

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD DEON BELL,

Defendant-Appellant.

UNPUBLISHED

April 19, 2007

No. 267295

Oakland Circuit Court

LC No. 2005-203936-FH

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 2-1/2 to 40 years for the drug conviction and two to ten years for the felon-in-possession conviction, to be served consecutive to two concurrent two-year prison terms for the felony-firearm convictions. He appeals as of right. We affirm. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

On July 6, 2005, officers from the narcotics enforcement section of the Pontiac Police Department went to 33 Stout Street in Pontiac, a multi-family building divided into separate apartments, to execute a search warrant. Officer Mark Locricchio and his partner were at the rear of the building. After Locricchio heard other officers enter the apartment, he saw defendant run outside through the back door. Defendant was ordered to get down on the ground, but did not immediately comply; instead, he threw a wad of paper to the ground. After Locricchio secured defendant, he looked inside the paper and found a clear plastic baggie that appeared to contain a sizeable piece of crack cocaine. A field test performed on the substance was positive for cocaine. Subsequent laboratory testing revealed that that substance and other substances found during this search were in fact cocaine. The package defendant threw to the ground contained 10.89 grams of cocaine.

At the time defendant was taken into custody, he had keys on him that fit the door to the apartment that was searched. He also had \$243 on him.

Inside the apartment was an entrance to a basement that was searched pursuant to the warrant. None of the other apartments in the building had access to that basement. Officer David Wheatcroft, who was part of the search team, found a blue stocking hat on a shelf, which had a loaded, nine-millimeter, nickel-plated handgun inside of it.

Codefendant Donna Williams was arrested in the house while in the bathroom braiding her hair. Williams told the police at the time of her arrest that she had been dating defendant for a couple of weeks. When Williams was taken into custody, she had two small baggies in her underwear; one appeared to contain marijuana and the other crack cocaine. Williams had three rocks of cocaine on her, weighing 1.2 grams. Two other people were in the home besides Williams and defendant. They were issued citations for loitering in a drug house.

The bathroom where Williams was found was off of a bedroom that was searched. On a dresser inside that bedroom was a box containing a plastic bag that was tied in knots with approximately ten individually tied off portions of crack cocaine. The box also contained a gram and a half of powder cocaine not yet converted into rock form. Also, on the dresser was a handgun holster that fit the handgun found in the basement. Inside the dresser was a cable television bill addressed to defendant at that address, dated June 24, 2005, and some paperwork from the Secretary of State addressed to defendant at another address. The dresser also contained a photograph of defendant with a large sum of U.S. currency in his hands.

The bedroom closet contained both male and female clothing, but there was more male clothing. The men's clothing appeared consistent with defendant's size. There was also a container that held ammunition, including ammunition for a nine-millimeter gun. On a shelf just below the ammunition was an unsigned lease agreement for the apartment in defendant's name, dated June 1, 2005.

In their search of the apartment, the police did not find any proof that defendant's former girlfriend resided in that apartment, as defense counsel had claimed in his opening statement. In fact, the residence was under surveillance for some time and defendant was observed walking a pit bull around the neighborhood and also observed in the front yard of the home the day before the warrant was executed.

During their search, the police did not find any items indicating that the drugs that were found were for personal use rather than distribution. Indeed, Officer Charles Janczarek, who was assigned to the narcotics enforcement section, testified as an expert witness in the area of narcotics trafficking that there was much evidence suggesting that drugs were being sold from the residence. Janczarek testified that there was a vicious pit bull within the home when the police arrived, which was shot because it appeared it would have attacked the officers. Janczarek testified that dogs are sometimes used as security or to provide warnings of approaching individuals at drug operations. A digital scale was found in the living room and some razor blades were found in the kitchen along with a box of plastic bags. Janczarek testified that razor blades are frequently used to divide larger rocks of crack cocaine. In the garbage, the police found the remnants of plastic bags that had their corners cut off to package cocaine. White residue also appeared to come from the baggies. Defendant also was known by the name "Black"; Janczarek explained that drug dealers often use other names because they do not want to use their real names when selling narcotics.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his felony-firearm and felon-in-possession convictions because the evidence failed to show that he possessed the firearm that was recovered by the police during their search. We disagree.

