STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM OTIS MILLER,

Defendant-Appellant.

UNPUBLISHED
July 30, 1996

No. 181399
LC No. 92-026120-FH

Before: Hood, P.J., and Markman and A. T. Davis,* JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6) and of habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to ten to twenty years in prison. Defendant now appeals as of right and we affirm.

On appeal, defendant argues that he was denied the right to be free from double jeopardy because he was prosecuted twice for the same offense. We disagree. On September 19, 1993, as the result of a domestic violence complaint from his girlfriend, defendant was found in the possession of a .9 millimeter handgun and an assault rifle. At the time, defendant was on probation for malicious destruction of property and resisting and obstructing a police officer. On October 3, 1993, as the result of another domestic violence complaint, defendant was found in the possession of a .22 caliber Colt pistol. Following an acquittal for the possession of the Colt pistol, defendant was convicted for possession of the assault rifle and the .9 millimeter handgun. Defendant contends that he was thereby deprived of his constitutional right not to be subject to double jeopardy. US Const, Am V; Const 1963, art 1, sec 15.

Although both cases involved firearms found by police in the same apartment and the same complaining witness, the weapons were discovered by police as a result of different complaints on different days. Further, there is no evidence suggesting that the weapons were obtained by defendant during the same transaction nor is there any indication that the .22 caliber handgun was in the apartment

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* Circuit judge, sitting on the Court of Appeals by assignment.

when police confiscated the rifle and the .9 millimeter handgun. Nor is there any evidence of bad faith on the part of the police or prosecutor in transforming one criminal episode into multiple episodes. Based on these facts, we find that the two cases involved separate and distinct incidents and were not part of a single, continuous criminal episode. *People v White*, 212 Mich App 298, 305-06; 536 NW2d 876 (1995). Accordingly, we find that defendant's convictions for possession of a firearm by a felon were not barred by double jeopardy. See e.g. *United States v Felix*, 503 US 378; 112 S Ct 1377; 118 L Ed 25, 33 (1992); *White*, supra.[1]

We also reject defendant's contention that the second prosecution was barred by double jeopardy because the assault rifle and handgun were introduced as evidence in the prior trial. An overlap in proofs does not establish a violation of the prohibition against successive prosecutions for the same offense. *Felix*, *supra*, 118 L Ed 2d 34. "[T]he introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Id.*

Defendant next argues that the trial judge should have been disqualified because he presided over a prior proceeding involving the same weapons for which defendant was prosecuted in the instant case. We disagree. A trial judge may be disqualified on the basis of bias or prejudice. MCR 2.003(B). Generally, a showing of actual prejudice is required. *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995). In the instant case, there is nothing in the record which would suggest the existence of actual bias or prejudice on the part of the trial court. "Merely proving that a judge was involved in a prior trial or other proceeding against the same defendant does not amount to proof of bias for purposes of disqualification." *People v White*, 411 Mich 366, 386; 308 NW2d 128 (1981). Although proof of actual prejudice is not required where circumstances are present which cast doubt on the judge's partiality, *People v Lowenstein*, 118 Mich App 475, 482; 325 NW2d 462 (1982), no special circumstances existed in this case which would have justified disqualification. The trial judge did not personally conduct the investigation which led to defendant's first trial, nor did he amass evidence, file charges or sit as factfinder in that case. See *People v Upshaw*, 172 Mich App 386, 389; 431 NW2d 520 (1988). The trial court did not abuse its discretion in denying defendant's motion for disqualification.

Next, defendant contends that his convictions for being a felon in possession of a firearm should be reversed because the prosecution failed to present sufficient evidence to prove that he possessed the assault rifle and the .9 millimeter handgun. Once again, we disagree. Possession may be proven by both direct and circumstantial evidence, and the term "possession" includes both actual and constructive possession. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). 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.* at 470-471. Here, Shajuan Blunt testified that she and defendant lived in the apartment from which the weapons were seized. The weapons were discovered by police in a rifle case which Blunt testified belonged to defendant. Further, after the weapons were seized, defendant met with Kenneth Moore, a detective with the City of Monroe police department, and requested that the police return both the rifle and the .9 millimeter handgun. Although there was conflicting testimony with regard to defendant's possession of the weapons, it is the right of the trier of

fact to believe or disbelieve, in whole or in part, any of the evidence presented. *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975). Viewing the evidence in a light most favorable to the prosecution, we believe the evidence was sufficient to allow a rational trier of fact to find that the essential elements of possession of a firearm by a felon were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

We also find that the prosecution produced sufficient evidence to support defendant's fourth-felony offender conviction. The supplemental information alleged that defendant had previously been convicted of four offenses: (1) possession of under twenty-five grams of cocaine; (2) resisting and obstructing a police officer; (3) attempted carrying of a concealed weapon; and (4) receiving and concealing stolen property in excess of $100. A habitual offender, fourth offense, conviction requires proof that the defendant was convicted of three or more felonies or attempts to commit felonies. MCL 769.12; MSA 28.1084. The only conviction which defendant challenges on appeal is the possession of cocaine conviction; he apparently concedes that there was sufficient evidence introduced to establish that he was convicted of the three remaining offenses. Accordingly, even if the evidence was insufficient to prove that defendant was convicted of possession of under twenty-five grams of cocaine, the error was harmless.

Finally, we reject defendant's contention that the trial court erred in allowing the prosecutor to amend the supplemental information prior to trial. Although the information listed the wrong date for the resisting and obstructing conviction, the substantive nature of the offense and the place of conviction were correct. Regarding the concealed weapon offense, the information accurately reflected the date and nature of the conviction. There is nothing in the record which would suggest that defendant was denied an opportunity to present a defense as a result of these amendments. See e.g. *People v Hardiman*, 132 Mich App 382, 385-386; 347 NW2d 460 (1984). Because defendant was not prejudiced by the trial court's decision to permit amendment of the information, reversal is not warranted. MCL 7676.76; MSA 28.1016; *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Alton T. Davis

[1] Defendant's reliance on *Blockberger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932) is misplaced. The *Blockberger* test is used to determine whether two distinct statutory provisions constitute separate offenses for double jeopardy purposes. Dressler, Understanding Criminal Procedure, § 205, p 448. Here defendant was prosecuted twice for distinct violations of the same statute.