

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON MICHAEL BIRKLE,

Defendant-Appellant.

UNPUBLISHED
February 24, 2004

No. 244159
Livingston Circuit Court
LC No. 02-012811-FH

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

MEMORANDUM.

Defendant appeals as of right his jury conviction for delivery of marijuana, MCL 333.7401(2)(d)(iii), and felony-firearm, MCL 750.227. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant asserts that the trial court gave inaccurate supplemental instructions on the element of possession for the felony-firearm charge. Defendant failed to object and assented to the instructions that were given.

A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Sabin (On Second Remand)*, 242 Mich App 656, 657-658; 620 NW2d 19 (2000). Manifest injustice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

In *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000), the Court quoted *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989) in discussing the meaning of the term possession in a felony-firearm charge:

Michigan courts also have recognized that the term “possession” includes both actual and constructive possession. As with the federal rule, a person has constructive possession if there is proximity to the article together with indicia of control. *People v Davis*, 101 Mich App 198; 300 NW2d 497 (1980). 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. Physical possession is not necessary as long as the defendant has constructive possession. *People v Terry*, 124 Mich App 656; 335 NW2d 116 (1983).

Burgenmeyer added the clarification that the defendant must have possessed a firearm at the time he committed the underlying felony.

The trial court instructed the jury that possession may be actual or constructive, but it must be knowing and must be in proximity with the felony and at the time of the commission of the crime. Although the court could have given more detailed instructions, the instructions that were given adequately described the concept of possession, and there was no manifest injustice.

Affirmed.

/s/ Bill Schuette

/s/ Patrick M. Meter

/s/ Donald S. Owens