

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK LAINE BROWN,

Defendant-Appellant.

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UNPUBLISHED

October 11, 1996

No. 182807

LC No. 94-18130-FH

Before: Fitzgerald, P.J., and O'Connell and T.L. Ludington,\* JJ.

PER CURIAM.

Defendant was convicted by jury of possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6), and subsequently pleaded guilty to being an habitual offender, third offense. MCL 769.11; MSA 28.1083. He was sentenced to a six- to ten-year term of imprisonment. He now appeals as of right, and we affirm.

One of the elements of the crime of being a felon in possession of a firearm is that the defendant be a convicted felon. MCL 750.224f; MSA 28.421(6). Defendant contends that it is impossible for a convicted felon accused of unlawfully possessing a firearm to receive a fair trial where, necessarily, the jury is presented with evidence that the defendant is *already* a felon. While it is true that some degree of "potential prejudice is unavoidable" in such a situation, *People v Mauch*, 23 Mich App 723, 728; 179 NW2d 184 (1970) (evidence of prior convictions admissible in prosecution for escape from prison despite possibility of prejudice), the suggestion that a trial is irredeemably tainted by the introduction of evidence of a prior conviction is refuted by the rule of evidence addressing this issue, MRE 404, which provides that such evidence may be admitted when done for a proper purpose. MRE 404(b)(1). In a prosecution such as the present one, evidence of a prior conviction is "not only material and relevant, but serve[s] as part of the showing necessary for a conviction." *Mauch, supra*, pp 726-727. We hold that this is a proper purpose warranting its admission.

We note that defendant has cast this argument on appeal in very general terms, implying that a defendant alleged to be a felon in possession of a firearm is always deprived of his right to a fair trial

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

where evidence of a prior conviction is introduced. Our discussion above confutes this position. Because defendant has not relied on the particular facts of the instant case in bringing his argument, we find it unnecessary to address directly the proceedings below.

Defendant next raises an allegation of error with respect to the trial court's instruction to the jury concerning a particular witness, Laura Loggins. One of the prosecution's witnesses, Vanita Greathouse, was unavailable the day of trial, and her preliminary examination testimony was read into evidence. Loggins, one of defendant's witnesses, testified that Greathouse had made statements to her that were inconsistent with the testimony she gave at the preliminary examination, and related the inconsistent statements. The court instructed the jury that Loggins' statements at trial could be used only for impeachment purposes. We review the court's evidentiary ruling for an abuse of discretion. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989).

On appeal, defendant argues that the court should have allowed the jury to consider Loggins' testimony concerning Greathouse's statements as substantive evidence pursuant to MRE 804(b)(3), and not simply for impeachment purposes. This rule of evidence provides that, where the declarant is unavailable (as was Greathouse), another witness may relate statements made by the declarant where those statements are against the defendant's pecuniary or proprietary interest or would subject the declarant to civil or criminal liability. Such statements as related by the witness, being against the declarant's interest, may be used as substantive evidence.

In the present case, the statements made by Greathouse (and related by Loggins) were not against Greathouse's interest – they were entirely innocent and in no way could have subjected her to any adverse consequences. Because of this, the statements did not fall within 804(b)(3), and were hearsay. MRE 801(c). Accordingly, these statements would not normally have been admissible at all. MRE 802. However, in light of the fact that Greathouse was unavailable for trial, the court allowed Loggins' testimony strictly for impeachment purposes. We find no abuse of discretion under the circumstances of the present case. *Watkins, supra*.

Defendant next claims that the trial court erred in denying his motion to suppress his confession. Specifically, defendant argues that his confession was involuntary because it was induced by promises of leniency from the police. When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995). A review of all the circumstances surrounding defendant's confession shows that the confession was voluntary.

Defendant testified that Officer Werkema promised him that if he confessed to possessing the weapon, the police would release him for two days to locate a suspect in a homicide. Defendant also testified that the promise was to work out some sort of deal with the firearm charge, or to ultimately drop the charge against him. Werkema testified that he made no promises to defendant. Werkema's testimony was corroborated by Officers VanLiere and Elders. They testified that no promises were

given to defendant and that he was not threatened or coerced in any way. In addition, during defendant's hour and a half taped confession, he never once mentioned the promise Werkema allegedly made to him. Considering the entire record, we determine that the trial court's finding that defendant's confession was voluntary was not clearly erroneous. *Young, supra*, p 634.

Finally, defendant claims that his sentence was disproportionate in light of the circumstances of the offense and the offender. We find that the trial court did not abuse its discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant carried a firearm into an incendiary confrontation between rival gangs, and, though he was not directly involved in the shooting, contributed to the violence atmosphere surrounding the homicide that ensued. In addition, defendant's criminal background includes five prior felonies. Therefore, we find that the sentence of six to ten years does not violate the principle of proportionality. *Id.*

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Thomas L. Ludington