A. Standard of Review

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id.* at 514-515.

B. Analysis

Possession may be either actual or constructive. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). A defendant may have constructive possession of a firearm if the location of the weapon is known to the defendant and is reasonably accessible to him. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Possession may be proven by circumstantial evidence and reasonable inferences drawn from the evidence. *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005).

But to support a conviction for felony-firearm, the inquiry must focus on whether the defendant possessed the firearm at the time he committed the felony, not whether he possessed it at the time the police searched the residence or whether the defendant owned a firearm. *Burgenmeyer*, *supra* at 436, 439-440.¹ “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. In *Burgenmeyer*, the Supreme Court held that there was sufficient evidence to convict the defendant of felony-firearm when cocaine was found in a dresser in his bedroom and firearms were on top of the dresser. *Id.* at 439-440. The drugs and weapons were close enough for the jury to reasonably infer that both were possessed by the defendant at the same time. *Id.* at 440.

In this case, evidence that defendant had keys to the apartment and that personal property belonging to defendant was found inside a bedroom dresser supported an inference that

¹ Defendant's reliance on *People v Myers*, 153 Mich App 124; 395 NW2d 256 (1986), is misplaced. In *People v Samuel Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993), this Court disavowed *Myers* to the extent that MCL 750.227b requires actual possession of a weapon at the time of arrest. Defendant's reliance on *People v Ben Williams*, 212 Mich App 607; 538 NW2d 89 (1995), is also misplaced. In *Burgenmeyer*, *supra* at 438-440, our Supreme Court overruled *Ben Williams* to the extent that it was inconsistent with its decision, because whether the defendant possessed a firearm at the time of arrest or a police raid is immaterial to whether he possessed it during the commission of a felony.

defendant was living at the apartment at the time of the search. Although the gun was found hidden in the basement, items associated with the gun, including a holster and ammunition, were found in the bedroom with defendant's personal belongings, in close proximity to some of the drugs discovered in the residence. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that the location of the gun was known to defendant, that it was accessible to defendant during the time he possessed the drugs, and that defendant attempted to hide the gun in the basement. Thus, there was sufficient evidence that defendant possessed the firearm to support his convictions for felony-firearm and felon in possession of a firearm.

III. OPINION TESTIMONY

Defendant next argues that a police officer was improperly allowed to offer opinion testimony that defendant possessed the drugs with the intent to distribute them. We disagree.

A. Standard of Review

Defendant did not object to Officer Janczarek's testimony at trial. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

B. Analysis

The officer was qualified to testify as an expert in the area of narcotics trafficking. The officer testified that based on the items discovered during the search of the residence, it was his opinion that defendant possessed the narcotics with the intent to distribute them. The officer was qualified as an expert, so he properly could offer opinion testimony, even if it embraced an ultimate issue to be decided by the jury. MRE 704; *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Defendant's reliance on cases holding that it is improper for a witness to comment on the credibility of another witness is misplaced, because the officer here did not so comment. Compare *People v Peterson*, 450 Mich 349, 373-374; 537 NW2d 857, amended 450 Mich 1212 (1995); *People v Jesse Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987). Rather, the officer provided expert testimony on indicia of drug trafficking, a subject not within the common knowledge of the average layperson. The officer's testimony was admissible to aid the jury in its determination of this issue. *People v Griffin*, 235 Mich App 27, 44-45; 597 NW2d 176 (1999); *People v Samuel Williams (After Remand)*, 198 Mich App 537, 541-542; 499 NW2d 404 (1993); *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991). Therefore, the officer's testimony did not constitute a plain error.

Furthermore, the trial court instructed the jury that it was not required to believe the officer's testimony, even though he was qualified as an expert, and that it was to judge the testimony of police officers by the same standards applicable to any other witness. The court's instructions were sufficient to protect defendant's substantial rights.

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette