

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 9, 2012

v

ELISHA DEMETRIUS WILSON,

Defendant-Appellant.

No. 302654
St. Clair Circuit Court
LC No. 08-002223-FH

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Elisha Demetrius Wilson appeals as of right his jury trial convictions of possession with the intent to deliver less than 50 grams of cocaine,¹ felon in possession of a firearm,² assault with a dangerous weapon (“felonious assault”),³ failure to stop on direction of a police officer (“fleeing and eluding”) in the fourth degree,⁴ resisting, assaulting, or obstructing a police officer,⁵ and possession of a firearm during the commission of a felony (felony-firearm), second offense.⁶ We affirm.

A joint task force of the City of Port Huron Police Department and the St. Clair County Sheriff’s Department received a tip from a confidential informant that led to surveillance of a specific home in Port Huron. Wilson was observed arriving by car at the specified home and then leaving shortly thereafter. Officers in a marked patrol car attempted to complete a traffic stop of Wilson after he left the home. Police officers in two unmarked police vehicles also positioned themselves in front of Wilson’s car to prevent him from driving away. The police officers from the marked patrol car approached Wilson’s car with their guns drawn, identified

¹ MCL 333.7401(2)(a)(iv).

² MCL 750.224f.

³ MCL 750.82.

⁴ MCL 257.602a(2).

⁵ MCL 750.81d(1).

⁶ MCL 750.227b.

themselves as being with the Sheriff's Department, and ordered Wilson to show his hands. Instead of complying, Wilson accelerated his vehicle toward the unmarked vehicles positioned in front of his car. During the ensuing police chase, Wilson discarded money, a gun and a bag containing 36 individually packaged rocks of cocaine from his vehicle.

Wilson asserts that the cocaine and gun that were retrieved by police should have been suppressed because they were fruit of an unlawful arrest. We disagree. This issue is unpreserved, so we review for plain error affecting Wilson's substantial rights.⁷

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures."⁸ "[T]o constitute a seizure for purposes of the Fourth Amendment there must be either the application of physical force or the submission by the suspect to an officer's show of authority."⁹ The police had not applied physical force and Wilson had not submitted to the officers' show of authority when Wilson threw the gun and contraband from his vehicle. As Wilson was in the process of fleeing from police, he had not been seized, and the items discarded during the chase are deemed abandoned and, therefore, were not the fruit of an illegal seizure.¹⁰

Relying on *People v Shabaz*,¹¹ Wilson asserts that because his freedom was restrained, an arrest was made at the time of the traffic stop. He further argues that based on the absence of probable cause for his arrest, the gun and cocaine should have been suppressed. *Shabaz*, however, was decided before *California v Hodari D*,¹² on which this Court in *Lewis*¹³ relies. As such, because Wilson had not been seized,¹⁴ his argument must fail.

Next, Wilson contends that there was insufficient evidence to support his convictions of felonious assault and possession of cocaine with the intent to deliver. We disagree. This Court reviews challenges to the sufficiency of the evidence de novo.¹⁵ The evidence is viewed "in a light most favorable to the prosecution and determine if any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."¹⁶

⁷ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

⁸ *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000).

⁹ *People v Lewis*, 199 Mich App 556, 559; 502 NW2d 363 (1993).

¹⁰ *Id.* at 560.

¹¹ *People v Shabaz*, 424 Mich 42, 59; 378 NW2d 451 (1985).

¹² *California v Hodari D*, 499 US 621, 624; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

¹³ *Lewis*, 199 Mich App at 559.

¹⁴ *Id.*

¹⁵ *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007).

¹⁶ *Id.* (citation omitted).

To convict a defendant of felonious assault, the prosecutor must prove: “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.”¹⁷ An automobile can be considered a “dangerous weapon” under the felonious assault statute.¹⁸ “[F]elonious assault is a specific intent crime.”¹⁹ Specific intent “may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows.”²⁰

Wilson contends that there was insufficient evidence to support his conviction for felonious assault because he did not intend to injure or place the officers in apprehension of a battery, but was instead attempting to flee. With a marked patrol car behind his vehicle and police officers approaching with their guns drawn, Wilson accelerated his vehicle into two unmarked police cars while Officer Brian Kerrigan and Lieutenant Richard Mouilleseaux were inside. While Wilson asserts that Kerrigan initiated contact with his vehicle, whether that occurred is a question of fact to be determined by the jury.²¹ Viewing the evidence in the light most favorable to the prosecution,²² it was reasonable for the jury to infer that Wilson intended to injure or place both Kerrigan and Mouilleseaux in reasonable apprehension of a battery.²³ Therefore, reversal is not warranted.

To convict Wilson of possession with the intent to deliver cocaine conviction, the prosecution must prove (1) that the substance was cocaine, (2) the cocaine weighed less than 50 grams, (3) Wilson was not authorized to possess the substance, and (4) Wilson knowingly possessed the cocaine with the intention of delivering it.²⁴ The fourth element consists of two components: possession and intent.²⁵ Only minimal circumstantial evidence is required to prove Wilson’s intent.²⁶

Wilson only challenges whether the prosecutor proved that he intended to deliver the cocaine. Thirty six individual rocks of suspected cocaine were found packaged in the same manner in a larger bag. “Intent to deliver may be inferred from the quantity of drugs in a

¹⁷ *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (citation omitted).

¹⁸ *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984).

¹⁹ *People v Robinson*, 145 Mich App 562, 564; 378 NW2d 551 (1985).

²⁰ *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

²¹ *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

²² *Cline*, 276 Mich App at 642.

²³ *Lawton*, 196 Mich App at 349.

²⁴ *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

²⁵ *Id.*

²⁶ *Id.* at 623.

defendant's possession."²⁷ As such, the evidence supports that Wilson intended to deliver the cocaine.²⁸

Wilson also argues that it was too speculative to conclude that the untested substances were cocaine. One of the 36 rocks retrieved was scientifically tested and was determined to be cocaine. This Court has held that an "inference that the entire lot contained cocaine" is appropriate when a sample of one indistinguishable package is tested and found to be cocaine.²⁹ Because it was permissible for the jury to reasonably infer that because one rock was cocaine, the other rocks were also comprised of the same substance,³⁰ Wilson's argument cannot be sustained.

Wilson also asserts that the trial court's failure to give an instruction of juror unanimity denied his due process right to a fair trial. We disagree. Unpreserved claims of instructional error are reviewed for plain error that affected Wilson's substantial rights.³¹

The Michigan Constitution guarantees criminal defendants a unanimous jury verdict.³² To protect this right, a trial court must "properly instruct the jury regarding the unanimity requirement."³³ "Under most circumstances, a general instruction on the unanimity requirement will be adequate."³⁴

[T]he trial court must give a specific unanimity instruction where the state offers evidence of alternative acts allegedly committed by the defendant and 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt.³⁵

Wilson asserts that a specific unanimity instruction should have been given because the alleged victims of the felonious assault were in separate cars and there was evidence that one witness initiated contact with Wilson's vehicle. Contrary to Wilson's contention, the alternative

²⁷ *Id.* at 611.

²⁸ *Id.*

²⁹ *People v Williams*, 188 Mich App 54, 57; 469 NW2d 4 (1991).

³⁰ *McGhee*, 268 Mich App at 611.

³¹ *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

³² Const 1963, art 1, § 14; *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998).

³³ *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994).

³⁴ *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006).

³⁵ *Id.* (citation and quotation marks omitted).

acts were not materially distinct,³⁶ and the same evidence demonstrated that Wilson collided with both Mouilleseaux and Kerrigan's vehicles. As such, there was no instructional error by the trial court.³⁷

Finally, Wilson contends that defense counsel was ineffective for failing to move to suppress the physical evidence discovered after law enforcement's unsuccessful traffic stop and when counsel failed to object to the trial court's instruction on unanimity. We disagree. Because Wilson failed to move for a new trial or an evidentiary hearing in the trial court, this Court's review is limited to mistakes apparent on the record.³⁸

To establish a claim of ineffective assistance of counsel, Wilson bears the heavy burden of showing that "counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different."³⁹ As the physical evidence was properly admitted and the trial court's instruction on unanimity was correct, Wilson's claims of ineffective assistance lack merit, as counsel is not ineffective for failing to "advocate a meritless position."⁴⁰

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Kirsten Frank Kelly

³⁶ *Id.*

³⁷ *Aldrich*, 246 Mich App at 124-125.

³⁸ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

³⁹ *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

⁴⁰ *Snider*, 239 Mich App at 425.