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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2006
v	No. 260159 Wayne Circuit Court
JOSEPH JUAN GLEGOLA II, Defendant-Appellant.	LC No. 04-008112-02

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

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

I. FACTS

This case arises out of defendant's arrest on July 3, 2004. Early on July 3, 2004, Cassandra Smith saw three men standing near and touching her car, which was parked in her apartment's parking lot. She called 911, and the man with whom she was living called out the window to the men. Smith witnessed the men drive off in a white van, and then return some moments later, at which time she dialed 911 a second time. Smith recognized the men as her brother's friends. Smith described the men to police and indicated in which direction the van was headed.

The police eventually stopped the van in which they found defendant, Curtis Aigner, and Brian Coen. Crack cocaine was recovered from Aigner and a gun was found on the floorboard. Coen was sitting in the front seat between Aigner, who was seated on the driver's side and had been driving, and defendant, who was seated on the passenger's side. No fingerprints were found on the gun.[1]

[1] Detective Anthony Chicko recounted this information regarding the stop of the van based on notes and reports to refresh his recollection (Tr I, p 108).

The suspects were arrested, and defendant was charged with felon in possession of a firearm, MCL750.224f, and possession of a firearm during commission of a felony, MCL 750.227b. Detective Anthony Chicko conducted separate interviews with each of them. Coen and Aigner both testified at defendant's trial. In exchange, the charges against each of them were dismissed. At trial, both Coen and Aigner testified that they had seen the gun on defendant during the evening. Regarding Smith's car, Coen testified that defendant made a statement about taking the radio and looked in the car while Coen was standing next to it. He also testified that he saw defendant toss the gun on the floorboard of the van when it was stopped by the police.

In contrast, defendant testified that no one tampered with Smith's car. Further, defendant testified that the gun in fact belonged to Aigner, who had been carrying it in his waistband until the police stopped the van. Defendant testified that upon stopping, Aigner threw the gun towards defendant and Coen.

The jury convicted defendant of both charges, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to one to five years' imprisonment for the first count, and two years imprisonment for the second count. Both sentences were to be served consecutively. Defendant now appeals as of right.

II. SUFFICIENCY OF EVIDENCE

On appeal, defendant argues that the evidence is insufficient to support his convictions. We disagree.

A. Standard of Review

Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

In determining whether the evidence was sufficient to support a conviction, the weight of the evidence and the credibility of witnesses is a determination for the jury, independent of interference from the trial court. *Wolfe*, *supra* at 514-515. In addition, this Court must resolve all conflicts of evidence in the favor of the prosecutor, who need not negate every reasonable theory of innocence, but only prove the case beyond a reasonable doubt despite any contradictory evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

B. Analysis

The elements of felon in possession of a firearm are possession of a firearm by a defendant who was previously convicted of a felony. MCL 750.224f; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of felony-firearm are possession a firearm during the commission or attempted commission of a felony. MCL 750.227b; *Avant*, *supra* at 505. Felon in possession of a firearm may constitute the underlying felony for felony-firearm. *People v Calloway*, 469 Mich 448, 457; 671 NW2d 733 (2003), citing *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Because defendant stipulated that he was ineligible to possess a firearm due to a prior felony conviction, the only issue concerning whether the evidence is sufficient to support defendant's felon in possession of a firearm and felony-firearm convictions is whether defendant was in possession of a firearm. Possession of a firearm includes both actual and constructive possession, which may be established by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). Constructive possession exists if the location of the firearm is known and reasonably accessible to the defendant. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000).

Viewing the evidence in the light most favorable to the prosecution, sufficient evidence existed to support defendant's convictions. Brian Coen indicated that he saw defendant with a gun at a party on July 3, 2004. In addition, Coen stated that when the police stopped the van in which he and defendant were riding, defendant took a gun from his waistband, wiped it off, dropped it onto the floorboard, and pushed it underneath the seat. Curtis Aigner also claimed that he saw defendant carrying the gun in his waistband at the party. Further, both Aigner and Coen admitted to police officer Anthony Chicko that they saw defendant with a gun that night. In addition, Chicko recounted that defendant admitted that while he was in the van, the gun, at one point, was lying in his lap.

Defendant had the gun at the party and knew of the gun's location underneath his seat in the van or in his lap, and thus defendant had both actual and constructive possession of the. *Burgenmeyer*, *supra* at 437. Notably, statements made by Coen and Aigner to police corroborating their subsequent trial testimony occurred shortly after their arrest and before the charges against them in this case were dropped. Because it is within the purview of the jury to determine the credibility of witnesses, the testimony at trial was sufficient for the jury to find that defendant possessed a firearm and was guilty of felon in possession of a firearm and felony-firearm. *Wolfe*, *supra* at 514-515.

III. WEIGHT OF EVIDENCE AND JURY VERDICT

Next, defendant argues that the verdict was against the great weight of the evidence. Again, we disagree.

A. Standard of Review

This Court reviews the unpreserved issue of whether the verdict was against the great weight of the evidence for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To determine whether the verdict is against the great weight of the evidence, this Court reviews the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon,* 456 Mich 625, 639, 642; 576 NW2d 129 (1998). When the evidence conflicts, the Court must leave the

resolution of credibility issues to the jury, even if the testimony is impeached to a certain extent, *Lemmon*, *supra* at 642-643, "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or [the testimony] contradicted indisputable physical facts or defied physical realities . . . ." *Id*. at 645-646, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 410, 412; 124 NW2d 255 (1963).

B. Analysis

Defendant has failed to show how the verdict was against the great weight of the evidence, much less that there was plain error affecting his substantial rights. Contrary to the testimony of Chicko, Coen and Aigner, defendant claimed that he told Chicko in the interview that Aigner showed him a gun, but that defendant never held it or placed it in his waistband. Defendant further explained that it was actually Aigner who had the gun in his waistband and threw the gun towards defendant and Coen when the police stopped the van in which they were riding. Although defendant's testimony directly contradicts the statements of Coen, Aigner and Chicko, their testimony was not devoid of probative value nor did it contradict indisputable physical facts or defy physical realities. Therefore, the verdict was not against the great weight of the evidence. As a result, there was also no plain error affecting defendant's substantial rights. *Musser*, *supra* at 218, citing *Carines*, *supra* at 763-764.

IV. EFFECTIVE ASSISTANCE OF COUNSEL & WITNESS INSTRUCTION

Defendant next argues that because defense counsel failed to request a missing witness instruction, he was denied the effective assistance of counsel. We disagree.

A. Standard of Review

Claims of ineffective assistance of counsel involve a question of law, which this court reviews de novo. *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002). This issue is unpreserved, therefore this Court limits its review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002). The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

B. Analysis

Under the current res gestae statute, MCL 767.40(a), "the prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). However, once the prosecution endorses a witness pursuant to MCL 767.40a(3), the prosecution must use due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). Due diligence requires that a good faith effort be made, not that every possible effort be made. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). If the prosecution does not show due diligence, the

missing witness instruction may be appropriate. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003); *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). The missing witness instruction, CJI2d 5.12, provides that if the prosecution fails to call a listed witness, the jury "may infer that [the] witness's testimony would have been unfavorable to the prosecution's case." *Perez*, *supra* at 416 n 1.

In this case, the prosecutor endorsed the four police officers involved with defendant's arrest. Before trial, the prosecutor informed the court that although he had intended to present them, they would not be present because they were on a hunting trip even though subpoenas had been placed in their mailboxes. It can hardly be said that informing the trial court that four witnesses would not be present because of a hunting trip after the jury had been selected and only moments before trial was part of a good faith effort to provide the witnesses. *Watkins*, *supra* at 4. Thus, given this lack of due diligence, it would have been objectively reasonable for defense counsel to request the missing witness instruction. *Effinger*, *supra* at 69.

Notwithstanding this, defendant has failed to show that the failure to request this instruction was outcome determinative given the other witnesses' incriminating testimony at trial. *Effinger*, *supra* at 69. Specifically, Coen and Aigner stated at trial and during their interview with Chicko after their arrest that they saw defendant with the gun at the party and Coen indicated at trial the defendant had the gun while inside the van. Also, Chicko noted that defendant admitted to him that the gun was inside the van. Therefore, defendant was not denied the effective assistance of counsel.

Alternatively, defendant argues that even if defense counsel were not ineffective, the trial court failed to give the missing witness instruction *sua sponte*. This Court reviews an unpreserved instructional issue for plain error. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005). A trial court is required to clearly present a case and instruct the jury on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). However, the trial court is not required to give an instruction *sua sponte*. *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993). Therefore, the trial court was not required to give the missing witness instruction and there was no plain error.

V. SENTENCING

Finally, defendant argues that the case must be remanded to determine whether he is entitled to receive credit against his sentences for time spent in jail while awaiting sentencing. Again, we disagree.

A. Standard of Review

This Court reviews an unpreserved challenge to the validity of a sentence for plain error. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002), citing *Carines*, *supra* at 763-764.

B. Analysis

In *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324(2006), this Court noted that MCL 769.11b "provides that where a sentencing court has before it a convict who has served

time in jail before sentencing because he or she could not afford or was denied bond, the court must credit that person with time served." However, "[w]hen a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Rather, the jail credit is to be applied exclusively to the offense from which the parole was granted. *Stead*, *supra* at 552, citing *Seiders*, *supra* at 705.

Prior to sentencing, defendant was in jail for 157 days, which the trial court indicated would "go toward whatever you have left on the parole matter." Defendant argues that remand is required to determine whether the parole board required him to serve additional time for his previous sentence following his convictions in this case, which were a violation of his parole. Defendant contends that if the parole board did not assess time for the parole violation, 157 days should be credited to his new sentences pursuant to MCL 769.11b, and the case should be remanded because the record does not disclose whether the parole board assessed additional time. Defendant's reading of MCL 769.11b is mistaken.

Specifically, *Stead* noted that MCL 769.11b requires a court to credit a convict for time served in jail "because he or she could not afford or was denied bond." *Stead*, *supra* at 551. Here, because defendant was arrested for a new offense, he was held on parole detainer. *Id*. *Stead* explained that "[c]redit is not available to a parole detainee for time spent in jail attendant to a new offense, because 'bond is neither set nor denied when a defendant is held in jail on a parole detainer.'" *Id*., quoting *Seiders*, *supra* at 707. For this reason, whether the parole board assessed time for defendant's parole violation has no bearing on this case. Therefore, defendant would not be entitled to jail credit and has failed to demonstrate plain error affecting his substantial rights.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette