STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 6, 2012
v	No. 306682 Berrien Circuit Court
RAY LEE DOSS, Defendant-Appellant.	LC No. 2010-005133-FH

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of felon in possession of a firearm, MCL 750.224f, felony-firearm, MCL 750.227b, and reckless use of a weapon, MCL 752.863a. Defendant was sentenced to serve a two-year prison term for the felony-firearm conviction, and he was sentenced to time served for the other two convictions. Defendant primarily challenges the admission at trial of the preliminary examination testimony of the prosecution's primary witness. We affirm in part and remand in part.

I. BASIC FACTS

Defendant's convictions arise from a bullet wound to his leg. The prosecution's theory was that defendant accidentally shot himself with a handgun that he had in his pocket. As a previously convicted felon, defendant was prohibited from possessing a firearm. The defense's theory was that an individual standing very close to defendant accidentally shot him while trying to sell him a handgun, and defendant never possessed the gun. The treating physician testified that defendant's injury was consistent with either theory. The prosecution's primary witness was declared unavailable at trial and her former preliminary examination testimony was admitted. That witness testified that she did not see the shooting, but when she heard the gunshot it was clear to her that defendant shot himself because he had just threatened to shoot her and went into his house purportedly to retrieve a gun. Defendant presented one witness who testified that he observed someone else shoot defendant while allegedly attempting to sell defendant the gun. That witness testified that he never saw defendant possess the gun.

II. INTRODUCTION OF FORMER TESTIMONY

First, defendant argues that the introduction of a witness's former preliminary examination testimony violated his right to confront the witness because the witness was

available to testify. Because defendant failed to preserve this constitutional claim, we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Under MRE 804(b) and the Sixth Amendment Confrontation Clause, former testimony is admissible at trial if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. See *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). According to MRE 804(a)(5), a declarant is unavailable when the declarant "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." The use of preliminary examination testimony as substantive evidence at trial does not violate the defendant's right to confront the witness if the prosecution used due diligence to produce the absent witness. *People v Bean*, 457 Mich 677, 682-683; 580 NW2d 390 (1998). "The test for due diligence is one of reasonableness, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v James*, 192 Mich App 568, 571; 481 NW2d 715 (1992). The reasonableness of good-faith efforts by the prosecution is determined by the facts and circumstances of each case. *People v Dye*, 431 Mich 58, 67; 427 NW2d 501 (1988).

In addition, the defendant must have had a prior opportunity to cross-examine the witness. MRE 804(b)(1), provides:

> Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

"Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony was presented at each proceeding." *People v Farquharson*, 274 Mich App 268, 275; 731 NW2d 797 (2007). In *Farquharson*, we provided the following factors to determine whether a party had a similar motive to develop the witness's testimony:

> (1) whether the party opposing the testimony "had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue"; (2) the nature of the two proceedings—both what is at stake and the applicable burdens of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities) [*Id.* at 278, quoting *United States v DiNapoli*, 8 F3d 909, 914-915 (CA 2, 1993).

In this case, defendant had a prior opportunity to cross-examine the witness. The prosecution introduced the witness's preliminary examination testimony at trial for the same purpose that it did at the preliminary examination—to prove that defendant possessed the gun. In addition, defendant had the same attorney for the preliminary examination and the trial, and his attorney was able to cross-examine the witness at the preliminary examination. During this cross-examination, defense counsel was able to discredit the witness's account of the events that occurred. Although the burden of proof at the preliminary examination is different from the

burden of proof at trial, defendant still has a similar motive to cross-examine the witness. See *People v Meredith*, 459 Mich 62, 67; 586 NW2d 538 (1998).

However, it is less obvious whether the prosecution used due diligence to produce the absent witness. At the due diligence hearing, the prosecution asked the officer whether he was able to serve the witness, but the transcript of the hearing reflects "no audible response." The trial court asked the officer the same question, but again, there was "no audible response." The trial court found that the officer secured service, but the record does not indicate whether the officer personally served the witness or whether he, for example, left the subpoena at her doorstep. Further, the officer was unable to provide documentation that showed the witness signed or acknowledged the subpoena. If the witness were not personally served the subpoena, then the witness was not legally obligated to appear for court. If that were the case, we do not believe that the prosecution used due diligence to produce the witness under the circumstances, and it would have been error for the trial to admit the former testimony. However, we cannot make this determination on this record. We therefore remand this matter to the trial court to make a record of whether the witness was personally served the subpoena. If the trial court determines that the witness was personally served, then the introduction of the former testimony was not plain error. If, however if the trial court finds that the witness was not personally served, then it was plain error to admit the former testimony, and defendant may move for a new trial, which the trial court may grant if it determines that doing so is warranted.

Defendant also argues that the trial court abused its discretion by admitting hearsay statements in the witness's preliminary examination testimony. We review a trial court's decision to admit evidence for an abuse of discretion. *Farquharson*, 274 Mich App at 271. "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, if the trial court's decision involves a preliminary issue of law where a constitutional provision, statute, or rule of evidence determines admissibility, then it is subject to de novo review. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). If there is an evidentiary error in a criminal case, reversal is not warranted unless it is more probable than not that a different outcome would have resulted. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant argues that the following statements by the witness were impermissible hearsay: "I learned a few minutes after that he had shot himself" and "So I took it as if he went to get a gun for me, and had he not shot his self possibly I don't know what would have happened." MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The trial court correctly concluded that the statements were not offered to prove defendant shot himself. Rather, the statements were offered to explain why she left to call the police: that she suddenly felt that defendant's threats were credible, and he might have come after her.

III. INSUFFICIENT EVIDENCE FOR FELONY-FIREARM

Next, defendant argues that the evidence was insufficient to convict him of felony-firearm. We review sufficiency-of-the-evidence claims de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), with an eye toward determining whether a rational trier of

fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt, *People v Wolfe*, 440 Mich 508, 515-514; 489 NW2d 748 (1992).[1] In doing so, all evidence must be viewed in a light most favorable to the prosecution. *People v Railer*, 288 Mich App 213, 216; 792 NW2d 776 (2010). We defer to the fact-finder's weighing of the evidence and assessment of the credibility of the witnesses. *Wolfe*, 440 Mich at 514. This issue also involves a question of law and statutory interpretation, which we review de novo. *People v Breidenbach*, 489 Mich 1, 6; 798 NW2d 738 (2011).

To convict a defendant of felony-firearm, the prosecution must prove beyond a reasonable doubt "that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Johnson*, 293 Mich App 79, 82; 808 NW2d 815 (2011). In this case, the underlying felony was felon in possession of a firearm, MCL 750.224f. Defendant argues that the felon-in-possession charge cannot be the underlying felony for felony-firearm because the 1976 Legislature who enacted the felony-firearm statute would not have intended such. However, we have rejected a similar argument in *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001). In *Dillard*, we stated,

> In enacting the felon in possession statute the Legislature presumably was aware of the four exceptions to the felony-firearm statute. *Walen v Dep't of Corrections*, 443 Mich 240, 248, 505 NW2d 519 (1993) ("It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws."); *People v Ramsdell*, 230 Mich App 386, 393, 585 NW2d 1 (1998). We conclude that had the Legislature wished to exclude the felon in possession charge as a basis for liability under the felony-firearm statute, the Legislature would have amended the felony-firearm statute to explicitly exclude the possibility of a conviction under the felony-firearm statute that was premised on MCL 750.224f [*Dillard*, 246 Mich App at 168.]

Further, our Supreme Court held that "[b]ecause the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Defendant urges this Court to disregard its opinion in *Dillard* and our Supreme Court's opinion in *Calloway*. However, we are required to follow a published decision from another panel issued on or after November 1, 1990, in addition to binding precedent from our Supreme Court. See MCR 7.215(C)(2), (J)(1); *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 353-354; 785 NW2d 45 (2010). Therefore, the underlying felony of felon in possession is sufficient to convict defendant of felony-firearm.

In addition, defendant argues that there was legally insufficient evidence to convict him of the felon-in-possession charge. However, defendant fails to factually support this assertion. "A party may not leave it to this Court to search for the factual basis to sustain or reject its

[1] Amended on other grounds 441 Mich 1201 (1992).

position, but must support its position with specific references to the record." *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009).

IV. IMPOSITION OF COSTS

Defendant argues that the trial erred by assessing additional costs. Defendant did not preserve this issue by objecting to the assessment of the costs at sentencing. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Therefore, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764.

A trial court must have statutory authority to assess costs against a criminal defendant. *People v Dilworth*, 291 Mich App 399, 400; 804 NW2d 788 (2011). MCL 769.1k(1)(b)(*ii*) allows a trial court to order "any cost in addition to the minimum state cost." However, our Supreme Court has imposed limitations on this rule. For example, "the costs imposed must bear some reasonable relation to the expenses actually incurred in the prosecution." *People v Wallace*, 245 Mich 310, 314; 222 NW 698 (1929). In addition, costs may not include "expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law." *People v Teasdale*, 335 Mich 1, 6; 55 NW2d 149 (1952).

Recently, in *People v Sanders*, __ Mich App __; __ NW2d __ (Docket No. 303051, decided May 29, 2012), we held "that the trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(ii) without the necessity of individually calculating the costs involved in a particular case." *Id.* at slip op p 4. Thus, it would be acceptable for a trial court to impose a reasonable flat fee for felony cases. *Id.* at slip op p 3-4. However, the trial court should explain the basis for its cost figure, "in order to facilitate meaningful appellate review of the reasonableness of the costs assessed defendant." *Id*.

Unlike the trial court in *Sanders*, it does not appear that the trial court in this case imposed a flat fee. The trial court assessed defendant an additional $500 in costs for the felon-in-possession conviction and $209 in costs for the reckless-use conviction. The trial court did not assess defendant costs for the felony-firearm conviction. Based on these facts, it appears the trial court made a thoughtful calculation of the costs. Further, unlike the defendant in *Sanders*, defendant failed to seek clarification of the costs imposed at sentencing. Therefore, this Court reviews the fee assessment for plain error, and under the plain error standard, the $709 in costs is not obviously unreasonable on its face. The trial court did not err by imposing $709 in additional costs.

V. CRIME VICTIM'S RIGHTS FEE

Next, defendant argues that the trial court erred by imposing a $130 victim's rights fee. Defendant did not preserve this issue by objecting to the fee at sentencing. See *Metamora Water Serv, Inc*, 276 Mich App at 382. Therefore, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

Defendant argues that assessment of a $130 victim's rights fee is an ex post facto violation because the crimes were committed before the Legislature increased the fee from $60 to $130. However, in *People v Earl*, __ Mich App __; __ NW2d __ (Docket No. 302945,

decided June 19, 2012), we determined that an assessment under the Crime Victim's Rights Act (CVRA) is not restitution, because it is not punitive. *Id.* at slip op p 5. Rather, the assessment is for the benefit of all crime victims. *Id.* at slip op p 5-6. Thus, "the trial court's order that defendant pay $130 into the CVRA is not a violation of the ex post facto doctrine." *Id.* at slip op p 6. The trial court did not err by ordering defendant to pay the $130 victim's rights fee.

Affirmed in part, and remanded in part for findings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Amy Ronayne Krause