

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY EVON SPENCER,

Defendant-Appellant.

UNPUBLISHED

August 16, 1996

No. 178623

LC No. 94-050232-FH

Before: Jansen, P.J., and Reilly and M.E. Kobza,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227; MSA 28.424, receiving and concealing stolen property in excess of \$100, MCL 750.535; MSA 28.803, possession of a firearm by a felon, MCL 740.224f; MSA 28.421(6), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant then pleaded guilty to being a fourth habitual offender, MCL 769.12; MSA 28.1984. Defendant was sentenced to concurrent prison terms of twelve to twenty years on the carrying a concealed weapon conviction and the possession of a firearm by a felon conviction and fourteen to twenty-five years on the receiving and concealing stolen property conviction. A ten-year sentence was imposed for felony-firearm, third offense, to be served consecutively to the other three sentences. He appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence to support his weapons convictions. In determining whether sufficient evidence was presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Circumstantial evidence and reasonable inferences which arise from the evidence may constitute sufficient proof to prove an element of an offense. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995).

* Circuit judge, sitting on the Court of Appeals by assignment.

Pursuant to the statutory language defining the crime, each of the weapons offenses of which defendant was convicted requires that defendant either “possessed” or “carried” the weapon. A defendant has possession of a gun when it is available and accessible at the time that the crime is committed. *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993). The defendant’s access to the gun should not be determined solely by reference to the defendant’s arrest. *Id.*

Here, although nobody actually saw defendant holding the gun, the evidence presented was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant possessed the gun in order to satisfy this requirement for the crimes of carrying a concealed weapon, possession of a firearm by a felon, and felony-firearm. The evidence showed that when defendant got out of the car, he reached for his waistband with his right hand. Defendant was subsequently pushed to the ground, at which time his right hand went underneath the car. A five-shot Smith & Wesson .38-caliber snub-nose gun was found underneath the driver’s side of the car. The gun had three lead round-nose bullets and two metal jacket bullets in it. Five lead round-nose bullets and one metal jacket bullet were found on defendant after he was arrested. Based on this evidence, the jury could have reasonably concluded that defendant had the gun in his waistband and had thrown the gun under the car when pushed onto the ground.

Defendant next argues that he should have been given notice before trial that if convicted of felony-firearm, he would face a mandatory ten-year term of imprisonment based on his third offender status. However, a defendant need not have been formally charged with felony-firearm, third offense, in order for his sentence to be enhanced. *People v Williams*, 215 Mich App 234; 544 NW2d 480 (1996). Defendant received sufficient notice that he would be subjected to the mandatory ten-year sentence in the presentence information report. *Id.*; *People v Eason*, 435 Mich 228, 251; 448 NW2d 17 (1990).

Defendant also argues that his sentences are disproportionate. Contrary to defendant’s claims, we do not consider the consecutive nature of a defendant’s sentences in determining proportionality. *People v Hardy*, 212 Mich App 318, 320; 537 NW2d 267 (1995). Further, the trial court appropriately considered defendant’s background (eight prior felony convictions, four prior misdemeanor convictions, defendant on parole when he committed the instant offenses) and the circumstances surrounding the present offenses. Defendant’s sentences do not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael Eugene Kobza