

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY PETTY,

Defendant-Appellant.

UNPUBLISHED

January 20, 2005

No. 247815

Wayne Circuit Court

LC No. 02-014244

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of possession of a short-barreled shotgun, MCL 750.224b, possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' probation for the possession of a shotgun and cocaine convictions, and a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I

Narcotics officers from the Romulus Police Department executed a search warrant at defendant's residence on September 12, 2002, and found suspected crack cocaine in the refrigerator and a sawed-off shotgun in a bedroom closet. They also found an uncut shotgun, handguns, and other suspicious substances, but defendant was not charged with any offense pertaining to these items. Defendant was arrested and gave a custodial statement to Officer Greg Brandemihl. He admitted that he owned "part of the drugs found in the ice box," and that the uncut shotgun was his. The parties stipulated that a Michigan State Police analyst determined that the substance found in the refrigerator was cocaine, weighing a total of 2.36 grams after the laboratory analysis.

II

Defendant challenges his felony-firearm conviction, claiming that the trial court misunderstood and misapplied the applicable law. We review questions of law de novo on appeal. *People v Maynor*, 470 Mich 289, 294; 683 NW2d 565 (2004).

After finding defendant guilty of possession of less than twenty-five grams of cocaine and possession of a short-barreled shotgun, the trial court considered the felony-firearm charge. The trial court noted that it had already found defendant guilty of the predicate felony, and remarked, “[e]ven if I don’t have to find him guilty of that, the Court does because the jury can render inconsistent verdicts. The Court cannot.” The court then stated, “more importantly, I don’t even have to address that issue because there’s more than ample enough evidence on that issue,” and found that defendant possessed a short-barreled shotgun.

Relying on these statements, defendant asserts that the trial court mistakenly assumed that its findings with respect to the firearm and drug charges required it to find him guilty of felony-firearm, otherwise its verdicts would be inconsistent. Defendant contends that when the underlying felony is possession of drugs, the mere fact that he possessed both a gun and drugs is insufficient to support a felony-firearm conviction; instead, the finder of fact must also find that the items were so close in proximity that they were possessed simultaneously. Defendant maintains that the trial court’s findings are defective because the court did not make a specific finding of simultaneous possession, and that the evidence does not establish such a finding.

Defendant relies on *People v Burgenmeyer*, 461 Mich 431; 606 NW2d 645 (2000). Discussing the application of the felony-firearm statute to an offense involving possession of narcotics, the Supreme Court stated:

Many criminal offenses occur within a short interval of time, and witnesses often see the use or display of a weapon, if one is present. Thus, the inquiry about the element of possession is simplified. In a prosecution for delivery of a controlled substance and for felony-firearm, the question would be whether the offender possessed a firearm at the time of the delivery. When a defendant is prosecuted for *possession* of a controlled substance, however, the inquiry is potentially more complex. A drug-possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it. In a case of that sort, the focus would be on the offense dates specified in the information. [*Id.* at 439.]

The *Burgenmeyer* Court concluded that there was sufficient proof of felony-firearm where cocaine was found in a dresser drawer, and firearms were found atop the dresser. The Court stated, “The drugs and the weapons were close enough that a jury reasonably could conclude that the defendant possessed both at the same time, as the prosecutor had charged.” *Id.* at 440. Defendant emphasizes that, in contrast to *Burgenmeyer*, the instant case involved a bench trial in which the trial court was required to “find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” MCR 6.403.

The trial court’s findings, and the evidence supporting those findings, are sufficient to support defendant’s felony-firearm conviction under *Burgenmeyer*. The trial court did not simply assume that possession of a controlled substance and possession of a firearm necessarily establish felony-firearm. The trial court expressly stated:

I don’t even have to address that issue [of whether an acquittal of felony-firearm would be inconsistent with the convictions of possession of a controlled substance and possession of a short-barreled firearm] *because there’s more than*

ample enough evidence on that issue. And second, that at the time the Defendant possessed the cocaine, that he knowingly carried or possessed a [firearm], to wit a short barreled shotgun which, of course, the Court finds that he did.

Clearly, the trial court specifically found, rather than merely assumed, that defendant simultaneously possessed both the cocaine and the firearm. Moreover, that finding is supported by the evidence. Although the two items of contraband were not as close in proximity as in *Burgenmeyer*, they were both in defendant's dwelling at the same time. We conclude that this evidence was sufficient to establish that defendant was in possession of both at the same time.

III

Defendant claims that the trial court should have granted his motion for a directed verdict because there was no evidence that the substance analyzed as cocaine was the same substance found in his house. Although defendant moved for a directed verdict, he did not do so on these grounds. Nonetheless, a challenge to the sufficiency of the evidence need not be preserved for appellate review. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

The evidence was sufficient to permit the inference that the analyzed substance was the same substance taken from defendant's home. The parties' stipulation stated that the substance that Scott Penebaker analyzed was contained in "knotted plastic bag corners each containing off-white chunky material." Officer Greg Brandemihl testified that he found plastic bags containing suspected crack cocaine, and a photograph of this evidence was introduced at trial. The trial court therefore had sufficient evidence to infer that Penebaker's descriptions of knotted plastic bag corners matched the photographs of the bags that Officer Brandemihl found.

Defendant also claims that there was insufficient evidence to convict him of the charged offenses because no witness identified him as the person who was arrested and interviewed, and gave an incriminating statement to Officer Brandemihl. Defendant himself, however, established his identity with his own testimony. Defendant accused Officer Brandemihl of ordering him to give an incriminating statement, but he did not dispute that he was arrested on September 12, 2002, or that Officer Brandemihl interviewed him, or that he signed the statement.

Because the evidence was sufficient to establish defendant's identity as the person arrested, interviewed, and charged, we need not address the prosecutor's argument that this issue should be analyzed as a challenge to the trial court's personal jurisdiction over defendant.

In his final challenge to the sufficiency of the evidence, defendant argues that there was no evidence that the short-barreled shotgun was operable, hence, the evidence was insufficient to prove felony-firearm. In the context of the felony-firearm statute, MCL 750.227b, this Court has held that an inoperable handgun may qualify as a "firearm." *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11 (1991); see also *People v Hill*, 433 Mich 464, 475; 446 NW2d 140 (1989). Consequently, the absence of proof of operability did not preclude a conviction for felony-firearm.

IV

Defendant contends that the prosecutor erroneously allowed Officer Michael St. Andre to give rebuttal testimony. Defendant preserved this issue with a timely objection. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. *People v Rice*, 235 Mich App 429, 442; 597 NW2d 843 (1999). The test for rebuttal evidence is whether it is justified by the evidence it is offered to rebut. *Id.* Also, the prosecution cannot introduce evidence on rebuttal unless it relates to a substantive rather than a collateral matter. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997).

Defendant testified that the drugs found in his house were not his, and insinuated that they belonged to two other men who had access to his home. He denied telling Officer Brandemihl that people sold drugs from his house. He did not explicitly deny selling drugs himself. On recross examination, the defendant testified that he rode a bicycle for exercise and did not use a bicycle to sell drugs. Defendant also testified that a man who he later learned was a “friend” of Officer Brandemihl came to his house to buy drugs before the search, but no sales were made.

The defense objected to rebuttal testimony. However, the trial court overruled the objection, concluding that the defense theory was that the cocaine found in the home did not belong to defendant and defendant did not sell it. The trial court held that the evidence was offered to rebut this theory, and its admission was properly within the trial court’s discretion. Officer St. Andre then testified, in rebuttal, that he conducted surveillance on defendant’s home a few weeks before the search. He saw three different cars drive up to the house within a fifteen-minute period; each time, defendant “would come out of the house with a closed fist, put his hand inside the car, pull his hand back, and put his hand in his pocket and go in the house.” Officer St. Andre testified that these actions were consistent with narcotics trafficking.

Admission of rebuttal evidence rests within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The purpose in limiting the scope of rebuttal is based on the trial court’s discretionary authority to prevent the trial from litigating secondary issues. *Id.* Therefore, it is a necessity that the trial court evaluate the overall impression that might be created by the defense proofs. *Id.* Additionally, the trial court is presumed to possess an understanding of the law that allows it to recognize the difference between admissible and inadmissible evidence. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

On this record, we cannot conclude that the trial court’s decision to admit this rebuttal evidence was an abuse of discretion in this bench trial. *Figgures, supra.* The trial court recognized that it could conditionally admit evidence until it could be correlated to information provided later in the trial. *Wofford, supra.* Moreover, the rebuttal testimony did not affect the outcome of the trial. The officer’s rebuttal testimony, if credited, would have established defendant’s guilt of possession with intent to deliver. The trial court acquitted defendant of that offense, finding that the prosecution failed to prove that defendant intended to sell the drugs found in the house. Therefore, this challenge is without merit.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood