STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2010
v	No. 290503 Wayne Circuit Court
JAMES ERIC BARMORE, Defendant-Appellant.	LC No. 08-013048

Before: Talbot, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm (felon-in-possession), MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to prison terms of seven months to five years for the felon-in-possession and carrying a concealed weapon convictions, and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecutor presented insufficient evidence to support his convictions. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn from the evidence are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact 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). Any conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of felon in possession of a firearm are that the defendant (1) possessed a firearm, (2) he or she has been convicted of a prior specified felony, and (3) less than five years

has passed since the defendant successfully completed probation or parole, completed a term of imprisonment, and paid all fines with regard to the underlying felony. MCL 750.224f; *People v Parker*, 230 Mich App 677; 684-685, 584 NW2d 753 (1998).[1] The only element of carrying a concealed weapon is that defendant knowingly possessed a concealed weapon. MCL 750.227(2); *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 2; 728 NW2d 406 (2007). The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or an attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

The prosecution presented evidence from which a rational trier of fact could conclude beyond a reasonable doubt that defendant possessed a concealed firearm. Officer Robson testified that he personally observed defendant outside the bar fumbling with his waistband, a gesture which his experience suggested was consistent with concealing a firearm. Upon seeing the officer, defendant immediately started walking quickly toward the bar. Officer Robson was able to enter the bar only three to five seconds after defendant, and never lost sight of defendant. Officer Robson personally observed defendant remove a large handgun from his waistband and throw it in between two arcade machines. Defendant acknowledged in his witness statement that the officer was "right behind" him as he entered the bar. The weapon was found between the two arcade machines moments later.

Although the defense witnesses collectively stated that they saw defendant holding a beer, not a gun, a jury is permitted to disregard or disbelieve any of the evidence presented. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). This Court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127, citing *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Based on the testimony that defendant knowingly possessed a concealed weapon, the prosecutor presented sufficient evidence on the charges of felon-in-possession, MCL 750.224f, and carrying a concealed weapon, MCL 750.227. Because felon-in-possession is a felony not excluded under MCL 750.227b, the same evidence was sufficient to support the jury's verdict on the charge of felony-firearm, MCL 750.227b.

Next, defendant argues that the jury's verdicts were against the great weight of the evidence. We disagree. To preserve an issue that the jury's verdict is against the great weight of the evidence, a defendant must raise the issue in a post-trial motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). This issue is not preserved for appeal because defendant did not move for a new trial. Our review is limited, therefore, to plain error affecting defendant's substantial rights. *Id.;* see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (plain error rule applies to all unpreserved non-constitutional claims of error).

[1] At trial, defendant stipulated to the fact that he had previously been convicted of a felony and was ineligible to possess a firearm on the date of the incident. Accordingly, the only issue relevant to the felon-in-possession charge was whether defendant possessed a firearm.

The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record, such as passion, prejudice, sympathy or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993), quoting *Nagi v Detroit United Rwy*, 231 Mich 452, 457; 204 NW 126 (1925).

Defendant points to contradictions between the testimony of his witnesses and the prosecutor's main witness, Officer Robson, to suggest that the verdicts were against the great weight of the evidence.[2] The existence of conflicting testimony, even when impeached to some extent, is an insufficient basis for granting a new trial. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Officer Robson's testimony, if believed, established that defendant knowingly possessed a concealed weapon. When evaluating a great weight of the evidence claim, a reviewing court may not act as a "thirteenth juror" or attempt to resolve credibility questions anew. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Issues with respect to witness credibility are, generally, insufficient grounds for granting a new trial. *Lemmon*, 456 Mich at 643-644. Rather, a new trial may be granted on the basis of questions of witness credibility only in narrow circumstances, such as when the testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it. *Id.* at 643.

In this case, the testimony by Officer Robson showing that defendant knowingly possessed a concealed weapon does not contradict indisputable physical facts or laws, nor is it patently incredible or implausible. Accordingly, defendant has failed to demonstrate plain error affecting his substantial rights.

Finally, defendant asserts that he was denied the effective assistance of counsel. In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a hearing in the trial court. *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Defendant did not move for a new trial or evidentiary hearing in this case and, therefore, our review is limited to mistakes apparent on the record. See *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. The Court must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of

[2] Although defendant claims in this issue that Robson incorrectly stated that the arcade machines were on the left side of the bar, there is no testimony in the record that the arcade games were located on the right. Rather, it appears that Robert Wiley was shown a photograph of the entrance taken from inside the bar, and he confirmed that it depicted the arcade games on the right side *of the photo*. This would be consistent with the testimony that the machines were to the left as one entered the bar, as Officer Robson and others testified.

counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). 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 Mesik (On Reconsideration)*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009). A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

First, defendant claims that counsel was deficient in failing to object to the prosecutor's opening statement, which arguably suggested that more than one witness observed defendant holding a weapon. The prosecutor stated:

> When they saw him, the defendant held his waistband and walked, and went into the lounge. The officers followed him into the lounge. They observed him toss a handgun, which you will see here today. They recovered it, and they arrested the defendant. That's what this case is about.

The use of the pronoun "they" in this context could indeed suggest that there were two witnesses who could testify that they observed defendant in possession of a handgun. The decision whether to object to an inaccuracy is considered a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58-59; 687 NW2d 342 (2004). Here, the reference to "they" was isolated and brief. Had defense counsel objected during opening statement, the prosecutor would likely have responded that both officers were on the people's witness list and were available to testify. The trial court would, therefore, have been compelled to overrule any objection. Defense counsel will not be found ineffective for failing to make futile objections. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

Furthermore, despite defense counsel's failure to object to this misstatement, counsel nonetheless challenged the substance of that statement during her own closing arguments, by repeatedly stating that the prosecutor presented the testimony of "one officer." Counsel also noted that defendant's witnesses, who had been inside the bar, were accustomed to the low light in the bar and thus were able to more accurately observe defendant than Officer Robson could. Thus, defense counsel utilized at least a modicum of strategy to contrast the prosecution's one eyewitness with defendant's three. While that strategy was ultimately not successful, it did not fall below an objective standard of reasonableness.

Even assuming, however, that defense counsel was deficient in failing to object, it is highly unlikely that an objection would have resulted in acquittal. The trial court instructed the jury that only "sworn testimony of witnesses [and] the exhibits admitted into evidence" could be considered evidence. Specifically, the court instructed that the lawyers' statements were not evidence. Since jurors are presumed to follow the court's instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), we assume that the jury disregarded any assertions in the prosecutor's opening statement that were unsupported by the evidence.

Next, defendant claims that his trial counsel's performance was deficient for failing to call Officer Robson's partner, Officer Harris, as a witness, suggesting that his testimony would likely have been different from Officer Robson's. In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Here, defendant was not deprived of a substantial defense as counsel fully presented a defense based on the unreliability of Officer Robson's account. Moreover, the record is devoid of any evidence to suggest that Officer Harris would have testified any differently than Officer Robson. Because this Court's review is limited to the record before it, *Riley*, 468 Mich at 139, there is no basis for finding that defense counsel was deficient for failing to call Officer Harris as a witness.

Lastly, defendant claims that trial counsel was ineffective for having failed to cross-examine Officer Robson about the layout of the bar, and suggests that Officer Robson was lying about the location of the arcade machines. Defendant makes much of testimony by defense witness Robert Wiley who stated that the arcade machines were on "the right-hand side" in a photograph of the bar. He contrasts this with Officer Robson's testimony that defendant turned to the left to dispose of the gun between the arcade machines. However, it is clear from the record that Wiley was describing the location of the arcade machines in the photograph taken from the inside of the bar, and his testimony is, therefore, consistent with Officer Robson's that the machines were on the left as one entered the bar. There being no material issue with the location of the arcade machines, defense counsel had no reason to cross-examine Officer Robson on the issue.

Defense counsel's performance did not fall below an objective standard of reasonableness. Accordingly, defendant is not entitled to a reversal of his convictions on the basis of ineffective assistance of counsel.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly