STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD ARMSTEAD JOHNSON, III,

Defendant-Appellant.

UNPUBLISHED
February 14, 1997

No. 178725

Genesee Circuit Court
LC No. 94-050270

Before: White, P.J., and Griffin, and Kolenda,* JJ.

PER CURIAM.

Defendant was convicted by a jury of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). He then pleaded guilty of habitual offender second offense, MCL 769.10; MSA 28.1033, and was sentenced to 3 to 7½ years' imprisonment. He now appeals, and we affirm.

The prosecution presented evidence that defendant, who was a convicted felon on parole, pawned a shotgun. Defendant offered a defense of justification/excuse. Specifically, defendant claimed that he was paroled to his mother's house and had found the gun under a bed in his bedroom. He asserted that because he knew that possession of the gun would constitute a parole violation, he enlisted the help of a person named "Buddie," and pawned the gun so that he would not be in possession of the weapon. Neither the prosecution nor the defense was able to locate Buddie for trial.

Defendant first argues that the trial court committed error when, although defendant had raised the issue in a motion in limine and had stipulated that he was not eligible to possess a weapon, the court informed the jury of the specific felony of which defendant was previously convicted.

It appears the trial court inadvertently informed the jury of the nature of the prior felony (armed robbery) when it read the information to the jury during jury selection and final instructions. We conclude that any error was harmless based on the overwhelming evidence presented and the fact that

* Circuit judge, sitting on the Court of Appeals by assignment.

the prosecutor never addressed the nature of the prior felony. Moreover, any error was cured when the trial court instructed the jury during final jury instructions that the evidence of defendant's prior conviction was only to be used in determining whether defendant was a truthful witness and was not evidence of guilt in the instant case.

Defendant next argues that he was prejudiced by the approximately four month delay between the time that the police became aware of the crime and the date the warrant was issued because during that time Buddie had disappeared. In determining whether dismissal is warranted by pre-arrest delay, a defendant must show that he suffered substantial prejudice to his right to a fair trial and that the prosecution intended to gain a tactical advantage. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). Some prejudice is permissible if it is clearly and convincingly shown that the delay is explainable and was not deliberate and when no undue prejudice attaches. *People v Hernandez*, 15 Mich App 141, 147; 170 NW2d 851 (1968).

We conclude that the approximately four month delay, although somewhat lengthy, was not deliberate or used by the prosecution to gain a tactical advantage. Moreover, we agree with the trial court that defendant did not suffer undue prejudice as a result of the delay. Defendant admitted that the gun was his, that he had participated in the pawn, and that he was on parole at the time. Thus, the evidence was clear that defendant committed the crime of felon in possession of a firearm.

Defendant next argues that he was prejudiced by the prosecution's failure to provide him reasonable assistance in attempting to locate Buddie. Pursuant to MCL 767.40(a)(5); MSA 29.980(1)(5), the prosecuting attorney or investigating law enforcement officer must, upon request, provide reasonable assistance in locating a witness. *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990). However, the prosecutor is not required to provide reasonable assistance to a defendant in locating an accomplice. *Id.* at 45. Accomplices are not required to testify, and thus, the failure to provide reasonable assistance does not prejudice a defendant. *Id.* An accomplice is a person who knowingly and willingly helps or cooperates with another in committing a crime. *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993). Here, Buddie was an accomplice because defendant had informed Buddie of the circumstances regarding why he had to dispose of the gun and Buddie helped him to do so. Thus, defendant did not suffer prejudice as a result of the lack of reasonable assistance received in attempting to locate Buddie.

Next, defendant contends that the trial court erred when it refused to instruct the jury on innocent possession. Innocent possession is a very limited defense to a charge of weapons possession. *People v Coffey*, 153 Mich App 311, 314; 395 NW2d 250 (1986). It is similar to the concepts of excuse and justification. *Id.* Innocent possession can constitute a valid defense if the possessor, who had gained possession of the weapon by disarming a wrongful possessor, had the intention of delivering the weapon to the police at the earliest time possible. *Id.* at 315; *People v Walker*, 167 Mich App 377, 381; 422 NW2d 8 (1988). Assuming such a defense would be available under the circumstances presented here, we conclude that the court did not err in refusing to instruct on innocent possession because defendant did not claim that he intended to deliver the weapon to the police or his parole officer. Rather, he pawned the weapon.

Defendant argues that he received ineffective assistance of counsel. We disagree. In order to succeed on a claim of ineffective assistance of counsel a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the point of depriving him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance is presumed, and a defendant bears a heavy burden in proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant first argues that he received ineffective assistance of counsel because counsel did not assert an inoperable firearm defense. However, the decision not to introduce evidence of the inoperability of the gun may be viewed as a matter of sound trial strategy, and accordingly defendant has failed to establish that counsel was ineffective. Defendant's theory at trial was that he had attempted to avoid any contact with the gun. Defense counsel may have believed that it would be inconsistent for defendant to assert that the gun was inoperable when defendant had supposedly not touched the gun.

Defendant also argues that counsel was ineffective for failing to raise an entrapment defense. Entrapment occurs when either (1) the police engaged in impermissible conduct that would induce a person not ready and willing to commit a crime to commit the offense; or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. *People v Fabiano*, 192 Mich App 523, 531-532; 482 NW2d 467 (1992). Defendant's entrapment argument lacks merit. Accordingly counsel was not ineffective in failing to present this defense.

Defendant next contends that the felon in possession of a firearm statute, MCL 750.224f(1); MSA 28.421(6)(1), is unconstitutionally overbroad as applied to the facts of this case because it does not provide any exception to divest oneself of a gun. However, if defendant's possession of the gun had been innocent and he had taken the gun to the police instead of pawning the gun, his actions may have been excused under the innocent possession defense. *Coffey*, *supra*, 314-315. Thus, an exception would have been provided for defendant to divest himself of the gun. Accordingly, the statute is not overbroad as applied to defendant. *People v Lino*, 447 Mich 567, 575-576; 527 NW2d 434 (1994).

Lastly, defendant argues that the cumulative effect of the errors alleged on appeal denied him a fair trial. However, because there are no errors to view collectively and cumulatively defendant's claim is without merit. *People v Lyles*, 148 Mich App 583, 600; 385 NW2d 676 (1986).

Affirmed.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda