

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD DESHAWN FORD,

Defendant-Appellant.

UNPUBLISHED

January 27, 2004

No. 243331

Oakland Circuit Court

LC No. 01-179863FH

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of felon in possession of a firearm, MCL 750.224f, possession of a firearm during a commission of a felony (“felony-firearm”), MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to 11 months to 7 ½ years for felon in possession of a firearm, 2 years to be served consecutively for felony-firearm, and sentenced him to time served for the misdemeanor marijuana offense. We affirm.

I. FACTS

This case arose from the discovery, by police, of firearms and marijuana at defendant’s residence during a search of his home. Detective Bart Wilson of the Oakland County Sheriff’s Department testified that on June 21, 2001, he obtained a search warrant¹ to search the residence of 21014 Wyoming Street in Royal Oak Township. Wilson, several other undercover narcotics detectives, and a uniformed officer arrived at defendant’s residence at approximately 4:30 in the afternoon to execute the warrant. Wilson knocked loudly on the door and announced, “Police with a search warrant. Open the door.” No one answered. The detectives then attempted to open the door forcibly with a ram². After about five to ten minutes, the police were able to gain entry to defendant’s residence.

¹ The warrant was granted based on the results of an ongoing investigation of the residence for narcotic sales.

² A ram is a ten-pound pole used by police authorities to strike a door open around the lock area to gain entry to a premises.

Wilson testified that upon their initial entry to the residence, he observed defendant awake sitting in a chair in the living room listening to music. Wilson testified that defendant did not seem scared or surprised and that his demeanor was calm upon their entry. The detectives secured defendant and the residence before conducting a search of the premises. The detectives forced open a locked bedroom and found a loaded .38 caliber handgun, two baggies of marijuana, several empty baggies³, a digital scale, \$80-90 cash, and mail correspondence bearing defendant's name as the addressee. Detectives also discovered an unloaded AK-47 rifle on the floor between the bed and the dresser with an ammunition clip next to it. In the closet they found two .22 caliber rifles, several loaded ammunition clips, and miscellaneous bullets.

After the search, Detective Wilson and Detective Tim Pawlowski took defendant into the utility room to talk. Wilson verbally advised defendant of his rights which he read from a sheet and then showed defendant the same. Defendant took the paper and read it aloud in front of the officers. Defendant then signed a paper waiving his rights and spoke to the officers. Wilson told defendant what they had found in his room. Wilson testified that defendant admitted that it was his bedroom and never suggested that someone else lived there. Defendant admitted that the marijuana was his stating, "The dope is mine." Defendant admitted using the marijuana⁴ and that he gave it away to friends sometimes. Defendant also admitted that the handgun and the AK-47 were his. Wilson testified that defendant concluded by stating, "You got me red-handed." No other evidence linking anyone but defendant to the home was found. Defendant was arrested and subsequently convicted by jury. He now appeals as of right.

II. DOUBLE JEOPARDY

Defendant contends that his convictions and sentences for both felon in possession of a firearm and felony-firearm violate the federal and state protections against double jeopardy. We disagree.

A. Standard of Review

A challenge under the double jeopardy clauses of the federal and state constitutions presents a question of law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

B. Analysis

Recently, the Michigan Supreme Court addressed the issue of whether convictions for both felon in possession of a firearm and felony-firearm violated the double jeopardy clauses of federal and state constitutions in *People v Calloway*, ___ Mich ___; ___NW2d ___(2003)

³ Wilson, who was qualified as an expert in narcotics investigations at trial, characterized the small empty baggies as a sort of "packaging material" commonly used by someone breaking down marijuana into smaller quantities for sale.

⁴ There was inconsistent testimony at trial regarding defendant's statements admitting that he sold the marijuana. Detective Wilson testified that he recalled defendant saying that he sometimes sold it. Detective Pawlowski testified that defendant denied selling it.

(docket # 122430, rel'd 11/25/03). The double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for both multiple prosecutions for the same offense after a conviction or acquittal and multiple punishments for the same offense. *Ohio v Johnson*, 467 Mich 493, 497; 104 S. Ct 2536; 81 L. ED. 2d 425 (1984). The issue presented in this case is one of multiple punishments for the same offense.

Even if the crimes are the same, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end. *Id.* at 499. The question is, then, whether the state legislature intended to authorize cumulative punishments. *Id.* at 497. Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b. *Calloway, supra, (slip op at 6).*

Based on the reasoning articulated in our Supreme Court's analysis in *Calloway*, defendant's argument cannot be accepted. Thus, there were no violations of the federal or state double jeopardy protections.

II. SUFFICIENCY OF THE EVIDENCE

Defendant next contends that there was insufficient evidence to show that the defendant possessed a gun under the felony-firearm statute. Defendant suggests that because of the insufficiency of evidence, his felony-firearm conviction and the corresponding sentence should be vacated with prejudice. We disagree.

A. Standard of Review

When reviewing a challenge to the sufficiency of the evidence, this Court must examine the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Collins*, 239 Mich App 125, 130; 607 NW2d 760 (1999).

B. Analysis

The felony-firearm statute punishes anyone who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony. MCL 750.227b. A person has "possession" of a weapon when it is accessible and available at the time the crime is committed. *People v Terry*, 124 Mich App 656, 662; 335 NW2d 116 (1983). Possession may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him. *Id.* at 470-471.

At trial, testimony was given that defendant was the lessee of the premises and was identified as the head of the household. Defendant received mail at the residence and his driver's license bore the same address. There was no evidence found in the home to support defendant's assertion that his brother lived there and not him. No other evidence linking anyone but defendant to the home was found. Further, defendant admitted that the handgun and the AK-47 were his. In addition, there was ample evidence that defendant did reside at the residence, in

which case, his knowledge of the weapons would be imputed. Viewed in a light most favorable to the prosecution, the evidence could support a finding beyond reasonable doubt that defendant knew of the location of the weapons and had access to them.

III. PROSECUTORIAL MISCONDUCT

Defendant next contends that he was denied a fair trial due to prosecutorial misconduct. Specifically, defendant asserts that the prosecutor denied him his state and federal due process rights by making an improper closing argument which shifted the burden of proof from the prosecutor to defendant. We disagree.

A. Standard of Review

Claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. Issues of prosecutorial conduct are reviewed case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Akins*, ___ Mich App ___; ___NW2d ___ (2003) (docket # 240359, rel'd 12/09/03).

B. Analysis

Where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. *Id.*

A prosecutor may comment on the weakness of defendant's alibi and may observe that the evidence against the defendant is undisputed even if the defendant is the only one who could have contradicted the evidence or failed to call corroborating witnesses. *Id.* Here the prosecutor commented that it was unusual that defendant's brother did not testify on behalf of defendant, given that defendant contended that his brother was the sole person living in the residence and the occupant of the room where the weapons were found. The prosecutor's comments were observations about the weakness inherent in the defense theory and thus, did not amount to prosecutorial misconduct.

IV. INSTRUCTIONAL ERROR

Finally, defendant contends that the trial court reversibly erred by not giving an instruction of mere presence. We disagree.

A. Standard of Review

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). In reviewing claims of error in jury instructions, this Court examines the instructions in their entirety. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Jury instructions must include all the elements of the charged offense and

must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

B. Analysis

Instructions are reviewed in their entirety to determine if reversal is required. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1982). Failure to give a requested instruction is error requiring reversal only if the requested instruction is substantially correct, was not substantially covered in the charge given to the jury, and concerns an important point in the trial so that failure to give it seriously impaired the defendant's ability to effectively present a given defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

Here, the requested instruction by the defendant was to supplement the definition of constructive possession. Specifically the defense requested that the instruction be supplemented with, ". . . that you must look at the actions of the defendant to make a determination. The Prosecution must show an additional link between the item and the defendant." The trial court denied the request, reasoning that the instructions given already covered the issues in defendant's suggested supplement to the definition of possession. In the final jury instructions, the trial court defined possession as follows:

Possession does not necessarily mean ownership. Possession means either: the person had actual physical control of the substance or guns, or the person has the right to control the substance or guns, even though it is in a different room or place. Possession may be sole, where one person alone possesses the substance or guns. Possession may be joint, where two or more people each share possession. **It is not enough if the defendant merely knew about the marijuana or guns; the defendant possessed the marijuana or guns only if he had control of them or the right to control them, either alone or together with someone else.** (emphasis added)

The jury was given instructions that an additional link between the item and the defendant must be shown by the prosecutor. Thus, the instructions given to the jury substantially covered defendant's mere presence issue and fairly presented the issues to be tried. The trial court did not err in its denial of defendant's request for a supplemental instruction.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello