

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD CARPENTER,

Defendant-Appellant.

UNPUBLISHED

July 20, 2004

No. 247543

Wayne Circuit Court

LC No. 02-011587-01

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to seven months to five years' imprisonment for the CCW conviction and seven months to five years' imprisonment for the felon in possession of a firearm conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm.

I. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to support his convictions. In reviewing the sufficiency of the evidence in a criminal bench trial, this Court must review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). "This Court must resolve all evidentiary conflicts in favor of the prosecution." *Id.*

Defendant first argues that there was insufficient evidence to prove that he possessed or carried a firearm. Possession is required to support convictions for both felon in possession of a firearm and felony-firearm. See MCL 750.224f; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "Possession" includes both actual and constructive possession. *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). "[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.*

The CCW statute prohibits a person from “carrying” a pistol in a vehicle. MCL 750.227(2). In order to “carry” a firearm under the CCW statute, there must be additional proof of “carrying” beyond mere operation of a vehicle with knowledge that it contains a weapon. *People v Green*, 260 Mich App 392, 404; 677 NW2d 363 (2004). Our Supreme Court has noted factors considered in determining whether a weapon was “carried” for purposes of CCW:

Hard and fast rules regarding what circumstantial evidence is sufficient to sustain a conviction of carrying a weapon in a motor vehicle have not evolved. The decisions have, however, emphasized the relevancy of the following factors either alone or in combination: (1) the accessibility or proximity of the weapon to the person of the defendant, (2) defendant’s awareness that the weapon was in the motor vehicle, (3) defendant’s possession of items that connect him to the weapon, such as ammunition, (4) defendant’s ownership or operation of the vehicle, and (5) the length of time during which defendant drove or occupied the vehicle.

We do not wish to be understood, by reference to the foregoing factors, as expressing any view with regard to their relevancy or importance. [*People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982) (citations omitted).]

Here, the police saw defendant drive a car to a stop, get out, and begin talking to the driver of a parked SUV. Defendant’s sister, Juanita Kimbrough, who was a passenger in the car driven by defendant, got out of the car and walked away. When police vans approached the scene to make arrests for a suspected drugs transaction involving the passenger of the SUV and another person, defendant began walking away from the scene. After detaining defendant, a police officer looked into the car defendant had been driving and saw the barrel of what he believed to be a handgun under the driver’s seat. The officer searched the car, found a loaded handgun, and arrested defendant. Defendant told the officer that the gun was not his, the vehicle was not his, and that he had not been driving the vehicle. However, a search of defendant revealed that he was carrying the keys to the vehicle. Defendant’s father then approached the scene and told the officer that the car belonged to him, but that the gun was not his and had never been in his car.

We conclude that this evidence was sufficient to prove that defendant possessed and carried the gun in the vehicle. We must draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). “ ‘ “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” ’ ” *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The trial judge could infer that defendant knew that the gun was in the car for several reasons: (1) defendant drove the car with the gun in plain view; (2) defendant walked away from the car when the police arrived; (3) defendant lied to the officer about having driven the car and therefore could have lied about owning the gun; (4) defendant’s father, who owned the car, denied ownership of the gun; and (5) defendant possibly drove the car on a regular basis, as he lived with his father, who was the owner of the car. The gun was also reasonably accessible to defendant, because it was under the driver’s seat in the car that he was driving. Therefore, we conclude that there was sufficient evidence to find that defendant possessed and carried the gun when he was driving the car where the police found the gun.

Defendant also argues that there is insufficient evidence to prove that the gun was concealed for purposes of his CCW conviction. However, to be convicted for CCW under MCL 750.227(2), the prosecutor need not prove that a gun carried in a vehicle is concealed: “A person shall not carry a pistol concealed on or about his or her person, or, *whether concealed or otherwise*, in a vehicle operated or occupied by the person . . .” MCL 750.227(2) (emphasis added). Therefore, there was sufficient evidence to support defendant’s CCW conviction.

II. Ineffective Assistance of Counsel

Defendant argues that his trial counsel’s failure to thoroughly investigate the case, file pretrial motions, cross-examine witnesses, and call witnesses on his behalf constituted ineffective assistance of counsel. Defendant preserved this issue for review in his motion for a new trial. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, because the trial court denied defendant’s request to hold an evidentiary hearing, our review is limited to the facts on the record. *Id.*

To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The reviewing court indulges a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance, and defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The alleged errors must be so serious that counsel was not functioning as “counsel” guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Second, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma*, *supra* at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Carbin*, *supra* at 600. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, quoting *Strickland*, *supra* at 694.

Defendant first argues that his trial counsel’s failure to call Kimbrough as a witness denied him the effective assistance of counsel. Decisions regarding whether to call witnesses are presumed to be matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). In an affidavit submitted with defendant’s post-conviction motions, Kimbrough stated that she did not see a gun in the car when defendant was driving on the day of the offense. She also stated that she did not see defendant with a gun before or after he entered the car.

[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [*People v Reed*, 449 Mich 375, 400-401; 535 NW2d 496 (1995), quoting *Strickland*, *supra* at 697.]

We conclude that defendant was not prejudiced by his trial counsel’s failure to call Kimbrough as a witness. Regardless whether Kimbrough actually saw a gun, the evidence shows that the

police found a gun in the car that was driven by defendant. That Kimbrough did not see the gun in the car does not prove that it was not there.

Next, defendant argues that his trial counsel was ineffective by failing to call witnesses who owned, operated, or rode in the car in which the gun was found. As discussed, decisions regarding whether to call witnesses are presumed to be matters of trial strategy. *Garza, supra* at 255. There is no evidence on the record that these witnesses' testimony would have benefited defendant in any way. Therefore, defendant has not shown that trial counsel's failure to call these witnesses was a mistake or that it was prejudicial to him.

Defendant also argues that his trial counsel was ineffective by failing to vigorously cross-examine prosecution witnesses. Decisions whether to question witnesses are also presumed to be matters of trial strategy. *Id.* There is no evidence on the record that the prosecution witnesses would have testified favorably for defendant if defendant's trial counsel would have cross-examined them differently. Defendant has not shown that his trial counsel's cross-examinations were deficient or prejudicial to him.

III. Double Jeopardy

Defendant argues that his convictions for both felony-firearm and felon in possession of a firearm are violative of his right against double jeopardy. We disagree. A double jeopardy challenge presents a question of law that is reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2003). In *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), our Supreme Court held that convictions of both felony-firearm and felon in possession of a firearm for the same conduct do not violate a defendant's protections against double jeopardy. See also *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001). This Court is required to follow decisions of the Michigan Supreme Court. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Therefore, defendant's argument must fail.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder