STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JAVONTE DEWAYNE COLE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

JAVONTE DEWAYNE COLE,

Respondent-Appellant.

UNPUBLISHED
November 15, 2011

No. 299487
Wayne Circuit Court
Family Division
LC No. 06-460801

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

PER CURIAM.

Respondent, a juvenile, appeals as of right from an order of disposition entered by the trial court following a determination that respondent was responsible for carrying a concealed weapon, MCL 750.227(2), and possession of a firearm in public by a minor, MCL 750.234f(1). We affirm.

Respondent argues that the trial court abused its discretion by allowing a police officer to testify, on redirect examination, about a statement made by respondent. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). The trial court allowed the testimony over respondent's objection that it exceeded the scope of cross-examination. Thus, the issue has been preserved to the extent respondent argues that the statement was improperly admitted as part of the prosecutor's redirect examination. We review a trial court's decision relating to the scope of redirect examination for an abuse of discretion. *Barksdale v Bert's Marketplace*, 289 Mich App 652, 655; 797 NW2d 700 (2010); *Parkdale Homes, Inc v Clinton Twp*, 23 Mich App 682, 685; 179 NW2d 232 (1970). However, because an objection on one ground is insufficient to preserve an appellate challenge on a different ground, *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992), the issue has not been preserved to the extent respondent contends that the testimony was inadmissible for any other reason. We review an unpreserved claim of error for plain error affecting respondent's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A trial court is required to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a). While MRE 611(c) indicates that the trial court may limit the scope of cross-examination "with respect to matters not testified to on direct examination," there is no similar rule concerning limiting the scope of redirect examination. A court has discretion to "permit open redirect examination." *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998). Here, because there is no basis for concluding that petitioner gained some tactical advantage by offering the evidence on redirect examination rather than on direct examination, and because defense counsel was given the opportunity to re-examine the witness after petitioner elicited the testimony regarding respondent's statement, the trial court did not abuse its discretion in admitting the testimony. *Id*.

Respondent argues that the trial court erred by admitting the evidence because his attorney was not given pretrial notice of the statement. Respondent fails to offer any argument supported by citation to relevant authority for his claim that the prosecutor had a duty to provide notice of the statement. Thus, not only has he failed to properly present and address this issue, *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), he has not satisfied his burden of demonstrating a plain error.

Respondent also argues that the evidence was improper because he may have been subjected to "improper custodial interrogation" and because petitioner failed to establish a proper foundation. Although respondent's argument is not clearly presented, it appears from the cases he cites that he believes that his statement was inadmissible because petitioner failed to show that the officer advised him of his constitutional rights before taking the statement. "A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). A custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999) (internal citations and quotation marks omitted). Conversely, "volunteered statements of any kind are not barred by the Fifth Amendment and are admissible." *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). In this case, the officer testified that respondent made the statement in question when he (the officer) "encountered" him. The officer did not state whether this was before or after he took respondent into custody, or whether respondent made the statement in response to a question or whether he volunteered it. Because the record does not clearly show that the statement was the product of a custodial interrogation, respondent has not established a plain error.

In his last issue on appeal, respondent argues that the evidence was not sufficient to sustain the verdict. A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). This Court reviews the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

MCL 750.227(2) prohibits the carrying of a pistol concealed on or about one's person. The elements of the offense are (1) respondent knowingly carried a pistol, and (2) the pistol was concealed on or about respondent's person. *People v Shelton*, 93 Mich App 782, 785; 286 NW2d 922 (1979); CJI2d 11.1. The word "carry" is similar to possession, which may be actual or constructive, and denotes intentional control or dominion over the weapon. *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982).

MCL 750.234f(1) prohibits the possession of a firearm in public by a person who is less than 18 years old.[1] Thus, the elements of that offense are (1) respondent was under the age of 18, (2) respondent knowingly possessed a firearm, and (3) while in possession of the firearm, respondent was in a public place.

A "pistol" is defined as a "loaded or unloaded firearm that is 30 inches or less in length, or a loaded or unloaded firearm that by its construction and appearance conceals itself as a firearm." MCL 750.222(e). A "firearm" is defined as "a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air," but the definition does not include a BB gun. MCL 750.222(d). This Court has held that the firearm must be operable for a conviction under MCL 750.227(2). *People v Huizenga*, 176 Mich App 800, 806; 439 NW2d 922 (1989). However, operability is not an element of a prima facie case. *People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992); *People v Gardner*, 194 Mich App 652, 653; 487 NW2d 515 (1992). Rather, inoperability is an affirmative defense, requiring the respondent to present some evidence "that the pistol would not fire and could not readily be made to fire." *Parr*, 197 Mich App at 45; *Gardner*, 194 Mich App at 655. Absent such evidence, the trier of fact can conclude that the pistol was operable. *Parr*, 197 Mich App at 45; *Gardner*, 194 Mich App at 655-656. This is particularly true when the pistol is loaded. *Parr*, 197 Mich App at 45.

Viewed in the light most favorable to the prosecution, the police officers' testimony establishes that respondent, age 15, was walking in the street. He refused to display the left side of his waist area and later reached toward that area and threw away a revolver that was loaded with three live rounds of ammunition. Conversely, respondent testified that he showed the officers his entire waist area because he had nothing concealed and the item he threw away was a small packet of marijuana, not a gun. Because respondent denied possessing a firearm, he did not present any evidence that the firearm was inoperable. In deciding whether the evidence at trial was sufficient to sustain a conviction, "[t]his Court will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses." *People v Hill*, 257 Mich App 126, 140-141; 667 NW2d 78 (2003). The trial court clearly chose to believe the officers' testimony over that of respondent, which it was entitled to do. *People v Cummings*, 139 Mich App 286, 293-294; 362 NW2d 252 (1984). We will not resolve credibility anew. *People v Jackson*, 178 Mich App 62, 64-65; 443 NW2d 423 (1989). Because the officers' testimony was sufficient to show that respondent was under the age of 18 and was carrying a concealed pistol in a public place, we affirm the trial court's verdict.

[1] There is an exception for instances involving adult supervision.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher