

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 10, 2012

v

ERNEST GRAHAM,

No. 301389
Wayne Circuit Court
LC No. 09-020192-FH

Defendant-Appellant.

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his jury trial convictions for carrying a concealed weapon, MCL 750.227, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to five years' imprisonment for the felony-firearm (second offense) conviction and to three years' probation for the carrying a concealed weapon and felon-in-possession convictions. We affirm.

I. BACKGROUND

On May 7, 2009, Detroit police officers George Pajor, Brandon Shortridge, and Sergeant Michael Jackson were driving in a police vehicle when they noticed defendant riding his bicycle on the sidewalk. Defendant and Pajor made eye contact, and then defendant looked directly at the police vehicle before he turned the sidewalk corner on his bicycle. Defendant continued to bike down the sidewalk but he removed his left hand from the bicycle's handle bar, reached into his left jacket pocket, and removed a gun from the pocket. Then, defendant reached over a four foot fence that ran parallel to the sidewalk and dropped the gun on the other side of the fence. At that point, Jackson stopped the police vehicle, and detained defendant while Pajor hopped over the fence and retrieved the gun. After a jury trial, defendant was convicted of carrying a concealed weapon, felon-in-possession, and felony-firearm.

I. ANALYSIS

The prosecution concedes that the jury was improperly instructed on the elements of felony-firearm, and that the prosecutor misstated the law regarding felony-firearm during her closing argument. However, because neither of these errors were objected to, we review them for plain error affecting defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 642-

643; 664 NW2d 159 (2003); *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Under the plain error rule, a defendant must establish that an error occurred, the error was clear and obvious, and that it affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because we do not find that the errors below affected defendant's substantial rights, we affirm.¹

A. INSTRUCTIONAL ERROR

The trial court must clearly instruct the jurors on the applicable law, which includes giving them all the elements of the charged offenses. *People v Fennell*, 260 Mich App 261, 265; 677 NW2d 66 (2004). If the trial court's instructions were erroneous, an error exists under the plain error rule. *Carines*, 460 Mich at 768. However, where the evidence alone was sufficient to support the defendant's conviction, the alleged instructional error will not affect the defendant's substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

The felony-firearm statute, MCL 750.227b(1), provides:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of . . . [MCL 750.223, carrying a concealed weapon, MCL 750.227, MCL 750.227a, or MCL 750.230], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.

The trial court gave the jurors the following instruction regarding defendant's felony-firearm charge:

To prove this charge, ladies and gentlemen, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant committed or attempted to commit the crime of weapons, carrying a concealed, and weapons firearm possession by a felon which has been defined for you.

* * *

Second, it must [sic] proven that at the time the defendant committed or attempted to commit that crime he knowingly carried or possessed a firearm, does not matter whether or not the [sic] was loaded.

¹ Although defendant waived review of any jury instruction error because he approved of the instructions on the record, *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011), we will nonetheless review this unpreserved issue.

The trial court erroneously instructed the jurors that the prosecutor had to prove that defendant committed or attempted to commit carrying a concealed weapon to prove the charge of felony-firearm because carrying a concealed weapon is not a valid underlying felony for felony-firearm. MCL 750.227b(1); *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

Nevertheless, this error did not affect defendant's substantial rights because the evidence alone was sufficient to support defendant's conviction, *Gonzalez*, 256 Mich App at 225-226. The testimony of Pajor, Shortridge, and Jackson supports the finding that defendant possessed a gun. These witnesses testified that defendant reached into his left jacket pocket, removed a gun from his pocket, and threw the gun over a fence while riding on his bike down the sidewalk. Furthermore, defendant stipulated to the fact that on the date in question he was ineligible to possess a firearm because he had been previously convicted of a felony. Therefore, we hold that the evidence was sufficient to support defendant's conviction of felon-in-possession, which is a valid underlying felony for felony-firearm, and accordingly, sufficient evidence was presented to convict defendant of felony-firearm. MCL 750.224f; MCL 750.227b; see also *People v Sturgis*, 427 Mich 392, 405-406; 397 NW2d 783 (1986) (the presence of a second underlying felony allows defendant's felony-firearm conviction to stand). Because the instructional error did not affect defendant's substantial rights, reversal is not required. *Gonzalez*, 256 Mich App at 225-226; see *People v Kowalski*, 489 Mich 488, 506; 803 NW2d 200 (2011) ("If the evidence related to the missing element was over-whelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings.").²

B. THE PROSECUTION'S MISSTATEMENT OF LAW

During closing argument, the prosecution misstated the elements needed to prove the charge of felony-firearm. Defendant asserts that this error requires reversal. We agree with the prosecution that, although there was error, defendant has failed to show plain error affecting his substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

During closing argument, the prosecution described the crime of felony-firearm as follows:

² We also note that defendant mischaracterizes this erroneous instruction as a structural error based on *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000). The *Duncan* Court held that a "jury's conviction must be set aside where the court omitted instructions on *all* the elements of an offense" because such a failure constitutes a structural error requiring automatic reversal. *Id.* at 57. (Emphasis added.) However, as the *Kowalski* Court held, where the trial court did not fail to instruct on *all* the elements of the charged offense – as is the case here because the trial court gave an instruction that was only partially incorrect – the structural error doctrine is inapplicable. *Kowalski*, 489 Mich at 505 n 30. Instead, as already noted, this is an unpreserved constitutional error reviewed for plain error. *Id.* at 505.

The third crime is called felony[-]firearm. It's a little awkward in the wording. And it's that while the defendant committed or was attempting to commit either a carrying a concealed weapon or being a felon in possession he simply possessed a firearm. Anytime, here in the State of Michigan, that you're committing a felony with a gun we charge felony[-]firearm, and this is what this count is.

As already noted, this was error because carrying a concealed weapon cannot be the predicate felony for felony-firearm. *Cortez*, 206 Mich App at 207; MCL 750.227b(1). However, “[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). The trial court instructed the jurors that “[t]he lawyers statements and arguments are not evidence they are only meant to help you understand the evidence and each side’s legal theories.” Also, the trial court informed the jurors that they have “taken an oath to return a true and just verdict based only on the evidence and [the trial court’s] instructions on the law.” Because the error was cured, it did not affect defendant’s substantial rights, and thus, reversal is not required. *Fyda*, 288 Mich App at 460-461; *Leshaj*, 249 Mich App at 419.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that defense counsel’s failure to object to the trial court’s jury instruction, to object to the prosecution’s misstatement during its closing argument, and counsel’s statement that he was satisfied with the felony-firearm instruction, resulted in a conviction based on an error of the law and this error requires reversal.

In the absence of an evidentiary hearing, this Court reviews ineffective assistance of counsel issues based on the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Ineffective assistance of counsel raises a question of constitutional law that is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To demonstrate ineffective assistance of counsel, a defendant must show that his attorney’s performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). To demonstrate prejudice, the defendant must show the probability that but for counsel’s errors, the result of the proceedings would have differed. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

Defense counsel erred by failing to object to the trial court’s instruction, to the prosecution’s closing argument, and by stating that he was satisfied with the jury instructions because the elements of the felony-firearm charge were clearly misstated to the jury. However, defendant has failed to show that this error has prejudiced him because, as previously concluded, neither the trial court’s error nor the prosecution’s error affected his substantial rights. Accordingly, defendant has failed to show that, but for counsel’s error, the result of the proceedings would have been different. *Solmonson*, 261 Mich App at 663-664.

D. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he was in possession of a gun. In reviewing whether sufficient evidence exists to convict

defendant, this Court reviews the evidence de novo, in the light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). In doing so, we must determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* at 196.

In order to establish that a defendant carried a concealed weapon, MCL 750.227, the prosecution must prove that the defendant knowingly possessed a concealed weapon. *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 1; 728 NW2d 406 (2007). The elements of felon-in-possession, MCL 750.224f, are that the defendant possessed a firearm, the defendant was a convicted felon, and the defendant's right to possess a firearm had not yet been restored. *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004) aff'd 473 Mich 626 (2005). The elements of felony-firearm, MCL 750.227b, are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). The positive identification of a defendant by witnesses may be sufficient to support his conviction, *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000), and the credibility of witnesses' testimony is a question for the trier of fact, not this Court, *id.*

In looking at the evidence in the light most favorable to the prosecution, there was sufficient evidence for a jury to find that defendant possessed a gun. Pajor, Shortridge, and Jackson saw defendant drop the gun over a fence with his left hand while he was riding his bike. After detaining defendant, Pajor retrieved the gun from the same location that he saw defendant drop the gun. Also, defendant stipulated that on the day in question he was ineligible to possess a firearm because he had been previously convicted of a felony. Therefore, sufficient evidence existed to convict defendant of carrying a concealed weapon, felon-in-possession, and felony-firearm.

E. RIGHT TO CONFRONTATION

Defendant asserts that the admission of a laboratory report without the author of the report being a witness denied him his Sixth Amendment right to confrontation, and therefore requires reversal. "A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal." *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). At trial, defendant stipulated to the admission of Lieutenant Brent Sojda's laboratory report which concluded that the gun in question functioned as designed. Because defendant stipulated to the admission of the laboratory report, he waived any objection regarding his ability to confront Sojda. *In re Vanidestine*, 186 Mich App 205, 212; 463 NW2d 225 (1990) (defense counsel's stipulation to the admission of evidence was binding on the defendant). Thus, defendant cannot raise this issue as an error on appeal. *Aldrich*, 246 Mich App at 111.

F. DOUBLE JEOPARDY

Defendant concedes that the Michigan Supreme Court has held that there is no double jeopardy violation when a defendant is convicted of both felon-in-possession and felony-firearm. This Court reviews unpreserved issues regarding double jeopardy for plain error. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). "Because the felon[-]in[-]possession charge is not one of the felony exceptions in the statute, it is clear that [a] defendant could constitutionally be given cumulative punishments when charged and convicted of both felon[-]

]in[-]possession, MCL 750.224f, and felony-firearm, MCL 750.227b.” *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Accordingly, it does not violate the double jeopardy clause for a defendant to be punished for both felon-in-possession, MCL 750.224f, and felony-firearm, MCL 750.227b. *Id.* Consequently, defendant’s convictions and punishments for both felon-in-possession and felony-firearm do not violate the double jeopardy clause.

Affirmed.

/s/ Jane E. Markey

/s/ Christopher M. Murray

/s/ Douglas B. Shapiro