STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED
v	No. 196656 Genesee Circuit Court
MICHAEL ALONZO THOMPSON, Defendant-Appellant.	LC No. 95-052293 FH December 15, 1998

Before: White, P.J., and Saad, and Markey, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), conspiracy to possess with intent to deliver marijuana, MCL 750.157a; MSA 28.354(1), delivery of marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), possession of a weapon by a convicted felon, MCL 750.224f; MSA 28.421(6), and possession of a weapon during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a fourth habitual offender to concurrent terms of ten to fifteen years' imprisonment on the first three counts and forty to sixty years' imprisonment for felon-in-possession, to be served concurrent to a two-year term for felony firearm. Defendant appeals as of right. We affirm.

I

There was evidence that on December 19, 1994, an informant working with the Flint Area Narcotics Group (FANG) arranged to purchase three pounds of marijuana from defendant. The informant had been cooperating with FANG since it raided his home in November 1994. After the informant arranged to purchase the marijuana from defendant for $4200, he contacted Lieutenant Compeau of FANG, informing him of the arrangement. Compeau met with the informant, giving him $4200. The informant left the meeting place and drove to defendant's home. The informant gave defendant the money, and defendant told the informant that he would "take care of" the informant, but that he had to go to his safe house and would then be at the informant's house after a short time.

After the informant left defendant's house, a FANG surveillance team followed defendant to a condominium owned by Bethany Gayden.

The informant left defendant's house and met Compeau nearby. They drove to another location to talk. The informant told Compeau that he had to go to his house, where defendant would bring the marijuana.

A short time after the informant returned home, defendant drove up in his car and beeped the horn. The informant went out to the car, got in and took a grocery bag that was sitting on the passenger-side floor. He took the bag into his home. After defendant drove away, Compeau arrived at the informant's home. He went inside. The informant pointed out a grocery bag. Campeau opened the bag and saw that it contained marijuana. He made a quick search of the house and left with the bag of marijuana.

After defendant left Gayden's, FANG members searched the condominium with Gayden's consent. The officers found a duffel bag of marijuana and a box containing an electronic scale in a closet in Gayden's spare bedroom and a duffel bag containing a large sum of money, including the buy money in a closet in Gayden's bedroom.

Officers stopped defendant in his car shortly after he left the informant's home around 9 p.m. and arrested him. They found no weapons or drugs on defendant or in his car. FANG members then met for a briefing and obtained a search warrant for defendant's home. The home was searched at midnight, and police seized a number of guns.

II

Defendant first raises an entrapment argument. He asserts that the facts demonstrate that the conduct of FANG members and the informant induced his criminal activity. He suggests that the informant interjected himself as a co-conspirator. We find no entrapment.

Entrapment exists if either of the following is established "(1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances; [or] (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). It is not entrapment for the police to present the defendant with an opportunity to commit the crime. *Id*. In analyzing the first prong of the test, courts must consider:

> (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was

police control over any informant; and (12) whether the investigation is targeted." [*People v James Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992), citing *People v Juillet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991).]

The facts demonstrate that defendant and the informant had known one another for about two years after meeting while completing previous felony sentences at a YMCA. The informant, who worked at a muffler shop, worked on defendant's cars. The informant initiated the conversations to set up the drug deal and made the arrangements, but there is no indication that he pressured defendant. The informant began working with FANG after his drug-related arrest one month before the instant offense. He hoped to receive some favorable treatment for his cooperation.

There is nothing in the facts to suggest that FANG's conduct of supplying the informant with money and securing his participation induced defendant's criminal activity. The informant did not appeal to defendant's sympathy or use excessive consideration or enticement. Defendant had a history of drug offenses. There is no indication of government pressure, threats of arrest or procedures used to escalate defendant's criminal culpability. The conduct in this case was not such that it would have induced a law-abiding person to commit these offenses. There is nothing to show that the police conduct was so reprehensible that it cannot be tolerated. Defendant's entrapment argument fails.

III

Defendant argues that the trial court erred in denying his motion for directed verdict on the counts of felon-in-possession and felony-firearm because the prosecutor failed to prove that defendant possessed a firearm. In a related issue, defendant asserts that he was not at home or in possession of a firearm at the time of his arrest or at the time of commission of any of the charged offenses. The trial court properly denied defendant's motion for directed verdict.

Defendant has failed to argue the merits of this issue with regard to the denial of his motion for directed verdict as to the felon-in-possession conviction. Therefore, that aspect of this issue is not preserved for review. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Our review is limited to defendant's claimed error with respect to the trial court's denial of his directed verdict motion as to felony-firearm[1].

Defendant asserts that the prosecution failed to present sufficient evidence of possession to convict him of felony firearm. During the search of defendant's home, officers seized several guns. They found a .357 between the mattresses of the bed in the master bedroom and a .32 caliber gun in the master bedroom closet. The officers seized other guns from a locked closet in the second story of defendant's home. Defendant's wife, Bridgit, asserted that she owned the .357 caliber and typically kept it in the locked closet. She said that the officers found the gun on her side of the bed. She also claimed that defendant purchased the .32 caliber for his father, who ultimately gave the gun to her. Bridgit also claimed ownership of the remaining guns.

Defendant moved for directed verdict as to these counts, relying primarily on *People v Ben Williams*, 212 Mich App 607; 538 NW2d 89 (1995). The trial court denied his motion. A trial

court's ruling on a motion for directed verdict is reviewed by this Court by considering, in a light most favorable to the prosecution, the evidence presented by the prosecution up to the time the motion is made to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997), quoting *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

To establish the offense of felony-firearm, MCL 750.227b; MSA 28.424(2), the prosecution must prove the defendant possessed a firearm during the commission or attempt to commit a felony. *People v Passeno*, 195 Mich App 91, 97; 489 NW2d 152 (1992). A defendant may have actual or constructive possession of a firearm. *Ben Williams*, *supra* at 609. Constructive possession is established if the defendant knows the location of the firearm and it is reasonably accessible to the defendant. *Id.* at 609-610. As explained in *Ben Williams*, the purpose of the felony-firearm statute is to "reduce the possibility of injury to victims, passersby and police officers. . . . The mere fact that a felon has a firearm at his disposal, should he need it, creates a sufficient enough risk to others that it is within the state's power to punish its possession." *Id.* at 609. On the other hand, the purpose of the felony-firearm statute is not fulfilled by punishing a defendant for possession of a firearm that is not accessible or at his disposal. *Id.* Where a defendant is far away from the location of the firearm, the firearm is not readily accessible and a conviction for felony-firearm is improper. *Id.* at 610. As to the possession element of felony-firearm, "a person away from home cannot be deemed in possession of a firearm found in his house." *Id.*

We conclude there was sufficient evidence to support the felony firearm charge. The informant testified that he went into defendant's house, going into the kitchen and a back room. At defendant's request, he gave defendant the money for the marijuana, and defendant told the informant that he would "take care of him" shortly and that he had to go to his safe house.

While there was no evidence that defendant possessed the marijuana at his home, and no evidence that defendant had either constructive or actual possession of a firearm while he had the marijuana, the delivery transaction began at defendant's home with the informant's payment of $4200 to defendant for the marijuana. Although the offense of delivery was not completed with the exchange of the money, and the exchange of money is not an element of the offense of delivery, in the instant case the acceptance of the money expressly in exchange for the marijuana that would soon be delivered was part of the offense. One who possesses a firearm while collecting payment for a controlled substance that will soon be delivered in exchange for that payment can be convicted of possession of a firearm during the commission of a felony even though the controlled substance and the firearm are never actually possessed at the same time.

IV

Defendant moved for suppression of evidence obtained through a defective search warrant and a suppression hearing, both of which the trial court denied. He argues that the trial court erroneously denied this motion. We disagree.

To prevail on a claim that evidence seized pursuant to a search warrant should be suppressed because the affidavit in support of the warrant contained false and misleading information, a defendant must demonstrate "by a preponderance of the evidence that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause." *Ben Williams, supra* at 610, citing *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

Defendant argues that the affidavit in support of the search warrant contained false and misleading information in support of probable cause to search his home. Defendant failed to support this allegation. He asserts that Compeau had no reason to believe that drugs or drug-related paraphernalia would be found in his home. However, the affidavit acknowledges that Compeau recognized that defendant likely kept his supply of marijuana at a location other than his home. The affidavit also states that Compeau's experience had taught him that persons who deal in drugs often maintain drug-related items within their homes as well as "safe houses," and recounts that officers found marijuana residue in the trash at defendant's home and that a month earlier the informant was seen going to defendant's house to pay off a drug debt. The affidavit further explained that $4200 in "buy money" was given to the informant, who gave it to defendant in the premises to be searched, but only $3900 was recovered from the safe house, and none was found on defendant when he was arrested. Therefore, Compeau believed the money would be found in the residence. Defendant argues that Compeau lied when he stated in the affidavit that $300 was missing from the $4200 buy money and that he believed officers would find the missing money at defendant's home. Defendant asserts that when Compeau went to the prosecutor's office to obtain the search warrant, he did not yet know of the missing buy money. However, there was testimony that while at the prosecutor's office Compeau received a telephone call from another officer, who informed Compeau about the missing buy money. This information was included in the affidavit. It is irrelevant that Compeau was apparently seeking the search warrant before he had knowledge of the missing buy money; the affidavit as presented and signed was adequate to provide probable cause.

Defendant has failed to demonstrate that the statements in the affidavit were false or made with reckless disregard for their truth. The trial court did not err in refusing to hold a hearing regarding suppression of the evidence seized from defendant's home.

V

Defendant argues that his right to be free from double jeopardy is violated by his convictions of both felony-firearm and felon-in-possession. We disagree.

Our Supreme Court has recently ruled that a felony-firearm conviction does not violate the protection against double jeopardy where the defendant is convicted of any felony except those enumerated in MCL 750.227b; MSA 28.424(2)[2] as the predicate offense. *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998). Here, the jury was instructed that the predicate felony for the felony-firearm charge was any of the three drug charges. The excluded felonies listed in MCL 750.227b; MSA 28.424(2) do not include these drug offenses.

Defendant further relies on *People v Bonner*, 116 Mich App 41; 321 NW2d 835 (1982), *People v Martin*,398 Mich 303; 247 NW2d 303 (1976), and *People v Stewart (On Rehearing)*, 400 Mich 540; 256 NW2d 31 (1977), asserting that because the same facts support both the felon-in-possession conviction and the felony-firearm conviction the double jeopardy bar was violated. However, in *People v Robideau*, 419 Mich 458, 485-488; 355 NW2d 592 (1984), the Supreme Court disavowed prior cases applying the factual test in single-trial, multiple-punishment cases, and instead focused solely on the question of legislative intent. Here, we think it clear that the Legislature addressed distinct social norms in the felon-in possession and felony-firearm statutes. We thus conclude that defendant's right to be free from double jeopardy is not violated by his convictions of both felony-firearm and felon-in-possession.

VI

Defendant also argues that his criminal convictions violate double jeopardy because they followed forfeiture proceedings. Again, we disagree.

Following *United States v Ursery*, 518 US 267; 116 S Ct 2135; 135 L Ed 2d 549 (1996), this Court adopted a test to determine whether a criminal conviction following a civil forfeiture constitutes a violation of the right to be free from double jeopardy. There is a presumption that a double jeopardy analysis does not apply to forfeiture proceedings in MCL 333.7521 *et seq*.; MSA 14.15(7521) *et seq*. because such forfeiture actions are in rem civil proceedings. A defendant may overcome the presumption only by presenting "clearest proof" that the forfeiture had "an excessive punitive purpose or effect" so as to amount to a criminal proceeding. *People v Acoff*, 220 Mich App 396, 399; 559 NW2d 103 (1996).

Pursuant to MCL 333.7521(1)(d), (f); MSA 14.15(7521)(1)(d), (f), the following property may be forfeited: vehicles used or intended to be used to transport or facilitate the transportation for selling or receiving controlled substances and "any thing of value that is furnished or intended to be furnished in exchange for a controlled substance . . . or that is used or intended to be used to facilitate any violation of [the uniform controlled substances act] . . . or that is traceable to an exchange for a controlled substance . . . or that is used or intended to be used to facilitate any violation of [the uniform controlled substances act]." The prosecution must prove its case in a forfeiture action by a preponderance of the evidence. *In re Forfeiture of 301 Cass St*, 194 Mich App 381, 384; 487 NW2d 795 (1992). For an asset to be forfeited, there must be a "substantial connection between that asset and the underlying criminal activity. . . . [P]roperty that has only an incidental or fortuitous connection to the unlawful activity is not subject to forfeiture." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 146; 486 NW2d 326 (1992). Connection to a specific drug transaction is not required; "the assets need only be traceable to drug trafficking." *Id.* at 147.

The government seized and forfeited personal property belonging to defendant, including his car, U.S. currency, employment paychecks amounting to $1192.93, firearms and jewelry. Defendant argues that the forfeitures in this case were clearly punitive, as evidenced by the fact that the seizure and forfeiture of his paychecks violated the principle that there must be a substantial connection between the asset forfeited and the underlying criminal activity.

Defendant has failed to establish that the forfeiture of his paychecks had an "*excessive* punitive purpose" as required under *Acoff*. Defendant simply asserts that the forfeiture of the paychecks is evidence of the punitive nature of the forfeiture proceedings, but does not demonstrate that it was excessively punitive. Defendant has failed to overcome the presumption that the criminal proceeding was not barred because the forfeiture action was an in rem civil proceeding.

VII

Next, defendant argues that the 67th District Court did not have jurisdiction to bind him over. We disagree.

We review de novo a trial court's determination regarding venue in a criminal prosecution. *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996). The prosecution must prove venue beyond a reasonable doubt. *Id.* "Due process requires that trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature." *Id.*, citing *People v Lee*, 334 Mich 217, 225-226; 54 NW2d 305 (1952).

The prosecution relies on the conspiracy charge to establish that venue was proper in the 67th district. A case involving conspiracy may be prosecuted in any jurisdiction in which occurred an overt act in furtherance of the conspiracy. *People v Meredith (On Remand)*, 209 Mich App 403, 408; 531 NW2d 749 (1995). Here, the prosecution presented evidence that there was a conspiracy between defendant and/or Gayden and/or Robert Grashan to possess with intent to deliver marijuana, and that defendant picked up the marijuana from Gayden's home in Grand Blanc (the 67th district) and delivered it to the informant in Flint (the 68th district). The 67th district therefore provided proper venue.

VIII

Defendant next argues that the trial court's denial of his motion to enforce the plea agreement warrants reversal. We disagree.

In exchange for defendant's introducing law enforcement authorities to a drug dealer and pleading guilty to one four-year controlled substance felony, the prosecution agreed to dismiss the remaining counts and another case, and not to oppose probation. After receiving the presentence report, the court declined to go along with the agreement and refused to sentence defendant to probation. Defendant asserts that he complied with his part of the agreement and argues that the court should have upheld the plea agreement.

MCR 6.302(C)(3) provides:

> If there is a plea agreement, and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may
>
> (a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or

(c) accept the agreement without having considered the presentence report; or

(d) take the agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

Pursuant to the court rule, the circuit court stated when the plea was offered that it would entertain the request for probation, and if it could not go along with the request, defendant would be permitted to withdraw his plea and go to trial on all five counts. The record reflects that the prosecutor did not oppose probation and did not breach the plea agreement. The motion to enforce the plea agreement did not seek to enforce the prosecutor's obligations under the agreement,[3] but rather to require the judge to comply with the sentencing provision of the agreement. The court correctly determined that it was not obliged to do so and that defendant was only entitled to the opportunity to withdraw his plea.

IX

Defendant argues that because he is black, his trial counsel's failure to make a record of the racial composition of the jury or to object to the prosecution's striking of potential jurors who are black constituted ineffective assistance of counsel. We disagree.

By failing to move in the trial court for a new trial or an evidentiary hearing regarding this claim of ineffective assistance of counsel, defendant has failed to preserve the issue for appeal unless the record is sufficient to support defendant's claim. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). This Court's review is limited to the record. *Id*. To establish that his counsel was ineffective, defendant must demonstrate, through the record, that his counsel's performance fell below an objective standard of reasonableness and the representation prejudiced defendant to the extent that he was denied a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995), citing *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

There is nothing in the record to demonstrate that defendant's trial counsel's performance fell below an objective standard of reasonableness or that his counsel's representation prejudiced him to the extent that he was denied a fair trial. He has failed to establish a denial of effective assistance of counsel.

X

Next, defendant argues that the trial court's response to the jury's request for the court to read back certain witness testimony warrants reversal of his convictions. We find no error requiring reversal.

MCR 6.414(H) provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

During deliberations, the jury requested a transcript of the informant's testimony. The trial court observed that a transcript had not yet been prepared, but that the court would have the reporter replay the testimony for the jury. The court asked the reporter to estimate the length of the testimony. The reporter replied that she had five tapes of the testimony, and the court told the jury that the reporter estimated that the testimony was four hours, fifteen minutes long. The court gave the jury the option of hearing the tapes and requested that the jury go back into the jury room, instructing them as follows:

> Now, would you like to, I don't want you to say a word, I think you should all go back in there and then you should write me another note and say yes you wanna hear it or no you don't wanna hear it or whatever you want me to do, tell me and we will proceed to accommodate you as best we can.

The jury replied that it did not want the testimony "at this time" and returned its verdict 2½ hours later, without ever hearing a play-back of the testimony or again requesting it.

Defendant's reliance on *People v Wytcherly*, 172 Mich App 213; 431 NW2d 463 (1988) is misplaced. The trial court did not foreclose the possibility of providing the jury with the testimony or a portion of the testimony. The trial court complied with MCR 6.414(H). Its response to the jury's request is not error requiring reversal.

XI

Relying on *People v Booker*, 208 Mich App 163; 527 NW2d 42 (1994), defendant next argues that the trial court's failure to advise the parties of an erasure of a mark in a "not guilty" box on the verdict form constituted reversible error. However, the verdict was read in the courtroom, and each juror expressed agreement with the verdict when polled. We therefore find no merit in this argument.

XII

Next, defendant argues that his forty- to sixty-year sentence for felon-in-possession constitutes cruel and/or unusual punishment under both the United States Constitution and the Michigan Constitution. Defendant essentially argues that this sentence is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and is therefore cruel and unusual. We must disagree.

In reviewing sentences imposed for habitual offenders, this court must determine whether there has been an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562NW2d 460 (1997).

The trial court sentenced defendant as a fourth habitual offender. Because the statutory maximum sentence for felon-in-possession, MCL 750.224f; MSA 28.421(6), is five years' imprisonment, defendant could be sentenced to life in prison, or a lesser term of years, under MCL 769.12(1)(a); MSA 28.1084(1)(a). Thus, defendant's forty- to sixty- year sentence for felon-in-possession was within the range of sentences authorized by the sentence enhancement statute.

Defendant asserts that because the underlying offense of felon-in-possession is punishable by a maximum of only five years; the weapons were not used in the commission of any offense, belonged to his wife, and were for the most part found in a locked closet; and defendant had no notice that he was not permitted to possess firearms,[4] the forty to sixty year sentence is cruel and unusual.

While we agree that defendant's forty to sixty year sentence is quite severe and would likely have opted for a lesser minimum term ourselves, we are unable to conclude that the trial court abused its discretion in imposing such a lengthy term. Defendant had been convicted three times of cocaine-related offenses, once of conspiracy to bring contraband into prison, and once of possession of a fraudulent financial transaction device. The court noted that his first offense was in 1982 and that he had had continuous involvement with the criminal justice system for fourteen years at the time of sentencing. The court further observed that many of the offenses were committed while defendant was on probation, parole or in prison, and that the purpose of the habitual offender provisions "is to provide for a longer sentence where a defendant has shown a persistent commission of crime and indifference to the law."

In *Hansford, supra,* the Supreme Court focused attention on the habitual offender's criminal history and potential for rehabilitation, focusing more on an assessment of the offender than the offense, *id.* at 325, and stated:

> We believe that a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. [454 Mich at 326.]

The trial court did not abuse its discretion in determining that defendant had demonstrated an inability to conform his conduct to the laws.

XIII

Defendant next argues that his convictions must be reversed because the prosecutor knowingly presented false testimony. We find no error requiring reversal.

The knowing production of false testimony by the prosecution constitutes reversible error. *People v Thornton*, 80 Mich App 746, 749; 265 NW2d 35 (1978). "It is inconsistent with due process when the prosecutor, although not having solicited false testimony from a state witness, allows it to stand uncorrected when it appears, even when false testimony goes only to the credibility of the witness." *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986).

Defendant called the informant's wife as a witness, after interviewing her pretrial, and questioned her regarding the informant's drug use. On cross-examination, the prosecutor elicited testimony regarding her observations at the home, which testimony corroborated in part that of the informant regarding the controlled buy. She testified that she lived with her husband at the time of the controlled buy and was present in the house during the time that defendant delivered the marijuana and Compeau retrieved it. One of defendant's attorneys testified that, at a pre-trial interview with the witness, the witness told the attorney that she and the informant were separated at the time of this transaction and that she was not at the informant's home on the night that the controlled buy took place. Defendant asserts that he is entitled to a new trial because the prosecutor either presented perjured testimony or failed to list a res gestae witness. We disagree.

The witness' testimony may or may not have been false. The informant first testified that he was alone at home while waiting for defendant on December 19, 1994. He then testified that he could not remember whether anyone else was at home with him, although he was fairly certain he was alone. Compeau testified that he searched the living room and kitchen of the informant's home, but did not give definitive testimony regarding the presence of any other person in the home. We cannot say the prosecutor knowingly presented false testimony. The facts were not within the prosecutor's knowledge. Compare *People v Cassell*, 63 Mich App 226; 234 NW2d 460 (1975), relied on by defendant. It was for the jury to determine whether the witness testified truthfully. Because the record does not establish that the prosecution knowingly presented false testimony, we find no reversible error.

Defendant also asserts that the prosecution had a duty to endorse the informant's wife as a res gestae witness. MCL 767.40a; MSA 28.980(1) describes the prosecutor's duty with regard to listing witnesses. The prosecution has a duty to list all known witnesses who it might call at trial and all known res gestae witnesses. MCL 767.40a(1); MSA 28.980(1)(1). It also has a continuing duty to disclose the names of any res gestae witnesses as those witnesses become known. MCL 767.40a(2); MSA 28.980(1)(2).

A res gestae witness is one who witnesses an event in the continuum of the criminal transaction and whose testimony will help in developing a full disclosure of the facts of the case. *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990). Because the informant's wife testified that she witnessed some of the events regarding the transaction between the informant and defendant, she was a res gestae witness. However, under the statute, the prosecution had an affirmative duty to list her only if it knew she was a res gestae witness. The purpose of this listing requirement is to notify the

defendant that the witness exists and that the witness is a res gestae witness. *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989).

In this case, defendant has not shown that the prosecutor knew the informant's wife was present at the time. More important, defendant knew that the informant was married, and defense counsel listed the informant's wife as a witness and interviewed her at least once before trial. Because defendant knew of the witness, the failure of the prosecution to list her as a res gestae witness, even if it knew of her status as such, does not constitute error requiring reversal.

XIV

Defendant claims that the prosecution improperly withheld a police report and that he learned of the contents of the report after his conviction. The trial court denied defendant's motion for new trial, which he sought on the basis of prosecutorial misconduct and newly discovered evidence. Defendant now seeks reversal of his convictions, claiming an erroneous denial of his motion for new trial. We disagree.

This Court reviews a trial court's disposition of a motion for new trial based on newly discovered evidence for an abuse of discretion. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). The motion cannot be granted unless the defendant demonstrates that the evidence "(1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence." *Id.* Where the evidence would be used only for impeachment purposes, it is not a basis for a new trial. *Id*. at 516.

Defendant asserts that the prosecution failed to provide him with pages one through eleven of a police report, which addresses an incident involving defendant that occurred during November 1994. Pages twelve through twenty-four of this report, which defendant received, related to the investigation of the instant incident. Pages one through eleven involved in part the November 9, 1994, seizure of marijuana from the informant's wife.

Defendant and the prosecution provided affidavits regarding discovery of the report. The prosecution presented Compeau's affidavit in which he stated that at a meeting before the trial in this case he presented to defense counsel all the evidence of the investigation of his case, including pages one through twenty-four of the report and property receipts. Included in these receipts, which Compeau stated defendant's counsel copied, was that of the November 9, 1994, seizure of marijuana from the informant's wife.

In an affidavit supplied by defendant's counsel, Kenneth Scott, Scott stated that he sought discovery on the case and received only pages twelve through twenty-four of Compeau's report. Scott stated that in September 1996, after the instant trial, he received pages one through eleven of the report during discovery in a second case against defendant. Defendant asserts that the lack of knowledge of the information contained in pages one through eleven prejudiced him in the instant case because he called the informant's wife as a witness, her testimony was detrimental to defendant and the lack of this knowledge denied him effective impeachment of the witness.

First, the trial court properly denied defendant's motion because a motion for new trial for newly discovered evidence cannot be granted where the evidence would be used only to impeach a witness. *Davis*, *supra*. Moreover, there clearly is a dispute regarding whether the prosecution failed to comply with discovery. The trial court determined that the prosecution complied with discovery. This Court may not set aside the trial court's factual findings unless they are clearly erroneous. MCR 2.613. The trial court's finding that the prosecution provided defense counsel with the entire police report before trial is supported by the evidence and not clearly erroneous.

XV

Defendant also asserts that he was denied a fair trial by the district court's failure to provide him a bill of particulars. Because this issue is not presented in defendant's statement of questions presented, it is not preserved for appeal. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Further, defendant does not explain how he was prejudiced.

XVI

Defendant next argues that the trial court erred in denying his motion for acquittal of the conspiracy count and the felony-firearm count. We disagree.

Defendant asserts that the prosecution presented insufficient evidence to convict defendant of a conspiracy with Gayden and/or Grashan. Therefore, he contends, the conspiracy conviction must be reversed and, because the conspiracy is the underlying offense for the felony-firearm conviction, the felony-firearm conviction must be reversed.

To determine whether the prosecution presented sufficient evidence of guilt to sustain a conviction, we must consider the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all the elements of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992). To establish the existence of a conspiracy, the prosecution must establish that two or more persons voluntarily agreed to commit a criminal offense. *Justice*, *supra* at 345. There must be evidence that the persons "specifically intended to combine to pursue the criminal objective of their agreement." *Id*. Thus, there must be proof that the individuals "specifically intended to further, promote, advance or pursue an unlawful objective." *Id*. at 347. Proof of a conspiracy can be drawn from the circumstances, acts and conduct of those involved, and inferences are permissible. *Id.* at 347. The scope of the conspiracy must be determined through examining circumstantial evidence, but any inferences that are drawn must be reasonable. *Id.* at 348. Inferences may not be based on uncertain or speculative evidence or evidence that raises merely a conjecture or possibility. *People v Fisher*, 193 Mich App 284, 289; 483 NW2d 452 (1992), citing *People v Orsie*, 83 Mich App 42, 47; 268 NW2d 278 (1978). Defendant suggests that his conviction for conspiracy was impermissibly based on inference piled upon inference. However, "[t]he rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that

defendant is guilty beyond a reasonable doubt." *Orsie, supra* at 48, quoting *Dirring v United States*, 328 F2d 512, 515 (CA 1, 1964).

The evidence established that defendant went to Gayden's after meeting with the informant, accepting $4200 from the informant and telling the informant that he had to go to his safe house. Defendant told the informant that he would deliver the marijuana at the informant's home. FANG officers saw defendant leave Gayden's house carrying a grocery bag. The informant went into defendant's car when defendant arrived at the informant's house and left defendant's car carrying a grocery bag. The informant took the grocery bag into his house. When Compeau retrieved it he found that it contained marijuana. Thus, it was reasonable to conclude that defendant obtained the marijuana from Gayden's house.

Additional evidence established that one of Gayden's closets contained a duffel bag of marijuana and an electronic scale in a box. Gayden testified that Robert Grashan brought duffel bags, including the one containing marijuana, to her home and that Grahsan left the duffel bag and scale at Gayden's. Gayden testified that she did not know what was in the duffel bag or box. However, Gayden signed a statement for police shortly after the search stating that defendant brought duffel bags to her house, left them there a few days and then picked them up, and that while she did not look in the bags, she had a good idea that marijuana was inside. While Gayden denied the truth of the statement at trial, and the statement was admitted for impeachment only, the statement provided a reasonable basis for disbelieving Gayden's trial testimony. Further, officers found a large quantity of money, including the buy money, in a bag contained in a duffel bag belonging to Gayden in a closet in Gayden's bedroom. Additionally, Gayden admitted pleading guilty to possession of marijuana.

This circumstantial evidence is sufficient for a fact-finder to find defendant guilty of conspiracy. The jury could reasonably infer that defendant stored marijuana and money at Gayden's house with Gayden's knowledge and consent, and that Gayden was knowingly and willingly providing a safe house for defendant to store marijuana for future delivery and large sums of money. Defendant came and went from Gayden's home as he pleased and had his own key, although he had his own home. The informant knew of the safe house's location.

We further conclude that defendant's claims of instructional error regarding the conspiracy charge are unpreserved. A timely objection would have avoided any prejudice.

XVII

Defendant asserts that he was denied effective assistance of counsel through counsel's failure to object to the prosecutor's sentencing memorandum, which contained damaging allegations. However, because the court explained that defendant's pending charges played no part in its sentencing of defendant, defendant has failed to demonstrate prejudice. He has therefore failed to demonstrate a denial of effective assistance of counsel. *Barclay*, *supra*.

We also reject defendant's argument that he was denied effective assistance of counsel through his counsel's failure to object to the prosecutor's questions regarding events occurring before he

committed the instant offenses. Defendant has failed to overcome the presumption that his trial counsel's conduct was sound trial strategy. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Thus, his claim of ineffective assistance on this basis fails.

XVIII

Defendant next argues that the trial court erred in admitting Gayden's statement. He asserts that the statement was not relevant and was prejudicial to his penal interest. We find no error requiring reversal.

This Court reviews the admission of evidence for an abuse of discretion. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996). In general, evidence of a prior inconsistent statement made by a witness is admissible for impeachment purposes, even when the statement tends to directly inculpate the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). An exception to this rule is that a statement inculpating a defendant may not be used under the guise of impeachment if the statement is relevant to the central issue of the case and there is no other testimony from the particular witness for which her credibility is relevant to the case. *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994); *Kilbourn*, *supra* at 682-683.

The court properly admitted Gayden's statement for impeachment. She provided additional testimony for which her credibility was relevant. Moreover, the trial court instructed the jury that prior statements by the witnesses were not to be used as substantive evidence, but only to assess credibility. The trial court did not abuse its discretion in admitting Gayden's statement.

XIX

Finally, defendant claims his counsel's failure to object to the admission of Compeau's testimony as an expert witness constituted ineffective assistance of counsel. We disagree.

Compeau's testimony was based on Compeau's experience and training and was admissible to help the jury determine defendant's intent and guilt. It was not inadmissible merely because it addressed the ultimate issue of intent to deliver. *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993). Defendant has failed to establish a denial of effective assistance of counsel on this basis.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Jane E. Markey

[1] Regardless of defendant's failure to properly preserve this issue, we find the trial court properly denied his motion for directed verdict of his felon-in-possession charge. Under MCL 750.224f; MSA 28.421(6), felons are prohibited from possessing firearms for a period of time after they have fully completed their sentences. The purpose of the felon-in-possession statute is to "protect[] the public from guns in the hands of convicted felons . . . ." *People v Swint*, 225 Mich App 353, 374; 572

NW2d 666 (1997). The *Swint* Court also noted: "The Legislature has made the determination that felons, who have exhibited their disregard for ordered society and pose a threat to public safety, and firearms are a lethal combination—at least for three to five years after a felon successfully completes his term of incarceration and probation and pays all requisite fines." *Id.* at 374. It is apparent that, unlike the concern with the immediate risk posed by a person possessing a firearm during the commission of a felony, the felon-in-possession statute is aimed at deterring the possibility of a generalized, long-term risk to society. Under this statute, the fact that the guns were at defendant's home while the offenses were committed and defendant was arrested elsewhere is irrelevant. This conclusion is supported by the fact that the statute encompasses not only possession and use, but the transport, sale, purchase, carriage, shipment, receipt or distribution of firearms. The statute clearly covers any association a convicted felon may have with a firearm. Thus, the trial court properly denied defendant's motion for directed verdict with regard to the felon-in-possession charge.

[2] MCL 750.223; MSA 28.420 (unlawful sale of a pistol or firearm more than thirty inches long), MCL 750.227; MSA 28.424 (carrying a concealed weapon), MCL 750.227a; MSA 28.424(1) (unlawful possession of a pistol by a licensee), and MCL 750.230; MSA 28.427 (alteration, removal or obliteration of firearm identity marks).

[3] Defendant could have declined the opportunity to withdraw his plea, and could have affirmed his charge agreement with the prosecutor, leaving the sentence to the court's discretion. Apparently, he decided in favor of trial on all five counts.

[4] We reject this argument on the basis that defendant's order of probation required that he not violate any criminal law of any unit of government.