

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
February 11, 2014

v

MARZENE CURLEY,

No. 313151  
Wayne Circuit Court  
LC No. 12-004528-FH

Defendant-Appellant.

---

Before: JANSEN, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b. He was sentenced to 23 months to five years' imprisonment for the felon in possession conviction and five years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

**I. BASIC FACTS**

Defendant was charged with numerous crimes for events that took place on March 25, 2012, and March 30, 2012. Prosecutors alleged that on March 25, 2012, defendant fired several shots at his neighbor down the road. When officers executed a search warrant at defendant's home on March 30, 2012, they observed defendant remove a gun from his waistband and throw it into a closet. In the first case relating to the events of March 25th, defendant was charged with two counts of assault with intent to murder, two counts of assault with intent to do great bodily harm less than murder, two counts of felonious assault, felon in possession of a firearm, and felony-firearm. In the second case for the events of March 30th, defendant was charged with felon in possession and felony-firearm. The cases were joined for trial over defense counsel's objections. The jury acquitted defendant of all charges arising out the March 25<sup>th</sup> events, but convicted defendant of the charges arising out of the March 30<sup>th</sup> events. Defendant was sentenced as outlined above and now appeals as of right.

**II. SUFFICIENCY OF THE EVIDENCE**

Defendant first argues that there was insufficient evidence to convict him of felon in possession of a firearm and felony-firearm. Specifically, defendant complains that the jury's verdict was inconsistent because he was acquitted of charges relating to possession of a firearm

from March 25th, but was convicted of charges involving possession of a firearm from March 30th. We disagree.

“Challenges to the sufficiency of the evidence are reviewed de novo.” *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). “A court must view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *Id.* (internal quotation marks omitted).

A person convicted of a specified felony is prohibited from possessing a firearm until five years after he has paid all fines, served all terms of imprisonment, and completed all terms of probation or parole imposed for the offense. MCL 750.224f; *People v Pierce*, 272 Mich App 394, 396-397; 725 NW2d 691 (2006). “To be guilty of felony-firearm, one must *carry or possess* [a] firearm, and must do so *when* committing or attempting to commit a felony.” *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis in original). In either the felon in possession charge or the felony-firearm charge, actual or constructive possession of a firearm can be shown by direct or circumstantial evidence. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). For a person to have constructive possession of a firearm, physical possession is not required. *Burgenmeyer*, 461 Mich at 438. Rather, 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.*

It was stipulated at trial that defendant had previously been convicted of a specified felony under MCL 750.224f, felon in possession of a firearm. Additionally, the parties stipulated that defendant was not eligible to possess a firearm under MCL 750.224f. Because the jury reasonably concluded that defendant possessed a firearm on March 30, 2012, the convictions for felon in possession of a firearm and felony-firearm were supported by sufficient evidence. Two police officers present on March 30, 2012, stated that they witnessed defendant grab a pistol from his waist area and throw it into a closet. Defendant’s possession of the gun constituted felon in possession of a firearm because defendant was not eligible to possess any firearms, and the same facts support a felony-firearm conviction. Jasmin Taylor, defendant’s girlfriend, testified that the pistol belonged to her, and that it had been wrapped in a towel in the closet throughout the entire encounter with the police officers. Taylor also stated that one of the arresting officers on March 30, 2012, had some personal vendetta against defendant; however, Taylor provided no details or specific allegations about that claim. Taylor also stated the wrong caliber type of the revolver to police officers and during the course of her testimony. Further, Taylor is the mother of defendant’s child and, therefore, possibly biased in his favor. Such questions of credibility are for a jury to decide. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Taking the evidence in the light most favorable to the prosecution, a reasonable jury could have concluded that defendant was guilty of felon in possession of a firearm and felony-firearm.

Defendant argues that the jury’s verdict was inconsistent because the jury found defendant not guilty of charges relating to the events of March 25th, but found defendant guilty of charges relating to the events of March 30th. Initially, we note that Michigan Courts do not require jury verdicts to be consistent. *People v Lewis*, 415 Mich 443, 450; 330 NW2d 16 (1982). Even so, the verdicts here were consistent. Defendant was charged with two counts of assault with intent to murder, two counts of assault with intent to do great bodily harm less than murder,

two counts of felonious assault, felon in possession of a firearm, and felony-firearm arising out of a separate incident on March 25th. The jury found defendant not guilty of those charges. However, it was entirely reasonable and logical for the jury to convict defendant of the charges arising out of the events of March 30th. The jury apparently could not find beyond a reasonable doubt that the charged offenses arising out of the March 25th incident occurred, but it could find beyond a reasonable doubt that defendant possessed a firearm when he was arrested on March 30th. Other than the prosecution alleging that defendant possessed the same firearm on both dates, there was no factual overlap between the charged offenses that allegedly occurred on separate days. Consequently, the jury's verdicts were consistent, and defendant's argument is without merit. Accordingly, the convictions for felon in possession of a firearm and felony-firearm were based on sufficient evidence.

### III. DOUBLE JEOPARDY

Defendant next argues that the convictions for felon in possession of a firearm and felony-firearm violated his double jeopardy rights. We disagree.

This Court reviews “an unpreserved claim that a defendant’s double jeopardy rights have been violated for plain error that affected the defendant’s substantial rights, that is, the error affected the outcome of the lower court proceedings.” *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). Reversal is warranted only if the plain error “resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Id.*

The United States and Michigan constitutions protect a defendant from being placed twice in jeopardy, “or subject to multiple punishments, for the same offense.” *Id.* (citing US Const, Am V; Const 1963, art 1, § 15). The validity of multiple punishments under the Michigan Constitution is analyzed under the “same elements standard,” that arose from *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). *McGee*, 280 Mich App at 682-683. If the Legislature intended to impose multiple punishments, multiple sentences are permissible regardless of whether the charged offenses have the same elements. *Id.* at 683. However, if the Legislature has not clearly expressed intent, multiple punishments may be imposed for multiple offenses where one offense has an element that the other does not. *Id.* If each offense requires an element that the other does not, the “same elements standard” is satisfied. *Id.*

It is settled law in Michigan that a defendant may be punished for felon in possession of a firearm and felony-firearm cumulatively without violating the double jeopardy rights of that defendant. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Specifically, the Court has stated that “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.” *Id.* It was the intent of the Legislature to provide for an additional felony, felony-firearm, whenever a person in possession of a firearm committed a

felony other than those four explicitly enumerated in the felony-firearm statute.<sup>1</sup> *Id.* Defendant’s argument that his cumulative punishments for felon in possession of a firearm and felony-firearm violate double jeopardy is foreclosed by *Calloway*.

Defendant also argues that the “rule of lenity” provides that the court should mitigate punishment if a criminal statute is unclear or ambiguous. However, “[t]he rule of lenity properly applies only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent.” *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983). This case does not involve any ambiguity in the statutes under which defendant was convicted and punished, and defendant does not make any argument to suggest that there is a lack of legislative intent regarding the possibility of cumulative punishments for felon in possession of a firearm and felony-firearm. Accordingly, defendant’s convictions were not a violation of his double jeopardy rights.

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his counsel was ineffective at trial. Specifically, defendant contends that counsel should have filed a written motion to sever the charges based on their date of occurrence, that he should have objected to all jury instructions relating to felon in possession of a firearm and felony-firearm, that he should not have stipulated that defendant was a felon in possession of a firearm, and that he should have made a written motion to suppress the items seized from defendant’s home on March 30, 2012. Additionally, defendant argues that but for the errors of counsel, there is a reasonable probability that the outcome of the trial would have been different. We disagree.

“[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record.” *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Criminal defendants have a right under the United States and Michigan constitutions to the effective assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish ineffective assistance of counsel, a criminal defendant must show that counsel’s performance fell below an objective standard of reasonableness and, but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Michigan Courts employ a presumption that counsel’s performance is effective, and there is a heavy burden upon the defendant to prove otherwise. *Vaughn*, 491 Mich at 670. Specifically, there is a strong presumption that counsel’s assistance constitutes sound trial strategy. *People v Armstrong*, 490 Mich 281, 291; 806 NW2d 676 (2011). This Court will not substitute its judgment for that of defense counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of defense counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

---

<sup>1</sup> Felon in possession of a firearm is not one of the four explicitly enumerated felonies listed in the felony-firearm statute. MCL 750.227b.

#### A. FAILURE TO FILE WRITTEN MOTION IN OPPOSITION TO JOINDER OF CHARGES

Defendant's contention that counsel's performance fell below an objective standard of reasonableness by failing to make a written motion in opposition to joinder of the charges against defendant is without merit. While counsel did not make a written motion to oppose the joinder of the charges, he did object at trial and argued at length against the joinder. There is no legal authority in Michigan to support defendant's contention that a written motion was required where counsel objected and argued the issue at trial. Further, defendant does not cite any legal authority to support his position on this issue. Counsel chose to oppose the prosecution's motion to join the cases orally at trial, rather than via a written motion. Considering the presumption that counsel's performance was effective, defendant has not shown that the failure to file a written motion on the joinder of charges fell below an objective standard of reasonableness.

#### B. FAILURE TO OBJECT TO JURY INSTRUCTIONS

The trial court stated during trial that it wanted to depart from the prosecution's proposed jury instructions by separately instructing the jury that possession of a firearm does not require ownership, and then instructing on the definition of possession under the felon in possession of a firearm statute. Specifically, the court stated that the prosecution's proposed instructions were not specific enough on what possession of a firearm constituted, so the court sought to inform the jury that possession "means either, one, that the person had actual physical control of the handgun . . . or the person has the right to control the handgun even though it is in a different room or place." The prosecution stated that the instruction "just helps" the government's position, and defense counsel did not object. Defendant does not provide an argument for why a jury instruction on the possession of a handgun would prejudice defendant, or on what grounds defense counsel could have objected. Because the legal definition of possession would have necessarily been provided to the jury based on the charges of felon in possession of a firearm and felony-firearm, it is unlikely that counsel could have made a nonfrivolous objection. Accordingly, in light of the heavy presumption in favor of counsel's trial strategy, counsel's actions did not fall below an objective standard of reasonableness.

#### C. STIPULATION TO PRIOR CONVICTION

Defendant contends that counsel's stipulation that defendant had been convicted of a specified felony under the felon in possession of a firearm statute, and that defendant was not eligible to possess a firearm at the time of the alleged offenses, was ineffective assistance of counsel. At trial the parties stipulated that defendant, "for purposes of the charge felon in possession of a firearm has been convicted of a specified felony," and that defendant "did not have a right to possess or carry a firearm because the requirements for regaining eligibility had not been met at the time of the offense." Defendant's assertion that the stipulation constituted an admission that defendant was guilty of felon in possession of a firearm is factually incorrect; the prosecution was still required to prove beyond a reasonable doubt that defendant did, in fact, possess a firearm at the time of the alleged offenses. Further, counsel's stipulation was reasonable; without a stipulation, the prosecution would have presented evidence of defendant's prior felony conviction in the presence of the jury. Considering the presumption in favor of counsel's actions as effective trial strategy, counsel's actions did not fall below an objective standard of reasonableness.

#### D. FAILURE TO FILE A WRITTEN MOTION TO SUPPRESS EVIDENCE

Finally, defendant argues that counsel should have filed a written motion to suppress the items seized from defendant's home. However, defendant does not provide any legal argument counsel could have made in support of a motion to suppress. Police entered defendant's home on March 30, 2012, pursuant to a search warrant arising out of an unrelated criminal investigation. Defendant does not argue that the search warrant was invalid. Because there is no apparent nonfrivolous objection that counsel could have made to suppress the firearm recovered from the house, counsel's actions did not fall below an objective standard of reasonableness.

Affirmed.

/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly  
/s/ Deborah A. Servitto