

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DOUGLAS WALLER,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 264031

Wayne Circuit Court

LC No. 05-002368-01

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), 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. Pursuant to MCL 769.10, defendant was sentenced as a second habitual offender to concurrent terms of 28 months to 6 years in prison for his possession-with-intent-to-deliver conviction, and 28 months to 7½ years in prison for his felon-in-possession conviction. Defendant was sentenced to a consecutive term of two years in prison for his felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Facts

While conducting surveillance prior to executing a search warrant, Detroit police sergeant Andrew White saw defendant open the front door of a house after a man knocked. White observed defendant accept money at the door, step into the house, quickly return, and give the man what White suspected to be narcotics. Within minutes, White saw another man approach the house and knock on the front door. White again observed defendant open the door, accept money, and give the man a “small item inside his hand.”

Upon entering the house, the police found defendant in the living room, standing less than two feet away from three bags of suspected marijuana on a table. These bags were later determined to contain 78.17 grams of marijuana. Inside the front door of the house is a foyer or vestibule, where a closet is located. On the floor of the closet, police found a loaded handgun and two receptacles containing additional bags of marijuana. These additional bags were later determined to contain 32.39 grams of marijuana. After searching defendant, the police found \$54 and no narcotics.

The police discovered two other people in the dining room, where they confiscated a multi-colored backpack containing a bag of marijuana, six smaller bags of marijuana, and several paper wrappers containing suspected heroin and marijuana. These items were determined to contain substantial quantities of marijuana. However, police chemists disagreed about whether the other substance was heroin. Upstairs, the police found three individuals, one of whom had five additional bags of marijuana. All six people in the house were arrested.

II. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his felon-in-possession and felony-firearm convictions.¹ We disagree. We review de novo challenges to the sufficiency of the evidence to determine whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Felony-firearm consists of two essential elements: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b(1); *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). A person who has been convicted of a specified felony may not possess a firearm until certain conditions have been met and the right to possess a firearm has been restored. MCL 750.224f; *People v Perkins*, 473 Mich 626, 629; 703 NW2d 448 (2005). The prosecution and defense counsel stipulated that defendant had been convicted of a specified felony, and was therefore ineligible to possess a firearm at the time of his arrest. Accordingly, the only disputed element with respect to defendant's felon-in-possession and felony-firearm convictions was the element of possession.

One has constructive possession of a firearm if it is available and reasonably accessible to him and he knows its location. *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989); *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993). Defendant is correct that none of the police officers saw him handle a gun. However, circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). Defendant was the only person seen standing at the front door and the only person seen conducting suspected narcotics transactions. The gun was found in a closet located in the vestibule or foyer directly inside the front door. Accordingly, the gun was available and reasonably accessible to defendant. Further, because the firearm was in the same location as the marijuana, it is reasonable to infer that defendant knew of its location. We conclude that, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant constructively possessed a firearm at the time of his arrest.

III. Jury Instruction

¹ Defendant does not challenge the sufficiency of the evidence supporting his possession-with-intent-to-deliver marijuana conviction.

Defendant contends that the trial court abused its discretion in failing to provide an adverse inference jury instruction because the prosecutor failed to produce Officer Gary Edwards, an endorsed witness. We disagree. We review a trial court's decision regarding a request for a "missing witness" instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004); *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000).

When the prosecution endorses a witness under MCL 767.40a(3), it is obligated to exercise due diligence to produce the witness at trial unless the trial court grants leave to delete the witness for good cause shown. MCL 767.40a(4); *Eccles, supra* at 388. Due diligence is an attempt to do everything reasonable, but not everything possible, to obtain the witness' presence. *Id.* at 391. If the trial court finds that the prosecutor failed to exercise due diligence, it should instruct the jury pursuant to CJI2d 5.12² that it may infer that the missing witness' testimony would have been unfavorable. *Id.* at 388.

When the prosecution filed its witness list pursuant to MCL 767.40a(3), it identified Edwards as a witness it intended to produce at trial. But Edwards did not testify at trial, apparently because he had retired and moved to Florida as Sergeant Rodney Jackson testified. Defendant objected to Jackson's testimony concerning the items Edwards confiscated at the time of the arrest, asserting that the trial court was required to make a finding regarding whether the prosecution had exercised due diligence in attempting to produce Edwards. The trial court disagreed and did not make a finding regarding due diligence. However, after Jackson's testimony, the trial court instructed the prosecution that it needed to make Edwards available because he was endorsed. Otherwise, the trial court stated that it would provide the "negative instruction."

After the prosecution rested its case, the trial court directed it to have all its witnesses present for defendant. Defense counsel did not request the production of Edwards, and the parties proceeded to closing arguments without any further mention of Edwards. Defense counsel did not request the adverse inference jury instruction. After the trial court instructed the jury, however, defendant objected to the lack of "the adverse instruction." The trial court stated that it was not aware that Edwards had moved to Florida, and noted that that defendant had not requested the production of Edwards. Defense counsel asserted that this was a "hyper-technicality," requiring him to request production of a witness when everyone knew he would not be present.

Defendant's entire argument on appeal is based on *Bean, supra*. In *Bean*, our Supreme Court granted leave to appeal to consider whether the trial court had erred in concluding that the prosecutor had exercised due diligence in attempting to locate two witnesses, whose testimony from the preliminary examination was read at trial. *Id.* at 682. Defendant's reliance on *Bean* is

² CJI2d 5.12 provides: "_____ is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case." *People v Bean*, 457 Mich 677, 680 n 6; 580 NW2d 390 (1998).

misplaced. *Bean* did not involve the adverse inference jury instruction. Instead, it involved the availability of witnesses for MRE 804(a)(5) purposes, and the prosecutor's efforts in locating the witnesses in that context. Unlike *Bean*, the present case does not involve the reading into evidence of an unavailable witness's prior testimony. Edwards's prior testimony was not read into evidence; other witnesses merely testified in Edwards's stead. Thus, no Confrontation Clause issues are presented in the instant matter and *Bean* is inapposite.

On the record before us, we are unable to determine what efforts the prosecution made to locate Edwards. However, we note that a trial court is not required to provide the adverse inference instruction. Rather, case law dictates that the court *should* provide the instruction if the prosecution fails to demonstrate due diligence. *Eccles, supra* at 388. Therefore, even assuming that the prosecution's efforts to locate Edwards did not satisfy the due diligence requirement, the missing-witness instruction was discretionary. A trial court abuses its discretion when its decision is "so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003). Further, to establish an abuse of discretion, defendant must demonstrate that the trial court's decision resulted in prejudice. *Id.* at 328.

Before defendant was arrested, White saw one of the other suspects enter the house with a multi-colored backpack. Although Jackson was not the one who placed the items from the backpack into evidence, he personally observed Edwards confiscate the multi-colored backpack and its contents. Accordingly, because both White and Jackson testified at trial, Edwards's testimony would likely have been cumulative.

Further, Edwards was merely a "backup" during the raid that led to defendant's arrest. Edwards's only other role in the execution of the search warrant was confiscating the multi-colored backpack, which was found in a different room than defendant. White observed defendant engaging in two suspected narcotics transactions, defendant was found within two feet of a substantial quantity of marijuana, and additional marijuana and a loaded firearm were found in the closet near defendant's location. Defendant was the only person who answered the front door or engaged in suspected narcotics transactions at its threshold. We conclude that the trial court did not abuse its discretion in declining to provide the missing-witness instruction because defendant was not prejudiced by the prosecution's failure to produce Edwards at trial.

IV. Admission of Evidence

Defendant claims that the prosecution failed to lay a proper foundation for the admission of a photograph of defendant taken on the day of his arrest. We disagree. The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

The proper foundation for the admission of a photograph is made if someone who is familiar from personal observation of the person photographed testifies that the photograph is an accurate representation of the person. *In re Robinson*, 180 Mich App 454, 460; 447 NW2d 765 (1989). White, who observed defendant before the warrant was executed and during the execution of the warrant, asserted that the photograph was a fair and accurate representation of

defendant on the date of his arrest. Therefore, the foundation was proper, and the trial court properly overruled defendant's objection in this regard.

Defendant contends that the danger of unfair prejudice substantially outweighed the photograph's probative value. During direct examination, White stated that he had provided Jackson with a physical description of defendant before executing the search warrant. White explained that defendant looked different at trial because he no longer had hair extensions and a long ponytail. The prosecutor presented a photograph, which had not been produced during discovery, and asserted that it had been taken the day of defendant's arrest. The photograph was not dated, it contained no indications that it belonged to the police department, and White was not the one who took the photograph. However, White asserted that the photograph was a fair and accurate representation of defendant on the date of his arrest, and the trial court admitted the photograph into evidence over defendant's objection.

Photographs are admissible if they are relevant under MRE 401 and their probative value is not substantially outweighed by the danger of unfair prejudice under MRE 403. See *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). MRE 401 provides that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is generally admissible. MRE 402. Further, photographs are relevant when they corroborate witness testimony. *Mills, supra* at 76. The evidence of defendant's appearance at the time of arrest corroborated White's description of defendant's physical appearance and made White's identification of defendant as the individual engaged in drug transactions more probable than it would have been without the photograph. Therefore, we cannot conclude that the photograph was not relevant.

MRE 403 provides "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" Unfair prejudice occurs "when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Defendant fails to identify any prejudice that admission of the photograph may have created, and we do not find any prejudice in admitting a photograph that is a fair and accurate representation of defendant at the time of arrest. An appellant may not simply announce a position or assert an error and leave it to this Court to discover and rationalize the basis for his claims; nor may he leave it to this Court to unravel and elaborate his arguments, and then search for authority to sustain or reject his position. *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), citing *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We hold that the trial court did not abuse its discretion in admitting the photograph of defendant.

V. Sentencing

Finally, defendant claims that the trial court erroneously imposed consecutive terms of imprisonment for his possession-with-intent-to-deliver and felon-in-possession convictions. Whether consecutive sentences are proper is a question of law that this Court reviews de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003). A trial court may only impose consecutive sentences if specifically authorized by law. *Id.*

Defendant correctly notes that, at the sentencing hearing, the trial court stated from the bench that all three sentences would be consecutive to one another. However, the judgment of sentence contained in the lower court record provides that the sentences for defendant's possession-with-intent-to-deliver and felon-in-possession convictions are to be served concurrently. According to the judgment of sentence, only the felony-firearm sentence is to run consecutively to the other sentences.³ It is well established that a trial court speaks through its orders and judgments, not its oral statements. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). Because the judgment of sentence is correct, defendant's focus on the trial court's oral statements at the time of sentencing is misplaced. Resentencing is not required.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen

³ The mandatory two-year sentence for felony-firearm must run consecutively to any sentence imposed for the underlying felony. MCL 750.227b(2).