

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON BROWN,

Defendant-Appellant.

UNPUBLISHED

October 16, 2007

No. 272784

Wayne Circuit Court

LC No. 06-004008-01

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of delivery or manufacture of 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), delivery or manufacture of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and delivery or manufacture of marijuana, MCL 333.7401(2)(d)(3). He was sentenced to concurrent prison terms of 87 months to 20 years each for the cocaine-related convictions, and two to four years for the marijuana conviction. Defendant appeals as of right and for the reasons set forth in this opinion, we affirm.

I

On March 21, 2006, police officers obtained a search warrant to search the upper flat of a Detroit residence for evidence of drug trafficking. Before the search began, Officer John Maxey saw defendant, accompanied by an unidentified woman, enter the residence with a key. Maxey and other officers watched defendant and the woman leave the house after a few minutes. Following his exit from the house, the police apprehended defendant, seized his key, and entered the residence to execute the search warrant. After entering the house, officers found narcotic packaging material, a digital scale, 92 grams of marijuana, a bail of marijuana weighing approximately 18.5 pounds, a small bag of suspected heroine, a large quantity of powder cocaine and crack cocaine, and a handgun.

At trial, defendant denied that he lived in the flat or that he possessed keys to the flat. He testified that Angie Bell, an acquaintance for seven or eight years, owned the building and often hired him for odd maintenance jobs. He explained that he entered the house on the day of the raid because Bell hired him to repair a broken pipe.

The trial court found defendant guilty, commenting:

I don't believe the defendant. I think he's disingenuous to sit here on the witness stand after taking an oath to tell the truth, the whole truth, and nothing but the truth. And he's asked a question, if he's with the lady, Ms. Angie [Bell] . . . , who is here today, and she's been here in the courtroom most of the time either at or near the defendant. And then he's asked a question while he's on the witness stand, do you see her or have you seen her here? And he looks around the courtroom, she's obviously sitting on the back row here in the courtroom. And he says something like, yes, I saw her out in the hall and she was sitting right in front of him at the time that he made that statement. And I found that just despicable, actually. So, I don't believe anything the defendant said cause I think he's lying.

II

Defendant argues that the evidence was not sufficient to support his convictions. This Court reviews de novo a challenge to the sufficiency of the evidence at a bench trial. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005), lv den 474 Mich 1099 (2006), cert den ___ US __; 127 S Ct 403; 166 L Ed 2d 287 (2006). The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Id.* The elements of the offense may be proved by circumstantial evidence and reasonable inferences therefrom. *Id.*

Defendant argues that there was insufficient evidence to establish that he had possession or control of the upper flat where the drugs were found. Possession of a controlled substance may be actual or constructive, and may also be joint, with more than one person actually or constructively possessing the substance. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 521. Here, the trial court reasonably could find that defendant had possession or control of the controlled substances based on the evidence that he had a key to the apartment where the drugs were located, that he used the key to gain access to the apartment while accompanied by another person, and that he gave a false explanation for his entry into the flat.

Defendant argues that the trial court improperly based its verdict on its belief that defendant was "despicable" for failing to recognize Bell in the courtroom. However, the trial court's verdict was clearly based on the evidence. The court's comment that defendant was "despicable" was made in the context of commenting on defendant's credibility. The court observed that defendant had testified that Bell was a long-time acquaintance who hired him for odd jobs, but defendant failed to recognize her in the courtroom. The determination of defendant's credibility was for the trial court, as the trier of fact, to resolve. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997), lv den 458 Mich 868 (1998).

Defendant contends that the trial court may have erred in assuming that the woman present in the courtroom was actually Bell. We review a trial court's findings of fact in a bench trial for clear error. MCR 2.613(C). A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). The record discloses that the prosecutor identified a woman present in the courtroom as Bell and that the woman left the

courtroom when “Ms. Bell” was asked to leave during defendant’s testimony. Consequently, we are not persuaded that a mistake was made.

III

Defendant argues that he was denied the effective assistance of counsel because trial counsel failed to call Bell as a witness. He maintains that Bell would have corroborated his testimony that he did not live in the upper flat, and that he entered the premises only to repair a pipe.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney’s performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney’s error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), reh den 464 Mich 1212 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001), lv den 467 Mich 900 (2002). A defendant must affirmatively demonstrate that counsel’s performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994), reh den sub nom *People v Wallace*, 447 Mich 1202; 525 NW2d 450 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002), lv den 467 Mich 854 (2002). Unless a defendant claiming ineffective assistance of counsel moves for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court’s review must be limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Here, defendant did not move for a *Ginther* hearing, so this Court’s review is accordingly limited. There is no evidence to support defendant’s claim that Bell would have given favorable testimony. Accordingly, there is no basis to conclude that trial counsel’s failure to call Bell was objectively unreasonable or prejudicial.

IV

Defendant argues that his sentence was invalid because it was not “individualized” and was based on inaccurate information.

Defendant acknowledges that he was sentenced within the sentencing guidelines range of 87 to 145 months. Absent constitutional error, when the minimum sentence is within the guidelines range this Court must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10); *People v Conley*, 270 Mich App 301, 315-316; 715 NW2d 377 (2006), lv den 477 Mich 931 (2006). Defendant argues that the trial court relied on inaccurate information because it mistakenly assumed that defendant was going “with Ms. Bell.” In support of this argument, defendant refers only to the trial court’s statements at trial to the effect that defendant was “with” Bell, who was present during defendant’s testimony. The trial court never referred to defendant’s relationship with Bell at sentencing. Thus, there is no basis for concluding that defendant’s sentences were based on any perceived relationship between defendant and Bell. Defendant also argues that “the guidelines inaccurately portray the level of his culpability in this case,” but he fails to identify any in the scoring of the guidelines. Accordingly, we must affirm defendant’s sentence.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering