STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DEVON PRUDE,

Defendant-Appellant.

UNPUBLISHED
December 9, 2021

No. 353505
Calhoun Circuit Court
LC No. 2019-001126-FH

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of carrying a concealed weapon (CCW), MCL 750.227(2), felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). We affirm.

I. STATEMENT OF FACTS

On April 11, 2019, a shooting occurred at a gas station in Battle Creek. An initial investigation into the shooting led police officers to pull over a car driven by defendant's cousin, in which defendant and another cousin were passengers. Upon approaching the vehicle, an officer saw a revolver resting against defendant's right leg. Defendant was detained, and three more guns were subsequently found in the car.

Defendant was charged with CCW, felon-in-possession, and felony-firearm. At trial, multiple police officers from the Battle Creek Police Department's Special Investigations Unit and Gang Suppression Unit testified that they were familiar with defendant on the basis of previous contacts with him, and they identified defendant in court. Defense counsel moved the court for a mistrial after one police officer, on cross-examination, testified about investigating shootings "with those who are associated gang members." Defense counsel argued that defendant was unfairly prejudiced by testifying officers' repeated references to their familiarity with defendant and by the remark about gang activity. The trial court denied the motion but struck the testimony on gang members from the record and instructed the jury that it should consider the testimony about previous contacts with defendant for identification purposes only. Defendant now appeals and

challenges the trial court's decision to deny the motion for a mistrial, and the sufficiency of the evidence concerning each of his convictions.

II. DENIAL OF MISTRIAL

Defendant first argues that the trial court erred by denying his motion for a mistrial. We disagree.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). An abuse of discretion occurs if the trial court chooses an outcome that is "outside the range of principled outcomes." *Id*. The United States and Michigan Constitutions guarantee the rights to due process of law and a fair trial. US Const, Ams V and XIV; Const 1963, art 1, § 17. A trial court should grant a mistrial "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Schaw*, 288 Mich App at 236 (quotation marks and citations omitted).

Defendant contends that the references by testifying police officers to their work with the Gang Suppression Unit were irrelevant, highly prejudicial, and responsive to the prosecutor's questions. Although defense counsel objected to an officer's testimony on cross-examination when moving for the mistrial, counsel never objected to officers' testimony on direct examination concerning their employment with the Gang Suppression Unit. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Therefore, this argument is unpreserved.

Unpreserved issues are subject to plain-error review. *People v Head*, 323 Mich App 526, 537; 917 NW2d 752 (2018). To avoid forfeiture of an unpreserved nonconstitutional error, the defendant must show that "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Defendant has not shown that any error, let alone plain error, occurred in this case. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. A fact that is of consequence need not be directed at an element of a crime or defense. *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). An "unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). An answer is responsive if it was elicited by the prosecutor's question. *Id*.

In this case, the prosecutor elicited responses from two officers that they each worked in the Gang Suppression Unit. This evidence was relevant to show that the officers were members of the Battle Creek Police Department and to explain why they were conducting surveillance. In fact, both officers testified that they were working unrelated surveillance assignments before becoming involved in this investigation. The prosecutor also did not imply that defendant was affiliated with a gang or offer evidence of gang activity. While the officers' answers were responsive to the prosecutor's questioning, there was nothing improper about the exchanges.

Therefore, it was not error to elicit testimony regarding the officers' involvement with the Gang Suppression Unit.

Defendant next argues that the officers' testimony about their familiarity with defendant was irrelevant and unduly prejudicial evidence, especially when combined with mentions of the Gang Suppression Unit. This issue is also unpreserved, as defense counsel did not object to such testimony when it occurred during direct examination and only raised the issue when arguing the motion for a mistrial during defense counsel's cross-examination. See *Jones*, 468 Mich at 355. Because the testimony was more than marginally probative and outweighed any prejudicial effect, the trial court did not commit plain error by denying a mistrial on this ground.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Jurors are presumed to follow instructions given by the court. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). A reviewing court will not reverse a conviction if a curative instruction alleviated the prejudicial effect of any improper testimony. *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009). Improper testimony on gang association may affect a defendant's substantial rights when it infects the entire trial. See *People v Gonzalez*, 256 Mich App 212, 222-223; 663 NW2d 499 (2003).

At defendant's trial, multiple officers testified that they were familiar with defendant on the basis of previous personal contact and identified him in court. The trial court instructed the jury that testimony about familiarity with defendant was offered only for identification purposes. Identification was probative because it helped to explain why officers took certain steps in their investigation. For example, one detective testified about a phone call she received from defendant on the day of the shooting and text messages she sent to him after. The detective's testimony that she was familiar with defendant was probative to explain why defendant called her and why she texted defendant to come to the police station.

Defendant further contends that, even if relevant, this testimony by police officers was unduly prejudicial. We disagree. Any prejudice did not substantially outweigh the testimony's probative value. Testimony by officers concerning their familiarity with defendant was probative of their in-court identifications and investigative steps. The possible prejudice to defendant was that the jury might infer from the testimony that defendant was somehow involved with gang activity. However, the court's limiting instruction emphasized that previous contacts with the police are not necessarily negative and were not to be inferred in that way against defendant. Because identification of defendant was probative to the case, and because the jury is presumed to have followed the court's instructions, there was no error in allowing officers to testify as they did,

much less a clear or obvious error that infected defendant's trial. The trial court did not abuse its discretion by denying the motion for a mistrial on this ground.[1]

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence presented at trial was insufficient to support his convictions of CCW, felon-in-possession, and felony-firearm. We disagree.

Claims of insufficient evidence are reviewed de novo. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). When reviewing a sufficiency of the evidence claim, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979). Circumstantial evidence and reasonable inferences drawn from that evidence can sufficiently prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (citation omitted).

In order to convict a defendant of CCW in a vehicle, the prosecution must prove: "(1) the presence of a weapon in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of its presence, and (3) that he was 'carrying' it." *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999) (quotation marks and citation omitted). CCW is a general intent crime, meaning the defendant must only intend to do the prohibited act. *People v Brown*, 330 Mich App 223, 229-230; 946 NW2d 852 (2019).

"[T]he 'carrying' element of CCW has been equated to possession." *People v Barbee*, 325 Mich App 1, 12 n 4; 923 NW2d 601 (2018), citing *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982). In *Butler*, 413 Mich at 390 n 11, our Supreme Court noted the following factors as ones considered relevant by other courts reviewing whether a defendant "carried" or "possessed" a weapon in a vehicle:

> (1) the accessibility or proximity of the weapon to the person of the defendant, (2) defendant's awareness that the weapon was in the motor vehicle, (3) defendant's possession of items that connect him to the weapon, such as ammunition, (4) defendant's ownership or operation of the vehicle, and (5) the length of time during which defendant drove or occupied the vehicle.

The Court reserved expressing an opinion on the "relevancy or importance" of these factors. *Id*. Possession of a firearm can be actual or constructive. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). A defendant has constructive possession if "the location of the weapon is known and it is reasonably accessible to the defendant." *People v Hill*, 433 Mich 464, 471; 446 NW2d 140 (1989).

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[1] As noted earlier, defendant moved the trial court for a mistrial after police testimony on cross-examination referred to gang association. However, defendant's argument on appeal focuses solely on answers elicited by the *prosecutor*. Therefore, we will not address the propriety of testimony concerning gang affiliation elicited on cross-examination.

In this case, the circumstantial evidence introduced at trial against defendant was sufficient for a jury to find that defendant knew of the revolver's presence and possessed or "carried" it. One officer testified that defendant's car was parked behind a house. Another officer testified that during his aerial surveillance of this house, he observed three men getting in and out of vehicles. Both officers testified about suspicious behavior engaged in by the drivers and occupants of a Ford Fusion and Jeep Grand Cherokee that left the house. After stopping the Fusion and approaching the car, a detective recognized defendant and saw a revolver resting against defendant's right leg. Defendant later told that detective, "[W]e were just trying to protect ourselves." Taken together, and viewed in the light most favorable to the prosecution, the circumstantial evidence was sufficient for a jury to reasonably infer that defendant had knowledge of the revolver and constructively possessed it, given the behavior observed by the police and the accessibility of the revolver in that location. Therefore, there was sufficient evidence supporting defendant's CCW conviction.

Possession is also an element of the felon-in-possession and felony-firearm offenses. *Barbee*, 325 Mich App at 12 n 4. Being a felon-in-possession requires that "(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). A felony-firearm charge requires 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). Defendant's sufficiency argument concerning each of these convictions rests on the possession element. For the same reasons discussed above, the evidence was sufficient for the jury to convict defendant of these charges.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael F. Gadola