

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DECARLO DAMIEN GATSON,

Defendant-Appellant.

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UNPUBLISHED  
September 1, 2009

No. 284654  
Wayne Circuit Court  
LC No. 08-000769

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of being a felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony,<sup>1</sup> MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 7 months to 7½ years each for his felon in possession and CCW convictions, both of which to be served consecutive to a five-year term for his felony firearm conviction. Defendant appeals as of right. We affirm, but we remand for the trial court to correct a portion of defendant's sentence.

On December 23, 2007, at approximately 12:55 a.m., Detroit Police Officers Michael Patti and Brian James were on routine patrol in a fully marked police vehicle when they observed a group of people outside a gas station. The officers made a U-turn and pulled into the parking lot, whereupon defendant and two other men walked quickly toward the sidewalk, then began running as the police officers continued to approach. Officer James pursued one of the other men on foot, while Officer Patti pursued defendant in the police vehicle, apparently losing control of the vehicle at least once in the process because of the slippery road conditions. Both officers testified that they saw defendant remove a handgun from his pants; Officer Patti observed defendant throw the handgun into a snow bank. Officer Patti exited the patrol vehicle and, after a short foot chase and scuffle with defendant, placed him under arrest. He retrieved the handgun and found it loaded with five live rounds.

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<sup>1</sup> The information and jury instructions both properly specified being a felon in possession of a firearm as the predicate felony for defendant's felony-firearm charge.

Defendant's defense at trial was that he did not possess the handgun. Defendant and the other man pursued by Officer James both testified that they ran away from the gas station because they believed it was going to be blown up by a vehicle. Defendant had, consistently, stated in a post-arrest interrogation conducted by Sergeant Raymond Evans that he ran away because the police vehicle almost hit the gas pumps and he did not want to get blown up. Another defense witness, Gilbert Howard, testified that he walked hurriedly away from the gas station after he heard a loud engine roaring and saw everybody leaving. Defendant testified that he never possessed a gun.

On appeal, defendant argues that the evidence was insufficient to support each of the convictions and, in addition, that the verdict for each conviction was against the great weight of the evidence. Defendant argues that the officers' testimony was patently incredible and that the prosecution failed to provide the requisite proof that the handgun was operable. We disagree. In reverse order, the relevant definition of a "[f]irearm" is found in MCL 750.222(d):

a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber.

Decisions considering the similar definition of "firearm" in MCL 8.3t<sup>2</sup> indicated that a "firearm" must be operable, such that "the pistol must be capable of propelling the requisite-sized dangerous projectile or be able to be altered to do so within a reasonably short time." *People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992); see also *People v Gardner*, 194 Mich App 652; 487 NW2d 515 (1992). However, our Supreme Court has explained that operability is not relevant to whether a weapon meets the statutory definition of a firearm under MCL 750.222(d). *People v Peals*, 476 Mich 636, 638; 720 NW2d 196 (2006). Therefore, we reject defendant's assertion that the handgun's operability was relevant to his convictions for offenses within the firearms chapter of the Penal Code, MCL 750.222 *et seq.*

We also find nothing patently incredible about the police officers' testimony. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). There must be some exceptional circumstance, such as testimony that contradicts indisputable physical facts or is patently incredible, to take the issue of

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<sup>2</sup> "The word 'firearm,' except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas or air."

witness credibility away from the jury. *People v Lemmon*, 456 Mich 625, 642-644; 576 NW2d 129 (1998).

To prove the CCW offense, the prosecutor was required to prove beyond a reasonable doubt that defendant knowingly carried a concealed pistol. MCL 750.227(2); *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 1; 728 NW2d 406 (2007). A pistol is defined as “a loaded or unloaded firearm that is 30 inches or less in length, or a loaded or unloaded firearm that by its construction and appearance conceals itself as a firearm.” MCL 750.222(e). To be concealed, it must not be readily observable, but need not be absolutely hidden. *People v Jackson*, 43 Mich App 569, 571; 204 NW2d 367 (1972). The offenses of felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b, also contain an element of possession. *Peals, supra* at 640.

Defendant argues that the officers’ testimony was incredible because, among other things, they admitted that they did not perceive defendant engaging in any illegality at the gas station; the fact that after observing defendant produce a gun, Officer James pursued one of the other fleeing individuals and neither officer immediately responded by drawing and possibly firing their own guns; the fact that defendant needed treatment at a hospital but was described by officers as having sustained only minor injuries, and the fact that the gun was preserved for fingerprinting but no fingerprints were ever taken. These facts might be relevant to other possible arguments, but they simply do not render the officers’ testimony patently incredible. Viewed in a light most favorable to the prosecution, the police officers’ testimony regarding their observations of defendant were sufficient to establish the requisite possession to sustain each conviction. The credibility of their testimony was for the jury to decide. *Wolfe, supra* at 514. Therefore, in addition to finding no basis for a directed verdict of acquittal, defendant has failed to establish a plain error to support a new trial based on the great weight of the evidence. *Musser, supra* at 218-219.

Defendant next argues that the trial court violated his right under US Const, Am VI, to be tried before a jury drawn from a fair cross-section of the community when it excused a prospective juror who advised the court during voir dire, “I don’t think I speak English good. I don’t think that I will understand so I don’t want to judge something. So I don’t understand English.” We disagree. The exclusion of a single prospective juror who volunteered information that could have affected her ability to function as an effective juror is simply not the kind of systematic exclusion of a distinct group necessary to establish even “a prima facie violation of the fair-cross-section requirement.” *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). Even if that one juror was part of defendant’s hypothetical “distinctive” group consisting of the immigrant population, the states remain free to establish relevant qualifications for jurors that advance significant state interests. *Id.* at 367-368. Under MCL 600.1307a(1)(b), a person must be able to communicate in the English language in order to qualify as a juror. We find no error in the trial court’s decision to excuse the juror.<sup>3</sup>

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<sup>3</sup> Although not binding on us, see *Woodel v State*, 985 So2d 524, 529 (Fla, 2008) (exclusion of two jurors who were not proficient in English did not violate *Duren*, even in the absence of an express Florida law mandating English proficiency, because the use of an interpreter in jury  
(continued...)

Next, defendant argues that he was deprived of his right to a fair trial because the trial court and the prosecutor disclosed to the jury that he had been previously convicted of a specified felony. Defendant argues that the jury should have been instructed only that he was ineligible to possess a weapon, not that the reason why he was ineligible was because of a prior felony. We disagree. This issue is waived because the disclosure was by stipulation of both defendant and the prosecutor. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). In any event, ineligibility because of a prior felony is an actual element of the crime with which defendant was charged, and establishing this element by stipulation actually minimizes prejudice. We further hold that any challenge to the trial court's flight instruction was waived by defense counsel's affirmative reply to the trial court's question, "Are both sides satisfied with the charge?" *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant next argues that the prosecutor engaged in misconduct and denied him a fair trial by ridiculing and disparaging the defense, to the extent that reversal is warranted even though defendant did not object. Plaintiff concedes on appeal that it was improper for the trial prosecutor to state that defense counsel was doing a "good job of trying to muddy it up" when commenting on Officer Patti's testimony. However, the prosecutor's remarks are examined in context to determine whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). Defendant has the burden of showing an outcome-determinative plain error. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). We find none.

The challenged remark might have suggested that defense counsel was attempting to mislead the jury, but in fact, it was generally directed at whether the jury could find, based on the evidence and Officer Patti's demeanor, that Officer Patti's testimony was credible. Examined in context, the prosecutor's comments regarding the testimony of the defense witnesses were directed at the credibility of the witnesses and the reasonableness of the defense claim that defendant fled because he believed that a vehicle was going to blow up the gas station. A prosecutor's comment from the facts and testimony that witnesses were credible or not worthy of belief are not improper. *Dobek, supra* at 66. "The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Id.* Thus, the prosecutor's remarks were not improper, nor did they deprive defendant of a fair and impartial trial. *Dobek, supra* at 63; *Watson, supra* at 594; see also *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Furthermore, the trial court instructed the jury the "lawyers [sic] questions and arguments are not evidence," and "[y]ou should use your own common sense and general knowledge in weighing and judging the evidence," and nothing in the record suggests that the jury could not or would not follow its instructions.

Finally, defendant argues that his mandatory sentence of five years for a second conviction under the felony-firearm statute, MCL 750.227b(1), amounts to cruel and unusual punishment under US Const, Am VIII. Defendant also asserts that the sentence is

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deliberations would amount to fundamental error); see also *State v Gibbs*, 254 Conn 578, 598-599; 758 A2d 327 (2000) (English proficiency requirement under Connecticut statute does not violate federal constitution).

disproportionately severe, contrary to this state's prohibition against cruel or unusual punishment in Const 1963, art 1, and § 16. We disagree.

“Statutes are presumed to be constitutional, and this Court must construe them as being constitutional absent a clear showing of unconstitutionality.” *People v Launsbury*, 217 Mich App 358, 363; 551 NW2d 460 (1996). A statute that passes muster under Const 1963, art 1, § 16, necessarily passes muster under US Const, Am VII, because the state prohibition against cruel or unusual punishment affords greater protection than the federal prohibition against cruel and unusual punishment. *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000).

The federal constitution forbids criminal sentences that are grossly disproportionate to the underlying offense. *United States v Polk*, 546 F3d 74, 76 (CA 1, 2008); *United States v Gross*, 437 F3d 691, 692-693 (CA 7, 2006). In weighing the gravity of an offense to the harshness of the penalty, the defendant's recidivist criminal history is considered. *United States v Paton*, 535 F3d 829, 837 (CA 8, 2008), citing the plurality opinion in *Ewing v California*, 538 US 11, 29; 123 S Ct 1179; 155 L Ed 2d 108 (2003). Sentence enhancement for repeat offenders serves several purposes, including “deterrence and the proper desire of society to provide more severe punishment for a person who declines to change his or her ways following an opportunity to reform.” *People v Sawyer*, 410 Mich 531, 535-536; 302 NW2d 534 (1981).

The relevant factors considered in reviewing a claim that a sentence is cruel and unusual under the federal constitution are also relevant to a claim of cruel or unusual punishment under the state constitution, except that a fourth factor, based on the goal of rehabilitation, is also considered under the state constitution. *People v Bullock*, 440 Mich 15, 33-35; 485 NW2d 866 (1992). “In determining whether a punishment is cruel or unusual, one must look to the gravity of the offense and the harshness of the penalty, compare the penalty to those imposed for other crimes in this state as well as the penalty imposed for the instant offense by other states, and consider the goal of rehabilitation.” *Launsbury, supra* at 363.

Here, defendant's felony-firearm conviction was predicated on his possession of a firearm during the commission of the felon-in-possession offense. Notwithstanding defendant's claim on appeal that the gravity of the offense was not severe, his unlawful possession of a firearm is a serious offense. “Whether operable or not, firearms pose a grave danger to members of the public when they are possessed by convicted felons or persons committing felonies.” *Peals, supra* at 654. Further, this Court has previously determined that the two-year mandatory sentence for an initial felony-firearm conviction does not violate the state constitution's prohibition against cruel or unusual punishment. *Wayne Co Prosecutor v Recorder's Court Judge*, 92 Mich App 433, 438-441; 285 NW2d 318 (1979).

Likewise, defendant has failed to establish that the lengthier sentence of five years, imposed against a repeat offender, is constitutionally infirm. The trial court appropriately considered defendant's rehabilitative potential when imposing the consecutive sentence of 7 months to 7-1/2 years for the felon-in-possession conviction. The fact that the five-year sentence for felony-firearm is mandatory does not render it cruel or unusual. Cf. *United States v Raad*, 406 F3d 1322, 1324 (CA 11, 2005) (sentence does not become cruel and unusual simply because it is mandatory); *United States v Dumas*, 934 F2d 1387 (CA 6, 1990) (consecutive prison sentences of one year for drug trafficking and mandatory five years for carrying a firearm during

a drug trafficking offense is not cruel and unusual). We conclude that defendant has not met his burden of showing a plain error. *Carines, supra* at 763.<sup>4</sup>

Nevertheless, our review of this matter has revealed an error in sentencing that must be corrected. Unlike a sentence for being a felon in possession, MCL 750.227b does not allow a CCW conviction to serve as a predicate felony for a felony firearm conviction. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Furthermore, a CCW sentence should run concurrent to a felony firearm sentence. *People v McCrady*, 213 Mich App 474, 486; 540 NW2d 718 (1995). Therefore, we sua sponte remand to the trial court to correct defendant's sentence to provide that his felony firearm sentence should be served consecutive only to his felon in possession sentence. See *People v Clark*, 463 Mich 459, 465; 619 NW2d 538 (2000); *People v Wyatt*, 470 Mich 878; 683 NW2d 143 (2004).

We remand for correction of defendant's sentence. In all other respects affirmed. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Alton T. Davis

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<sup>4</sup> Contrary to defendant's argument on appeal, the decision in *Dist of Columbia v Heller*, \_\_\_ US \_\_\_ ; 128 S Ct 2783; 171 L Ed 637 (2008), holding that a District of Columbia prohibition against handgun possession in the home violates US Const, Am II, has no bearing on the instant case. The majority opinion in that case makes it clear that the rights secured by the Second Amendment are not unlimited and "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." 128 S Ct at 2816-2817.