

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAFAYETTE WILLIAM CURRIE, a/k/a
LAFAYETTE WILLIAM CURRY,

Defendant-Appellant.

UNPUBLISHED
October 28, 1997

No. 187272
Washtenaw Circuit Court
LC No. 93-000492-FH

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Defendant was convicted by a jury of being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and thereafter pleaded guilty to habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to three to five years' imprisonment, and now appeals of right. We affirm.

I

Defendant first contends that he was denied a fair trial because the prosecutor was permitted to introduce evidence regarding the nature of his previous conviction and sentence. We disagree.

Defendant was charged with violating MCL 750.224f(2); MSA 28.421(6)(2), which provides in pertinent part:

(2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until all of the following circumstances exist:

(a) the expiration of 5 years after all of the following circumstances exist:

* * *

(iii) The person has successfully completed all conditions of probation or parole imposed for the violation.

A “specified felony,” as applied to the facts of this case, is defined in MCL 750.224f(6)(i); MSA 28.421(6)(6)(i) as follows:

(6) As used in subsection (2), “specified felony” means a felony in which 1 or more of the following circumstances exist:

(i) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. . . .

The “specified felony” in the present case was felonious assault.¹

A

In *People v Mayfield*, 221 Mich App 656, 661, 562 NW2d 272 (1997), this Court held that where the defendant did not offer to stipulate the fact of his prior conviction, “he may not now contend that the admission of evidence beyond the mere fact of his conviction constituted error.” In the present case, defense counsel requested that the court not mention to the jury that defendant had previously been convicted of a felony, and offered to so stipulate if plaintiff and the court would simply tell the jury that defendant was being charged with possession of a firearm, without adducing evidence of his prior conviction. The court declined defendant’s offer, noting that the jury might acquit defendant on the ground that a person has a constitutional right to possess a firearm. Plaintiff offered to stipulate that defendant had been guilty of a felony, without going into the nature of the conviction, and the court stated that it would then make a finding that the stipulated-to conviction was one of the enumerated felonies constituting a proper basis for conviction of the present charge. Thus, the jury would be informed that defendant had been convicted of a felony and that the requirements for regaining eligibility to possess a firearm had not been met, but plaintiff and the court would not inform the jury of the specific nature of the prior felony conviction.

Defendant rejected this proposal on two grounds: (1) that by informing the jury early in the case that defendant had been convicted of a prior felony, defendant would be convicted based on his status alone regardless of whether plaintiff established that defendant possessed the firearm; and (2) defense counsel regarded felonious assault as “one of the least of the enumerated felonies,” and would therefore like to explain the prior conviction. Defense counsel concluded that “if the Court’s going to let the Prosecutor get into the fact that my client is a prior felon; that under the circumstances of this case, I would see no reason why not to get into all the details.”

By refusing to stipulate the fact of his prior felony conviction, defendant may not claim error in the admission of evidence regarding his conviction and sentence for felonious assault. *Mayfield, supra* at 661; cf. *People v Swint*, ___ Mich App ___, ___, ___ NW2d ___ (Docket No. 192493, issued

9/12/97) (holding that the trial court abused its discretion by refusing to accept the defendant's stipulation that he committed felonious assault and was ineligible to possess a firearm).

B

Defendant also suggests that the requirement in MCL 750.224f(2); MSA 421(6)(2) that the prosecution establish that defendant's prior felony was a "specified felony" is unconstitutional. Defendant argues that the jury will necessarily treat the "specified felony" as propensity evidence with which to convict him of the present charge.

Statutes are presumed to be constitutional, and courts have a duty to construe them as constitutional unless their unconstitutionality is clearly apparent. *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). Unlike the situations to which defendant analogizes, the Legislature in enacting this statute has specifically incorporated as an element of the offense the jury's determination of whether defendant has been convicted of a "specified felony." See *People v Tice*, 220 Mich App 47, 53-55; 558 NW2d 245 (1996). Defendant's argument that the jury will improperly use evidence of his prior felonious assault conviction to convict him of the present charge is insufficient to constitute a "clearly apparent" basis for declaring the felon in possession of a firearm statute unconstitutional.

II

Defendant next maintains that the trial court erred by denying his pretrial motion to suppress statements he made to investigating officers inside his apartment in the absence of warnings pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A trial court's decision on a suppression motion will not be disturbed unless it is clearly erroneous. A ruling is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made. *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996).

At the time of his statements, defendant was not in custody or deprived of freedom of action in a significant manner. His statements were therefore admissible at trial. *People v Hill*, 429 Mich 382, 397; 415 NW2d 193 (1987); *McElhaney, supra*, p 278.

III

We also reject defendant's claim that he was denied a fair trial because of alleged improper rebuttal testimony and because the trial court refused to sequester the officer in charge of the case. The admission of rebuttal evidence is within the trial court's discretion. *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988). Because this case involved resolution of defendant's wife's claim that she—not defendant—had fired a handgun on the night in question, the trial court did not abuse its discretion by allowing Officer Spickard's rebuttal testimony with regard to her description of how the gun operated.

The sequestration of witnesses is discretionary with the trial court. *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). Defendant has furnished no authority supporting his contention

that the court was required to sequester Officer Spickard, the officer in charge of this case, because he investigated the incident with which defendant was charged and testified at trial. There was no error.

IV

Defendant next argues that error necessitating reversal occurred when plaintiff, over objection, elicited from defendant's wife the fact that the couple's daughter had been born out of wedlock. We agree that this evidence is irrelevant and should not have been admitted. MRE 402. However, reversal may not be predicated on error resulting from an evidentiary ruling unless a substantial right was affected. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Under the circumstances of this case, the error is harmless beyond a reasonable doubt because it had no effect on the jury's verdict. *People v Mateo*, 453 Mich 203, 213-215, 220 n 21; 551 NW2d 891 (1996).

V

Defendant's final allegation of error is that plaintiff denied defendant a fair trial by discussing facts not in evidence during rebuttal argument. Claims of prosecutorial misconduct are decided on a case-by-case basis, and this Court must examine the pertinent portion of the record and evaluate plaintiff's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case, and they must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353-354; 492 NW2d 810 (1992).

We have carefully reviewed the challenged remarks in context, and find that they did not deny defendant a fair trial.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Janet T. Neff

¹ MCL 750.82; 28.277.