

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN HALE DAVIS,

Defendant-Appellant.

UNPUBLISHED

April 21, 2005

No. 253604

Kalamazoo Circuit Court

LC No. 03-001403-FH

Before: Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of one to fifteen years for the CCW conviction and one to twenty years for the felon in possession conviction. He was sentenced to a consecutive two-year term for the felony-firearm conviction.

We affirm defendant's convictions, but remand to the trial court for a correction in the judgment of sentence. The amended judgment of sentence shall provide that defendant's sentences for CCW and felony-firearm shall be served concurrently, not consecutively.

I

Defendant's convictions stem from a traffic stop in the early morning hours of September 15, 2003. During the stop, police found a revolver and suspected drugs on the passenger side of the car near the floorboard. Defendant was driving the car and his cousin, Thomas Cowley, was a passenger. Defendant initially falsely identified himself by his brother's name. After obtaining defendant's identification from his wallet and learning his true identity, police conducted a LIEN check, which revealed outstanding warrants, and defendant was arrested.

The arresting officer then looked into the vehicle and saw baggies of suspected marijuana on the floor of the car. Right behind the baggies, the officer found a loaded .32 caliber revolver under the passenger seat. Police also allegedly found crack cocaine in the car. When questioned by the arresting officer, defendant initially stated that he was unaware that the gun was in the

vehicle, but later stated that he was aware of the gun, and his fingerprints might be on the gun, but it was not his. Likewise, he stated that he believed Cowley was aware of the gun, and his fingerprints might be on the gun, but it wasn't Cowley's gun either.

At trial, defendant testified that the car he was driving was not his. He was driving it because he was considering buying it. He had picked up the car from the repair shop about three hours earlier. He had taken the car to the repair shop two weeks ago when the transmission went out. Cowley asked for a ride to his brother's house, which was in the direction defendant was headed.

Defendant testified that initially he did not know the gun was in the car, which was why he told the officer he was not aware of the gun. Further, the arresting officer told defendant that the police thought the gun belonged to Cowley. He testified that Cowley brought the gun to defendant's attention when the car was being pulled over. At that time, defendant touched the gun and told Cowley that Cowley could not have the gun on him. Defendant testified that he admitted knowledge and possession of the controlled substances to the police, but not the gun.

The trial court found that defendant was aware that the gun was in the vehicle. The court concluded that the prosecutor had established the elements of each offense, CCW, felon in possession, and felony-firearm.

II

Defendant argues that the evidence was insufficient to support his convictions because there was no direct evidence linking defendant to the gun. He contends that the prosecution failed to introduce any evidence, beyond defendant's mere proximity to the gun and his knowledge of the gun after the fact, to establish the possession element of any of the three offenses of which he was convicted. Further, the trial court merely found that defendant was "aware that the gun was in the car," which is insufficient to support his convictions. We disagree.

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich. 1201 (1992). The standard of review is deferential, and requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

As defendant notes, evidence of possession was essential to each of the three offenses at issue. A conviction of felony-firearm requires that the defendant possessed a firearm during the commission of or the attempt to commit a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). A conviction of carrying a concealed weapon in a vehicle requires that defendant was "carrying" a weapon. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999); *People v Emery*, 150 Mich App 657, 667; 389 NW2d 472 (1986). The element of "carrying" may not be automatically

inferred from evidence that the defendant knew the weapon was present in the vehicle; however, the defendant's awareness of the gun is a factor that may be considered. *Id.* Under MCL 750.224f, felon in possession of a firearm, a person convicted of a felony¹ shall not *possess*, use, transport, sell, purchase, *carry*, ship, receive, or distribute a firearm in Michigan. MCL 750.224f(1); emphasis added.

The trial court found that police retrieved the gun and suspected drugs from the passenger side of the car toward the center of the floor. Defendant had the car for about three hours and was considering purchasing it. Defendant lied to the police about his identity, the drugs, and the gun. Cowley, the passenger, stated that he brought nothing into the car and left nothing in it. The gun was accessible to defendant, who just had to reach over. The handle was sticking out about three to six inches. Although there was conflicting testimony, defendant at one point admitted to the police that he was aware of the gun and that his fingerprints may be on it. The arresting officer testified that defendant told police that the gun was not Cowley's although his fingerprints may be on it.

The court noted that when asked whether he knew the gun was in the vehicle, defendant testified "yes and no"; however, the court found that defendant was aware the gun was in the vehicle. The court then addressed the specific elements of the charged offenses, including the requisite element of possession or carrying a firearm. The court concluded that the prosecution had established the elements of each offense.

"Possession may be actual or constructive and may be proved by circumstantial evidence." *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000); *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). Constructive possession exists if there is proximity to the article together with indicia of control, i.e., if the location of the weapon is known and it is reasonably accessible to the defendant. *Id.* at 470-471.

The trial court's findings are supported by the evidence, including testimony from the police officers, Cowley, and defendant himself. The evidence and findings were sufficient to establish that defendant possessed or carried the revolver found in the car. *Avant, supra; Nimeth, supra; Emery, supra* at 667-668.

III

Defendant argues that the trial court erred in sentencing him to consecutive terms for his convictions of CCW and felony-firearm. Plaintiff concedes this error, and we agree.

¹ Defendant stipulated below that he had a prior conviction and that he had not regained eligibility to possess a firearm.

MCL 750.227b(1) provides:

A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223 [MCL 750.223], section 227, 227a or 230 [MCL 750.227, MCL 750.227a or MCL 750.230], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.

As this Court stated in *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994):

a defendant is not guilty of felony-firearm if the underlying felony is the carrying of a concealed weapon. Although the presence of a second underlying felony allows defendant's felony-firearm conviction to stand, [*People v Sturgis*, 427 Mich 392,] 410; 397 NW2d 783 [(1986)], it follows that the felony-firearm sentence may run consecutively only to that second underlying felony.

Defendant's felony-firearm sentence still runs consecutively to the remaining felony. *Id.* Accordingly, we remand for the limited purpose of correcting defendant's judgment of sentence to specify that defendant's sentences for carrying a concealed weapon and felony-firearm shall be served concurrently, rather than consecutively.

IV

Defendant argues that his conviction of both felon in possession of a firearm and felony-firearm violates double jeopardy principles. We disagree.

As defendant acknowledges, this issue was addressed in *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003). The Court found no double-jeopardy violation. *Id.* at 450. "Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL § 750.227b. *Calloway, supra* at 452.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot