STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2004
v	No. 246713 Wayne Circuit Court
JAMES EDWARD WHITE, Defendant-Appellant.	LC No. 02-002289-01

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for carrying a concealed weapon (CCW), MCL 750.227, possession of less than twenty-five grams of a controlled substance (heroin), MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant's first issue on appeal is that reversal is required because he was denied his right to testify. Alternatively, defendant claims reversal is required because he was denied the effective assistance of counsel when he was talked out of testifying or misled about not testifying. We disagree with both contentions.

The constitutional right to testify on one's own behalf at a criminal trial is essential to due process of law. *People v Solomon*, 220 Mich App 527, 533-537; 560 NW2d 651 (1996). Defendant claims that he clearly indicated that he wanted to testify and that he was denied the right to testify on his own behalf without a valid or complete waiver of his right to testify made on the record. This claim is without merit.

At the close of the prosecution's case, the following colloquial occurred on the record:

> MR. LANGFORD: . . . . I have explained to [defendant] that he has the absolute Constitutional right to testify in his own behalf. Is this correct, sir?
>
> MR. WHITE: Yes.
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> MR. LANGFORD: Also explained . . . if he does take the stand, that his testimony will be judged by the standards of anybody else. Right, sir?

MR. WHITE: Yes.

MR. LANGFORD: Okay, but that he can also can say [sic], I do not want to take the stand; and that if elects not to take the stand, no adverse inference can be drawn from it. In fact, you will give an instruction saying you cannot make any negative assumptions. All explained to you, sir?

MR. WHITE: Uh-huh.

MR. LANGFORD: And are you comfortable with the explanations?

MR. WHITE: Yes.

MR. LANGFORD: And you've indicated to me that you do not wish to take the stand.

MR. WHITE: Yes.

Then, upon hearing the verdict, defendant informed his trial counsel and the trial court that he wanted to take the stand to tell his side of the story. The trial court informed defendant it was an issue he could take up on appeal.

Defense counsel, on the record, expressly and unequivocally informed defendant that he could testify on his own behalf and defendant affirmatively declined to exercise his right to testify. Defendant did not express that he wanted to testify until after he heard the jury's verdict. A criminal defendant may forfeit a right by failing to timely assert it, but a forfeited right may still be reviewed for plain error, while the intentional relinquishment of a known right constitutes a waiver that extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Any error was extinguished as defendant intentionally relinquished his right to testify on his behalf. Nonetheless, even if there was no waiver, this Court has held that there is no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991).[1] Although the trial court did not inquire, when a defendant is represented by counsel a trial court has no duty to inquire into the defendant's waiver of the right to testify. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995). Accordingly, even if there was no waiver of defendant's right to testify on the record, which there was, the trial court did not err.

With regard to defendant's claims of ineffective assistance of counsel, our review is limited to the facts apparent on the record. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.

[1] In *Harris*, *supra*, the defendant claimed that she was denied a fair trial because she was denied the right to testify on her own behalf and there was no waiver on the record. *Harris*, *supra* at 661. This Court held that the trial court had no duty to advise her of the right, nor was it required to determine whether she made a knowing and intelligent waiver of the right. *Id*. at 661-662.

People v LeBlanc, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id*. at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

There is nothing on the record supporting that defendant was talked out of testifying or was misled about testifying by his trial counsel. To the contrary, on the record trial counsel informed defendant regarding his right to testify and with regard to how the jury would be instructed if he decided not to testify. Even if it was defense counsel's decision, counsel's decision not to put defendant on the stand is presumed to be a matter of trial strategy for which this Court will not substitute its judgment. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Therefore, after a review of the record, we do not believe defendant has overcome the presumption that he received effective assistance of counsel. Furthermore, defendant has not shown there is a reasonable probability that the result of the proceedings would have been different if he had testified. *Bell*, *supra* at 695; *Toma*, *supra* at 302. Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *LeBlanc*, *supra* at 579.

Defendant's second issue on appeal is that his convictions should be reversed because the prosecution failed to present sufficient evidence in support of the charged offense. In the alternative, defendant argues that the convictions should be reversed because the verdict was against the great weight of the evidence and/or manifestly unjust. We disagree.

In reviewing the sufficiency of the evidence, we must view the evidence de novo in the light most favorable to the prosecutor 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 Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999)*; People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). We do not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Fletcher*, ___ Mich App ___; ___ NW2d ___ (Docket No. 229092, issued February 10, 2004) slip op p 15. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *Fennell, supra*.

With regard to the CCW conviction, defendant contends that the evidence was insufficient because there was no scientific evidence to establish that the gun had his fingerprints on it. The elements of CCW require that: (1) the defendant carried a gun and (2) the gun was concealed on or about his person. MCL 750.227; *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979). Detroit Police Officer Sean Harris testified that he saw the butt of a handgun protruding out of defendant's waistband. Detroit Police Officer Don Eastman testified that he retrieved a handgun from underneath defendant's shirt and waistband. Thus, there was testimony that defendant carried a gun and that the gun was concealed under his waistband and clothing. Upon a review de novo, we find, reviewing the testimony of Officers Harris and Eastman in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of CCW were proven beyond a reasonable doubt. It is not necessary to fingerprint a gun that is retrieved from defendant's person, and the lack of fingerprint evidence is goes to the credibility, which we leave to the trier of fact.

With regard to the possession of less than twenty-five grams of heroin conviction, defendant argues that that the evidence presented was insufficient because there was no evidence that he possessed the heroin that was found outside the window. The elements of possession of less than twenty-five grams of heroin are: (1) the defendant possessed the heroin and was not authorized to possess the heroin, (2) the defendant knew he possessed the heroin, and (3) the heroin was in a mixture weighing less than twenty-five grams. See *Wolfe, supra* at 516-517. Officer Harris testified that when the police arrived to execute a search warrant he observed defendant throw a plastic baggie out the window, and that, from his experience, he expected the baggie to contain narcotics. Detroit Police Officer Jessica Jones testified that she observed defendant throw a plastic baggie out the window, and that she exited and recovered the baggie on the pavement under the window. Officer Jones further testified that the baggie contained folded paper packets of what she suspected was heroin. It was stipulated that Tiffany McKay, an expert in chemical analysis, would testify that she examined the contents of two paper packets found in the recovered baggie and that the material found contained heroin and weighed .09 grams.

The testimony of Officers Harris and Jones and the stipulation that the bag contained a heroin mixture supports that defendant possessed heroin without authorization. And, the stipulation regarding what McKay's testimony would have been supports that the paper taken from the baggies contained a heroin mixture that weighed .09 grams, which is less than twenty-five grams. Defendant's knowledge of his possession can be inferred from the facts and circumstances; i.e. the fact that he threw the baggie out the window when the police entered. See *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *Fennell*, *supra* at 270-271. We find, upon a review de novo, the evidence when viewed in a light most favorable to the prosecution is sufficient in that a rational trier of fact could find that the essential elements of possession of less than twenty-five grams of heroin were proven beyond a reasonable doubt.

Lastly, the elements of felony-firearm are that defendant possessed a firearm during the commission or attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1, (1996). For the above stated reasons, there is sufficient evidence, when viewed in a light most favorable to the prosecution, that defendant possessed a firearm while in the possession of less than twenty-five grams of heroin (a felony).

In the alternative, defendant contends that his convictions were against the great weight of the evidence, but defendant has not properly preserved his great weight of the evidence argument. An objection going to the weight of the evidence in a jury trial can be raised only by a motion for new trial before the trial court. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). Failure to raise the issue by the appropriate motion forfeits the issue on appeal, *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997), and limits review to plain error which affected the defendant's substantial rights, *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Defendant has failed to present any plain error that affected his substantial rights. *Carines, supra* at 763. Defendant only raises issues of credibility, which are left to the trier of fact. See *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Thus, defendant's argument that his convictions are against the great weight of the evidence also fails.[2]

Defendant's final issue on appeal is that he was denied a fair trial when the prosecutor improperly made comments not supported by the evidence and by improperly offering her personal opinion. We agree that the prosecution made an improper comments during rebuttal argument. But we disagree that defendant was denied a fair trial.

Defendant did not object to the challenged comments. Unpreserved issues are reviewed for plain error that affected substantial rights. *Rodriguez, supra* at 32. Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Comporting with this standard, appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Thus, if defense counsel fails to object, review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Watson, supra* at 586. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice, supra* at 438. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra* at 721. A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *Stanaway, supra* at 686; *Schutte, supra* at 721, but she is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the

[2] Furthermore, the verdict is not against the great weight of the evidence. The evidence does not clearly preponderate so heavily against the verdict that a miscarriage of justice would result if the verdict was allowed to stand. *Lemmon, supra*; *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Schutte*, *supra*. A prosecutor may not vouch for the credibility of a witness to the effect that she has some special knowledge that the witness is testifying truthfully. *Bahoda, supra* at 276; *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). And, a prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge. *People v Ignofo*, 315 Mich 626, 631-636; 24 NW2d 514 (1946).

During the prosecutor's rebuttal argument she made the following statement to the jury:

> I lived in Cass Corridor for 4 years, all through law school and after. I never tripped over a baggie of heroin. It doesn't just sit out there. It was dropped by defendant.

Defendant argues that this was improper argument by the prosecution. The prosecution contends that it was in response to defense counsel's contention that the drugs found were not defendant's, and that the prosecutor was properly arguing reasonable inferences arising from the evidence. We agree with defendant that the challenged statements were improper.

Although the prosecutor can respond to issues raised by defense counsel in closing argument, it remains improper to argue on the basis of the prosecutor's personal knowledge and for the prosecutor to indicate that she has special knowledge with regard to the area where the heroin was found. Therefore, plain error exists. But we find that this error did not affect defendant's substantial rights; i.e., it did not affect the outcome of the proceedings, nor did the error result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity or public reputation of judicial proceedings. See *Carines, supra* at 763-764. The evidence against defendant was overwhelming, and the statements made by the prosecution during rebuttal argument, when reviewing the entire case, did not affect the outcome of the proceedings. Moreover, any prejudice caused by the prosecutor's comments regarding her knowledge of Cass Corridor could have been cured by a curative instruction if defense counsel had objected. See *Stanaway*, *supra* at 687; *Watson, supra* at 586. In addition, any error was cured by the trial court's instructions to the jury to decide the case solely on the evidence, and further directing the jury that the statements of counsel are not evidence. Prior to opening statements and during jury instructions, the trial court instructed the jury that the statements and arguments of the attorneys were not evidence, and that the jury was to only consider evidence in coming to its verdict.

Although there was plain error, defendant has not demonstrated that his substantial rights were affected. In light of the evidence presented against defendant, the remarks by the prosecutor, though improper, were not critical to a determination of defendant's guilt or innocence and could have been cured by a curative instruction. Further, the trial court's instructing the jury that the attorneys' statements and arguments were not to be considered evidence cured any prejudice. Accordingly, this unpreserved issue does not require reversal.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot