STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2010
v	No. 294740 Wayne Circuit Court
MICHAEL SMITH, Defendant-Appellant.	LC No. 09-015249-FH

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of carrying a concealed weapon (CCW), MCL 750.227, 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 126 days' imprisonment for his CCW conviction, 126 days' imprisonment for his felon in possession conviction, and five years' imprisonment for his felony-firearm conviction. We affirm.

I. BASIC FACTS

On May 26, 2009, defendant borrowed his friend's car to pick up another friend from the hospital. While en route, police officers Frederick Person and Myron Watkins observed defendant's vehicle swerving toward the center lane. The officers stopped defendant's vehicle and exited their squad car. As Person approached defendant's vehicle on the driver's side, he saw defendant reach over and put a handgun in the glove box. When he arrived at the driver's side window, Person asked defendant to step out of the vehicle and then Person told Watkins, using a special "code" language, that there was a gun located in the vehicle's glove box. Defendant was arrested for reckless driving and placed in the back of the squad car. In the meantime, Watkins approached the passenger side of the vehicle and told the vehicle's two passengers to exit the car. He then looked in the car's glove box and found the handgun.

At the bench trial, defendant testified that he did not know that a gun was in the car and that he was surprised when the officers found it. The parties stipulated to the admission of defendant's two prior convictions, one for armed robbery and felony-firearm in 1999, and another for the delivery and manufacture of marijuana in 2008. The handgun was admitted into evidence without objection; no recoverable fingerprints were found on it. Defendant was convicted as charged.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his convictions. We disagree. We review claims that the evidence was insufficient to support a conviction de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "When ascertaining whether sufficient evidence was presented in a bench 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 Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). "Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *Id*. at 619. "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). We resolve evidentiary conflicts in the prosecution's favor. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

A defendant is not denied due process where the prosecution proves all the elements of the crimes charged beyond a reasonable doubt. A defendant is guilty of committing the offense of CCW, which is a felony, if the defendant does not have a license to carry the weapon, concealed or otherwise, and he carries the weapon on his person or he carries the weapon while occupying or operating a vehicle. MCL 750.227(2). The elements of felon in possession are that the defendant was in possession of a firearm and that the defendant had been convicted of a specified felony. MCL 750.224f(2). Possession may be actual or constructive and may be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). A person can have constructive possession if the firearm's location was known to the person and was reasonably accessible to him. *Id*. "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 Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007) (citation and quotation marks omitted).

Here, Person testified that he saw defendant put a handgun in the vehicle's glove box as he approached the vehicle. Person had defendant get out of the vehicle and communicated to Watkins that a handgun was in the vehicle's glove box. Shortly thereafter, Watkins recovered the gun from the glove box. Defendant has two prior felony convictions for possession of a controlled substance and armed robbery, which are "specified felon[ies]" under the felon in possession statute, see MCL 750.224f(2) and (6), and it is illegal for him to possess a firearm, MCL 750.224f. Based on this evidence a rationale trier of fact could reasonably conclude beyond a reasonable doubt that defendant was guilty of CCW, felon in possession of a firearm, and felony-firearm. It is illegal for defendant to carry a firearm and a firearm was found in his possession while he was occupying a vehicle; thus, he is guilty of CCW, a felony. MCL 750.227. Defendant was convicted of a "specified felony" in 1999 and 2008 and he was in possession of a firearm, meaning that he was guilty of felon in possession. MCL 750.224f. Finally, defendant possessed a handgun while committing a felony, here CCW, and thus he was guilty of felony-firearm. MCL 750.227b. Defendant's argument on appeal merely advances his theory of the case by focusing on the version of events he provided in his trial testimony. However, conflicting evidence must be resolved in the prosecution's favor and this Court will not displace the trier of fact's credibility determinations. *Williams*, 268 Mich App at 419; *Harmon*, 248 Mich App at 524. Accordingly, the relief requested is not warranted.

III. SEIZURE OF THE HANDGUN

Defendant next argues that the officers' seizure of the handgun was unreasonable and violated his Fourth Amendment rights. Specifically, he contends that the search and seizure constituted an unlawful search incident to an arrest. We disagree. Because defendant did not move to suppress the handgun or otherwise object to its admission below, we review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The Fourth Amendment of the United States Constitution and article 1, section 11 of the Michigan Constitution protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, Art 1 Sec 11.[1] The general rule is that searches and seizures conducted without a warrant are presumptively unreasonable. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). However, certain established exceptions to the warrant requirement exist that permit law enforcement officers to conduct a search and seizure without a warrant, only one of which is relevant to this appeal: probable cause to search the automobile. In other words, "police may lawfully search an automobile without a warrant where they have probable cause to believe that the vehicle contains contraband." *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999) (citation and quotation marks omitted).

Under the facts of this case there was no plain error in the admission of the handgun. Although defendant argues that the gun was illegally seized under the search incident to arrest doctrine, that exception is irrelevant. Person witnessed potentially illegal activity when he saw defendant reach over and put a handgun in the vehicle's glove box. "The test for probable cause is whether the facts and circumstances known to the officers would warrant a person of reasonable prudence to believe that evidence of a crime or contraband sought is in a stated place." *People v Carter*, 194 Mich App 58, 61; 486 NW2d 93 (1992). Clearly, it was reasonably prudent for Person to believe, based on his first-hand observation, that a handgun would be found in the vehicle's glove box, which would potentially be evidence of a crime, specifically CCW. Accordingly, the officers had probable cause to search the vehicle for the gun and the search and subsequent seizure was not unreasonable. Defendant's Fourth Amendment rights were not violated and his claim fails.

IV. PROSECUTORIAL MISCONDUCT

Lastly, defendant asserts that he was deprived of a fair trial because the prosecution shifted the burden of proof during closing argument. We disagree. At the outset, we note that defendant fails to cite the portions of the prosecutor's closing argument that allegedly shifted the burden to defendant. Accordingly, this argument is abandoned on appeal and we need not consider it. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Nonetheless, our review of the prosecutor's closing statements reveals no plain error, see *Carines*, 460 Mich at

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[1] The Michigan Constitution is construed to provide the same protection as that provided by the Fourth Amendment. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999).

763-764, and certainly not a "pervasive" one as defendant contends. The prosecutor's statements in closing argument asserted that the trier of fact should believe the officers' testimonies and his rebuttal argument suggested, apparently in response to defense counsel's argument, that defendant had a reason to lie. There was nothing improper in these statements. Defendant's claim of misconduct is without merit.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello