

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HECTOR BERDECIA,

Defendant-Appellant.

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UNPUBLISHED  
September 8, 2009

No. 286070  
Wayne Circuit Court  
LC No. 08-002601-FH

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of being a felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon in a motor vehicle, MCL 750.227, and possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to terms of two to five years in prison on the felon in possession and concealed weapon convictions, and to a two-year term on the felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm. We have decided this appeal without oral argument under MCR 7.214(E).

Police officers stopped defendant, who was driving a vehicle with two passengers, for a traffic violation. During the stop, the officers discovered that defendant's front passenger possessed marijuana and cocaine. An officer testified that he approached from the passenger's side of the car and noted that defendant had his left hand pressing down on the control panel on the driver's side door. Further, when asked to lower the window, defendant did not use his left hand to activate the control, but rather reached over with his right hand to lower the window. The officer characterized this as "odd." This officer testified that, when he went to assist the officer who was removing defendant from the vehicle, he noticed that the control panel was detached from the door and that a handgun was protruding from under the control panel. The officer testified that the magazine protruded by about one and one-half inches.

Defendant first argues that the trial court erred in admitting evidence that drugs were found on the passenger; defendant maintains that it was irrelevant and more prejudicial than probative. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Id.*

In order to prove that defendant possessed the handgun, the prosecution had to show that defendant knew about the handgun stashed in the compartment under the control panel. See *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). The trial court determined that defendant's knowledge was "circumstantially established by the fact that there were also drugs in the car because the two go together so often" and defendant was "transporting a guy who had possession of drugs."

At trial the officer testified that he smelled marijuana when the passenger lowered his window and that he observed the passenger with what appeared to be a marijuana cigarette behind his ear. The officer also testified that the passenger was found to have cocaine. Likewise, the officer testified that drug dealers often carry guns for protection and that he had seen control panels that were removed so that the compartment could be used to conceal drugs. Thus, the evidence concerning the drugs tended to provide context within which the jury could evaluate whether defendant knew about the compartment with the gun in it. See *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (explaining that evidence of other crimes may be admitted when the other criminal acts explain the circumstances of the charged crime). Likewise, the evidence suggests that defendant may have known that his passenger was using marijuana and possessed cocaine and this in turn permitted an inference that defendant knew about the dislodged control panel and the compartment under it. Hence, this evidence was relevant. MRE 401. Further, the trial court expressed concern that a generic reference to the fact that the passenger was arrested on other matters might be more prejudicial because the jury would be left to speculate about the nature of the offense and defendant's potential involvement; this factor was especially relevant given that the jury was going to hear that the vehicle had been used in a homicide. Finally, we note that the references to the drugs were minimal and not particularly prejudicial. Based on this record, we cannot conclude that the trial court's decision to admit this evidence was outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 353.

Defendant next argues that the prosecutor committed misconduct during the closing argument. Because defendant failed to object, this Court will review the claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

In her closing argument, the prosecutor stated that the case did not involve whether the jury "believe[s] the officer." Although the prosecutor intimated that the jury had to believe the officer's testimony, when read in context, we conclude that the prosecutor was merely commenting on the fact that defendant was not contesting the veracity of the officer's testimony. Indeed, defendant's sole argument was that the officer's testimony did not establish beyond a reasonable doubt that defendant knew about the handgun in the compartment below the control panel. In any event, during voir dire, the trial court made it clear that there would probably be only one witness—a police officer—and instructed the jury that it would have to determine whether the officer was credible and, if credible, whether the officer's testimony established the elements of the crimes beyond a reasonable doubt. The trial court clarified that the jury could convict based on this officer's testimony alone, but did not have to. In addition, after the evidence, the trial court instructed the jury that it had to decide what the evidence meant and its importance, including "whether you believe what the witness said." The trial court also explained that the attorney's statements were not evidence. Finally, the jury was given a list of

criteria to consider when evaluating the officer's credibility. A jury is presumed to follow the instructions given to it by the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, it is unlikely that the prosecutor's misstatement affected the jury's assessment of the officer's testimony and, for that reason, we cannot conclude that any error on the part of the prosecutor was outcome determinative. *Carines*, 460 Mich at 763.

The prosecutor also noted that the officer's testimony was uncontested and that the issue was whether this testimony was "enough to prove the charges in this case beyond a reasonable doubt." Defendant maintains the evidence was in fact contested by stipulations that there was no videorecording of the stop, which defendant maintains would have highlighted whether the gun was visible, and that there was no fingerprinting of the gun. Presumably, if the gun was not visible it would be some indication that defendant may not have been aware of it. However, the stipulations were not evidence that the gun was hidden or that the discovery of prints other than defendant's prints would have exonerated defendant. The officer's pertinent testimony on this point was not contested; rather, defendant contested the inferences that could be drawn from the officer's testimony. Thus, the prosecutor's argument that the evidence was uncontested was accurate. A prosecutor may comment that evidence against the defendant is "uncontroverted" or "undisputed." *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly

/s/ Kirsten Frank Kelly