# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 23, 2010 |
| V | No. 293973<br>Wayne Circuit Court |
| CORDELL JAMAL FIELDS,<br><br>Defendant-Appellant. | LC No. 09-008408-FH |

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to nine to 60 months' imprisonment for the felon in possession conviction and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions, affirm defendant's sentence for the felony-firearm conviction, but vacate defendant's sentence for felon in possession and remand for resentencing.

Defendant first alleges that the trial court erred in denying his motion to suppress evidence. We disagree. The trial court's findings of fact on a motion to suppress are reviewed for clear error, but the trial court's ultimate decision on the motion is reviewed de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The lawfulness of a search or seizure is contingent upon its reasonableness. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). The reasonableness depends on the totality of the circumstances. *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001). A search or seizure conducted without a warrant is unreasonable unless a recognized exception to the warrant requirement applies. *People v Tierney*, 266 Mich App 687, 704; 703 NW2d 204 (2004). A valid exception to the warrant requirement occurs when a seizure of an item in plain view occurs. *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009). Although the exceptions do not require a warrant, the action must be reasonable and based on probable cause. *Id*. at 516-517. Additional exceptions to the warrant requirement authorize a vehicle search to protect the

safety of law enforcement officials and to protect evidentiary interests. *Arizona v Gant*, 556 US ___; 129 S Ct 1710; 173 L Ed 485 (2009).

An unlawful detention or illegal arrest does not necessarily result in the exclusion of evidence. "The exclusionary rule is a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights," and evidence suppression "should be used only as a last resort." *People v Frazier*, 478 Mich 231, 247; 733 NW2d 713 (2007) (quotations and citations omitted). To determine whether exclusion of evidence is appropriate, the court must evaluate the circumstances of the case in light of the policy served by the exclusionary rule. *Id*. at 249. Suppression of evidence is proper only when an unlawful detention is employed as a tool to procure any type of evidence from a detainee. *People v Corr*, 287 Mich App 499, 508-509; ___ NW2d ___ (2010). Evidence need not be excluded if police would have inevitably discovered the evidence regardless of the unconstitutional conduct. *People v Stevens (After Remand)*, 460 Mich 626, 637; 597 NW2d 53 (1999). There is no Fourth Amendment protection for what a person knowingly exposes to the public regardless of whether the exposed object is examined or illuminated by artificial means. *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989).

In the present case, defendant does not contest the validity of the stop or the removal from the vehicle. The police officers testified that they observed a furtive gesture by defendant and saw an open intoxicant in the vehicle as they approached. Consequently, they removed all occupants of the vehicle. Officer Banks testified that he observed the weapon on the floorboard of the front seat, not under the seat, after defendant was removed. The trial court found the officers' testimony was credible. Under the circumstances, we cannot conclude that the trial court's decision was clearly erroneous. *Williams*, 472 Mich at 313.

Defendant's reliance on the *Gant* decision is misplaced. In *Gant*, the defendant had an outstanding warrant for driving with a suspended license. The defendant arrived home, exited his vehicle, and walked approximately twelve feet from the vehicle when he was arrested. After Gant was handcuffed and secured, the police searched his vehicle. *Gant*, 129 S Ct at 1715. However, the *Gant* Court held that exceptions to the warrant requirement authorized a vehicle search when safety or evidentiary concerns remained. Specifically, officers were entitled to search a vehicle's passenger compartment when there was a reasonable suspicion that an individual was dangerous or might access the vehicle to gain immediate control of weapons. *Id*. at 1721. In the present case, the officers testified that defendant engaged in a furtive gesture and was belligerent and agitated during the stop. He questioned why he was being removed from the vehicle and used profanity at the officer. The trial court found this testimony credible. In light of the safety concerns presented to the officers coupled with the furtive gesture, defendant's challenge is without merit.

Next, defendant asserts that he was deprived of his constitutional right to be present when closing arguments continued without his presence. We disagree. Review of the record reveals that defendant had a history of failing to appear or timely appear at court proceedings. Defendant arrived over two hours late for a calendar conference hearing before Judge David Groner. At a hearing to review defendant's bond, the trial court noted that defendant had failed to appear in two different district courts. More importantly, a defendant may waive his right to be present by affirmative consent or by failing to appear when he is at liberty to do so. *People v*

*Mallory*, 421 Mich 229, 248; 365 NW2d 673 (1984). The trial court did not deprive defendant of the right to be present for closing arguments, but rather, he failed to timely appear. Therefore, this challenge does not provide defendant with appellate relief.

Defendant contends that the trial court deprived him of a fair trial when it asked the police officer to testify regarding defendant's exact statement to police. We disagree. Defendant did not challenge this testimony in the trial court, and therefore, we review the issue under the plain error standard. *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009). The trial court has authority to retain control of the proceedings. *People v McLaughlin*, 258 Mich App 635, 648 n 5; 672 NW2d 860 (2003). In the present case, Officer Lewis testified that defendant was agitated and nervous. However, his testimony was conclusive in nature. Therefore, when Officer Banks testified similarly, the trial court asked for specifics regarding defendant's conduct. The trial court had the authority to require the officer to expand on this issue. *Id*. Additionally, the trial court instructed the jury to disregard any perception of the trial court's comments, rulings, and questions. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, with regard to this issue, we note that defense counsel failed to object to the testimony at the time of the admission. In closing argument, defense counsel argued that Officer Lewis did not testify regarding the profanity used by defendant, but Officer Banks testified that there was excessive profanity and name calling. Defense counsel asserted that this disparity demonstrated that the officers were not credible. Counsel may not harbor error as an appellate parachute. A party may not acquiesce to the trial court's handling of an issue and then raise the issue as error on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Defendant's contention that the cumulative punishments for felon in possession of a firearm and felony-firearm violate double jeopardy protections was rejected by our Supreme Court in *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003).

Lastly, the defense contends that the trial court abused its discretion in sentencing defendant to nine to 60 months' imprisonment for the felon in possession of a firearm, and the prosecutor agrees. Therefore, we vacate the sentence for this conviction only and remand for resentencing.[1]

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[1] In a Standard 4 brief filed pursuant to Supreme Court Administrative Order No. 2004-4, defendant alleges that there was insufficient evidence to support his convictions because he did not knowingly possess the weapon and he was merely present in the vehicle. The word "possession" includes both actual and constructive possession, and it can be established by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). When the resolution of the issue involves the credibility of diametrically opposed versions of events, the test of credibility lies where statute, case law, common law, and the constitution have reposed it, with the trier of fact. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). In the present case, Officer Banks testified that he found the weapon on the floorboard

We affirm defendant's convictions, affirm his sentence for felony-firearm, and remand for resentencing with regard to the felon in possession of a firearm conviction.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

in front of defendant's seat. This weapon was found after defendant engaged in a furtive gesture and was removed from the vehicle. On the contrary, defendant testified that the weapon did not belong to him. The trier of fact resolved this credibility dispute in favor of the prosecution, and there was sufficient evidence of constructive possession to support the convictions. *People v Hardiman*, 466 Mich 417, 428; 646 NW2dd 158 (2002); *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).