# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 25, 2012 |
| v | No. 306336<br>Oakland Circuit Court |
| WILLIE DAVIS MCCALL,<br><br>Defendant-Appellant. | LC No. 2011-235544-FH |

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, the trial court convicted defendant Willie McCall of felon in possession of a firearm (felon in possession),[1] possession of a firearm during the commission of a felony (felony-firearm),[2] and domestic violence.[3] The trial court sentenced McCall as a fourth habitual offender[4] to serve consecutive terms of two to 20 years' imprisonment for his felon in possession conviction, two years' imprisonment for his felony-firearm conviction, and 93 days' imprisonment for his domestic violence conviction. We affirm.

## I. FACTS

McCall's convictions arise from an altercation between McCall and his wife, Nina Philips, on January 7, 2011. Amy McNamara testified that when she arrived at Philips's house that day, she noticed that there were packed bags on the house's front porch. McCall testified that Philips called him and told him to retrieve his belongings from their house, that she had put his belongings on the porch, and that if he did not retrieve them within 30 minutes she would not be responsible if they were stolen. When McCall arrived at the home, his bags were sitting on the front porch. McNamara testified that around two hours after she arrived, McCall arrived at

[1] MCL 750.224f.

[2] MCL 750.227b.

[3] MCL 750.81(2).

[4] MCL 769.12.

the house and began yelling at Philips. McNamara testified that one of the things McCall yelled was a request for his handgun.

Debra Williams, Philips's mother, testified that she and Philip's child were sleeping inside house, but the yelling woke her. When Williams went downstairs, she saw that McCall and Philips were "tussling," and she called the police. McCall admitted that he had entered the home and pushed Philips against the wall, that he and Philips struggled, and that Philips pepper-sprayed him. Williams testified that she saw Philips eventually push McCall out the door, and that she saw McCall fall down the porch's stairs. McCall testified that after Philips pushed him down the porch stairs, she kicked him three times while he was on the ground and pepper-sprayed him a second time.

Three Ferndale police officers responded to the domestic violence dispatch. Sergeant Steven Jennings testified that when he arrived, he saw McCall sitting on the front porch with his head in his hands. Sergeant Jennings saw a knife about one foot away from McCall, and secured it. Sergeant Jennings testified that there were two or three bags on the lawn, about 15 to 20 feet from McCall. Officer Chris Schwartz searched the bags. Sergeant Jennings testified that Officer Schwartz found a handgun and a piece of certified mail, addressed to McCall, in one of the bags.

Officer Jeffrey Pearce testified that when he arrived at the home, he went inside to speak with Philips, McNamara, and Philip's child. Officer Pearce testified that Philips told him that McCall came to the house to retrieve "his things," and that they began to struggle when Philips would not let him into the house. Officer Pearce testified that Philips told him that McCall had pinned her against a wall, and that Philips then pepper-sprayed McCall in the face.

Officer Pearce also took written statements from McNamara and Williams. At trial, McNamara and Williams read their statements into the record. Both statements indicated that McCall came to the house and wanted inside, that Philips and McCall fought, and that Philips pepper-sprayed McCall. Both statements indicated that after Philips pushed McCall out of the house, he drew a knife. McNamara's statement included that "[McCall] kept asking for his gun." Williams's statement included that "[McCall] said he was not going to leave. He said he wanted his gun and that he was not going to leave until he got it."

McCall testified that he and Philips did not speak about a handgun, that it did not belong to him, and that he had never seen it before. McCall testified that he believed that Philips had put the handgun in the bag. The Oakland County Sherriff's Department Crime Laboratory processed the handgun, but did not discover any fingerprints on it.

Philips testified at the preliminary examination, but claimed that she could not remember any details about the incident. She testified that "[i]t happened so fast I don't remember . . . I don't remember what happened and I'm not going to sit up here and say stuff and assume or try to act like I remember. I don't remember." McCall's counsel indicated that she had no questions for Philips at the preliminary examination.

Between the preliminary examination and trial, Philips moved to Florida, would not return phone calls, and did not respond to the prosecution's subpoena. The prosecution filed a notice of intent to introduce Philip's written statement and her oral statements to Officer Pearce

as evidence. McCall challenged the admission of the statements, arguing that they violated his right of confrontation because he had not had the opportunity to cross-examine Philips. The trial court ruled that Officer Pearce could testify about Philips's statements concerning the domestic violence, but excluded Philips's statements concerning the handgun.

## II. SIXTH AMENDMENT RIGHT OF CONFRONTATION

### A. STANDARD OF REVIEW

This Court reviews de novo questions of constitutional law, including whether the trial court improperly admitted testimony that violated a defendant's Sixth Amendment right of confrontation.[5] Generally, we will not disturb the trial court's determination that the prosecution has made diligent good-faith efforts to procure a witness unless the trial court has clearly abused its discretion.[6]

However, a defendant may not raise issues for the first time on appeal absent extraordinary circumstances, but must instead properly preserve issues by raising them before the trial court.[7] A defendant must challenge the issue below on the same ground that the defendant challenges the issue on appeal.[8] We review unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights.[9]

### B. LEGAL STANDARDS

In all criminal prosecutions, the accused has the right "to be confronted with the witnesses against him."[10] The Confrontation Clause bars a trial court from admitting "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[11]

A witness is unavailable for the purposes of the Confrontation Clause if "he or she is 'absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.'"[12] Our Supreme Court has given examples of unavailable witnesses, including when "the witness has since deceased, *or has left the State*, or is insane, or sick and

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[5] *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011).

[6] *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998).

[7] *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

[8] *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

[9] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[10] *Fackelman*, 489 Mich at 524-525; US Const, Am VI; Const 1963, art 1, § 20.

[11] *Crawford v Wash*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[12] *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008), quoting MRE 804(a)(5).

unable to testify . . . ."[13] Further, the prosecution must make reasonable, good-faith efforts to obtain the witness's presence at the trial.[14] Whether the prosecution made diligent, good-faith efforts depends on the facts and circumstances of the case.[15]

A defendant must also have had a prior opportunity to cross-examine the witness.[16] However, the Confrontation Clause does not guarantee that the witness's testimony will be unmarred by forgetfulness or evasion.[17] It only guarantees a defendant the *opportunity* to cross-examine the witness.[18] A defendant may have had a prior opportunity to cross-examine the witness if the defendant could have cross-examined the witness at the preliminary hearing.[19]

For the purposes of the Confrontation Clause, MRE 804(b)(1) sufficiently protects the defendant's opportunity for cross-examination.[20] Under this rule, the trial court can admit the testimony of an unavailable witness only if the defendant had both an opportunity and similar motives to cross-examine the witness at the preliminary examination.[21]

## C. APPLYING THE STANDARDS

McCall's argues on appeal that the trial court's admission of Philip's statements violated his right of confrontation because the prosecution did not make diligent efforts to procure Philips. McCall did not preserve this argument below. McCall argued below that if the prosecution used Phillip's testimony, it would violate McCall's right of confrontation because he had not had the opportunity to cross-examine Philips; McCall did not argue that the prosecution had not made good-faith, reasonable attempts to find Philips. Thus, because McCall did not challenge this issue on the same ground below, McCall's argument that the prosecution did not make reasonable efforts to locate Philips is not preserved. We will review this issue for plain error affecting McCall's substantial rights.

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[13] *Fackelman*, 489 Mich at 528-529 (emphasis added), quoting 1 Cooley, Constitutional Limitations (8th ed), p 664.

[14] *Hardy v Cross*, ___US ___; 132 S Ct 490, 493-494; 181 L Ed 2d 468 (2011); *Bean*, 457 Mich at 682.

[15] *Bean*, 457 Mich at 684.

[16] *United States v Owens*, 484 US 554, 558; 108 S Ct 838; 98 L Ed 2d 951 (1988).

[17] *Id*.

[18] *Id*. at 559.

[19] *Cal v Green*, 399 US 149, 165; 90 S Ct 1930; 26 L Ed 2d 489 (1970).

[20] *People v Meredith*, 459 Mich 62, 69-71; 586 NW2d 538 (1998).

[21] *Id*. at 66-67.

Here, the prosecution made efforts to locate Philips, and tracked her to an address in Florida. Philips was unavailable because she had left the state.[22] The prosecution attempted to call Philips five times, but Philips would not return their messages. The prosecution also subpoenaed Philips to appear at trial, but Philips ignored the subpoena. Under these circumstances, the trial court did not abuse its discretion by concluding that the prosecution made reasonable, good-faith efforts to obtain Philips's presence at trial. We conclude that McCall has not shown that plain error affected his substantial rights on this issue.

McCall also argues that he did not have an effective opportunity or the same motivations to cross-examine Philips about her statement at the preliminary examination. A defendant had an adequate opportunity to cross-examine a witness at a preliminary hearing if the witness gave a statement "under circumstances closely approximating those surrounding the typical trial," such as if the witness was under oath, counsel represented the parties, the judicial tribunal was equipped to provide a record, and the trial court gave the defendant an opportunity to cross-examine the witness about the witness's statement.[23] A defendant has similar motives to cross-examine a witness at a preliminary examination as the defendant would have to cross-examine the witness at trial.[24]

Here, the setting of the preliminary examination was trial-like, and there is no indication that the trial court limited the scope of possible cross-examination at the hearing. Although Philips claimed she could not remember what had happened, this did not deprive McCall of his opportunity to cross-examine Philips about her lack of memory.[25] Defense counsel had the opportunity to cross-examine Philips, but counsel stated that she had no questions. That defendant waived his right to cross-examine Philips also did not deprive him of his opportunity or motive to do so.[26] Thus, we conclude that the trial court's admission of Philips's statements to Officer Pearce did not violate McCall's right of confrontation, because he had an effective opportunity and similar motives to cross-examine Philips at the preliminary examination.

## III. SUFFICIENCY OF THE EVIDENCE

### A. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.[27] Thus, this Court reviews de novo the sufficiency of

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[22] *Fackelman*, 489 Mich at 528-529.

[23] *Green*, 399 US at 165.

[24] *Meredith*, 459 Mich at 66-67; *People v Adams*, 233 Mich App 652, 659; 592 NW2d 794 (1999).

[25] *Owens*, 484 US at 558-559.

[26] *Meredith*, 459 Mich at 67.

[27] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); see *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

the evidence on appeal.[28] When reviewing a challenge to the sufficiency of the evidence, we review 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.[29]

## B. ELEMENTS AND LEGAL STANDARDS

The defendant's possession of a firearm is an element of both felon in possession and felony-firearm.[30] The trial court may convict a defendant of felony-firearm for being a felon in possession.[31] A defendant need only constructively possess a firearm to establish the possession element of a crime.[32] A defendant constructively possesses an object when the defendant "knowingly has the power and intention at a given time to exercise dominion and control over a thing, either directly or through another person[.]"[33] Whether a defendant constructively possessed a firearm is a question of fact for the jury.[34]

Circumstantial evidence can sufficiently prove the elements of a crime.[35] Further, minimal circumstantial evidence will be sufficient to prove a defendant's state of mind, including knowledge.[36] When reviewing the sufficiency of the evidence, we will not interfere with the trier of fact's role to determine the weight of the evidence or the credibility of the witnesses.[37] We must resolve any conflicts in the evidence in the prosecution's favor.[38]

## C. APPLYING THE STANDARDS

McCall only disputes the sufficiency of the evidence concerning the possession elements of his felon in possession and felony-firearm convictions. The record, however, contains sufficient evidence to support the jury's conclusion that McCall possessed the handgun. The prosecution established that McCall went to Philips's house to get his belongings, which Philips had put on the front porch. Although McCall testified that he did not know about the handgun,

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[28] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[29] *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

[30] MCL 750.227b; MCL 750.227f; *People v Peals*, 476 Mich 636, 640; 720 NW2d 196 (2006).

[31] *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

[32] *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989).

[33] *Id*., quoting *US v Burch*, 313 F2d 628 (CA 6, 1963).

[34] *Id*. at 469.

[35] *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

[36] *Id*. at 270-271; *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004).

[37] *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

[38] *Id*.

both McNamara and Williams testified that McCall asked Philips for his handgun. McNamara testified that McCall asked for the handgun repeatedly, and Williams testified that he refused to leave without it. Thus, whether McCall knew about the handgun—and therefore could knowingly exercise control over it—was a question of credibility that the jury had sufficient evidence to determine. We will not interfere with the jury's determination of questions of credibility.[39] We conclude that sufficient evidence established that McCall knew about the handgun.

We also conclude that sufficient evidence established that McCall exercised control over the handgun. Sergeant Jennings testified that Officer Schwartz found the handgun in the same bag as a piece of certified mail that was addressed to McCall. Even if Philips placed the handgun in the bag, the jury could reasonably infer from the evidence that McCall asked or intended Philips to pack his handgun in the bag, and thus could conclude that McCall had the power or intent to exercise control over the handgun through another person. While we agree that the evidence linking McCall to the handgun was circumstantial, circumstantial evidence alone may be sufficient evidence to support a conviction.[40] When the evidence is viewed in the light most favorable to the prosecution, a rational juror could find beyond a reasonable doubt that McCall constructively possessed the handgun.

We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck

[39] *Id.* at 619.

[40] *Fennell*, 260 Mich App at 270.