

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE WAGNER,

Defendant-Appellant.

UNPUBLISHED

January 17, 2008

No. 274467

Wayne Circuit Court

LC No. 06-007723-01

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 15 months to five years' imprisonment for the felon in possession conviction, 23 months to five years' imprisonment for the carrying a concealed weapon conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise out of a police chase during which one of three pursuing officers saw what looked like a handgun fly out defendant's vehicle. The gun was later retrieved in the road in an inoperable condition.

Defendant first argues that the prosecutor improperly vouched for the credibility of her witnesses during closing arguments, in violation of his right to a fair trial.

The issue of prosecutorial misconduct must be objected to at trial to preserve the issue for appellate review. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005); *People v Thomas*, 260 Mich App 450, 453-54; 678 NW2d 631 (2004). Defendant did not object to this comment at trial so it is not preserved for appeal. Therefore, we review the issue for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To require reversal, an error must be "clear and obvious" and it must be prejudicial, or outcome determinative. *Id.*; *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

From the evidence and its reasonable inferences, the prosecutor is free to argue in support of a witness's credibility. *People v Schutte*, 240 Mich App 713, 721-22; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Although the prosecutor may not vouch for the credibility of her witnesses,

Schutte, supra at 722, the prosecutor may comment on her own witnesses' credibility where credibility is at issue or to rebut charges of fabrication by the defense. *Thomas, supra* at 454.

Here, defense counsel suggested that inconsistencies in the police officers' testimony proved that the officers were lying. In response, the prosecutor argued that these inconsistencies were insignificant and established that the officers' testimony was truthful. The prosecutor suggested that if the witnesses had planned to lie, they likely could have lined up their stories better. The prosecutor summarized, "[T]hey got up here and they testified truthfully about what their role was and what exactly they saw and what they were doing at the time this chase was going on." We conclude that the prosecutor's statements were fairly responsive to defense counsel's claim that the witnesses' inconsistent testimony meant they lied. Further, the particular comment that, "they testified truthfully," when viewed in context, did not "convey a message to the jury that the prosecutor had some special knowledge or facts indicating the witness' truthfulness." *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995). Rather, the statement merely purports that the subtle inconsistencies of their testimony provides reason to believe they told the truth.

Moreover, the standard jury instruction given in this case-- that the jury alone is charged with making determinations of witness credibility-- easily cures any suggestion that the prosecutor is trying to improperly influence this determination. *Schutte, supra* at 721-722. To the extent that a more specific instruction may have aided the jury, defendant did not request one. See *id.* There was no danger of prejudice to defendant created by the prosecutor's statement. The prosecutor's conduct did not imperil defendant's right to a fair trial.

Defendant next argues that there is insufficient evidence to prove that the revolver in question was operable, and thus, to convict defendant of carrying a concealed weapon. A claim of insufficient evidence need not be preserved at trial. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). This Court reviews claims of insufficient evidence de novo, viewing the evidence 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 Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

The elements of carrying a concealed weapon as applied in this case are: (1) the presence of a pistol in the vehicle, (2) the defendant knows of its presence, and (3) the defendant was carrying the pistol. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999); MCL 750.227. In *People v Gardner*, 194 Mich App 652, 654; 487 NW2d 515 (1992), this Court held that a pistol is a firearm, which "must be capable of propelling the requisite-sized dangerous projectile or be able to be altered to do so within a reasonably short time." Thus, under *Gardner, supra*, "[a]n affirmative defense to a charge of carrying a concealed pistol can be made by the presentation of proof that the pistol would not fire and could not readily be made to fire." *People v Parr*, 197 Mich App 41, 494 NW2d 768 (1992); but see *People v Peals*, 476 Mich 636, 720 NW2d 196 (2006) (operability not an element of felony-firearm of felon in possession of firearm); *People v Thompson*, 189 Mich App 85, 86-87; 472 NW2d 11 (1991) (operability not an element of felony-firearm statute).

Here, even assuming that operability is an element of the charge of carrying a concealed weapon, a reasonable jury could conclude beyond a reasonable doubt that the gun was operable while in defendant's possession. The evidence in this case regarding operability is conflicting.

There was no direct evidence of the gun's condition while defendant was carrying it. The gun was found in an inoperable condition after being run over by a car. One officer testified that defendant fled the police at a high rate of speed, and objects resembling handguns flew out of defendant's car window just before he pulled over again to submit to the police. The officer consistently testified that he saw more than one object flying out of defendant's car. The officer who recovered the gun, however, found only one gun, but in two pieces. Defendant challenged the credibility of the officers' testimony about the gun, highlighting the failure of the police vehicle's in-dash camera to record the chase.

The trier of fact is charged with the responsibility of making credibility determinations and resolving inconsistent evidence. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). We must defer to the jury's findings in this regard. Further, "conflicts in the evidence must be resolved in favor of the prosecution." *Fletcher, supra* at 561. Circumstantial evidence and reasonable inferences arising there from may aid the jury in resolving inconsistencies and constitute proof of the elements of the crime. *Carines, supra* at 759; *Avant, supra* at 506.

The jury could have made the natural inference that a gun being carried by defendant in his car was operable, especially when coupled with defendant's evasive actions. The jury was entitled to believe the officer who testified driving over the gun with a car could render the gun inoperable. Deferring to the jury's findings and viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the gun was operable before defendant threw it out of the window and it was run over by a car. *Tombs, supra* at 459; *Fletcher, supra* at 562.

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Patrick M. Meter