

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SYLVESTER JEROME PARKER,

Defendant-Appellant.

UNPUBLISHED

December 22, 2009

No. 287202

Wayne Circuit Court

LC No. 06-012308-FH

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to 14 months to 10 years' imprisonment for the felon in possession of a firearm conviction and five years' imprisonment for the felony-firearm conviction. Because defendant was not denied the effective assistance of counsel, his convictions and sentences do not violate the double jeopardy clause, and sufficient evidence supports defendant's convictions, we affirm.

This case arises from the non-fatal shooting of Tyrone Turner outside of his house on Winston in Detroit, Michigan. Tyrone testified that he lives on Winston next door to Angelina Clark. Tyrone testified that he knew defendant from seeing him next door with Clark. On October 1, 2006, Tyrone was in his backyard around 3:00 p.m. and had on his person his .380 handgun, for which he had a concealed weapons permit, in its holster covered by his shirt. Tyrone heard his wife arguing with Clark in the front yard. At trial, Tyrone testified that he saw defendant come out of the side door of Clark's house with two revolvers, one black, one silver. Tyrone testified that he told defendant that it was not necessary to have his guns out and then Tyrone pulled his own .380 handgun out of its holster. At that point, according to Tyrone, defendant approached Tyrone and shot him in the chest. Tyrone then tried to grab defendant's other gun. As defendant wrestled Tyrone to the ground, Tyrone momentarily passed out. When Tyrone woke up, he saw defendant pick up the .380 handgun and run toward Clark's back yard. Tyrone also did not regain possession of his .380 handgun because it was never found. Tyrone testified that he spent a week in the hospital and did not have the bullet removed.

Defendant raises multiple grounds on which he argues that he was denied the effective assistance of counsel. Whether a defendant has been denied the effective assistance of counsel is

a mixed question of fact and law. “A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), this Court’s review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

“Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise.” *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). Under the standard set forth in *Strickland v Washington*, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), establishing ineffective assistance of counsel requires a showing “that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant’s first issue on appeal is that he was denied the effective assistance of counsel because his trial counsel did not know the charges that defendant was facing at the preliminary examination relying on *United States v Cronin*, 466 US 648, 659-662; 104 S Ct 2039; 80 L Ed 2d 657 (1984). In *Cronin*, the United States Supreme Court identified three rare situations in which the attorney’s performance is so deficient that prejudice is presumed. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). One of these situations is where a defendant is completely denied counsel, such as where the accused is denied counsel at a “critical stage” of the proceedings. *Id.*

Defendant argues that he was denied the effective assistance of counsel because his trial counsel did not know the charges that defendant was facing at the preliminary examination. At the preliminary examination, defense counsel was confused about whether defendant had been charged with felonious assault because the board outside the courtroom indicated that defendant had been charged with felonious assault. However, defendant had only been charged with felon in possession of a firearm and felony-firearm at that time. Defendant contends that this constitutes ineffective assistance of counsel, with prejudice being presumed under *Cronin*, because defendant was denied counsel at a critical stage of the proceedings. However, *Cronin* is inapplicable to this situation because defendant was represented at his preliminary examination and his counsel cross-examined the only witness and argued on defendant’s behalf. Further, under the *Strickland* standard, defendant has failed to establish any prejudice regarding the confusion on the charges. The charge of felonious assault was later added, but then dismissed prior to trial and defendant presents no argument regarding how his counsel could have prevented him from being bound over on the remaining charges of felon in possession of a firearm and felony-firearm.

Second, defendant argues that his counsel was ineffective for failing to request an adjournment in order for fingerprint evidence to be processed. Defendant contends that this evidence would have been exculpatory. The record reveals that the trial court ordered fingerprinting of the guns and ammunition casings recovered in this case, but the testing was never done. The trial court did not learn about this development until the middle of trial. Defense counsel argued in his closing argument that the trial court should infer that, because the

testing was not done, the result would have been unfavorable to the prosecution. It may have been unreasonable for defense counsel not to request an adjournment and pursue the testing of this evidence. However, defendant fails to establish prejudice because he has made no showing that the fingerprint evidence would have been exculpatory and, in fact, one of the trial court's bases for convicting defendant was defendant's possession a .380 handgun, which was never found, and not part of the evidence that was supposed to be fingerprinted.

Third, defendant argues that his counsel was "per se" ineffective because defense counsel argued at the sentencing hearing that defendant should be placed on probation, when, in fact, defendant was convicted of a crime that had a mandatory five-year sentence. Defense counsel argued that MCL 771.1, which addresses when a trial court may sentence a defendant to probation, should apply to this case and defendant should be sentenced to probation. Although defendant argues that this was a complete denial of counsel at a critical stage of the proceedings under *Cronic*, defendant was not denied counsel at his sentencing hearing. Rather, his counsel made a good faith argument that the plain language of MCL 771.1 permitted the trial court to sentence a defendant convicted of an offense with mandatory prison time to probation. Further, defendant does not dispute that the trial court correctly ruled regarding his ineligibility for probation. Therefore, defendant cannot show he was prejudiced by his counsel's argument.

Next, defendant argues that his counsel was ineffective for not introducing evidence that defendant's statement, "I went for mine," is a commonly used cultural expression and did not mean defendant possessed a gun. On cross-examination, the prosecution elicited from defendant that he told police that, during the fight with Tyrone, "I just went for mine." However, on redirect, defense counsel elicited from defendant that when police asked him what he meant, defendant answered that he had used the wrong terminology and simply meant that he was fighting for his life. The trial court asked defendant to elaborate further and defendant reiterated that he had used the wrong words and only meant that he was fighting for his life and trying to keep from being killed. Regardless of the other interpretations of this phrase, which defendant now posits on appeal, defendant was permitted to explain what he meant by his own words at trial. It was reasonable for defense counsel not to pursue other interpretations of this phrase because defendant claimed he used the wrong words to express himself and had the opportunity to explain what he actually meant to say. Therefore, defendant was not denied the effective assistance of counsel.

Defendant also argues that his counsel was ineffective for failing to present a claim of self-defense. Presentation of a claim of self-defense would have been entirely inconsistent with the assertions of defendant and two other defense witnesses, who all testified that defendant never possessed a gun. While defendant could have presented inconsistent defenses, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), he must overcome the strong presumption that defense counsel pursued alone a theory that defendant never possessed a firearm as a matter of sound trial strategy. Defendant fails to argue how deciding against presenting a claim of self-defense that was entirely inconsistent with his testimony and effectively impeached his testimony and the other defense witnesses was not sound trial strategy. Therefore, defendant was not denied the effective assistance of counsel.

Defendant argues that these cumulative errors by his counsel denied him a fair trial. However, "only actual errors are aggregated to determine their cumulative effect." *LeBlanc*,

supra at 592 n 12. Because defendant failed to establish any instances of error, there are no errors to aggregate, and there can be no cumulative effect.

Next, defendant argues that his sentences for his felony-firearm and felon in possession of a firearm convictions violate the double jeopardy protection against multiple punishments for the same offense. Defendant contends that the Legislature did not clearly intend to permit multiple punishments for the crimes of felony-firearm and felon in possession of a firearm. We review an unpreserved double jeopardy challenge for plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). “The double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense.” *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). This case involves multiple punishments for the same offense, where defendant was convicted and sentenced for both felon in possession of a firearm and felony-firearm.

This Court and the Michigan Supreme Court have previously concluded that the scenario involving multiple punishments for felon in possession of a firearm and felony-firearm is not a double jeopardy violation because the Legislature clearly intended to permit a defendant charged with felon in possession of a firearm to be properly charged with an additional felony-firearm count. *Calloway, supra* at 452; *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998); *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Defendant has not established error.

Finally, defendant argues that there is not sufficient evidence to support his convictions because of the inconsistencies in the evidence and the trial court’s misinterpretation of the evidence. A challenge to the sufficiency of evidence is reviewed by this Court de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must “view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *Id.*, quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

When reviewing a sufficiency of evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). It is solely the trier of fact’s role to weigh the evidence and judge the credibility of witnesses. *Wolfe, supra* at 514-515. Therefore, “[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

To establish the crime of felon in possession of a firearm, the prosecutor must show the following elements: (1) defendant possessed a firearm; (2) defendant had been convicted of a prior felony; and (3) less than five years had elapsed since defendant had been discharged from probation. MCL 750.224f; *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004), *aff’d* 473 Mich 626 (2005). The word “possession” includes both actual and constructive possession of a firearm, and it can be established by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000).

Four witnesses testified that defendant was in possession of either one or two handguns during a standoff with Tyrone Turner. Further, an additional uninterested witness, Charles Kauppi, who lived across the street from where the incident occurred, saw an African-American male, who was wearing a white t-shirt and holding a gun, fire a shot outside of Clark's house. Defendant was photographed later that day wearing a white t-shirt. Finally, defendant, when responding to a question from police about when the shot was fired during his encounter with Tyrone, told the police, "In the beginning in the middle we were just fighting then in the middle I just went for mine." Although the testimony of the prosecution's witnesses was not entirely consistent, it is solely the trier of fact's role to weigh the evidence and judge the credibility of witnesses, *Wolfe, supra* at 514-515. The evidence, viewed in the light most favorable to the prosecution, supports that defendant possessed a firearm and the parties stipulated that defendant had a prior felony conviction and was not eligible to possess a firearm. Therefore, a rational trier of fact could find that the essential elements of felon in possession of a firearm were proven beyond a reasonable doubt.

To support a conviction for felony-firearm, the prosecution must prove the following elements: (1) 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); MCL 750.227b. The second element of felony-firearm may be established by the felony of felon in possession of a firearm. *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Plainly, there is sufficient evidence to show that defendant possessed a firearm. This possession constituted the underlying felony of felon in possession, thus satisfying the elements of felony-firearm. Therefore, a rational trier of fact could find that the essential elements of felony-firearm were proven beyond a reasonable doubt.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens