STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRIS LARONN MORROW,

Defendant-Appellant.

UNPUBLISHED
June 29, 2006

No. 256195
Genesee Circuit Court
LC No. 04-013883-FH

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), maintaining a drug vehicle, MCL 333.7405(1)(d), possession of a firearm by a person convicted of a felony, MCL 750.224f, carrying a concealed weapon in a vehicle (CCW), MCL 750.227(2), and possession of a firearm during the commission of a felony, MCL 750.227b.[1] Defendant appeals as of right, and we affirm.

Police received a tip that defendant was selling drugs. An investigation revealed that defendant had an outstanding warrant. Police obtained a copy of defendant's driver's license photograph and verified that he was driving a gray Riviera. Defendant was stopped in his vehicle for an outstanding warrant based on an income tax violation. A police officer testified that a pill vial containing crack cocaine and a razor blade were in plain view in the center console of the vehicle. A gun was also found under the front driver's seat. Two other adult occupants of the vehicle at the time of the stop testified that the cocaine and gun did not belong to them. One adult occupant, the husband of defendant's cousin, testified that defendant would allow his vehicle to be driven by other people.

Defendant first alleges that the prosecutor improperly commented on defendant's exercise of his right to remain silent. Although a prosecutor's comment on a defendant's exercise

[1] Before trial, defendant conditionally pleaded guilty to felon in possession of a firearm, MCL 750.224f. After the jury returned a guilty verdict for the CCW and felony-firearm charges, the trial court accepted defendant's guilty plea. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to two years' imprisonment for the felony-firearm conviction, and thirty-four months to fifteen years' imprisonment for the remaining offenses.

of the right to remain silent is generally a constitutional error, "a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." United States v Olano, 507 US 725, 731 (1993) (citation omitted). In this case, defendant did not object to the prosecutor's comment during closing rebuttal argument; although the prosecutor's comment was error, it does not here rise to the level of reversible error. Defendant did not properly preserve this claim of prosecutorial misconduct by objecting at trial, and therefore we review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture of an unpreserved issue, defendant must establish that an error occurred, that the error was plain, clear or obvious, and that the error affected defendant's substantial rights by impacting the outcome of the trial court proceedings. *Id*. Claims of prosecutorial misconduct are reviewed on a case by case basis, examining the remarks in context to determine if the defendant received a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003).

The police officer that initiated the traffic stop of defendant's vehicle testified that, after he located the gun, he returned to his police cruiser where defendant was seated in the backseat. The officer showed the gun to defendant and told him that he was also under arrest because of the gun. The officer testified that defendant said that he understood. In closing argument, the defense noted that the burden of proof rested with the prosecution, and defendant had a right to remain silent. Defense counsel further stated that the jury should not assume that an individual would protest the charges and should not assume that defendant's silence indicated that he was hiding something. The prosecutor, during rebuttal, stated that when presented with the gun and advised of the charges by police, he *only* indicated that he understood.

Irrespective of the characterization of the prosecutor's statement,[2] because defendant failed to object to the statement at trial, it is reviewable on appeal only for plain error affecting substantial rights, and here that standard is not met. *Carines, supra*. The evidence at trial indicated that the vehicle in question was registered to defendant. Defendant was stopped in the vehicle where a vial of cocaine was observed in plain view. Further investigation revealed the presence of a gun under the driver's seat, near the front edge of the seat. Although there were two other adult occupants of the vehicle, both occupants denied ownership of the cocaine or the gun. In fact, both occupants denied seeing the items in the car. Defendant's theory of the case was that he loaned his vehicle to others, and defense counsel indicated to the jury that the situation was similar to being held responsible for items found in a rental vehicle. This theory was introduced through the testimony of defendant's relative. However, there was no indication in the hours immediately preceding the stop and arrest that defendant loaned the vehicle to another person. Furthermore, the trial court instructed the jurors that the arguments of counsel were not evidence. Jurors are presumed to follow the trial court's instructions. *People v Graves*,

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[2] We note that the prosecutor alleges that it was a permissible argument because it was in response to arguments made by defense counsel and the statement was made before defendant was advised of his right to remain silent. See *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The admission of the statement itself is not contested; rather, the manner in which the prosecutor argued the evidence is in dispute.

458 Mich 476, 486; 581 NW2d 229 (1998). There is no indication that the prosecutor's statement in rebuttal affected the outcome of the proceedings in light of the evidence presented at trial and the instructions read to the jury.

Defendant next alleges that there was insufficient evidence of his knowledge of the presence of the firearm to convict him of CCW.[3] We disagree. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). Circumstantial evidence and reasonable inferences drawn from the evidence can be sufficient to prove the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

"To support a conviction for carrying a weapon in an auto, the prosecution must show: (1) the presence of a weapon in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of its presence, and (3) that he was 'carrying' it." *People v Courier*, 122 Mich App 88, 90; 332 NW2d 421 (1982). Possession of a firearm may be actual or constructive and may be exclusive or joint. *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). A defendant may have constructive possession of a firearm if he knows its location, and the firearm is readily accessible to him. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). The question of possession is factual and is decided by the jury. *Hill, supra* at 469. Factors to consider in determining whether there is sufficient circumstantial evidence to sustain a conviction for carrying a weapon in a motor vehicle include: "(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." *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence of knowledge to support the CCW conviction. Defendant was the owner and the driver of the vehicle at the time of the stop. After he stepped out of the vehicle, the gun was found underneath defendant's seat. Defendant was in close proximity to the gun, and the gun was in close proximity to the cocaine. Under the circumstances, there was sufficient evidence for the trier of fact to determine that defendant was aware of the presence of the gun in his vehicle.

Defendant next alleges that there was insufficient evidence of knowledge of the presence of cocaine in the vehicle to support the possession of cocaine and maintaining a drug vehicle convictions. We disagree. To establish the elements of possession of less than twenty-five

[3] Defendant also references the felon in possession of a firearm and felony-firearm convictions, but cites no authority to challenge the convictions. A defendant may not merely announce a position, nor may he give cursory treatment to an issue with little or no citation to supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Therefore, any challenge to the other firearm convictions has been abandoned. *Id*.

grams of cocaine, a prosecutor must prove that (1) the defendant possessed a controlled substance, (2) the substance that the defendant possessed was cocaine, (3) the defendant knew he was possessing cocaine, and (4) the substance was in a mixture that weighed less than twenty-five grams. MCL 333.7403(2)(a)(v); CJI2d 12.5; see also *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). The offense of possession of a controlled substance requires a showing of dominion or control over the controlled substance with knowledge of its presence and character. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). Possession may be either actual or constructive and may be joint or exclusive. *Id.* at 166. The defendant's mere presence where the controlled substance was found is not sufficient to establish possession; rather, an additional connection between the defendant and the controlled substance must be established. *Wolfe, supra* at 520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the controlled substance. *Id.* at 521. Possession may be proven by reasonable inferences drawn from circumstantial evidence. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). The jury, not the appellate court, determines what inferences may be fairly drawn from the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

In regard to a conviction for maintaining a drug vehicle, MCL 333.7405(1)(d) provides that a person "shall not knowingly keep or maintain a . . . vehicle . . . that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article."

For both offenses, defendant challenges only the knowledge element. With respect to the cocaine possession charge, defendant contends that the prosecutor failed to establish that defendant knew that he was possessing the cocaine found in his vehicle. Viewed in a light most favorable to the prosecution, the evidence was sufficient to justify the jury's conclusion that defendant had constructive possession of the cocaine, i.e., that he had the right to exercise control over the cocaine and knew that it was cocaine. A jury could infer that defendant had knowledge of the presence and character of the cocaine, given that the cocaine was found in defendant's vehicle, that it was on the central console next to the driver's seat, and that it was in plain view. Accordingly, we hold that a jury could conclude that the totality of these circumstances indicated a sufficient nexus between defendant and the controlled substance. *Wolfe, supra* at 521.

With respect to the maintaining a drug vehicle offense, defendant contends that the prosecution failed to establish that defendant knowingly kept a vehicle that is used for keeping or selling controlled substance. Contrary to defendant's contention, the evidence shows that the cocaine along with a single-edged razor blade was found in the pill vial on the center console of the vehicle. A police officer offered as an expert in the sale and distribution of cocaine opined that the pill vial with a single-edged razor blade and one large chunk of cocaine, along with nine other average-sized rocks of cocaine found in defendant's vehicle indicated that defendant was selling the smaller rocks first and using the razor blade to chip off more rocks from the large rock in order to sell them. He also opined that the presence of the gun underneath the seat and the $288 in cash found on defendant were consistent with the sale of cocaine. Thus, the totality of the circumstances provided circumstantial evidence that cocaine had been used in the vehicle or that the vehicle was used for keeping or selling cocaine. As such, viewed in a light most

favorable to the prosecution, we conclude that the evidence was sufficient to convict defendant of possession of less than twenty-five grams of cocaine and maintaining a drug vehicle.

Finally, defendant argues that his constitutional right against unreasonable searches and seizures was violated when the trial court denied his motion to suppress the evidence seized from his vehicle. Defendant asserts that the testimony at the evidentiary hearing showed that the police manufactured a pretext to stop and search his vehicle. We disagree. We review a trial court's factual findings at a suppression hearing for clear error, but review the ultimate ruling on a motion to suppress de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). Generally, a search or seizure conducted without probable cause is unreasonable. *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002). In *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the Unites States Supreme Court determined that the Fourth Amendment permits the police to stop and briefly detain a person based on "reasonable suspicion that criminal activity may be afoot." The *Terry* exception has been extended to incorporate "investigative stops" under a variety of circumstances for "specific law enforcement needs." *People v Nelson*, 443 Mich 626, 631; 505 NW2d 266 (1993). In *Nelson*, *supra* at 632, the Michigan Supreme Court summarized the appropriate test for the validity of an investigative stop as follows:

> In order for law enforcement officers to make a constitutionally proper investigative stop, they must satisfy the two-part test set forth in *United States v Cortez,* 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity. That suspicion must be reasonable and articulable, and the authority and limitations associated with investigative stops apply to vehicles as well as people. [Citations omitted.]

Reasonable suspicion, not probable cause, was required to effectuate a valid investigatory stop. *Nelson*, *supra* at 632. "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996), citing *United States v Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed 2d 1 (1989). The reasonableness of a police officer's suspicion must be determined "case by case on the basis of the totality of all the facts and circumstances." *People v LoCicero (After Remand),* 453 Mich 496, 501-502; 556 NW2d 498 (1996); *People v Jones*, 260 Mich App 424, 429; 678 NW2d 627 (2004).

We agree with the trial court's ruling that police had reasonable suspicion to stop and detain defendant. The police effectuated an investigatory stop based on the information learned from the LIEN and arrested defendant on the outstanding warrant for the income tax violation. The instant case is similar to *Jones, supra,* where the officer ran a computer check of a license plate number and then conducted an investigatory stop based on the information learned from the

computer check. *Jones, supra* at 426-427. This Court held in *Jones*, "Because the officer proceeded lawfully in (a) running the computer check, (b) making an investigatory stop, and (c) establishing that defendant was the registered owner of the vehicle for whom two warrants were outstanding, the officer was justified in arresting defendant and conducting a search of defendant and his car." *Jones, supra* at 428.

Similarly, because defendant was a registered owner of the vehicle and had an outstanding warrant, the police officer had reasonable suspicion to believe that defendant drove the vehicle and could properly conduct an investigatory stop. Because the officer made a proper investigatory stop and positively identified defendant as the driver and registered owner of the vehicle, he lawfully arrested defendant on the outstanding warrant and searched defendant's car. *Jones, supra* at 430.

Defendant mainly argues that the challenged evidence should be suppressed because his stop and arrest on the warrant was a pretext to search for drugs in his vehicle, based on the confidential informant's tip. Defendant is correct to point out the basic principle that a stop or an arrest may not be used as a pretext to search for evidence, as held in *United States v Lefkowitz*, 285 US 452, 467; 52 S Ct 420; 76 L Ed 2d 877 (1932), and *Taglavore v United States*, 291 F2d 262 (CA 9, 1961). It should be noted, however, that courts do not agree on what objective factors or elements are dispositive in determining whether an intrusion is a pretext and thus unconstitutional. See *People v Haney*, 192 Mich App 207, 210; 480 NW2d 322 (1991), citing *United States v Guzman*, 864 F2d 1512, 1515 (CA 10, 1989). In Michigan, this Court has considered two objective factors expressed in *United States v Trigg*, 878 F2d 1037, 1039 (CA 7, 1989). See *Haney, supra* at 210. "First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense? Second, was the arresting officer authorized by state or municipal law to effect a custodial arrest for the particular offense?" *Id.* In other words, regardless of a police officer's subjective intent in making a stop, where his actions constitute "no more than [he is] legally permitted and objectively authorized to do," the stop will be considered constitutionally valid as "necessarily reasonable under the Fourth Amendment." *Id.* Here, both factors were present. The evidence establishes that the police had probable cause to believe, based on information learned from the LIEN and the positive identification of defendant, that defendant had an outstanding warrant for a tax violation. Also, it is undisputed that the police officer was authorized by law to make the stop and arrest for the tax offense. Although defendant raises questions regarding the veracity of the officer's testimony that the sole reason for stopping the vehicle was to locate defendant who had a tax offense warrant, we defer to the trial court's assessment that the officer was credible. See *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Because the police officer was legally permitted to effectuate a stop of the vehicle given the outstanding warrant, we conclude that the warrant was not a mere pretext for the stop and arrest and that the stop and arrest were constitutionally valid despite any alleged subjective motivations the officer may have harbored in effectuating the stop. *Haney, supra* at 210.[4] Under these circumstances, we conclude that the

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[4] Defendant also alleged that he could not have been stopped for the tax violation. However, documentation indicted that a valid arrest warrant issued for defendant's arrest. We also note because the stop was lawful, the police could have properly searched the vehicle incident to arrest. See *People v Houstina*, 216 Mich App 70, 75, 77; 549 NW2d 11 (1996).

officer's stop was lawful and that the evidence seized from defendant's vehicle should not be suppressed as the "fruit" of an unlawful detention or arrest. Accordingly, we hold that the trial court properly denied defendant's motion to suppress the evidence seized from the vehicle.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello