STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DERAY BENN,

Defendant-Appellant.

UNPUBLISHED
August 19, 2021

No. 354634
Wayne Circuit Court
LC No. 19-002207-01-FH

Before: CAVANAGH, P.J., MURRAY, C.J., and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felon in possession of a firearm, MCL 750.224f, felon in possession of ammunition, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant was arrested when a loaded gun was found in plain view next to his passenger seat during a traffic stop. Cocaine and heroin were also found under the passenger seat. On appeal, defendant argues that (1) his trial counsel provided ineffective assistance by failing to file a motion to suppress the evidence seized from the car, (2) the evidence was not sufficient to bind him over for trial or to convict him, and (3) the prosecutor committed misconduct by inaccurately stating that the driver of the car would testify. We find no merit in any of these claims.

I. INEFFECTIVE ASSISTANCE

Defendant argues that defense counsel was ineffective because counsel did not file a motion to suppress the evidence found in the car in which defendant was a passenger, on the ground that its discovery resulted from an illegal search. We disagree.

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This "right to counsel encompasses the right to the effective assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). The "effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show (1) "that counsel's performance was deficient" and (2) "that counsel's deficient performance prejudiced the defense." *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007) (quotation marks and citation omitted). A counsel's performance is deficient if "it fell below an objective standard of professional reasonableness." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance will be deemed to have prejudiced the defense if it is reasonably probable that, but for counsel's error, "the result of the proceeding would have been different." *Id.*

When, as in this case, there has been no evidentiary hearing to develop the issue, a claim of ineffective assistance of counsel is reviewed for errors apparent on the existing record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). The constitutional question whether an attorney provided ineffective assistance, depriving a defendant of the right to counsel, is reviewed de novo. *Id*. at 242.

Both the United States and Michigan Constitutions protect individuals from unreasonable searches and seizures. US Const, Am IV; US Const, Am XIV; Const 1963, art 1, § 11; *People v Slaughter*, 489 Mich 302, 310-311; 803 NW2d 171 (2011). The lawfulness of a search or seizure depends on its reasonableness, and a warrantless search is unreasonable unless both probable cause and a circumstance establishing an exception to the warrant requirement exist. *People v Snider*, 239 Mich App 393, 406-407; 608 NW2d 502 (2000). The exclusionary rule generally bars the admission of evidence obtained during an unconstitutional search. *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003).

A citizen may be briefly stopped for investigation if a police officer has a reasonable suspicion that criminal activity may be taking place. *People v Oliver*, 464 Mich 184, 193; 627 NW2d 297 (2001). A brief investigatory stop may be necessary for public safety or to investigate possible criminal behavior. *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Wallin*, 172 Mich App 748, 750; 432 NW2d 427 (1988). An investigatory stop constitutes a seizure and requires specific and articulable facts demonstrating a reasonable suspicion that the person under investigation is committing, or has committed, a crime. *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998).

In this case, defendant argues that there was no evidence to demonstrate that the stop of the vehicle was based on a reasonable suspicion that defendant or the driver were involved in a crime. To evaluate whether an officer had reasonable suspicion to make an investigatory stop, the totality of the facts and circumstances is considered on a case-by-case basis. *People v Horton*, 283 Mich App 105, 109; 767 NW2d 672 (2009). A reasonable suspicion " 'entails something more than an inchoate or unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.' " *People v Rizzo*, 243 Mich App 151, 156; 622 NW2d 319 (2000), quoting *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). Overly technical reviews of the police officer's assessment are unwarranted, and deference should be afforded to the police officer's experience and the known patterns of certain types of lawbreakers. *Id.*

In this case, Redford Township Police Officer Edward French testified that he stopped the vehicle that defendant was in because the Detroit Police Department "needed assistance in stopping a homicide suspect car," thus articulating a particular suspicion of illegal activity. As defendant notes, there was no description of the suspect or of the evidence of a homicide.

However, French testified that he was informed by the Detroit Police that a person in the subject vehicle was suspected of homicide. Officer French thus had precise information about a vehicle with a homicide suspect from other police officers who were apparently familiar with the homicide investigation. An investigative stop may be based on information supplied to the officer by another person, depending on the nature of the information. *People v Tooks*, 403 Mich 568, 576; 271 NW2d 503 (1978). Officer French could reasonably have deemed reliable the information from another officer concerning a homicide suspect being in the vehicle. Considering the totality of the experiences, the evidence supported that Officer French had a reasonable suspicion that an occupant of the vehicle was involved in a crime, and his stop of the vehicle was justified to investigate his suspicion.

Officer French testified that, following the stop of the vehicle and detention of its occupants, he observed part of a gun with an extended ammunition magazine protruding from an area between the passenger seat and the passenger-side door. The plain-view exception to the warrant requirement allows a police officer to seize items in plain view if the officer is lawfully in the position to have that view and the evidence is obviously incriminatory. *People v Antwine*, 293 Mich App 192, 201; 809 NW2d 439 (2011). Defendant does not dispute that the weapon and ammunition were in plain view.

For these reasons, a motion to suppress would have been futile, and thus, defense counsel did not fail to provide effective assistance for having declined to bring one. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence at trial was insufficient to establish that he possessed the gun and ammunition beyond a reasonable doubt. We disagree. This Court reviews de novo a challenge to the sufficiency of the evidence to support a conviction. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). A trial court's findings of fact in a bench trial are reviewed for clear error. See MCR 2.613(C); *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). "A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *Id*.

Due process requires that evidence of every element of a crime be proved beyond a reasonable doubt in order to sustain a criminal conviction. *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979), citing *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). To determine if the prosecutor produced evidence sufficient to support a conviction, the appellate court considers "the evidence in the light most favorable to the prosecutor" to ascertain " 'whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' " *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010), quoting *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002). Direct and circumstantial evidence, as well as all reasonable inferences that may be drawn, are considered to determine whether the evidence was sufficient to sustain the defendant's conviction. *Hardiman*, 466 Mich at 429.

At trial, three police officers testified that, after the driver of the vehicle had been detained, defendant was alone in the vehicle and took some time before he began to comply with orders to surrender himself. Two of the officers testified that defendant was moving in the vehicle before

he cooperated with the police. After defendant was detained, Officer French approached the vehicle and observed part of a gun with an extended ammunition magazine protruding from an area between the passenger seat and the passenger-side door. Another officer seized the gun, magazine, and 16 bullets.

Defendant argues specifically that there was no evidence that the gun and ammunition belonged to him. However, possession of a firearm includes actual or constructive possession. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). Constructive possession exists where there is proximity of the defendant to the firearm with indicia of control of it. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). In other words, there is constructive possession of a firearm where the location of the weapon is known, and the weapon is reasonably accessible, to the defendant. *Id*. at 471. See also *People v Burgenmeyer*, 461 Mich 431, 437-439; 606 NW2d 645 (2000).

In this case, the plain-view location of the firearm and ammunition suggested that defendant knew of, and had access to, them. The loaded gun was seen protruding from immediately next to defendant's passenger seat, where defendant was seen moving while he was the sole occupant of the vehicle. The evidence that the gun was next to defendant, and plainly visible, was sufficient to support the conclusion that he possessed the loaded gun beyond a reasonable doubt.

Defendant points out that the driver of the vehicle did not testify and so did not name defendant as the source of the gun. Further, defendant himself testified that he did not know there was a gun in the vehicle, and thus, there was no testimony that he owned or otherwise exercised dominion over the gun. However, possession of a firearm may be sole or joint; therefore, dominion or control over the object need not be exclusive to defendant for this purpose. *Hill*, 433 Mich at 469-470; *People v Strickland*, 293 Mich App 393, 400; 810 NW2d 660 (2011). And because the gun was plainly visible between defendant's seat and the passenger door, defendant would likely have seen the weapon as he entered the vehicle if it was already present. Moreover, defendant testified that he was a passenger in the car for only the five- to eight-minute ride before it was pulled over, so there was no reasonable alternative explanation of its presence other than that defendant or the driver placed the gun in the location where it was found. Also, defendant gave contradictory statements while testifying about whether he spoke to the police about the gun, and told the police during his interview that he would not admit to possessing a gun. This Court will not interfere with the trier of fact's role of determining the credibility of witnesses. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

For these reasons, the circumstantial evidence and reasonable inferences drawn from it, viewed in a light favorable to the prosecution, were sufficient to persuade the trier of fact beyond a reasonable doubt that defendant possessed the gun and ammunition. See *Tennyson*, 487 Mich at 735; *Hardiman*, 466 Mich at 429.

Defendant also argues it was contradictory that the trial court found he possessed the gun and ammunition, but not the cocaine and heroin that were also located in the car. However, the gun was in plain sight while the illegal drugs were hidden under defendant's seat. Further, defendant testified that the driver had told him that he had marijuana in the car but said nothing of other drugs. Because the firearm and ammunition were in plain sight, but the cocaine and heroin

were not, the trial court had a reasonable evidentiary basis for deciding those possession charges differently.

Defendant separately argues that the evidence presented at his preliminary examination was not sufficient to justify the district court's finding of probable cause for purposes of binding him over for trial. See *People v Taylor*, 316 Mich App 52, 54; 890 NW2d 891 (2016); *People v Laws*, 218 Mich App 447, 451-452; 554 NW2d 586 (1996). However, when a defendant "is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004) ("Because defendant was fairly convicted of the crimes at trial, he could not appeal the sufficiency of the evidence at the preliminary examination and the Court of Appeals erred in reviewing his claim."). Our conclusion that defendant was fairly convicted at trial on sufficient evidence obviates any need to consider defendant's challenge to the district court's bindover decision.

III. PROSECUTORIAL ERROR

Defendant argues that the prosecutor committed misconduct by promising in opening statements that the driver of the car would testify, but then not calling him as a witness. Defendant further argues that defense counsel was ineffective for failing to raise that objection at trial. We disagree with both contentions.

If there is no objection to a prosecutor's conduct and request for a curative instruction, appellate review is limited to determining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent person, or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Unger*, 278 Mich App at 235.

The prosecutor has a duty to ensure that the defendant receives a fair trial. *People v Farrar*, 36 Mich App 294, 299; 193 NW2d 363 (1971). The responsibility of a prosecutor is "to seek justice, rather than merely to convict." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "The test of prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *Id*. A fair trial "can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused." *Id*. at 63-64.

In this case, the prosecutor stated in opening statement, "Your Honor, you will hear from . . . the driver of that vehicle, and he will tell you that when he went into that vehicle that morning, there was no weapon and no drugs in that vehicle." But that witness was never called. A prosecutor "may not argue the effect of testimony that was not entered into evidence." *Unger*, 278 Mich App at 241. See also *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992).

Defendant argues that the challenged statement denied him a fair trial because it created the impression for the factfinder that he would have incriminated defendant while exonerating himself. Defendant states that the prosecutor thus had the benefit of the driver's damaging testimony without having to produce him at trial. However, it is not error requiring reversal when a prosecutor promises testimony that is not produced if the prosecutor does not act in bad faith and the defendant is not prejudiced. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997).

Defendant does not argue that the prosecutor was acting in bad faith. Regarding prejudice, in this bench trial, the trial judge detailed the facts underlying its determination of defendant's guilt, which did not include any reference to the driver's denying possession of the gun. That the trial court did not credit the prosecutor's assertions about the driver's anticipated testimony is further demonstrated by the court's conclusion that the prosecution failed to satisfy its burden of proving defendant possessed the illegal drugs also found in the driver's vehicle. For these reasons, defendant has failed to show that he was denied a fair trial by the prosecutor's remarks about the driver's anticipated testimony.

Defendant states that his trial counsel provided ineffective assistance by failing to object to the challenged statement, or when the prosecution did not produce the driver as a witness. However, as discussed, defendant has not demonstrated that he was denied a fair trial, was prejudiced, or that a mistrial was warranted. Further, had defense counsel insisted that the prosecution produce the driver as promised, the likely result would have been live testimony contradicting the primary defense theory that defendant was prosecuted for the driver's possession of the gun and illegal drugs. Failing to raise even a legitimate objection to a prosecutor's comments is often consistent with sound trial strategy. See *Unger*, 278 Mich App at 242.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Christopher M. Murray
/s/ James Robert Redford