

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN CORNEAL WARNSLEY,

Defendant-Appellant.

UNPUBLISHED

November 29, 2005

No. 255082

Wayne Circuit Court

LC No. 03-013398

Before: Whitbeck, C.J., and Saad and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for felonious assault, MCL 750.82, third-degree fleeing and eluding, MCL 257.602a(3), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to one to eight years’ imprisonment for the assault with a dangerous weapon conviction, one to ten years’ imprisonment for the fleeing and eluding conviction, and two years’ imprisonment for the felony-firearm conviction. We affirm.

Defendant’s first issue on appeal is that there was insufficient evidence to support his convictions for assault with a dangerous weapon and felony-firearm. We disagree. “When determining if sufficient evidence was presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution. It must determine whether any rational trier of fact could have found that the essential elements of the crime were proven as required.” *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). We leave questions of credibility and intent to the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

“The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable fear or apprehension of an immediate battery.” *People v Wardlaw*, 190 Mich App 318, 319; 475 NW2d 387 (1991). “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *Avant, supra* at 505.

Sufficient evidence was presented to find defendant guilty beyond a reasonable doubt of both crimes. Police Officer Phillip Randazzo testified that he tried to pull defendant’s car over, but defendant sped away. After discarding a firearm, defendant left the car and fled on foot. Officer Randazzo pursued defendant through a field roughly ten yards away from defendant. At one point, defendant fired two gunshots at him, and Officer Randazzo returned fire. During the

event, Officer Randazzo was transmitting the events into dispatch as they unfolded, describing defendant, the pursuit, and the volley of gunfire. The tape from dispatch was entered into evidence. Officer Randazzo chased defendant into a house and then waited for more police to arrive. Police found defendant in the basement pretending to sleep but wearing the same dark jeans and sweatshirt he wore during the chase. Deferring to the trial court's superior position to judge witness credibility, and viewing the evidence in a light most favorable to the prosecution, we conclude that defendant assaulted Officer Randazzo with a dangerous weapon with the intent to hurt or intimidate him and that defendant possessed a firearm during the commission of a felony.

Defendant argues that an incompetent police investigation resulted in a lack of evidence and a denial of his due process rights. With regard to due process, defendant's argument misses the critical distinction between the failure to disclose evidence and the failure to develop it. *People v Coy*, 258 Mich App 1, 22; 669 NW2d 831 (2003). The failure to find additional evidence generally hurts the prosecution's case because it bears the burden of proof. *Id.* A criminal defendant does not have the right to have every incriminating article of evidence brought forward and used against him. There has been no claim of suppression of evidence, intentional misconduct or bad faith in this case. Therefore, any failure by the police to develop evidence during their investigation is only relevant to whether the prosecution proved guilt beyond a reasonable doubt, which it did.

Defendant also argues that he was denied the effective assistance of counsel due to counsel's failure to argue for jail credit at sentencing. Because defendant has not established a testimonial record, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To prevail on his claim of ineffective assistance, defendant must show that his counsel's performance was objectively deficient and that the sub-par performance prejudiced his defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant argues that trial counsel was deficient for failing to argue that defendant should receive credit for time he served in jail prior to his trial on these offenses. Defendant's claim lacks factual support. According to the record, defendant had violated parole in Michigan and Tennessee. His trial counsel argued that the court should dismiss the Michigan parole violation as stale, and reminded the sentencing judge that whatever time defendant served in Michigan would be added to the time he served in Tennessee. When a parolee violates parole, he becomes liable for the unexpired portion of the paroled offense. MCL 791.238(2). That remaining portion of the original sentence must be served before a sentence for a second offense may begin. MCL 768.7a(2). Accordingly, any jail credit should be applied to the paroled offense, not the offense that violates the parole. *People v Watts*, 186 Mich App 686, 691; 464 NW2d 715 (1991). The same is true for an out-of-state sentence for parole violation. *People v Seiders*, 262 Mich App 702, 707; 686 NW2d 821 (2004). Although *Seiders* represents a recent change in the law, we have already determined that courts should apply it retroactively. *People v Meshell*, 265 Mich App 616, 641; 696 NW2d 754 (2005). Therefore, the record reflects that the trial court rejected defendant's proffered argument that the Michigan violation was stale, and the trial court would have been reversed if it had adopted defendant's argument that he should receive jail credit because the other parole violation was from out-of-state. In short, defendant

has not suffered prejudice from any failure of his trial counsel to articulate fully the meritless jail-credit arguments he advances on appeal.

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Peter D. O'Connell