STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2010
V	No. 293358 Bay Circuit Court
ERIC JERMAINE HARVEY, Defendant-Appellant.	LC No. 08-010775-FH

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of carrying a dangerous weapon with unlawful intent, MCL 750.226, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of 60 to 240 months in prison for the convictions for carrying a dangerous weapon with unlawful intent and felon in possession of a firearm, and two years in prison for each felony-firearm conviction. For the reasons set forth below, we affirm.

Defendant claims the prosecution presented insufficient evidence to support his convictions. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Defendant maintains that the jury lacked adequate evidence to conclude that he is the man who carried a handgun through a Bay City neighborhood on August 6, 2008.

Defendant is correct that some of the area residents who saw the man holding and shooting a gun offered differing testimony about the gunman's clothing and that only one witness was able to identify defendant in a photographic lineup. However, ample evidence established that defendant was, indeed, the gunman.

Local resident Kenneth Mercier testified that, on August 6, 2008, he saw a man shoot a handgun while walking down a sidewalk near Mercier's house on North Birney Street. Mercier could not identify defendant as the shooter, but testified that the gunman wore a blue shirt, white pants, and a tight, nylon stocking cap or "do-rag" on his head.[1] Mercier was able to point police officers to two shell casings on the sidewalk and he saw the man shoot directly at a sport utility vehicle parked nearby. Police later found a bullet fragment in the vehicle. At the same time, another resident, Lawrence Michalski called the police and reported that he saw a man shooting a gun from a residence across the street from his home, at an apartment house later identified as 519 North McLellan. Witness Cody Ryczek testified that he saw a tall, slim black man with a gun in his hand on N. Birney Street at the time of the shooting. Ryczek recalled that the man was wearing a blue shirt and do-rag. James Schwartz also testified that he saw a tall black male carrying a gun, and recalled that he wore a do-rag on his head. Schwartz identified defendant as the shooter in a photographic lineup and testified that the photo was the "closest" to resembling the man that he saw on August 6th. Barbara Meany also testified that she saw a man holding a gun while walking down a sidewalk on North Birney. According to Meany, the man wore a blue shirt, long shorts and a do-rag. Kimberly Hitz saw the gunman load his weapon while standing on the corner of Birney Street and Tenth. She testified that the man wore white pants. She saw the man run inside a home later identified as 519 N. McLellan.

Officers called to 519 N. McLellan surrounded the building and found shell casings in front of the apartment house, on the porch, and on the steps leading up to the porch. As the officers attempted to secure the area, they received notice that the man was walking and shooting a gun nearby. Sergeant John Harned and Officer Brian Ritchie left the house and took their patrol car to search for the gunman. They spotted defendant on the corner of Birney and McKinley. Defendant was wearing a blue shirt and white pants. After ordering defendant to show his hands, defendant ran from the officers, through neighborhood yards. Officer Kristin Thomas chased after defendant and testified that he wore a blue shirt, white pants, and a do-rag. Officer Eric Sporman also chased defendant and testified that he wore a blue shirt and white pants. As defendant tried to jump over a fence, his pants were snared by the fence and he fell to the ground. However, before officers could detain him, defendant jumped up and ran to Apartment 3 at 519 N. McLellan. Officer Sporman used his taser gun in an attempt to incapacitate defendant, but defendant was able to enter the apartment and barricade himself inside. Defendant was later arrested.

Defendant is correct that none of the police officers testified that they saw him carrying a gun when they chased him through the Bay City neighborhood. The weapon used in the shooting, a 9-millimeter semi-automatic handgun, was later recovered behind a garage on N. Birney Street. However, a 9-millimeter ammunition clip and 9-millimeter ammunition were found inside of the apartment at 519 N. McLellan, and a firearms toolmark examiner testified that the spent shell casings found near the apartment and along the gunman's path were fired from the gun found on Birney Street. Defendant counters that there was insufficient proof that

[1] All of the witnesses who testified about the gunman's headwrap used the term "do-rag," which is a slang term for "a kerchief of scarf worn on the head to protect the hairdo . . . ." *Random House Unabridged Dictionary*, p 584 (2d ed, 1998).

he lived at 519 N. McLellan to link him to the clip and ammunition. However, evidence showed that he had two children with the woman who rented the apartment, the two were known to be personally involved because of previous police contacts, the woman who rented the unit identified defendant as her boyfriend, defendant's last name was on the mailbox of the apartment, and a cellular phone bill found inside the apartment linked defendant to that address. Thus, based on the eyewitness testimony of various residents and the evidence from police officers, there was sufficient evidence to establish that defendant was the person who possessed and shot the weapon involved in this crime.

Defendant claims his trial attorney prejudiced him when he stipulated that defendant had a previous conviction for second-degree home invasion for purposes of the felon in possession of a firearm charge. Because defendant's ineffective assistance of counsel claim is unpreserved, we review this issue for mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). As this Court explained in *People v Mesik (On Recon)*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009):

> In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant has not overcome the presumption that counsel's stipulation was a matter of trial strategy. Though defendant complains that defense counsel should merely have stipulated to a prior felony conviction, without specifying that the felony was home invasion, counsel clearly could have chosen to stipulate to the crime to avoid jury speculation about the nature of defendant's prior offense. Because our review is confined to mistakes apparent on the record, we have no basis to second-guess counsel's trial strategy on this issue. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant further claims that the trial court violated double jeopardy protections when he was convicted and punished for both felony-firearm and felon in possession of a firearm. Our Supreme Court has rejected this argument. In *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), the Court specifically ruled that, "[b]ecause the felon in possession charge is not one of the felony exceptions in the [felony-firearm] statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b." Accordingly, defendant's double jeopardy argument is without merit.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad