STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2010
v	No. 292895 Wayne Circuit Court
TIMOTHY ORLANDO MIDDS, Defendant-Appellant.	LC No. 09-001455

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

A jury convicted defendant of possession of a firearm during the commission of a felony, MCL 750.227b, and acquitted him of felon in possession of a firearm, MCL 750.224f, and carrying a concealed weapon, MCL 750.227. Because defendant had two prior felony-firearm convictions, he was sentenced to a mandatory term of ten years in prison. He now appeals as of right. We affirm.

I. BASIC FACTS

In the early morning hours of November 23, 2008, defendant was pulled over while speeding in a SUV, failing to signal a turn, and driving a car with tinted front driver-and passenger-side windows. Although the car windows were tinted, with the police car's spotlight and the individual officers' flashlights, two of the officers testified they were able to see the driver hand an object to the front seat passenger and toss an unknown object into the rear of the vehicle. A gun holster was later observed in the backseat of the vehicle. A loaded handgun was found in the passenger's left waistband when she searched after exiting the vehicle. A third police officer, who approached the SUV first from the passenger's side, did not see any hand movements by defendant. Due to a police department mix-up in requests, the fingerprint analysis of the gun had not been completed prior to trial.

II. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant argues there is insufficient evidence to support his felony-firearm conviction. We disagree.

This Court reviews a sufficiency of the evidence challenge de novo on appeal. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, amended on other grounds 441 Mich 1201

(1992); *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). When reviewing thesufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the elements of the charged offense were proven beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002); *Wolfe*, 440 Mich at 515.

A person is guilty of felony-firearm when he possesses a firearm while committing or attempting to commit a felony. MCL 750.227b(1); *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Herein, the underlying felony is felon in possession of a firearm, MCL 750. 224f, which provides that a person convicted of a specified felony may not possess, use, transport, sell, purchase, carry, ship, receive or distribute a firearm. Being a convicted felon is an element of the offense of felon in possession of a firearm. *People v Tice*, 220 Mich App 47, 54; 558 NW2d 245 (1996). Possession may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him. *Hill*, 433 Mich at 470-471.

A jury may reach inconsistent verdicts in a criminal case. *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980). "The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached its conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release." *Id.* at 466.

There is sufficient evidence to support defendant's conviction for felony-firearm. *Lundy*, 467 Mich at 257; *Wolfe*, 440 Mich at 515. A police officer testified that, as he approached the car on the driver's side, he saw defendant pass an object to the front seat passenger. He also saw defendant toss an unidentified object into the back seat of the car. A second officer testified that, as he approached the vehicle from the passenger area, he saw the driver with his arm extended towards the passenger. The passenger then leaned towards the driver's side door. The officer also saw the driver's right arm extend to the back and an object come towards the back of the vehicle. The officer used his flashlight to check the seat behind defendant and saw a gun holster. Both officers stated the patrol car's spotlight and their own respective flashlights illuminated the vehicle. This allowed them to see silhouettes of body movements through the vehicle's tinted windows.

While the gun was physically found tucked into the passenger's waistband, the officer's testimony was sufficient to conclude that defendant had knowledge of the location of the gun and that he had constructive possession of it. *Hill*, 433 Mich at 470-471. The passenger was seen leaning towards the passenger side door after defendant handed her something. It is reasonable to conclude this occurred when she placed the gun in her waistband. Defendant correctly points out that a third officer did not see the hand movement or the passing of an object between defendant and the passenger and that he was the first officer to the car. However, the jury is the finder of the facts and decides all issues of credibility. *People v Lacalamita*, 286 Mich App 467, 469-470; 780 NW2d 311 (2010). The jury may have reasonably believed the third officer was unable to see the movements from the angle at which he approached. Accordingly, there is

sufficient evidence to support defendant's felony-firearm conviction.[1] *Lundy*, 476 Mich at 257; *Wolfe*, 440 Mich at 515.

Defendant argues in the alternative that the felony-firearm conviction is against the great of the evidence. We disagree.

To determine whether an outcome is against the great weight of the evidence, this Court must decide whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lacalamita*, 286 Mich App at 469; *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Generally, when the evidence does not reasonably support a verdict and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence, a verdict may be vacated. *Lacalamita*, 286 Mich App at 469. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Issues of credibility are within the exclusive province of the jury. *Lacalamita*, 286 Mich App at 469-470. "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' . . . or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Lemmon*, 456 Mich App at 645-646 (citation omitted).

As previously discussed, two police officers testified that they saw defendant throw something into the back seat, which could plausibly be the gun holster. There was also testimony that he handed a dark object to the front seat passenger. A gun was found in the passenger's waistband on her left hip, which was next to defendant and within his reach, and the passenger was seen leaning towards the door, which is consistent with her hiding the gun in her waistband. The officers were impeached and there was conflicting testimony. However, deciding witness credibility questions is for the trier of fact. *Lacalamita*, 286 Mich App at 469-470. Moreover, conflicting testimony, even when impeached, is not a ground for granting a new trial. *Lemmon*, 456 Mich at 647. Accordingly, the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lacalamita*, 286 Mich App at 637; *McCray*, 245 Mich App at 637.

III. SUPPLEMENTAL JURY INSTRUCTION

Defendant's final argument is that he was denied a fair trial when the trial court refused defense counsel's request for a supplemental instruction during jury deliberations. We disagree.

[1] Defendant's reliance on *Parker v Renico*, 506 F3d 444 (CA 6, 2007), is misplaced. Unlike the defendant in that case, there was evidence in the instant action linking defendant to the gun found on the passenger. Two police officers testified that they saw defendant hand an object to the passenger, the passenger lean toward the driver's door, and defendant toss an object into the backseat where a gun holster was later found. Defendant correctly points out there were inconsistencies between the officers' preliminary exam testimony and their trial testimony. In addition, the third officer did not see the arm movements. However, the resolution of issues of credibility is within the exclusive province of the jury. *Lacalamita*, 286 Mich App 469-470.

Questions of law, including questions of the applicability of jury instructions, are reviewed de novo on appeal. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). If preserved, this Court "review[s] jury instructions in their entirety to determine if error requiring reversal occurred." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried, and sufficiently protect the defendant's rights. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009); *Aldrich*, 246 Mich App at 124.

We find no error in the jury instructions, or the trial court's refusal to give an amended instruction following the jury's questions during deliberations. A criminal defendant has a right to a properly instructed jury. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). "When a word is not defined by statute, this Court presumes that the word is subject to ordinary comprehension and there will be no error warranting reversal as a result of a trial court's failure to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension." *People v Martin*, 271 Mich App 280, 352-353; 721 NW2d 815 (2006).

Here, the trial court paraphrased the felon in possession statute, MCL 750.224f, and gave the jury the Standard Jury Instruction for the offense. The words "transport" and "possess" are not defined in the felon in possession of a firearm statute, MCL 750.224f, but their definitions are susceptible to ordinary comprehension. The trial court did not err by refusing to impose an additional mens rea definition for the specified words not set forth in the statute. *Martin*, 271 Mich App at 352-352; *People v Knapp*, 244 Mich App 361, 376-377; 624 NW2d 227 (2001).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter