STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2010
v	No. 293645 Midland Circuit Court
JOHN HOUSTON CROW, Defendant-Appellant.	LC No. 09-003992-FH

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of carrying a concealed weapon (CCW), MCL 750.227, being a felon in possession of a firearm, MCL 750.224f, possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and operating a vehicle with a suspended license, MCL 257.904(1). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of 20 months' to 90 months' imprisonment for the CCW and felon in possession convictions, a 12-month term for the operating with a suspended license conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Several Midland police officers testified at trial to the circumstances surrounding their arrest of defendant near a Midland apartment complex in the early morning hours of January 12, 2009. The officers had received dispatch information concerning a distraught, possibly suicidal person leaving the complex with a gun. The first two officers to respond to the dispatch illuminated the interior of a car driving away from the apartment complex, and one of the officers identified defendant at trial as the driver and sole visible occupant of the car. The officers observed defendant, who had his driver's side window down, turn into the nearby driveway of another facility. Midland officer Lawrence Keeler described that defendant headed along the driveway of the other facility away from the officers, and "as [the vehicle] approached the building, . . . adjacent to the building, it slowed down" noticeably before turning around and heading out of the driveway. Other responding officers arrested defendant shortly thereafter. Keeler searched defendant's car, finding "nothing of evidentiary value," but recounted that "[i]n the area close to where [defendant] slowed down adjacent to the building, I noticed a mark in the snow like something had been tossed into the snow or like the snow had been disturbed," and that "[w]hen I looked closer, . . . I could see . . . a partially covered pistol." Keeler denied

noticing any footprints, other than those made by the officers that morning, in the vicinity of the pistol.

I

A

Defendant first raises several right to confrontation- and hearsay-based evidentiary challenges. He initially disputes the propriety of the trial court's admission of an audio-recorded 911 call made by defendant's sister early on January 12, 2009, shortly before defendant's arrest. Defendant contends that the recording embodied testimonial hearsay violative of his constitutional right of confrontation, and amounted to hearsay inadmissible under the Michigan Rules of Evidence. At trial, defendant offered no objection on any ground to the admission of the 911 recording, and we thus limit our review of his appellate challenges to "whether a plain error affected [his] substantial rights." *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005); MRE 103(d).

"'Testimonial statements of witnesses absent from trial (are admissible) only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" *People v Bryant*, 483 Mich 132, 138; 768 NW2d 65 (2009), cert gtd ___ US ___; 130 S Ct 1685; 176 L Ed 2d 179 (2010), quoting *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004); US Const, Am VI; Const 1963, art I, § 20.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).]

The 911 recording in this case plainly reflects the nontestimonial nature of the statements made by defendant's sister, who throughout the call exhibited some level of distress in trying to secure assistance for her suicidal brother. Defendant's sister, who speaks in the present tense during the call, advises the 911 operator at different points that her brother has locked himself in her bathroom with a knife and, later, that he has a silver handgun. The recording objectively establishes that defendant's sister phoned seeking emergency assistance, and that the emergency persisted throughout the call. *Davis*, 547 US at 822, 826-828. In conclusion, the admission of the 911 recording did not violate defendant's right of confrontation.[1]

[1] Defendant's sister testified at trial, but denied the ability to remember having called 911. Without citing any authority, defendant avers that his sister's minimal recollection of pertinent events precluded him from exercising his right to confront her. However, defendant ignores that

With regard to defendant's contention concerning the hearsay nature of the 911 recording, although the precise rationale the trial court employed in admitting the recording into evidence appears unclear, the prosecutor cited MRE 803(1) as one basis for admissibility. Pursuant to MRE 803(1), a court may admit as a hearsay exception "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." "The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be substantially contemporaneous with the event." *People v Hendrickson*, 459 Mich 229, 236 (lead opinion by Kelly, J.), 240 (concurring opinion by Boyle, J.); 586 NW2d 906 (1998) (internal quotation omitted).

The 911 recording at issue here satisfies admissibility prerequisites (1) and (3) because, as noted above, the recording documented defendant's sister's perceptions of defendant's suicidal ideations, his possession of a knife and a handgun, and his driving away from the apartment complex, all as they contemporaneously occurred. Defendant suggests that his sister "apparently did not see the man with a gun as she stated that she heard he might have a gun," thus disputing requirement (2), her personal perceptions of the events she reported. We have listened to the 911 recording several times. Although the sister's first mention of defendant's possession of a gun might have occurred with some prompting, she later unequivocally, and with no evident prompting, declared that she had perceived the handgun herself. The tape contains the following relevant exchange:

> *911 Operator*: Can you tell me, did you see or do you know that he has a gun on him?
>
> *Defendant's sister*: Yes, I know that he has it on him.
>
> *911 Operator*: You do know he has it?
>
> *Defendant's sister*: Yes.

The sister then goes on to identify the gun as a silver handgun. We conclude that the trial court properly admitted the 911 recording as a present sense impression because it satisfied all the admissibility prerequisites delineated in *Hendrickson*, 459 Mich at 236.[2]

B

"when witnesses are present at trial and could be cross-examined about their statements—even though they claim to remember nothing—the witnesses are 'available' for cross-examination within the meaning of the Confrontation Clause." *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999), overruled in part on other grounds in *People v Williams*, 475 Mich 245, 254; 716 NW2d 208 (2006).

[2] Although defendant maintains that defense counsel was ineffective for failing to object to the admissibility of the 911 recording, counsel need not have offered a groundless objection to the properly admitted recording. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant also characterizes as inadmissible testimonial hearsay trial testimony by Officer Brian Hampton summarizing his conversations with defendant's sister, which discussion took place after the sister had phoned 911. Again, defendant offered no objection at trial to Officer Hampton's testimony, which we consider to determine whether any plain error affected defendant's substantial rights. *Bauder*, 269 Mich App at 180. We will assume the testimonial nature of Officer Hampton's trial recitations of defendant's sister's statements that defendant had possessed a handgun and a knife and had threatened the sister at one point, all of which occurred at a point when the emergency situation prompting her 911 call had concluded or greatly diminished. Nonetheless, we detect no prejudice to defendant's substantial rights, given that the details mentioned by Officer Hampton are contained in the 911 recording, which the court properly admitted, and the other properly admitted circumstantial evidence of defendant's gun possession. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (observing that evidence admitted in violation of a defendant's right of confrontation remains subject to harmless error analysis); *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003) ("An erroneous admission of hearsay evidence can be rendered harmless error when corroborated by other competent testimony.").[3]

II

Defendant additionally submits that the prosecutor infringed on his constitutional right to remain silent. Specifically, defendant complains that the prosecutor improperly questioned him at trial about his neglect to suggest at the time of his arrest the identity of the owner of the gun found by the police, and that the prosecutor compounded the impropriety by commenting on defendant's silence during closing arguments. In light of defendant's failure to object at trial to the prosecutor's cross-examination query or the challenged portion of the prosecutor's closing argument, this Court considers defendant's unpreserved claims of constitutional error to ascertain whether they warrant reversal under the plain-error standard of review. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290, aff'd on reh 485 Mich 868 (2009).

The federal and state constitutions generally prohibit a prosecutor from referring to a defendant's silence that occurs "(1) after [the] defendant was arrested, (2) after [the] defendant had been read the *Miranda*[4] warnings, and (3) after [the] defendant chose to remain silent." *Borgne*, 483 Mich at 184-188, 191 n 6. But "[w]here a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial." *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999).

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[3] Given the cumulative nature of Officer Hampton's testimony, any purported failure of defense counsel to object to its admissibility gave rise to no reasonable probability that the result of defendant's trial would have differed. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

According to trial testimony by Officer John DuBois, who assisted in defendant's arrest, he advised defendant of his *Miranda* rights, defendant waived the rights, and defendant denied ever possessing a firearm. Defendant testified on direct examination that another man, Tom Everett, had been present at his sister's apartment shortly before she called 911, and the following relevant exchange ensued:

> *Defense counsel*: Okay. And why haven't you mentioned Tom before?
>
> Why didn't you tell the police? When you initially got stopped that night, why didn't you tell them about Tom?
>
> *Defendant*: Because I didn't think it mattered. I wasn't doing anything wrong but I needed mental help. And I didn't want to bring somebody else into something that really had nothing to do with him at the time.
>
> *Defense counsel*: Okay. Did you possess a firearm or a pistol on that night?
>
> *Defendant*: No, sir.
>
> *Defense counsel*: Do you know . . . whether or not Tom did?
>
> *Defendant*: Yes, sir.
>
> *Defense counsel*: And how do you know that?
>
> *Defendant*: Because when he was coming out of the back room with my sister, he said I got to get out of here. And I said why. He said I have a gun. I said, well, you better run, because my sister called the police.

The prosecutor cross-examined defendant, in pertinent part as follows, about his omission of any mention of Everett to the police:

> *Prosecutor*: Are you saying Officer DuBois lied yesterday when he testified to this jury he read to you *Miranda* Rights and he asked you about a gun. I know nothing about a gun. . . .
>
> *Defendant*: He asked me where the gun was at. He said if I had a gun, and I said I didn't know anything about a gun.
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> * * *
>
> . . . He said something about a gun, but the first time I knew I was being charged with a gun was when I got the police report.
>
> *Prosecutor*: But you knew that night they were looking for a gun; correct?
>
> *Defendant*: Correct.

> *Prosecutor*: So wouldn't it have been wise at that point to say, hey, listen, there's a guy named Tom Everett at the house. He had a gun. . . . [H]e's the one you should be looking at?
>
> *Defendant*: Well, I figured . . . I had nothing to do with the gun. So why would it be anything to me? I knew I couldn't be proven guilty on it.

The prosecutor later commented in his rebuttal closing argument:

> [Defendant] testified . . . he didn't . . . want to get this Tom guy in trouble for the gun . . . . Didn't think it was an issue.
>
> Well, on January 12th or 13th when Mr. Crow was arraigned on these charges that included all the weapons, maybe that would have been the time to come forward. The first time anybody hears evidence of this gun belonging to a Tom Everett or somebody other than the Defendant was today.

This Court's holding in *People v Davis*, 191 Mich App 29, 35-36; 477 NW2d 438 (1991), equally applies to the circumstances of this case:

> Had defendant here made no statements to police after he was advised of his *Miranda* rights, there is no question that the prosecutor's questions and comments regarding defendant's silence would have been improper. However, defendant here made postarrest, post-*Miranda* warning statements to the police. . . .
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> * * *
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> . . . [A] defendant who speaks following *Miranda* warnings must affirmatively reassert the right to remain silent. There is no indication in this case that, once defendant chose to speak to the police, he affirmatively invoked his right to remain silent with respect to [his] claim of self-defense.
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> * * *
>
> . . . Defendant here did not choose to remain silent. He chose to speak. Defendant cannot have it both ways—he cannot choose to speak and at the same time retain his right to remain silent. Absent an affirmative and unequivocal invocation of his right to remain silent following a postarrest, post-*Miranda* warning statement to police, defendant cannot claim that his right to remain silent was infringed by the prosecutor's questions and comments about his failure to assert his claim of self-defense before trial.

Because (1) defendant waived his *Miranda* rights and freely spoke with Officer DuBois after his arrest, and (2) the record does not reflect that defendant thereafter reasserted his constitutional right to remain silent, but instead took the stand to testify in his defense at trial, we conclude that neither the prosecutor's cross-examination inquiries of defendant why he had never mentioned the identity of Everett as purported the gun owner, nor the rebuttal argument reference to

defendant's failure to mention Everett before trial, infringed in any respect on defendant's constitutional rights. And with respect to defendant's related ineffective assistance of counsel contention, defense counsel need not have lodged a groundless objection to the prosecutor's inquiries or rebuttal argument reference to defendant's postarrest, post-*Miranda* neglect to mention Everett. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

III

Defendant next insists that the trial court misinformed "the jury of the law by which the verdict was controlled in a way which enabled the jury to apply the law to the facts of the case." Defendant criticizes the court's response to notes from the deliberating jury, arguing that the court did not clearly or adequately elucidate the distinctions between the elements of felon in possession and felony-firearm. However, when presented with several opportunities to object or comment regarding the trial court's responses to the jury's notes, including the court's reinstruction of the felony-firearm elements, defense counsel consistently replied, "No, your Honor." Defense counsel's repeated and intentional abandonment of any objections to the trial court's supplemental jury instructions constituted a waiver of his present appellate challenge, which extinguishes any error. *People v Dobek*, 274 Mich App 58, 64-66; 732 NW2d 546 (2007); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Furthermore, our review of the trial court's supplementary instructions belies defendant's appellate contention that the trial court disregarded the jury query concerning the elements of felony-firearm, "Is he committing a felony at the time or is this a previous felony?" The court reread an instruction tracking CJI2d 11.34, which delineates the elements of felony-firearm, and the court explained that the felony forming the basis for the felony-firearm count in this case constituted the instant felon in possession charge. Although defendant correctly observes that the court did not "repeat[] the instruction for . . . felon in possession," the court properly instructed the jury before deliberations on the elements of felon in possession,[5] the jurors had copies of the final instructions to consider during deliberations, and the record reveals no hint of jury confusion between the charged felon in possession and felony-firearm offenses after the court recited its supplemental instructions. In summary, when viewed as a whole, the entirety of the trial court's instructions included all the elements of the charged offenses and "clearly present[ed] the case and the applicable law to the jury." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

IV

Defendant lastly puts forth a proposition rejected by a consistent line of Michigan case law, namely that his convictions of both felon in possession and felony-firearm violate constitutional double jeopardy principles. As defendant acknowledges, our Supreme Court most

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[5] In final jury instructions, after reciting the felon in possession elements, the court apprised the jury, "The parties have stipulated to the fact that the Defendant has been convicted of a felony and was not eligible to possess a firearm on January 12th of 2009."

recently addressed this question in *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003). The Supreme Court explained as follows that a defendant's punishment for both felon in possession and felony-firearm did not amount to multiple punishments for the same offense:

> In considering MCL 750.227b in [*People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998),] we concluded that, with the exception of the four enumerated felonies [MCL 750.223 (unlawful sale of a firearm), MCL 750.227 (carrying a concealed weapon), MCL 750.227a (unlawful possession by licensee), and MCL 750.230 (alteration or removal of identifying marks)], it was the Legislature's intent "to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute." *Id*. at 698.
>
> We follow, as did the Court of Appeals in [*People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001)], our *Mitchell* opinion in resolving this matter. Because the felon in possession charge is not one of the felony exceptions in the 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. [*Calloway*, 469 Mich at 452 (footnote omitted).]

The Michigan Supreme Court decisions in *Calloway* and *Mitchell* and this Court's opinion in *Dillard* bind our resolution of this issue. MCR 7.215(C)(2); *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Moreover, defendant has offered no persuasive authority casting doubt on *Calloway*, *Mitchell*, and *Dillard*; he invokes only a federal district court's analysis in a case subsequently reversed by the United States Court of Appeals for the Sixth Circuit, *White v Howes*, 586 F3d 1025 (CA 6, 2009), cert den ___ US ___; 130 S Ct 3370; 176 L Ed 2d 1257 (2010).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher