

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEIF W. FIDEL,

Defendant-Appellant.

UNPUBLISHED

September 28, 1999

No. 206344

Recorder's Court

LC No. 97-001819

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

I. Introduction

Following a bench trial, the trial court convicted defendant of carrying a concealed weapon ("CCW"), MCL 750.227(2); MSA 28.424(2), and felony jail escape, MCL 750.197(2); MSA 28.394(2). The trial court sentenced defendant to three to five years' imprisonment for the CCW conviction and two to four years' imprisonment for the escape conviction, the sentences to be served consecutively. Defendant now appeals as of right, alleging that (1) the trial court clearly erred in its finding of fact that the evidence was sufficient to support defendant's conviction for CCW, (2) the trial court improperly relied upon its own specialized knowledge in finding defendant guilty of CCW, and (3) the trial court had an affirmative duty to disqualify itself because of bias and prejudice. We disagree and affirm.

II. Basic Facts And Procedural History

A. Defendant's Arrest

At the trial in this matter, Officer Oscar Garza of the Detroit Police Department testified that one evening in early February, 1997, he was on routine patrol with two other officers, David Wasmund and Todd Adams, when he was dispatched to Junction and Buchanan streets in Detroit to respond to a call regarding a person with a weapon, whom the dispatcher described and identified as defendant. Upon arrival at the scene, Officer Garza observed defendant, who matched the description that had been given, walking southwest through a field in a park. Officer Garza noted that he was familiar with defendant through previous contacts. According to Officer Garza, the officers pulled up in their vehicle

and shone a flashlight on defendant, who began to flee through the playground. The officers identified themselves, and Officers Garza and Wasmund pursued defendant on foot. Officer Garza testified that defendant was about to run out of the playground onto Junction Street and that he observed defendant reach into his right coat pocket and discard a blue, steel, automatic weapon.

Officer Garza testified that he and Officer Wasmund continued to pursue defendant, who ran inside a vacant dwelling directly across the street from the playground. Officer Garza stated that he caught up with defendant and apprehended him inside the vacant dwelling. Shortly thereafter, according to Officer Garza, Officer Wasmund joined them and confirmed that the weapon found was a blue, steel, automatic nine-millimeter gun. The officers advised defendant of his rights and charges, arrested him, and conveyed him to the fourth precinct.

Officer Wasmund's testimony regarding the basic circumstances of the arrest was much the same. With respect to the handgun, Officer Wasmund testified that Officer Garza, who was between defendant and Officer Wasmund as they ran through the playground, pointed to the opening of the playground on Junction Street and told him that defendant had discarded a handgun. Officer Wasmund testified that he stopped in that area by the opening of the fence and recovered the weapon, which was a Hipoint nine-millimeter, blue, steel, automatic handgun. Wasmund testified that he checked the weapon for safety purposes and determined that it was loaded with one live round in the chamber and seven live rounds in the magazine. Officer Wasmund stated that he then met Officer Garza at a vacant house on Junction, where Officer Garza had defendant in custody. The officers asked defendant if he had a permit or license to carry a weapon; he replied that he did not. Officer Wasmund later "place[d] the weapon on evidence."

Defendant's version of the events was considerably different. He testified that, on the evening in question, he was with two friends on his way home from a friend's house. Defendant stated that he was coming across Junction Street from a playground, which was about a block from his home, when he was approached by some police officers. Defendant testified that Officer Wasmund—who did not identify himself but whom defendant recognized from prior contacts—got out of the police car and grabbed him. Defendant stated that he ran when Officer Wasmund grabbed him because he did not know what Officer Wasmund was going to do.

Defendant testified that he stopped at a vacant house across the street from the park, and that the officers started hitting, kicking, and punching him. He stated that his jaw was cut, and his face and chin were burning. According to defendant, when he later got his handcuffs off and touched his face, it was "bleeding real bad." Defendant testified that, when he was running away from the officers in the park, he did not have a weapon, nor did he drop a weapon at the entrance of the park. When asked how many contacts he had previously had with Officer Wasmund, defendant responded, "Everytime [sic] he see [sic] me."

B. Defendant's Escape From Jail

Officer Thomas Vida of the Detroit Police Department testified that he was on duty as a prisoner detention officer in the fourth precinct on the evening when defendant was brought in.

According to Officer Vida, approximately thirty minutes after defendant was brought in, Officer Vida let him out of his cell to make a telephone call. Officer Vida stated that he escorted defendant to the telephone, which was inside the cell block near a swinging half-door with an open top portion. Officer Vida stated that, pursuant to standard procedure, defendant was not handcuffed or restricted in any way. Officer Vida observed defendant dial a phone number. Officer Vida testified that he then left the area and walked approximately ten feet to a counter, where he wrote in a logbook that defendant had made a phone call.

