

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID BRANDON PEATROSS,

Defendant-Appellant.

UNPUBLISHED

December 28, 2006

No. 263508

Wayne Circuit Court

LC No. 05-001152-01

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon in a vehicle, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

On appeal, defendant argues that the trial court erred in denying his motion for dismissal or for an evidentiary hearing to suppress evidence. We disagree. This Court reviews the trial court's factual findings on a motion to suppress evidence for clear error. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999). However, it appears from the record that the trial court based its factual findings on the preliminary examination transcript. Further, the parties cited the preliminary examination transcript in their arguments to the court at the pretrial conference. "Therefore, the trial court was in no better position than this Court to assess the evidence, and there is no reason to give special deference to the trial court's 'findings.'" *People v Zahn*, 234 Mich App 438, 445-446; 594 NW2d 120 (1999). This Court reviews the trial court's conclusions of law pertaining to a motion to suppress evidence de novo. *People v Garvin*, 235 Mich App 90, 96-97; 597 NW2d 194 (1999).

Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Bolduc*, 263 Mich App 430, 437; 688 NW2d 316 (2004). "The lawfulness of a search or seizure depends on its reasonableness." *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). Regarding motor vehicles, "[i]t is well established that brief investigative stops short of arrest are permitted where police officers have a reasonable suspicion of ongoing criminal activity." *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996), quoting *People v Christie (On Remand)*, 206 Mich App 304, 308; 520 NW2d 647 (1994), citing *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). The reasonableness of an investigative stop is evaluated

in light of the totality of the circumstances. *People v Armendarez*, 188 Mich App 61, 67; 468 NW2d 893 (1991).

Although an anonymous tip uncorroborated by the police may lack “sufficient indicia of reliability” to support an investigative stop, a tip may contribute to a finding of reasonable suspicion when combined with other factors. *People v Faucett*, 442 Mich 153, 168-170, 172; 499 NW2d 764 (1993). Other pertinent factors in evaluating whether a stop is reasonable include presence in a high crime area in conjunction with “nervous and evasive behavior.” *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000).

Here, the detention of defendant before the police discovered his outstanding arrest warrants was proper. Although Detroit police officers Shawn Stallard and Khary Mason were dispatched to investigate an anonymous report that two black males with a gun were sitting inside a beige Oldsmobile selling narcotics, they did not rely exclusively upon this information in detaining defendant until their supervisor arrived. Rather, after the officers confirmed the report, they continued their investigation.

Specifically, the officers, who knew that this was a high crime area known for narcotics, noticed that one of this vehicle’s doors was slightly opened and the dome light was on inside the vehicle. As the officers approached with their weapons and a flashlight to investigate, the vehicle’s door closed and the light went out. One officer saw the occupants moving around inside the vehicle. This officer then explained to defendant, who was sitting in the driver’s seat, that he was investigating a police run and asked defendant to roll down the window, but defendant refused and started talking on his cellular phone. It was not until this point that the officers detained defendant and contacted their supervisor, who subsequently discovered defendant’s outstanding arrest warrants. Therefore, defendant’s “nervous and evasive” behavior in conjunction with the anonymous tip and his presence in a high crime area created the reasonable suspicion that criminal activity was afoot before the police discovered defendant’s arrest warrants. See *Illinois*, *supra*; *Faucett*, *supra* at 168-170, 172.

Defendant’s reliance on *Florida v JL*, 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000), to support the contention that the tip was insufficient to create a reasonable suspicion of criminal activity, is misplaced. There, an investigatory stop was based solely on an anonymous tip that lacked sufficient indicia of reliability. *Id.* at 268-274. In contrast, the tip in this case served as an impetus for further investigation of a potential crime. Contrary to defendant’s argument, the tip’s lack of specificity is not fatal to the claim that the officers had a reasonable suspicion to justify their investigative stop. Rather, the tip was but one factor to be considered in contemplating whether the totality of the circumstances created a reasonable suspicion that criminal activity was afoot. See *Faucett*, *supra* at 168-169, 172. Therefore, considering the tip in context, the officers’ detention of defendant was proper.

Defendant next argues that the evidence was insufficient to support the possession element of both the felon in possession of a firearm and felony-firearm offenses, and the “carrying” element of the carrying a concealed weapon in a vehicle charge. We disagree. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992). In determining the sufficiency of the evidence, this Court considers the evidence in the light most favorable to the prosecution.

People v Tombs, 472 Mich 446, 459; 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence presented proved the essential elements of the crime beyond a reasonable doubt. *Wolfe, supra*, quoting *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

Among the elements the prosecution must prove to sustain convictions for felon in possession of a firearm and felony-firearm is the element of possession. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Tice*, 220 Mich App 47, 50; 558 NW2d 245 (1996). Among the elements that the prosecution must prove to sustain a conviction for carrying a concealed weapon in a vehicle is that the defendant carried the weapon. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999).

Regarding a firearm, a person has possession when the person has knowledge of the firearm's location and the firearm is reasonably accessible to the person. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). To determine whether the evidence satisfies the "carrying" element of MCL 750.227(2), the following factors, either alone or in combination, should be considered: "(1) the accessibility or proximity of the weapon to the person of the defendant, (2) defendant's awareness that the weapon was in the motor vehicle, (3) defendant's possession of items that connect him to the weapon, such as ammunition, (4) defendant's ownership or operation of the vehicle, and (5) the length of time during which defendant drove or occupied the vehicle." *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982).

Sufficient evidence existed to show that defendant had possession of and was carrying a firearm inside a vehicle. Regarding the element of possession, defendant admitted in his statement to police that he knew there was a gun under the armrest next to the driver's seat. Police officers testified that they found a gun in the car underneath defendant's leg near the armrest between the seats. Therefore, it is reasonable to infer that defendant, who knew about the firearm, had access to it while he was inside the car. See *Burgenmeyer, supra*.

Furthermore, although it is unclear how long defendant was occupying or operating the vehicle before the police arrived, the police did find a magazine loaded with bullets next to the gun after removing defendant from the vehicle. When this is considered in conjunction with the fact that the firearm was accessible to defendant and defendant was aware of the firearm's presence in the vehicle, it is also reasonable to infer that defendant was "carrying" the gun in the vehicle within the meaning of MCL 750.227(2). See *Butler, supra*. Therefore, the evidence was sufficient to support the jury's conclusion that, beyond a reasonable doubt, defendant possessed and carried the firearm. See *Wolfe, supra*.

Defendant claims that other evidence supported the inference that defendant did not have possession and was not carrying the gun. However, this Court must resolve all conflicts of evidence in the favor of the prosecutor, who need not negate every reasonable theory of innocence, but only prove his case beyond a reasonable doubt despite any contradictory evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Moreover, it is the role of the jury to determine credibility and weigh the evidence in drawing reasonable inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *Avant, supra* at 506. In light of this, given that sufficient evidence existed to support the elements at issue, defendant's argument fails.

Defendant next argues that the trial court erred in granting the prosecution's motion in limine to exclude evidence of Marvin Calvin's¹ statement to police. We disagree. A trial court's evidentiary ruling is reviewed for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, preliminary questions of law pertaining to this issue are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

All relevant evidence is admissible unless otherwise provided in the rules of evidence, United States or Michigan Constitutions. MRE 402; *People v Crawford*, 458 Mich 376, 412 n 14; 582 NW2d 785 (1998). Under MRE 802, hearsay is inadmissible absent an exception. However, if a declarant is unavailable as a witness, the declarant's out-of-court statement is admissible if:

[the] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. [MRE 804(b)(3).]

At the preliminary examination, Sergeant Ramon Childs explained that Calvin, who was sitting in the passenger's seat of the vehicle, provided a statement in which he admitted that he had a handgun on the night in question and that the handgun was in the middle of the seat near the armrest when the police arrived. Defendant claims that Calvin's statement was admissible under MRE 804(b)(3) because it would have subjected Calvin to criminal liability. However, this argument fails because Calvin testified at trial; therefore, he was not an unavailable witness and MRE 804(b)(3) is inapplicable. Further, given that Calvin's statement was made out-of-court and would have been offered for its truth, the statement constituted inadmissible hearsay. MRE 801(c). Thus, the trial court properly excluded evidence referring to the contents of this statement. We note that even if the trial court's ruling was erroneous, defendant has failed to show outcome determinative error in light of Calvin's testimony at trial in which he admitted that he placed the handgun on the seat in the vehicle. Therefore, any error was harmless. See *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001).

Next, defendant claims that the cumulative nature of the errors denied him a fair trial. We disagree. "This Court reviews a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). In order for a claim of cumulative error to warrant reversal, the errors must be of consequence. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). In other words, the cumulative effect of the errors must be so prejudicial that it denied defendant a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). In some cases, the cumulation of minor errors may amount to error requiring reversal, even if individual errors, alone, would not. *Hill, supra*. Nevertheless, "[o]nly actual errors are aggregated to determine their cumulative effect." *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Here, defendant has failed to show any actual errors. Therefore, "a cumulative effect of

¹ Calvin was the passenger in the vehicle.

errors is incapable of being found.” *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Bill Schuette