

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONEY LEE JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

October 18, 2016

No. 328279

Kalamazoo Circuit Court

LC No. 2014-001785-FH

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his convictions, following a jury trial, of carrying a concealed weapon (CCW), MCL 750.227; and being an intoxicated disorderly person, MCL 750.167(1)(e). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 36 months' to 20 years' imprisonment for CCW.<sup>1</sup> The sentence is consecutive to a sentence for which defendant was on parole at the time of his offenses in this case, and defendant received zero days of credit because he was on parole when he committed the instant offenses. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from an incident in a Walmart store. Store employees observed defendant driving an electric cart around the store while apparently intoxicated and drinking an alcoholic beverage. An unpleasant confrontation occurred, at which point an employee noticed that defendant possessed a knife under his coat or strapped to his belt. The store's loss prevention staff called the police. Deputy Rodney Rought of the Kalamazoo Sheriff's Department responded and ultimately arrested defendant for being a disorderly person. Rought's search of defendant after the arrest revealed that defendant was carrying a large knife with a five-inch blade. Defendant testified at trial that he frequently carried the knife, which he used for utilitarian purposes including hunting and fishing, and that other people could see his knife sticking out from the bottom of his coat, even though his coat covered up the top part of the knife.

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<sup>1</sup> The record does not reflect a sentence for defendant's intoxicated disorderly person conviction.

At trial, the trial court provided the jury with the opportunity to submit written questions to be asked of defendant. A juror question was relayed to defendant by the trial court, asking him what other equipment, besides his knife, he used for hunting and fishing. According to the trial transcript, defendant responded that he used a fishing pole, and he then volunteered, "I can't use a gun because I'm a (inaudible, voice too low)."<sup>2</sup> The prosecution then asked, "As it relates to being allowed to have a knife, isn't it true that you are under a Court order on parole that indicated that you are not permitted to have any weapons of any kind on your person?" Defendant responded, "That's true." Defense counsel objected on the ground that the cross-examination exceeded the scope of counsel's direct examination. The trial court allowed the testimony regarding the conditions of defendant's parole because defendant had raised the issue of his legal ability to possess a weapon. The prosecution then elicited testimony from defendant that he was on parole, that as a condition of his parole he was not permitted to possess weapons, that the knife defendant possessed in the Walmart store was a weapon, and that defendant possessed the knife even though he was not allowed to do so under the specific terms of his parole.

The jury convicted defendant as described above. This appeal followed.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant first claims that there was insufficient evidence for the jury to find him guilty of CCW. We disagree. We review *de novo* a claim of insufficiency of the evidence. *People v Henderson*, 306 Mich App 1, 8; 854 NW2d 234 (2014). When considering the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Id.* at 8-9.

To convict a defendant of CCW, the prosecution must prove that (1) the defendant carried a dangerous weapon, except a hunting knife adapted and carried as such, which was (2) concealed on or about the defendant's person. MCL 750.227(1); see *People v Czerwinski*, 99 Mich App 304, 306; 298 NW2d 16 (1980). Defendant on appeal does not contest that he carried a dangerous weapon within the meaning of the statute,<sup>3</sup> but he argues that there was insufficient evidence for a reasonable jury to find that he concealed the weapon. We disagree. Concealment of a weapon under MCL 750.227 occurs when the weapon "is not discernible by the ordinary observation of persons casually observing the person carrying it." *People v Hernandez-Garcia*, 266 Mich App 416, 421; 701 NW2d 191 (2005), *aff'd in part and vacated in part on other grounds* 477 Mich 1039 (2007) (citation and quotation marks omitted). The weapon need not be

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<sup>2</sup> The prosecution contends that the inaudible word was "felon." The video provided by the prosecution supports that contention. In any event, because we do not find that defendant's statement opened the door to questions about his parole status, it does not matter to our conclusion whether defendant said (or the jury heard) the word "felon."

<sup>3</sup> A reasonable jury could have concluded from defendant's testimony that defendant did not carry the knife as a hunting knife while in the Walmart store.

invisible or totally concealed for it to be concealed for the purposes of MCL 750.227. *Id.* at 422. Two witnesses at trial testified that the knife was concealed by defendant's long coat and that they did not see the knife until after interacting with defendant for several minutes. Defendant also admitted that his coat at least partially covered his knife. Viewing this evidence in the light most favorable to the prosecution, this evidence was sufficient for the jury to find that defendant concealed the knife and committed CCW. See *Henderson*, 306 Mich App at 9.

### III. STATUS AS PAROLEE

Defendant also claims on appeal that the trial court abused its discretion by permitting the prosecutor to elicit testimony from defendant that he was on parole and that as a condition of his parole he was not permitted to possess weapons. Defendant asserts that the evidence was irrelevant, immaterial, and highly prejudicial. We agree that the evidence was admitted in error, but conclude that reversal is not warranted. Although defendant claims that this issue was preserved by objection at trial, our review of the record reveals that defense counsel objected to the inquiry regarding defendant's parole on the basis of the scope of the questioning, rather than as eliciting impermissible MRE 404(b) evidence; the issue presented on appeal is thus unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review unpreserved issues for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763. To be found to affect substantial rights, the error must have caused prejudice, meaning "the error affected the outcome of the lower court proceedings." *Id.* Defendant bears the burden of demonstrating that prejudice occurred. *Id.* Once a defendant meets these three requirements, this Court reverses only when the error "resulted in the conviction of an actually innocent defendant" or the error "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (internal quotation marks omitted).

Evidence is generally admissible at trial if it is relevant, meaning the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." MRE 401; MRE 402. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. Unfair prejudice may exist where "'a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect . . .'" *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) (citation omitted). Generally, "evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), citing MRE 404(b). Evidence of other, prior acts is only admissible if it is relevant, offered for a proper purpose, and the probative value of the evidence is not substantially outweighed by its prejudicial effect. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994).

Here, the fact that defendant was on parole and the fact that as a term of his parole he was not allowed to possess a weapon were not relevant, as the evidence did not tend to make it more or less likely that the knife defendant carried was a dangerous weapon or that defendant had concealed the knife, as was necessary for a conviction of CCW. See MRE 401, 402;

MCL 750.227. In addition, the prosecution did not state a specific purpose for admitting evidence of defendant's parole status. Nonetheless, the prosecution argues that defendant opened the door for testimony regarding his parole status. Otherwise irrelevant evidence may become relevant if a defendant first raises the issue himself. *People v Figgures*, 451 Mich 390, 399-400; 547 NW2d 673 (1996). During trial, defendant volunteered testimony that he had been arrested and jailed several times and that he could not possess a gun. This testimony may have opened the door for evidence that defendant was a convicted felon, but we do not agree that this testimony also opened the door for testimony regarding the specific condition of defendant's parole requiring that he not carry a weapon. Defendant's testimony that he could not possess a gun because he was a felon was unrelated to his parole status—MCL 750.224f prohibits convicted felons from carrying firearms under certain circumstances regardless of their parole status. We thus conclude that the evidence of defendant's parole status was not relevant to the issues presented at trial. MRE 401, 402.

Furthermore, the testimony that defendant was prohibited from carrying weapons as a condition of his parole had the potential for substantial unfair prejudice. MRE 403. There was minimal danger of prejudice regarding the mere fact that defendant was on parole because defendant had already informed the jury of his previous encounters with the law, and "[t]he danger in revealing a defendant's parolee status is that a jury will recognize that the defendant had previously been convicted of a crime." *People v McDonald*, 303 Mich App 424, 436; 844 NW2d 168 (2013). However, the fact that defendant was not allowed to carry a knife like the one he admitted to carrying in the Walmart store had very little to no probative value in this case. See MRE 403. There was a chance that the jury, upon learning that defendant was not allowed to possess the knife as a condition of his parole, could weigh that fact heavily against defendant. That is, the jury could then improperly focus on the fact that defendant was not supposed to have the knife, rather than the extent to which the knife was concealed or whether defendant was carrying it as a hunting knife. This could result in unfair prejudice to defendant under MRE 403 by influencing the jury to find him guilty based on his parole violation rather than because it was convinced beyond a reasonable doubt that defendant had committed CCW. *Mills*, 450 Mich at 75; *VanderVliet*, 444 Mich at 55. Therefore, the trial court erred by admitting the irrelevant and potentially unfairly prejudicial evidence of defendant's parole condition.

Reversal is not warranted for this error, however, because defendant is unable to demonstrate that the error prejudiced him by affecting his substantial rights. *Carines*, 460 Mich at 763. The evidence in this case, including defendant's statements at trial, strongly supports defendant's conviction of CCW. Furthermore, the trial court specifically instructed the jury regarding how it should consider evidence of defendant's parole status and apparent parole violation, instructing the jury, "you must not decide that it shows the Defendant as a bad person or that he is likely to commit crimes," and that "you must not convict the Defendant here because you think he is guilty of other bad conduct." Defendant is unable to demonstrate that these instructions did not cure any prejudice in this case because "[j]urors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). Thus, there was no plain error affecting defendant's

substantial rights, i.e., that affected the outcome of the lower court proceedings, and defendant is not entitled to relief. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Peter D. O'Connell  
/s/ Mark T. Boonstra