

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS ANTONIO HUNTER,

Defendant-Appellant.

UNPUBLISHED

October 28, 2008

No. 280677

Wayne Circuit Court

LC No. 07-009529-01

Before: Servitto, P.J., and Donofrio, and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of carrying a concealed weapon, MCL 750.227; felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense. MCL 750.227b. Defendant was sentenced to 18 months to 15 years for the concealed weapon and felon in possession convictions, to be served consecutively to a five-year term for the felony firearm conviction. Defendant appeals as of right. Because there was sufficient evidence to convict defendant of the charged crimes, and defendant received effective assistance of counsel, we affirm.

Defendant was a passenger in a car that matched the description of one used in an armed robbery. After fleeing the vehicle, defendant was found hiding under a barbecue. The officer who searched him testified that he found a black semi-automatic handgun on defendant's person.

Defendant first argues that no reliable evidence showed that he possessed the gun. There were numerous errors in the original and corrected police reports, some of which indicated that defendant was unarmed. Although the officer who searched defendant unequivocally testified that he took the gun from defendant's person, defendant claims the errors undermined the officer's credibility, and that the evidence was insufficient to convict him. We disagree.

"When determining if sufficient evidence was presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution. It must determine whether any rational trier of fact could have found that the essential elements of the crime were proven as required." *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005), overruled on other grounds, *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Given the

officer's unequivocal testimony regarding the gun, a rational trier of fact could have concluded that the testimony was credible, especially since the officer explained the errors in the report. We will not upset the jury's assessment of credibility.

Defendant next argues that the trial court should have arranged for a "read back" of a trooper's testimony when, during deliberations, the jury asked to review his statement and/or testimony. We disagree.

Both parties agreed that the police report was not an exhibit or subject to review. Regarding the testimony, the court instructed the jury that "at this point" it was asking the jury to "rely on your collective memories and go back and try and sort through his testimony in that way at this point." The court then confirmed with the attorney who was standing in for defendant's counsel that she had discussed the matter with defense counsel, who agreed with the court's handling of the matter. Under MCR 6.414(H), the trial court properly exercised its discretion to require further deliberations while indicating that a later review would not be foreclosed. The record does not support defendant's contention that review was foreclosed. Moreover, "[a] defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal." *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

Defendant next argues in a supplemental brief that he was denied the effective assistance of counsel. Our review is limited to the facts contained on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Defendant first argues that counsel failed to investigate and prepare impeachment evidence to challenge the credibility of witnesses. This is not borne out by the record, as counsel brought out the errors in the police report and demonstrated how the information recorded in the report differed from the officer's testimony.

Defendant next asserts that counsel failed to object in order to exclude or limit cross-examination testimony. However, defendant did not call any witnesses and thus, the prosecutor did not cross-examine anyone. Defendant next argues that counsel should have objected when an officer identified a "temp tag" (a temporary tag obtained from an automobile dealership), which was confiscated as evidence, and stated, "it was added as info from the armed robbery—And that's another charge." In his opening statement, the prosecutor noted that the vehicle fit the description of one involved in an armed robbery. In defense counsel's opening, he noted that, "[t]he defendant had nothing to do with that [the armed robbery]." He then noted that defendant was initially released from jail because the police report did not initially link him to the gun, and indicated defendant was not picked out of a lineup, although the driver of the vehicle was picked out, presumably referring to the armed robbery. Since defendant was never linked to the armed robbery, although the driver of the car was linked, the failure to object to the comment was not below an objective standard of reasonableness under professional norms. Therefore, it did not constitute ineffective assistance of counsel.

Defendant also asserts that his attorney should have moved for a mistrial based on prosecutorial misconduct involving allegedly prejudicial remarks, and "prejudicial" testimony by an officer. A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Our review of the record does not disclose any impermissible remarks that resulted in prejudice. To the extent defendant may be arguing that testimony was

prejudicial because the witness was impeached, the impeachment evidence created a jury question, but was not the basis for a mistrial.

Defendant next claims that counsel should have objected to the introduction of defendant's prior conviction, and should have requested a limiting instruction. Presumably, defendant is referring to the stipulation that he had a prior specified felony conviction. This was an element of the crime of felon in possession. The stipulation was probably the best way to deflect attention from the prior crime. Regarding a limiting instruction, in *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998), this Court found that "(1) the introduction by stipulation of the fact of the defendant's prior conviction, [and] (2) a limiting instruction emphasizing that the jury must give separate consideration to each count of the indictment" provided adequate safeguards to protect the defendant where he was being tried for felon in possession along with other crimes. Although a specific instruction to consider the prior conviction only as it related to the felon-in-possession charge would have been ideal, the *Green* Court concluded that manifest injustice, the applicable standard since there was no request for an instruction, would not result given the adequate safeguards.

Here, as in *Green*, the first two safeguards were in place, but the specific limiting instruction was not given. Unlike *Green*, defendant raises the issue in the context of an ineffective assistance claim. However, just as there was no manifest injustice from the omission of a limiting instruction in *Green*, there is no reasonable probability that the result of defendant's trial would have been different if the instruction had been given. Moreover, there is no fundamental unfairness or lack of reliability in the verdict. See, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Also, it is conceivable that counsel considered requesting an instruction and opted not to, as he may have believed that the instruction itself would have given added emphasis to the prior felony. As a matter of trial strategy, we should not second-guess the determination.

Next, defendant challenges counsel's failure to make an objection that he requested. This is not evident on the record. Defendant also argues that counsel interjected prejudice when he asked the officer in charge if the gun was test-fired to determine if it was involved in any other known incidents of murder or armed robbery. However, the officer had no incriminating test results, and the armed robbery was linked to the driver of the car, not defendant. Accordingly, there is no reasonable likelihood that this exchange affected the verdict. *Odom, supra*.

Finally, defendant argues that the cumulative effect of errors violated his constitutional rights. Since there were no errors, there likewise was no cumulative effect of errors.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood