STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMONDE JONES,

Defendant-Appellant.

UNPUBLISHED
July 28, 2000

No. 212347
St. Clair Circuit Court
LC No. 98-000394-FH

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant was acquitted on charges of felon in possession of a firearm, MCL 750.224f; MSA 28.424(6), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to 48 to 360 months' imprisonment, to be served consecutively to an unspecified sentence imposed in another file, docket no. 94-51372-FH. Defendant appeals by right, and we affirm.

Defendant argues that the prosecutor's remarks in rebuttal argument regarding defendant's prearrest silence resulted in error requiring reversal. We disagree. In cases of prosecutorial misconduct, the determination must be made whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999).

Defendant argues that it was impermissible for the prosecutor to comment on defendant's pre-arrest silence. Defendant cites *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973), for the proposition that pre-arrest silence cannot be used for any purpose except impeachment when the defendant testifies. Our Supreme Court has released several decisions clarifying *Bobo* to make it coextensive with federal precedent. See, e.g., *People v Sutton (After Remand)*, 436 Mich 575, 559; 464 NW2d 276 (1990); *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990). As

explained in *People v Alexander*, 188 Mich App 96, 101; 469 NW2d 10 (1991), as a result of these decisions, where the prosecutor's comments concern silence after the defendant has been given his *Miranda*[1] warnings, the issue is a constitutional one; where the prosecutor's comments concern silence before the *Miranda* warnings are given, the issue is an evidentiary one. *Alexander*, *supra* at 104.

In *Alexander*, this Court held that, from an evidentiary standpoint, the trial court would have been within its discretion in allowing the defendant's silence to be used to impeach him, and thus there was no error requiring reversal. *Id*. In *People v Collier*, 426 Mich 23, 35-36 n 3; 393 NW2d 346 (1986), our Supreme Court also held that the defendant's pre-arrest silence could be used for impeachment purposes. In fact, according to *People v Cetlinski*, 435 Mich 742, 760; 460 NW2d 534 (1990), citing *Collier*, *supra* at 38-39, *Bobo* is only still viable when confined to the use of a defendant's silence at the time of arrest in the face of accusation for impeachment purposes.

Defendant also relies on *Cetlinski*, *supra* at 759, for the proposition that non-utterances can never be used to intimate guilt. In *Cetlinski*, *supra* at 759, however, our Supreme Court held that the use of a defendant's prior statements, including omissions, given during contact with the police, prior to arrest or accusation, does not violate the defendant's constitutional rights, but rather is an evidentiary issue. *Cetlinski* did not directly address the issue whether the admission as substantive evidence of testimony concerning a defendant's silence before custodial interrogation and before the *Miranda* warnings have been given is a violation of the defendant's constitutional rights. *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992).

In *Schollaert*, *supra* at 161, the prosecutor commented in rebuttal that the police went to the defendant's house at 3:30 or 4:00 a.m. and the defendant did not ask why they were there. The defendant argued that the prosecutor impermissibly used the defendant's silence as substantive evidence of guilt by suggesting that an innocent person would have asked why the police were present. *Id*. at 161. This Court concluded that the admission of the substantive evidence of the defendant's silence or non-responsive conduct before custodial interrogation and before the *Miranda* warnings were given was not a violation of the defendant's constitutionally protected silence. *Id*. at 166. Consequently, as an evidentiary question, the defendant's silence was relevant as evidence of consciousness of guilt. *Schollaert*, *supra* at 167.

In this case, the police stopped the vehicle in which defendant was a passenger and subsequently discovered a gun on the car floor, between defendant's feet. One of the officers testified that defendant did not say anything when he was patted down or when the officer went to retrieve the weapon; nor did defendant point to the gun or give any sign that it was there. These events took place before defendant's arrest and before he was given *Miranda* warnings. Defendant did not object to the testimony. Under *Alexander*, *Cetlinski*, and *Schollaert*, the evidence was admissible. Prosecutors may argue from the evidence and all reasonable inferences as it relates to their theory of the case. *Bahoda*, *supra* at 282; *Gonzalez*, *supra* at 535. Thus, the prosecutor's remarks in her rebuttal argument were proper.

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Moreover, the prosecutor was responding to defense counsel's contention in closing argument that defendant's actions demonstrated his innocence. A prosecutor may respond to remarks in defense counsel's closing arguments. *People v Guenther*, 188 Mich App 174, 178; 469 NW2d 59 (1991). Defense counsel argued that defendant did not do anything when the officer stopped them and implied that defendant's conduct was consistent with that of an innocent person being stopped by the police. The prosecutor's remarks were clearly directed toward rebutting that claim. Accordingly, the prosecutor's comments did not deny defendant a fair trial.

Defendant argues that the trial court's denial of defendant's motion for directed verdict on the CCW charge was in error. Again, we disagree. When ruling on defendant's motion for directed verdict, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the elements of the crime charged were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Review is de novo. See *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

To support a conviction for carrying a weapon in an automobile, the prosecution must show the presence of a weapon in a vehicle operated or occupied by the defendant, that the defendant knew or was aware of its presence, and that he was "carrying" it. *People v Courier*, 122 Mich App 88, 90; 332 NW2d 421 (1982). Defendant contends that there was insufficient evidence of the third element, that he carried the gun in the car.

In *People v Butler*, 413 Mich 377, 390 n11; 319 NW2d 540 (1982), our Supreme Court listed several factors that may be considered when determining what circumstantial evidence is sufficient to sustain a conviction of carrying a weapon in a motor vehicle, including: (1) the accessibility or proximity of the weapon to the defendant, (2) the defendant's awareness that the weapon was in the motor vehicle, (3) the defendant's possession of items that connect him to the weapon such as ammunition, (4) the defendant's ownership or operation of the vehicle, and (5) the length of time during which the defendant drove or occupied the vehicle. These factors are not exclusive, but are among factors to be considered and are not a test for determining when sufficient evidence of carrying is present. *Id*.; *People v Emery*, 150 Mich App 657, 667; 389 NW2d 472 (1986).

In *Emery*, *supra* at 661, the defendant was seated in the rear seat of a vehicle stopped by the police. The police discovered a styrofoam box containing a pistol on the back window ledge next to him. *Id*. The defendant admitted that he loaded the gun and put it in the box earlier that day, but denied knowing it was in the vehicle. *Id*. On appeal, the defendant contended that there was insufficient evidence to support a finding that he "carried" the weapon. *Id*. at 667. This Court disagreed. The *Emery* Court considered the defendant's proximity to the gun, as well as the duration he was in the car with the gun, the fact that he loaded the gun, and the fact that a witness saw him with the gun to determine that the jury could have reasonably concluded that the defendant was guilty of carrying a pistol in a vehicle. *Id*. at 668-669.

In this case, the evidence indicated that the gun was located with the handle positioned toward the front of the car and the barrel positioned toward the back of the car on the passenger side between defendant's feet. Thus, defendant was in close proximity to the weapon and almost certainly was aware

of its presence because it was in plain view. Furthermore, the weapon was easily accessible to him. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Jolly*, *supra* at 466. Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could conclude that defendant carried the weapon.

Defendant also contends that he was denied a fair trial due to ineffective assistance of counsel. Again, we disagree. The effective assistance of counsel is presumed, and the defendant's burden to prove otherwise is a heavy one. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). In *People v Pickens*, 446 Mich 298, 311-317; 521 NW2d 797 (1994), our Supreme Court adopted the test for ineffective assistance of counsel set out in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), requiring a showing that counsel's errors are so serious that the defendant's attorney was not functioning as "counsel" as guaranteed the defendant by the Sixth Amendment to the United States Constitution, and that counsel's ineffective assistance was prejudicial to the defendant. Thus, to determine whether ineffective assistance of counsel occurred, this Court must determine (1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant contends that his attorney's failure to object to the jury instructions regarding the offense of CCW deprived him of the effective assistance of counsel. According to defendant, the final paragraph of the judge's instruction—which was taken from CJI2d 11.7—led the jurors to believe they could find defendant guilty based on mere knowledge that the gun was in the car. However, reading the instructions in their entirety demonstrates that the judge informed the jury that more than mere knowledge was needed to convict defendant. The jury was also told that defendant had to take part in carrying or keeping the pistol. Furthermore, defense counsel requested additional clarification that defendant had to participate in the carrying of the weapon, and the trial judge read an adapted version of CJI2d 8.5 to the jury, stating even if defendant knew that a crime was being committed, his mere presence was not enough to prove he committed the crime. Thus, there was no reason for defense counsel to object to the trial court's instructions. Defense counsel is not required to make meritless or frivolous objections. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Because the trial court correctly instructed the jurors regarding the elements and instructed them that defendant must take part in the carrying, counsel's failure to object was objectively reasonable and did not prejudice defendant.

Finally defendant argues that his maximum sentence was disproportionately harsh. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree. This Court reviews a trial court's sentence imposed on an habitual offender for abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). A given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn*, *supra*. It is within the discretion of the trial court whether to impose a sentence under the habitual offender statutes. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991). If it is shown that a defendant, in the context of his previous felonies, demonstrates an inability to conform his conduct to the laws of society, a trial court does not abuse its

discretion in sentencing within the statutory limits established by the Legislature. *Hansford*, *supra* at 326.

Here, the underlying offense is carrying a concealed weapon, which is punishable by up to five years' imprisonment. MCL 750.227; MSA 28.424. Defendant had three prior felony convictions and one misdemeanor conviction according to his presentence information report. Under the fourth habitual offender statute, the maximum enhanced sentence is life imprisonment. MCL 769.12(1)(a); MSA 28.1084(1)(a). The trial court sentenced defendant to a term of 48 to 360 months, or four to thirty years. Thus, defendant's sentence was within the statutory limits.

In imposing this sentence, the trial judge noted that defendant accepted responsibility for the offense and the court rejected the probation department's recommended minimum sentence of sixty months. However, as the trial court was aware, despite defendant's incarceration for his prior felony convictions, he continued to break the law. Defendant has also violated his parole twice. Thus, the trial court's conclusion that defendant has not conformed his conduct to the law is supported by defendant's history. The trial court therefore did not abuse its discretion by imposing a disproportionate sentence. See *Hansford*, *supra* at 326.

Affirmed.

/s/ Harold Hood
/s/ David H. Sawyer
/s/ Mark J. Cavanagh