STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2007
v	No. 266275 Muskegon Circuit Court
TAUREEN HARRIS, Defendant-Appellant.	LC No. 05-051650-FH

Before: O'Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions after a jury trial for resisting and obstructing a police officer, MCL 750.81d(1), possession of a firearm as a felon, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant was sentenced as a habitual offender, third offense, MCL 769.11, to 15 months to 4 years' imprisonment for his resisting and obstructing a police officer conviction, to 18 months to 10 years' imprisonment for his felon in possession conviction, and to 24 months' imprisonment for each of his felony-firearm convictions. We affirm.

These convictions stem from an encounter between defendant and Muskegon Heights police officers on July 22, 2004. Sergeant Gary Cheatum spotted defendant on his bicycle at approximately 4:00 a.m. He approached defendant and asked to speak with him about an alleged shooting on July 18, 2004. Witnesses to that shooting named defendant as one of the participants. Defendant declined to speak to the Sergeant and rode off on his bicycle. Sergeant Cheatum gave chase, first on foot with his canine partner, and then by car.

Officer John Waldo responded to Sergeant Cheatum's call for assistance in setting up a perimeter. He saw defendant climb over a fence and noticed that he had a gun in his right hand. Officer Waldo ordered defendant to stop several times. After defendant disobeyed these orders, the officer chased him to an abandoned house. Defendant surrendered to police after Sergeant Cheatum threatened to release his dog. Officer Waldo found a silver revolver under a heating grate several feet from where defendant was captured. The officer testified that this gun appeared to be the same gun he had seen defendant holding earlier.

Defendant claims that he was denied a fair trial by the admission of other-acts evidence under MRE 404(b). We disagree. This Court will not reverse a trial court's decision to admit evidence absent an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785

(1998). To the extent that the admission of evidence involves preliminary questions of law, such questions are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). No reversal is required for a preserved error in the admission of evidence unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). The defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred. *Id*.

Here, Paul Shappee, a resident of defendant's neighborhood, testified that he observed defendant use a gun, specifically a revolver, in a shoot-out with several other men on July 18, 2004. This incident occurred four days before defendant's arrest on these charges. At defendant's request the trial court gave the following limiting instruction; "You may only think about whether this evidence tends to show circumstantial evidence of the defendant's possession 3 ½ or 4 days before this happened."

Our Supreme Court has held that evidence of a defendant's possession of a weapon of the kind used in a charged offense is relevant and admissible "under MRE 401, without reference to MRE 404(b)." *People v Hall*, 433 Mich 573, 580; 447 NW2d 580 (1989). Further, the fact that the evidence of a defendant's gun possession may also reveal a separate act, wrong, or crime does not bring the evidence within MRE 404(b). *Id*. Subsequently, this Court has explained that, because evidence that a defendant possessed a gun days before a crime does not "operate through an intermediate inference," "[a]nalysis under MRE 404(b) is inapposite." *People v Houston*, 261 Mich App 463, 468; 683 NW2d 192 (2004).

Therefore, we find that the trial court did not abuse its discretion by admitting Shappee's testimony. The evidence was relevant to the issue of whether the revolver found with defendant in the abandoned house had been in his possession. Shappee's testimony tended to prove that defendant was in possession of a revolver four days prior and, therefore, made it more probable that the revolver in the house was the same gun. MRE 401. In addition, the evidence was highly probative because it complemented Officer Waldo's testimony that he saw defendant with a silver revolver as he ran toward the abandoned home. Because defendant's possession of the revolver found in the abandoned house was a critical issue, we find that the probative value of Shappee's testimony was substantially outweighed by any risk of unfair prejudice to defendant. MRE 403; *Hall, supra* at 584; *Houston, supra* at 468.

Defendant's next argument is that the trial court erred by denying his motion to dismiss based on a violation of his right to a speedy trial. Defendant's claim that he was denied the right to a speedy trial raises constitutional questions that this Court reviews de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). To the extent that defendant's claim requires a review of the trial court's factual determinations, those findings are reviewed for clear error. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

Defendant asserts that his convictions must be vacated because the delay between his arrest and the commencement of his trial, during which he was held on a parole detainer, denied him his constitutional and statutory right to a speedy trial.[1] In assessing whether defendant's

[1] See US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1.

constitutional right to a speedy trial was violated, the following factors are to be balanced: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of the right; and (4) prejudice to defendant. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Missouri*, 100 Mich App 310, 319-320; 299 NW2d 346 (1980). With regard to the element of prejudice to defendant, there are two types of prejudice, prejudice to the person and prejudice to the defense. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993).

Here, the 14-month delay in awaiting trial was entirely attributable to the prosecution or to congestion in the court system. *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997); *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Nonetheless, because the delay was under 18 months, defendant carries the burden of establishing prejudice. See *People v Janice Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999).

We find no violation of defendant's constitutional or statutory right to a speedy trial because defendant has not established that he was prejudiced by the time he served on a parole detainer while awaiting trial. Our Supreme Court recently found that a defendant who served 19 months on a parole hold awaiting trial was not prejudiced under *Barker* because the defendant did not demonstrate that his defense was prejudiced. *Williams, supra* at 264. Here, defendant's claim that he was prejudiced relies solely on the fact that he was not given any sentence credit for the time he served on a parole detainer while awaiting trial. He does not claim that his defense was prejudiced as a result of the delay.

Defendant cannot establish prejudice to his person because, by statute, a parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. MCL 768.7a(2); *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). MCL 791.238 precludes a parolee from receiving credit toward his sentence for the new offense for time served while being held on a parole detainer. *People v Watts*, 186 Mich App 686, 689-690; 464 NW2d 715 (1991); *People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990). Therefore, because defendant was on parole at the time he committed these offenses, the trial court could not give defendant credit for the 451 days he spent in jail on the detainer prior to his sentencing on these convictions. Furthermore, this Court has recognized that the period of time that a defendant serves on a parole detainer is not, as defendant characterizes it, "dead time" because the time is ultimately credited, pursuant to MCL 791.238(2), against the sentence for the paroled offense. *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994). Accordingly, we find that there was no violation of defendant's constitutional or statutory right to a speedy trial because defendant has not established that the personal deprivation he suffered while awaiting trial amounted to prejudice. *Cain, supra* at 112.

Defendant also takes the position that the trial court erred in denying his motion to quash all charges because the evidence used against him was obtained in violation of his right against unlawful searches and seizures. We disagree.

This Court reviews de novo a trial court's decision to grant or deny a motion to quash charges. *People v Wilson*, 257 Mich App 337, 341; 668 NW2d 371 (2003) vacated in part on other grounds *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004). Likewise, whether an alleged violation of the federal constitutional prohibition against unreasonable searches and

seizures requires exclusion of the evidence is a question of law that this Court reviews de novo. *Id*. at 351.

Defendant argues that, because he was within his rights to refuse to talk to Sergeant Cheatum, neither Cheatum nor the other pursuing officers had the requisite reasonable suspicion of criminal activity to justify the chase that followed. He contends that the officers had insufficient information to satisfy a reasonable person that defendant had committed or was about to commit a crime when Sergeant Cheatum decided to pursue him. Therefore, he asserts that all evidence obtained through the unjustified pursuit must be suppressed as the fruit of an illegal seizure.

As this Court recently summarized:

> The federal and Michigan constitutions protect persons from unreasonable searches and seizures. *People v Champion*, 452 Mich 92, 97; 549 NW2d 849 (1996); US Const, Am IV; Const 1963, art 1, § 11. Generally, a search without a warrant or a seizure without a warrant is unreasonable per se, 'subject to several specifically established and well-delineated exceptions.' *Id.* at 98; *People v Gonzalez*, 256 Mich App 212, 232; 663 NW2d 499 (2003). Evidence seized pursuant to an unconstitutional search must be excluded from trial unless an exception to the exclusionary rule is applicable. *People v Stevens (After Remand)*, 460 Mich 626, 634, 636; 597 NW2d 53 (1999). [*Wilson, supra* at 351.]

Therefore, this Court must determine when defendant was "seized" by Fourth Amendment standards and whether, at that point, the officers had a lawful basis to seize him without a warrant. Michigan follows the rule established by the United States Supreme Court in *California v Hodari D*, 499 US 621, 625-626; 111 S Ct 1547; 113 L Ed 2d 690 (1991), that a suspect is not "seized" because he observes officers chasing him. The *Hodari* Court concluded that a suspect in a police chase is not seized until the moment he is physically apprehended. *Id*. at 626. Following *Hodari*, this Court found that where evidence is obtained during a pursuit before the defendant is actually seized, the evidence may not be suppressed as the fruit of an illegal detention. *People v Lewis*, 199 Mich App 556, 560; 502 NW2d 363 (1993).

Applying that principle to this case, we find that whether Sergeant Cheatum had reasonable suspicion to initiate the police chase is irrelevant because a chase does not constitute a "seizure" under the Fourth Amendment. Consequently, the trial court properly found that Officer Waldo's observation that defendant possessed a gun as he ran was not the fruit of an illegal pursuit.

The remaining question is whether Officer Waldo had probable cause to arrest defendant at the time he apprehended him.

> This Court repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. [*People v Shabaz*, 424 Mich 42, 58; 378 NW2d 451

(1985), quoting *Michigan v DeFillippo*, 443 US 31, 37; 99 S Ct 2627; 61 L Ed 2d 343 (1979).]

According to his preliminary examination testimony, Officer Waldo was aware that defendant was in flight from Sergeant Cheatum. Flight from police, by itself, does not create reasonable suspicion to stop a defendant. However, flight is a factor to be considered under the totality of the circumstances test for reasonable suspicion to stop or probable cause to arrest. *People v Parr*, 197 Mich App 41, 43; 494 NW2d 768 (1992); *People v Armendarez*, 188 Mich App 61, 68; 468 NW2d 893 (1991). The other factors contributing to probable cause to arrest defendant were that defendant was holding a revolver as he ran from Sergeant Cheatum, he disobeyed Officer Waldo's repeated commands to stop, and he refused to surrender to police until threatened with a police dog. We find that defendant's conduct created probable cause to arrest because Officer Waldo reasonably believed, at a minimum, that defendant committed a felony by disobeying his lawful order.

Finally, defendant challenges the sufficiency of the evidence for his convictions. In reviewing a sufficiency of the evidence question, this Court views the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). This Court does not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

We find that the prosecution presented sufficient evidence to show that defendant obstructed Officer Waldo, who defendant had reason to know was performing his duties, and that defendant possessed a firearm at the time of this offense.

To prove a charge of resisting and obstructing a police officer, the prosecutor must show that an individual assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer that the individual knew or had reason to know was performing his or her duties. MCL 750.81d(1). Obstruct includes the "use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a).

Defendant argues that his conviction is invalid because the evidence adduced at trial was insufficient to demonstrate that he knowingly ran from Officer Waldo. He suggests that the early morning conditions made it impossible for him to observe that Officer Waldo was a uniformed officer. This Court has held that the "has reason to know" language of MCL 750.81d "requires the fact-finder to engage in an analysis to determine whether the facts and circumstances of the case indicate that when resisting, defendant had 'reasonable cause to believe' the person he was [resisting or obstructing] was performing his or her duties." *People v Nichols*, 262 Mich App 408, 414; 686 NW2d 502 (2004). The jury must objectively determine whether the prosecution met its burden of proof. *Id.* A defendant knows or has reason to know that he is resisting and obstructing a police officer in the performance of his duties when he ignores or resists the persistent commands of an police officer in a full uniform. *Id.* at 413.

Viewed in a light most favorable to the prosecution, the evidence presented at trial was sufficient to permit a rational jury to conclude that defendant committed the offense of resisting and obstructing a police officer. Officer Waldo was in full uniform and was training a flashlight and his service weapon on defendant when he gave his first order for defendant to stop. Defendant initially ran toward Officer Waldo but then turned at a 90-degree angle and accelerated away from the officer after the command to stop was given. Officer Waldo testified that he gave at least two additional orders to stop but defendant only ran faster. Sergeant Cheatum testified that he heard at least one of Officer Waldo's commands from his position. Furthermore, defendant's earlier encounters with Sergeant Cheatum raise a reasonable inference that defendant knew Officer Waldo was one of the police officers pursuing him. *Vaughn*, *supra* at 379-380. Finally, the evidence that defendant continued to ignore commands from the police inside the abandoned house casts doubt on his argument that he ignored Officer Waldo's stop command because he reasonably thought the officer was "a stranger in the dark."

Defendant also challenges the sufficiency of the evidence of his conviction for being a felon in possession of a firearm. At trial, the parties submitted a stipulation that defendant had been convicted of a felony and had no right to be in possession of a firearm. Therefore, the only disputed element under MCL 750.224(f) was whether defendant possessed a firearm. Viewed in the light most favorable to the prosecution, the testimony of Officer Waldo was itself sufficient to establish that defendant was in possession of a firearm. He testified that he was a certified firearms instructor and that he was able to see the silver revolver in defendant's hand "as clear as day." The jury chose to credit Officer Waldo's testimony and this Court does not interfere with the jury's role of determining the credibility of witnesses. *Wolfe, supra* at 514. Furthermore, Officer Waldo's testimony was consistent with circumstantial evidence that defendant possessed a firearm during the incident. Officer Waldo testified that the silver revolver recovered next to defendant's hiding place in the abandoned house was the same gun he observed him with earlier. From this, a rational trier of fact could infer that defendant had actual possession of a firearm. Thus, the evidence presented at trial was sufficient to support defendant's felon in possession of a firearm conviction.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis