

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE LEE SMITH,

Defendant-Appellant.

UNPUBLISHED
September 16, 2010

No. 292394
Wayne Circuit Court
LC No. 08-016313-FH

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, 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), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to two years' imprisonment for the felony-firearm conviction, and two years' probation for the felon in possession of a firearm conviction. For the reasons set forth in this opinion we affirm the conviction and sentence of defendant. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Officer James Taylor of the Detroit Police Department, testified that, on the night of October 27, 2008, he and his partner, Officer Ernest Cleaves, were in the area of Mandeal and Elsmere Street, investigating an armed robbery. Officer Taylor stated that at 11:30 p.m., while he and Officer Cleaves were interviewing a woman regarding the recent robbery, they heard gunshots coming from a nearby alley, where there was a small group of people. Officer Cleaves testified that there were approximately five people, at least two females and two males, and that the officers heard "several" shots, although he could not say how many. Officer Taylor stated that there may have been four females, and roughly four males, although he could not be specific. Officer Taylor heard a young woman say "something to the effect of, the police right there, or they're right behind you all," at which point two "subjects" ran from the group down the alley. Officer Cleaves identified one of these individuals as defendant, who was wearing a hooded sweatshirt at the time, and seemed to be holding the right side of the shirt as he ran.

James Sherrod, who was also detained by the officers that night, testified that, on the night of October 27, 2008, he and three male friends, one of whom was defendant, were leaving the residence of friends and walking to a gas station on Vernor through the alley, when they stopped to talk to a group of four females, none of whom they knew. Sherrod testified that during this conversation, a police car pulled up and the people standing in the crowd ran.

Defendant and Sherrod ran together out of the alley, and down the street, away from the police car, laughing. On cross-examination, Sherrod testified that he did not remember hearing any gunshots or seeing a weapon. Sherrod explained that, upon seeing the police, he ran because he thought he had a probation violation warrant. The officers chased after both men, and when they split—one running eastbound, the other southbound—Officer Taylor chased Sherrod, who was going southbound. After catching him, Officer Taylor handcuffed Sherrod, put him in the police car, and deduced from Officer Cleaves's yelling in the next yard that his partner had apprehended the second man. The police car was equipped with a camera and microphone, and according to the Detroit Police Activity Log, they were working on October 27, 2008. Officers are required to wear a body microphone as well, but Officer Cleaves was unsure if his microphone was working on October 27, 2008. Officer Cleaves testified that, while his partner chased Sherrod, he followed defendant, only to lose sight of him when defendant entered the backyard of 1728 Elsmere, which is concealed behind a six-foot wooden gate. Defendant jumped the fence at the south side, and Officer Cleaves ran to the north side, and saw defendant attempt to jump over the gate, but failed to do so. Officer Cleaves called for backup, and the residents of 1728 Elsmere allowed him to walk through the home and search for defendant in their backyard. In the backyard, Officer Cleaves found defendant, alone, and detained him, while other units searched for a weapon in the vicinity. The police car video and microphone might have been working, but the car was facing southbound, so the camera would have caught the initial foot chase, but not Officer Cleaves detaining defendant.

Officer Taylor entered the backyard through a gate in the fence, where his partner had drawn his weapon, and was yelling at defendant to "show his hands." While Officer Cleaves was handcuffing, checking, and taking defendant to the police car, Officer Taylor began searching for a weapon using a flashlight. Officer Taylor testified that in doing so, he discovered a weapon "just over the fence." When asked how close the weapon was to where Officer Taylor saw defendant, Officer Taylor replied, "if you can go through the fence, it's six inches . . . right on the other side of the fence. Like he dropped, boom." When the court asked Officer Taylor if he was able to determine if the gun had been fired recently when he found it, he testified that he could because it "smelled of recently being fired, yes, sir."

Defendant was charged with (1) felon in possession of a firearm, (2) carrying a concealed weapon, and (3) felony-firearm. At the trial, the prosecution and defense stipulated that on October 27, 2008, defendant was ineligible to possess, use, or carry a firearm, as he had been convicted of a felony, and not met any requirements for regaining eligibility.

Before calling any witnesses, the prosecution informed the court that the defense made multiple discovery requests for the prosecution to test the gun for fingerprints, preserve the in-car video in the event that the camera in the police car was working, and obtain the log sheets. The prosecution acknowledged that it had only supplied the log sheets, and could not produce any other items or information. The defense argued that it believed the gun was dusted for fingerprints, but those results were not submitted. The defense asked "for the adverse jury instruction that you will give to yourself now in regards to the failure to preserve the evidence, the video tape evidence." The court agreed to "take into consideration the adverse jury instructions as it relates to the failure of the People to provide the fingerprints for the gun and the squad car video."

The trial court judge convicted defendant of felon in possession and felony-firearm. The judge also found, however, that there was “insufficient factual basis, and a reasonable doubt . . . created with respect to the charge of carrying a concealed weapon.” The judge ruled that there was insufficient evidence to convict defendant of concealing a weapon. The police car videotape would have shown defendant holding his side “if there was a weapon there,” but the prosecution failed to produce that tape. However, the judge found the officers’ testimony with respect to the finding of the gun more credible than that of Sherrod, and therefore, found that the “prosecution has proved beyond a reasonable doubt that [defendant] was a felon in possession of a weapon.”

On appeal, defendant argues that there was insufficient evidence to sustain his convictions. When reviewing a challenge to the sufficiency of evidence in a bench trial, this Court reviews *de novo* and in a light most favorable to the prosecution. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). “[A] court must . . . determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Nevertheless, “[t]his Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime.” *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

Defendant was convicted of felon in possession of a firearm, MCL 750.224f, as well as felony-firearm, MCL 750.227b. “Under MCL 750.224f, a person who has been convicted of a felony may not ‘possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm’ unless certain conditions are met.” *People v Dupree*, 284 Mich App 89, 102; 771 NW2d 470 (2009). Therefore, to be guilty of this offense, a defendant must have a previous felony conviction and be in possession of a firearm. Because both sides stipulated that defendant had committed a prior felony and was not eligible to possess a firearm, the only element in question is defendant’s possession of the gun. Likewise, to be guilty of felony-firearm, a defendant must possess a firearm during the commission of a felony. “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Again, here, the question of possession dictates defendant’s guilt.

Defendant argues that there is no evidence to prove he had possession of a firearm as no officer ever saw him with a gun, or saw him drop the gun where it was found. Defendant argues that the crucial element of possession is lacking, and therefore, there is insufficient evidence to convict him of these crimes.

Defendant fails to consider that possession under the statute may be actual *or* constructive. In *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000), the Court held that for purposes of possession, “[a] defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him Accordingly, the possession requirement of the felony-firearm statute has been described in terms of ready accessibility.” *Id.* at 437. The trial court found the testimony of Officers Ernest Cleaves and James Taylor to be more credible than James Sherrod’s testimony that he had neither seen nor heard a gun that evening. According to Officer Taylor’s testimony, the firearm, which smelled like it had recently been fired, was found six inches from defendant at the time of his arrest, with only a fence separating it from defendant. Also, during the foot-chase, it

appeared to Officer Taylor that defendant was holding something in the side of his sweatshirt. The officers' testimony is sufficient to prove that defendant had constructive possession of the firearm. Therefore, there was sufficient evidence for a rational trier of fact to find defendant guilty beyond a reasonable doubt of felon in possession and felony-firearm.

Defendant also argues that the trial court was obligated to follow the requested adverse jury instruction because the prosecution failed to turn over microphone recordings.¹ In doing so, the trial court would have accepted Sherrod's testimony that the police conspired to pin the gun on defendant when they discovered he was on parole. In following the jury instruction, the trial court would have accepted Sherrod's testimony, and found there was insufficient evidence to support the convictions.

The prosecution admitted its failure to turn over requested discovery materials to the defense. In *People v Davis*, 199 Mich App 502; 503 NW2d 457 (1993), this Court found that unless a prosecutor is found to have acted in bad faith in their suppression of evidence, a court is not obligated to apply an adverse jury instruction, so long as the prosecutor fairly presented the issues to be tried and sufficiently protected defendant's rights. *Id.* at 515. Where evidence is absent, the proper considerations are, "(1) whether the suppression was deliberate; (2) whether the evidence was requested; and (3) whether 'hindsight discloses . . . that [the] defense could have put the evidence to not insignificant use.'" *People v Paris*, 166 Mich App 276, 283; 420 NW2d 184 (1988).

The trial court was not obligated to apply the adverse jury instruction, as the prosecutor did not act in bad faith. The prosecutor was forthcoming regarding the absence of the requested evidence, and moreover, stated that she herself could not obtain such evidence. Such an admission does not indicate bad faith on her part. Nevertheless, the judge did take the adverse jury instruction into account, as evidenced by his acquitting defendant of the concealed weapons charge. However, the judge found the testimony of Officers Taylor and Cleaves to be more convincing than that of Sherrod, and consequently convicted defendant of felon in possession of a firearm and felony-firearm, regardless of the jury instruction. Thus, defendant's argument that the convictions must be vacated based on the adverse jury instruction is without merit.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Richard A. Bandstra

¹ Although the defense argues that microphone recordings from the in-car conversation would corroborate Sherrod's testimony, microphone recordings were never actually requested. Rather, the defense requested the squad car videotape and the log sheet, and that the gun be tested for fingerprints.