

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANNON JAVON HOLMES,

Defendant-Appellant.

UNPUBLISHED

December 22, 2009

No. 288103

Wayne Circuit Court

LC No. 08-003224-FH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Following a bench trial, the court convicted defendant of carrying a concealed weapon (CCW), 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. The court sentenced defendant to four years' probation for the CCW and felon in possession convictions, to be served concurrently with a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was convicted primarily on the testimony of the arresting officer, Officer Joel Tomaszewski, who testified that he and his partner arrested defendant and his companion, Kenyatta King, after they stopped to investigate a Chevy Malibu that was illegally parked. Officer Tomaszewski testified that defendant and his companion exited the Malibu as the officers pulled up in their squad car and he saw defendant "bending down into the passenger compartment of the vehicle." While his partner detained defendant and King, Officer Tomaszewski shined a flashlight into the vehicle and observed a handgun partially protruding from under the passenger seat. The officer testified that he opened the car door and retrieved the gun. Police testimony was presented that officers no longer are permitted to carry slim jims in their cars, and no officer testified that a slim jim was used to unlock the Malibu.

Defendant testified that he was not in the vehicle. He testified that an officer wearing a mask opened the door of the Malibu with a "slim jim," grabbed a gun from under the seat, and said, "That's your gun, I got you." Lakeisha Benjamin testified that one of the officers opened the Malibu with a slim jim. She testified that a police officer asked her about the keys to the Malibu, and that King had a key to the Malibu in his possession when he was subsequently released from jail.

Defendant first argues that he was denied a fair trial due to ineffective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish his claim, defendant “must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel’s assistance was sound trial strategy.” *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

Defendant asserts that trial counsel was ineffective because he did not call certain witnesses and present other evidence at trial. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). “Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense.” *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant contends that defense counsel was ineffective for failing to call Christa Sims and Judy King to testify at trial. According to defendant, these witnesses were available to testify that the police had asked for keys to the Malibu which, according to defendant, would have corroborated the testimony that the police used a “slim jim” to enter the car. Defendant asserts that additional evidence that the police used a “slim jim” to enter the car would have undermined the credibility of the police officers’ testimony.

A review of the proffered affidavits reveals that they do not undermine confidence in the verdict that defendant possessed the gun. The proffered affidavits merely have some tendency to show that the police used a slim jim to enter the car. While this would have contradicted the testimony of the police officers regarding the means of entry, this revelation regarding the means of entry does not undermine confidence in the testimony indicating that defendant was in possession of the gun.

Defendant also contends that defense counsel was ineffective for failing to obtain and present the videotape from the police car at the scene. The record shows that the patrol car was equipped with a video camera and that the camera was working, but the microphone was not. One of the officers testified that he was not sure if the camera “would have got the Malibu from where we were parked at because we were just offset in front of the vehicle.” Because there is no evidence that anything relevant was captured on the videotape, defendant has not shown that counsel’s alleged error deprived him of a substantial defense.

Defendant further argues that counsel was ineffective for failing to obtain and present various police records. There is nothing in the record to suggest that the documents exist or what

they would have shown. Thus, defendant has not shown that counsel's alleged error deprived him of a substantial defense.

In his second issue, defendant argues that the evidence was insufficient to sustain the verdicts. In particular, defendant contends that the evidence was insufficient to prove that he possessed the weapon at issue.

A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). This Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Felon in possession of a firearm and felony-firearm both require proof that the defendant possessed a firearm. *People v Peals*, 476 Mich 636, 640; 720 NW2d 196 (2006). Possession of a weapon may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). CCW requires proof that the defendant carried a pistol. MCL 750.227(2); *People v Shelton*, 93 Mich App 782, 785; 286 NW2d 922 (1979). "Carrying" is similar to possession and denotes intentional control or dominion over the weapon. *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982). The word "carry" encompasses actual, as well as constructive, possession of a weapon. *People v Adams*, 173 Mich App 60, 62-63; 433 NW2d 333 (1988).

The trial court found that defendant possessed the weapon recovered from his friend's car. There was no direct evidence that defendant actually possessed the firearm, because there was no evidence that someone saw him handling the gun or saw the gun on his person. However, there was sufficient circumstantial evidence to prove that defendant possessed the firearm. As defendant got out of the car, he was observed bending down inside the car and reaching down with his arm. Within a few minutes, the police officer observed and confiscated a firearm protruding from beneath the front passenger seat, the same area where defendant had been observed bending down and reaching. From this circumstantial evidence, a rational trier of fact could find beyond a reasonable doubt that defendant had possession of the weapon and placed it beneath the seat. Therefore, the evidence was sufficient to sustain the verdicts.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder