STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2000
v	No. 213126 Oakland Circuit Court
WILLIAM L. STEPHENSON, Defendant-Appellant.	LC No. 97-155064-FC

Before: Smolenski, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years in prison for the felony-firearm conviction, to run consecutively to his sentences of 1½ to 10 years in prison for the armed robbery conviction and 1½ to 5 years in prison for the concealed weapon conviction, which sentences are to run concurrently with each other. Defendant appeals as of right. We affirm.

This case arises from an armed robbery in the parking lot of a Foodland grocery store in the City of Ferndale. Susan Carol testified that a man approached her holding a gun, as she was loading her trunk with groceries. He stated, "this is an armed robbery," and grabbed her purse out of her hands. Then, the man jumped into a Ford Probe occupied by two other males. Police stopped the Probe a few minutes later on a nearby street and Carol identified defendant as the perpetrator.

Defendant first contends the trial court improperly excluded statements made by the two other occupants of the car, Robert Burton and Jonathan Pointer. A trial court's decision regarding the admission of evidence at trial is reviewed for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 516; 603 NW2d 802 (1999).

Defendant moved to introduce the statements at issue pursuant to the catch-all exception to the hearsay rule, MRE 803(24). Specifically, defendant wanted to introduce Burton's oral and written statements that the person who sat in the Probe's front seat committed the robbery. Defendant also wanted to introduce Pointer's statement that he was in the Probe's front seat. Both Burton and Pointer appeared before the trial court during oral argument on the motion and

both invoked their rights under the Fifth Amendment and refused to testify about the incident. Despite their unavailability, the trial court ruled that the statements were inadmissible because they were inherently unreliable.

MRE 803(24) provides that the following type of statement is not excluded by the hearsay rule, even though the declarant is available as a witness:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The "equivalent circumstantial guarantees of trustworthiness" portion of the catch-all exception was recently addressed by this Court in *People v Welch*, 226 Mich App 461; 574 NW2d 682 (1997). Noting the lack of Michigan case law construing the exception's trustworthiness requirement, this Court looked to decisions under the analogous federal rule, FRE 803(24). *Id*. at 466. Specifically, this Court quoted from *United States v Barrett*, 8 F3d 1296, 1300 (CA 8, 1993), in which the Eighth Circuit held that "hearsay statements offered into evidence must bear adequate 'indicia of reliability,'" which is fulfilled when the statement "'falls within a firmly rooted hearsay exception' or occurs under circumstances with 'particularized guarantees of trustworthiness.'" *Welch*, *supra* at 467, quoting *Barrett*, *supra* at 1300. The *Barrett* Court further opined that trial courts should "examine the totality of the circumstances surrounding the making of the statement and those rendering the declarant particularly worthy of belief." *Id*.

In *Welch*, this Court also cited *United States v Shaw*, 69 F3d 1249, 1253 (CA 4, 1995), for the proposition that the trustworthiness requirement is essentially a "surrogate" for cross-examination, so that a statement is trustworthy "if the court can conclude that cross-examination would be of 'marginal utility.'" *Welch*, *supra* at 467-468, quoting *Shaw*, *supra* at 1253. This Court also noted that trial courts should consider reliability factors applicable to other hearsay exceptions, such as a declarant's personal knowledge and lack of bias. *Welch*, *supra* at 468, quoting *United States v Trenkler*, 61 F3d 45, 58 (CA 1, 1995).

In *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), our Supreme Court addressed the similar trustworthiness requirement of the hearsay exception for statements against interest, MRE 804(b)(3). The Court held that the presence of the following factors would favor admission of such a statement:

> [W]hether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates--that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener. [*Id*. at 165.]

In contrast, the presence of the following factors would favor a finding of inadmissibility:

> [W]hether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth. [*Id.*]

Although *Poole* did not specifically address the requirements of MRE 803(24), we nonetheless find its analysis instructive.

In this case, both Burton and Pointer's statements were made while in police custody, during police questioning about their participation in the crime. Further, the statements tended to minimize their own roles in the incident. Burton's statements include the assertions, "I told him don't do it . . . . Guy in the front seat did it . . . . I just parked in the parking lot and he got out." Burton also said that he wished to testify against Pointer and defendant. Thus, not only was Burton shifting the blame, he was attempting to curry favor with police by indicating his willingness to implicate his accomplices and by claiming that he tried to stop the perpetrator from committing the robbery. Similarly, Pointer's statement indicates that Burton picked him up from his sister's house and that the police stopped them shortly thereafter. His statement effectively denies any involvement in the robbery and implies that he was not present when it occurred.

Not only were the statements given by both Brown and Pointer self-serving, both declarants had a motive to lie since they were both under arrest for their participation in the crime when the statements were made. Because the statements were made during custodial interrogations, they also cannot be construed as "voluntary" in the sense that they were speaking freely at their own initiative as they might to a relative or friend. Finally, the statements cannot be construed as reliable surrogates for cross-examination because serious questions remain concerning the declarants' respective roles in the robbery. Considering the totality of the circumstances, the trial court did not abuse its discretion in excluding the hearsay statements, which lacked the necessary indicia of reliability to allow admission under MRE 803(24).

Defendant next alleges error in the admission of and reference to flight evidence at trial. Defendant argues that the trial court erred in admitting flight evidence during the testimony of Officer Steven Carroll, and argues that the prosecutor's introduction of that evidence constituted misconduct warranting reversal. A trial court's decision to admit evidence at trial is reviewed for an abuse of discretion. *Ortiz-Kehoe*, *supra* at 516. In reviewing a claim of prosecutorial misconduct, this 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 does not argue that the evidence of flight lacked probative value or that it was unduly prejudicial. Rather, he merely asserts that flight evidence has been questioned or criticized by this Court and others. Contrary to defendant's assertion, it is well established in Michigan that evidence of a defendant's flight is generally admissible as evidence at trial. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Although evidence of flight by

itself is insufficient to sustain a conviction, it is generally probative of a defendant's consciousness of guilt. *Id.*

We believe the trial court did not abuse its discretion for failing to sua sponte stop the testimony. Defendant failed to object to the evidence and, as he fails to note on appeal, his own counsel pursued the issue of flight during his cross-examination of Officer Michael Lennon, before Carroll even testified. We also believe that the limiting instructions read by the trial court cured any potential misinterpretation of the evidence by the jury. The trial court instructed the jury that defendant was merely a passenger and not the driver of the car that fled from police. Further, the trial court also instructed the jury that the testimony about flight was not evidence of guilt and left it to the jury to decide the testimony's weight and value.

Upon our reading of the record, we are convinced that the alleged misconduct by the prosecutor did not deny defendant a fair and impartial trial. The first mention of the Probe's failure to stop was made without prompting by the prosecutor. Further, the prosecutor did not ask Carroll about the flight evidence until after defendant had already pursued the matter in detail with Lennon. In addition, it was repeatedly established at trial that Burton was the driver of the Probe, not defendant, and there was no implication that defendant initiated the flight himself. Therefore, no misconduct by the prosecutor denied defendant a fair and impartial trial.

Defendant next contends that the trial court erred in instructing the jury. In reviewing a claim of instructional error, this Court considers the "jury instructions as a whole to determine if the trial court made an error requiring reversal." *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). There is no error in the instructions "if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*. at 127, quoting *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Defendant argues that constructive possession of a firearm during the commission of a felony is insufficient to sustain a felony-firearm conviction. To be convicted of felony-firearm, the prosecutor must prove that the defendant carried or possessed a firearm during the commission of a felony. MCL 750.227b; MSA 28.424(2); *People v Burgenmeyer*, 461 Mich 431, 436; 606 NW2d 645 (2000). It is well-settled in this state that possession of the firearm may be actual or constructive. *Id*. at 437-438, citing *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). Constructive possession is shown if the defendant knows the location of the firearm and it is reasonably accessible to him at the time the felony is committed. *Id*. at 438. Therefore, defendant's assertion that constructive possession of a firearm is insufficient to support a felony-firearm conviction is erroneous. Furthermore, because the victim consistently identified defendant as the person who held the gun and took her purse, there was sufficient evidence in the record to support a finding that defendant actually possessed the firearm during the commission of the felony.

Defendant next contends that the trial court abused its discretion in ordering him to pay $500 in restitution. Defendant's claim is premature. Requests for relief from a restitution order "should be made when defendant is imperiled with further incarceration or punishment because of his financial inability to comply with the order of restitution." *People v Guajardo*, 213 Mich App 198, 202; 539 NW2d 570 (1995). Because defendant has not shown that he is now subject to further punishment based on his inability to pay the restitution, we decline to review this issue.

Finally, defendant contends he was denied the effective assistance of counsel. In reviewing a claim of ineffective assistance of counsel, this Court determines "(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). To establish such a claim, the defendant must show that counsel's performance was deficient and that counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Lloyd*, 459 Mich 433, 445-446; 590 NW2d 738 (1999), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first asserts that he was denied the effective assistance of counsel because defense counsel failed to object to the jury instructions given by the trial court. Defense counsel did not object on the issue of constructive possession before the trial court but, as discussed above, possession may be constructive or actual to convict a defendant of felony-firearm. *Burgenmeyer, supra* at 437-438. Therefore, defense counsel did not err and his performance was not objectively unreasonable.

Defendant also contends he was denied the effective assistance of counsel when defense counsel failed to object to the order of restitution by the trial court. Defense counsel did not object when the trial court ordered defendant to pay, jointly and severally with Burton, $500 restitution. No evidence in the record shows that defense counsel made an error in failing to raise this issue. Defendant's presentence report indicates that he had a steady income for three years prior to his arrest. The report does not indicate defendant was responsible for financially supporting any dependents. Based on these uncontested facts, the amount imposed was not excessive. Moreover, there is no evidence in the record that any information in the report was inaccurate and there is no support for defendant's contention that defense counsel's failure to object constituted deficient performance. Further, no evidence suggests that, had the trial court actually reviewed his ability to pay, it would have altered its order. Thus, defendant has not shown he was prejudiced by any error by defense counsel or that defense counsel's performance fell below an objective standard of reasonableness.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter