STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN M. NICKELBERRY,

Defendant-Appellant.

UNPUBLISHED
January 24, 1997

No. 184213

Detroit Recorder's Court
LC No. 94-012276

Before: Holbrook, Jr., P.J., and White and S.J. Latreille,* JJ.

PER CURIAM.

After a bench trial, defendant was convicted of carrying a concealed weapon in a vehicle, MCL 750.227; MSA 28.424, and was sentenced to serve eighteen months to five years in prison. He appeals as of right and we affirm.

Defendant first argues that he was arrested without probable cause. Although defendant failed to raise this issue in the trial court, this Court may review the issue to prevent a miscarriage of justice where there is a sufficient record upon which this Court can decide the issue. *People v Cook*, 153 Mich App 89, 92; 395 NW2d 16 (1986). In this case, we find no miscarriage of justice. Probable cause to arrest defendant existed when the police officers saw defendant throw the gun out of his car window. See *People v Arnold Smith*, 87 Mich App 730, 737; 276 NW2d 481 (1979).

Defendant next argues that the prosecution presented insufficient evidence that defendant knew that the gun was in the car. We disagree. When reviewing a challenge to the sufficiency of the evidence in a bench trial, this Court views the evidence in the light most favorable to the prosecution to determine whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). Questions of credibility should be left to the trier of fact. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

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

Here, the testimony of the police officers indicated that defendant threw the gun out the window after the police began to pursue him with their lights and siren activated. Officer Niarhos testified that defendant told him that he threw the gun out the window because he did not want to go back to jail. Circumstantial evidence and the reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991). Furthermore, because of the difficulty in proving a person's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). It could reasonably be inferred from the police officers' testimony that defendant knew the gun was in the car and that he decided to dispose of it when he saw the police pursuing him. Viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented to establish that defendant knew the gun was in the car.

Finally, defendant argues that he was denied effective assistance of counsel because defense counsel failed to subpoena the true owner of the gun found in the car. We disagree.

To prove ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation was so prejudicial that it denied defendant a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To show prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Lavearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Because defendant did not move for a new trial or a *Ginther* hearing below, our review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

The failure to call a witness or present other evidence is a matter of trial strategy and can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A defense is substantial if it would have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995).

Here, defendant testified that he did not know to whom the gun belonged. Defendant's testimony indicates that defense counsel could not have subpoenaed the true owner of the gun because the true owner was unknown. Furthermore, there was no showing that, had defense counsel subpoenaed the owner of the gun, the owner's testimony would have exonerated defendant. Therefore, defendant has not established that he was denied effective assistance of counsel.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Stanley J. Latreille