

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN GEE,

Defendant-Appellant.

UNPUBLISHED

January 27, 2009

No. 281378

Wayne Circuit Court

LC No. 07-008607

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon in a motor vehicle, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 10 to 20 years each for the CCW and felon in possession convictions, and a consecutive two-year prison term for the felony-firearm conviction. He appeals by right. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

I. Basic Facts

Defendant's convictions arise from a traffic stop that took place on April 18, 2006, at 1:50 a.m. Two police officers in a semi-marked patrol car observed a four-door Ford Focus disregard a stop sign. After the officers turned around and got behind the Ford, it made a "hard right," sped away, and pulled toward the curb on the passenger side. Both officers observed one gun being tossed from the front passenger side window and another from the rear passenger side window. The officers activated their lights and siren, and the Ford drove to the end of the block and stopped. Defendant was seated in the front passenger seat and his window was partially down. The officers observed the two backseat passengers moving around, attempting to remove or hide latex gloves; one rear-seat passenger had a ski mask on his lap. Defendant and the other occupants were arrested. About eight houses down from where the Ford stopped, the officers recovered a .44-caliber Rutger long-barrel revolver with one spent shell in the chamber and a .380-caliber AccuTek automatic weapon with eight live rounds; the guns were two to three feet from the curb.

The defense presented the testimony of James Dixon, who was the backseat passenger on the driver's side.¹ Dixon claimed that defendant was asleep before the police stopped the car. He testified that there were no guns in the car, that no one tossed a gun from the car, that the car did not pull toward the curb before stopping, that he never saw a ski mask in the car, and that the latex gloves belonged to the driver's girlfriend and were used for hair treatments.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to sustain his convictions for CCW, felony-firearm, and felon in possession of a firearm because there was no evidence that he carried or possessed a firearm. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a 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), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of felon in possession of a firearm include a previous felony conviction and possession of a firearm. MCL 750.224f; *People v Perkins*, 473 Mich 626, 629-631; 703 NW2d 448 (2005). The offense of CCW in a vehicle requires: (1) the presence of a weapon in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of the presence of the weapon, and (3) that the defendant was carrying the weapon. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Defendant argues only that there was no evidence that he possessed or carried a firearm. Because no one actually viewed defendant with a firearm, the evidence presented at trial consisted solely of circumstantial evidence. Our Supreme Court has observed, "circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *Wolfe, supra* at 526 (citation omitted). In this case, the evidence showed that defendant was the front seat passenger in a four-door vehicle. When the police pulled behind the vehicle to make a traffic stop, the vehicle made a "hard turn," sped off, and pulled toward to the curb on defendant's side of the vehicle. Both officers observed a gun being tossed out of defendant's window and another from the backseat passenger side window. The officers were within one car length of defendant's vehicle and the street was well lit. Although the officers activated their lights and siren, the

¹ Dixon testified that he was released from police custody (Tr I, p 59).

driver did not immediately stop. Instead, he continued driving to the end of the block before stopping. When the officers approached the car, defendant's passenger side window was still partially lowered. The guns were recovered eight houses from where the vehicle stopped, close to the curb. Given the officers' testimony about their observations, defendant's position in the vehicle, and the recovery of the firearms, the jury could reasonably infer that defendant possessed and carried the firearm that was tossed from his window even though other people were in the car. This inference is even more persuasive when considering that the driver pulled to the curb on defendant's side of the vehicle and that the rear window was used to discard a different firearm.

Thus, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a reasonable fact-finder to find beyond a reasonable doubt that defendant committed the crimes of CCW, felon in possession of firearm, and felony-firearm by knowingly possessing and carrying a firearm.

III. Evidentiary Issue

Defendant further argues that the trial court abused its discretion when it admitted the latex gloves and ski mask seized from the backseat passengers. Defendant argues that this evidence was not relevant and was unduly prejudicial. We disagree. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *McDaniel, supra*.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The relevancy "threshold is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). The challenged evidence was relevant to assist the jury in understanding the complete story and to support the police officers' testimony to the extent that the occupants in the vehicle were attempting to dispose of or hide incriminating items in the car. In closing argument, the prosecutor explained that "[they're] here for the guns," there is "nothing illegal about having a ski mask" or latex gloves, and that those items are "only to help [the jury] understand everything that was going on that night."

Furthermore, the evidence was not inadmissible simply because the nature of the evidence is prejudicial; defendant has not demonstrated that he was unfairly prejudiced. MRE 403. The danger that MRE 403 seeks to avoid is that of *unfair* prejudice, because, presumably, all evidence presented by the prosecution is to some extent prejudicial to the defendant. *Crawford, supra* at 398. The probative value of the evidence was not substantially outweighed by its prejudicial effect. The trial court did not abuse its discretion in admitting the evidence.

V. Sentencing Guidelines Departure

Defendant also argues that he is entitled to be resentenced because the trial court did not articulate a substantial and compelling reason for exceeding the sentencing guidelines range of 14 to 29 months.

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the sentencing guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A court may depart from the appropriate guidelines range only if it “has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure.” MCL 769.34(3). A court may not depart from the guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds based on facts in the court record that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). The phrase “substantial and compelling” constitutes strong language intended to apply only in “exceptional cases.” *Babcock, supra* at 257-258 (citation omitted). The reasons justifying departure should “keenly and irresistibly grab” the court’s attention and be recognized as having “considerable worth” in determining the length of a sentence. *Id.* Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id.* at 258, 272. Further, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant’s conduct and his criminal history. *Id.* at 261-264; *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

Whether a factor exists is reviewed for clear error on appeal. *Babcock, supra* at 264, 273. Whether a factor is objective and verifiable is subject to review de novo. *Id.* The trial court’s determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion, as is the extent of the departure. *Id.* at 264-265, 274. “A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.” *Smith, supra* at 300.

Initially, one of the trial court’s articulated reasons for departure, i.e., its belief that defendant suborned perjury by presenting Dixon’s testimony, is not objective and verifiable. Although subornation of perjury is substantial and compelling, see *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988), and *People v Syakovich*, 182 Mich App 85, 90-91; 452 NW2d 211 (1989), there is no objective and verifiable evidence that defendant willfully, materially, and flagrantly convinced Dixon to lie for him. Accordingly, this factor does not provide a basis for departing from the sentencing guidelines range.

The court, however, relied on other reasons for departure that were objective and verifiable. Thus, the court did not abuse its discretion in determining that those reasons were substantial and compelling. The trial court’s primary reason for departure was that one of the guns thrown from the car was not an “ordinary gun,” but rather a high-powered “cannon” that would undoubtedly cause severe maiming or death when used. This characteristic is unique to this case and is not adequately reflected in the scoring of the guidelines. The trial court also found that defendant is a “dangerous criminal.” A trial court’s general conclusion that a defendant is a danger is not, itself, an objective and verifiable factor. See *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). Here, however, the trial court based this finding on specific objective circumstances surrounding defendant’s prior history and his possession of a “cannon,” which it concluded were not adequately accounted for in the scoring of the guidelines, thereby justifying an upward departure. The facts on which the trial court relied

for its conclusion that defendant will be a continuing threat were external to the court's mind and were capable of being confirmed.

Even where a departure is warranted, "a trial court must justify why it chose the particular degree of departure." *Smith, supra* at 318. Here, the trial court departed from the sentencing guidelines range of 14 to 29 months and imposed minimum sentences of ten years each for defendant's CCW and felon in possession convictions. No explanation was given for the extent of the departure, and thus the court failed to justify the large departure made. A court's articulation must include an explanation for the particular departure imposed, i.e., "an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Id.* at 311. We therefore vacate defendant's sentences and remand for resentencing. On remand, the trial court must sentence defendant within the sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from that range and for the extent of the departure, in accordance with *Babcock* and *Smith, supra*.

We affirm in part and remand for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Jane E. Markey