

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SERELL BUTTS,

Defendant-Appellant.

UNPUBLISHED

November 24, 2020

No. 349017

Wayne Circuit Court

LC No. 18-008959-01-FC

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with intent to rob while armed (AWIRWA), MCL 750.89, being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a second-offense habitual offender, MCL 769.10, to 96 months to 30 years’ imprisonment for the AWIRWA conviction, 4 1/2 years to 7 1/2 years’ imprisonment for the felon-in-possession conviction, and to two years’ consecutive imprisonment for each felony-firearm conviction. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

In October 2018, the victim¹ was working as a prostitute in the area of Fenkell and Coyle Streets in the City of Detroit. The location was known for prostitution and drug transactions. At approximately 11:30 p.m., defendant walked to the area and reached an agreement with the victim for her to perform oral sex. They proceeded to walk to the side of a nearby church. At that point, defendant pulled a firearm from his pocket, pointed it at her and repeatedly demanded the victim give defendant money. Although the victim was unfamiliar with firearms, she believed that it was a black handgun, maybe a revolver. After the victim informed defendant there was no money on

¹ The victim identified as a transgender female and was dressed as a female at the time of the incident.

her person, defendant ordered the victim to go to a nearby street corner and set up potential clients for defendant to rob. Video surveillance footage from the church showed defendant and the victim walking alongside the church, but defendant did not have a visible weapon. The victim explained that this video excerpt only depicted the events following defendant's robbery demand. After the victim left defendant's line of sight, the victim called 911 from a cellular telephone.

Responding police officers obtained a description of defendant from the victim and soon after found defendant on a nearby street. Defendant was questioned, searched, and released by the officers, who did not find any weapons on defendant's person. However, the responding officers then obtained a second, more detailed description of defendant from the victim and realized that the description matched defendant. Once again, the officers located defendant in the vicinity and arrested him. During this time period, a second set of responding officers found a handgun matching the description provided by the victim in a flower planter near where defendant was first spotted by the officers. The handgun was not covered with any dirt or leaves and appeared to be undamaged by weather conditions. The officers did not find anyone else present near the flower planter when the handgun was discovered.

Defendant waived his right to a jury trial, and a bench trial was held. At the trial, the parties stipulated that defendant was found guilty of a specified felony and had not regained his right to carry a firearm. Additionally, defendant waived his right to testify at the trial. However, the statement defendant made to the officer in charge was admitted at trial. Defendant claimed that he left a friend's house and was walking on Fenkell Street when he was approached by two prostitutes for cigarettes. Defendant attempted to negotiate oral sex in exchange for \$10. However, it was proposed that the act occur at a house, and defendant thought he was being "set up." He continued to walk on Fenkell Street, and within five minutes, the police drove up and questioned him, but left. A short time later, the police returned and arrested him. In addition to his statement, defense counsel explored inconsistencies between the victim's written statement given to the police and her trial testimony. The trial court found defendant guilty of AWIRWA, felon-in-possession of a firearm, and two counts of felony-firearm.

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the trial court erred in finding sufficient evidence was presented to sustain defendant's convictions of AWIRWA, felon-in-possession, and two counts of felony-firearm. We disagree.

In evaluating a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo to assess whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). Evidence is examined in the light most favorable to the prosecution. *Id.* "A trial court's findings of fact may not be set aside unless they are clearly erroneous." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). "A ruling is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Id.* (citation and quotation marks omitted).

"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 Kanaan*, 278 Mich App 594, 619; 751 NW2d

57 (2008). “All conflicts in the evidence must be resolved in favor of the prosecution.” *Id.* Circumstantial evidence and reasonable inferences derived from such evidence may constitute sufficient proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). “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). Furthermore, “this Court must defer to the fact-finder’s role in determining the weight of the evidence and the credibility of the witnesses.” *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). We do not resolve challenges to the credibility of witnesses anew. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

In his brief on appeal, defendant does not challenge the evidence to support the individual elements of AWIRWA,² felon-in-possession,³ or felony-firearm.⁴ Rather, defendant essentially submits that the victim was not credible because she consumed alcohol before encountering defendant and admittedly engaged in prostitution. Additionally, defendant cites to inconsistencies between the church surveillance video and the victim’s testimony regarding defendant’s possession of a weapon, her identification of the weapon as a black revolver when it was a “black semi-automatic with a magazine,” and the police request for additional information from the victim regarding the assailant’s description.⁵

During the trial, the victim was questioned regarding the fact that, in the church surveillance video, defendant was not shown displaying a firearm. The victim explained that the excerpt of the video recording followed defendant’s demand for money from her and his request that she set up clients to be robbed by him. She also described the firearm as a black handgun and opined it “maybe” a revolver, but admitted during cross-examination that she was not familiar with guns. Additionally, defense counsel highlighted the victim’s alcohol consumption and asserted

² “The elements of [AWIRWA] are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant’s being armed.” *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991) (citation omitted).

³ “Felon-in-possession is a statutory offense that is set forth by MCL 750.224f,” and requires two essential elements: “(1) the defendant is a felon who possessed a firearm (2) before his right to do so was formally restored under MCL 28.424.” *People v Bass*, 317 Mich App 241, 267-268; 893 NW2d 140 (2016).

⁴ “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *Avant*, 235 Mich App at 505.

⁵ The 911 call was played for the trial judge, as the trier of fact, but it was not transcribed in the lower court record. According to the trial court’s factual findings, in the 911 call, the victim described her assailant as wearing a black jacket with red sleeves and with a bandana. However, in the trial court’s factual findings, it stated that the police dispatch only advised of a man with a dark complexion and a handgun wearing black jeans. When the police found defendant, he was wearing a blue jacket with red sleeves and a bandana. Thus, although defendant attributes a deficient description by the victim to 911 as the reason for defendant’s initial release by the police, the trial court did not support that contention in its factual findings.

that she had motive to lie in light of her occupation. However, the trial court considered the discrepancies in the evidence, the victim's testimony, and defendant's statement, but nonetheless gave credibility to the victim's testimony and found defendant guilty of the charged offenses.

The victim's testimony at trial indicated that defendant lured her into a secluded area and pointed a handgun at her while repeatedly demanding that she give him money. A handgun matching the description provided by the victim was found by responding officers in the vicinity of where those officers observed defendant. The handgun was not covered with debris or appear to be affected by weather conditions, suggesting that it was recently placed in the flower planter where it was found. Thus, irrespective of the failure to test the weapon for DNA or fingerprints, there was circumstantial and direct eyewitness evidence to correlate the weapon to defendant. While surveillance video of the area by the church near where the incident took place does not depict defendant with a handgun, the parties did not dispute that defendant was the individual shown to be walking with the victim. Additionally, the surveillance video was consistent with the victim's testimony. The victim testified that the portion of the footage depicted the events after the attempt to rob the victim occurred, when the victim and defendant were walking away from the church and splitting off into different directions. Because the convictions were premised on the credibility of the victim's testimony, and we do not resolve this issue anew, *Avant*, 235 Mich App at 506, defendant's challenge to the sufficiency of the evidence to support his convictions is without merit.

In his Standard 4 brief, Admin Order 2004-6, while defendant raised a single issue addressing ineffective assistance of counsel, within the discussion of this issue, he also asserts that the prosecutor failed to present evidence of possession of a firearm beyond a reasonable doubt because the video did not show defendant carrying a weapon. However, possession can be established by circumstantial or direct evidence and presents a factual question for the trier of fact. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). The trial court noted the victim's testimony, the timing of the 911 call, the prompt police response, and defendant's proximity to the weapon and its uncovered and unweathered condition. There was sufficient evidence to support the trial court's finding that defendant had actual possession of the handgun irrespective of the surveillance video.

III. OFFENSE VARIABLE (OV) 1

Defendant submits that the trial court erred in its scoring of 15 points for OV 1 of the sentencing guidelines. We disagree.

When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

OV 1 assesses points for the aggravated use of a weapon. MCL 777.31; *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004). Fifteen points should be assessed for OV 1 when "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL

777.31(1)(c). A trial court appropriately assesses OV 1 at 15 points when a defendant brandishes a firearm at the victim during a robbery. See *People v Harverson*, 291 Mich App 171, 182; 804 NW2d 757 (2010). However, OV 1 is assessed at only 5 points, when “[a] weapon was displayed or implied.” MCL 777.31(1)(e). Defendant submits that OV 1 should have been scored at 5 points because the victim’s testimony solely indicated that defendant “pulled out” a weapon during the assault to steal money.

The trial court properly scored OV 1 at 15 points. Contrary to defendant’s assertion, the victim directly testified that defendant pointed the handgun at her while demanding the victim give defendant money, and that she was fearful of being shot by defendant as a result. The trial court cited this testimony as the basis for its assessment of 15 points for OV 1. Any conflicts in the victim’s statement and testimony regarding the location where the gun was displayed does not negate the victim’s testimony that the gun was removed from defendant’s pocket and pointed directly at her.

To the extent defendant claims the trial court erred in its assessment because the victim was not a credible witness in light of conflicts in her testimony, defendant’s argument is unavailing; this Court defers to the fact-finder for determining the credibility of the witnesses. *Bennett*, 290 Mich App at 472. Therefore, the trial court did not err when it assessed 15 points for OV 1.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant contends that trial counsel was ineffective for: (1) failing to call a witness or present this witness’s affidavit; (2) failing to hire an investigator; and (3) refusing to allow defendant to testify on his own behalf. We disagree.

“Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law.” *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). This Court reviews a trial court’s factual findings for clear error and its conclusions of law de novo. *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). When no *Ginther*⁶ hearing is held in the trial court, appellate review is limited to mistakes apparent on the record. *Id.*

“Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions.” *People v Schrauben*, 314 Mich App 181, 189-190; 886 NW2d 173 (2016). To obtain a new trial premised on ineffective assistance of counsel, a defendant must demonstrate that counsel’s performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel’s errors, the result of the proceeding would have been different. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). It is presumed that defense counsel was effective, and a defendant must overcome the strong presumption that counsel’s performance was sound trial strategy. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). “[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic

⁶ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

decisions with the benefit of hindsight.” *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The burden of establishing the factual predicate for a claim of ineffective assistance is on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant contends that trial counsel was ineffective for failing to call Malcolm Morrison, or alternatively, to present a signed affidavit from Morrison at trial. According to defendant, Morrison would have testified that he was “almost the victim to a prostitute on Fenkell” as a result of a scheme in which a prostitute threatened to call the police and claim that Morrison tried to rob that individual at gunpoint if Morrison did not pay her more than the agreed upon amount for sexual services. Defendant’s argument implies that these circumstances are similar to defendant’s, and that defendant was victimized through a similar ruse by the victim. However, defendant failed to meet the factual predicate of his claim by presenting the affidavit from Morrison. Indeed, the police officers testified that this area of Fenkell Street was a high crime area for prostitution and drug transactions, and there was no correlation between Morrison’s allegations and the victim’s.

In a cursory fashion, defendant contends that trial counsel was ineffective for failing to hire an investigator to track down another prostitute who was across the street that night to be a witness. Again, defendant failed to meet the factual predicate for his claim. Because this location was known as a high crime area, defendant failed to provide any information to warrant such a request by trial counsel. He did not identify the prostitute by description or name or indicate how far across the street that she was located and whether it was plausible that she heard the conversation between defendant and the victim. Under the circumstances, defendant’s claim was speculative at best.

Finally, defendant’s contention that defense counsel refused to allow defendant to testify at trial is not supported by the record. After being sworn by the court, defendant was subject to voir dire and agreed that the decision not to testify was his own. In light of the record, this contention is without merit. Therefore, defendant failed to demonstrate that he was denied the effective assistance of counsel.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro