

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASHEID HOUZE,

Defendant-Appellant.

UNPUBLISHED

January 31, 2008

No. 274470

Genesee Circuit Court

LC No. 06-018757-FH

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 24 to 120 months each for the felon-in-possession and CCW convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

State Trooper Dennis McCunkin, working as part of a drug interdiction team, noticed that the passenger in a vehicle driven by defendant was not wearing a seatbelt. Upon checking the license plate, he discovered that the vehicle was registered to defendant and another man, Leonard Poe, for whom there were two arrest warrants. McCunkin stopped the vehicle. When he approached the window of defendant's vehicle, McCunkin noticed a strong odor of burnt marijuana. When asked for his driver's license, defendant stated that it had been suspended. McCunkin asked defendant to step out of the vehicle and placed him under arrest for driving without a license. He placed defendant in the police car. While conducting an inventory search, Trooper Barker found a fully loaded .32 caliber revolver in the vehicle, under the dashboard, sandwiched in a tangle of wires on the hump between the areas for the driver's and front passenger's feet, with the handle facing the driver. The gun was partially concealed. Officer Dickenson noticed that carpeting on the passenger side floorboard was pulled up and, upon pulling it back, discovered a large amount of money bundled in a rubber band. The gun and the money were approximately 10 to 12 inches apart. While McCunkin was observing the search, defendant motioned for him to come back to the police car. When he did so, defendant spontaneously stated that the money the police had found was his. McCunkin asked about the gun, but defendant did not say anything else. The troopers subsequently discovered a large

amount of marijuana “shake,” i.e., seeds and stems, in the back of the vehicle and in the front seat.

According to the passenger in the vehicle Candace King, defendant’s girlfriend at the time of trial, Poe agreed that defendant could use the car and picked them up. Poe was smoking marijuana at the time and passed some to defendant. Poe drove to the place where he was dropped off, at which point the defendant got into the driver’s seat. King did not see defendant put the money under the carpet. She did not see or know about the gun or the money.

Defendant first argues that he was denied a fair trial by the admission of evidence that marijuana and money were discovered in the vehicle because the evidence was irrelevant to the weapons charges and was highly prejudicial.

This Court reviews preserved claims of evidentiary error for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Defendant’s unpreserved claim that the prosecutor engaged in misconduct by eliciting the evidence is reviewed under the plain error test of *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999):

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. “It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” [*Id.*, p 763 (citations omitted).]

Convictions of the charged offenses required proof that defendant, rather than the co-owner of the vehicle or the passenger, possessed the weapon. Defendant admitted to the police that the money hidden in the vehicle belonged to him. The prosecution established a link between the money, drugs, and possession of a firearm. According to Trooper McCunkin, a large amount of cash, a loaded gun, and the smell of marijuana were consistent with drug trafficking because people who are affiliated with smuggling narcotics, stolen property, and money more than likely carry firearms for protection. He also testified that the majority of significant money seizures involve twenty-dollar bills because most small drug sales are for paid by ten- or twenty-dollar bills. The money seized from defendant’s vehicle, totaling \$1,650, included 52 twenty-dollar bills. The evidence of the money and the marijuana was relevant to establishing defendant’s possession of the firearm, and the probative value was not substantially outweighed by the danger of unfair prejudice. MRE 401; MRE 403. The trial court did not abuse its discretion, and the prosecutor’s admission of the evidence was not plain error.

Defendant also claims that he was denied a fair trial by the prosecutor’s elicitation of testimony concerning defendant’s silence after McCunkin asked about the gun, and that trial counsel was ineffective for failing to object. This Court reviews unpreserved claims of

constitutional error for plain error affecting substantial rights pursuant to *Carines, supra*, p 763. To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *Id.*

Defendant waived his right to remain silent by initiating the conversation with Trooper McCunkin. His subsequent failure to answer McCunkin's question concerning ownership of the gun was not an invocation of the right to silence, and therefore, evidence of his failure to respond was admissible at trial. *People v McReavy*, 436 Mich 197, 211-212; 462 NW2d 1 (1990); *People v Rice (On Remand)*, 235 Mich App 429, 436; 597 NW2d 843 (1999).

Because the evidence was admissible, counsel was not ineffective for failing to object. Counsel is not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood