STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES D. SHARPE,

Defendant-Appellant.

UNPUBLISHED
September 3, 1996

No. 178393
LC No. 93-127022

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to one to five years' imprisonment for the UDAA conviction and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that the evidence presented at trial was insufficient to support his conviction for felony-firearm.[1] In an appeal based upon insufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994). A conviction of felony-firearm requires that the prosecutor prove, beyond a reasonable doubt, that the defendant possessed or carried a firearm during the commission of any felony or attempted felony. *People v Passeno*, 195 Mich App 91, 97; 489 NW2d 152 (1992). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of a crime. *People v Fisher*, 193 Mich App 284, 289; 483 NW2d 452 (1992).

Defendant in this case was convicted of UDAA, which is a felony under Michigan law. MCL 750.529; MSA 28.797. Before the car in question was taken, defendant and co-defendant were

observed together. In addition, defendant was later observed jumping out of the stolen car and running from the police. Subsequently, a police officer observed defendant making furtive movements toward the front of his waist with both hands, as if he was trying to pull something out or adjust something. Upon retracing defendant's path, the officer found a .357 magnum, along with defendant's driver's license, a leather holster, a large sum of money and some food stamps. In addition, another police officer saw defendant take something from his pocket, causing two items to fall to the ground. Defendant threw the other items into an area of bushy overgrowth where defendant's driver's license and food stamps were later found. The jury could have inferred from this evidence that defendant was carrying the gun at the time the UDAA was committed. Therefore, we conclude that the evidence was sufficient to support defendant's conviction of felony-firearm. *Passeno, supra* at 97.

Defendant also argues that the prosecutor committed misconduct by stating that the evidence against defendant was uncontroverted. Defendant did not object to the prosecutor's remarks made during closing argument, which he now claims were impermissible. Therefore, this issue was not preserved for appellate review absent a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den ___ US ___; 115 S Ct 923; 130 L Ed 2d 803 (1995); *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). In general, this Court reviews prosecutorial misconduct issues on a case by case basis and evaluates the prosecutor's remarks in context to determine whether defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

It is well settled that a prosecutor may not comment upon a defendant's failure to testify. MCL 600.2159; MSA 27A.2159; *People v* Davis, 199 Mich App 502, 517; 503 NW2d 457 (1993); *People v* Guenther, 188 Mich App 174, 177; 469 NW2d 59 (1991). However, Michigan courts have generally held that a prosecutor's remark that the evidence was uncontradicted or undisputed does not amount to improper comment on a defendant's failure to testify, even where the defendant was the only person who could have provided contradictory testimony. *Guenther*, *supra* at 177.

During closing argument, the prosecution stated, "[i]n this case, the evidence is uncontroverted." The prosecution then proceeded to review the evidence presented at trial. The prosecution also stated, "the fact that he [defendant] was in possession of that gun has been uncontroverted and the evidence requires that you find that he's guilty." Defendant was the only one who could rebut the circumstantial evidence that he possessed the .357 magnum at the time of the UDAA. However, in his opening statement, defendant's attorney stated that no one really knew whether defendant was armed the entire time, and that all anyone really knew was that a gun was found after the crime had been committed. The prosecution's remarks could have been in response to defense counsel's statement that there was no eyewitness testimony. *Guenther*, *supra* at 179. Moreover, although there were two remarks, rather than just one, the prosecution did not continually refer to the fact that the testimony was undisputed. Therefore, we conclude that the remarks complained of did not constitute improper comment on defendant's failure to testify, and did not deprive defendant of a fair trial. *Id.*

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski

[1] Defendant also states in his brief on appeal that the evidence that he participated in the UDAA was circumstantial. However, defendant does not argue that there was insufficient evidence to support his UDAA conviction or cite any authority in support of this conclusion in his brief on appeal. Therefore, this issue is abandoned. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994); *People v Jones*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).