S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2005
v	No. 249833 Wayne Circuit Court
MARVIN FITZGERALD SMITH, Defendant-Appellant.	LC No. 03-000607-01

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of intentional discharge of a firearm at a dwelling, MCL 750.234b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of eighteen months to four years for the intentional discharge of a firearm conviction and eighteen months to five years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Underlying Facts

Defendant's convictions arise from allegations that, on the afternoon of November 13, 2002, he discharged a firearm at the complainant's house. The complainant testified that while he was sitting on his porch, defendant stopped his car, a black Grand Am, and confronted him about an alleged breaking and entering. The complainant pushed defendant and told him to leave because he was intoxicated. The complainant's niece, Kimberly Earl, testified that she heard defendant and the complainant arguing and, when she went outside, the complainant instructed her to call a cab and leave. According to the complainant and Earl, defendant subsequently left, but said he would return. Approximately ten minutes later, defendant drove slowly past the complainant's house, fired a shot, and sped away. At the time, Earl was on the porch waiting for a cab. Earl called 911. Both the complainant and Earl identified defendant as the shooter. The complainant testified that he saw defendant driving the same black Grand Am on other occasions before the shooting.

Defendant testified on his own behalf, and admitted having a disagreement with the complainant, and seeing Earl at the time. But he denied driving to the complainant's house and shooting a firearm, and asserted that he does not drive, own a car, or have access to a car. He

acknowledged that his girlfriend has a Grand Am, but denied that it was operable on the date of the shooting, and denied ever driving it.

II. Trial Court's Findings of Fact

Defendant argues that the trial court erred in finding that a witness, Robert Woodfolk, testified that he saw defendant driving a dark looking car "at times," where his actual testimony was that he observed defendant driving a dark colored car *once*. Defendant contends that, because the court relied on an inaccurate material fact, his convictions must be reversed. We disagree.

This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C). A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake was made. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

Although at one point, the trial court incorrectly stated that Woodfolk had observed defendant driving "at times," it is apparent that this minor misstatement was not material to the court's consideration of Woodfolk's testimony. The court stated:

> The other thing is Mr. Woodfolk, I didn't understand until Defendant's testimony why he even testified and he wasn't clear as to what he was testifying about. He testified, it was very short, and he testified that he knows the Defendant as Fooman and he knows [the complainant's family], that he saw the Defendant driving a car and it was a dark looking car. He wasn't able or wouldn't say that it was a black Grand Am but clearly says he sees the Defendant driving a dark looking car at times. And then he testified about what the relationship was . . . . *But what's interesting is when the Defendant testifies he says he doesn't drive at all. He doesn't have a car. At first he said he didn't have access to a car. But he doesn't own a car, doesn't have access to a Grand Am he says and then he said on a couple of occasions I don't even drive. That's directly contrary to Mr. Woodfolk's testimony* and that's important because he clearly was someone that didn't have an ax to grind with anyone. In fact, his testimony was very infinitive to both lawyers. I can see no reason for him to lie and certainly when the Defendant goes that far to say he doesn't drive *at all* this Court has to wonder why. [Emphasis added.]

The court's focus was not on how many times Woodfolk saw defendant drive, i.e., once or "at times," but whether he ever saw defendant drive in light of defendant's unwavering statements at trial that he does not drive. We also note that the court fully summarized its factual findings, and a significant part of those findings concerned the contents of Earl's 911 call, and the consistency of the complainant's and Earl's testimony. As such, contrary to defendant's suggestion, there was substantial other evidence, as detailed by the court, supporting the court's findings. In sum, after reviewing the entire record, we are not left with a definite and firm conviction that a mistake was made. Reversal is not warranted on this basis.

III. Prosecutorial Misconduct

Next, defendant argues that he was denied a fair trial by two instances of prosecutorial misconduct. We disagree.

Because defendant failed to raise his claim below, this issue is unpreserved. Therefore, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant contends that the prosecutor impermissibly asked him to comment on the credibility of other witnesses. It is improper for the prosecutor to ask a witness to comment on the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). But even if the prosecutor's questions were improper, we are not persuaded that any error affected this bench trial verdict. "A judge, unlike a juror, possesses an understanding of the law which allows [her] to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Moreover, our review of the record shows that the trial court found defendant guilty on the basis of properly admitted evidence. Because the trial court's decision was not affected by the disputed testimony, defendant has failed to demonstrate outcome-determinative plain error. Therefore, reversal is not warranted on this basis.

Defendant also contends that the prosecutor shifted the burden of proof by inquiring about his failure to produce his girlfriend, who owns a Grand Am, during cross-examination. "While the prosecution may not use a defendant's failure to present evidence as substantive evidence of guilt, the prosecution is entitled to contest fairly evidence presented by a defendant." *People v Reid,* 233 Mich App 457, 477; 592 NW2d 767 (1999). Additionally, although a defendant has no burden to produce any evidence, once he advances a theory, argument with regard to the inferences created does not shift the burden of proof. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

At trial, the complainant testified that defendant was driving a Grand Am. Defendant testified that he does not own a car, and has no access to a car. He further testified that, although his girlfriend owns a Grand Am, it was inoperable. The prosecutor's questions concerning whether defendant had been in contact with his girlfriend and whether she could testify about the operability of her Grand Am on the date of the offense directly challenged the credibility of defendant's testimony on direct examination. Therefore, the prosecutor's inquiry was not an improper response to defendant's testimony and did not improperly shift the burden of proof. *Id*. Moreover, as previously indicated, even if the prosecutor's inquiry was improper, any error would be harmless because defendant was tried by a judge rather than a jury. *Jones*, *supra*. In sum, given the nature of the prosecutor's inquiry and the circumstances of defendant's trial, defendant has failed to demonstrate a plain error that prejudiced the outcome of the trial. Defendant is not entitled to a new trial.

IV. Sentence

Defendant's final claim is that his judgment of sentence must be amended because the trial court erred by making his felony-firearm sentence consecutive to his sentences for felon in

possession and intentional discharge of a firearm. Defendant contends that his felony-firearm sentence should be imposed consecutively only to his sentence for intentional discharge of a firearm because the trial court specifically found that discharge of a firearm was the predicate offense. We disagree.

Whether the trial court erred in ordering defendant's felony-firearm sentence to be served consecutively is a question of law reviewed de novo. *People v Clark,* 463 Mich 459, 463 n 9; 619 NW2d 538 (2000).

Defendant relies on *Clark*, *supra*, to support his claim. In that case, our Supreme Court held that a felony-firearm sentence is to run consecutive only to the sentence for the underlying or predicate offense, not to all other felonies for which a defendant is convicted. In *Clark*, the defendant was charged with fifteen weapon-related offenses, two counts of felony-firearm, and two counts of possessing a bomb with unlawful intent, but the information only charged that the felony-firearm offenses occurred in connection with the bomb possession offenses. *Id.* at 460-461. Accordingly, the jury could have found only that the defendant possessed a firearm while he possessed two bombs with unlawful intent and not made specific findings with regard to whether the defendant possessed a firearm while committing the other charged offenses. *Id.* at 464. The Court stated that "[w]hile it might appear obvious that the defendant also possessed a firearm while committing the other crimes of which he was convicted, neither a trial court nor an appellate court can supply its own findings with regard to the factual elements that have not been found by a jury." *Id.* The Court noted that a prosecutor has considerable charging discretion, and "the complaint and the information could have listed additional crimes as underlying offenses in the felony-firearm count, or the prosecutor could have filed more separate felony-firearm counts." *Id.* at n 11.

In this case, the trial court did not err by imposing the felony-firearm sentence consecutive to the sentences for discharge of a firearm and felon in possession. Unlike *Clark*, in which each of the two felony-firearm charges was specifically linked to a particular underlying felony, the single felony-firearm charge here was linked to two underlying felonies. Specifically, the information charged defendant with possession of a firearm during the commission of the felonies of "discharge at a building *and* felon in possession of a firearm." (Emphasis added.) The trial court, as the trier of fact, found defendant guilty as charged. The court found that, pursuant to defendant's stipulation, the crime of felon in possession was proven beyond a reasonable doubt and that, based on the evidence, discharge of a firearm was also proven beyond a reasonable doubt. In relation to the felony-firearm charge, the court stated:

> Count Three, felony firearm. The information states that the Defendant did carry or have in his possession a firearm, to wit: A handgun at the time he committed or attempted to commit a felony, to wit: Discharge at a building and felony in possession of a firearm. *And I'm finding for this record that has been sustained also by the prosecution.*
>
> And I need to be clear about what the underlying felony is. He is guilty because he did discharge a firearm at a building *and* he was in possession of a firearm during the commission of that crime. [Emphasis added.]

Defendant suggests that the trial court's lack of plural phrasing when it stated that it needed "to be clear about what the underlying *felony is*" indicates that the court found him guilty of felony-firearm with only one predicate offense. (Emphasis added.) But the trial court's findings in their entirety indicate that the court found that both felonies were predicate offenses. We are not prepared to amend defendant's judgment of sentence, thereby resulting in inconsistent findings of fact and conclusions of law, based on defendant's suggestion.[1] In sum, because the prosecutor listed both charges as underlying felonies in the information and the court found defendant guilty of each underlying felony to which the felony-firearm charge was connected, defendant is not entitled to any relief on this basis. *Id.*

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White

[1] While a jury may render inconsistent verdicts, a judge sitting as trier of fact does not share this freedom. *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984).