

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUCIANO REYES,

Defendant-Appellant.

UNPUBLISHED

July 6, 2006

No. 260063

Saginaw Circuit Court

LC No. 04-024695-FH

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant argues that he is entitled to a new trial because there was insufficient evidence to support his felony-firearm and his felon in possession of a firearm convictions. We disagree. We review a claim of insufficient evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). However, we will not interfere in the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Id.* at 561.

First, defendant essentially contends that there was insufficient evidence to support his firearm-related convictions because the testimony of the police officers and probation officers in this case was riddled with inconsistencies. But this argument is contrary to the basic principle that credibility of witnesses cannot be considered in evaluating the sufficiency of the evidence. See *id.*

Defendant also contends that without the officers' testimony, there was insufficient evidence to convict him of the weapons charges. More specifically, defendant asserts that the prosecution failed to produce sufficient evidence that he possessed the gun that was found in the bedroom. However, because we have concluded that the officers' testimony must be considered, we review that testimony, as well as the other evidence presented at trial, in the light most favorable to the prosecution, to determine if the prosecution presented sufficient evidence to support defendant's felony-firearm and felon in possession of a firearm convictions.

To support a felony-firearm conviction, the prosecution was required to prove that defendant carried or possessed a firearm while he was committing or attempting to commit a felony. MCL 750.227b; *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Possession may be actual or constructive, and it may be proved by circumstantial evidence. *Id.* at 437. Constructive possession exists if there is proximity to the weapon together with indicia of control. *Id.* at 438. “[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.*, quoting *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). Additionally, MCL 750.224f prohibits a person convicted of a felony from possessing a firearm if fewer than three years have passed since the person paid all fines, served all terms of imprisonment, and successfully completed all terms of probation or parole imposed for the violation. See, also, *People v Perkins*, 262 Mich App 267, 269; 686 NW2d 237 (2004).

Here, the prosecution presented evidence that the probation officers found a gun in a bedroom that they were told was defendant’s bedroom and that contained defendant’s court papers, as well as men’s clothing and a tether unit. We conclude that this evidence was sufficient for a reasonable jury to infer that the gun found in the bedroom belonged to defendant. And although we agree with defendant that this may not be sufficient evidence to show that he possessed the gun at the time he committed the felony of assaulting, resisting, or obstructing a police officer, because the gun was not readily accessible to him during commission of that crime, that argument is irrelevant because felon in possession of a firearm can serve as the underlying felony for a felony-firearm conviction, *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Further, the prosecutor presented evidence that the officers were at defendant’s house because he was on probation for a felony at the time of this offense. So he clearly was a felon in possession of a firearm, in violation of MCL 750.224f, if the jury believed that the gun found in the bedroom was defendant’s gun. For all of these reasons, there was sufficient evidence to support defendant’s felony-firearm and felon in possession of a firearm convictions.

Next, defendant argues that he is entitled resentencing because there was nothing in the record to indicate that the trial court knew at sentencing that it had the discretion to sentence him to an intermediate sanction. We again disagree. We review sentencing issues for an abuse of discretion. *People v Sabin (On Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000).

While a defendant is entitled to resentencing when a sentencing court fails to exercise its discretion because of a mistaken understanding of the law, *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994), there is no evidence of any such mistake here by the trial court. In fact, defendant made this argument to the court at the hearing on his motion for a new trial, resentencing, and an evidentiary hearing, and the court specifically stated that it was “aware of its options” at the time of sentencing. But even if the trial court had not stated at the motion hearing that it was aware that it had the option to sentence defendant to an intermediate sanction, a trial court is presumed to have knowledge of its discretion, even when it does not articulate it at sentencing:

Contrary to defendant’s assertion, there is no legal requirement that a trial court state on the record that it understands it has discretion and is utilizing that discretion. See *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992). Rather, absent clear evidence that the sentencing court incorrectly

believed that it lacked discretion, the presumption that a trial court knows the law must prevail. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). [*People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001).]

Additionally, defendant requests this Court to order that the \$240 in costs assessed against him by the trial court at sentencing not be deducted from his prison account, but rather be due when he is paroled. However, defendant has abandoned this issue on appeal by not identifying it in his statement of questions presented, MCR 7.212(C)(5), and by his failure to provide this Court with any authority to support his argument. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Finally, we reject defendant's argument that his trial counsel was ineffective. The determination as to whether there has been a deprivation of the effective assistance of counsel is a mixed question of law and fact. The factual findings are reviewed for clear error, and the matters of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel, defendant bears the burden of showing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To meet the second part of the test, defendant must show that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error. *Id.* at 6. And, a reviewing court will not assess trial counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant asserts that trial counsel was ineffective in the following ways: (1) when he failed to move to suppress evidence that was seized during a warrantless search; (2) when he failed to impeach the officers' inconsistent testimony; (3) when he failed to object to or file a motion to exclude evidence that violated the trial court's discovery order; (4) when he failed to advise the trial court that it could sentence defendant to an intermediate sanction; (5) when he failed to request a continuance to call defendant's probation officer; and (6) when he failed to argue against defendant's bindover at the preliminary examination or to object to its untimeliness. We disagree.

Defendant first argues that he was denied his right to the effective assistance of counsel by trial counsel's failure to move to suppress the evidence that was seized during the warrantless search of his house. More specifically, while defendant concedes that, under the terms of his probation, he was required to "submit to a search of [his] person, motor vehicle, or residence for controlled substances, firearms, or stolen property without the need of a warrant if the field agent has reasonable cause to believe those items will be found," he contends that there was no reasonable cause for the search in this case. Defendant again refers this Court to the inconsistencies in the probation officers' testimony as to why they were at defendant's house in the first place. However, there was testimony that they went to defendant's house to execute a warrant for his arrest, presumably for a probation violation. Further, once the officers approached defendant's house and he fled out the back door, they had reasonable cause to suspect that there was something in the house that defendant did want them to find. Therefore,

trial counsel was not ineffective for failing to move to suppress the evidence seized during the search because any such motion would have been meritless, and counsel cannot be faulted for not asserting a meritless position. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant next argues that trial counsel was ineffective by failing to impeach the officers' inconsistent testimony. But cross-examination is a matter of trial strategy that this Court will not second-guess. See *Rice, supra*. Further, while trial counsel did not directly impeach the officers' testimony at trial with their preliminary examination testimony, he was able to bring out the inconsistencies in their testimony on cross-examination, which put their credibility before the jury. Therefore, trial counsel was not ineffective in this regard.

Defendant further asserts that because of trial counsel's failure to object to or file a motion to exclude evidence that violated the trial court's discovery order, he was denied his right to the effective assistance of counsel. He contends that the prosecutor's introduction of the tether evidence violated the trial court's discovery order because the prosecutor did not disclose to defendant before the trial that he would be introducing that evidence. We again disagree. Contrary to defendant's assertions, the tether equipment found in the bedroom with the gun was not essential evidence in the case against defendant. Therefore, trial counsel's failure to object to it or to move to exclude it did not affect the outcome of defendant's trial.

Defendant's contention that his counsel was ineffective because he failed to advise the trial court that it could sentence defendant to an intermediate sanction is also without merit. As discussed above, the trial court was presumptively aware that it had the option to sentence defendant to an intermediate sanction. Thus, it was not ineffective for trial counsel to fail to advise the trial court of that opinion.

Defendant further argues that he was denied the right to the effective assistance of counsel by trial counsel's failure to request a continuance to call his probation officer. However, trial counsel's failure to call defendant's probation officer as a witness is presumed to be trial strategy, which can only constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense, i.e., a defense that would have made a difference in the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant contends that his probation officer's testimony was critical because he could have answered the following questions, which would have helped to determine if the search in this case was reasonable: (1) whether the tether had been removed from the house before the day of the arrest, and (2) whether defendant's probation address was 615 Miller Street or another address. But, as previously noted, there was a warrant for defendant's arrest and as a condition of his probation if the officers had reasonable cause, they could search his house. Therefore, we fail to see how either of these questions are critical to his defense.

Lastly, defendant argues that trial counsel was ineffective when he failed to argue against defendant's bindover at the preliminary examination or to object to its untimeliness. As to trial counsel's failure to argue against defendant's bindover, because we have concluded that there was sufficient evidence to convict defendant of the charges brought against him at trial, defendant cannot establish that he was prejudiced by the bindover or that his counsel was ineffective. See *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004).

As to the issue of the untimeliness of defendant's preliminary examination, defendant is correct that a preliminary examination must be conducted within 14 days of arraignment, MCL 766.4, and that did not occur here. However, the initial, timely preliminary examination date was adjourned when defendant, who had stated at the arraignment that he would obtain his own attorney, requested a court-appointed attorney the day before the hearing. Therefore, any untimeliness in the scheduling of defendant's preliminary examination appears to be of defendant's own making. Further, the fact that a preliminary examination is not timely held does not automatically entitle defendant to dismissal of the charges against him; rather, it may be adjourned, continued, or delayed for good cause shown. *People v Horne*, 147 Mich App 375, 377-378; 383 NW2d 208 (1985). And where the reason for delay in holding a preliminary examination was to make sure defendant had counsel, this Court has held that the delay was adequately explained and did not require reversal. *People v Bersine*, 48 Mich App 295, 300-301; 210 NW2d 501 (1973). For all of these reasons, defendant was not denied his right to the effective assistance of counsel.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto