

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
September 9, 2014

v

VERNON ANTHONY JOHNSON,  
  
Defendant-Appellant.

No. 315879  
Wayne Circuit Court  
LC No. 12-011115-FH

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Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f(2), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant to the mandatory five-year term for felony-firearm, second offense, and suspended his sentences for the remaining convictions. We affirm.

**I. FACTUAL BACKGROUND**

Detroit Police Officers Nzinga Moore and Timothy Barr were conducting a routine patrol around 10:30 a.m. in Detroit on November 11, 2012. They observed defendant walking on a street even though there was a sidewalk available to him, which is a ticketable offense. The police officers noted that when they got closer, defendant turned his body sideways so that the front of his body was obstructed.<sup>1</sup> The officers suspected something was amiss, so they turned their vehicle around and approached defendant.

Officer Moore asked defendant if he was carrying a gun, and defendant nodded his head in the affirmative. Officer Moore instructed defendant to place his hands on his head. As defendant moved to comply, Officer Barr observed the gun in defendant's pants. The officers arrested defendant and removed the gun, which also had a silencer or suppressor. The officers testified that they did not draw their weapons.

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<sup>1</sup> Officer Moore described defendant as "blading his body" from their view.

Defendant, however, testified to a different course of events. Defendant claimed that he was walking along and saw the gun lying in a field. He looked up and saw the police coming, so he flagged them down. According to defendant, the officers jumped out of the vehicle, with their guns drawn, and ordered him to put his hands in the air. Defendant denied ever touching the gun. Officer Moore, however, testified that not only was the gun found on defendant's person and warm from his body, there was no noticeable moisture, debris, gravel, grass, or rust on the weapon

Defendant was convicted of felon in possession of a firearm, felony-firearm, and carrying a concealed weapon. Defendant now appeals on several grounds.

## II. RIGHT TO PRESENT A DEFENSE

### A. STANDARD OF REVIEW

Defendant first claims that the trial court improperly prevented him from questioning Officer Barr about Moore's preliminary complaint report (PCR), which denied defendant the right to present a defense. Defendant did not raise an argument below based on his right to present a defense. An issue is not preserved for appellate review if it is not raised before, addressed by, and decided by the lower court. *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). An unpreserved claim is reviewed only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

### B. ANALYSIS

A criminal defendant must be afforded a meaningful opportunity to present a defense. *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012). Nevertheless, that right may be limited, and is subject to reasonable restrictions. *Id.* "The right to present a complete defense may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* (quotation marks and citation omitted). "Thus, an accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* (quotation marks and citation omitted).

In the instant case, defense counsel cross-examined the officers based on Moore's PCR, and highlighted apparent inconsistencies. However, during the cross-examination of Officer Barr, the trial court sustained the prosecution's objection, which precluded further impeachment of Officer Barr based on Moore's PCR. Defendant contends that he was denied the right to present a defense. However, that argument overlooks that the desired impeachment testimony was introduced vis-à-vis Officer Moore.

During the cross-examination of Officer Moore, defense counsel elicited the fact that Moore omitted details from his PCR, as the report made no mention of initially driving by defendant or that defendant "blade his shoulders" when the officers drove past. When cross-examining Officer Barr, defense counsel also elicited alleged inconsistencies in Barr's PCR, such as when or how many times the officers saw defendant turn his body away. In light of the foregoing, we conclude that further impeachment would have been cumulative and at most marginally probative. A trial court has discretion to limit cross-examination to avoid repetition

or questioning that is marginally relevant. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

Moreover, defendant had the opportunity to present his defense through his own testimony, whereby he could attack the credibility and reliability of the officers' account of the incident. See *King*, 297 Mich App at 474 ("it is patent from a review of the trial record that defendant was allowed to present evidence in the form of his testimony, . . . which, if the jury believed, would have provided defendant a complete defense to the charges brought against him."). In fact, defendant testified, contrary to the officers' version of events, that he found the gun in a field, flagged the officers down, and never possessed the weapon.

Accordingly, we find no error requiring reversal.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

#### A. STANDARD OF REVIEW

Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court's factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

#### B. ANALYSIS

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant first must establish that "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012) (quotation marks and citation omitted); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, the defendant must show that trial counsel's deficient performance prejudiced his defense, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 491 Mich at 669 (quotation marks and citation omitted); see also *Strickland*, 466 US at 687.

Defendant's sole claim of ineffective assistance is that defense counsel failed to impeach the arresting officers with a PCR from an unrelated case, allegedly written by the same officers who detailed the same fact pattern as defendant's case. However, there is no factual support for defendant's claim on the existing record. *Davis*, 250 Mich App at 368 (our review is limited to mistakes apparent on the record). Defendant did not include the alleged PCR below or on appeal. There simply is no factual predicate on the existing record to support defendant's claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Furthermore, defendant has not overcome well-settled caselaw that "decisions regarding what

evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation marks and citation omitted). We also question the relevancy and admissibility of a report because without any factual context, there is no indication that the report is the result of police misconduct. See MRE 401; MRE 403.

#### IV. SUFFICIENCY OF THE EVIDENCE

##### A. STANDARD OF REVIEW

Lastly, defendant challenges the sufficiency of the evidence relating to the possession element of his convictions. “Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt.” *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). We review “de novo a challenge on appeal to the sufficiency of the evidence.” *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor” to ascertain “whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (quotation marks and citations omitted). “All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury’s determinations regarding the weight of the evidence and the credibility of the witnesses.” *Unger*, 278 Mich App at 222. However, “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

##### B. ANALYSIS

Possession of a firearm is a required element of each of defendant’s convictions. MCL 750.224f(2); MCL 750.227b; MCL 750.227(2). Whether defendant possesses a firearm is a question of fact, and can be established with circumstantial evidence and reasonable inferences arising therefrom. *People v Strickland*, 293 Mich App 393, 400; 810 NW2d 660 (2011). “Possession of a firearm can be actual or constructive, joint or exclusive.” *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). “A person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.* (quotation marks and citation omitted). Thus, “[t]he essential question is one of control.” *Strickland*, 293 Mich App at 400.

Here, both arresting officers testified that they retrieved a loaded automatic handgun from defendant’s waistband after observing him walking in the road and blading his body to obstruct their view of him. While defendant’s version of events contrasted with the officers’, “[w]e will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012) (quotation marks and citation omitted). Accordingly, the evidence established that defendant was in possession of the firearm.

## V. CONCLUSION

Defendant has not established that his right to present a defense or his right to the effective assistance of counsel was infringed upon. Moreover, there was sufficient evidence that defendant possessed the weapon. We affirm.

/s/ Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra