

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 24, 2012

v

DEANDRE CORTEZ KEYS,
Defendant-Appellant.

No. 303588
Oakland Circuit Court
LC No. 2010-233932-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

MARK GIBSON HOLMES,
Defendant-Appellant.

No. 304169
Oakland Circuit Court
LC No. 2010-233923-FC

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

In this consolidated appeal, Deandre Cortez Keys¹ appeals as of right his jury trial convictions of armed robbery,² two counts of possession of a firearm during the commission of a felony (“felony-firearm”),³ and possession of a short-barreled shotgun.⁴ Keys was sentenced to concurrent terms of 81 months to 20 years’ imprisonment for his armed robbery conviction and three to five years’ imprisonment for the possession of a short-barreled shotgun conviction, to be

¹ Docket No. 303588.

² MCL 750.529.

³ MCL 750.227b.

⁴ MCL 750.224b.

served consecutive to concurrent terms of two years' imprisonment for each felony-firearm conviction. Mark Gibson Holmes⁵ appeals as of right his jury trial conviction of armed robbery.⁶ Holmes was sentenced to 45 months to 45 years' imprisonment for his armed robbery conviction. We affirm.

I. DOCKET NO. 303588

On appeal, Keys argues that the prosecution failed to present sufficient evidence to demonstrate that he knew that the shotgun he possessed was short-barreled. Thus, the trial court erred in denying his motion for a directed verdict. We disagree. This Court reviews the trial court's ruling on a motion for a directed verdict de novo.⁷ When reviewing a trial court's ruling on a motion for a directed verdict, we view the evidence "in a light most favorable to the prosecution in order to 'determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.'"⁸

"A person shall not manufacture, sell, offer for sale, or possess a short-barreled shotgun or a short-barreled rifle."⁹ The term "short-barreled shotgun" "means a shotgun having 1 or more barrels less than 18 inches in length or a weapon made from a shotgun, whether by alteration, modification, or otherwise, if the weapon as modified has an overall length of less than 26 inches."¹⁰ To be found guilty of possession of a short-barreled shotgun, the prosecution must prove "the intentional possession of the prohibited gun with the knowledge of its character as a weapon."¹¹ The requisite knowledge, however, does not extend to the specific aspects of the weapon that render the weapon illegal.¹²

The prosecution presented evidence that Keys removed a shotgun from the trunk of a vehicle and then approached Adam Williams's car with the shotgun in hand. Keys then pointed the shotgun at Williams's head. After the robbery, Keys took the shotgun to the Silver Oaks Apartments and attempted to sell it. The type of shotgun that Keys attempted to sell was identified by Michael Elliott at trial. Additionally, it was established that the barrel of the shotgun that Keys possessed measured 15 1/2 inches in length. As such, the prosecution

⁵ Docket No. 304169.

⁶ MCL 750.529.

⁷ *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

⁸ *People v Hartuniewicz*, 294 Mich App 237, 242; ___ NW2d ___ (2011) (citation and quotation omitted).

⁹ *People v Hill*, 433 Mich 464, 472; 446 NW2d 140 (1989), citing MCL 750.224b.

¹⁰ *Hill*, 433 Mich at 472, citing MCL 750.222(i).

¹¹ *Hill*, 433 Mich at 479.

¹² See *People v Quinn*, 440 Mich 178, 184-185; 487 NW2d 194 (1992) (holding that the prosecution is not required to prove that the defendant knew the firearm was loaded in demonstrating that the defendant was guilty of transporting or possessing a loaded firearm).

presented evidence sufficient to establish that Keys intentionally possessed a shotgun with knowledge of the shotgun's character as a weapon, and that the barrel was less than 18 inches in length. Accordingly, the trial court did not err in denying Keys's motion for a directed verdict.¹³

Keys also argues that because there was insufficient evidence to establish that he knew the shotgun he possessed was short-barreled, he was inappropriately scored 10 points for prior record variable ("PRV") 7.¹⁴ We disagree. This unpreserved issue is reviewed for plain error affecting Keys's substantial rights.¹⁵

As there was sufficient evidence to support Keys's conviction for possession of a short-barreled shotgun, Keys has failed to demonstrate plain error by the trial court in scoring ten points for PRV 7.¹⁶ Therefore, Keys's argument must fail.

II. DOCKET NO. 304169

Holmes argues that the trial court erred when it failed to suppress evidence regarding the cellular telephone found by Sergeant Lawrence Porter in Holmes's nightstand. Specifically, Holmes asserts that Porter's examination of the telephone to determine its make and whether it contained a battery constituted an illegal search and seizure. We disagree. A trial court's decision regarding a motion to suppress evidence is reviewed de novo, while the trial court's findings of fact are reviewed for clear error.¹⁷ "A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made."¹⁸ Deference must be given "to the trial court's factual findings, particularly where the credibility of witnesses is involved."¹⁹ Thus, this Court "may not substitute [its] judgment for that of the trial court and make independent findings."²⁰

Holmes does not challenge the officers initially entering his home. He also does not challenge Porter opening the nightstand drawer pursuant to a protective search. Rather, Holmes contends that Porter's examination of the cellular telephone went outside of the scope of what was necessary for the protective search.

¹³ *Hartuniewicz*, 294 Mich App at 242.

¹⁴ PRV 7 is regarding subsequent or concurrent felony convictions and is scored at ten points when "[t]he offender has 1 subsequent or concurrent conviction." MCL 777.57(b).

¹⁵ *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

¹⁶ *Id.*

¹⁷ *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

We find, however, that the seizure of the cellular telephone was permissible under the plain view doctrine. The United States and Michigan constitutions “guarantee the right of persons to be secure against unreasonable searches and seizures.”²¹ “The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item’s incriminating character is immediately apparent.”²² “Immediately apparent” means having probable cause that the item is seizable without further search.²³ Porter was aware that an Evo brand cellular telephone had been stolen during the armed robbery. Porter also was aware that GPS tracking of the stolen cellular telephone led law enforcement to the rear yard of Holmes’s residence and that Holmes was believed to be a suspect in an armed robbery. Also, Porter observed a cellular telephone on top of the nightstand, and inside the ajar nightstand drawer, observed a second cellular telephone. Furthermore, when questioned by law enforcement, Holmes denied having a cellular telephone other than the telephone that was on top of the nightstand. As such, seizure of the cellular telephone was permitted as there was probable cause to believe that it was the stolen Evo cellular telephone.²⁴ Moreover, “[o]nce an object is lawfully seized, a cursory examination of the exterior of that object, . . . , is not, . . . , a constitutional ‘search’ for purposes of the Fourth Amendment.”²⁵ Accordingly, the trial court did not err when it admitted evidence regarding the cellular telephone’s make and that the battery that had been removed.²⁶

Holmes next argues that the trial court erred when it granted the prosecution’s motion to reopen proofs and amend its witness list to add Keys and Simpson as witnesses against Holmes. We disagree. Both a trial court’s decision to allow a late endorsement of a witness and to permit the reopening of proofs are reviewed for an abuse of discretion.²⁷

“A prosecutor’s late endorsement of a witness is permitted at any time upon leave of the court and for good cause shown.”²⁸ “Generally, the reopening of proofs for either the prosecution or defense rests within the sound discretion of the trial judge.”²⁹ “Relevant in ruling on a motion to reopen proofs is whether any undue advantage would be taken by the moving

²¹ *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996), citing US Const, Am IV; Const 1963, art 1, § 11.

²² *People v Champion*; 452 Mich 92, 101; 549 NW2d 849 (1996).

²³ *Id.* at 102-103.

²⁴ *Id.*

²⁵ *People v Fletcher*, 260 Mich App 531, 549; 679 NW2d 127 (2004).

²⁶ *Galloway*, 259 Mich App at 638.

²⁷ *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992); *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001).

²⁸ *Canter*, 197 Mich App at 563.

²⁹ *People v Collier*, 168 Mich App 687, 694; 425 NW2d 118 (1988).

party and whether there is any showing of surprise or prejudice to the nonmoving party.”³⁰ As Keys and Simpson were once codefendants, they were unavailable to be called as witnesses against Holmes until they agreed to testify at trial.³¹ Because of their initial unavailability, good cause was shown for the late endorsement of Keys and Simpson as witnesses.³² Contrary to Holmes’s assertion, there is no evidence that the trial court permitting the late endorsement of witnesses and reopening proofs caused Holmes to suffer prejudice, thus depriving him of a fair trial.³³ The record demonstrates that Holmes had ample notice of the prosecution’s intent to call Keys and/or Simpson as witnesses against him if they became available. Holmes’s contention that the late endorsement and proofs deprived him of a fair trial because it rendered his defenses “useless” is without merit. A review of the record reveals that Holmes raised the defenses that the prosecution failed to meet its burden of proof, mistaken identity due to disparate physical characteristics, credibility based on contradictory testimony, and duress. Therefore, there was no abuse of discretion by the trial court.³⁴

Lastly, Holmes argues that his trial counsel was ineffective for failing to request that the trial court sever his trial from the trials of Keys and Simpson. We disagree. This Court’s review of unpreserved issues of ineffective assistance of counsel is limited to “errors apparent on the record.”³⁵ Additionally, we review a trial court’s factual findings for clear error, and constitutional determinations de novo.³⁶

“To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that counsel’s deficient performance prejudiced the defense.”³⁷ To show that counsel’s performance was deficient, Holmes “must show that it fell below an objective standard of reasonableness under prevailing professional norms” and in doing so Holmes “must overcome a strong presumption that counsel’s performance constituted sound trial strategy.”³⁸

Keys’s trial counsel made a motion for separate juries, or in the alternative, to sever his trial from that of Holmes and Simpson. While the trial court permitted Keys, Holmes and Simpson to have separate juries, it denied Keys’s motion to sever the trials. As Keys unsuccessfully made the same motion that is the basis of Holmes’s ineffective assistance claim,

³⁰ *Herndon*, 246 Mich App at 420 (citation and quotation omitted).

³¹ See *People v Cheatham*, 453 Mich 1, 9; 551 NW2d 355 (1996).

³² *Canter*, 197 Mich App at 563.

³³ *Herndon*, 246 Mich App at 420.

³⁴ *Canter*, 197 Mich App at 563; *Herndon*, 246 Mich App at 419.

³⁵ *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

³⁶ *Id.*

³⁷ *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

³⁸ *Id.*

and a claim of ineffective assistance of counsel cannot be based on a failure to make a meritless or futile motion, Holmes's argument must fail.³⁹

Affirmed.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

³⁹ *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).