STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2011
v	No. 294574 Wayne Circuit Court
COREY KENELLE DUNCAN, a/k/a STEVE SMITH, Defendant-Appellant.	LC No. 09-000029-FH

Before: JANSEN, P.J., and OWENS and SHAPRIO, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of carrying a concealed weapon (CCW) in a motor vehicle, MCL 750.227(2), possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced to concurrent prison terms of 7 months to 5 years for the CCW and felon-in-possession convictions, and a consecutive term of 5 years for the felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence to support his convictions of CCW, felon-in-possession, and felony-firearm because there was no evidence that he was in possession of the gun found on the floor of the passenger side of the vehicle. We disagree. We view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of felon-in-possession are: (1) that the defendant possessed a firearm, (2) that the defendant was previously convicted of a felony, and (3) that less than five years have elapsed since the defendant completed probation or parole, completed a term of imprisonment, and satisfied certain other requirements. MCL 750.224f; *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004). "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); see also MCL 750.227b. The elements of CCW in a motor vehicle are: (1) that a weapon was present in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of its presence, and (3) that the defendant was "carrying" the weapon. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d

393 (1999); see also MCL 750.227(2). With respect to each of the three charged offenses, defendant disputes only the element of possession.

With regard to the term "carry" as used in MCL 750.227, the Michigan Supreme Court has noted:

> The case law indicates that the concepts of "carrying" and "possession" have much in common . . . . [A] defendant carries a weapon when he exercises some element of intentional control or dominion over it. Most jurisdictions have held that this control need not amount to "actual possession" but that it encompasses "constructive possession" of the forbidden instrument as well. [*People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982).]

The element of possession can be satisfied by actual or constructive possession, and can be proved with circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000). Further, "'[a] defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him.'" *Id.* at 437 (citation omitted).

In this case, when viewed in the light most favorable to the prosecution, the evidence was sufficient to prove beyond a reasonable doubt that defendant had constructive possession of the firearm. Officer Travis Kostanko observed defendant sitting in the front passenger seat of a white Mercedes Benz. He observed defendant pull something out of his waistband, an area where it is not uncommon to carry a firearm. Kostanko then observed that, upon removing the object from his waistband, defendant bent over as if placing the object on the floor of the passenger side of the vehicle. Following this furtive conduct, defendant exited the vehicle and quickly walked toward a house. Immediately following defendant's exit from the vehicle, Kostanko approached the vehicle and observed a gun on the floor of the passenger side of the vehicle. Given the proximity of the gun to where defendant was sitting in the vehicle, and in light of Kostanko's testimony concerning defendant's furtive conduct, a rational trier of fact could have concluded that the gun's location was known to defendant and that the gun had been readily accessible to him. See *Burgenmeyer*, 461 Mich at 437. We hold that there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant was in possession of the gun found on the floor of the passenger side of the vehicle. Accordingly, for purposes of MCL 750.227, a rational trier of fact also could have found that defendant exercised dominion or control over the gun. *Butler*, 413 Mich at 390 n 11.

Defendant next argues that the verdict was against the great weight of the evidence and that a new trial is warranted. We disagree. We review a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). When a motion for a new trial is brought on the ground that the verdict was against the great weight of evidence, the test is whether the evidence preponderated 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).

Motions for a new trial based solely on the credibility of the witnesses are not favored and should be granted only with caution and in exceptional circumstances. *Lemmon*, 456 Mich at 639 n 17. Ordinarily, the question of witness credibility should be left to the trier of fact. *Id.* at 642-643. Conflicting testimony, even when impeached to some extent, is not a sufficient ground for granting a new trial. *McCray*, 245 Mich App at 638. A narrow exception exists when the testimony contradicts "indisputable physical facts or law" or defies physical realities. *Lemmon*, 456 Mich at 647.

Defendant argues that the verdict was against the great weight of evidence because Officer Kostanko was unreliable and his testimony was not corroborated. Defense counsel attempted to attack Kostanko's perception of the events on the ground that the Mercedes had dark tinted windows limiting the officer's view inside. But despite the tinted windows in the vehicle, Kostanko explained that he observed defendant's furtive conduct while shining his spotlight into the car. This evidence was uncontroverted. Again, we note that questions of witness credibility must be left to the trier of fact. *Id.* at 642-643. We cannot conclude that the trial court abused its discretion by denying defendant's motion for a new trial. The verdict was not against the great weight of the evidence.

Lastly, defendant argues that the trial court erred by considering his attempted flight as evidence of a guilty conscience. Again, we disagree. Defendant failed to preserve this issue, and we therefore review it for outcome-determinative plain error affecting defendant's substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

Following trial, the court observed that evidence of defendant's attempted flight was admissible to show that defendant had a guilty conscience. Specifically, the court stated:

> There has been some evidence that the defendant tried to run away or ran away after the alleged crime or after he was accused or arrested or after the police tried to arrest him. The evidence alone does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake, or fear. However, a person may also run or hide because of consciousness of guilt. The jury must decide whether the evidence is true and if true whether it shows that the defendant had a guilty state of mind. Again, his actions after the stop certainly bespeak of someone who furtively would have placed a gun at his feet and didn't want to be seen in the vehicle with that gun right at his feet, and he's out of that car lickety-split as soon as the officers roll up. And that certainly is, it's a circumstantial case. The officer didn't see it on him, but adding what we do have by way of direct evidence, what we do have by way of circumstantial evidence, and what we have by reasonable inferences by the action of the defendant points to the officers['] versions of the events being true.

It is clear that the court's consideration of defendant's attempted flight did not amount to plain error affecting defendant's substantial rights.

It is "well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001); see also *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). The term "flight" includes any attempt

to escape custody, *Compeau*, 244 Mich App at 598, even if the defendant does not actually succeed in leaving the scene, *Unger*, 278 Mich App at 226. In this case, there was evidence presented at trial to support the trial court's consideration of defendant's attempted flight. Specifically, the evidence established that after removing an object from his waistband and leaning forward, defendant quickly exited from the vehicle and hastily ran or walked toward a house. The trial court did not err by considering this evidence or by determining that defendant's attempt to leave the scene was probative of his consciousness of guilt. See *id*. We perceive no plain error in this regard.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro