

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 13, 2011

v

CHARLOTTE DENISE THURMAN,

Defendant-Appellant.

No. 299609
Wayne Circuit Court
LC No. 10-001128-FH

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced her to two years' probation for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction. She appeals as of right. We affirm.

Defendant's convictions stem from an encounter with Eduardo Reyes, whose van struck defendant's parked car. Reyes and defendant were the primary witnesses at trial. Their testimony was consistent to the extent that defendant did not see Reyes's van strike her car, but that a short while later Reyes saw defendant near her car, approached her, and admitted his responsibility for striking defendant's car. However, their testimony diverged regarding the subsequent events. Reyes testified that he gave defendant all his insurance information, but that she nonetheless insisted that he could not leave the scene, which caused him to swear at defendant and suggest that she call the police. Reyes recalled that as he turned to go back to his van, defendant began swearing at him, drew a black handgun and pointed it at him, and eventually fired the gun three times before Reyes drove away. Reyes recounted that after he drove a block or two away and stopped in a parking lot to call 911, defendant pulled into the lot and twice pointed her gun at him, although she did not fire again.

In contrast, defendant testified that Reyes cursed at her, approached her, pushed her, and reached inside his clothing as if for a weapon, placing her in fear for her safety and prompting her to fire shots in Reyes's direction.

Defendant first maintains that her felony-firearm conviction violates her right to bear arms under both the Michigan Constitution and the United States Constitution. Defendant did not raise this issue in the trial court. Therefore, this Court reviews the issue to ascertain whether

the trial court committed plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The Michigan Constitution provides that “[e]very person has a right to keep and bear arms for the defense of himself and the state.” Const 1963, art 1, § 6. In *People v Brown*, 253 Mich 537, 541; 235 NW 245 (1931), a case interpreting art 2, § 5 of the 1908 Constitution,¹ our Supreme Court expressly determined that the right to bear arms is subject to “the valid exercise of the police power of the State to regulate the carrying of firearms.”

In *People v Graham*, 125 Mich App 168; 335 NW2d 658 (1983), this Court considered a defendant's argument that his felony-firearm conviction infringed on his constitutional right to bear arms. *Id.* at 169, 172. The Court briefly, but clearly, deemed “without merit” the defendant's constitutional challenge, explaining, “[a] right to bear arms does not encompass the possession of a firearm during the commission of a felony.” *Id.* at 172-173. Defendant criticizes *Graham* as devoid of “substantive analysis.” We disagree. The *Graham* panel cited *Brown* for the proposition that “the state possesses police power to regulate the right to carry weapons.” *Graham*, 125 Mich App at 172 n 5. The panel additionally cited *People v Elowe*, 85 Mich App 744, 748-749; 272 NW2d 596 (1978), “for a comprehensive, incisive analysis of the purpose of the felony-firearm statute,” and *People v Glenn*, 122 Mich App 675; 332 NW2d 404 (1982), in which “this Court applied the felony-firearm statute to an instance where the defendant used the firearm as an instrument in committing a felonious assault.” *Graham*, 125 Mich App at 173 n 6. The *Graham* panel's analysis has precedential effect under the rule of stare decisis. MCR 7.215(C)(2).

Consistent with the recognition in *Graham* that the felony-firearm statute does not infringe on a defendant's right to bear arms, this Court has subsequently recognized the limited nature of the right to bear arms contained in the Michigan Constitution. See *People v Green*, 228 Mich App 684, 692; 580 NW2d 444 (1998), and *People v Swint*, 225 Mich App 353, 363; 572 NW2d 666 (1997). Given the *Graham*, *Green*, and *Swint* decisions, defendant cannot establish an error to support her claim under the Michigan Constitution.

Defendant's claim under the United States Constitution also fails. Defendant relies upon the United States Supreme Court's decision in *Dist of Columbia v Heller*, 554 US 570; 128 S Ct 2783; 171 L Ed 2d 637 (2008). In *Heller*, the Supreme Court examined at length the history and meaning of the Second Amendment before holding “that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” *Id.* at 635. Yet the Supreme Court in *Heller* additionally included the following pertinent passage:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and

¹ Article 2, § 5 of the 1908 Constitution stated, “Every person has a right to bear arms for the defense of himself and the state.” The wording of art 2, § 5 of the 1908 Constitution is nearly identical to the wording of 1963 Const, art 1, § 6.

courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.* [*Id.* at 626-627 (emphasis added, some citations omitted).]

In a footnote at the end of this passage, the Supreme Court added, “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n 26. Michigan’s felony-firearm prohibition falls squarely within the category of reasonable or suitable limitations. Defendant has not established any error, plain or otherwise, regarding her claim that the felony-firearm conviction violated her right to bear arms contained in the United States Constitution.

Defendant next contends that her trial counsel ignored the existence of potential trial witnesses who could have aided her defense. Because defendant did not move for a new trial or an evidentiary hearing to address her claim that trial counsel was ineffective, we limit our review of defendant’s assertion to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant does not identify, either in the trial court record or in her brief on appeal, the witnesses or any evidence concerning what the desired witnesses may have said. Accordingly, we conclude that defendant has not satisfied her “burden of establishing the factual predicate for h[er] claim of ineffective assistance of counsel.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant lastly contends the trial court deprived her of the constitutional right to present a self-defense theory at trial by ignoring her trial testimony. We review this unpreserved issue for plain error. *Carines*, 460 Mich at 763.

The trial court did not disregard the defense case in rendering its verdict. Instead, the trial court carefully compared defendant’s trial testimony with a statement she gave to the police on the day of the shooting, and also considered Reyes’s trial testimony. At no point did the trial court inaccurately characterize the evidence. The trial court noted that the testimony of Reyes and defendant, and defendant’s statement to the police, agreed in many respects. In this credibility contest, the court ultimately found Reyes the more credible witness, primarily because defendant and Reyes consistently testified that Reyes had taken the initiative to reveal his identity as the individual who hit defendant’s car, when he easily could have simply left the scene. Our review of the trial evidence and the court’s verdict reveals no clear error in the court’s credibility assessment or other findings of fact. See *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio