

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE BENJAMIN SAMUEL, JR.,

Defendant-Appellant.

UNPUBLISHED

April 17, 2008

No. 271297

Washtenaw Circuit Court

LC No. 05-001582-FH

Before: Wilder, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of a firearm by a felon, MCL 750.224f; discharge of a firearm in a building, MCL 750.234b; possession of a firearm during the commission of a felony, MCL 750.227b; and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to 2 years' imprisonment for his felony-firearm conviction, which was to be served preceding and consecutively to concurrent sentences of 2 to 5 years' imprisonment for being a felon in possession of a firearm, 2 to 4 years' imprisonment for discharging a weapon in a building, and 16 months to 2 years' imprisonment for resisting and obstructing a police officer. We affirm.

In the early morning hours of September 14, 2005, defendant was in a trailer home with three other people. Two or three seconds after police officers and other witnesses heard gunshots, defendant was observed with a pistol in his hand. When defendant became aware that officers had entered the trailer, he fled. Defendant then ignored instructions by the officers to stop and put his hands up. After he finally stopped and placed his hands on a car, he then pushed off the car into an officer standing behind him. Officers had to physically restrain defendant and bring him down to the ground to place him in handcuffs.

Defendant first argues that there was insufficient evidence to support his conviction for being a felon in possession of a firearm. His argument is twofold. First, defendant argues that his stipulation, that he did not complete the steps necessary to restore his right to possess a firearm, was not sufficient to prove the elements of the crime, because the prosecutor was additionally required to prove that five years had not elapsed from the time defendant fulfilled his probation requirements stemming from the underlying felony. Second, defendant argues that there was insufficient evidence that he possessed the firearm. On both points, we disagree.

We review a challenge to the sufficiency of the evidence by considering the evidence in a light most favorable to the prosecution, and by determining whether any rational trier of fact could have found that all the essential elements of a crime were proved beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002).

MCL 750.224f provides:

(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 the following circumstances exist:

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

(i) The person has paid all fines imposed for the violation.

(ii) The person has served all terms of imprisonment imposed for the violation.

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

(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424 of the Michigan Compiled Laws.

A "specified felony" includes one that has an element of the unlawful possession of a controlled substance. MCL 750.224f(6)(iii).

Defendant stipulated that he did not complete the steps necessary to restore his right to possess a firearm. A stipulation is "an agreement, admission, or concession made by the parties in a legal action with regard to a matter related to the case," and stipulations of fact are binding on the court. *People v Metamora Water Service, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007).

A felon's right to possess a firearm will be restored when the concealed weapons licensing board determines, by clear and convincing evidence, that he "properly submitted an application for restoration of rights . . ."; five years have elapsed from the time the defendant paid all the fines, served all terms of imprisonment, or successfully completed all conditions of parole or probation that were imposed for the underlying felony; and the "person's record and reputation are such that the person is not likely to act in a manner dangerous to the safety of other persons." MCL 28.424(3). Based on defendant's stipulation, he could not have had his right to possess a firearm restored.

Moreover, when a defendant is charged with being a felon in possession, it is the defendant's burden to produce evidence that he has completed all the necessary steps to regain his rights, including the passage of five years from the completion of his penalties. *People v Perkins*, 473 Mich 626, 639-640; 703 NW2d 448 (2005). The prosecutor is not required to prove

that the defendant has not taken the necessary steps to regain his rights, unless the defendant has met his burden of production. *Id.*

Here, because defendant never met his burden of production (never provided evidence that he took the necessary steps to regain his right to possess a firearm), the prosecutor did not have to specifically prove that five years had not yet elapsed from the time defendant completed his probation requirements. *Id.* Furthermore, considering his stipulation in a light most favorable to the prosecution, we conclude a reasonable jury could conclude beyond a reasonable doubt that defendant did not have his right to possess a firearm restored at the time relevant to this case. Therefore, defendant's argument lacks merit.

