STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 20, 2013
v	No. 309420 Wayne Circuit Court
AARON ALONZO THOMAS, Defendant-Appellant.	LC No. 10-012996-FH

Before: JANSEN, P.J., and CAVANAGH and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon ("CCW"), MCL 750.227, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 3-1/2 to 15 years for the felon-in-possession and CCW convictions, and a consecutive five-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from his possession of a firearm during the early morning hours of September 27, 2010, in a Detroit neighborhood. The prosecutor's theory at trial was that three police officers approached defendant because he was walking in the middle of the street in violation of a city ordinance. The prosecutor presented evidence that defendant looked toward the officers, clutched his right waistband area as if concealing something illegal, took off running, and discarded a firearm along the way. The defense denied that defendant possessed a gun, and asserted that the police testimony was not credible. The defense argued that there were legitimate reasons why defendant ran from the officers, who were not in uniform or driving a marked scout car, and were in a very dangerous area of the city.

I. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that his convictions must be reversed because the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. We disagree. Because defendant failed to raise this issue in a motion for a new trial, the issue is not preserved for appeal. *People v Cameron*, 291 Mich App 599, 617-618; 806 NW2d 371 (2011). Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

In evaluating whether a verdict is against the great weight of the evidence, this Court must determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). In this case, as further discussed in parts II and III of this opinion, eyewitness testimony and circumstantial evidence established defendant's possession and concealment of a firearm. Considering the police testimony that defendant looked toward their police car, grabbed his right jacket pocket area in a suspicious manner, fled, ignored an officer's command to stop, and dropped a gun that was subsequently recovered, the evidence does not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand.

We disagree with defendant's argument that the testimony of the police officers was so unbelievable and contradictory that the jury was not justified in finding him guilty of the charged weapons crimes. Defendant notes that the officers testified that they observed him violating a city code by walking in the middle of the street, but no officer testified that the sidewalk was unobstructed. He also cites the officers' testimony that he fled when the officers approached, but asserts his justification was that the officers were in an unmarked car and were not wearing any identifiable police clothing in a high crime area. Further, of the three officers who gave chase, only Officer Rodak testified that he observed defendant drop a gun. Defendant also emphasizes that there was no corroborative scientific evidence because the police did not have the firearm tested for fingerprints. Contrary to what defendant asserts, however, conflicting testimony and questions regarding the credibility of witnesses are not sufficient grounds for granting a new trial. *Lemmon*, 456 Mich at 643. We defer to the jury's determination of credibility "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities[.]" *Id*. at 644-646 (citation omitted). That clearly is not the case here. The jury's verdict is not against the great weight of the evidence.

II. DEFENDANT'S POSSESSION OF A FIREARM

Defendant argues that there was no credible evidence of the possession element to support his convictions of felon in possession of a firearm, CCW, and felony-firearm. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of felon in possession include a previous felony conviction and possession of a firearm. See MCL 750.224f; *People v Perkins*, 473 Mich 626, 629-631; 703 NW2d 448 (2005). "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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); see also MCL 750.227b. The elements of CCW include proof that defendant carried a weapon and that the weapon was concealed on or about his person. See *People v Hernandez-Garcia*, 477 Mich 1039, 1040; 728 NW2d 406 (2007). "Carrying" is

similar to possession and denotes intentional control or dominion over the weapon. *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982) (citation omitted). For each of the three offenses, defendant challenges only the element of possession.

The element of possession can be satisfied by actual or constructive possession, and can be proven by direct or circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000). In this case, three police officers testified that they observed defendant walking in the middle of the street at 1:30 a.m. According to the police testimony, when they approached defendant to conduct an investigation, defendant turned his head, looked toward their vehicle, and took off running while grabbing or clutching his right jacket pocket in the area of his waist. One officer stated that defendant's gesture was "a very typical" and "non-verbal" type of action, referred to as a "gun check."

Testimony indicated that as defendant continued to flee, Officers Rodak and Smith pursued defendant on foot, while Officer Rutledge maneuvered the police car in an attempt to cut defendant off. While defendant was still in Officer Rodak's view, Officer Rodak observed defendant use his right hand to retrieve a revolver from his right jacket pocket and drop it on the ground just before running between two houses. Officer Rodak explained that he was about 19 to 20 feet away from defendant at the time, and could clearly see defendant's actions because the area was "pretty well lit" by a streetlight; nothing was blocking his view of defendant. Testimony indicated that after defendant was apprehended, Officer Rodak directed Officer Smith to the location where he observed defendant drop the gun. Following Officer Rodak's instructions, Officer Smith went to the location and retrieved a firearm. The .38 caliber nickel plated revolver appeared to Officer Rodak to be the same gun that he observed defendant discard.

The evidence that defendant fled from the police while doing a "gun check" of his right jacket pocket area, that an officer observed defendant pull a gun from his right pocket and drop it on the ground, and that the gun was found minutes later in the same location where the officer observed defendant drop it, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to infer beyond a reasonable doubt that defendant possessed the firearm. Although defendant argues that there was no fingerprint evidence, and that the officers' testimony was not credible, those challenges are related to the weight of the evidence rather than its sufficiency. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). These same challenges were presented to the jury during cross-examination and closing argument. This Court will not interfere with the jury's role of determining issues of weight and credibility. *Wolfe*, 440 Mich at 514. The evidence was sufficient to support defendant's convictions of felon in possession, CCW, and felony-firearm.

III. DEFENDANT'S CONCEALMENT OF THE FIREARM

Defendant also argues that there was no credible evidence that he actually concealed the handgun on or about his person and, consequently, his CCW conviction must be reversed. Again, we disagree.

As defendant correctly notes, concealment is an essential element of the crime of carrying a concealed weapon. *People v Jackson*, 43 Mich App 569, 571; 204 NW2d 367 (1972). The

weapon, however, need not be absolutely hidden to be "concealed." *Id*. Rather, the weapon must merely not be readily observable by persons in the ordinary and usual associations of life. *Id*. The issue of concealment is a question of fact determined on a case-by-case basis by the trier of fact. *Id*.; *People v Reynolds*, 38 Mich App 159, 161; 195 NW2d 870 (1972).

As previously discussed, testimony indicated that defendant grabbed his right jacket pocket area when he saw the police. Testimony also indicated that as defendant was being pursued by the officers, he was clutching his right jacket pocket. Officer Rodak testified, "While [defendant] was in my view he actually retrieved from his right pocket . . . a nickel plated revolver, Charter Arms." From this evidence, a jury could reasonably infer that the gun was not readily observable. Consequently, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find the element of concealment beyond a reasonable doubt.

IV. TRIAL COURT'S QUESTIONING

Defendant next argues that the trial court improperly invaded the role of the prosecutor by questioning Sgt. Leeray Stephens, the officer in charge of the case. We disagree. Because defendant did not object to the trial court's questions, we review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

It is well established that the trial court has a duty to control trial proceedings in the courtroom, and has wide discretion and power in fulfilling that duty. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). But a court's conduct may not pierce the veil of judicial impartiality. *Id*. at 308. Invading the prosecutor's role is a violation of this tenet. *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). A court may, however, question witnesses to clarify testimony or elicit additional relevant information, but must exercise caution to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. MRE 614(b); *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). The test to determine whether the court pierced the veil of impartiality is whether the court's questions "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Conley*, 270 Mich App at 308 (citations omitted).

During direct examination, Sgt. Stephens testified that he submitted the recovered firearm for testing to determine if it had been used in another crime. However, he did not request additional fingerprint testing. On cross-examination, defense counsel attempted to elicit from Sgt. Stephens whether fingerprint testing would have been futile because Officer Smith had grabbed the gun and bullets with his bare hands. The trial court sustained the prosecutor's objection. Sgt. Stephens later testified that he did not know how Officer Smith had handled the gun and bullets until he heard Officer Smith testify at trial. After cross-examination, the trial court briefly examined Sgt. Stephens during the following exchange:

> *Q.* Sgt. Stephens, in regard to the handgun and the ammunition which was provided to you by these police officers that arrested Mr. Aaron Alonzo Thomas, you made some decision as to why the handgun was not going to be subjected to additional testing; is that right?

A. I have to say at this time it probably was a failure not to have that (unintelligible.)

Q. What?

A. I think it was a failure; I should have held that weapon for fingerprints.

Q. Why?

A. Cause it's, based on the crime of CCW Person, in the handling of the property, that would have probably more-ly [sic] attached the defendant to him by having his fingerprints on that weapon.

It would have been another tool.

Q. It would have been another tool. But had—when you came into possession of the handgun and the ammunition, did you have some information as to whether or not that handgun and ammunition was connected to somebody?

A. Yes, the defendant. They recovered it from him.

Q. Okay. So was there any need to have the handgun undergo further examination?

A. Yeah, there was a need, Counsel—I mean, your Honor. It should have been printed.

Q. And that was a failure on your part?

A. That's correct, your Honor.

While the trial court asked Sgt. Stephens additional questions regarding the lack of fingerprint testing, the brief questioning attempted to clarify why the testing was not performed. The inquiries were material to an issue in the case (possession), limited in scope, and posed in a neutral manner. The questioning did not constitute plain error. *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996) ("[a]s long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality . . . a trial court is free to ask questions of witnesses that assist in the search for truth"). The fact that elicited testimony may be harmful to a defendant's case does not demonstrate that the trial court's questioning was improper. *Id*. Furthermore, the brief questioning did not affect defendant's substantial rights. As a result of the trial court's questions, Sgt. Stephens testified that the lack of fingerprint testing was a failure on his part. Moreover, the trial court twice instructed the jury that its questions are not evidence, that it is not trying to influence the jury's vote or express a personal opinion about the case, and that if the jury believes that the court has an opinion, that opinion must be disregarded. Defendant has not demonstrated that the trial court's questions were improper or prejudicial.

V. DENIAL OF THE MOTION IN LIMINE TO PRECLUDE A PRIOR CONVICTION

Defendant next argues that the trial court abused its discretion by deciding in limine to admit his prior armed robbery conviction for impeachment under MRE 609(a)(2). Defendant initially preserved this issue by moving in limine to preclude his impeachment by his prior armed robbery conviction. But by deciding not to testify, defendant has waived further review of the issue. See *People v Finley*, 431 Mich 506; 431 NW2d 19 (1988), and *People v Boyd*, 470 Mich 363; 682 NW2d 459 (2004). In *Finley*, our Supreme Court held that "a defendant must testify in order to preserve for review the issue of improper impeachment by prior convictions." *Finley*, 431 Mich at 521. Otherwise, the issue is waived. *Id*. Because defendant did not testify, this issue has been waived.

VI. 180-DAY RULE

Defendant also argues that the trial court no longer had jurisdiction because the 180-day rule was violated. Defendant notes that on June 27, 2011, he was imprisoned for a parole violation, but the Michigan Department of Corrections did not send notice of his confinement to the Wayne County Prosecutor's Office until September 26, 2011. Defendant contends that the prosecutor's duty under MCL 780.131 should have been triggered by the date that the Department of Corrections should have sent the notice—such as within 30 days of his incarceration. We disagree. Whether the 180-day rule mandates reversal of a conviction is a question of law that this Court reviews de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

The statutory 180-day rule, MCL 780.131(1), provides, in pertinent part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, *the inmate shall be brought to trial within* 180 days *after the department of corrections causes to be delivered to the prosecuting attorney* of the county in which the warrant, indictment, information, or complaint is pending *written notice* of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint . . . . [Emphasis added.]

Our Supreme Court has held that the explicit language of this statute sets the commencement of the 180-day period at the time the prosecution receives written notice of the defendant's incarceration from the Department of Corrections. See *People v Lown*, 488 Mich 242, 255-256; 794 NW2d 9 (2011), and *People v Williams*, 475 Mich 245, 259; 716 NW2d 208 (2006). An attempt to set an alternate trigger based on actual or constructive knowledge is an impermissible expansion of the statute. *Id*. Further, the statute does not mandate that the Department of Corrections send the notice on a particular date; it only indicates that the notice triggers the 180-day requirement. *Id*. In this case, the prosecutor commenced this action well within the applicable 180-day period. Defendant was arraigned on November 18, 2011, and trial began on February 1, 2012. Thus, defendant was brought to trial well within the 180-day period. Consequently, the trial court was not deprived of jurisdiction over defendant.

VII. THE SCORING OF OFFENSE VARIABLES 1 AND 19

Defendant lastly argues that he is entitled to resentencing because the trial court abused its discretion in scoring five points for offense variable (OV) 1 (a weapon displayed or implied), and ten points for OV 19 (threat to security/interference with administration of justice). We disagree. Defendant did not preserve these scoring challenges by objecting to the scoring decisions at sentencing. MCL 769.34(10). Accordingly, we review the scoring challenges for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

At sentencing, the trial court reviewed the sentencing guidelines for accuracy. With regard to the challenged offense variables, the following exchange occurred:

> *The court*: In regards to the offense variables, OV-1 is scored at five points.
>
> Is that an accurate score?
>
> *Defense counsel*: Yes.
>
> * * *
>
> *The court*: OV-19 is scored at ten points.
>
> Is that an accurate score?
>
> *Defense counsel*: Yes.

By expressly agreeing to the scoring of OV 1 and OV 19, defendant waived any error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). A waiver extinguishes any error, leaving no error to review. *Id*. at 216.

Defendant alternatively argues that defense counsel was ineffective for failing to object to the scoring of OV 19. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, 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).

Ten points must be scored for OV 19 where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49. Interfering or

attempting to interfere with the administration of justice is broadly interpreted when assessing OV 19. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004); *People v Steele*, 283 Mich App 472, 492; 769 NW2d 256 (2009). Any acts by a defendant that interfere or attempt to interfere with the judicial process or law enforcement officers and their investigation of a crime may support a score for OV 19. *Id*. In scoring OV 19, the trial court may consider "conduct that occurred after the sentencing offense was completed." *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). In *People v Ratcliff*, 299 Mich App 625; ___ NW2d ___ (2013), slip op at 4, this Court recently held that the defendant's act of "fle[eing] from the police contrary to an order to freeze," "is sufficient to warrant scoring ten points under OV 19." In this case, the record discloses that defendant fled from the police and ignored an officer's command to "Stop, police." Three officers pursued defendant, two on foot and one in a car. During the chase, defendant ran down streets, in between houses, and up a driveway. Defendant was ultimately apprehended while lying face down on the back porch of a house. From these facts, the trial court reasonably could conclude that defendant hindered a police investigation by fleeing and attempting to hide, contrary to an officer's command to stop. Thus, the record supports the trial court's scoring of OV 19. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Consequently, defendant cannot establish that defense counsel was ineffective for failing to object to the scoring of OV 19.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Jane E. Markey