STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN L. TETREAU,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 189024
Huron Circuit Court
LC No. 94-003708 FH

Before: Wahls, P.J., and Gage and Nykamp,* JJ.

PER CURIAM.

Defendant was convicted by a jury of carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, and operating a vehicle while under the influence of intoxicating liquor (OUIL), MCL 257.625(1); MSA 9.2325(1). Following the jury verdict, defendant was convicted after a bench trial of habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and OUIL, second offense, MCL 257.625(7); MSA 9.2325(7). Defendant was sentenced to three years' probation with the first year to be served in the county jail for the CCW conviction and to 270 days in jail for the OUIL conviction. Defendant appeals as of right. We reverse defendant's CCW conviction and affirm his OUIL conviction.

Defendant was stopped for traffic violations and was found to be intoxicated. After failing the field sobriety tests, the police officer placed defendant under arrest and conducted a pat down search of his person. Defendant told the officer that he had a knife in his pocket. The officer found a butterfly knife (a double edged knife which has a handle that folds down over it) in a zipped pocket of his jacket. Defendant said that it was a gift from his wife and he always carried it. Defendant denied that he carried the knife for assaultive or defensive purposes. In denying the motion for directed verdict, the trial court suggested that defendant's failure to offer an explanation of why he carried the knife gave rise to circumstantial evidence from which a reasonable juror could conclude that the knife was carried for use as a dangerous weapon.

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

Defendant argues that there was insufficient evidence to support his conviction for CCW. We agree. In reviewing a claim of insufficient evidence, we view the evidence presented in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The burden is on the prosecution to prove that a pointed instrument carried by the defendant is either dangerous per se or that it was used, or intended for use, as a weapon for bodily assault or defense. *People v Brown*, 406 Mich 215, 222-223; 277 NW2d 155 (1979). "The fact that a pointed instrument . . . has great potential as a dangerous weapon does not render it a dangerous weapon per se." *Id*. Whether knives are dangerous weapons "would depend upon the use which the carrier made of them." *People v Vaines*, 310 Mich 500, 505; 17 NW2d 729 (1945). It is a question of fact whether an instrument is a dangerous weapon per se or one used or intended for use as a weapon for assault or defense. *People v Johnson*, 175 Mich App 56, 59; 437 NW2d 302 (1989). However, before a question of fact is presented there must be some "evidence showing, or from which it could reasonably be inferred, that [the defendant] had used it, or was carrying it for use, as a weapon of assault or defense." *Vaines, supra* at 506.

In the present case, the prosecutor presented no evidence that the knife was dangerous per se. In addition, no evidence was presented to rebut defendant's uncontroverted statement that he had carried the knife—a gift from his wife—for seven to ten years. Plaintiff's argument that defendant's statement was incredible is not persuasive. There was no credibility contest in this case because there was no testimony or evidence that contradicted defendant. Defendant is not required to prove that he had an innocent reason for having the knife with him. Defendant showed no hostility to the officer when he was arrested, he had the knife in a zipped pocket, he told the officer about it, and he was arrested for drunk driving. There were no circumstances in this case that would give rise to the inference that the knife was carried for assaultive or defensive purposes. Defendant's conviction for CCW is reversed and the sentence imposed thereon is vacated.

Defendant also urges reversal of both the CCW and OUIL convictions on the basis that the trial court abused its discretion in denying his motion for continuance to call additional witnesses. Defendant has failed to persuade this Court that he suffered any unfair prejudice as a result of the trial court's denial of his motion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). The trial court found that, with the exception of Chief Bissonette of the Utica Police Department, the testimony of the proposed witnesses would be merely cumulative of testimony already in the record. These witnesses apparently would have challenged police testimony about when and where they stopped defendant. However, in view of the fact that defendant does not deny that he was driving the night the officers stopped him or that he had a blood alcohol level of .13 when tested, there was no prejudice to him in the denial of this motion. The trial court further stated that Bissonette's testimony was not relevant. Bissonette would have testified that he told defendant five to seven years earlier that some knife defendant showed to him was not illegal to possess under a local ordinance. However, the officer could not recall what type of knife he was shown and would not have been able to testify that he was shown the knife in question. Defendant was not, therefore, unfairly prejudiced by not being allowed an adjournment to produce this testimony.

In light of our reversal of defendant's CCW conviction, we find it unnecessary to address the remaining issues raised by defendant.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Hilda R. Gage
/s/ Wesley J. Nykamp