

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE SMITH,

Defendant-Appellant.

UNPUBLISHED

August 19, 2008

No. 278399

Wayne Circuit Court

LC No. 06-004588-01

Before: Schuette, P.J., Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for carrying a concealed weapon (CCW), MCL 750.227, possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was acquitted on the charge of felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to 12 months' probation for the CCW and possession convictions, and two years' imprisonment for the felony-firearm conviction. Defendant was resentenced to five years' imprisonment for the felony-firearm conviction, as a second offender. We affirm.

Defendant argues on appeal that the trial court entered inconsistent verdicts by acquitting defendant on the felon in possession charge, but convicting him on the CCW and felony-firearm charges. We disagree. This issue is raised for the first time on appeal. In order to preserve most issues for appeal, a party must object at the trial court level. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Objections must be timely, and specify the same ground for challenge as the party seeks to assert on appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Because defendant failed to object to the verdicts below, this issue is not properly preserved for appeal. An unpreserved issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The defendant must show that a plain error occurred, which affected his substantial rights. *Id.* at 774.

Sitting without a jury, a trial court "may not enter an inconsistent verdict." *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003), quoting *People v Walker*, 461 Mich 908; 603 NW2d 784 (1999). Inconsistent verdicts result in error requiring reversal only when the trial court's findings of fact with regard to the acquittal of one charge would also require the acquittal of another charge, on which the defendant is convicted. *People v Fairbanks*, 165 Mich App 551, 557; 419 NW2d 13 (1987).

The elements of felon in possession are: (1) the defendant possessed a firearm, (2) the defendant had been convicted of a prior felony, and (3) less than five years had lapsed since defendant had been discharged from probation. *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004). In this case, the trial judge explicitly found that defendant possessed a firearm, and then went on to state that there was no evidence to support the felon in possession charge. While defendant argues that this statement was the result of uncertainty regarding the possession of a firearm, the record indicates that it was proof of a prior felony that was missing. The only testimony during the trial regarding a prior felony conviction was that defendant showed a prison identification card when stopped by the police.

After the prosecution's closing argument, the trial court asked about evidence regarding the felon-in-possession charge, and the prosecutor responded that "there was some prior history in this file before we began," but that he did not "know what happened to it since then." As further evidence that it was the lack of evidence of a prior felony that led to defendant's acquittal on the felon in possession charge, he was originally sentenced to two years' imprisonment without reference to his previous felony-firearm conviction, and he was later resentenced as a second offender when the error was discovered. While the trial court did not specifically hold that defendant's acquittal of the felon in possession charge was based on a lack of evidence of a prior felony, the testimony at trial supports this reasonable inference. Therefore, based on the lower court record, it was not plain error to acquit defendant on the felon in possession charge. Even though defendant was found to be in possession of a firearm, defendant's acquittal was proper because the remaining elements of that charge were not satisfied.

Defendant argues additionally that the evidence was insufficient to prove possession of a firearm. Though sufficiency of evidence was not listed in defendant's statement of questions presented, he argues that his acquittal on the felon in possession charge indicates that there was insufficient evidence to convince the trial court beyond a reasonable doubt that he possessed a firearm. This Court reviews a claim of insufficient evidence by undertaking a de novo review of the lower court record. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission or attempted commission of a felony. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Possession encompasses both actual and constructive possession, and can be established by circumstantial evidence of either. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). Constructive possession of a firearm is established if the defendant knows the location of the weapon and it is reasonably accessible to him. *Id.* at 438.

The elements of carrying a concealed weapon are: (1) the weapon was present in a vehicle operated or occupied by the defendant; (2) the defendant was aware that the weapon was present in the vehicle; and (3) the defendant was carrying the weapon. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). The element of "carrying" can be satisfied if the defendant was aware of the weapon's location and was in control of the vehicle. *Id.* at 622.

In this case, defendant argues only that the evidence was insufficient to prove that he possessed a firearm. When viewed in the light most favorable to the prosecutor, the evidence

meets the criteria for possession. Officer Bristol testified that he saw defendant lean forward as he approached the side of the vehicle, and then saw the gun's handle protruding from beneath the driver's seat, where defendant was seated. The police took a firearm into custody, and its evidence number was read into the record. Defendant testified that a spent shell casing was found in the van. This evidence supports the reasonable inference that defendant knew that the gun was beneath his seat, and had access to it, fulfilling the element of possession for both CCW and felony-firearm.

Affirmed.

/s/ Bill Schuette

/s/ Brian K. Zahra

/s/ Donald S. Owens