STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2004
v	No. 247141 Wayne Circuit Court
ANTHONY DESHAUN SHIELDS, Defendant-Appellant.	LC No. 02-002096

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f(1), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to one to five years in prison for the CCW and felon in possession of a firearm convictions and to two years in prison for the felony-firearm conviction. We affirm.

Defendant challenges the sufficiency of the evidence with regard to his convictions for CCW and felony-firearm. In particular, defendant argues that there was insufficient evidence that defendant was "carrying" or in possession of the handgun found in the car that he was driving. We disagree.

When reviewing a claim that insufficient evidence was presented to support a conviction, we view the evidence de novo and in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We will not "interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses." *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

The prosecution must prove the following elements to support a conviction for carrying a concealed weapon in a vehicle: "(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). The element of "carrying" is essential for a conviction of carrying a concealed weapon in a vehicle and may not be inferred solely from evidence that the defendant knew the weapon was present in the vehicle. *People v Emery*, 150 Mich App 657, 667; 389 NW2d 472 (1986).

Defendant claims there was insufficient evidence to sustain his convictions of CCW and felony-firearm because there was no credible evidence, beyond the fact that the gun was found in the car that defendant was driving, that defendant was "carrying" the weapon. Defendant emphasizes that no fingerprints were taken off the gun to link him to its possession and that no officer or occupant of the car saw him with the gun.

However, the arresting police officers both testified that they could clearly see into the car when they pulled up in front of it and that they saw defendant reach back as though stuffing something behind the passenger seat. Both officers testified that they found the gun behind the passenger seat on the floor of the car. While neither officer saw defendant with the gun, one officer testified that, in his experience, gestures and movements like those defendant made indicate an attempt to conceal or hide something. Also, defendant was driving the car on the night in question, and defendant told the officer who questioned him after his arrest that the gun found in the car belonged to him. Defendant's admission of ownership of the gun, his control over the car in which the weapon was found, the movements he made that were consistent with an attempt to hide the weapon, and the weapon's discovery in close proximity to defendant formed a sufficient basis from which a jury could infer that defendant was carrying the weapon.

In *Nimeth, supra* at 618-619, the defendant was convicted of CCW when the police found a gun wedged next to the engine of the motorcycle on which the defendant was riding. This Court found the facts that the gun was readily accessible to the defendant and that the defendant owned and was driving the motorcycle at the time the weapon was found to be sufficient evidence to establish that the defendant was "carrying" the gun for the purposes of a CCW conviction. *Id.* at 622. Here, while defendant did not own the car, he was driving it with his girlfriend's permission, he admitted that he owned the gun, and the gun was found in a location that was readily accessible to him. Therefore, *Nimeth* supports our decision today.

Defendant also challenges his felony-firearm conviction on the basis of sufficiency of the evidence, alleging that there was no evidence of possession of the gun by defendant. The elements the prosecutor was required to prove in this case were that defendant possessed a firearm during the commission of, or the attempt to commit, possession of a firearm by a felon. See MCL 750.227b(1) and *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). "Possession may be actual or constructive and may be proved by circumstantial evidence." *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). Constructive possession exists if there is proximity to the weapon together with indicia of control. *Id.* at 438. "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.*

The evidence set forth above, that the gun belonged to defendant, that the officers witnessed his suspicious movements, and that, subsequently, the gun was found under the passenger seat in close proximity to defendant and where it was readily accessible to him, constituted sufficient evidence of possession by defendant of the gun found in the car. Also, because it was stipulated at trial that defendant was convicted of attempted possession of a controlled substance less than twenty-five grams, MCL 333.7403(2)(a)(5), in September 2000, was sentenced to probation for one year, and had not regained eligibility to carry a weapon on the date of the instant offense, the prosecution established the elements of felon in possession of a firearm. See MCL 750.224f and *People v Perkins*, 262 Mich App 267; ___ NW2d ___ (2004). There was sufficient evidence that defendant was in possession of the gun during the commission

of a felony, i.e., the offense of felon in possession of a firearm, thereby establishing the elements of felony-firearm.

Defendant next asserts that his convictions and sentences for CCW and felony-firearm violate the state and federal proscriptions against double jeopardy. Again, we disagree.

"A challenge under the double jeopardy clauses of the federal and state constitutions presents a question of law that this Court reviews de novo." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). The constitutional prohibition against double jeopardy provides three related protections: "(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004); see also US Const, Am V, and Const 1963, art 1, § 15. It is well settled in Michigan that convictions for CCW and felony-firearm, arising from the same occurrence, do not violate double jeopardy as long as the felony-firearm conviction is not predicated on the CCW offense. *People v Sturgis*, 427 Mich 392, 409-410; 397 NW2d 783. In *Sturgis*, the Court stated:

> Each statute is directed at a distinct object which the Legislature seeks to achieve through the imposition of criminal penalties. Where the act giving rise to the predicate felony is distinct from the act giving rise to the concealed weapon felony, both convictions are authorized by the Legislature.
>
> To hold that a defendant could not be convicted of felony-firearm under these circumstances would be in clear contradiction of legislative intent. It would amount to saying that a defendant could avoid the clear intent of the Legislature that a person be subjected to a separate and distinct minimum penalty, if that person simply took the precaution of concealing the weapon sometime during the criminal transaction. [*Id.*]

Defendant's conviction of felony-firearm is predicated on the crime of felon in possession of a firearm, and *not* on the CCW crime. Therefore, defendant's convictions and sentences for felony-firearm and CCW do not violate proscriptions against double jeopardy. *Id.*

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter