

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THERESA M. KEMP,

Defendant-Appellant.

UNPUBLISHED

May 3, 2002

No. 229609

Wayne Circuit Court

LC No. 99-012607

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right her jury convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

This case arises out of a shooting outside a bar, in which the victim was struck in the neck by a single bullet.

Defendant first asserts that insufficient evidence was presented at trial to support her felony-firearm conviction on either a principal or an aider and abettor theory. We disagree.

This Court reviews a party's claim of insufficient evidence to determine whether the evidence presented would justify a rational trier of fact in finding that each element of the charge was proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). All conflicts of fact are to be viewed in a light favorable to the prosecution. *Id.*

A defendant's conviction for felony-firearm requires proof beyond a reasonable doubt that the defendant (1) carried or possessed a firearm (2) during the commission or attempted commission of a felony. MCL 750.227b(1). A defendant who did not actually possess or carry a firearm during the commission or attempted commission of a felony may be convicted as an aider or abettor if the prosecution proves beyond a reasonable doubt that the defendant assisted in the acquisition or retention of the firearm. *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981); *People v Eloby (After Remand)*, 215 Mich App 472, 478; 547 NW2d 48 (1996). In the absence of a defendant's *personal* possession of the firearm during the commission of a felony, a felony-firearm conviction requires a sufficient factual basis for finding that the

defendant counseled, aided, or abetted the *actual* possessor of the firearm in its acquisition or retention. *Johnson, supra* at 54.

Reasonable inferences drawn from circumstantial evidence may be sufficient to prove the elements of a crime, *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993), but the trier of fact may not indulge in inferences completely unsupported by any direct or circumstantial evidence. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). In our opinion, defendant's conviction for felony-firearm was supported with sufficient circumstantial evidence indicating that she provided her codefendant with the gun, and direct evidence that she counseled her codefendant in the use and retention of the gun, directing him to shoot the victim. Moreover, the evidence supports a finding that defendant had constructive possession of the gun. In *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989), our Supreme Court, noting that constructive possession of a firearm is sufficient to establish the element of possession, stated:

Although not in actual possession, a person has constructive possession if he "knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons" [Quoting *United States v Burch*, 313 F2d 628, 629 (CA 6, 1963).]

Here, defendant had the power and intention to exercise dominion or control over the gun through her codefendant, where there was evidence that defendant instructed her codefendant to shoot the victim, and the codefendant proceeded to do so on command.

Defendant's conviction for felony-firearm rested solely on the jury's assessment of the witnesses' credibility – a constitutionally guaranteed province exclusive to the jury and accorded great respect by an appellate court. *People v Lemmon*, 456 Mich 625, 637, 642; 576 NW2d 129 (1998).

Defendant next contends that the trial court abused its discretion when it denied her motion for new trial. We disagree. This Court reviews a trial court's ruling on a motion for new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Defendant asserts here – as she did before the trial court – nothing more than her trial attorney's unsolicited interpretation of the proposed witness' testimony in support of her argument that this "newly discovered evidence" merits a new trial. Although the trial court refused defense counsel's spontaneous request to create an unscheduled record, the court noted that the reasons already offered for counsel's failure to produce a witness listed on defendant's own witness list did not satisfy the definition of newly discovered evidence. We agree.

To merit a new trial on the basis of newly discovered evidence, a defendant must meet a four-part test showing that: (1) the evidence was newly discovered; (2) the evidence is not merely cumulative; (3) admission of the evidence likely would have resulted in a different outcome; and (4) the evidence could not have been discovered and produced at trial through the exercise of due diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

This Court declined to remand a defendant's case for retrial where the defendant failed to file an affidavit or make an offer of proof in support of a newly discovered evidence motion. *People v Messenger*, 221 Mich App 171, 178-179; 561 NW2d 463 (1997). Notwithstanding the

trial court's refusal to make an instant record of the witness' testimony, defendant's motion for new trial contained no affidavit, deposition, or offer of proof, showing the substance of that testimony for this Court's review. The trial court did not prohibit defendant from creating and providing her own record. Where a proposed witness' newly discovered testimony does not support a finding that a different result would have occurred, and the court deems the witness incredible, there is no abuse of discretion. *People v Miller (After Remand)*, 211 Mich App 30, 54; 535 NW2d 518 (1995). What evidence the witness might have offered fails the four-part test noted in *Mechura, supra*, and we question whether due diligence was exercised by defendant.

Defendant finally asserts that her counsel's failure to produce the bar owner's testimony deprived her of the effective assistance of counsel. Appellate review of a defendant's unpreserved claim of ineffective assistance of counsel is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it was plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A reversal based on ineffective assistance of counsel is justified if a defendant affirmatively shows that his counsel's performance fell below an objective standard of reasonableness and prejudiced him to the extent that he was denied a fair trial. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). A defendant bears a heavy burden of disproving his counsel's presumption of competence. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). He must also show that actual prejudice resulted from his counsel's ineffectiveness – that is, had his counsel not erred, there existed a reasonable probability that the result of his trial would have been different. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999).

Defendant has produced insufficient evidence by which this Court can evaluate the diligence or lack thereof with which his counsel attempted to discover and produce the bar owner's testimony. Moreover, there is no evidence to ascertain actual prejudice where there is no affidavit or offer of proof concerning the bar owner's potential testimony. Because this Court's review of defendant's unpreserved claim of ineffective assistance of counsel is limited to the existing record, her claim is unsupported. *Snider, supra* at 423.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald