the validity of Langolf's consent in his motion to suppress. Therefore, appellate review of this issue is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. A "plain error" is one that is "clear or obvious." *Id.* "A consent to search permits a search and seizure without a warrant when the consent is

unequivocal, specific, and freely and intelligently given. The validity of consent depends on the totality of the circumstances.” *Galloway*, 259 Mich App at 648.

In his motion to suppress, defendant agreed that the trial court could rely on the preliminary examination transcript to decide the motion. At the preliminary examination, Langolf admitted that she provided written consent to allow the police to search her residence. She did not offer any additional testimony suggesting that her consent was not freely and intelligently given. Thus, there was no basis in the preliminary examination testimony for finding that Langolf’s consent was invalid. Nonetheless, defendant now relies on Langolf’s trial testimony in support of his argument that Langolf’s consent was coerced. At trial, Langolf testified that the police entered the doorway of her house before she invited them inside and told her that if she did not consent to a search, they would obtain a warrant and the home would be left in a state of disarray after the search. Because defendant did not renew his motion to suppress at trial, the prosecutor had no reason to explore the validity of Langolf’s consent at trial, and the trial court was not called upon to evaluate the credibility of Langolf’s testimony for purposes of resolving any suppression issue. Furthermore, Langolf also testified at trial that the police allowed her to contact and consult an attorney before she consented to the search of the premises. This testimony refutes any claim that Langolf’s consent was not freely and intelligently given. Accordingly, we find no plain error.

## II. DIRECTED VERDICT

Defendant next argues that the trial court erred by denying his motion for a directed verdict. In reviewing a trial court’s denial of a motion for a directed verdict, this Court must consider only the evidence introduced at the time the motion was made, view that evidence in the light most favorable to the prosecution, and determine whether a rational trier of fact could find that all elements of the crime were established beyond a reasonable doubt. *People v Burgenmeyer*, 461 Mich 431, 434; 606 NW2d 645 (2000); *People v Dorris*, 95 Mich App 760, 764; 291 NW2d 196 (1980). The credibility of testimony is to be determined by the trier of fact. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Defendant’s argument on appeal pertains only to the two weapons offenses, felon-in-possession and felony-firearm. The elements of felon-in-possession include a previous felony conviction and possession of a firearm. See MCL 750.224f; *People v Perkins*, 473 Mich 626, 629-631; 703 NW2d 448 (2005). “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *Avant*, 235 Mich App at 505. For each of these offenses, defendant challenges only the element of possession.

Possession of a weapon can be actual or constructive, and can be proven by either direct or circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). Possession can also be joint or exclusive. See *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003). “[A] person has constructive possession if there is proximity to the article together with indicia of control” or, “[p]ut 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.” *Hill*, 433 Mich at 470-471; see also *Burgenmeyer*, 461 Mich at 438.

The evidence indicated that the firearm was found in the same bedroom that Langolf said she shared with defendant. Langolf also stated that both she and defendant shared the closet in the bedroom. The firearm was found under a blanket and pile of clothes just outside the closet. Langolf denied previously seeing the shotgun and denied that it belonged to her. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant knew the location of the firearm and that it was reasonably accessible to him just outside the closet of the bedroom that he shared with Langolf. Although defendant offered evidence that the firearm belonged to a friend, Cody Hansen, who left it behind at the residence when he house-sat for defendant, the credibility of Hansen's testimony was for the jury to resolve. Because there was sufficient evidence that defendant constructively possessed the firearm, the trial court did not err by denying defendant's motion for a directed verdict.

### III. PROSECUTORIAL MISCONDUCT

Defendant lastly argues that misconduct by the prosecutor denied him a fair trial. Defendant preserved his claim as it relates to the prosecutor's cross-examination of defense witness Cody Hansen by making an appropriate objection at trial. However, defendant failed to object to the prosecutor's remarks during closing argument, leaving that issue unpreserved.

A claim of prosecutorial misconduct is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Prosecutorial comments must be read as a whole and evaluated in the light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Appellate review of an unpreserved claim of prosecutorial misconduct is limited to ascertaining whether there was a plain error that affected substantial rights. *Id.* at 134.

The record does not support defendant's argument that the prosecutor violated the trial court's evidentiary ruling prohibiting any reference to a "special interrogator" or a "polygraph" during the prosecutor's cross-examination of Hansen. The prosecutor never mentioned the words polygraph or special interrogator. The prosecutor's line of questioning referred to the interrogation as "contact," an "interview," and "another opportunity [for Hansen] to tell this story." It is apparent that the prosecutor attempted to avoid any reference to a polygraph, consistent with the trial court's ruling. The trial court appropriately stated that the prosecutor's question was within the parameters of the court's earlier ruling, and the court reasonably found that Hansen's response referring to a polygraph was non-responsive. Further, defendant was not prejudiced by the reference. The reference was brief and isolated, and the prosecutor did not capitalize on it. The brief reference did not refer to the results of any polygraph. Immediately after Hansen's reference to a polygraph, the prosecutor redirected the questioning by asking Hansen whether he gave an "interview," and the subject was not mentioned again. The trial court offered to give a curative instruction upon request, but there is no indication that one was requested. For these reasons, we reject this claim of error.

We also reject defendant's argument that the prosecutor improperly implied that defendant had a duty to present evidence to defend himself or that the jury should draw negative inferences from defendant's failure to testify by remarking that defendant "cannot come in here and claim that he is just using marijuana" and "cannot come in here and present evidence to you from Cody Hansen who claims that the firearm is his . . . because it's not credible evidence." The prosecutor did not ask the jury to draw any inference from defendant's failure to testify, or suggest that defendant had a duty to present evidence. Rather the prosecutor was merely commenting on the credibility of the defense theory that any marijuana possessed by defendant was only for personal use. The prosecutor argued that this theory was not credible in light of the many seized items showing that the marijuana was intended for sale. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case, *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008), and the prosecutor does not shift the burden of proof by attacking the credibility of a theory advanced by the defendant, *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). Accordingly, there was no plain error.

Finally, it was not improper for the prosecutor to argue that Hansen's claim that the firearm belonged to him lacked credibility where it was not made until more than three months after defendant was charged, and was made after defendant and Hansen had an opportunity to confer while lodged in the same jail. A prosecutor may argue from the facts in evidence that the defendant or another witness is not worthy of belief. *People v Cain*, 299 Mich App 27, 36; 829 NW2d 37 (2012), vacated in part on other grounds 495 Mich 874 (2013). Contrary to what defendant asserts, nothing in the prosecutor's remarks can be characterized as a comment on defendant's failure to testify. We perceive no plain error.

Affirmed.

/s/ Kathleen Jansen  
/s/ Christopher M. Murray  
/s/ Mark T. Boonstra