

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DARNELL NELSON,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2000

No. 215980

Kalamazoo Circuit Court

LC No. 98-000894-FC

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

In this case involving the robbery of two individuals in a single house, defendant appeals by right from his convictions by a jury of two counts of armed robbery, MCL 750.529; MSA 28.797, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). The trial court sentenced defendant to two terms of two years' imprisonment for the felony-firearm convictions. Applying a second-offense habitual offender enhancement under MCL 769.10; MSA 28.1082, the trial court then sentenced defendant to three concurrent terms of ten to thirty years' imprisonment for the remaining convictions, to be served consecutively to the felony-firearm sentences. We affirm.

Defendant first argues that the trial court erred in denying his motion for a mistrial after a prosecution witness made reference to a polygraph examination. We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

The challenged comment occurred in the following context:

Q: And, were – was a condition of your . . . plea agreement . . . that you testify truthfully against any and all co-defendants, including David Nelson?

A: Yes, but I thought it was just for a polygraph.

In *People v Rocha*, 110 Mich App 1, 8-9; 312 NW2d 657 (1981), this Court set forth several factors to consider in determining whether a reference to a polygraph examination warrants reversal:

(1) whether [the] defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted.

An application of these factors to the instant case leads us to conclude that reversal is unwarranted, even though defendant properly preserved this argument by objecting to the polygraph comment. First, the jury received an adequate cautionary instruction. Second, the mention of the polygraph came in an unresponsive, volunteered answer to a proper question and was not used by the prosecutor to bolster the credibility of the witness. Third, the polygraph reference was brief and not repeated. Finally, the witness did not even indicate whether he in fact *took* a polygraph examination, much less whether he *passed* a polygraph examination. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Id.* See also *Haywood, supra* at 228.

Next, defendant argues that his second felony-firearm conviction was based on speculation because the trial court failed to properly instruct the jury regarding the elements of the crime. The trial court's instructions regarding the felony-firearm charges were as follows:

This instruction is on the offense known as, "Possession of a firearm at the time of the commission of a felony."

The Defendant is also charged with a separate crime of possessing a firearm at the time he committed the crime of armed robbery. To prove this charge the Prosecutor must prove each of the following elements, beyond a reasonable doubt:

First, that the Defendant committed the crime of armed robbery, which has been defined for you. It is not necessary, however, that the Defendant be convicted of that crime.

Second, that at the time the Defendant committed that crime he knowingly carried or possessed a firearm. It does not matter whether or not a gun was loaded.

Defendant contends that because the court did not provide the jurors with a separate instruction for each felony-firearm charge, they had no basis on which to return two felony-firearm convictions.

Defendant, however, did not object to the court's felony-firearm instructions at trial. Accordingly, the instructions do not warrant reversal unless they constituted a plain error that affected defendant's substantial rights and (1) defendant was actually innocent; or (2) the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 767-774; 597 NW2d 130 (1999). To establish plain error, defendant must demonstrate that a different outcome would have resulted in the absence of the error. *Id.* at 763, 771-772.

Defendant has not met this burden. Indeed, viewed in their entirety, the instructions given by the trial court were sufficient to convey to the jury that the predicate felonies for the two felony-firearm offenses were the two charged armed robbery offenses, and defendant did not and does not object to the instructions for the two armed robbery offenses. Accordingly, the felony-firearm instructions sufficiently protected defendant's rights, see *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995), and reversal is not warranted under *Carines*, *supra* at 763, 771-772.

Finally, defendant argues that he should not have received two felony-firearm convictions because he possessed only a single firearm during a single, continuous transaction. Again, however, defendant failed to raise this argument below, and reversal is therefore warranted only if a significant, plain error occurred under *Carines*, *supra* at 767-774. We find no such error. In *People v Morton*, 423 Mich 650, 653-656; 377 NW2d 798 (1985), our Supreme Court concluded that the felony-firearm statute, MCL 750.227b; MSA 28.424(4), clearly reflects the intent of the Legislature that a criminal defendant who has used a firearm to commit multiple felonies during a single transaction may be convicted of more than one count of felony-firearm. Defendant suggests that *Morton* was incorrectly decided and that we should decline to follow it. This Court is bound by *Morton*, however, and must follow the decision until such time that the Supreme Court modifies or overrules it. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Consequently, defendant's second challenge to the validity of his second felony-firearm conviction must fail.

Affirmed.

/s/ Hilda R. Gage  
/s/ Patrick M. Meter  
/s/ Donald S. Owens