

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

JEROME SMITH,

Defendant-Appellant.

UNPUBLISHED
November 13, 2008

No. 279613
Wayne Circuit Court
LC No. 07-008770-01

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to 23 months to 5 years' imprisonment for the felon in possession conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. We affirm.

On appeal, defendant argues that the trial court abused its discretion in finding that the prosecution acted with due diligence in its attempts to procure Detroit Police Officer Sean Wall for trial, and in allowing Officer Wall's preliminary examination testimony to be admitted as evidence. We disagree.

In order to preserve an issue for appeal, a party must object at the trial court level, so that the trial court has the opportunity to address it and correct any potential error. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Objections must be timely, and specify the same ground for challenge as the party seeks to assert on appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Defendant moved for dismissal of the charges against him based on the failure of Officer Wall and another police officer to appear for trial, but did not object to the trial court's decision to admit Officer Wall's preliminary examination testimony. Because defendant failed to make this specific objection on the record, this issue is not properly preserved for appeal. An unpreserved issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The defendant must show that a plain error occurred, which affected his substantial rights. *Id.* at 774.

The preliminary examination testimony of a witness may be offered as evidence at trial if the witness is unavailable according to MRE 804(a)(5). *People v Bean*, 457 Mich 677, 683-684; 580 NW2d 390 (1998). A witness is considered unavailable in situations where the declarant "is

absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . and in a criminal case, due diligence is shown." MRE 804(a)(5). In order for a witness to qualify as unavailable, the prosecution must show that it has made a diligent, good-faith effort to locate a witness for trial. *Bean, supra* at 684. The test is not whether more stringent efforts would have produced the testimony, but rather, is determined on a case-by-case basis considering the circumstances. *Id.*

Here, Officer Wall appeared to testify at defendant's preliminary examination, so it was reasonable for the prosecution to believe that he would also appear for the trial. The prosecutor issued a subpoena to inform Officer Wall of the trial date. This subpoena, along with those for other witnesses in the trial, was given to the officer in charge of the case for service on Officer Wall. This method successfully resulted in the appearance of the other police officers that testified at the trial, but was unsuccessful with respect to Officer Wall because he was on furlough. The prosecutor did not discover Officer Wall's absence until the morning of trial. Under the circumstances of this case, we conclude the prosecution exercised due diligence in its attempt to procure Officer Wall's testimony.

Further, even if the prosecutor's efforts did not meet the requirements of due diligence, the defendant bears the burden of proving that this error resulted in prejudice, affecting the outcome of the lower court proceedings. *Carines, supra* at 763. Defendant argues that, without Officer Wall's preliminary examination testimony, defendant would not have been convicted for felon in possession because Officer Wall testified that he found the shotgun that formed the basis of that conviction. Officer Gutierrez, however, supplied nearly identical testimony to that supplied by Officer Wall's preliminary examination testimony. Both officers testified that Katrina Salter told them that defendant lived with her at the Bulwer house at the time of his arrest. The officers also testified that Katrina confirmed that they had found the shotgun in her and defendant's bedroom. The only testimony of Officer Wall not also offered by Officer Gutierrez, and relevant to defendant's conviction, was that the shotgun in the closet would have been plainly visible to anyone who looked within. This testimony, however, was not necessary for the finding that defendant constructively possessed the firearm. Therefore, the admission of Officer Wall's preliminary examination testimony did not amount to plain error affecting defendant's substantial rights.

Defendant further argues that Salter's consent to search the house where the shotgun was found was not valid because she was coerced into consenting, and the police did not have reason to search the house after defendant had been removed from the premises. We disagree.

To preserve a claim that a search violated a defendant's Constitutional right to protection from unreasonable search and seizure, that defendant must move to suppress the evidence at the trial court level. *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). Defendant did not object to the validity of Salter's consent to search at trial, so the issue is unpreserved. An unpreserved issue is reviewed for plain error. *Carines, supra* at 763. The defendant must show that a plain error occurred, which affected his substantial rights. *Id.* at 774.

The United States Constitution and the Michigan Constitution guarantee that a person shall be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. This Constitutional protection does not prohibit all searches, but rather, only unreasonable ones. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Under ordinary

circumstances, a search conducted without a warrant is unreasonable. *Id.* In general, evidence seized in violation of the constitutional prohibition against unreasonable searches must be excluded from trial. *Id.*

Voluntary consent to search is recognized as an exception to the general prohibition against warrant-less searches. *Dagwan, supra* at 342. This voluntary consent must be unequivocal, specific, and freely and intelligently given. *Id.* The totality of the circumstances are considered when determining whether a person has freely and voluntarily consented to a search. *Id.* The party granting the consent may limit its scope or revoke it at any time after it is given. *Id.* at 343.

Defendant argues that Salter's consent was not valid because defendant's arrest was already complete, and he had already been removed from the premises. However, police are entitled to approach a person and ask for consent to search their property if they believe that further investigation might lead to the discovery of illicit materials, even when the information they already have is insufficient to constitute probable cause. *People v Frohriep*, 247 Mich App 692, 697; 637 NW2d 562 (2001). Therefore, the search in this case was valid, as long as Salter's consent was voluntary and the search was within the scope of the consent given.

In the instant case, Salter signed the consent to search form, authorizing the police to search her home without limitation. Even if the statement made by Officer Gutierrez, that he intended to search the home for purposes of officer safety, limited the scope of the search, the shotgun was found in plain view inside a closet, and police are authorized to seize contraband discovered during a protective sweep if its illegal nature is obvious. *People v Beuschlein*, 245 Mich App 744, 758; 630 NW2d 921 (2001).

Defendant argues that Salter was threatened and coerced into signing the consent to search form. The only evidence offered to support this argument is Salter's testimony, which is in conflict with both the language of the consent to search form itself and the testimony of Officer Gutierrez. The question of whose testimony to believe is one of credibility that must be determined by the trial court. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). The trial court's determined that consent to search was voluntarily given by Salter. Based on the record, we cannot conclude the trial court's findings amounted to plain error requiring reversal.

Finally, defendant argues that insufficient evidence was offered to support conviction for felon in possession of a firearm. We disagree.

This Court reviews a claim of insufficient evidence by undertaking a de novo review of the lower court record. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant had been convicted of a prior felony, and (3) less than five years had lapsed since defendant had been discharged from probation. *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004). Possession encompasses both actual and constructive

possession. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). Constructive possession of a firearm is established if the defendant knows the location of the weapon and it is reasonably accessible to him. *Id.* at 438. Possession can be established by circumstantial evidence. *Id.*

Here, the parties stipulated to defendant's prior conviction, and agreed that he had not regained his right to possess a firearm since that conviction, satisfying the second and third elements for felon in possession. Defendant argues that insufficient evidence was offered to prove that he lived at the house and possessed the gun that was found in the bedroom closet. We disagree.

When viewed in the light most favorable to the prosecutor, the evidence meets the criteria for possession. The Bulwer address was supplied to the police by a complainant in another case as defendant's address. The police found defendant at that address on their first attempt at executing the arrest warrant. Defendant and Salter both testified that defendant had slept in the bedroom where the shotgun was found. Officers Wall and Gutierrez both testified that Salter told them defendant lived with her at the house at the time of his arrest. Officer Gutierrez testified that defendant had listed the Bulwer house as his address at the processing station. The shotgun was in the closet, leaning against the wall, and Officer Wall testified that it could be seen by anyone who opened the closet door. The closet contained both men's and women's clothing. While defendant provided some evidence that he received mail at a different address, he admitted that it was his sister's address, and he had also used that address while living with Salter on Plainview. Additionally, the testimony offered by Salter regarding defendant's residence at the house was both internally inconsistent and conflicted with defendant's own testimony.

Whether to believe the testimony of defendant and Salter regarding defendant's residence at the time of defendant's arrest is a question of credibility. Such questions are left to the trier of fact to determine, and all matters involving conflicting evidence must be resolved in favor of the prosecution. *Fletcher, supra* at 562. In this case, the trier of fact found the testimony of the police officers to be credible and this Court must defer to those findings. Sufficient evidence exists for a reasonable trier of fact to infer that defendant lived at the Bulwer address, slept in the bedroom where the shotgun was found, and knew that it was in the closet, making it reasonably accessible to him.

Defendant also argues that insufficient evidence was presented to support his conviction for felony-firearm. The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission or attempted commission of a felony. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Defendant bases his argument, however, on the belief that insufficient evidence was presented to support the predicate felony, felon in possession. Because we have found that sufficient evidence was presented to support defendant's conviction for felon in possession, this evidence also satisfies the elements of felony-firearm.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter