

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 17, 2013

v

ARMONE WAYNE PEARSON,

Defendant-Appellant.

No. 307667
St Clair Circuit Court
LC No. 11-001317-FH

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with a dangerous weapon (felonious assault), MCL 750.82, being a felon in possession of a firearm (felon in possession), MCL 750.224f, and discharge of a firearm at an occupied structure, MCL 750.234b.¹ He appeals by right, and we affirm.

At the preliminary examination, the victim testified that defendant inquired about missing money while at her cousin's residence and later returned with a weapon and fired it. The victim called 911 and reported that defendant was the shooter. Additionally, the victim told two police officers who came to the scene that defendant was the shooter. The police contacted defendant's sister, who lived near the scene of the shooting, and defendant attempted to connect with his sister through text message while she met with the police. Defendant inquired whether the police had left the scene. Defendant's sister indicated that the police had left. Instead, the police established an "invisible perimeter" and apprehended defendant when he returned to the scene.

At trial, the victim, defendant's childhood friend, vacillated in her account of the shooting. She could not recall specific information or recall answering questions at the preliminary examination. She did not wish to review or see her prior testimony. After review of

¹ Defendant was acquitted of the charge of possessing a firearm while under the influence of alcohol, MCL 750.237(2). He was sentenced as an habitual offender, second offense, MCL 769.10, to 2 to 6 years' imprisonment for the felonious assault and discharge of a firearm convictions, and 2 to 7 ½ years' imprisonment for the felon in possession conviction. Defendant's sentences are not challenged on appeal.

the preliminary examination transcript, she denied some of the testimony. Ultimately, over defense counsel's objection, the trial court admitted the preliminary examination testimony from the victim's direct examination. Despite the victim's evasion of the prosecutor's questions and her denial that defendant committed the shooting, the jury found defendant guilty of felonious assault, felon in possession, and discharge of a firearm.

On appeal, defendant contends that trial counsel was ineffective for failing to request a cautionary instruction regarding the limited use of the victim's testimony as impeachment, not substantive evidence, the trial court erred by failing to sua sponte provide such a cautionary instruction, and there was insufficient evidence of possession to convict defendant of the firearm-related convictions. We disagree. Because defendant did not raise the ineffective assistance of counsel claim in the trial court, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, the defendant first must show that counsel's performance fell below an objective standard of reasonableness. To meet this requirement, he must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must demonstrate that, but for the deficient performance by trial counsel, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

“[A] statement of identification is admissible under MRE 801(d)(1)(C) if a witness is present in court and under oath and is considered subject to cross-examination about his prior position. The jury can determine the credibility of a disavowal as well as his present position.” *People v Malone*, 445 Mich 369, 384-385; 518 NW2d 418 (1994). Previously, the rules of evidence provided that prior statements of a witness were admissible only for impeachment, and substantive use was objectionable. *Id.* at 375. MRE 801(d) reflects an abandonment of that view, and evidence previously admissible for impeachment only may now be introduced as substantive evidence. *Id.* at 375-385. Additionally, although out of court statements offered for their truth are generally inadmissible hearsay, MRE 801(c), a prior statement of a witness is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement which is inconsistent with prior testimony given under oath at a hearing, MRE 801(d)(1)(A); *People v Chavies*, 234 Mich App 274, 281-282; 593 NW2d 655 (1999) overruled in part on other grounds, *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006). “[I]nconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.” *Chavies*, 234 Mich App at 282 (further citation omitted). Consequently, when the testimony of witnesses at a grand jury proceeding implicated the defendant, but at trial, the witnesses had no recollection of any of the events, the grand jury testimony was properly admitted as substantive evidence pursuant to MRE 801(d)(1)(A). *Id.* at 282-283.

In the present case, the victim was evasive, claimed a lack of recollection, and denied that she made certain statements at the preliminary examination despite reading her own testimony. Additionally, although the victim denied that defendant committed the offenses at trial, she identified him as the perpetrator at the preliminary examination. Under these circumstances, the testimony was properly admitted as substantive evidence. *Malone*, 445 Mich at 384-385;

Chavies, 234 Mich App at 282. Trial counsel cannot be deemed ineffective when he fails to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Consequently, the contention that the trial court erred in failing to sua sponte provide a limiting instruction is also without merit.

Defendant's challenge to the sufficiency of the evidence does not entitle him to appellate relief.

A challenge to the sufficiency of the evidence is reviewed de novo. When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. Appellate review of a challenge to the sufficiency of the evidence is deferential. The reviewing court must draw all reasonable inferences and examine credibility issues in support of the jury verdict. When assessing a challenge to the sufficiency of evidence, the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. [*People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010) (citations omitted).]

Conflicts in the evidence are resolved in favor of the prosecution, and circumstantial evidence and reasonable inferences arising from that evidence may constitute proof of the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

Defendant does not challenge each element of the convicted offenses, but rather, only asserts that the requirement of possession was not established. Possession can be actual or constructive. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). It can be proven by circumstantial evidence. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). "The test for constructive possession is whether the totality of the circumstances indicates a sufficient nexus between defendant and the contraband. Although not in actual possession, a person has constructive possession if he knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons[.]" *People v Minch*, ___ Mich ___; ___ NW2d ___ (2012), slip op 3-4 (internal quotations and footnotes omitted).

Although the victim gave various accounts of the incident, her preliminary examination testimony was admitted as substantive evidence. There, she testified that defendant questioned her regarding his money and threatened to shoot. He left the scene, but returned wearing a red hoodie, and his hand was in his pocket. The victim testified that defendant started shooting as she stood right next to him. Although the defense challenges this testimony, citing the victim's consumption of alcohol, the credibility of her testimony at trial as opposed to her preliminary examination testimony presented an issue for resolution by the trier of fact, and we defer to the jury's role as the sole judge of the facts. *Malone*, 287 Mich App at 654. Accordingly, there was sufficient evidence to support the requirement of possession underlying the convicted offenses.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto