STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 13, 2009
v	No. 286068 Wayne Circuit Court
DEVIN MARTELL MCMILLER, Defendant-Appellant.	LC No. 2077-020999-01-FC

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of carrying a concealed weapon in a vehicle, MCL 750.227, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to prison terms of 15 to 90 months for the felon in possession of a firearm and CCW convictions, and to a consecutive two-year term for the felony firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the prosecutor failed to produce sufficient evidence to support the convictions. In reviewing a challenge based on the sufficiency of the evidence, this Court conducts a de novo review. *People v Sherman-Huffman*, 241 Mich App 264, 265; 616 NW 2d 776 (2000). A conviction will be affirmed when, viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

A conviction for carrying a concealed weapon in a vehicle requires proof beyond a reasonable doubt that (1) there was a weapon present in the vehicle operated or occupied by the defendant, (2) the defendant knew of the weapon's presence, and (3) the defendant was carrying the weapon. *People v Courier*, 122 Mich App 88, 90; 332 NW2d 421 (1982). Defendant asserts the prosecution failed to establish beyond a reasonable doubt that he knew of the weapon's presence and that he was carrying a weapon. The term "carrying" denotes that a defendant had some exercise of dominion and control of the weapon. Here, evidence was presented that defendant was a passenger in the vehicle where a weapon was recovered. When the police car initiated the traffic stop, the vehicle slowly rolled for 200 to 250 yards before coming to a complete stop. Police testimony demonstrated that defendant made movements towards the area where the weapon was recovered. Defendant attempted to explain his movements by stating that he was merely trying to remove his seat belt. "It is for the trier of fact, not the appellate court, to

determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman,* 466 Mich 417, 428; 646 NW2d 158 (2002). Here, jurors could have reasonably inferred that defendant had control of the weapon and was trying to use this time to place it underneath his seat. All of these facts were sufficient for a rational trier of fact to find that defendant knew of the gun's presence and was carrying the gun.

Defendant also asserts that the prosecution failed to present sufficient evidence in support of his remaining two convictions. The elements of the offense of felon in possession of a firearm are (1) the defendant possessed or used a firearm in this state, and (2) that the defendant was convicted of a specified felony that precludes him from being eligible to possess, use, or transport a firearm in this state. *People v Dupree,* ___ Mich App ___; ___ NW2d ___ (2009), (Docket No 281408). The elements of the offense of felony-firearm are (1) that the defendant possessed a firearm during the commission, or (2) attempt to commit a felony. *People v Avant,* 235 Mich App 499, 505; 597 NW2d 264 (1999). In challenging each conviction, defendant asserts only that the prosecution failed to show that he possessed a firearm. The element of possession may be satisfied by actual or constructive possession and can be proved by circumstantial evidence. *People v Burgenmeyer,* 461 Mich 431, 437; 606 NW2d 645 (2000). A defendant has constructive possession of a firearm if he knows of the firearm's presence and if there is indicia of control. *Id.* at 438.

The circumstantial evidence presented at trial was sufficient to establish that defendant placed the firearm under his seat in the vehicle. Because the jury was justified in concluding that defendant placed the weapon under the seat, it follows that the jury could reasonably conclude that defendant had constructive possession of the weapon as he was aware of its location and there was indicia of control.

Defendant also asserts he was denied the effective assistance of counsel. Because defendant failed to preserve this issue for appeal, this Court is limited to reviewing errors that are evident on the record. *People v Matuszak,* 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant's claim that he was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While the trial court's factual findings are reviewed for clear error, the questions of constitutional law are reviewed de novo. *Id.*

In order to prevail on a claim of ineffective assistance of counsel, defendant must show: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers,* 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant maintains that counsel was ineffective for stating in his closing argument that "it could have been the back seat passenger [who placed the gun under the seat] and it could have been the front seat passenger…maybe even probably was but as the Judge said at the beginning, probably isn't good enough." Defense counsel's statement referred to the trial court's earlier instruction to the jury that "[the] prosecutor can't get up and say, maybe, probably, could be, more likely than not, that's too low of a standard." Defense counsel did not act unreasonably in

reminding the jury to not disregard the reasonable doubt standard. Defendant has failed to establish that he was denied the effective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald