STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN EVERETT WOODMAN,

Defendant-Appellant.

UNPUBLISHED
July 7, 2000

No. 218072
Otsego Circuit Court
LC No. 98-002300-FH

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon (CCW), MCL 750.227(2); MSA 28.424(2), and fourth-degree fleeing and eluding a police officer, MCL 257.602a(1); MSA 9.2302(1)(1). He was sentenced to ninety days in jail and to eighteen months' probation. Defendant appeals as of right. We affirm.

Defendant argues that there was insufficient evidence to support his CCW conviction because the prosecutor failed to establish that the gun was operable. We disagree. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). A conviction for CCW under the circumstances of this case required proof that (1) a pistol was in a vehicle operated or occupied by the defendant, (2) the defendant knew or was aware of its presence, and (3) the defendant took part in carrying or keeping the pistol in the vehicle. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999); CJI2d 11.1.

A "pistol," as defined under the concealed weapons statute, must be operable. *People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992); *People v Gardner*, 194 Mich App 652, 654; 487 NW2d 515 (1992). That is, the pistol must be "capable of propelling the requisite-sized dangerous projectile or of being altered to do so within a reasonably short time." *Parr*, *supra* at 45. Thus, an affirmative defense to a charge of CCW can be made by proof that the pistol would not fire and could not readily be made to fire. *Parr*, *supra* at 45; *Gardner*, *supra* at 655. A successful defense requires a showing that the gun is "totally inoperable and cannot be readily repaired." *People v Hill*, 433 Mich

464, 476; 446 NW2d 140 (1989) (citing CJI 11:1:09, currently CJI2d 11.6, with approval). Here, while defendant offered uncorroborated testimony that the pistol found in his van was inoperable, he admitted on cross-examination that it was capable of firing a single round if placed directly in the chamber. Moreover, both arresting officers testified that, based on their experience, training, and inspection of the pistol, they believed that it was capable of being fired. Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational jury could have found that defendant's pistol was operable and that all the elements of CCW were proven beyond a reasonable doubt.

Defendant also argues that he was denied a fair trial with respect to his CCW conviction because the trial court did not instruct the jury on the affirmative defense of inoperability of a firearm, and referred to defendant's pistol as a "firearm," thereby implying to the jury that it was operable. As discussed above, defendant contradicted his own uncorroborated testimony that the pistol was inoperable by admitting that the weapon was capable of being fired. Moreover, the trial court instructed the jury in accordance with the law, and informed them that its commentary was not evidence. Accordingly, we hold that defendant has failed to establish either that the error, if any, affected the outcome of the proceedings or was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

Finally, defendant argues that there was insufficient evidence to support his conviction for fourth-degree fleeing and eluding a police officer. Again, we disagree. To support a conviction for fourth-degree fleeing and eluding under § 602a of the Vehicle Code the prosecutor must establish that (1) the police officer was in uniform, performing his lawful duties, and driving a vehicle adequately marked as a law enforcement vehicle, (2) the defendant was driving a motor vehicle, (3) the officer, with his hand, voice, emergency light, or siren ordered the defendant to stop, (4) the defendant was aware of the order to stop, and (5) the defendant willfully refused to obey the order by trying to flee to avoid being caught. MCL 257.602a(1); MSA 9.2302(1)(1); CJI2d 13.6d. The requirement that the defendant act willfully is satisfied where a defendant voluntarily, intentionally, and knowingly attempts to elude the police. See *People v Harrell*, 54 Mich App 554, 561; 221 NW2d 411 (1974).

In this case, testimony from the two arresting officers established the following: both officers were dressed in full uniform and were driving marked vehicles at the time defendant was stopped; after observing defendant's van make two turns without a turn signal, the first officer activated his overhead lights and pulled defendant's van to the side of the road; the first officer approached defendant, informed him why the stop was made, and asked him for his driver's license; in response, defendant stated, "I don't have to show you nothing," and drove away just as the second officer drove up in a marked vehicle; and, the officers pursued defendant with overhead lights and sirens until he eventually stopped. Although defendant's testimony conflicted with that of the police officers, we will not interfere with the jury's determination that defendant's version of the events was less credible. *Wolfe, supra* at 514-515; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Viewed in a light most favorable to the prosecution, therefore,

we conclude that a rational jury could conclude that the elements of the offense were proven beyond a reasonable doubt.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot