STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 12, 2013
v	No. 310839 Wayne Circuit Court
EDWARD T. MCCASKILL, Defendant-Appellant.	LC No. 06-012940-FH

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for felon in possession of a firearm, MCL 750.224f, possession of a firearm during a felony (felony-firearm), MCL 750.227b, possession of 50 to 449 grams of cocaine, MCL 333.7403(2)(a)(iii), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as a habitual offender, second offense, MCL 769.10, to prison terms of two years for felony-firearm, three to seven years for felon in possession of a firearm, and eight to 30 years for possession of cocaine, and to 12 months in jail for possession of marijuana. We affirm defendant's convictions for felon in possession of a firearm and felony-firearm. However, because the prosecution presented insufficient evidence to establish beyond a reasonable doubt that defendant possessed the cocaine or marijuana, we reverse defendant's convictions for possession of cocaine and possession of marijuana.

On April 1, 2006, Detroit police officers executed a drug raid on a home located at 7764 American Street. Officers had obtained a search warrant for the home pursuant to information from an informant. The officers did not locate the individuals named in the warrant; however, in the home, they found defendant and at least two other individuals. Officer Phillip Rodriguez testified that he found bills and many other personal items in the home that indicated that the other two individuals resided there. He acknowledged that he found nothing that belonged to defendant. The police found and confiscated over 2,300 grams of marijuana and 230 grams of cocaine. They also found zip-lock bags, scales, razor blades, and plates, items that the officers testified indicated that a drug-selling operation was located in the home.

Officer Cheryl Muhammad testified that she found defendant and two other individuals in a room at the rear of the house. Defendant was sitting on the end of a couch. Muhammad saw defendant raise his hand from the side of the couch and place it on the arm of the couch. Another officer later found a loaded nine-millimeter handgun on the floor between the wall and

the couch. Muhammad testified that the wall was located merely two to three inches from where defendant sat. Officers testified that both the drugs and the handgun were destroyed before trial.

Muhammad testified that the marijuana was found in an open television cabinet on the opposite side of the room from where defendant sat. Due to the small size of the room, Muhammad estimated that defendant was "three to five feet" from the marijuana. She stated that the cocaine was found at the edge of a couch, again, approximately "three to five feet" from defendant. However, this was a different couch than the one defendant was sitting on, and another individual was on that couch at the time.

Defendant testified that he went to the home in order to purchase marijuana and crack cocaine for personal use. He testified that he did not bring money; he hoped to purchase the drugs on credit by loaning the drug dealer his car. Defendant was charged with possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7403(2)(a)(3), possession with intent to deliver marijuana, MCL 333.7403(2)(d), possession of a firearm by a felon, and felony-firearm. The jury convicted defendant of the lesser offenses of possession of 50 to 449 grams of cocaine and possession of marijuana, as well as the charged offenses of felon in possession and felony-firearm. Defendant appealed by right.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecution failed to present sufficient evidence to allow a reasonably jury to find that the elements of the charged crimes were proven beyond a reasonable doubt.[1]

> In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. A reviewing court is required to draw all reasonable inferences and make credibility choices in support of the trier of fact's verdict. [*People v Strickland*, 293 Mich App 393, 399; 810 NW2d 660 (2011) (quotation marks and brackets omitted).]

"Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999).

A. DRUG CONVICTIONS

Defendant argues that there was insufficient evidence to convict him of possession of cocaine and possession of marijuana. We agree.

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[1] Whether a defendant's conviction was supported by sufficient evidence is reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010).

The prosecution was required to prove beyond a reasonable doubt that defendant possessed the drugs. "The element of possession . . . requires a showing of dominion or right of control over the drug with knowledge of its presence and character." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003) (quotation marks and citations omitted). "[P]ossession may be either actual or constructive, and may be joint as well as exclusive." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). "The essential issue is whether the defendant exercised dominion or control over the substance." *McKinney*, 258 Mich App at 166.

Defendant does not dispute that he was present in the home when the drugs were found in the asserted quantities. As defendant did not physically possess any drugs, the prosecution was required to prove constructive possession. However, the prosecution failed to introduce any circumstantial evidence that would support a reasonable inference that defendant had "dominion or right of control" over the drugs. *Id*. at165. While defendant admitted that he intended to purchase a small amount of drugs, he had not yet done so, and, therefore, possessed no right of control or dominion over even that small amount. There was no evidence that defendant attempted to destroy the drugs when police arrived. See *People v Wolfe*, 440 Mich 508, 522-523; 489 NW2d 748 (1992) (possession established where the defendant attempted to destroy drugs when police arrived). There was also no evidence that defendant was participating the drug-selling operation. See *id*. at 523-524 (the defendant was found in possession of $5 bills used to purchase cocaine by an undercover officer); *McKinney*, 258 Mich App at 166 (possession established where the defendant claimed ownership of $3,000 discovered by police). And while the other individuals in the house were found with substantial sums of money on their person, defendant had none.

Constructive possession may be shown where the individual resides at the house in which the drugs are found. See *Wolfe*, 440 Mich at 522 (the defendant had the only key to the apartment where drugs were discovered); *McKinney*, 258 Mich App at 166 (the defendant shared the bedroom where drugs were located); *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000) (possession established where police found utility bills addressed to the defendant, the defendant had a key to the apartment, and a witness testified that the defendant resided in the apartment). In this case, however, the officers conceded that they found no evidence that defendant lived in the home or had any possessory interest in it. They testified that: (1) defendant did not possess a key to the house; (2) no mail or documents addressed to defendant was found on the premises; (3) no clothing or other possessions were found on the premises that were identified as belonging to defendant; (4) none of the bills sent to the house were in defendant's name; and (5) that defendant's car was registered to a different address. Moreover, at least two other individuals, who *were* linked to the house, were present. See *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005) (possession established where the defendant was found alone in a garage where methamphetamine was being cooked).

In sum, the prosecution only proved beyond a reasonable doubt that defendant was present in a home where drugs were found. "It is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *Wolfe*, 440 Mich at 520. The prosecution failed to make the required showing of an "additional connection between the defendant and the contraband[.]" *Id*. Accordingly, we find that defendant's convictions for possession of cocaine and possession of marijuana were not

supported by sufficient evidence. We reverse and vacate with prejudice those convictions and sentences.

B. FIREARM CONVICTIONS

Defendant next argues that there was insufficient evidence to convict him of felon in possession of a firearm and felony-firearm. We disagree.

MCL 750.224f(1) provides that "a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm[,]" except under certain conditions. At trial, defendant stipulated that he was a felon who was barred from carrying a firearm. Thus, the prosecution was only required to show that defendant "possessed" the firearm.

With regard to firearms, "actual possession is not required; constructive possession is sufficient." *People v Minch*, 493 Mich 87, 91; 825 NW2d 560 (2012). "The test for constructive possession is whether the totality of the circumstances indicates a sufficient nexus between defendant and the contraband." *Id*. at 91-92 (quotation marks and citation omitted). "[A] person has constructive possession if he knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons[.]" *Id*. at 92 (quotation marks and citation omitted).

Defendant testified that he never possessed the firearm and was unaware of its presence in the home. However, Officer Muhammad testified that she saw defendant's arm rise from behind the couch where the firearm was later found. Muhammad's testimony allows for the reasonable inference that defendant constructively possessed the firearm, or actually possessed the firearm moments before police arrived. See *Strickland*, 293 Mich App at 399. Whether the prosecution established beyond a reasonable doubt that defendant possessed the firearm was solely a question of witness credibility between Muhammad and defendant. Because "we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of witnesses[,]" *People v Unger*, 278 Mich App 210, 286; 749 NW2d 272 (2008), we find that defendant's conviction for felon in possession of a firearm was supported by sufficient evidence.

MCL 750.227b(1) provides that "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony" is guilty of felony-firearm. There was sufficient evidence to support a reasonable inference that defendant possessed the firearm, and felon in possession of a firearm may serve as the predicate felony for felony-firearm. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Accordingly, we find that defendant's conviction for felony-firearm was supported by sufficient evidence.

II. EVIDENTIARY CHALLENGE

Defendant argues that the evidence regarding the handgun found in the home was inadmissible because no fingerprint analysis was performed and the gun had been disposed of by the police prior to trial in violation of MCL 780.655. No objection was made at trial, rendering this issue unpreserved; accordingly, our review is limited to plain error that affected defendant's substantial rights. See *People v Pipes*, 475 Mich 267, 277-279; 715 NW2d 290 (2006).

The admitted failure by the police to preserve the gun plainly violates MCL 780.655(2) which provides that property and items seized pursuant to a search warrant "shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence in any trial."

Defendant asserts that testimony about the gun should therefore have been excluded. We agree that failing to preserve evidence that could be considered the corpus delecti of the crime cannot be dismissed as merely a technical deficient of compliance with the statutory requirements. However, the remedy for a violation of MCL 780.655 is not suppression, but "to instruct the factfinder that it may infer that evidence unpreserved because of violations of the statute would have favored the [defendant]." *In re Forfeiture of $25,505*, 220 Mich App 572, 579; 560 NW2d 341 (1996). "In other words, a violation of [MCL 780.655] resulting in the loss of relevant evidence raises a rebuttable presumption that the unpreserved evidence would have been adverse to the police." *Id*. at 579-580.

While the failure to provide this instruction constituted plain error, we conclude that given the facts of this case, the error was ultimately harmless. See *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009). "[An] error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Id*.

Defendant did not deny that the gun was found next to the arm of the couch on which he sat. Thus, the failure to preserve the gun did not prejudice him in terms of the jury's determination of whether or not a gun was present. Defendant argues only that if the gun had been fingerprinted, it would not have contained his fingerprints. However, the officers testified that fingerprints are not typically found on handguns and defendant offered no evidence to the contrary. The question before the jury, therefore, was not whether a handgun had been present, but whether to believe the officers' or the defendant's testimony regarding his movements in relation to the gun and what any such movements indicated. This is a credibility question properly left for the jury. *Unger*, 278 Mich App at 286.

While we find this error harmless under the facts of this case, we cannot overlook that the officer's testimony that seized contraband is "frequently" disposed of before trial suggests that this may not be an isolated incident. Accordingly, we remind the prosecution and relevant police agency that violations of MCL 780.655 "seriously undermine[] the balance established by the Legislature between the encouragement of effective law enforcement activities and the maintenance of the integrity of such activities" and that "[t]he police thus act at their peril when they fail to observe the requirements of [MCL 780.655]." *In re Forteiture of $25,505*, 220 Mich App at 577, 580.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant asserts that his trial counsel was ineffective for failing to raise two objections.[2] We disagree.

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Swain*, 288 Mich App at 643.

Defendant first maintains that defense counsel should have moved to suppress evidence or seek a cautionary instruction regarding the handgun because it had been destroyed. We have already indicated that the failure to preserve the handgun was not reversible error under the facts of this case. Thus, counsel's failure to object does not give rise to a reasonable likelihood that, but for that failure, the result of defendant's trial would have been different. *Id.*

Defendant also argues that his convictions for felon in possession of a firearm and felony-firearm violate the constitutional protection against double jeopardy, and that, therefore, defense counsel was ineffective for failing to raise a double jeopardy objection. Our Supreme Court has held that convictions for both felon in possession of a firearm and felony-firearm do not violate double jeopardy principles. *Calloway*, 469 Mich at 452. Thus, any objection by defendant's trial counsel would have been futile, and counsel is not ineffective for failing to raise meritless or futile objections. *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012).

Reversed as to defendant's convictions and sentences for possession of cocaine and possession of marijuana.[3] Affirmed as to defendant's convictions and sentences for felon in possession of a firearm and felony-firearm.

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

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[2] "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[3] Because we reverse defendant's drug convictions, we need not address his arguments regarding jury instructions and the alleged ineffective assistance of defense counsel, at least as those arguments pertain to the drug convictions.

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O'CONNELL, J. (*concurring in result only*).

I concur in the result only.

/s/ Peter D. O'Connell