According to Officer Vida, while he was standing at the counter, which was approximately one to two feet away from the door to the telephone area, he heard the door open and saw defendant run past him. Officer Vida testified that attempted to tackle defendant, but that defendant pushed him off to the side, hopped over the front desk, and ran out the double set of front doors of the precinct. Officer Vida testified that he and several other officers chased defendant, who ran eastbound on Fort Street to American Way, south on American Way, and west through an alley. Officer Vida stated that, when defendant turned a corner to head south in another alley, he lost sight of defendant.

Officer Vida testified that the officers sectioned off the area, and he walked alone down the alleyway, where he found defendant hiding underneath a porch of a house. Officer Vida stated that he attempted to surprise defendant, but defendant saw him and began running through the alley again. According to Officer Vida, he chased defendant east toward American Way, where defendant unsuccessfully attempted to climb into a dumpster. Officer Vida testified that he advised defendant that he was under arrest, but that defendant began running again, heading north on American Way. Defendant crossed Fort Street and ran into the precinct parking lot, where he stopped and faced Vida and told Vida that he would kill him before he would go back into the precinct. According to Officer Vida, he and defendant exchanged blows, and he wrestled defendant to the ground and waited for backup because he did not have any restraints with him. Officer Vida stated that he struggled with defendant for approximately three minutes before assistance arrived. Officer Vida further stated that the officers walked defendant, who continued to struggle the entire time and had to be sprayed with pepper spray, back to his cell. Officer William Melendez of the Detroit Police department confirmed Officer Vida's testimony and further noted that when Defendant was then brought back into the cell block he was complaining of injuries, but that he did not observe any injuries on defendant other than a small laceration on his forehead. Pursuant to standard operating procedure, because defendant was complaining of injuries, he was placed into a scout car and taken to a hospital.

Officer Melendez stated that he traveled in a different car to the hospital but that when he arrived at the hospital and was standing next to defendant, who was still struggling with the officers, defendant began making several statements. Defendant yelled out loud, "I have a bullet for the mother-----s. I know who they are." According to Officer Melendez, defendant mentioned Officers Garza, Wasmund, and Jones, stating, "I'm going to get them, I'm going to kill all them mother-----s."

Once again, defendant's version of the events was considerably different. Defendant testified that he was then taken to the fourth precinct. He stated that he was allowed to make a telephone call and, at some point, he was told to get off the phone. However, according to defendant, he did not comply with this order, because he was trying to get in touch with his family "to let them know that they

had jumped on” him. Defendant stated that the detention officer and the other officers then began trying to take the phone away from him. Defendant testified that the officers “start [sic] hitting me, punching me again, kicking me and they wouldn’t stop, so I just ran out [sic] the precinct.” Defendant stated that he made it to the parking lot, but he testified that he could not remember what happened next; he stated, “[A]fter that I woke up in the hospital.” Defendant stated that he was in the hospital for three days, and that his injuries were as follows:

Nine stitches in the jaw, stitches in the tongue and bruised, ribs bruised, my arms messed up, lacerations to my hand, scars all over my belly, deep groove scars all over my belly and chest, back was messed up and my face was messed up pretty bad, swolled [sic] up face and a chipped tooth.

C. The Trial Court’s Findings

The trial court made the following findings of fact and conclusions of law:

Well, I will tell you, he didn’t explain away the gun, they found a .9mm gun. And I can tell you that there’s three things you don’t find laying [sic] around. You don’t find dope and you don’t find money, that is unless you follow an armour [sic] truck with the doors falling off, and you don’t find guns. The only way police can find guns, especially a .9mm is when they see somebody ditch it. They found the .9mm, they even named the kind of gun they found. So the gun is there. If you want, they will bring it over here. The reason they found it is because they saw the person who ditched it and they arrested him. And they were there because they received a radio run and the radio run not only describing the person, but naming the person as being Mr. Fidel. And they placed him under arrest. That’s what happened.

And, instead of going in facing the charge of having a concealed weapon and giving him an opportunity to use the telephone, Mr. Fidel decided he was going to take matters in to his own hands and leave, which he did.

Now, he told the truth about two things which I believe beyond a reasonable doubt. He told me what his name was and he told me he was walking across the lot. After that he lied his head off. He never told another word of truth. I don’t believe any other thing that he said except for what his name was.

