

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 23, 2012

v

DONTAYE LAMONTE JONES,
Defendant-Appellant.

No. 301649
Saginaw Circuit Court
LC No. 10-033875-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

DONTAYE LAMONTE JONES,
Defendant-Appellant.

No. 301651
Saginaw Circuit Court
LC No. 10-034468-FH

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

PER CURIAM.

In Docket No. 301649, defendant appeals as of right his jury conviction of unarmed robbery, MCL 750.530.¹ Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 200 months to 50 years' imprisonment to be served prior and consecutive to the sentences imposed in Docket No. 301651. Defendant had 144 days of jail credit. In Docket No. 301651, defendant appeals as of right his jury convictions of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, resisting a police officer, MCL 750.81d, receiving and concealing a stolen firearm, MCL 750.535b, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL

¹ Defendant was acquitted of conspiracy to commit unarmed robbery, MCL 750.157a, in Docket No. 301649.

750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to serve concurrent sentences of 76 months to 18 years' imprisonment for his CCW conviction, 76 months to 18 years' imprisonment for his felon in possession conviction, 76 months to 15 years' imprisonment for his resisting a police officer conviction, 76 months to 18 years' imprisonment for his receiving and concealing a firearm conviction; and consecutive two year prison sentences for each felony-firearm conviction. For the reasons stated in this opinion, we affirm defendant's convictions, but remand for resentencing and for correction of the judgment of sentence.

I. FACTS & PROCEEDINGS

Defendant's conviction in Docket No. 301649 stems from an incident that occurred at a Wal-Mart on January 21, 2010. Jonathan Jozwiak, a Wal-Mart asset protection associate, observed defendant, Donald Holden, and Qiani Pittman walking through the store and placing merchandise in a backpack that was in their shopping cart. The group also placed some merchandise in the shopping cart without concealing it in the backpack. Jozwiak and another asset protection associate followed the group and observed them repeatedly placing some items into the shopping cart and concealing some inside the backpack. Jozwiak observed defendant direct Holden and Pittman to place certain items in the cart. Defendant, Holden, and Pittman eventually went through a checkout lane, and paid for the items that were in the shopping cart; however, the group left the backpack in the shopping cart and did not pay for any of the items that were inside it.

Jozwiak and another asset protection associate stopped defendant's group as they were leaving and confronted them about the merchandise in the backpack. Defendant, Holden, and Pittman all denied taking the items in the backpack, and physically resisted when the asset protection associates tried to detain them. After the police arrived, it was discovered that there were 28 items valued at a total of \$153.49 that were not paid for taken from the store by defendant, Holden, and Pittman.

Defendant was charged with unarmed robbery and conspiracy to commit unarmed robbery. Defendant's jury trial began on October 1, 2010. On October 7, 2010, the jury found defendant guilty of unarmed robbery, but acquitted him of the conspiracy charge.

Defendant's convictions in Docket No. 301651 are the result of defendant's behavior during a traffic stop on June 18, 2010. At about 3:30 a.m., Michigan State Police Officer Paul Oster attempted to stop a vehicle because the passenger headlight was not working. Oster turned on the flashing red light on his vehicle and directed two spotlights at the vehicle he intended to stop. Oster pulled up behind the vehicle at a stop sign, and once the vehicle turned, Oster activated his vehicle's siren. The vehicle Oster was pursuing accelerated. Oster observed defendant in the backseat of the vehicle moving from the right to the center and leaning forward. Oster eventually pulled along the side of the vehicle he was pursuing and intentionally struck the vehicle with his patrol vehicle, causing it to spin and eventually stop. Oster observed two firearms thrown from the vehicle as it was stopping. The firearms were identified as a .45-caliber firearm and a 9-millimeter firearm. A .357-caliber firearm was discovered in the vehicle between the middle pillar and the front passenger seatbelt; during the trial an officer testified that the firearm was primarily in the backseat of the vehicle. Two of the firearms were identified as

firearms that were reported stolen, the serial number on one of the firearms was scratched off making that firearm unidentifiable.

Defendant immediately ran from the scene after the vehicle stopped. Another officer chased defendant and eventually arrested him. Police found a .45-caliber magazine with bullets in it and a handful of 9-millimeter bullets in defendant's pockets. Defendant was charged with carrying a concealed weapon, felon in possession of a firearm, resisting a police officer, receiving and concealing a stolen firearm, and three counts of felony-firearm. Defendant's jury trial began on October 13, 2010, and the jury convicted defendant of the charged crimes on October 15, 2010.

Defendant was sentenced for his convictions in both cases on November 3, 2010. Defendant now appeals as of right in both cases, which have been consolidated on appeal.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues on appeal that his defense counsel was ineffective for failing to object to a comment made by a witness during plaintiff's closing argument in Docket No. 301649. Defendant also argues that in Docket No. 301651 defense counsel was ineffective for failing to move for separate trials, and for failing to object to the scoring of sentencing offence variable 13 (OV 13).

No evidentiary hearing was held in regard to defendant's claims of ineffective assistance of counsel in either case; accordingly, our review of defendant's claims is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 312 (quotation and citation omitted).

Defendant first claims that defense counsel in Docket No. 301649 was ineffective for failing to object to the unsolicited comments of a witness. During closing argument, the prosecutor was reviewing a videotape for the jury when a witness, who had been granted permission to operate the computer playing the videotape, interjected. The prosecutor was summarizing the events depicted in the video when the witness stated: "That's a block on the left." The prosecutor immediately responded, explaining "you can't speak now it's during argument." The prosecutor continued to provide closing argument without objection or interruption.

The witness's interjection was improper because a criminal defendant has the right to a fair and impartial jury, and a jury may not deliberate on extraneous facts not introduced as evidence. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Nevertheless, defendant cannot establish that there exists a substantial possibility that the unsolicited, limited, and ambiguous comment could have affected the jury's verdict. *Id.* at 88-89. To prove that an extraneous influence affected the verdict, a defendant must demonstrate that it was substantially

related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. *Id.* Based on the record before us, it is not clear what “a block on the left” refers to. Defendant argues that the witness was asserting that he was assisting one or both of his codefendants by creating “a block” so the cohort could escape with stolen merchandise. That is possible, but there is nothing before this Court to reveal who or what was doing the “blocking” and who or what was being “blocked.” Moreover, it is also possible that the witness was not referring to physical blocking.

Additionally, the prosecutor immediately addressed the error by telling the witness it was improper for him to interject during closing argument. And while the trial court did not specifically address the matter, it generally instructed the jury that it could only consider witnesses’ sworn testimony and admitted evidence when deciding the facts. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Therefore, even assuming defense counsel unreasonably failed to object to the improper comment, we conclude that defendant has not demonstrated any prejudice. *Pickens*, 446 Mich at 312. Accordingly, defendant was not denied the effective assistance of counsel.

In Docket No. 301651, defendant was jointly tried with the other individuals in the vehicle. On appeal, defendant first claims that defense counsel was ineffective for failing to move for severance.

A defendant does not have an absolute right to a separate trial. *People v Hoffman*, 205 Mich App 1, 20; 518 NW2d 817 (1994). Indeed, there is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52-53; 492 NW2d 490 (1992). Joinder of distinct criminal charges is permitted against multiple defendants where “(1) there is a significant overlapping of issues and evidence, (2) the charges constitute a series of events, and (3) there is a substantial interconnectedness between the parties defendant, the trial proofs, and the factual and legal bases of the crimes charged.” *People v Missouri*, 100 Mich App 310, 349; 299 NW2d 346 (1980).

Severance should be granted if the offered defenses of joined defendants are antagonistic or mutually exclusive. *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997). In order to require severance, defenses must be both inconsistent and mutually exclusive or irreconcilable. *People v Cadle*, 209 Mich App 467, 469; 531 NW2d 761 (1995). A defense is antagonistic when it appears that a codefendant may testify to exculpate himself and to incriminate the defendant. *Hoffman*, 205 Mich App at 19-20; *People v Harris*, 201 Mich App 147, 152-153; 505 NW2d 889 (1993). A conclusory statement of antagonistic defenses without affidavits defining the inconsistencies between them is insufficient to establish that the defenses are irreconcilable. *Harris*, 201 Mich App at 152-153; see MCR 6.121(C).

During closing argument defense counsel for one of the codefendants asserted that it was defendant who possessed a firearm.² Before closing argument it was not evident that defendant's codefendants were going to inculcate him. Both defendant and his codefendants argued in opening statements that they did not know about or possess the recovered firearms. There was no testimony that any of the three was seen with the firearms, just that two guns were thrown from the passenger side of the car and one was found stuck in the rear of the front seat. Accordingly, the defenses were not recognizably irreconcilable when trial began. Therefore, it is unlikely that defendant would have been able to establish the need to sever his trial. Because it is unlikely that a motion for severance would have been granted before trial, defense counsel's performance was not deficient. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (Defense counsel is not ineffective for failing to make a frivolous request).

Further, defendant has not overcome the presumption that defense counsel's decision to not object to a joint trial was a matter of sound trial strategy that this Court will not second guess with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defense counsel could have reasonably determined that joining the trials gave him the best opportunity to demonstrate reasonable doubt as to whether defendant possessed the weapons. Therefore, we conclude that defendant has failed to establish that defense counsel was ineffective for failing to move for severance.

III. SCORING OF OV 13

Defendant also asserts that defense counsel was ineffective because defense counsel did not object to scoring OV 13 at 25 points. Defendant argues that the trial court improperly found that defendant committed three or more crimes against a person within a five year period because there was insufficient evidence to establish he engaged in conspiracy to commit unarmed robbery.

Twenty-five points are scored under OV 13 where the scored "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c); see also *People v Bonilla-Machado*, 489 Mich 412, 422-423; 803 NW2d 217 (2011). "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). A sentencing factor need only be proved by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006).

The trial court scored 25 points for OV 13 based on defendant's unarmed robbery conviction, conspiracy to commit unarmed robbery charge, and defendant's resisting a police officer conviction. Defendant concedes that his convictions for unarmed robbery and resisting a police officer constitute two crimes against a person that occurred in the past five years, see

² Defendant and his two co-defendants all faced slightly different charges, but they were all charged with CCW, MCL 750.227, receiving and concealing a stolen firearm, MCL 750.535b, and felony-firearm, MCL 750.227b.

MCL 777.16y; MCL 777.16d, but he maintains that the conspiracy charge was improperly considered. In light of our Supreme Court's recent decision in *Bonilla-Machado*, we agree with defendant, albeit for different reasons, that the trial court erred when it used the conspiracy charge as a crime against a person for purposes of scoring OV 13.

In *Bonilla-Machado*, 489 Mich at 424-425, our Supreme Court noted that conspiracy is classified as a crime against public safety, and held that for purposes of scoring OV 13, a crime against public safety may not be transformed into a crime against a person based on the underlying criminal activity in order to establish a continuing pattern of criminal behavior under OV 13. See also *People v Pearson*, 490 Mich 984; 807 NW2d 45 (2012). Therefore, the trial court erred when it considered defendant's conspiracy charge a crime against a person for purposes of scoring OV 13 because all conspiracy charges are crimes against public safety. Accordingly, we remand for resentencing.³

IV. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to convict him of CCW, concealing a stolen firearm, felon in possession of a firearm, and felony-firearm because the evidence did not sufficiently establish that he possessed a firearm.

We review challenges to the sufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). When we review a claim of insufficient evidence, "we examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

It is up to the finder of fact to make decisions about the credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). We will not interfere with the trier of fact's role of determining the credibility of witnesses. *Id.*

All four of defendant's firearms-related convictions required proof that defendant possessed or constructively possessed a firearm. The CCW statute prohibits individuals from carrying a pistol, "whether concealed or otherwise, in a vehicle operated or occupied by the

³ We note that defendant's PSIR indicates that in 2006 he was charged with resisting and obstructing a police officer; it appears that the charge was later dropped in accordance with a plea agreement. Further, defendant's PSIR indicates he was also tried and acquitted of several other crimes against a person in 2006, including first-degree murder. The record before us does not indicate whether these charged crimes against a person could be established by a preponderance of the evidence for purposes of scoring OV 13.

person.” MCL 750.227(2); see also *People v Biller*, 239 Mich App 590, 594; 609 NW2d 199 (2000). To prove the charge of concealing a stolen firearm, it must be shown that defendant (1) received, concealed, stored, bartered, sold, disposed of, pledged, or accepted as security for a loan (2) a stolen firearm or stolen ammunition, (3) knowing that the firearm or ammunition was stolen. *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). The felon in possession statute provides, in pertinent part: “[A] person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state.” MCL 750.224f(1); see also *People v Brown*, 249 Mich App 382, 383; 642 NW2d 382 (2002). “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 Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007) (citation and quotation omitted).

Constructive possession exists where the defendant is in proximity to the firearm with indicia of control of the weapon. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). In other words, there is constructive possession of a firearm where the location of the weapon is known to defendant and it is reasonably accessible to the defendant. *Id.* at 471. Possession of a firearm may be sole or joint; therefore, dominion or control over the object need not be exclusive to defendant. *Id.* at 469-470.

The evidence in this case established defendant’s constructive possession of the firearms. The state police officer who stopped the vehicle defendant was riding in testified that he observed defendant looking at him from the backseat of the vehicle. Defendant was moving around from the right side to the center while appearing to lean forward. Further, at the end of the car chase, the officer saw two firearms thrown, almost simultaneously, over the vehicle from the passenger side. One of the guns was identified by a witness as the .45-caliber pistol stolen from his home, and the other was a 9-millimeter pistol that could not be traced because the serial number was removed. When defendant was apprehended, he had a handful of 9-millimeter bullets in his pocket and two loaded .45-caliber ammunition magazines. A firearms expert matched the ammunition to the firearms that were thrown from the vehicle.

Inside the vehicle, the police also found a .357-caliber pistol that was identified by a witness as stolen from his home. The handle of the .357-caliber was between the middle pillar and seatbelt holder for the front seat with the gun predominantly in the back seat area. The police believed that the .357-caliber could have been accessed by the front seat or the back seat. We conclude that this evidence, and the reasonable inferences that arise from it, constitute satisfactory proof of possession with respect to each of the firearms. Accordingly, there was sufficient evidence to support defendant’s firearms-related convictions.

V. JUDGMENT OF SENTENCE

On appeal defendant argues that the trial court erred when it ordered that defendant’s felony-firearm sentence be served consecutively to his CCW sentence. The prosecution concedes that the trial court erred.

Because there was no objection to defendant’s sentence in the trial court, our review is for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Our Supreme Court has specifically held that the plain language of the felony-firearm statute provides that a felony-firearm sentence shall be served consecutively with and preceding any term of imprisonment imposed for the felony offense during which the defendant possessed a firearm. *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). The felony-firearm statute, MCL 750.227b(1), specifically provides that a person is not guilty of felony-firearm when he or she commits or attempts to commit a felony in violation of MCL 750.227, which is the CCW statute. Therefore, CCW cannot be a predicate felony for felony-firearm. Further, “there is no statute mandating that a sentence for a CCW conviction run consecutively to a sentence for a felony-firearm conviction.” *People v McCrady*, 213 Mich App 474, 486; 540 NW2d 718 (1995). Accordingly, we agree with the parties that the judgment of sentence should be amended to reflect that defendant’s CCW conviction should run concurrently with his felony-firearm convictions.

Remanded for resentencing and correction of the judgment of sentence in conformity with this opinion. Affirmed in all other respects. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello