

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIE ANTOINE PAYNE,

Defendant-Appellant.

UNPUBLISHED

October 21, 2003

No. 242140

Oakland Circuit Court

LC No. 2001-181878-FH

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a habitual offender, fourth offense, MCL 769.12, to two to fifteen years' imprisonment for the felon in possession and possession of cocaine convictions and two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first alleges that the trial court erred in failing to sua sponte instruct the jury regarding the credibility of the testimony given by the codefendant. We disagree. A defendant is precluded from challenging an omitted instruction when it has not been requested or when an objection to the omission is not raised in the trial court. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003). A forfeited, nonconstitutional error may be considered by the appellate courts only where the error was plain and affected defendant's substantial rights. *Id.* at 643. Defendant has failed to demonstrate plain error affecting his substantial rights. He was not entitled to the instruction when the disputed testimony was given in a joint trial and the codefendant would have been prejudiced by such an instruction. *People v Reed*, 453 Mich 685, 687, 693-694; 556 NW2d 858 (1996).

Defendant next alleges that there was insufficient evidence of possession to support the felon in possession and felony-firearm convictions. We disagree. When reviewing a challenge to the sufficiency of the evidence to support a conviction, the appellate court reviews the evidence in a light most favorable to the prosecution. *People v Sherman-Huffman*, 466 Mich 39, 40; 642 NW2d 339 (2002). The Court must consider whether the evidence at trial justified a rational trier of fact in finding that the elements of the crime were proved beyond a reasonable doubt. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Possession includes both actual and constructive possession of a firearm, as well as joint and exclusive possession.

People v Hill, 433 Mich 464, 470-471; 446 NW2d 140 (1989). A person has constructive possession of a firearm when proximately located near the article and able to exercise dominion and control over it. *Id.* Possession occurs when a weapon is accessible and available at the time of commission of the crime. *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993).

In the present case, defendant was found in the same bedroom where the gun was located. Police found both men's and women's clothing in the bedroom. There was testimony that defendant had been staying with the codefendant for some time before the arrest. Defendant told police that the gun was unloaded, and it was indeed unloaded. Defendant also told police that his fingerprints might be on the gun because it was on the bed. Viewing the evidence in the light most favorable to the prosecution, a rational jury could reasonably find defendant resided in the bedroom and kept the gun in the course of his illegal possession of drugs. It is the province of the trier of fact to determine what inferences may be fairly drawn from the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood