

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TRAVELL RANDOLPH,

Defendant-Appellant.

UNPUBLISHED
December 28, 2010

No. 293999
Wayne Circuit Court
LC No. 09-007103-FH

Before: SHAPIRO, P.J., and SAAD and K.F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of 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. The jury acquitted defendant of the charge of carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant to two years' probation for the felon in possession of a firearm conviction and two years' imprisonment for the felony-firearm conviction. For the reasons set forth below, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant asserts that the prosecution presented insufficient evidence to support his convictions of felon in possession and felony-firearm.¹ To sustain a conviction for felon in possession of a firearm, the prosecutor must prove: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) less than five years elapsed since the defendant completed probation and satisfied certain other requirements. MCL 750.224f; *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004). “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a

¹ When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); see also MCL 750.227b. The prosecution and the defense stipulated that defendant had a prior felony conviction and was ineligible to possess a firearm. Thus, the only element in dispute is possession. The element of possession may be satisfied by actual or constructive possession and can be proved with circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000). Further, “[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.

Here, the evidence is sufficient to find that defendant had constructive possession of the weapon. The officers found the gun in the glove compartment directly in the front of the passenger seat where defendant was seated. Further, Mareeshia Mills told police officers that she had known defendant to have a gun, though she did not actually see defendant holding a gun that evening. Mills also made a voluntary, written statement to police that defendant had two guns and she identified the gun found in the glove compartment as his gun. Based on these facts, the jury could conclude that the location of the gun—directly in front of defendant—was known to defendant and it was readily accessible to him.

Though defendant argues that Mills’s testimony is not credible because of inconsistencies between her statement to the police on the night of the offense and her testimony at trial, this Court will not interfere with the jury’s role of weighing of the evidence or assessing the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). Thus, when viewed in the light most favorable to the prosecution, 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.

II. MOTION FOR NEW TRIAL

Defendant contends that the verdict was against the great weight of the evidence and that the trial court erred when it denied his motion for a new trial. A trial court’s decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *Lemmon*, 456 Mich at 648 n 27. When reviewing the denial of a motion for a new trial on the basis that the verdict is against the great weight of evidence, the test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Additionally, new trial motions that are based solely on the weight of the evidence regarding witness credibility are not favored and should be granted only with great caution and in exceptional circumstances. *Lemmon*, 456 Mich at 639 n 17. If the issue involves credibility and there is conflicting evidence, the question of credibility ordinarily should be left for the fact finder. *Id.* at 642-643. Conflicting testimony, even when impeached to some extent, is not a sufficient ground for granting a new trial. *McCray*, 245 Mich App at 638.

Defendant claims that the verdict is against the great weight of the evidence because Mills’s testimony was unreliable and inconsistent with her prior statements. Though Mills told police officers that defendant owned two guns and she described the one found in the vehicle, at trial, Mills denied any knowledge of defendant owning a gun. Defendant reasons that Mills’s

statements to the police were unreliable because she was upset with defendant on the night of the incident. He also emphasizes that no one saw defendant with a gun.

However, defendant's argument is based on witness credibility and, again, this is an issue for the jury. Although Mills's statements before and at trial were inconsistent, based on the evidence, the jury could conclude that, notwithstanding her retreat from the written statements she gave to the police, Mills accurately informed police that defendant owned the gun found in the glove compartment. Because the facts do not preponderate against the verdict, the trial court correctly denied defendant's motion for a new trial.

III. ASSISTANCE OF COUNSEL

Defendant further asserts that he was denied the effective assistance of counsel. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because defendant did not move for a *Ginther*² hearing, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

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 Mesik*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009). A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one which might have made a difference in the outcome of the trial. *Id.*

Defendant complains that defense counsel's failure to call additional witnesses to refute evidence of defendant's possession of the gun constitutes ineffective assistance of counsel. However, defendant does not name which witnesses he thinks counsel should have secured, nor does he state what pertinent information they would have contributed. Further, the record does not contain any indication that there are potential witnesses that may have aided the defense. Because defendant failed to provide proof of potential witnesses and how their testimony could have possibly changed the outcome of his case, we cannot find that defense counsel's failure to call additional witnesses deprived defendant of a substantial defense. Thus, we hold that

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

defendant cannot overcome the strong presumption that that defense counsel's decision not to call additional witnesses constituted sound trial strategy.

We also observe that defense counsel presented a coherent and unified defense theory. Defense counsel's theory was that Mills was an upset ex-girlfriend who told police that defendant carried a gun only because she was angry at defendant. Defense counsel attacked Mills's truthfulness, vigorously cross-examined her regarding her various statements, and argued that her credibility as a witness was highly questionable. Defense counsel emphasized concerns about Mills's credibility in his closing argument. The fact that defense counsel's trial strategy was unsuccessful does not constitute ineffective assistance of counsel. See *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant was not deprived of a substantial defense as a result of defense counsel's actions.

Defendant also requests a remand for further fact finding on these issues. A defendant is not entitled to a *Ginther* hearing as a matter of right. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). A defendant must demonstrate that there are factual issues regarding his or her counsel's performance that require further inquiry. *Id.* However, defendant has not filed a motion to remand with this Court and has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim. See MCR 7.211(C)(1)(a)(ii). Therefore, we hold that a remand on this basis is unwarranted.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Kirsten Frank Kelly