

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT LEE COFER,

Defendant-Appellant.

UNPUBLISHED

January 25, 2005

No. 250257

Jackson Circuit Court

LC No. 02-006498-FH

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of carrying a concealed weapon, MCL 750.227(1), and operating a motor vehicle while visibly impaired, MCL 257.625(3). He was sentenced as a habitual offender second, MCL 769.10, to serve consecutive jail terms of one hundred fifty days for the weapons conviction, and ninety-three days for the driving conviction. He now appeals as of right, challenging his concealed weapon conviction only. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

This case originated with a traffic stop shortly after midnight on June 24, 2002. According to police testimony, defendant was riding a motorcycle, speeding and swerving in his lane. An inventory search of defendant's motorcycle turned up a knife in a jacket under the seat. Defendant admitted that he had consumed some beer, and maintained that the knife was a souvenir, which he used as a cooking or dining utensil.

Defendant challenges the sufficiency of the evidence in support of his weapon conviction on the grounds that the evidence did not establish that the knife in question was a stabbing instrument or that defendant carried it. When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

MCL 750.227(1) prohibits the carrying of "a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument of any length, or any other dangerous weapon, except a hunting knife" In this case, the prosecutor chose to proceed on the theory that defendant's knife was the specific stabbing instrument described by the statute, eschewing the alternative argument that it was a dangerous weapon of other description.

The knife was admitted into evidence. The descriptions in the testimony include that the knife is double edged, sharpened on both sides, fixed (nonfolding), its blade eight or nine inches long, with a pearl handle. The descriptions alone indicate a weapon of dangerous potential for aggressive cutting or stabbing. Defendant himself conceded that the knife was not a letter opener, and that it was sharp and pointy. The evidence thus was sufficient to prove that the knife was indeed a “double-edged nonfolding stabbing instrument.” MCL 750.227(1).

Concerning the carrying element, MCL 750.227(1) prohibits carrying of certain weapons “concealed on or about his or her person, or whether concealed or otherwise in any vehicle operated or occupied by the person” Defendant admitted owning the knife, storing it in his motorcycle, finding uses, albeit peaceful ones, for it, and knowing that it was in his motorcycle at the time in question. That defendant thus carried the knife in his motorcycle, in any ordinary sense of the word, seems hardly in doubt. His argument in this regard is really derivative of his earlier one, stating that “[t]here was no evidence at trial Defendant carried the knife as a weapon.” Defendant cites authority that stands for the proposition that where the object in question is not a dangerous weapon per se the prosecutor is obliged to prove that the possessor carried the object for use as a weapon. See *People v Lynn*, 459 Mich 53, 58; 586 NW2d 534 (1998). However, as discussed above, there are clear indications in the record that the knife was an inherently dangerous weapon, not some normally benign object whose aggressive potential depended on its carrier’s imagination or resourcefulness. For these reasons, this argument must fail.

Defendant also argues that the trial court failed to instruct the jury on the nature of the knife as a stabbing instrument, and on carrying, as opposed to merely possessing, the instrument. The trial court instructed the jury as follows:

. . . The Defendant is charged with the crime of carrying a concealed weapon. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that the instrument or item was a double-edged, non-folding instrument. Second, that the instrument or item was in a vehicle that the Defendant operated. Third, that the Defendant knew the instrument or item was in the vehicle. Fourth, that the Defendant took part in carrying or keeping the instrument in the vehicle.

Defense counsel requested additional instruction on precisely “what carrying means.” The trial court held that the standard instruction, including that the defendant “took part in carrying or keeping the instrument or item in the vehicle,” was sufficient.

Defendant cites *People v Butler*, 413 Mich 377; 319 NW2d 540 (1982), in support of his position. In that case, the instruction below directed the jury to convict if the weapon was in a vehicle owned, operated, or occupied by the defendant, and if the defendant knew that the weapon was in the vehicle. *Id.* at 383. There was no mention of the defendant’s having otherwise taken part in keeping or carrying the weapon. Our Supreme Court held that carrying was a discrete element of the offense. *Id.* at 384. Accordingly, presence in a vehicle with knowledge of a weapon therein does not automatically establish guilt. *Id.* at 385-386. A separate instruction on carrying must be provided. *Id.* at 390.

However, such a separate instruction was provided in this instance. Again, the trial court presented as a separate element the requirement that “the Defendant took part in carrying or keeping the instrument in the vehicle.” This latter addition neatly distinguishes this case from *Butler*. Defendant’s attempt to shift the focus to defendant’s actual intended uses for the weapon argument presents a strained argument, which we cannot credit.

Finally, defendant observes that the trial court omitted “stabbing,” as in “stabbing instrument,” from its instruction, and argues that this was error requiring reversal. However, defendant admits that there was no objection in this regard. A defendant pressing an unpreserved claim of error must show a plain error that affected his substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Imperfect instructions do not require reversal if they nonetheless fairly presented the issues to be tried and adequately protected the rights of the accused. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). The actual nature of the knife was not seriously at issue. Given that the knife had obvious aggressive potential, and that the description the trial court provided, “a double-edged, non-folding instrument,” implied an instrument suited to stabbing, the imperfection in the court’s instruction was a minor one. For these reasons, defendant has failed to show any prejudice to his substantial rights. *Carines, supra*.

Moreover, because the instruction as given did not preclude the jury from considering defendant’s theory that the knife was mere cutlery or a souvenir, reversal is not warranted. *Lynn, supra* at 61. For these reasons, this argument must fail.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello