

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN GERMAINE ARMSTRONG,

Defendant-Appellant.

UNPUBLISHED

May 22, 2001

No. 219690

Oakland Circuit Court

LC No. 98-159354-FH

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), resisting or obstructing a police officer, MCL 750.479; MSA 28.747, driving without an operator's license or failure to display an operator's license to a police officer on demand, MCL 257.311; MSA 9.2011, and transporting or possessing alcoholic liquor in an open container in a vehicle, MCL 257.624a; MSA 9.2324(1). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to concurrent prison terms of eight to twenty years each for the CCW and felon-in-possession convictions, five to fifteen years for the resisting or obstructing conviction, and ninety days each for the two misdemeanor motor vehicle convictions. His motion for a new trial was denied. He appeals as of right. We affirm.

Defendant first claims that the trial court erred in denying his motion to suppress evidence. We could decline to consider this claim because defendant has not briefed the trial court's ruling, made when denying his motion for a new trial, that the search was valid as a search incident to defendant's arrest. See *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992) (failure to brief the merits of an allegation of error is deemed an abandonment of the issue); *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (failure to address a necessary issue precludes appellate relief). In any event, we conclude that defendant has not established any basis for disturbing the trial court's initial ruling that the challenged evidence was admissible on the basis that a valid inventory search was conducted. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000); see also *People v Toohey*, 438 Mich 265; 475 NW2d 16 (1991); *People v Poole*, 199 Mich App 261; 501 NW2d 265 (1993).

Defendant next claims that he was denied the effective assistance of counsel because defense counsel made no attempt to exclude the felon-in-possession charge from the trial. Specifically, defendant claims that defense counsel should have had him tender a conditional plea to the felon-in-possession charge under MCR 6.301(C)(2). Our review of this issue is limited to errors apparent from the record because defendant did not seek an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); see also *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). We note that the existing record is factually silent with regard to whether there were any plea discussions between defense counsel and defendant before trial. However, even without this factual development, defendant's claim of ineffective assistance of counsel fails because MCR 6.301(C)(2) does not permit the type of conditional plea suggested by defendant, that is, a plea to a felon-in-possession charge conditioned on a jury finding him guilty of a separate CCW charge. MCR 6.301(C)(2) permits a defendant to tender a plea conditioned on preserving for appeal a specified pretrial ruling or rulings, with the consent of the court and prosecutor. Under MCR 6.302(A) and (D), the trial court may not accept a plea unless it is accurate, that is, "the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading."

Because defendant does not claim that he would have given an accurate plea to the felon-in-possession charge, conditioned on a specific pretrial or trial ruling, we find that defendant's reliance on MCR 6.301(C)(2) is misplaced. Further, based on our review of the safeguards undertaken at trial to prevent unfair prejudice and, in particular, the stipulation entered into by defense counsel regarding defendant's felon status, we are satisfied that defendant has failed to show either the requisite deficient performance or the prejudice required for a claim of ineffective assistance of counsel. *Avant, supra* at 507-508. The jury's finding that defendant was not guilty of a cocaine possession charge and its related felony-firearm charge belies defendant's claim that the jury made improper use of his felon status.

Defendant next claims that he was denied due process by the introduction of flight evidence at trial. Because defendant did not timely object to the challenged evidence and has not shown plain error, we find no basis for relief. MRE 103(a)(1) and (d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In this regard, we note that it is plain from the record that the challenged evidence of defendant's flight and apprehension by the police was admissible because it formed the basis for the resisting or obstructing a police officer charge. Although evidence admitted for one purpose may be inadmissible for another purpose, MRE 105, flight evidence may also be relevant circumstantial evidence of an offense to show a defendant's consciousness of guilt. See *People v Cutchall*, 200 Mich App 396; 504 NW2d 666 (1993). Hence, the trial court's instruction to the jury, without objection, that flight evidence may be used to show consciousness of guilt was not plain error.

Defendant next claims that the trial court's ruling to allow other acts evidence deprived him of due process because the danger of unfair prejudice outweighed the probative value. We review the trial court's evidentiary ruling for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Although defendant claims a due process error, not all trial errors present a constitutional violation. *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). Having reviewed defendant's claim in the context of the evidentiary rules upon which it

is based, we conclude that defendant has not established an abuse of discretion. MRE 404(b); *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). The other acts evidence was not unduly prejudicial in light of the precautions taken by the trial court to limit the scope of the witnesses' testimony. MRE 403.

Finally, defendant claims that he was deprived of due process when his motion for a directed verdict was denied. In reviewing this claim, we note that the specific arguments presented by defense counsel when seeking a directed verdict at the trial were directed at the cocaine and felon-in-possession charges, but that defendant's motion for a new trial, like defendant's argument on appeal, was directed at the CCW charge. In any event, "when determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992).

The elements of CCW are, "(1) the presence of a weapon in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of its presence, and (3) that he was 'carrying' it." *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999), quoting *People v Courier*, 122 Mich App 88, 90; 332 NW2d 421 (1982). Relevant factors for deciding if evidence was sufficient to establish a carrying include, but are not limited to: (1) awareness of the weapon, (2) accessibility or proximity of the weapon, (3) possession of items connected to the weapon, such as ammunition, (4) ownership or operation of the vehicle, and (5) length of time during which the defendant drove or occupied the vehicle. *People v Butler*, 413 Mich 377, 390, n 11; 319 NW2d 540 (1982); *People v Emery*, 150 Mich App 657, 667; 389 NW2d 472 (1986).

Viewed in a light most favorable to the prosecution, the evidence that defendant was the sole occupant and driver of the vehicle, that the gun was found a couple of inches under the driver's seat, together with the evidence of the prior act wherein defendant was placed in the same vehicle and holding the same gun involved in the instant case, was sufficient circumstantial evidence to find the elements of CCW beyond a reasonable doubt. Hence, defendant's right to due process was not violated. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). We note that these proofs are also sufficient to establish the possession of a firearm element of the felon-in-possession charge, MCL 750.224f; MSA 28.421(6).

Affirmed.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ Patrick M. Meter