

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 22, 2014

v

DANDRE DSHAUN SANDERS,

Defendant-Appellant.

No. 313564
Wayne Circuit Court
LC No. 12-006822-FH

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of carrying a concealed weapon, MCL 750.227, being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender to concurrent terms of two to seven and one-half years in prison on the felon in possession conviction and to five years' probation on the CCW conviction. He was also sentenced to the mandatory two-year term on the felony-firearm conviction, to run consecutively to the felon in possession sentence. He now appeals and we affirm.

On the afternoon of June 26, 2012, the Detroit police received a report of four individuals on Pelkey Street, one of whom was armed with a handgun. Officer Lavon Green and his partner responded to the call. Upon arriving in the area, they observed four individuals, including defendant. Defendant matched the description of the individual with the handgun. As the officers approached, defendant began to run. Officer Green gave chase on foot and quickly apprehended defendant. Officer Green testified that at the end of the chase, defendant tossed a handgun into the grass and then raised his hands. Officer Green then arrested defendant and recovered the handgun. Officer Green was approximately nineteen feet from defendant at the time he tossed the gun into the grass.

Defendant first argues that his due process rights were violated by the trial court's permitting jurors to ask questions during trial. Defendant concedes that he did not preserve this issue for review and that our review is for plain error under *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). To be plain error, the error must be clear or obvious. *Id.* at 763. Given that,

not only has the Supreme Court authorized questions being placed by jurors, the Supreme Court has enacted a court rule on the subject, MCR 2.513(I), we cannot say that there is any error that is clear or obvious.¹ Moreover, defendant acknowledges that this practice has been in place for a number of years and urges that it should stop “as a matter of law reform.” Simply put, there is no plain error in this issue.

Next, defendant argues that the prosecutor improperly shifted the burden of proof to defendant. We disagree. At issue are comments made by the prosecutor during rebuttal closing argument regarding defendant’s failing to take advantage of the opportunity to have the firearm tested for fingerprints.

The trial court had, prior to trial, entered an order allowing for defendant to hire, at county expense, a latent print examiner. Defendant did not do so. At trial, defendant called as a witness the officer in charge of the case, Sgt. Shannon Dekun. Among other questions, defendant asked the officer whether she was aware of defendant’s request for fingerprint testing, to which she replied that she was not. Thereafter, the prosecutor introduced as an exhibit the order authorizing the hiring of an independent fingerprint examiner by defendant.

The prosecutor made no reference to the fingerprint issue during his closing argument. Rather, he simply argued that Officer Green’s uncontradicted testimony established that defendant possessed the gun and that the gun had been concealed.²

During his closing argument, however, defense counsel brought up the issue of the lack of fingerprint evidence. Specifically, defense counsel made a number of references to defendant’s requesting to have the gun fingerprinted and that no fingerprinting was done. The prosecutor then responded in rebuttal argument. First, the prosecutor referred to the report from the state police crime lab that the gun did not meet the submission guidelines for fingerprinting. Then, addressing the issue of defendant’s request for fingerprinting, the prosecutor argued the following:

On rebuttal I had Exhibit #7 [the order authorizing defendant’s request for an independent latent print examiner] admitted. The reason why Exhibit #7 is important is because it is a [sic—an?] independent latent print examiner. What happens is, as you heard the officer testify, is sometimes guns, sometimes they do it, sometimes they don’t. Sometimes they reply, sometimes they don’t. And, the reason why is because they’re back logged. And, so what defense counsel, on his own did, was he requested for independent latent print examiner to have the gun printed himself. And then he never got it done; he never did it. This is an order from the Court, saying, that the People of the State of Michigan, the County will

¹ It should also be noted that defendant does not argue that the trial court failed to comply with the court rule.

² The parties had stipulated that defendant had previously been convicted of a felony and that his right to possess a firearm had not been restored.

pay to have this gun submitted, if they wanted it, to have it—to order, a scientist and pay that scientist with our tax dollars to do it, and they didn't get it done.

You can take this in the back and read it yourself. And then you have to ask yourself, why would they not want [sic] to happen. And, you can reasonably infer, why. Because, it's obvious that he had this gun. And, I'll tell you what, if it was submitted for prints and the two times in the eighteen years or whatever it is, that it actually comes back, his prints are on the gun, that's going to look really bad for them.

The first challenge is to determine exactly what type of error defendant is arguing occurred here. Defendant frames the issue as being a due process violation based upon a shifting of the burden of proof. He then states the standards of review for both denial of a mistrial and prosecutorial misconduct. But regardless of how this argument is framed, we see no error.

The prosecutor's argument does not shift the burden of proof to defendant nor does it suggest that the failure of defendant to follow through on having an independent print examiner examine the weapon constitutes evidence of guilt. Rather, the prosecutor was merely responding to an argument made by defendant. First, defendant opened the door by raising the issue of a lack of fingerprinting, with the implication that he was denied a full opportunity to defend himself and that, perhaps, the fingerprint evidence would have been harmful to the prosecution. Second, the prosecutor responded by pointing out that defendant did have the opportunity to procure this evidence and that, perhaps the reason he did not was because it might have been harmful to defendant. In short, the implication from defendant's argument flows in both directions and the prosecutor was merely making that point.

Moreover, any error was harmless. An error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009). As the prosecutor argued in his closing argument, the only evidence necessary to convict defendant came from Officer Green's uncontradicted testimony: that he saw defendant pull out a concealed weapon and toss it on the ground. Thus, even without the argument relating to the lack of fingerprint evidence, there is no reasonable possibility that defendant would have been acquitted.

Next we turn to defendant's pro per Standard 4 brief. First, defendant argues that it constitutes double jeopardy to convict him of both carrying a concealed weapon and felony-firearm because both convictions are based upon his carrying the concealed handgun. But the felony-firearm conviction does not contain an element of the weapon being concealed. MCL 750.227b. And carrying a concealed weapon does not contain the element of the defendant doing so during the commission of a felony. MCL 750.227. Because each offense contains an element not found in the other, it does not constitute double jeopardy to convict defendant of both. See *People v Denio*, 454 Mich 691, 707; 564 NW2d 13 (1997).

Defendant's other argument is a two-sentence argument that he should not have been convicted of the crimes because his fingerprints were not found on the gun or bullets. There is no requirement that there be fingerprint evidence in order to convict a defendant of a crime. As

noted above, the officer's testimony, if believable, was sufficient to convict and whether it was believable was a decision for the jury to reach. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher