STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS FULLER,

Defendant-Appellant.

UNPUBLISHED
July 24, 1998

No. 203336
Recorder's Court
LC No. 96-004054

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant was charged with one count of attempted carjacking, MCL 750.529a; MSA 28.797(a); MCL 750.92; MSA 28.287, one count of armed robbery, MCL 750.529; MSA 28.797, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). After a jury trial, he was convicted of one count of armed robbery, MCL 750.529; MSA 28.797, one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, one count of felonious assault, MCL 750.82; MSA 28.277, and one count of felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent prison terms of five to sixteen years for the armed robbery conviction, five to ten years for the assault with intent to do great bodily harm less than murder conviction, and thirty to forty-eight months for the felonious assault conviction, to be served consecutively to a five-year prison term for the felony-firearm conviction.[1] Defendant appeals as of right. We affirm.

Defendant first argues that he was denied the effective assistance of counsel by defense counsel's failure to move to suppress evidence of the gun and cellular telephone seized during an illegal search of defendant's residence at the time of his arrest. Because defendant did not move for a new trial or *Ginther*[2] hearing below, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1995).

As an incident to an in-home arrest, the police may conduct a protective sweep, which is a quick and limited search of the premises conducted to protect the safety of police officers and others at

the arrest scene. *Maryland v Buie,* 494 US 325; 110 S Ct 1093; 108 L Ed 2d 276, 281 (1990); *People v Cartwright,* 454 Mich 550, 556-557; 563 NW2d 208 (1997). The protective sweep is justified by the danger that the house in which the arrest is occurring is harboring other persons who are dangerous and who could unexpectedly launch an attack. *Buie, supra,* 108 L Ed 2d 285. Therefore, the protective sweep allows the police to look in closets or other spaces immediately adjoining the place of arrest from which an attack could be launched. *Id*. at 286. However, there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. *Id*. at 287.

Here, police officers did not know how many people were present in the home. Defendant was emerging from a back bedroom when the police entered the house. Officer Cook, who knew that a weapon had been involved in the crime for which defendant was being arrested, immediately went into the back bedroom from which he saw defendant emerge, looked in a closet, and saw the gun in plain view on a shelf in the closet. The cellular telephone was observed in plain view on the closet shelf by another officer. Under these circumstances, a reasonably prudent officer would be warranted in believing that the back bedroom could have harbored an individual who could have posed a danger to those on the arrest scene. Thus, because the gun and cellular telephone were seized during a permissible protective sweep incident to an arrest, they were not the fruits of an illegal search. Defense counsel was not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next argues that the trial court erred in admitting into evidence the gun seized at his residence at the time of his arrest. Defendant did not object to the admission of the gun at trial and, therefore, this issue is not preserved for appeal. MRE 103(a)(1); *People v Grant,* 445 Mich 535, 545; 520 NW2d 123 (1994).

Defendant next argues that the trial court erred by denying his motion for a directed verdict on the attempted carjacking charge. We disagree.

When reviewing a denial of a motion for a directed verdict, this Court must consider the evidence presented by the prosecution up until the time the motion was made in a light most favorable to the prosecution 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 McKenzie,* 206 Mich App 425, 428; 522 NW2d 661 (1994). When deciding a motion for a directed verdict, the court may not determine the weight of the evidence or the credibility of witnesses. *People v Mehall,* 454 Mich 1, 6; 557 NW2d 110 (1997).

To prove carjacking, the prosecution must prove 1) that the defendant took a motor vehicle from another person, 2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and 3) that the defendant did so either by force or violence, by threat of force or violence, or by putting another in fear. MCL 750.529a(1); MSA 28.797(a)(1); *People v Green,* ___ Mich App ___; ___ NW2d ___ (Docket No. 194995, issued March 20, 1998), slip op p 5. To prove the crime of attempt, the prosecution must show 1) the

specific intent to commit a crime and 2) an overt act, going beyond mere preparation, toward the commission of the crime. MCL 750.92; MSA 28.287; *People v Stapf*, 155 Mich App 491, 494; 400 NW2d 656 (1986). The victim testified that, as he was approaching his vehicle, defendant pointed a gun at him and directed him to give defendant his cellular telephone and his money. The victim testified that, although defendant did not specifically demand his vehicle or the keys to his vehicle, in light of defendant's threats he purposely dropped the keys on the ground before running off. Defendant's passenger, Archie Broom, testified that after the victim ran off, defendant directed him to drive either the victim's vehicle or defendant's vehicle. When viewed in a light most favorable to the prosecution, Broom's testimony indicates that defendant intended to take the victim's vehicle. Accordingly, the trial court properly denied defendant's motion for a directed verdict on the attempted carjacking charge.

Finally, defendant argues that the evidence presented at trial was insufficient to support his felony-firearm conviction. We disagree.

To determine whether sufficient evidence was presented to sustain a conviction, this Court views the evidence in the 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).

A conviction of felony-firearm requires proof that the defendant possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; MSA 28.424(2); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Here, the victim testified that defendant pointed a gun at him while demanding his cellular telephone and his money. Broom testified that defendant threatened the victim with a revolver, and fired three shots at the victim as the victim ran off. A police officer also observed defendant fire three shots at the victim. The officer further testified that defendant held a gun out of the window of his car and shot at the officer's vehicle. Such evidence was more than sufficient to support a finding that defendant was guilty beyond a reasonable doubt of felony-firearm.

Affirmed.

/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[1] This was defendant's second felony-firearm conviction.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).