The officers didn’t just go around driving around in a city police car burning up gas, wasting time just to find him to beat him up. When they were chasing him out there, he was an escaped convict. There’s no evidence somebody—nobody tried to take deadly force. He—they took him back into the station. He had no right to leave the station. He’s the bad guy; he’s the trouble maker. They arrested him, he’s the one caused [sic] all the problem. I don’t buy his story about he’s the guy being persecuted. He’s the guy being chased after; he’s the good guy. This is the crook.

* * *

I find him guilty of both charges beyond a reasonable doubt. I accept the testimony of the police officers. I do not believe a word he said.

He's a danger menace [sic] and danger to his community. He shouldn't be running around. So I'm going to remand him.

III. Sufficiency Of The Evidence

A. Preservation Of The Issue And Standard Of Review

MCR 2.517(A)(7) provides that “[n]o exception need be taken to a finding or decision” of a court in a bench trial. Furthermore, defendant was not required to raise the issue of the sufficiency of evidence below in order to preserve it for appeal. *People v Wolfe*, 440 Mich 508, 516, n 6; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). We give deference to the trial court’s ability to view the evidence and the demeanor of the witnesses and will not set aside its findings of fact unless they are clearly erroneous. *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). This Court must consider the “special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). A court’s finding of fact is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been committed. *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996).

When reviewing a challenge to the sufficiency of the evidence, this Court must examine the evidence 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. *Wolfe, supra* at 515.

B. Defendant’s Argument

Defendant argues that there was insufficient evidence to support his CCW conviction, and that the trial court clearly erred in finding that the pistol he was carrying was “concealed.”

C. Elements Of CCW

MCL 750.227(2); MSA 28.424(2) provides:

A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

Thus, the prosecutor was required to prove that (1) defendant carried a pistol and (2) the pistol was concealed on or about his person. *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979) (Holbrook, Jr., J.); see also CJI2d 11.1. “Absolute invisibility of a weapon is not indispensable to concealment; the weapon need not be totally concealed.” *People v Kincade*, 61 Mich App 498, 502; 233 NW2d 54 (1975). A weapon is concealed “‘when it is not discernible by the ordinary observation of persons coming in contact with the person carrying it, casually observing him, as people do in the ordinary and usual associations of life.’” *Id.*, quoting *People v Jones*, 12 Mich App 293, 296; 162 NW2d 847 (1968).

D. Sufficiency

Here, Officer Garza testified that, as he chased defendant through the playground, he “observed him reach into his right coat pocket and discard a blue steel automatic.” Officer Garza’s testimony was corroborated by that of Officer Wasmund; he testified that, although he did not see defendant discard the weapon, Garza informed him that defendant “discarded a handgun near the opening of the school playground.” In response to this information, Officer Wasmund stopped in the area indicated by Officer Garza and recovered a nine-millimeter automatic handgun.

We find that the prosecutor presented sufficient evidence from which the trial court could have found that defendant was carrying a pistol which was concealed on or about his person. Circumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of the elements of the crime. *Wolfe, supra* at 526. Officer Garza testified that he saw defendant reach into his pocket and discard a gun. From this testimony, it is reasonable to infer that the pistol was “concealed”—that is, that it was “not discernible by the ordinary observation of persons coming in contact with the person carrying it.” *Kincade, supra* at 502.

Defendant, however, argues that Officer Garza’s testimony was inconsistent and proves that there was no concealment. The following exchange took place on cross-examination of Garza:

Q. And what type of jacket was Mr. Fidel wearing?

A. If I can refer to my PCR to refresh my memory?

Q. Sure? [sic]

A. I got him down wearing a blue jacket.

Q. Can you give any better description other than a—

A. No, ma’am.

Q. So, you don’t recall whether or not it had pockets or not?

A. Yes.

Defendant contends that, although Officer Garza first testified that he saw defendant reach into his pocket and discard a weapon, the officer's testimony on cross-examination shows that he did not even know if the jacket had pockets or not. Therefore, defendant argues, there was no evidence of concealment. We disagree. Officer Garza's response, "Yes," to the question, "So, you don't recall whether or not it had pockets or not?" was ambiguous. While this response could be read to mean that Officer Garza did not recall whether the jacket had pockets, it could just as easily be read to mean that he *did* recall that the jacket *did* have pockets. The latter reading is supported by Officer Garza's earlier testimony that he observed defendant reach into his pocket. Moreover, we give deference to the trial court's superior position in evaluating the testimony presented. MCR 2.613(C). We are not left with a definite and firm conviction that the court erred in determining that the pistol was, indeed, concealed. *Lombardo*, *supra* at 504. We hold that the trial court did not clearly err in its finding of fact that the evidence was sufficient to support defendant's conviction for CCW.

IV. The Trial Court's Alleged Reliance On Specialized Knowledge

A. Preservation Of The Issue And Standard Of Review

"No exception need be taken to a finding or decision" of a trial court sitting without a jury. MCR 2.517(A)(7). Therefore, defendant may raise this issue for the first time on appeal. We review constitutional issues de novo. *People v McIntire*, 232 Mich App 71, 93; 591 NW2d 231 (1998). Thus, because constitutional rights are involved, we review this issue de novo. See *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991) ("[w]hen the factfinder relies on extraneous evidence, the defendant is denied his constitutional right to confront all the witnesses against him and to get all the evidence on the record").

B. Defendant's Argument

Defendant contends that the trial judge improperly relied on extraneous evidence, in the form of his own specialized knowledge, in finding defendant guilty of CCW.

C. Common Sense And Everyday Experience

While factfinders may and should use their own common sense and everyday experience in evaluating evidence, a judge in a bench trial may not "go outside the record" in determining guilt. *Simon*, *supra* at 567-568. When a trial judge relies on extraneous evidence in rendering a verdict, he essentially "serve[s] as an expert witness against [the] defendant, thus depriving [the] defendant of his right to confrontation and cross-examination." *Id.* at 568.

Unlike the judge in *Simon*, *supra*, however, the trial court here did not refer to "specialized" knowledge gained, for instance, from his experiences as an attorney or judge. Rather, the trial court merely commented that guns are not normally found "laying [sic] around" unless somebody had "ditch[ed]" them. The trial court's comments simply demonstrate its sensible belief that, as a matter of common sense and general knowledge, a gun does not magically appear on the ground in a playground.

Moreover, the trial court further noted that “[t]he reason [the officers] found [the gun] is because they saw the person who ditched it.” Therefore, it is apparent that the court was relying solely on evidence within the record and not on extraneous evidence. We hold that the trial court did not improperly rely upon its own specialized knowledge in finding defendant guilty of CCW.

V. Trial Court Bias

A. Preservation Of The Issue And Standard Of Review

In order to preserve this issue for appeal, defendant was required to raise the issue below by pursuing the remedy provided for in MCR 2.003. *Meagher v Wayne State Univ*, 222 Mich App 700, 725; 565 NW2d 401 (1997). Because defendant is raising this issue for the first time on appeal, it is not preserved for appellate review. *Id.* Had defendant properly preserved this issue for appeal by moving for the disqualification of the trial court and then, if the motion were denied, by obtaining review de novo by the chief judge below, MCR 2.003(C)(3), this Court would review the decision of the chief judge for an abuse of discretion. *Meagher, supra.*

B. Defendant’s Argument

Defendant argues that the trial judge was biased against him and should have disqualified himself. Disqualification is appropriate when a judge cannot impartially hear a case, including when the judge “is personally biased or prejudiced for or against a party or attorney.” MCR 2.003(B)(1); *People v Coones*, 216 Mich App 721, 726; 550 NW2d 600 (1996) (Bandstra, J.) “An actual showing of prejudice is required before a trial judge will be disqualified.” *Id.*

C. The Presumption Of Judicial Impartiality

A defendant who challenges a judge on the basis of bias or prejudice bears the burden of overcoming the presumption of judicial impartiality; the defendant must demonstrate that the judge’s comments evidence actual bias or prejudice against defendant. *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998). Furthermore,

[o]pinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Likewise, judicial remarks during the course of a trial that are “critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” [*Schellenberg v Rochester Lodge No 2225*, 228 Mich App 20, 39; 577 NW2d 163 (1998) (citations omitted).]

All the comments defendant cites as evidencing the trial judge’s bias are merely indicative of “[o]pinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings.” *Id.* Because these comments do not indicate that the judge was actually biased or prejudiced against defendant, there is no basis for disqualification. MCR

2.003(B)(1); *Coones, supra* at 726-727. We hold that the trial court did not have an affirmative duty to disqualify itself because of bias and prejudice.

VI. Conclusion

We hold that (1) the trial court did not clearly err in its finding of fact that the evidence was sufficient to support defendant's conviction for CCW, (2) the trial court did not improperly rely upon its own specialized knowledge in finding defendant guilty of CCW, and (3) the trial court did not have an affirmative duty to disqualify itself because of bias and prejudice.

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Joel P. Hoekstra