STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 30, 2020
v	No. 347055 Calhoun Circuit Court
CHARLES IRVING PATTERSON, JR., Defendant-Appellant.	LC No. 2016-002700-FH

Before: BORRELLO, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm (felon-in-possession), MCL 750.224f; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and carrying a concealed weapon, MCL 750.227. We affirm.

I. BACKGROUND

Battle Creek Police Detective Tyler Sutherland testified that he was on patrol when he saw defendant sitting in the driver's side seat of a white Cadillac in a driveway. Detective Sutherland knew that defendant did not have a valid driver's license based on a previous encounter. After Detective Sutherland drove by, defendant pulled out of the driveway onto the roadway. Detective Sutherland saw this and radioed two other officers in the area to arrest defendant for driving without a license.

Officer Trevor Hoard testified that he and another officer—Corporal Anthony Gancer—were patrolling an area near Detective Sutherland when Officer Hoard heard from Detective Sutherland on the radio to look for defendant driving a white Cadillac. After driving for a few minutes, Officer Hoard found the white Cadillac with defendant and another individual inside. Officer Hoard exited his patrol car, and as he walked towards the Cadillac, defendant "started to get out of the driver side [of the] vehicle." Officer Hoard placed defendant in handcuffs for the "driving license violation" witnessed by Detective Sutherland. As he did, he noticed "a strong odor of marijuana . . . coming from the vehicle and [defendant]." As a result, officers searched defendant's car. During the search, officers found a firearm under the driver's side seat. When

officers asked defendant about the firearm, he admitted that he knew about it, and explained that it was for protection because of a shooting that happened a few days before.

Defendant testified at trial and offered a different version of events. According to defendant, he was never in the driver's seat of the vehicle, and he never drove the vehicle—he was in the backseat, and a woman drove the car. Defendant also testified that Officer Hoard did not stop him minutes after defendant saw Detective Sutherland, but it was "about an hour, maybe an hour and a half" later. As for the firearm, defendant testified that it belonged to his friend, that his friend had left the firearm under the driver's seat, and that defendant was unaware that the firearm was in the car when officers found it. Defendant admitted that he took the blame for the firearm after it was found, but explained that he did so because he did not want the passenger that was in the car with him to get in trouble.

The jury convicted defendant as stated. Defendant now appeals as of right.

II. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct[1] when she elicited testimony from officers about their affiliation with Battle Creek Police Department's Gang Suppression Unit. We disagree.

Defendant failed to preserve this issue by objecting at trial, see *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005), so our review is for plain error affecting substantial rights, see *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Issues of prosecutorial misconduct are decided case by case, and this Court evaluates a prosecutor's alleged misconduct in context. *People v Solloway*, 316 Mich App 174, 201; 891 NW2d 255 (2016).

At the beginning of the prosecutor's questioning of Officer Hoard, the following exchange occurred:

> *Q.* And what agency do you work for?
>
> *A.* Battle Creek Police Department.
>
> *Q.* How long have you worked there?
>
> *A.* It'll be six years this month.

[1] This Court explained in *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015), that a fairer label for most claims of prosecutorial misconduct would be "prosecutorial error," while only the most extreme cases rise to the level of "prosecutorial misconduct." However, we will use the phrase "prosecutorial misconduct" because it has become a term of art.

Q. Now, what's your current assignment?

A. The Gang Suppression Unit.

Q. And what is the Gang Suppression Unit?

A. We do multiple things, predominantly we focus on violent crime and narcotics.

* * *

Q. Okay, now do you also work patrol?

A. I can. I can work overtime but as far as my unit, yes, we do patrol if that's what specifically you're asking. . . .

Q. Okay. I'm gonna call to your attention June 7, 2016 at or about 7:00 o'clock p.m., do you recall where you were at about that time?

A. I was on the south side of town. . . .

Q. And why were you in that area?

A. A couple days prior to this incident—I say a couple days, it may have been three or four, there was a shooting that happened so we were just in the area for pure police presence . . . .

Q. Okay, so basically to patrol for safety, would that be correct?

A. That's correct.

At the beginning of the prosecutor's questioning of Corporal Gancer, the following exchange occurred:

Q. And where do you work?

A. Battle Creek Police Department.

Q. What position do you hold?

A. Corporal.

Q. And how long have you worked there?

A. Just over eight years.

Q. Over eight years you said?

A. Yes.

Q. And what is your current assignment?

A. I'm part of the Gang Suppression Unit.

Q. Okay. I'm gonna call to your attention June 7, 2016 at or about 7:00 o'clock p.m. that day. were at that time? Do you remember where you were at that time?

A. Yes. I was in a fully marked patrol vehicle in full police uniform with Officer Hoard.

* * *

Q. Okay, and do you recall performing—or do you recall what you were doing about this time?

A. At the time we were just on patrol, driving around[.]

Lastly, when Detective Sutherland testified, the prosecutor's questioning began with the following exchange:

Q. And where do you work?

A. City of Battle Creek Police Department.

Q. What position do you hold?

A. Currently assigned to the Detective Bureau as a detective.

Q. And how long have you worked for BCPD?

A. Almost 14 years now.

Q. I'm gonna call to your attention June 7, 2016 at or about 7:00 o'clock p.m. What was your assignment at that time?

A. At that time I was working—assigned to our Gang Suppression Unit. I had been in that unit for approximately eight years starting December of 2009.

Q. Okay, and on this particular date and time can you tell me what you were doing?

A. Yes. [I] was partnered up with Officer Bailey, he's our canine handler within our Gang Unit, so the two of us were in one patrol vehicle and Officer Hoard and Officer Gancer were in the other patrol vehicle. We were out patrolling that day as the Gang Unit, obviously in two separate cars.

Defendant contends that it was improper for the prosecutor to elicit testimony about the Gang Suppression Unit from the officers because it was not relevant and, combined with the

officers' familiarity with defendant, allowed jurors to infer that defendant was affiliated with gangs. Defendant's argument is too much of a stretch.

"Relevant evidence" means evidence that is material and has probative force. *People v Sabin*, 463 Mich 43, 57; 614 NW2d 888 (2000); MRE 401. The prosecutor's questions about the officers' employment were relevant to establish that the officers were members of the police force, that they were part of the same unit, and that their unit was assigned to patrol the area where they encountered defendant. Thus, the evidence was relevant, and the prosecutor's questions were not improper.[2]

As for the possibility that jurors could infer that defendant was affiliated with gangs, any error in that respect would not be attributable to prosecutorial misconduct. The prosecutor acted properly by eliciting relevant evidence and did not otherwise improperly imply that defendant had any gang affiliations; the prosecutor did not ask or elicit testimony about whether defendant had any gang affiliation, and none of the witnesses testified that they were surveilling defendant's neighborhood because of gang activity. Moreover, during closing arguments, the prosecutor made no mention about the officers' employment with the Gang Suppression Unit. In short, viewing the entire record, there can be no doubt that the prosecutor's conduct did not deprive defendant of a fair trial.

As part of his prosecutorial misconduct claim, defendant contends that the prosecution acted improperly because evidence that the officers were assigned to the Gang Suppression Unit was improper other-acts evidence and should have been excluded under MRE 404(b)(1). MRE 404(b)(1) prevents the admission of "other crimes, wrongs, or acts" if that evidence is admitted "to prove the character of [the] person in order to show action in conformity therewith." Evidence of the officers' affiliation with the Gang Suppression Unit was not a crime, wrong, or act, and that evidence did not, in any way, tend to prove anything about defendant or defendant's character. Thus, the prosecutor did not violate MRE 404(b) by eliciting testimony about the officers' employment.[3]

---

[2] Defendant argues that evidence of where the officers worked "was irrelevant to [defendant's] guilt or innocence." But as explained by our Supreme Court, relevant evidence "does not mean that the evidence must be directed at an element of a crime or an applicable defense." *People v Mills*, 450 Mich 61, 67-68; 537 NW2d 909 (1995). It need only be a fact " 'in issue' in the sense that it is within the range of litigated matters in controversy." *Id.* at 68 (quotation marks and citation omitted). The evidence of where the officers worked was relevant for the reasons already explained, and defendant's argument to the contrary is unpersuasive.

[3] Related to his other-acts evidence, defendant argues that the probative value of the officers' assignments to the Gang Suppression Unit was substantially outweighed by the danger of unfair prejudice in violation of MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Evidence of what unit the officers were assigned to was relevant for the reasons already stated. Any inference that jurors may—or may

III. EXPERT TESTIMONY

Defendant next argues that Detective Sutherland provided impermissible expert testimony. We disagree. Defendant did not object to Detective Sutherland's contested testimony in the trial court, so this issue is unpreserved. Unpreserved claims of evidentiary error are reviewed for plain error affecting substantial rights. See *People v Coy*, 258 Mich App 1, 12; 699 NW2d 831 (2003).

Lay witness testimony in the form of an opinion or inference is permitted when it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony or the determination of a fact at issue. MRE 701. An expert witness, on the other hand, is one who has been qualified by knowledge, skill, experience, training, or education and is used where scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or determine a fact at issue. MRE 702. This Court has "liberally applied MRE 701 in order to help develop a clearer understanding of facts for the trier of fact." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988). As such, lay witnesses, including police officers, may offer an opinion on matters that are related to their observations that are not "overly dependent upon scientific, technical, or other specialized knowledge." See *id*. (quotation marks and citation omitted).

Defendant takes issue with Detective Sutherland's statements in the following exchange between the detective and defense counsel:

> *Q.* So it's your testimony that [defendant], even though seeing you drive by, just continued to drive out of the driveway?
>
> *A.* A pretty common maneuver when people don't have valid licenses, they'll specifically wait for the police to go by, assuming the police are now in a bad position to turn around and they will try to scoot out behind us, take certain pathways that would be hard for us to turn around or follow them, they'll cut corners or cut the next intersection over, pretty common maneuvers once the police go by.

---

not—have drawn from that evidence was not likely to be given undue or preemptive weight. This is especially true because Officer Hoard explained that, while the Gang Suppression Unit mostly deals with violent and drug crimes, they also do road patrol, and all three of the officers testified that they were out on patrol when they encountered defendant. And relatedly, despite the unit's name, Officer Hoard's explanation for what the Gang Suppression Unit does made no mention of gangs. In light of these facts, we cannot conclude that the evidence should have been excluded under MRE 403.

Defendant also contends that for all of the same reasons that the prosecutor committed misconduct, defense counsel at trial was ineffective for failing to object. Because defendant has not identified any errors in the trial court, defense counsel was not ineffective for not objecting. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) ("Counsel is not ineffective for failing to make a futile objection.").

* * *

Q. But then when you came upon them the car was turned the other way?

A. Yes. Again, a pretty common maneuver when people are trying to avoid police, they'll . . . take off after we went by, or instead of try to continue down a roadway they'll hurry up and do a turn around, because—assuming the police were going to circle around like we did, they'll immediately try to curb up next to the road and try to get out of the car and appear as if they were to [sic] driving or in the car when the police then get to their location.

This testimony was not expert testimony. Detective Sutherland's testimony that he saw defendant pull out of the driveway after he passed by, and that the car was facing the opposite direction when police found it, were based on what the detective rationally perceived. When defense counsel further inquired about what Detective Sutherland saw, the detective confirmed what he saw and explained that, in his opinion, this was consistent with things he had observed in the past from other persons driving without a license. This opinion assisted the factfinder in determining whether defendant drove without a license, which was in issue because defendant denied driving the car. Applying MRE 701 liberally, Detective Sutherland's testimony was permissible lay-witness testimony.[4]

IV. STANDARD 4 BRIEF

Next, we address defendant's arguments in his Standard 4 Brief.

A. WITNESS TAMPERING

Defendant argues that the trial court engaged in witness tampering when it "badgered [defendant's] witness as [the witness] was on the stand" and "threaten[ed] [the witness] with jail time[.]" The record does not support defendant's assertions. Defendant is presumably referring to Melvin Hampton. Defendant testified at trial that the firearm found under the driver seat of the Cadillac belonged to Hampton, and Hampton arrived on the first day of trial to testify as a defense witness. Before Hampton testified, the trial court questioned Hampton outside the presence of the jury about whether Hampton was aware of his right against self-incrimination and his right to counsel. Hampton stated that he wished to talk to a lawyer, so the trial court delayed his testimony. The following day, Hampton's attorney informed the court that Hampton decided not to testify. Contrary to defendant's assertion, the trial court did not threaten Hampton with punitive consequences or otherwise intimidate Hampton; it simply informed Hampton of his rights, and after Hampton consulted with an attorney, he chose not to testify. The trial court's actions were not improper. See *People v Avant*, 235 Mich App 499, 515; 597 NW2d 864 (1999) ("Michigan courts have stated that if a trial court finds that it is necessary to inform a witness of his Fifth

[4] Defendant argues that trial counsel was ineffective for not objecting to Detective Sutherland's testimony on grounds that he was offering an improper expert opinion. Because we have concluded that the detective was not offering an expert opinion, defense counsel at trial was not ineffective for not objecting. *Thomas*, 260 Mich App at 457.

Amendment rights, the court should do so out of the presence of the jury."); *id*. at 518 n 11 (explaining that "error may occur" if the trial court "threatens the witness with punitive consequences . . . or otherwise discourages the witness from testifying").

B. FOURTH AMENDMENT

Next, defendant argues that police violated his Fourth Amendment right to be free from unreasonable searches and seizures.

The United States and Michigan Constitutions guarantee the right of citizens to be free from unreasonable searches and seizures. See US Const, Am IV; Const 1963, art 1, § 11. "In order to show that a search was in compliance with the Fourth Amendment, the police must show either that they had a warrant or that their conduct fell within one of the narrow, specific exceptions to the warrant requirement." *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). One such exception is the automobile exception, which allows police to search a vehicle if "probable cause exists to believe it contains contraband . . . ." *Id*. Probable cause exists if "there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place." *Id*. at 417-418.

Officers did not have a warrant to search the car defendant was found in, but the automobile exception applied. Officer Hoard testified that while he handcuffed defendant, he "smell[ed] a strong odor of marijuana . . . specifically coming from the vehicle and [defendant]." "[T]he smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement . . . ." *Id*. at 426. Therefore, contrary to defendant's position, police had probable cause to search the car defendant was found in for evidence of marijuana, and it did not violate his Fourth Amendment rights against unreasonable searches and seizures.[5]

C. SUFFICIENCY OF THE EVIDENCE

Defendant lastly argues that there was insufficient evidence to support his convictions. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Gaines*, 306 Mich App 289, 296; 856 NW2d 222 (2014). In analyzing sufficiency claims, this Court "must review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Powell*, 278 Mich App 318, 320; 750 NW2d 607 (2008) (quotation marks and citation omitted). The standard of review is deferential, and this 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).

[5] The use and possession of marijuana without a medical marijuana card were illegal at the time of defendant's 2016 offense, see MCL 333.26424, and Detective Sutherland testified that he asked defendant and the passenger whether either of them had a "medical marijuana card" and that they both responded that they did not.

Defendant contends that the evidence was insufficient to establish that he possessed the firearm, which is an element for all three of his convictions. See MCL 750.224f; MCL 750.227b(1); MCL 750.227(2). This Court has recognized that "possession" includes both actual and constructive possession. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id*. (quotation marks and citation omitted).

Defendant only argues that he could not have constructively possessed the firearm found in the car because he had no knowledge of it. Detective Sutherland and Officer Hoard testified that defendant admitted to possessing the gun. Officer Hoard also testified about defendant's ability to describe with particularity whether the gun was loaded. Although defendant testified that he had no knowledge of the firearm, "[j]uries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." *Palmer*, 392 Mich at 376. It was up to the jury to decide whether they believed defendant's story or the officers' story. If the jury credited the officers' testimony, they could have found beyond a reasonable doubt that defendant possessed the firearm.[6] Because possession is the only element of defendant's convictions that he challenges on appeal, and because the evidence was sufficient to support that element, we conclude that defendant's sufficiency claim does not entitle him to appellate relief.

Affirmed.

/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron

[6] Defendant also contends that there was no evidence that he was committing a felony, which is an element of felony-firearm. See MCL 750.227b(1). Felon-in-possession is a felony, MCL 750.224f(5), and it can serve as the underlying felony for a felony-firearm charge, see *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).