# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 17, 2016 |
| v | No. 328578<br>Wayne Circuit Court |
| DANDRE FAIRGOOD, also known as DEANDRE FAIRGOOD,<br><br>Defendant-Appellant. | LC No. 14-009823-02-FH |

Before: WILDER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a firearm during the commission of a felony (felony firearm), second offense, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to five years in prison for the felony firearm conviction and to "time served" for the misdemeanor possession of marijuana conviction. We affirm.

On October 17, 2014, Detroit police officer Anthony O'Rourke responded to the area of 1704 Atkinson due to multiple complaints concerning narcotics sales at that location. After observing several people go up to the location for short periods of time and suspecting narcotics activity, O'Rourke called for backup. Two other officers responded and as they were approaching the house, they saw another individual arrive on a bicycle, approach the front door and request that the person who answered the door give him "ten." As the individual entered the house, the officers made their presence known and entered as well. Defendant, who was sitting on the couch, rose and ran awkwardly toward a back bedroom. As an officer approached him, he drew a 44 caliber handgun from somewhere on his right side and threw it to the ground. A subsequent search of defendant revealed a bag of marijuana on his person. Defendant was ultimately tried on charges of carrying a concealed weapon, MCL 750.227; felon in possession of a firearm, MCL 750.224f; felony firearm, MCL 750.227b, and; possession of marijuana, MCL 333.7403(2)(d). He was convicted only of the felony firearm and possession of marijuana charges.

Defendant first argues that the prosecutor failed to present sufficient evidence to support the felony firearm conviction. We disagree.

When determining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"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). Defendant argues that the prosecution failed to prove beyond a reasonable doubt that he possessed a firearm. More specifically, defendant argues that Officer Bastine's testimony that defendant possessed a .44 caliber revolver was incredible because it was unreasonable that Officer Bastine would have failed to see such a large weapon hidden under defendant's clothes before he pulled it out. When reviewing the sufficiency of the evidence, however, this Court will "not interfere with the jury's assessment of the weight and credibility of witnesses or the evidence." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). Accordingly, defendant's argument, which is based solely on the credibility of Officer Bastine's testimony, is without merit.

Defendant also argues that the jury's verdict regarding the felony firearm charge was contrary to the great weight of the evidence, and the trial court erred in denying his motion for new trial. Again, we disagree. A motion for a new trial on the ground that the verdict was against the great weight of the evidence should be granted only when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). This Court reviews the trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

Defendant argues that the jury's verdict finding him guilty of felony firearm was against the great weight of the evidence because Officer Bastine's testimony was not credible. Defendant's testimony that he was not carrying a gun directly conflicted with Officer Bastine's testimony that defendant drew the gun from his right side and dropped in on the ground. While defendant argues that Officer Bastine's testimony was not credible because the .44 caliber revolver was too big to be hidden in defendant's clothing, and too big to go unnoticed by Officer Bastine, on the record presented, this Court sees no reason to disturb the jury's credibility determination. The question whether a verdict was against the great weight of the evidence "usually involves matters of credibility or circumstantial evidence, but if there is conflicting evidence, the question of credibility ordinarily should be left for the fact-finder." *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010). Accordingly, we cannot conclude that the verdict was against the great weight of the evidence.

Defendant next argues that the trial court erred in instructing the jury regarding the possession element of the felony firearm offense. Defendant raises several arguments with respect to the jury instruction, all of which are prompted by the jury's questions to the court during deliberations on the felony firearm charge. We find that the jury was properly instructed.

Generally, claims of instructional error are reviewed de novo on appeal. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal." *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). This Court will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*. To preserve an instructional issue for appeal, a party must object to the instruction before the jury deliberates. MCR 2.512(C); *Gonzalez*, 256 Mich App at 225.

Defendant argues that the trial court failed to emphasize the knowledge requirement of possession, given that the jury appeared to struggle with the "mere presence issue of constructive possession." We note that in its instructions to the jury before the jury retired to deliberate, the court instructed the jury that, to find defendant guilty of felony firearm, the jury must find that defendant "knowingly carried or possessed a firearm." Thus, the fact that knowledge was a requisite element was clear, albeit not emphasized.

The jury sent out a note during deliberations indicating that it needed clarification of "element one" on the felony firearm charge. Element one, as instructed by the trial court and as found in the Michigan Criminal Jury Instructions concerns the underlying felony. See, M Crim JI 11.34. Nevertheless, a judge filling in for the trial judge instructed the jury on possession, as provided in M Crim JI 11.34a. A short time later, the jury asked for clarification of the term "possession" for count 3, which was a charge of felon in possession of a firearm and for which defendant was not convicted. The replacement judge again instructed the jury on the definition of "possession" as found in M Crim JI 11.34a, and additionally stated that she could provide an example. The replacement judge stated, "Possession can be physical control, I got this pen, okay. What if I put the pen here? Do I have reasonable access to the pen? The person knows the location of the, in my hypothetical, the pen, and has reasonable access to it, but it ain't in my hand . . . ." Later the same day, the jury sent out another note asking "does access mean in plain sight when considering count three's definition of possession?" The replacement judge instructed, "I can't answer that. That's a question of fact." She further stated, "How it got from point A to point B, that's a question of fact." The replacement judge then again gave the definition of possession found in M Crim JI 11.34a and provided the jury with a written copy of the instruction.

On the next day of deliberations, the judge who presided over the trial was back and addressed the jury's note from the prior day asking whether access meant in plain sight. The trial judge confirmed that the jury had received the instruction on possession, then further instructed that the jury had to use its common sense and reasoning to decide whether there was access or not. Given the trial court's instructions, we see no error in its failure to emphasize the knowledge portion of the felony firearm instruction. The definition of "possession" repeatedly provided by the trial court states that the person must "know the location of the firearm" as well as have reasonable access to it. Knowledge is thus twice referenced.

We also see no error in the replacement judge's throwing down her pen and indicating that she possessed the pen even after throwing it down. The judge's demonstration merely illustrated that a person can have possession of an object by having access to, and control over, the object, even if the person does not have physical control of the object. The jury had already

been instructed that it must find that defendant "knowingly possessed" a firearm in order to convict defendant of the felony firearm offense.

Viewing the instructions as a whole, the instructions appear to have fairly presented the issues to be tried and sufficiently protected defendant's rights. *Gonzalez,* 256 Mich App at 225. Accordingly, defendant has not shown that he is entitled to reversal on the basis of the trial court's jury instructions regarding possession.

Finally, defendant argues that he was denied the effective assistance of counsel because defense counsel failed to investigate Sparkle Jones as a witness and further failed to call her as a witness at trial. We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must satisfy a two-part test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, a defendant must show that counsel's performance was deficient. *Id.* at 600. "This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Id.*, quoting *Strickland*, 466 US at 687. Second, a defendant must also show that counsel's deficient performance prejudiced the defense. *Strickland*, 466 US at 687; *Carbin*, 463 Mich at 600. To demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, 466 US at 694; *Carbin*, 463 Mich at 600.

Defendant first argues that defense counsel failed to investigate Sparkle Jones, the wife of defendant's co-defendant, as a witness. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 690-691. The evidence presented at the *Ginther*[1] hearing does not support defendant's contention that defense counsel failed to investigate Sparkle Jones as a witness. Defense counsel testified that she spoke to Sparkle Jones before trial, and that Jones's husband's attorney told counsel that he intended to advise Ms. Jones's husband not to testify at defendant's trial. While Ms. Jones denied ever speaking to defense counsel, the trial court found that testimony incredible. The trial court also found other portions of Ms. Jones testimony not credible. A review of the testimony from the *Ginther* hearing shows that defense counsel was aware of Sparkle Jones as a potential witness but made a strategic choice not to call her at trial. Defendant has not demonstrated ineffective assistance of counsel with respect to this issue.

Furthermore, defendant has not shown that defense counsel's decision not to call Sparkle Jones as a witness at trial amounted to ineffective assistance of counsel. A decision whether to call or question a witness is presumed to be a matter of trial strategy, which this Court will not second-guess on appeal. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *Id.*

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defense counsel gave reasonable, strategic reasons for failing to call Sparkle Jones as a witness. Defense counsel testified both that defendant told counsel that Ms. Jones would not cooperate at trial and that counsel did not think Ms. Jones would cooperate because her husband's attorney told counsel that he intended to advise Ms. Jones's husband not to testify at defendant's trial. Defense counsel testified that, while counsel spoke to Ms. Jones at some point before trial, counsel did not subpoena Ms. Jones because she was "acting funny," and counsel did not want to run the risk of putting Ms. Jones on the witness stand to "have her say, I don't know" or "take the fifth, which she really could have because it's her home where drugs and guns are." Defense counsel further explained her reasons for not calling Ms. Jones as a witness as follows: "I also knew that Mr. Jones had just gotten a gravy deal from the gun board and I appreciated all the dynamics of that. That they probably have been quietly instructed not to come in and contradict anything that happened on Mr. Jones's case."

Given defense counsel's reasonable belief that Sparkle Jones would not cooperate at trial and would not make a good witness because she was "acting funny," defendant has not overcome the presumption that counsel's decision not to call Ms. Jones was sound trial strategy. Accordingly, defendant has not shown that he is entitled to relief with respect to this issue.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto