STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2002
V	No. 224943 Wayne Circuit Court
MICHAEL A. ROBBINS, Defendant-Appellant.	Criminal Division LC No. 99-005539

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for carrying a concealed weapon in a motor vehicle, MCL 750.227(2).[1] He was sentenced to probation for one year. We affirm.

I. Facts and Proceedings

On May 23, 1998, Detroit Police Officers David Krupinski and Jeffrey Sklar observed a blue, 1994 Dodge cargo van traveling northbound on the Southfield Service Drive. The van matched the description of a van that was involved in a malicious destruction of property complaint in the area,[2] and the officers decided to execute a traffic stop of the van being driven by defendant.[3] The officers activated their overhead lights and the van was pulled over. When

[1] MCL 750.227(2) provides:

> A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

[2] Although the complaint described a 1986 rather than a 1994 Dodge van, the record does not provide evidence that the 1986 and 1994 vans are dissimilar.

[3] Defendant has not challenged the traffic stop as invalid.

officers approached the van, they noticed a gun on the passenger seat of the van[4] and asked defendant to exit the van. Defendant was then arrested and transported him to the police station.

At the police station, defendant was interviewed by Officer Timothy Bar. After being advised of his *Miranda*[5] rights and signing a release form, defendant was asked whether he had a hand gun on him or in the car. Defendant stated, "[N]o not on me. It was in the car, it's registered." In response to further questioning, defendant claimed that the gun in the van must have been left there by the van's owner, Mary Armstrong, because "my guns are at home." These answers were written down by Officer Bar and defendant signed the statement.

Defendant did not testify at trial. Instead, his only witness was Armstrong. Armstrong testified that on the day in question, she and defendant went to Target Sports in Royal Oak to shoot guns. She then testified that after being at Target Sports for about fifteen or twenty minutes, defendant received a call "to go do a plumbing job," and that she put the guns, including the one found on the passenger seat, in a canvas tote bag, and placed the bag on the floorboard of the van between the driver and passenger seats. Defendant then drove her home, at which point she picked up the canvas bag and got out of the van. Armstrong opined during her testimony that the gun must have somehow slipped out of the bag during the trip; however, she admitted that she never heard the gun slide out of the bag nor did she hear it roll around on the floor. She also admitted that the gun in question was registered to her.

Following testimony and closing arguments, the trial court found defendant guilty as charged. Specifically, the trial court stated:

> [Defendant] is charge [sic] with carrying a concealed weapon in a motor vehicle. And the court has heard testimony of the two arresting officers and also the investigator who interviewed the defendant and took a statement from him. And really, there isn't must dispute about the fact that there was a gun in the car.
>
> I think the defendants [sic] statement to the investigator was that the gun was there. There are some inconsistencies in the testimony of the officers in terms of when they saw the gun, how quick it was seized after or during the time that the defendant was being taken out of the car.
>
> But, really the elements of the crime are that a pistol was in a vehicle that the defendant was in, and there was a pistol in the vehicle. Secondly, that the defendant knew the pistol was there. And in listening to the officers testimony, I believe that the defendant knew that the pistol was in the car.
>
> And lastly and thirdly that the defendant took part in carrying or keeping the pistol in the vehicle.

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[4] There is some discrepancy as to whether both officers observed the gun before defendant was asked to exit the vehicle; however, both officers testified they observed the gun on the passenger seat.

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> Now, really possession can be actual or constructive. It's actual if the defendant has the gun on his person. It's constructive if the defendant has a right to exercise some dominion and control over the pistol and has ability to do it. And really, the defendant doesn't have to own the gun to be in possession. And possession can be actual or constructive, it can be joint or sole.
>
> And in this case, I think constructive possession has been established from the testimony that defendant was in a position to exercise dominion and control over it and knew that the gun was in the vehicle.
>
> So the court finds that all of the elements of the crime have been established and would accordingly find the defendant guilty of the charge.

II. Analysis

A. Insufficient/Erroneous Factual Findings Claim

Defendant argues that the trial court's findings of fact were insufficient because they failed to address whether he "carried" the weapon and instead focused only on his "possession" of the weapon. Defendant claims that because "possession" is not an element of the charged offense and because the trial court made no finding that he "carried" the weapon, reversal is required. We disagree.

A trial court's findings of fact are reviewed by this Court for clear error, giving deference to the trial court's resolution of factual issues. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999); *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). See also *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). In addition, this Court should not substitute its judgment for that of the trial court and make independent findings." *Farrow*, *supra* at 209.

The elements of carrying a concealed weapon in a motor vehicle are (1) the presence of the weapon in a vehicle operated or occupied by the defendant; (2) the defendant knew or was aware of its presence in the vehicle; and (3) the defendant took part in carrying or keeping the weapon in the vehicle. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999); *People v Courier*, 122 Mich App 88, 90; 332 NW2d 421 (1982). Here, the trial court's findings of fact and conclusions of law referred to all of the elements of the charged crime, including the element of carrying. In fact, the trial court specifically stated that defendant must have taken part in "carrying or keeping the pistol in the vehicle." In addition, the trial court referred to the evidence that supported each of the required elements; namely, that the evidence showed there was a handgun in the vehicle; that the vehicle was operated by defendant; that defendant knew the gun was in the vehicle; and that defendant exercised dominion or control over the handgun. See *Nimeth*, *supra*.

Further, while possession is not an element of the crime of carrying a concealed weapon in a vehicle, *People v Butler*, 413 Mich 377, 390, n 11; 319 NW2d 540 (1982), makes clear that possession of a weapon is one of the factors to be considered when determining whether a

defendant is carrying. Thus, in light of *Butler*, it is evident that the trial court's reference to constructive possession, dominion, and control related to the element of "carrying," and did not reflect a belief that possession was an element of the crime. As such, the trial court's findings of fact and conclusions of law indicate the trial court was aware of the issues in the case, did not utilize the wrong standard of proof, was aware of the elements of the crime, and correctly applied the law to the facts in this case. Hence, the court's findings of fact were sufficient to find defendant guilty. See *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995) and *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992); see also MCR 2.517(A)(2).

Defendant also contends that, to the extent the trial court found that he "carried" the weapon, that finding was clearly erroneous. However, the evidence established that defendant was operating a van at the time the handgun was discovered by the police; that defendant had been operating the van for several hours; that defendant was the sole occupant of the vehicle when the vehicle was stopped; and that the handgun was found on the passenger seat in close proximity to defendant, readily accessible to him and within plain view. Thus, the trial court's finding that defendant "carried" the handgun in the vehicle was not clearly erroneous. *Butler*, *supra*; *Courier*, *supra* at 90-91; see also *Nimeth*, *supra* at 622, citing *People v Emery*, 150 Mich App 657, 667; 389 NW2d 472 (1986).

Defendant also claims that the trial court erred in finding that he knew that the weapon was in the vehicle. However, we note that this finding was supported by defendant's own admission that he knew the weapon was in the vehicle. In addition, although there were minor inconsistencies in the testimony of the officers, no testimony contradicted the testimony of the officers that the gun was found on the passenger seat within defendant's reach, and was in plain view. Consequently, the trial court's finding that defendant knew the weapon was in the vehicle was not clearly erroneous. *Butler*, *supra*; *Courier*, *supra* at 91. See also *People v Johnson*, 245 Mich App 243, 256, n 5; 631 NW2d 1 (2001), *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998), and MCR 2.613(C).

B. Insufficiency of the Evidence Claim

Defendant also claims that the evidence presented at trial was insufficient to support his conviction of carrying a concealed weapon in a motor vehicle. Specifically, defendant contends that the evidence presented on the third element (i.e., that he carried the gun) was entirely circumstantial, that the prosecutor did not disprove defendant's reasonable theories of innocence, and that the evidence was insufficient to sustain a conviction. We disagree. A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999).

As previously indicated, the evidence showed that defendant was operating the vehicle at the time the handgun was discovered by police; that he had been operating the vehicle for several hours; that he was the sole occupant of the vehicle; and that the handgun was found on the passenger seat within arm's reach of defendant, readily accessible to him and within plain view. Viewed in a light most favorable to the prosecution, the evidence was sufficient evidence to

support a finding that defendant "carried" the handgun. *Nimeth, supra* at 622; *Courier, supra* at 91.

In addition, although defendant claims that the evidence against him was entirely circumstantial, circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Further, the prosecutor is not required to negate every reasonable theory consistent with innocence, contrary to defendant's claim, but is only required to convince the trier of fact in the face of whatever contradictory evidence the defendant may provide. *Id*. Here, as indicated above, the prosecutor presented sufficient evidence to establish the elements of the crime.

Further, defendant argues that the discrepancies in the officers' testimony amounted to conflicting evidence that established reasonable doubt with regard to defendant's guilt. However, "the question is not whether there was conflicting evidence, but rather whether there was evidence that," if believed by the trier of fact, "would justify convicting defendant." *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994). To this end, we note that the testimony of the officers, coupled with defendant's own statement to the police, enabled the trier of fact to find defendant guilty beyond a reasonable doubt. Therefore, the existence of any conflicting evidence was immaterial. See *Smith, supra*; see also *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), citing *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Similarly, to the extent defendant attacks the police officers' credibility in support of his claim that the evidence was insufficient to support his conviction, we note that "[a]s [the] finder of fact, the trial court was charged with making credibility determinations, and we find nothing in the record to suggest that the court clearly erred in its findings." *McCray, supra* at 640, citing *People v Thenghkam*, 240 Mich App 29, 46; 630 NW2d 633 (2000). Accordingly, we decline to resolve the credibility issue anew. See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000), citing *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988); see also *Fetterley, supra*, *Eggleston, supra*, and MCR 2.613(C).

C. Great Weight of the Evidence Claim

Finally, defendant argues that because Armstrong testified that the gun belonged to her and must have slipped out of her tote bag, his conviction was against the great weight of the evidence.[6] We disagree. This Court reviews a determination that a verdict is not against the great weight of the evidence for an abuse of discretion. *McCray, supra* at 637, citing *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the

[6] There is some authority that a "great weight of the evidence" claim is not appropriate in the context of a bench trial, and that the proper claim would be that the trial court relied on insufficient evidence or made erroneous factual findings, see *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 188, n 26; 422 NW2d 205 (1988); however, the prosecutor has not challenged the propriety of defendant's claim and thus, on the facts of this case, we will not address this issue. See also *DiFranco v Pickard*, 427 Mich 32, 59; 398 NW2d 896 (1987) (Findings of fact in a bench trial will be affirmed if not clearly erroneous, but findings of fact in a jury trial will be affirmed unless against the great weight of the evidence.)

verdict to stand. *McCray*, *supra*, citing *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

The mere fact that Armstrong owned the gun does not indicate that the verdict was against the great weight of the evidence. Ownership is not an element of carrying a concealed weapon in a motor vehicle. *Nimeth, supra* at 622. In addition, the testimony that the gun accidentally slipped out of Armstrong's tote bag onto the floor is inconsistent with the evidence that the gun was on the passenger seat. The trial court's finding that defendant exercised dominion and control over the gun was not an abuse of discretion.

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper