

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 21, 2013

v

WILLIE BERNARD MARSHALL,

Defendant-Appellant.

No. 307191
Wayne Circuit Court
LC No. 11-002981-FH

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

PER CURIAM.

Defendant appeals as of right his bench trial convictions of carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm), second offense, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to five years' imprisonment for a second felony-firearm offense and two years' probation for felon in possession of a firearm. For the reasons set forth in this opinion, we affirm.

This appeal arises from an incident in the City of Detroit on March 12, 2011 around 2:00 a.m. At that time, four men were trying to enter a night club located at Dover and Livernois with guns. Officers George Alam and Jon Gardner arrived at that location and heard gun shots. The testimony of the officers varied at trial, and defendant argues that the testimony of Alam and Gardner contains discrepancies relating to the identification of defendant and was "incredible". Based on the discrepancies of the officers' testimony, defendant asserts on appeal that there was reasonable doubt regarding the identity of the perpetrator. Additionally, he argues that based on the discrepancies of the officers' testimony, the evidence was insufficient to convict defendant because the identity evidence was essential to proving the possession element of felony-firearm and felon in possession of a firearm.

We begin our analysis of defendant's claims by stating the correct standard of review. "This Court reviews de novo a claim of insufficient evidence in a criminal trial." *People v Kissner*, 292 Mich App 526, 533; 808 NW2d 522 (2011). In reviewing a sufficiency of the evidence claim, this Court views "the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were

proven beyond a reasonable doubt.” *People v Portellos*, __ Mich App __; __ NW2d __ (Docket Nos. 301190, 301333, issued November 13, 2012), slip op at 6.¹ “Circumstantial evidence and reasonable inferences arising therefrom may be used to prove the elements of a crime.” *People v Brantley*, 296 Mich App 546, 550; 823 NW2d 290 (2012). Questions of the weight of evidence and credibility of witnesses are reserved for the fact finder; “any conflict in the evidence must be resolved in the prosecutor’s favor.” *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

“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 Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession is a question of fact. *Id.* “Possession of a firearm can be actual or constructive, joint or exclusive.” *Id.* To prove the elements of felon in possession of a firearm, the prosecution must show (1) the defendant possessed a firearm, (2) the defendant was convicted of a specified felony, which prohibits the defendant from possessing a firearm until his rights are restored, and (3) “the defendant’s right to possess a firearm has not been restored[, but] only if the defendant produces some evidence that his right has been restored.” *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004). Further, “positive identification by witnesses may be sufficient to support a conviction of a crime.” *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Defendant only takes issue with the element of possession in both crimes.

Defendant asserts that based on numerous discrepancies in the testimony of the two responding officers and what he labels “incredible” testimony, defendant’s conviction should be vacated because the prosecution failed to prove beyond a reasonable doubt that defendant was the person in possession of the AK-47. Turning to the record evidence presented in this case, we initially note that Alam specifically identified defendant in open court as the individual he saw with the AK-47. Further, as the trial court pointed out, Gardner’s testimony, regarding the moments before defendant’s arrest as he ran into the vacant lot and doubled back, corroborated Alam’s testimony. Alam saw defendant “walking in the middle of the street on Stoepel—backwards [heading north], just firing an AK.” Alam pursued defendant. Defendant was running south on Stoepel, and there was a house with a vacant lot south of the house’s driveway. The vacant lot was on the east side of Stoepel, south of Dover. Defendant turned left, heading in an eastbound direction, and entered the vacant lot. Defendant then doubled back and began running towards Alam. Meanwhile, Gardner looked south down an alley between Livernois and Stoepel. Gardner began heading south down the alley. Gardner saw a vacant lot, and turned

¹ Defendant also argues in passing at the end of his brief that the trial court erred in denying his motion for directed verdict. The standard of review for a sufficiency of the evidence claim and a claim of error regarding the outcome of a motion for directed verdict is the same. *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008). Because defendant did not call any witnesses after making the motion for directed verdict, it is not necessary to analyze this improperly presented argument separately. See MCR 7.212(C)(5) (requiring that “the questions involved in the appeal” be stated in the statement of questions presented).

westbound through the lot. Gardner saw an individual coming around the south corner of a house on Stoepel, coming from the front of the house toward the rear where Gardner was located, and then the man doubled back and continued on in the opposite direction, away from Gardner.

Defendant's challenge is ultimately one of witness credibility. However, the trial court specifically "credited" the testimony of Alam. Specifically, the trial court found:

I think there may have been a momentary loss of sight[;] however[,] with the testimony of Officer Gardner[—]that he was coming almost at the same instant from the back of the house, that the person rounded the corner, looked at him, turned around and went back the other way and then was up on the porch[—] [e]ven though Officer Gardner cannot identify that person today, . . . [Gardner's testimony] corroborates the testimony of Officer Alam that he had chased this person, that the person discarded the firearm. It was found in the place where [Alam] said [defendant] had discarded it

Because questions of the weight of evidence and credibility of witnesses are reserved for the fact finder and "any conflict in the evidence must be resolved in the prosecutor's favor[.]" viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the prosecution proved defendant possessed the AK-47 beyond a reasonable doubt. *Harrison*, 283 Mich App at 378.

Next, defendant argues that the trial court erred in finding defendant possessed the AK-47, and because this was a necessary fact to convict defendant, defendant's convictions must be vacated.

"A trial court's findings of fact may not be set aside unless they are clearly erroneous[.]" and a finding is clearly erroneous "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012), quoting *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). A review of the record does not demonstrate that a mistake has been made, first and foremost, because Alam identified defendant as the person who possessed the AK-47 and Gardner's testimony corroborated Alam's testimony regarding the pursuit of defendant. However, defendant identifies several alleged inconsistencies regarding Alam's and Gardner's testimony.

The trial court addressed a variety of discrepancies that defendant and defendant's codefendant, Tino Thomas, raised at trial. Regarding these discrepancies, the trial court stated, "I did not see them rise to the level of—that was suggested, that they would cast a significant doubt on the veracity of the testimony of the Officers." The trial court further indicated that if the officers had been fabricating their testimony, Gardner's testimony would have been far more detailed in his corroboration of Alam's testimony. The trial court acknowledged that there "may have been a momentary loss of sight[.]" but concluded that Gardner's testimony corroborated Alam's testimony regarding the moments of the pursuit leading up to defendant's arrest.

First, defendant argues on appeal that Alam testified that while he was running behind defendant, he never lost sight of defendant; however, Alam denied that defendant ran past him

when defendant doubled back. However, there is nothing explicitly inconsistent about this testimony. Alam testified that he came face-to-face with defendant, rather than defendant passing him. Further, the trial court *acknowledged* that there was a possibility that Alam lost sight of the suspect; however, the trial court found Alam's testimony credible because Gardner corroborated Alam's testimony regarding the final moments of defendant's pursuit, leading to his arrest. In other words, even if Alam lost sight of defendant when he came around the corner of the home, Gardner's testimony indicated that Gardner saw defendant as he came around the corner. Therefore, there was evidence sufficient to conclude beyond a reasonable doubt that the individual that Alam was pursuing was the same individual apprehended by Alam and Gardner—defendant.

Second, defendant argues that if Alam was behind defendant when defendant ran into the vacant lot, then Gardner and Alam would have seen each other while in the vacant lot; however, Alam testified that he did not see Gardner until he came from the side of the house. However, Gardner was coming into the vacant lot from an alley, heading west. Alam was heading south on Stoepel and defendant turned left, which would be eastbound; therefore, Alam was looking eastwardly to pursue defendant into the vacant lot. Therefore, because Alam and Gardner were coming from opposite directions, it is consistent that Alam and Gardner would not have seen each other until Gardner approached from the side of the house.

Third, defendant notes that Gardner identified the person who was on the porch of the house as Thomas, rather than defendant. This is true; however, regarding this identification, Gardner said, "I'm not 100 percent sure. I just remember the clothing." Therefore, it cannot be said that the trial court clearly erred in crediting Alam's testimony regarding the identification of the individual Alam was pursuing because Gardner expressed doubt about his own identification. Further, defendant notes that while Alam testified that he saw defendant with an AK-47, Gardner, who was across the street from Alam, did not see anyone with an AK-47. Also, defendant notes that Alam testified that he heard more shots while he was handcuffing Thomas, but Gardner's report only mentioned the multiple gunshots that he heard when he first arrived on the scene, but no other subsequent shots. Given the chaos of the situation, it is reasonable that Gardner and Alam could have observed and perceived different things. Regardless, all of these concerns constitute questions of witness credibility, and questions of witness credibility are reserved for the trial court in a bench trial, not this Court. *Harrison*, 283 Mich App at 378.

Therefore, because (1) Alam identified defendant as the man with the AK-47 and (2) the inconsistencies raised by defendant are either not inconsistencies at all or constitute questions of witness credibility, the trial court did not clearly err in finding that defendant possessed the AK-47.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray