

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 19, 2015

v

RONALD EARL BURROWS,

Defendant-Appellant.

No. 320716
Oakland Circuit Court
LC No. 2013-246293-FH

Before: HOEKSTRA, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b(1). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 61 days in jail for the possession of heroin conviction, 61 days in jail as a second or subsequent controlled substance offender under the controlled substances act, MCL 333.7413(2), for the possession of marijuana conviction, and a consecutive term of two years’ imprisonment for the felony-firearm conviction. Because the evidence was sufficient to support defendant’s convictions, any error relating to his bindover was harmless, and any collection of funds from defendant is lawfully proceeding under MCL 769.11, we affirm.

Defendant’s convictions arose from a police raid of a house at 26 Crescent Street, during which they found a handgun under a bed in one of the bedrooms, .3763 grams of heroin in a kitchen drawer, and 2.15 grams of marijuana on a table. In the kitchen where police found heroin, they also discovered two scales with drug residue on them as well as small baggies. At the time of the search, defendant was present and he was the only occupant of the house. In addition, police found mail and bills in the home addressed to defendant at the 26 Crescent Street address as well as other documents bearing defendant’s name, such as his birth certificate. Men’s clothing was discovered in one of the bedrooms. The officers did not find any proofs of residency, such as documents or mail, indicating that anyone other than defendant resided at 26 Crescent Street. A jury convicted defendant as noted above. He now appeals as of right.

On appeal, defendant first challenges the sufficiency of the evidence to support his convictions of felony-firearm and as a second or subsequent drug offender for his conviction of possession of marijuana. In particular, defendant contends that, although a gun was discovered

in the house, it was under a bed and out of sight. Defendant asserts that he has a constitutional right to bear arms, and he argues that there is no evidence that defendant carried the gun, “went for” the gun during the raid, or that he had the gun in his possession while possessing heroin. Consequently, defendant maintains that the evidence is insufficient to support his felony-firearm conviction. Regarding his subsequent drug offender enhancement relating to his conviction for possession of marijuana, defendant maintains that the trial court erred as a matter of law in applying MCL 333.7413(1) to this case because it is not applicable to enhance a sentence for conviction of possession of marijuana.

This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). This Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* “All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury’s determinations regarding the weight of the evidence and the credibility of the witnesses.” *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

The elements of felony-firearm are that the defendant possessed or carried a firearm during the commission of, or the attempt to commit, a felony. *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011). “Possession of a firearm can be actual or constructive, joint or exclusive.” *Id.* at 83. Constructive possession involves “proximity to the article together with indicia of control.” *Id.* (citation omitted). “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.* (citation omitted); *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993). “Possession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact.” *Johnson*, 293 Mich App at 83.

In this case, the predicate felony underlying defendant’s felony-firearm conviction is possession of heroin, meaning that the pertinent question is whether the evidence was sufficient to establish that defendant possessed the firearm at the time he possessed the heroin. See *People v Burgenmeyer*, 461 Mich 431, 439-440; 606 NW2d 645 (2000). When considering whether possession of a firearm occurred at the same time as possession of a controlled substance, it is helpful to remember that “[a] drug-possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it.” *Id.* at 439. Consequently, to support a conviction for felony-firearm premised on possession of a controlled substance, it is not necessary that a defendant have possession of the items at the specific time of arrest or during a police raid. *Id.* Rather, the evidence is sufficient if a rational jury could reasonably infer from the evidence that defendant possessed a firearm when also possessing a controlled substance. *Id.* at 439-440; *Johnson*, 293 Mich App at 82-83.

For example, in *Burgenmeyer*, 461 Mich at 439-440, the defendant was not home during the police search of his home, but the Court nonetheless found sufficient evidence to support a felony-firearm conviction because police found two handguns on top of a dresser in the defendant’s bedroom, within three feet of the dresser where police found cocaine. Despite the fact that the defendant was not present, the Court reasoned that “[t]he drugs and the weapons were close enough that a jury reasonably could conclude that the defendant possessed both at the same time.” *Id.* at 440. Similarly, in *Johnson*, 293 Mich App at 82-83, this Court upheld a

felony-firearm conviction based on the determination that firearms were “reasonably accessible” to the defendant where, during a raid, police found the defendant seated in the front room behind a table containing marijuana and found the firearms in the corner of the room, in the vicinity of, but not directly next to, the defendant and the marijuana. Finally, in *Williams*, 198 Mich App at 540-541, police found the defendant along with drugs, money, and paraphernalia in the basement, and they also found a loaded gun, some cash, and bankbooks belonging to the defendant inside a metal box inside a padlocked wooden safe in the basement of the home. During the raid, the defendant made no attempt to get to the safe and police never found the keys to the safe. Nevertheless, this Court rejected defendant’s argument that he was entitled to a directed verdict, concluding that “the presence of [the] defendant’s bankbooks inside the locked box created a question of fact regarding whether the contents of the safe, including the gun, were accessible to him at the time he possessed the controlled substances found in his home.” *Id.*

Likewise, in the present case, viewing the evidence in the light most favorable to the prosecution, we conclude that a rational jury could reasonably find that defendant constructively possessed the firearm at the time he possessed the heroin. Given defendant’s presence at the home at the time of the search, the mail and current bills addressed to defendant at 26 Crescent Street, the documents in defendant’s name found in the kitchen and bedroom, as well as the lack of any evidence indicating that anyone other than defendant resided in the home, the jury could reasonably infer that defendant resided at 26 Crescent Street. See *People v Hardiman*, 466 Mich 417, 422; 646 NW2d 158 (2002); *People v Echavarría*, 233 Mich App 356, 370; 592 NW2d 737 (1999). This evidence of defendant’s residency also supported the inference that defendant possessed the heroin found in the kitchen drawer and the handgun found under the bed in the bedroom. See *Hardiman*, 466 Mich at 422; *Johnson*, 293 Mich App at 82-83. The heroin was found in defendant’s residence in a kitchen drawer and the same drawer also contained defendant’s mail. The handgun was readily accessible under a bed in a bedroom containing men’s clothing, and papers bearing defendant’s name were recovered on a nightstand in the bedroom, supporting the inference that defendant knew of the gun’s location. These facts reasonably give rise to the inference that defendant possessed both the handgun and the heroin recovered in his home. Cf. *Hardiman*, 466 Mich at 422; *Johnson*, 293 Mich App at 82-83. Furthermore, considering the close proximity of the kitchen where police found the heroin and the bedroom where police found the handgun (approximately five feet), we find that the heroin and the handgun were sufficiently close for a rational jury to reasonably conclude that the loaded handgun, which was on the floor underneath the edge of the bed, was reasonably accessible to defendant at the time he possessed the heroin found only five feet away. Cf. *Burgenmeyer*, 461 Mich at 439-440; *Johnson*, 293 Mich App at 82-83; *Williams*, 198 Mich App at 540-541. In sum, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to permit the reasonable inference that defendant constructively possessed the handgun at the time he possessed the heroin and the evidence was therefore sufficient to support defendant’s felony-firearm conviction. *Johnson*, 293 Mich App at 82-83.

Although, as defendant argues on appeal, the evidence does not show that defendant “went for the gun during the raid” or that “the gun was *used* at all when he committed the heroin possession felony,” such a showing is not necessary to support a felony-firearm conviction. See *Burgenmeyer*, 461 Mich at 439-440; *Williams*, 198 Mich App at 540-541. Instead, it is enough to establish possession where the defendant knew of the firearm’s location and that the firearm

was reasonably accessible when he possessed the narcotics. *Johnson*, 293 Mich App at 82-83; *Williams*, 198 Mich App at 540-541.

We also find no merit to defendant's argument that the evidence did not support his felony-firearm conviction because he has a constitutional right to bear arms and the evidence failed to establish that he did not have a license to possess a gun in his home. A defendant's eligibility or ineligibility to possess a firearm is not an element of felony-firearm, which only requires that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. See *Johnson*, 293 Mich App at 82-83. Further, the right to bear arms is not unlimited, and it "does not encompass the possession of a firearm during the commission of a felony." *People v Powell*, 303 Mich App 271, 273; 842 NW2d 538 (2013).

Defendant also challenges the sufficiency of the evidence to support his conviction as a second or subsequent drug offender under MCL 333.7413, which "provides for enhanced sentencing for defendants convicted of a second or subsequent controlled substance offense[.]" *People v Lowe*, 484 Mich 718, 720; 773 NW2d 1 (2009); *People v Williams*, 268 Mich App 416, 427-428; 707 NW2d 624 (2005). In challenging the sentencing enhancement in this case, defendant mistakenly relies on MCL 333.7413(1), which allows for the imposition of a life sentence for subsequent specified drug offenses, and, because possession of marijuana is not an offense listed in MCL 333.7413(1), defendant argues the trial court could not enhance his sentence relating to his possession of marijuana. But, contrary to defendant's argument, the trial court did not rely on MCL 333.7413(1). In actuality, defendant was charged with and convicted of possession of marijuana as a second or subsequent drug offender subject to the double penalty under MCL 333.7413(2), which provides, "[e]xcept as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both." By its plain terms, this provision is not limited to the certain enumerated drug offenses listed in MCL 333.7413(1); rather, it encompasses "a second or subsequent offense under this article." "This article" refers to Article 7 of the Public Health Code, which relates to controlled substances and which includes possession of marijuana under MCL 333.7403(2)(d). See also MCL 333.7413(5) ("For purposes of [MCL 333.7413(2)], an offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug."). In short, defendant's conviction of possession of marijuana could properly form the basis for enhanced sentencing as a second or subsequent drug offender under MCL 333.7413(2). Defendant does not dispute that he was previously convicted of a drug offense. The jury in the instant case found defendant guilty of possession of marijuana, and thus, defendant, having been convicted of a prior drug-related offense, was subject to enhanced sentencing under MCL 333.7413(2) given his status as a repeat drug offender. See *Lowe*, 484

Mich at 720; *Williams*, 268 Mich App at 427-428. Accordingly, we find no error in the trial court's application of MCL 333.7413(2) in this case.¹

Defendant next argues that the trial court abused its discretion in denying his pretrial motion to quash the felony-firearm charge because the prosecution failed to present sufficient evidence to bind him over for trial. However, given our conclusion that the prosecution presented sufficient evidence at trial to support defendant's felony-firearm conviction, we need not consider whether there was any error in defendant's bind-over. *People v Bosca*, ___ Mich App ___, ___; ___ NW2d ___ (2015), slip op at 21. "[T]he presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless," and thus, defendant is not entitled to relief. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

Finally, defendant challenges the validity of the trial court's reimbursement order on the ground that it impermissibly delegates the court's authority to determine a defendant's ability to pay the court-imposed costs of his appointed counsel to the Michigan Department of Corrections ("MDOC") in violation of the separation of powers provisions of the Michigan Constitution. Const 1963, art 3, § 2. Defendant failed to challenge the court's reimbursement order in the trial court, on constitutional grounds or otherwise, meaning our review is limited to plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012).

Pursuant to MCL 769.1k, if a defendant is found guilty following a trial, the trial court may impose fees and costs, including the expenses of providing legal assistance to the defendant. See MCL 769.1k (b)(iv). Because an indigent defendant is not required to pay such a fee, a defendant is entitled to an ability to pay assessment when the trial court actually enforces the fee and the defendant contests his ability to pay. *People v Jackson*, 483 Mich 271, 292-293, 298; 769 NW2d 630 (2009). "The operative question for any such evaluation will be whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*." *Id.* at 293 (emphasis in original). If a defendant attempts to challenge a fee before enforcement, the trial court should not entertain the defendant's ability-to-pay-based challenge. *Id.* at 292.

Moreover, to collect fees imposed, MCL 769.1l, allows the trial court to order MDOC to "deduct 50% of the funds received by the prisoner in a month over \$50.00 and promptly forward a payment to the court as provided in the order when the amount exceeds \$100.00" By restricting garnishment of a prisoner's account to the balance exceeding \$50, this provision "inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency" that obviates the need to conduct an initial ability to pay

¹ Insofar as defendant claims counsel rendered ineffective assistance of counsel by failing to object to a sentencing enhancement under MCL 333.7413, his claim is without merit. Because the trial court properly applied MCL 333.7413(2), any objection to a sentencing enhancement would have been futile and counsel is not considered ineffective for failing to make a futile objection or advocate a meritless position. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

assessment. *Jackson*, 483 Mich at 295, 298. Despite its elimination of an initial individualized ability to pay assessment, MCL 769.11 is constitutional. *Jackson*, 483 Mich at 294-295. A defendant wishing to challenge the presumption created by MCL 769.11 may petition the court to reduce or eliminate the amount of remittance; but to succeed with such a petition, the defendant must meet the heavy burden of showing that enforcement of the order would “work a manifest hardship on the prisoner or his immediate family.” *Jackson*, 483 Mich at 297.

In this case, the trial court ordered payment of state costs, an assessment for the crime victim rights funds, and payment of attorney costs for a total of \$1,659. The trial court also entered three separate orders regarding collection of funds from defendant. It is the second collection order which defendant challenges on appeal.² This second order, which the trial court entered on March 6, 2014, required defendant to reimburse the court for the costs of his appellate attorney and, regarding collection, it stated: “If the Defendant is incarcerated at the time efforts to collect the trial/appellate attorney fees begin, the Court finds that the [MDOC] will make an ability to pay determination in accordance with [*Jackson*].” Defendant claims on appeal that permitting MDOC to make an ability to pay determination violates separation of powers principles because an ability to pay determination may only be made by the judiciary.

We find it unnecessary to decide the merits of defendant’s separation of powers claim, however, because a subsequent amended order to remit entered by the trial court has in effect superseded the March 6, 2014 order in question, and as a result there is no indication at this time that MDOC will make an ability to pay determination. Specifically, on September 15, 2014, the trial court entered an amended order to remit in connection with a balance of \$1,659, i.e., \$1,325 in costs for defendant’s appellate attorneys fees plus \$334 in earlier costs imposed at sentencing. This amended order to remit complied with MCL 769.11. That is, it ordered MDOC to collect 50 percent of all funds received by defendant over \$50.00 each month and to remit those funds to the trial court when the sum collected exceeded \$100. See MCL 769.11.

Given the amended order to remit now in effect, at the present time, any efforts to collect are being conducted pursuant to MCL 769.11, which creates a presumption of nonindigency and which obviates the need for an initial ability to pay assessment. See *Jackson*, 483 Mich at 295, 298. In other words, there has been no determination of defendant’s ability to pay by MDOC and, given that the governing order now in place has ordered collection pursuant to MCL 769.11, there is no basis for MDOC to make such a determination in the future.³ We note as well that defendant does not contest his ability to pay and that, although there is an order to remit in place,

² The first order to remit related solely to the minimum state costs and the assessment for the crime victims’ rights funds. These costs were imposed at sentencing and, on March 6, 2014, the trial court thereafter entered an order to remit in compliance with MCL 769.11. However, an amended order to remit has since entered and this first order to remit is not at issue on appeal.

³ In the unlikely event that MDOC should for some reason attempt to make such a determination in the future, defendant could challenge MDOC’s authority to do so at that time. Until then, defendant’s speculative concerns are not ripe for review. See *People v Carp*, 496 Mich 440, 527; 852 NW2d 801 (2014); *People v Conat*, 238 Mich App 134, 145; 605 NW2d 49 (1999).

there is no indication any funds have actually been collected from defendant. Should collection actually begin in accordance with the amended order to remit under MCL 769.11, defendant remains free to petition the trial court to reduce or eliminate the remittance if he believes he can show that enforcement of the order would work a manifest hardship on him or his immediate family.⁴ See *Jackson*, 483 Mich at 297. In sum, given the amended order to remit that currently governs any efforts to collect funds from defendant, it is unnecessary to reach his separation of powers argument and defendant has not demonstrated plain error affecting his substantial rights.

Affirmed.

/s/ Joel P. Hoekstra

/s/ David H. Sawyer

/s/ Stephen L. Borrello

⁴ On the record presented, contrary to defendant's arguments, we also discern no reason why counsel should be considered ineffective for failing to object to the trial court's order permitting MDOC to make an ability to pay determination. In light of the amended order to remit, collection is now proceeding, if at all, under MCL 769.11, without an ability to pay determination by MDOC, and defendant remains free to challenge the presumption created by MCL 769.11. Indeed, defendant does not actually contest his ability to pay and nothing in the trial court's order prevented defendant from raising an ability to pay challenge before the trial court at the time of enforcement. In these circumstances, counsel's performance was not unreasonable and it did not prejudice defendant. See *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). Defendant has not shown that counsel provided ineffective assistance.