

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 23, 2014

v

CHRISTOPHER SCOTT NICKERSON,
Defendant-Appellant.

No. 308060
Oakland Circuit Court
LC No. 2011-235705-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

MARC WILLIAM MCARTHUR,
Defendant-Appellant.

No. 308061
Oakland Circuit Court
LC No. 2011-235706-FH

Before: **SERVITTO, P.J.**, and **MURRAY** and **BOONSTRA, JJ.**

PER CURIAM.

Defendants Christopher Nickerson and Marc McArthur were tried jointly, before separate juries. Defendant Nickerson's jury convicted him of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for which the trial court sentenced him as a third habitual offender, MCL 769.11, to concurrent prison terms of 337 months to 80 years for the assault conviction and 1 to 10 years for the felon-in-possession conviction, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. Defendant McArthur's jury convicted him of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), felon-in-possession, and two counts of felony-firearm, second offense. The court sentenced defendant McArthur as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 24 months to 15 years for the cocaine conviction, and 24 months to 30 years for the felon-in-possession conviction, to be served consecutive to two concurrent five-year terms of imprisonment for the felony-firearm convictions. Both defendants appeal as of right. We affirm defendants'

convictions and sentences, but remand for correction of a clerical error in their judgments of sentence.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendants' convictions arise from a failed armed robbery plan at a motel in Madison Heights, Michigan, on October 26, 2010. The intended victim, Saud Shinko, met Constance Hazelett at the motel, with the intention that they would consume alcohol and drugs, and possibly engage in sex. However, Hazelett had made plans with defendant Nickerson for Nickerson to come to the motel to rob Shinko of his drugs and money. Defendant McArthur, who belonged to the same motorcycle club as Nickerson, also went to the motel that night with Noah Smith, the getaway driver. As the evening progressed, Shinko grew suspicious after noticing men sitting in a car about five or six rooms away and Hazelett repeatedly texting and talking on her cellular telephone. Shinko called the front desk and was connected to the police. Meanwhile, the two defendants approached the motel room and knocked on the door. When Hazelett went over to open it, Shinko stopped her. Defendants eventually stopped knocking and fled in a Chrysler 300, apparently because the police had arrived.

After a short police pursuit, defendants' vehicle crashed into a cement wall that separated the motel from a wooded area. According to witnesses at trial, Smith remained in the car, McArthur exited the back seat and fled into the woods, and Nickerson exited the front passenger seat and discharged a firearm five or six times at a pursuing police sergeant, Sergeant Pawlowski, before also fleeing into the wooded area. Nickerson was arrested at a hotel adjacent to the motel and the wooded area, and a police dog was used to locate McArthur, who was hiding in heavy brush in the wooded area. The police recovered a .38 caliber revolver approximately 10 feet from where the car crashed. In an elevator of the hotel where Nickerson was arrested, the police recovered a .380 caliber Caltech handgun, which was missing one round, a black hooded jacket, a black and white bandana, and a folding knife. Also in the woods, about six feet from where McArthur was found, the police recovered a baggie of cocaine, a black and white bandana, and a holster. A .22 caliber pistol was found about 14 feet from where McArthur was found. Later, the police located a .357 magnum handgun and a knife in the wooded area; these items were about six to eight feet from where the other items had been found. The police determined that the .357 Magnum was the weapon that was fired at the officer, and the prosecutor's theory at trial was that Nickerson shot at the officers and later handed off the gun to McArthur as the men were running from the police.

I. DOCKET NO. 308060 (DEFENDANT CHRISTOPHER NICKERSON)

A. SUFFICIENCY OF THE EVIDENCE

Defendant Nickerson argues that his conviction for assault with intent to commit murder must be vacated because the evidence was insufficient to establish his identity as the person who shot at the pursuing police sergeant, or to show that any assault was committed with the necessary intent to kill. On appeal, we review a defendant's challenge to the sufficiency of the evidence de novo, taking the evidence in the light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). This Court must determine, considering the evidence as a whole, whether a rational trier of fact could have found that the

crime's essential elements were proven beyond a reasonable doubt. *Ericksen*, 288 Mich App at 196. However, witness credibility and the weight of evidence are for the fact finder to determine, *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012), as are any inferences that may be drawn, *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Furthermore, because of the difficulty in proving one's state of mind, minimal circumstantial evidence, inferred from all the evidence, will suffice. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Thus, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

1. DEFENDANT NICKERSON'S IDENTITY AS THE SHOOTER

Assault with intent to commit murder requires proof that the defendant committed "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); see also MCL 750.83. Identity is also an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of the charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness may be sufficient to support a conviction for a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Id.*

Defendant Nickerson asserts that there was no credible evidence that he was the shooter. At trial, two witnesses—Hazelett and Pawlowski—identified defendant Nickerson as the person who fired several shots toward Pawlowski's patrol car. Pawlowski testified that he observed defendant Nickerson, who had a distinctive "Mohawk" style haircut, in the front passenger seat of the Chrysler. According to Pawlowski, the lighting conditions in the area were "really good." After a very brief pursuit, the Chrysler crashed into a wall and the sergeant stopped his patrol car about six to ten feet from the Chrysler's back bumper. Pawlowski observed defendant Nickerson exit from the front passenger seat of the Chrysler, raise two handguns, hold them straight out in front of him, and point them toward his patrol car. Pawlowski took cover and immediately heard five or six shots in rapid succession. Pawlowski was positive that defendant Nickerson was the person who shot at him, and testified that defendant Nickerson "was the only person pointing guns at [him]."

Hazelett also testified that she saw defendant Nickerson "shooting his gun" at a police car. She observed defendant Nickerson with his hands straight out, pointing a gun at a police car, and heard five or six shots. From her angle, she observed defendant Nickerson's "whole left side," so she saw the "whole left side of his face," his haircut, and him shooting a gun. Although defendant Nickerson notes the inconsistent witness testimony concerning the number of guns he held, a jury could reasonably infer that Hazelett saw only one gun because she saw only defendant Nickerson's left side. Further, Hazelett explained that she had spent time with defendant Nickerson on four or five occasions, and had a sexual relationship with him "a couple of times." From this evidence, a jury could reasonably infer that Hazelett was familiar with defendant Nickerson, thereby enhancing the reliability of her identification testimony.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant Nickerson's identity as the shooter beyond a reasonable doubt. Although defendant Nickerson argues that the witnesses' testimony was not credible because they varied on some facts, and additionally that he could not be the shooter because no gunshot residue was found on his hands and face, these challenges are related to the weight rather than the sufficiency of the evidence. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). These same challenges were presented to the jury during trial. This Court will not interfere with the jury's role of determining issues of weight and credibility. *Eisen*, 296 Mich App at 331.

2. DEFENDANT NICKERSON'S INTENT TO KILL

Defendant Nickerson also argues that, even if his identity as the shooter was established, the evidence was insufficient to show that he acted with the actual intent to kill. Again, because of the difficulty in proving one's state of mind, minimal circumstantial evidence, inferred from all the evidence, will suffice. *Kanaan*, 278 Mich App at 622. The jury may infer the intent to kill from "the manner and use of a dangerous weapon." *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997).

Pawlowski testified that after the Chrysler crashed into a wall, he intended to exit the car for a foot chase, but observed defendant Nickerson's "guns come up" and "ducked down to take cover." As previously indicated, testimony was presented that defendant Nickerson turned toward Pawlowski and his patrol car, with raised arms stretched out holding a firearm in each hand, and pointed the firearms at the patrol car before rapidly firing several shots in that direction. Pawlowski explained the measures he took to avoid being shot by Nickerson. After the shooting stopped, Pawlowski found a bullet hole "directly above [his] head maybe an inch or two off to the left," and two creases in the roof. A bullet struck the patrol car's oscillating emergency light bar on top of the car. The bullet emerged from the light bar at an angle consistent with the angle at which he parked the car behind the Chrysler. Pawlowski explained that considering the bullet's path and his height, had he continued to exit the vehicle as planned, the bullet would have gone "[t]hrough his head." Had Pawlowski already been standing outside the car, the bullet would have hit his chest area. This evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to infer beyond a reasonable doubt that defendant Nickerson intended to kill Pawlowski by shooting at him. It was up to the jury to determine whether Nickerson only fired the shots to avoid pursuit, without any harmful intent. *Wolfe*, 440 Mich at 514.

B. JURY INSTRUCTIONS - MODIFIED VERSION OF CJI2D 5.13

Defendant Nickerson next argues that the trial court erred by giving the jury a modified version of CJI2d 5.13, which addresses agreements in exchange for testimony. The modified version included the sentencing guidelines range that Hazelett would have faced if she had been convicted as charged of conspiracy to commit armed robbery. Defendant Nickerson argues that the trial court's instruction deprived him of his right to the due process of law. We disagree.

Claims of instructional error are reviewed de novo. *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009). Jury instructions are reviewed as a whole to determine whether any error requiring reversal occurred. *People v Chapo*, 283 Mich App 360, 373; 770

NW2d 68 (2009). The instructions must include all elements of the charged offense and may not omit material issues, defenses, and theories if supported by the evidence. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). Imperfect instructions will not warrant reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Chapo*, 283 Mich App at 373.

The trial court instructed the jury on Hazelett's agreement in exchange for her testimony as follows:

You have heard testimony that a witness, Constance Hazelett, made an agreement with the prosecutor in exchange for her testimony in this trial.

You have also heard evidence that she faced a possible penalty of life or any term of years as a result of those charges.

Sentencing guidelines in her case were twenty-seven to forty-five months. You are to consider this evidence only as it relates to her credibility and as it may tend to show her bias or self-interest. [Emphasis added.]

Defendant Nickerson correctly notes that the emphasized language is not part of CJI2d 5.13, but takes an incorrect view of the required usage of the standard jury instructions. Instructions given by the trial court are not erroneous simply because they do not mirror the standard criminal jury instructions. See *People v Williams*, 288 Mich App 67, 76 n 6; 792 NW2d 384 (2010). The trial court's instructions, as a whole, fairly presented the issue of weighing Hazelett's credibility and bias or self-interest because of the sentencing advantages of her plea agreement offered in exchange for her testimony. While the modified instruction further clarified Hazelett's particular circumstances, it did not lessen the objective of the instruction, and still included the statement that Hazelett faced potential life imprisonment. Further, the plea agreement was addressed extensively during trial, and defense counsel argued that the agreement between Hazelett and the prosecution influenced her testimony.

Additionally, the trial court's general instructions on witness credibility also guided the jury in assessing the credibility of Hazelett's testimony. For example, the jurors were instructed that it was their job to assess witness credibility, and in doing so, they should consider whether the witness has any bias, prejudice, or personal interest in the case, if there have been any promises, threats, or other influences that may have affected how the witness testified, and whether the witness had any special reason to be untruthful. In sum, the trial court's instructions fairly presented the issues to be tried and sufficiently protected defendant Nickerson's rights. Accordingly, defendant Nickerson was not denied his due process right to a fair trial.

C. SCORING OF OFFENSE VARIABLE 13

Defendant Nickerson argues that he is entitled to resentencing because the trial court erroneously scored 10 points for offense variable 13 (OV 13) of the sentencing guidelines. While we agree that OV 13 was incorrectly scored, we find that the error was harmless. When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the

scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.*

OV 13 considers the “continuing pattern of criminal behavior.” MCL 777.43. A score of 10 points is appropriate when “[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii) of the public health code[.]” MCL 777.43(1)(d). The prosecution concedes, and we agree, that defendant Nickerson had only two qualifying crimes and, therefore, the trial court erred in scoring 10 points for OV 13. As the prosecution asserts, however, the scoring error is harmless. If OV 13 is scored at zero points, defendant Nickerson’s total OV score decreases from 90 to 80 points. This scoring adjustment does not affect defendant Nickerson’s placement at OV Level V (80 to 99 points), and thus does not alter the appropriate guidelines range. MCL 777.62. Because the scoring error does not affect the appropriate guidelines range, defendant Nickerson is not entitled to resentencing. MCL 769.34(10); *People v Francisco*, 474 Mich 82, 89-90 n 8; 711 NW2d 44 (2006).

Defendant Nickerson argues, however, that this scoring error, in conjunction with errors in the scoring of OV 1, OV 2, OV 4, OV 6, and OV 19, necessitates resentencing. Defendant Nickerson does not set forth any challenge to the scoring of these other offense variables in his appellate brief, but instead merely directs the Court to his previously filed motion to remand, which this Court denied. Further, in raising the scoring of these five variables in his motion to remand, defendant Nickerson refers to his argument that had defense counsel ensured that gunshot residue testing was performed on his and codefendant McArthur’s clothing, the results would have confirmed that defendant Nickerson did not fire a weapon that night. We conclude in Section I(D) of this opinion that defense counsel was not ineffective for failing to pursue gunshot residue testing on the clothing. Accordingly, we reject this claim of error.

D. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant Nickerson argues that he is entitled to a new trial because defense counsel was constitutionally ineffective for failing to ensure that gunshot residue testing was performed on the clothing that both he and codefendant McArthur wore on the night of the incident. We disagree. Because defendant Nickerson did not raise an ineffective assistance of counsel claim in the trial court, and this Court denied his motion to remand for an evidentiary hearing,¹ our review of this issue is limited to mistakes apparent from the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed and defendant Nickerson bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant Nickerson first must show that counsel’s performance was

¹ *People v Nickerson*, unpublished order of the Court of Appeals, entered July 9, 2012 (Docket No. 308060),

below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant Nickerson must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant Nickerson's and codefendant McArthur's clothing were not tested for gunshot residue, and the clothing apparently was in the custody of the police because both defendants were arrested contemporaneously with their charged conduct. Gunshot residue testing was performed on defendant Nickerson's and codefendant McArthur's hands and faces. No gunshot residue particles were found in the samples taken from defendant Nickerson. A single particle of gunshot residue was found in the sample taken from codefendant McArthur's left hand. Defendant Nickerson now argues that had defense counsel ensured that the clothing was tested, it would have proven that defendant Nickerson was not the shooter, who therefore "must have been" codefendant McArthur.

Decisions about defense strategy, including what evidence to present, and how to argue the case, are matters of trial strategy, *People v Rokey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant Nickerson has not overcome the strong presumption that defense counsel chose not to pursue gunshot residue testing on the clothing as a matter of trial strategy. The defense was initially armed with results from gunshot residue testing that revealed that no residue was detected on defendant Nickerson's hands or face, and that a single particle was detected on codefendant McArthur's left hand. Those test results arguably pointed to codefendant McArthur as the shooter and also supported defendant Nickerson's theory that he did not shoot a gun because no residue was detected on his hands. Defense counsel was also aware, however, that two eyewitnesses, one a police sergeant, had identified defendant Nickerson as the shooter. Defense counsel could have made the objectively reasonable decision to proceed with the favorable results in hand, and not risk producing inculpatory evidence by testing Nickerson's clothing as well. The reasonableness of counsel's decision is supported by the forensic expert's testimony that the absence of particles does not mean that the person did not fire a weapon, and thus, that testing is not conclusive. Had defense counsel pursued testing of the clothing and also obtained favorable results, that evidence would have been cumulative to the prior test results. An unfavorable result, however, would have been more damaging to the defense than obtaining cumulative evidence would have been helpful. Under these circumstances, defendant has not overcome the presumption that defense counsel's decision constituted reasonable trial strategy, and "this Court will not second-guess defense counsel's judgment on matters of trial strategy." *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011).

Moreover, defendant Nickerson cannot demonstrate a reasonable probability that, but for counsel's failure to pursue the testing, the result of the proceedings would have been different. Again, the forensic expert explained that a negative test result does not mean that the person did not fire a gun. Moreover, two eyewitnesses identified defendant Nickerson as the gunman, and neither witness saw codefendant McArthur with a gun or shooting a gun. Considering the testimony of the two eyewitnesses and the forensic expert, defendant Nickerson has not established a reasonable probability that testing of the clothing would have affected the outcome

of the trial. *Armstrong*, 490 Mich at 289-290. Consequently, the record does not support this ineffective assistance of counsel claim.

II. DOCKET NO. 308061 (DEFENDANT MARC MCARTHUR)

A. SUFFICIENCY OF THE EVIDENCE

Defendant McArthur's first claim on appeal is that his convictions must be vacated because the prosecution failed to present sufficient evidence that he possessed the firearms and cocaine found in the woods. We disagree.

1. DEFENDANT MCARTHUR'S POSSESSION OF A 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." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); see also MCL 750.227b. For each of the two weapons offenses, defendant McArthur challenges only the element of possession. Possession of a firearm can be actual or constructive, joint or exclusive. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011).

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. [*Id.* (internal quotations and citations omitted).]

Possession can be proven by circumstantial evidence and reasonable inferences arising from the evidence, and is a factual question for the jury. *Id.*; *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Defendant McArthur frames his argument as though he was simply found in a dark, heavily wooded area where firearms and narcotics were also found. The prosecution presented evidence, however, that defendant McArthur, along with codefendant Nickerson, were part of an armed robbery setup in a nearby motel that went awry. Hazelett testified that she knew both defendants and knew them both to carry guns. On the day of the incident, both defendants were outfitted in black hooded sweatshirts and black and white bandanas. After their getaway car crashed into a cement wall, both defendants ran into a wooded area. The prosecution theorized that as they fled, defendant Nickerson "handed off" the gun he used to shoot at the sergeant. After a search of the wooded area, defendant McArthur was located hiding in a heavy brush and, within six feet of "kind of right where" defendant McArthur was located, the police recovered narcotics, a black and white bandana, and a holster. About 14 feet from defendant McArthur, the police found a .22 caliber semiautomatic handgun, which was positioned in the direction that defendant McArthur walked when emerging from the brush to surrender to the police. The police also recovered a knife and a Taurus .357 Magnum revolver on the "same pathway that [defendant McArthur] had taken" when he emerged from the heavy brush. This gun was within six to eight feet of the other items' location, and within 14 feet of defendant McArthur's hiding place. Defendant McArthur also walked right past where this gun was found when he emerged.

Defendant McArthur was the only person found near these items, and there was no indication that codefendant Nickerson had traveled to that area of the woods. In addition, a particle of gunshot residue was found on defendant McArthur's left hand, and a forensic expert testified that the particle could suggest that defendant McArthur had handled a gun.

The reasonable inferences arising from this evidence, considered together, were sufficient to support a finding that defendant McArthur was not merely present near the firearms, but constructively possessed them. Based on the positioning, a jury could reasonably infer that defendant McArthur knew the location of the firearms because he discarded them during the pursuit or his surrendering, and that the presence of the black and white bandana (the type that defendant McArthur had been seen in previously) with the items indicated that all of the items belonged to defendant McArthur. Further, given the proximity of the firearms to defendant McArthur's hiding place and the fact that defendant McArthur passed the locations where each of the firearms were found, the jury could reasonably infer that the firearms were readily accessible to defendant McArthur. Although defendant McArthur argues that there was no fingerprint evidence, and that his version of the events was more credible, those challenges are related to the weight of the evidence rather than its sufficiency. *Scotts*, 80 Mich App at 9. This Court will not interfere with the jury's role of determining issues of weight and credibility. *Wolfe*, 440 Mich at 514. Rather, this Court must draw all reasonable inferences and make credibility choices in support of the jury's verdict, and that deferential standard of review "is the same whether the evidence is direct or circumstantial." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to infer beyond a reasonable doubt that defendant McArthur possessed the firearms found in close proximity to his hiding place. Thus, the evidence was sufficient to sustain defendant McArthur's convictions of felon in possession and felony-firearm.

2. DEFENDANT MCARTHUR'S POSSESSION OF COCAINE

Like possession of a firearm, possession of cocaine can be actual or constructive, joint or exclusive. *Johnson*, 293 Mich App at 83. Thus, a person need not have "actual physical possession" of a controlled substance to be guilty of possessing it. *Wolfe, supra* at 519-520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the drugs. *Id.* at 520. A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id.* Instead, some additional connection between the defendant and the controlled substance must be shown. *Id.* "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

The same evidence and reasoning that supports the conclusion that defendant McArthur constructively possessed the firearms also supports a sufficient nexus between defendant McArthur and the cocaine discovered in the woods. After fleeing into the woods, defendant McArthur was apprehended and the baggie of cocaine was found within six feet of his hiding place. A similar baggie of cocaine was found on the driver's side floor board of the getaway car. Thus, a jury could reasonably infer that the baggie of cocaine originated from the getaway car. Defendant McArthur was the only person near the cocaine. Additionally, the cocaine was next to a black and white bandana that likely belonged to defendant McArthur. From this evidence, a

jury could reasonably infer that defendant McArthur brought the baggie of cocaine out of the getaway car, and, as he fled, discarded it in the woods along with his bandana and other items. Thus, when viewed in a light most favorable to the prosecution, the evidence was sufficient to establish beyond a reasonable doubt that defendant McArthur possessed the cocaine.

B. DEFENDANT MCARTHUR'S SENTENCING - SCORING OF OFFENSE VARIABLE 1

Defendant McArthur argues that he is entitled to resentencing because the trial court erroneously scored 25 points for offense variable 1 (OV 1) of the sentencing guidelines. We disagree.

OV 1 concerns the aggravated use of a weapon. A score of 25 points is appropriate if a "firearm was discharged at or toward a human being." MCL 777.31(1)(a). The instructions for OV 1 state that "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." MCL 777.31(2)(b). Codefendant Nickerson was scored 25 points for OV 1 for his conduct in discharging a firearm at or toward a police sergeant. Thus, the trial court properly scored OV 1 for defendant McArthur in accordance with codefendant Nickerson's score for that variable.

Defendant McArthur's reliance on *People v Johnston*, 478 Mich 903; 732 NW2d 531 (2007), is misplaced. In that case, the defendant did not have *any* convictions in common with the other offenders. *Id.* at 532. In this case, the evidence indicated that both defendants were armed, presumably for the botched armed robbery plot, and both were convicted of the common offense of felon in possession of a firearm. Because defendant McArthur was not the only offender convicted of felon in possession, this case is distinguishable from *Johnston*. Defendant McArthur acknowledges that he and codefendant Nickerson have the common felon-in-possession conviction. Thus, this case qualifies as a "multiple offender case" for purposes of scoring OV 1, and the trial court properly scored 25 points for OV 1.

For this reason, we also reject defendant McArthur's related ineffective assistance of counsel claim. Because there was no basis for an objection to the trial court's scoring of OV 1, defendant McArthur cannot establish a claim of ineffective assistance of counsel in this regard. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

C. DEFENDANT MCARTHUR'S AMENDED JUDGMENT OF SENTENCE

Defendant McArthur argues that he is entitled to resentencing because the trial court improperly amended his judgment of sentence to specify that his felony-firearm sentences were to be served consecutively to his sentences for possession of cocaine and felon in possession of a firearm. Defendant McArthur contends that the trial court's amendment, without conducting a new sentencing hearing, violated his due process rights. We disagree. Whether defendant McArthur is entitled to resentencing presents a question of law, which we review *de novo*. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

The trial court was authorized to correct clerical errors in the judgment of sentence. MCR 6.435(A). At sentencing, the trial court stated on the record that the sentences for Counts I and III (felon-in-possession and possession of cocaine) were to be served concurrently with each other and that the sentences for Counts II and IV (felony-firearm) were also to be served

concurrently to each other. The court stated that there was “no jail credit” for any sentence. On the original judgment of sentence, the trial court included the notation “CS,” an apparent abbreviation for consecutive sentencing, after each of defendant McArthur’s individual sentences. In the amended judgment of sentence, the trial court noted that only the felony-firearm convictions were to run consecutively to defendant McArthur’s other sentences in this case, but that the sentences for all counts were to run consecutive to McArthur’s prior sentence for a parole violation offense. The amended judgment did not substantively change McArthur’s sentences, but instead accurately reflected and clarified the sentences that the court had previously announced on the record at sentencing. Because the court was merely correcting a clerical error in the judgment, a full resentencing was not necessary. MCR 6.435(A).

D. CLERICAL ERROR IN DEFENDANT MCARTHUR’S JUDGMENT OF SENTENCE

Plaintiff concedes, and we agree, that defendant McArthur’s judgment of sentence erroneously indicates that defendant McArthur stood trial for, and was acquitted of, conspiracy to attempt to commit armed robbery. That charge was actually dismissed before trial and, therefore, it was never submitted to the jury for a verdict. Accordingly, we remand this case to the trial court for the ministerial task of correcting this clerical error in the judgment of sentence. MCR 6.435(A); MCR 7.216(A)(7). Although codefendant Nickerson does not raise this issue, like defendant McArthur, his judgment of sentence also erroneously indicates that he was acquitted of conspiracy to attempt to commit armed robbery. That charge was dismissed before trial in codefendant Nickerson’s case. Accordingly, pursuant to MCR 7.216(A)(7), we also remand for correction of this clerical error in codefendant Nickerson’s judgment of sentence.

E. REMAND - ATTORNEY FEES

Lastly, defendant McArthur challenges the trial court’s order holding him responsible for \$5,000 in attorney fees awarded to defense counsel. Defendant McArthur argues that the amount of attorney fees awarded to defense counsel, which exceeded the standard fee schedule for appointed counsel in Oakland County, was unreasonable. He requests a remand to the trial court for an opportunity to present “relevant information” to the trial court regarding the reasonableness of the amount of attorney fees.

The authority to impose costs authorized by statute is discretionary and review of the costs imposed should be for an abuse of discretion. *People v Dilworth*, 291 Mich App 399, 401; 804 NW2d 788 (2011). A trial court may order a criminal defendant who was afforded appointed counsel to reimburse the county for the costs incurred in criminal proceedings, including the expenses of providing legal assistance to the defendant. *Id.*; MCL 769.34(6); MCL 769.1k(1)(b)(iii). “[T]he costs of prosecution imposed must bear some reasonable relation to the expenses actually incurred in the prosecution,” but the amount need not be exact. *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012) (quotation marks and citation omitted).

The record discloses that the trial court had adequate information to decide whether counsel’s request for extraordinary fees was appropriate. In trial counsel’s request for extraordinary fees, which amounted to a difference of \$1,675 over the court’s regular fee schedule, counsel noted that defendant McArthur, a fourth habitual offender, was originally charged with conspiracy to commit armed robbery (a life offense), felon in possession, and two

counts of felony-firearm. As plaintiff notes, although the district court reduced the original conspiracy charge to conspiracy to attempt armed robbery, the prosecution filed a pretrial motion to reinstate the original charge. In the request for extraordinary fees, trial counsel detailed the hours spent on defendant McArthur's case from his appointment in July 2011 until sentencing on December 13, 2011. In addition to spending 2-1/2 hours reviewing and responding to the prosecution's pretrial motion, trial counsel's activities included visiting defendant McArthur in jail on six different occasions for a total of 8-3/4 hours, reviewing the police reports and preparing for defendant McArthur for two hours, attending pretrial hearings for two hours, researching gunshot residue testing and trial preparation for 12-1/2 hours, six days in trial for 36 hours, reviewing transcripts and preparing for defendant McArthur for two hours, and two hours for sentencing. The itemization submitted by trial counsel totaled 66.25 hours, resulting in compensation of approximately \$75 an hour.

Trial counsel submitted to the trial court an itemized listing of the dates, amounts of time, and the activities for which he sought compensation. Defendant McArthur has not explained what additional relevant information he would present on remand that directly addresses the alleged unreasonableness of the attorney fees. While defendant McArthur makes certain complaints about his overall legal representation, which he placed on the record below, the trial court was familiar with the record, having presided over the case since its inception. We therefore reject defendant McArthur's request to remand this case for a hearing on the reasonableness of the amount of attorney fees awarded.

Affirmed and remanded for the limited purpose of correcting the judgments of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra