

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ALEXANDER PETTWAY,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2010

No. 292170

Wayne Circuit Court

LC No. 08-005327-FH

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced to two years' probation for the felon-in-possession conviction and five years' imprisonment for the felony-firearm conviction. We affirm.

I. *CORPUS DELICTI* RULE

Defendant first argues that the admission of his statement to the police violated the *corpus delicti* rule. In order to preserve a *corpus delicti* challenge for appellate review, a defendant must raise the issue in the trial court. *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). Because defendant did not preserve this issue by raising it below, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

The prosecution must present proof of the *corpus delicti* of an offense before a defendant's inculpatory statements are admissible. *People v Schumacher*, 276 Mich App 165, 180; 740 NW2d 534 (2007). "The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). "Under the *corpus delicti* rule, 'a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury.'" *Schumacher*, 276 Mich App at 180. "[T]he *corpus delicti* rule does not bar admissions of fact that do not amount to a confession of guilt." *Schumacher*, 276 Mich App at 180-181. "If . . . the fact admitted does not of itself show guilt but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a

confession, but an admission . . . .” *Id.* at 181, quoting *People v Porter*, 269 Mich 284, 290; 257 NW 705 (1934).

Here, defendant’s statement was an admission rather than a confession because facts that defendant did not admit were required to establish his guilt. Defendant admitted only that the gun belonged to him. In order to convict defendant of felon in possession of a firearm, the prosecution was required to prove not only that defendant possessed the weapon, but also (1) that he was ineligible to possess a firearm because of a previous felony conviction, and (2) that he had not met the requirements for regaining his eligibility to possess a firearm. MCL 750.224f. Moreover, the prosecution was required to prove the elements of felon-in-possession as the underlying felony supporting the felony-firearm charge. Defendant’s statement did not alone show his guilt of the charged offenses, and proof of other facts that defendant did not admit was necessary to establish defendant’s guilt. Therefore, the challenged statement was an admission rather than a confession and the *corpus delicti* rule did not bar its admission. *Schumacher*, 276 Mich App at 181.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the prosecutor failed to present sufficient evidence to support his convictions. We disagree. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). “When ascertaining whether sufficient evidence was presented in a bench trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). This Court will not interfere with the role of the trier of fact in determining the credibility of witnesses or the weight of the evidence and all evidentiary conflicts must be resolved in favor of the prosecution. *Id.* at 619. Circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense. *Id.*

To convict defendant of felon in possession of a firearm, the prosecution was required to prove that defendant (1) possessed a firearm, (2) was ineligible to possess a firearm because of a previous felony conviction, and (2) had not met the requirements for regaining his eligibility to possess a firearm. MCL 750.224f. Moreover, to convict defendant of felony-firearm, the prosecution was required to prove that defendant (1) possessed a firearm, (2) during the commission or attempted commission of a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Officer Andrew Guntzviller testified that as he was driving by a vacant house, he saw a shadow in the second-story window of the home, so he went inside to investigate. He discovered defendant in the upstairs bedroom that faced the street. When asked for his identification, defendant nodded toward a table on top of which sat his identification card, several pieces of mail addressed to him at a different address, and a handgun. The gun and identification card were less than 12 inches apart on the table. Nobody else was upstairs and defendant admitted that the gun belonged to him. Defendant stipulated that he had a prior felony conviction and that his eligibility to possess a firearm had not been restored. This evidence, viewed most favorably to the prosecution, was sufficient to permit a rational trier of fact to find that the prosecution

established the elements of felon-in-possession and felony-firearm beyond a reasonable doubt. *Nowack*, 462 Mich at 399-400; *Kanaan*, 278 Mich App at 618.

### III. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit. Virtually all of defendant's issues were not raised in the trial court and, therefore, are not preserved for our review. See *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). We review unpreserved issues for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763; *Knapp*, 244 Mich App at 375. Defendant also failed to raise his ineffective assistance of counsel claims in a motion for a new trial or request for an evidentiary hearing in the trial court. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Therefore, our review of that issue is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). However, defendant was not required to take any special steps to preserve his claim that the evidence was insufficient to support his convictions. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). We review claims of insufficient evidence de novo. *Lueth*, 253 Mich App at 680.

Defendant argues that Officer Guntzviller discriminated against him and violated his equal protection rights by singling him out and disregarding other persons in the home. Although defendant claims that there were four people inside the house at the time of his arrest, his testimony conflicted with that of Guntzviller and the trial court found Guntzviller's testimony credible. Thus, the trial court believed that only one other person, a woman named "Lisa," was in the home when the police entered. Moreover, contrary to defendant's assertion that the police singled him out and failed to investigate other suspects, the record indicates that Guntzviller's partner detained Lisa. In any event, as previously discussed, the evidence shows that defendant, rather than Lisa, was the person who possessed the firearm, as defendant admitted in his statement to the police. Therefore, defendant's argument that his convictions resulted from the police's failure to investigate others in violation of his equal protection rights lacks merit.

Defendant also claims that Guntzviller engaged in malicious prosecution by knowingly and intentionally failing to investigate other suspects. A malicious prosecution claim is a civil claim rather than a criminal action. *People v Hill*, 282 Mich App 538, 545; 766 NW2d 17 (2009), vacated in part on other grounds 485 Mich 912 (2009). Moreover, to establish a malicious prosecution claim, a defendant must show that a criminal proceeding was decided in his favor. *Id.* at 545 n 1. Here, the criminal proceeding against defendant was not decided in his favor. Thus, this argument lacks merit.

Defendant next argues that Guntzviller intentionally destroyed exculpatory evidence by touching the firearm and placing it in his pocket, thereby wiping fingerprints off the weapon. The suppression of evidence favorable to a defendant "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To meet the constitutional materiality standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

*California v Trombetta*, 467 US 479, 489; 104 S Ct 2528; 81 L Ed 2d 413 (1984). Here, the evidence did not possess an exculpatory value that was apparent before the evidence was destroyed. Defendant merely assumes that Guntzviller's handling of the weapon resulted in fingerprints being wiped off the gun. Defendant further assumes that those fingerprints would have been exculpatory.

“[W]here the government fails to preserve evidence whose exculpatory value is indeterminate and only ‘potentially useful,’” a different test is applied. *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996), quoting *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988). A defendant must show bad faith to establish a due process violation resulting from the failure “to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Id.*

In such a case, the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means. [*Jobson*, 102 F3d at 218.]

The record does not support defendant's claim that Guntzviller acted in bad faith. Guntzviller testified that because he did not have rubber gloves with him, he picked up the gun and placed it in his pocket. In addition, any possible exculpatory value of the evidence was not apparent. Thus, defendant has failed to establish a plain error. *Carines*, 460 Mich at 763; *Knapp*, 244 Mich App at 375.

Defendant next argues that Guntzviller initially intended to arrest him only for entering without permission, in violation of MCL 750.115(1), but after running a LEIN check and discovering his criminal history, decided to also arrest him for possessing the firearm that was recovered. Defendant fails to indicate how Guntzviller's actions were improper. Guntzviller testified that he was unaware of defendant's criminal history until he ran defendant's name through the LEIN system. After he became aware that defendant was a felon, defendant was charged with felony-firearm and felon-in-possession in addition to entering without permission. Defendant has not shown that either the prosecutor's or Guntzviller's conduct amounted to plain error. *Carines*, 460 Mich at 763; *Knapp*, 244 Mich App at 375.

Defendant next contends that the trial court erred by disregarding Guntzviller's failure to investigate other persons in the home, thereby allowing Guntzviller's discrimination against defendant. Defendant further claims that the trial court disregarded Guntzviller's alleged perjured testimony and failure to preserve the vital fingerprint evidence on the gun. Because defendant's arguments with respect to Guntzviller's conduct lack merit, defendant has failed to establish that the trial court's conduct constituted a plain error affecting his substantial rights. *Carines*, 460 Mich at 763; *Knapp*, 244 Mich App at 375.

Defendant next argues that the trial court improperly reversed the burden of proof by finding that he failed to submit any evidence to prove his innocence. Defendant misconstrues the record. The trial court determined that the testimony of the police officers was more credible

than defendant's testimony. Nothing in the record indicates that the trial court shifted the burden of proof to defendant.

Defendant also maintains that the trial court determined that he was guilty before trial began. Defendant relies on the following exchange that occurred immediately after the trial court indicated that it found defendant's testimony incredible:

*THE DEFENDANT:* Your Honor, I did not have no gun. I didn't have no gun, your Honor. I did not have no gun. I was not upstairs.

*THE COURT:* I know. You told me that. You told me that. So, you know, the Court just finds that to be a – not a very credible version. And I didn't believe it the first time you told me, and I don't believe it this time either, and for the reasons that I stated on the record.

The trial court's remarks indicate that it found defendant's version of events incredible based on defendant's testimony, not because of any pretrial determination to convict defendant. Thus, defendant's argument lacks merit.

Defendant further asserts that the trial court made jokes about the nicknames of witnesses. The record does not support this contention. Defendant testified that the woman in the home, Lisa, was known as "pop-eyed Lisa." When the trial court was recounting defendant's version of events, the court stated, "They call her Lisa with the popped eye, I think he called her. The popped out eye, I think is how he described her." Thus, the trial court was summarizing defendant's testimony; it was not making jokes about Lisa's nickname. Defendant has failed to show a plain error in this regard. *Carines*, 460 Mich at 763; *Knapp*, 244 Mich App at 375.

Defendant next challenges the trial court's determination regarding Guntzviller's credibility. Defendant argues that the police report is false and erroneously states that there was only one person in the house. The record does not contain a copy of the police report and defendant has not submitted a copy as an exhibit to his brief on appeal. Defendant correctly contends that Guntzviller testified at the preliminary examination that there were two other people in the house and that he testified at trial that there was only one other person in house. Defendant asserts that both testimonies were perjurious because there were three other people in the house. As previously stated, the trial court disbelieved defendant's testimony regarding the number of people in the house. Moreover, whether there were two females in the downstairs area of the house as Guntzviller testified at the preliminary examination or only one female as he testified during trial, defendant has not shown that this discrepancy affected the outcome of the proceeding. *Carines*, 460 Mich at 763. Guntzviller testified that defendant was the only person in the upstairs portion of the house, in a room where the gun was found on a table next to defendant's other belongings. Defendant has failed to establish a plain error affecting his substantial rights. *Id.*; *Knapp*, 244 Mich App at 375.

Defendant next contends that there was no independent evidence connecting him to the weapon and that only his mere presence and proximity to the weapon implicated him, which was insufficient to show constructive possession. Contrary to defendant's argument, sufficient evidence was presented to establish that he possessed the weapon, as previously discussed. Defendant also contends that he was denied an evidentiary hearing that would have confirmed

the lack of evidence showing that he possessed the weapon. Because defendant never moved for an evidentiary hearing, however, he was not denied an evidentiary hearing as he contends. Further, defendant was afforded his right to a trial. Thus, this claim of error lacks merit.

Defendant next argues that Sergeant Michael Griffin or the prosecutor committed misconduct when Griffin submitted a false unsigned statement that was not written by defendant, was not videotaped or tape recorded, and was not witnessed by any other person. Defendant offers no support for his argument, other than his self-serving claim, that the statement was false. Defendant also claims, without record support, that Griffin was motivated to fabricate the statement because he is a relative of defendant's ex-fiancée's late husband. Griffin testified that he advised defendant of his constitutional rights, which defendant indicated he understood. Defendant then made a statement, which Griffin wrote on a piece of paper that defendant refused to sign because he was uncomfortable signing "these kind of documents." The trial court found Griffin's testimony credible and disbelieved defendant's claim that he did not make the statement. No evidence was presented during trial of a motivation on behalf of Griffin to fabricate the statement. Thus, the record does not support defendant's claim that either Griffin or the prosecutor committed misconduct.

Defendant next complains that a *Walker*<sup>1</sup> hearing was not held to confirm the authenticity of the statement to the police and that his attorney was ineffective in this regard. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner*, 262 Mich App at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, 462 Mich at 302.

The purpose of a *Walker* hearing is to determine whether a defendant's inculpatory statement to the police was voluntary. *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000). Here, defendant does not claim that the statement was involuntary, but rather denies making the statement altogether. Thus, because there existed no basis for a *Walker* hearing, defense counsel was not ineffective for failing to move for a *Walker* hearing. Defense counsel does not render ineffective assistance by failing to make a futile motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant appears to argue that he is entitled to recovery under 42 USC 1983 based on Griffin's alleged misconduct. This Court has previously recognized that "42 USC 1983 is not itself an independent source of substantive rights; rather it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes . . . ." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 30; 703 NW2d 822 (2005). Relief under 42 USC 1983

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<sup>1</sup> *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

may be granted in a civil action seeking civil remedies. *Moses v Dep't of Corrections*, 274 Mich App 481, 505; 736 NW2d 269 (2007). Because this is not a civil action, defendant's claim for relief under 42 USC 1983 lacks merit.

Defendant next contends that the trial court erred by depriving him of a liberty interest. Defendant relies on *Johnson v Martin*, 943 F2d 15 (CA 7, 1991), which involved a former probationary police officer's civil action alleging a claim for deprivation of a liberty interest in his post-employment reputation. Defendant fails to explain the relevancy of that case to this appeal or offer any authority supporting his argument that he was deprived of his liberty interest "in freedom." Thus, he has failed to establish a plain error affecting his substantial rights in this regard. *Carines*, 460 Mich at 763; *Knapp*, 244 Mich App at 375.

Defendant next contends that the owner of the house never testified and he had a right to confront his accuser regarding the entering without permission charge. Because that charge is not at issue in this appeal, however, defendant's argument is misplaced.

Defendant next argues that discovery was not completed in a timely fashion and that the trial transcript reflects that he was not provided a complete police report and forensic lab test results until the day of trial. On the contrary, the trial transcript does not indicate when defendant received a copy of the police report and lab test results. Moreover, at the preliminary hearing, defense counsel indicated that he had just reviewed the discovery materials with defendant. Thus, the record belies defendant's claim that he did not receive discovery materials until the day of trial.

Defendant also contends that the fingerprint analysis of the firearm was negative for his fingerprints and that the prosecutor deliberately withheld this exculpatory evidence. It is unclear from the record whether the laboratory test results were included in the discovery provided to defendant before the preliminary examination. Regardless, defendant has not established that the prosecutor withheld exculpatory evidence. "A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Here, the fingerprint test results did not satisfy this standard. The parties stipulated that the test results revealed that no fingerprints were found on the weapon. Thus, the test results were not withheld and would not have raised a reasonable doubt about defendant's guilt. Moreover, to the extent that defense counsel failed to investigate the prosecutor's alleged failure to provide the test results earlier, counsel was not ineffective because defendant has failed to establish prejudice. *Toma*, 462 Mich at 302-303; *Moorer*, 262 Mich App at 75-76.

Defendant next argues that counsel was ineffective for comparing this case to the O.J. Simpson murder trial by stating during the preliminary examination, "If the gloves don't fit you must acquit." The record does not support defendant's claim that defense counsel made such a statement at any time during the lower court proceedings. The preliminary examination transcript reflects that counsel argued only that no evidence was presented to show that the gloves, under which the gun was found, fit defendant. Counsel did not compare this case to the O.J. Simpson murder trial.

Defendant next argues that defense counsel was ineffective for failing to ask questions about other people in the house, including their names, addresses, and dates of birth. "The

questioning of witnesses is presumed to be a matter of trial strategy.” *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Guntzviller testified that only one other person, a female who was detained downstairs, was inside the home. Defense counsel questioned Guntzviller regarding the woman’s access to the gun and the possibility that she placed the gun in the upstairs bedroom. Defendant has failed to show that counsel’s performance was constitutionally deficient. *Pickens*, 446 Mich at 302-303; *Moorer*, 262 Mich App at 75-76.

Defendant next contends that defense counsel erroneously stated that defendant was asleep in the house. The record does not indicate that defense counsel made such a statement. Thus, defendant has failed to show that counsel was ineffective based on the alleged statement.

Defendant next argues that the amended judgment of sentence is “falsified and fraudulent.” On August 1, 2008, the trial court sentenced defendant to two years’ imprisonment for the felony-firearm conviction. On September 18, 2008, the trial court entered an amended judgment of sentence sentencing defendant to five years’ imprisonment for the felony-firearm conviction as required under MCL 750.227b(1) because this was defendant’s second felony-firearm conviction. The amended judgment of sentence indicates a “sentence date” of August 1, 2008, and the same date as the “date sentence begins.” Defendant appears to argue that the amended judgment of sentence is fraudulent because he was not sentenced to five years’ imprisonment on August 1, 2008. Although defendant was not sentenced to five years’ imprisonment on that date, his sentence nevertheless began on that date as the amended judgment of sentence reflects. Thus, defendant has failed to show plain error affecting his substantial rights. *Carines*, 460 Mich at 763; *Knapp*, 244 Mich App at 375.

Finally, defendant appears to argue that his convictions violate his double jeopardy protections. It is well settled that convictions of both felon-in-possession and felony-firearm do not violate a defendant’s constitutional protections against double jeopardy. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 166-167; 631 NW2d 755 (2001). Thus, defendant’s argument lacks merit.

Affirmed.

/s/ Donald S. Owens  
/s/ William C. Whitbeck  
/s/ Karen M. Fort Hood