Additionally, whether a defendant possessed a firearm is a question of fact for the jury. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Possession may be proved by circumstantial evidence. *Id.* at 470. Here, a police officer testified that he observed defendant, standing in a lighted room inside the trailer, holding a pistol with a long chrome barrel and a black handle. Two witnesses from inside the trailer also testified that they saw defendant holding the pistol. A pistol matching that description was recovered from inside the trailer after defendant's arrest. Considering the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that defendant possessed a pistol. While defendant argues that the testimony of these witnesses was so incredible as to be insufficient to support his conviction, we note that the credibility of witnesses is the province of the jury. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). We will not second-guess its credibility determinations in the context of a sufficiency of the evidence argument. *Id.*

Defendant also argues that the trial court erred when it failed to admit into evidence a letter stating that one of the other occupants of the trailer possessed the pistol. But defendant never moved for the admission of the letter. Therefore, we review this unpreserved error for plain error affecting defendant's substantial rights. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We will not reverse unless the error affected the outcome of the case. *Id.*

Even if relevant,¹ hearsay (an out-of-court statement offered for a substantive purpose, i.e. for its truth), is inadmissible unless a hearsay exception applies. *People v Farquharson*, 274 Mich App 268, 272; 731 NW2d 797 (2007); MRE 801(c), 802. Such statements may be used for non-substantive purposes, e.g., to impeach a witness, but "evidence used exclusively for impeachment purposes is not substantively admissible without an independent basis." *Barnett v Hidalgo*, 478 Mich 151, 164; 732 NW2d 472 (2007). To offer extrinsic evidence of a witness's prior inconsistent statement, the "litigant must lay a proper foundation in accordance with the court rule," by (1) eliciting testimony inconsistent with the prior statement, (2) asking the witness

¹ Generally, all relevant evidence is admissible at trial. *People v Fletcher*, 260 Mich App 531, 552; 679 NW2d 127 (2004); MRE 402. Evidence is relevant when it tends to make a material fact or issue at trial more or less probable than the fact would be without the evidence. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); MRE 401. "A material fact is '[a] fact that is significant or essential to the issue or matter at hand.'" *People v Katt*, 468 Mich 272, 292; 662 NW2d 12 (2003), quoting Black's Law Dictionary (7th ed).

to admit or deny making the first statement, (3) asking the witness to admit or deny making the later, inconsistent statement, (4) allowing the witness to explain the inconsistent statement, and (5) allowing the opposite party to cross-examine the witness. *Id.* at 165.

The letter is an out-of-court statement. But no foundation was laid to impeach the witness, James Ison, with the letter at the time defendant introduced the topic of the letter. Ison had not yet given testimony inconsistent with the statement made in the letter. Defense counsel did not ask the witness to admit or deny making the first statement, and he did not ask the witness to admit or deny making a subsequent contradictory statement. Because no foundation was laid, even if defendant introduced the topic of the letter for the purpose of impeachment, the trial court did not commit plain error when it failed to *sua sponte* admit the letter itself as evidence. The letter was also substantively inadmissible as hearsay, if offered to prove that defendant did not possess the pistol. MRE 802. Finally, even if the trial court committed error by failing to admit the letter, its admission would not have changed the outcome of the trial, because the witness testified to the contents of the letter, and the jury was fully aware that the letter impeached the witness' testimony.

Defendant next argues on appeal that the trial court erred when it failed to appoint substitute counsel at defendant's request. Generally, we review a trial court's decision relating to substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). But here, we decline to consider this issue, because defendant failed to state his claim on appeal with sufficient specificity. *Traylor, supra* at 462, quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990) ("A defendant may not leave it to this Court to search for a factual basis to sustain or reject his position."). Defendant's contention on this issue is that "[defendant] stated that there were many issues that [counsel] was not bringing up," and that "[t]he record shows there was more than a mere allegation that the defendant had lost trust in his counsel's loyalty . . . [t]herefore the court should have appointed substitute counsel" Defendant provides no additional factual support for his claim from the record, cites to a paucity of authority, and makes very little argument. The totality of defendant's presentation on this question is insufficient for us to conclude that defendant showed good cause for the substitution of counsel. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005) ("Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic."). Furthermore, defendant did not show that substitution of counsel, which he only requested just before closing arguments, would not have "unreasonably disrupt[ed] the judicial process." *Id.*

We also decline to consider defendant's remaining issues, presented in his standard 4 brief, because they are not supported by any citations to legal authority or by any reasoning. A defendant may not simply announce his position on appeal and leave it to the Court to discover legal bases or authorities to support it. See, e.g., *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Affirmed.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Patrick M. Meter