STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICO RENEE PORTER,

Defendant-Appellant.

UNPUBLISHED
November 21, 1997

No. 195719
Jackson Circuit Court
LC No. 96-074626-FH

Before: Markey, P.J., and M.J. Kelly and Whitbeck, JJ.

PER CURIAM.

Defendant was charged with carrying a concealed weapon in a motor vehicle (CCW) in violation of MCL 750.227; MSA 28.424, operating a vehicle while under the influence of intoxicating liquor (OUIL) in violation of MCL 257.625; MSA 9.2325, and was placed on notice that he was subject to sentence enhancement for prior convictions of three or more felonies pursuant to MCL 769.12; MSA 28.1084. In the course of arresting defendant for OUIL, the police discovered a loaded and cocked .22-caliber handgun located between the split in the front seat of the car that defendant was driving. In the same location, police also discovered a .25-caliber handgun.

Following trial, a jury convicted defendant of the principal charges. The trial court sentenced defendant to five to fifteen years of imprisonment for CCW in a vehicle as a fourth felony offender and to a concurrent 90-day jail term for the OUIL conviction. Defendant now appeals as of right. We affirm.

I

Defendant argues that the prosecution failed to produce evidence sufficient to prove guilt beyond a reasonable doubt as to the offense of CCW, and the conviction for this offense was against the great weight of the evidence. We disagree.

Defendant waived his argument that the verdict is against the great weight of the evidence by failing to move for a new trial. *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991).

The standard of review for a sufficiency-of-the-evidence claim is de novo; accordingly, this Court must view the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Quinn*, 219 Mich App 571, 573-574; 557 NW2d 151 (1996). The prosecution need not negate every reasonable theory of innocence, but it must prove its own theory beyond a reasonable doubt in the face of the defendant's contradictory evidence. *Id*. at 574.

Defendant's defense theory, as evidenced by the testimony of defendant's sixteen-year-old son, was that defendant's son had purchased these guns off the street on the very day that defendant was arrested and that defendant's son had not told defendant that the guns were hidden in the car. On cross-examination of prosecution witnesses, defendant elicited testimony that no fingerprints were found on the guns linking them to defendant and that defendant never admitted knowing that the guns were in the vehicle.

In his appeal brief, defendant concedes that "permissible inferences flowing from the circumstantial evidence adduced [at trial] may have validated the trial court's denial [of] defendant's motion for directed verdict." Defendant's sole argument on this issue is that the testimony of his son erased any inferences tending to establish defendant's guilt. That argument plainly fails. "The credibility of a witness is a matter of weight, not sufficiency." *People v Sharbnow*, 174 Mich App 94, 105; 435 NW2d 772 (1989). Thus, defendant cannot use his son's testimony to erase the "permissible inferences" of guilt established by the prosecution's case-in-chief. To allow defendant to do so would require an assumption that the jury accepted the testimony of defendant's son when, in fact, it may have rejected it entirely.

II

Defendant next claims that his right to a fair trial was prejudiced by the introduction of the evidence seized from the vehicle, which he claims was illegally seized. Defendant waived this issue. A defendant may not raise a suppression claim for the first time on appeal. *People v Carroll*, 396 Mich 408, 411-412; 240 NW2d 722 (1976).

We also find that the search and seizure was lawful as incident to defendant's arrest for OUIL, yet defendant does not challenge the validity of the arrest. See *People v Fernengel*, 216 Mich App 420, 422-423; 549 NW2d 361 (1996). Thus, the trial court's decision upholding the search and seizure, as well as the fruits of the search, was not clearly erroneous. *Id*. at 429-430.

III

Defendant next claims that the prosecutor elicited testimony from a police officer that he knew defendant from defendant's prior involvement as a drug informant and that such testimony was contrary to MRE 404(b)(1). We disagree.

The officer testified that he searched defendant's vehicle three times in October 1995, and he agreed with the prosecutor's question that defendant was "being cooperative with police at that time."

Defendant never objected to this testimony. Hence, the issue is waived. See, generally, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

While it is true that the jury was made aware that defendant was involved in controlled buys in his capacity as a drug informant, that fact came out only on defense counsel's cross-examination of the officer. A party waives review regarding the admission or exclusion of evidence when that party introduced the challenged evidence. *People v King*, 158 Mich App 672, 677; 405 NW2d 116 (1987).

Assuming that the alleged error was preserved, substantively defendant's argument fails as well because he fails to cite any authority for the proposition that testimony concerning a defendant's involvement with police as a drug informant is improper under MRE 404(b)(1). An appellant may not merely announce his position and then leave to this Court the task of finding support for his claims. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). In any event, there has been no showing that the admission, elicited on cross-examination by defendant himself that defendant was a drug informant constitutes manifests injustice.

IV

Defendant next claims that the court erred when it read a coercive deadlocked jury instruction. Defendant waived this issue by failing to object. *People v Pollick*, 448 Mich 376, 381-385, 386-388; 531 NW2d 159 (1995); *People v Hardin*, 421 Mich 296, 322-323; 365 NW2d 101 (1984); MCR 2.516(C).

V

Defendant next claims that he was denied effective assistance of counsel by his counsel's failure to move to suppress the evidence that he contends was illegally seized from his vehicle and by counsel's failure to object to the police officer's alleged testimony that he knew defendant from defendant's involvement as a drug informant. We disagree.

Defendant failed to preserve this issue by not moving for a new trial or requesting an evidentiary hearing on the matter. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The issue is not completely waived, however, but review is limited to the extent that the alleged mistakes of trial counsel are apparent on the record. *Id*.

Substantively, defendant's argument regarding counsel's failure to move to suppress the evidence fails because counsel is not required to argue a frivolous or meritless motion, *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991), and, as previously demonstrated in § II, *infra*, the search was proper as incident to defendant's arrest for OUIL and the handguns ultimately would have been discovered, regardless of the initial search, in a post-arrest inventory search.

Defendant next claims that he was denied effective assistance of counsel because his trial counsel failed to object when the police officer testified that he knew defendant from defendant's

involvement as a drug informant. This argument fails because its factual predicate is absent. In other words, the officer did not testify that he knew defendant from defendant's involvement as a drug informant; rather, he only testified that he had searched defendant's vehicle three times in October 1995 at a time when defendant "was being cooperative with police."

VI

Defendant next claims that the trial court erred in the sentencing phase of defendant's case. We disagree.

We reject defendant's claim that the trial court failed to articulate valid reasons for imposing a sentence of five to fifteen years' imprisonment. The sentencing transcript reflects that the court articulated that it was basing its sentencing decision on the circumstances surrounding this defendant and his criminal behavior in that defendant was "riding around at 2, 3 o'clock in the morning with a loaded gun and cocked when a police officer is coming up to your window, you're drunk . . . [and] you've got a duffle bag with a mask and some more guns and ammunition." See *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Gould*, ___ Mich App ___; ___ NW2d ___ (Docket No. 184342, issued August 15, 1997), slip op at 5. The court also properly based its sentencing decision on defendant's "awful" prior record, noting that defendant had four prior felonies and seven misdemeanors. The court appropriately concluded its sentencing considerations by announcing that the goal of any sentence is to punish the defendant, to deter others, to protect society, and possibly to reform the defendant. In defendant's case, the court emphasized the need "to protect society and [to] punish." Thus, reference to the sentencing transcript demonstrates that, contrary to defendant's claim, the trial court articulated its sentencing considerations on the record. *People v Terry*, 224 Mich App 447, 455-456; ___ NW2d ___ (1997).

We also reject defendant's claim that the trial court erred in basing defendant's sentence on an independent finding of guilt as to uncharged conduct. While it is true that the sentencing court may not make an independent finding of guilt and then sentence a defendant based upon that finding, *People v Dixon*, 217 Mich App 400, 410-411; 552 NW2d 663 (1996), a sentencing court may properly consider the circumstances of the surrounding criminal behavior, *Milbourn, supra*. We believe that the trial court's comments reflect only an appropriate consideration of the circumstances surrounding the crime and the charges brought against defendant that resulted in his conviction.

Finally, defendant claims that his sentence is disproportionate. We will not reverse a trial court's sentence of an habitual offender absent an abuse of discretion. *People v Cervantes*, 448 Mich 620, 626-627, 631; 532 NW2d 831 (1995).

We believe that the trial court's sentence of five to fifteen years' imprisonment is proportionate given defendant's extensive prior record of four felonies and seven misdemeanors and the circumstances surrounding the crime in that, in addition to the other weapons discovered in the vehicle, defendant was driving drunk with a loaded and cocked handgun immediately accessible to him. Defendant's presentence report reflects that an escalating criminal history in that nonviolent larceny convictions have

been followed by several convictions for violent, assaultive behavior. Accordingly, defendant's sentence is proportionate to this offense and this offender, and we find no abuse of discretion.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ William C. Whitbeck