STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 24, 2004
v	No. 247670 Saginaw Circuit Court
RICHARD STANLEY HAVENS, Defendant-Appellant.	LC No. 01-020835-FH

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of assault with a dangerous weapon, MCL 750.82, possession of a firearm while committing a felony, MCL 750.227b, and carrying a dangerous weapon whether concealed or otherwise in a motor vehicle, MCL 750.227. Defendant argues on appeal that he was denied a fair trial because his attorney was constitutionally deficient, and because the trial court committed errors by excluding character evidence and in its instructions to the jury. Defendant also argues that the prosecutor's misconduct denied him a fair and impartial trial. We conclude that none of these alleged errors merits reversal. Finally, defendant argues that his prison sentence constitutes cruel or unusual punishment. We disagree and, therefore, affirm.

I Summary of Facts and Proceedings

This case arises out of road rage incident. Defendant and the complainant were both driving southbound on I-75 near Saginaw. Defendant was alone in a green Blazer, while the complainant and her son occupied a blue Impala. Both the complainant and her son testified that defendant pointed a silver snub-nose .38-caliber revolver at them just north of the Birch Run exit. Within 30 minutes of the incident, the police stopped defendant near Grand Blanc and recovered a handgun matching the victims' description from a suitcase in the Blazer's hatchback area. Defendant denied committing the offense and testified that the two complainants must have seen a black, cassette tape recorder he held in his hand while making a gesture with his finger.

Before sentencing, defendant filed a motion for new trial for which a hearing was held on December 16, 2002. In a February 26, 2003 opinion and order addressing most of the issues defendant now asserts on appeal, the trial court denied defendant's motion. On March 19, 2003, the trial court denied defendant's motion to declare MCL 750.227b unconstitutional and

sentenced defendant to a prison term of two years for that conviction, consecutive and preceding concurrent sentences of from two months to four years imprisonment on the conviction for assault with a dangerous weapon and from five months to five years imprisonment on the conviction for carrying a weapon in vehicle. Defendant appeals by right.

II. Assistance of Counsel

A. Preservation & Standard of Review

Defendant preserved his claim of ineffective assistance of counsel by filing a motion for new trial, creating a record in the trial court. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

"Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). The trial court's findings of fact are reviewed for clear error. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Whether assistance provided in a particular case meets minimum constitutional standards of assuring the defendant a fair trial is a question of law reviewed de novo. *Id*.; *Strickland v Washington*, 466 US 668, 684-686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Id*. at 689; *Riley*, *supra* at 140.

In *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994), our Supreme Court held that the Michigan Constitution does not provide a higher standard for effective assistance of counsel than the United States Constitution. Thus, to establish that counsel's performance fell below the constitutional standard, a defendant must first show that under the circumstances counsel's performance was deficient as measured against objective reasonableness according to prevailing professional norms. *Id*. at 303, 338; *Strickland*, *supra* at 687-688. Second, a defendant must show the deficiency was so prejudicial that he was deprived of a fair trial and had a trial whose result is unreliable. *Id*.; *Pickens*, *supra* at 303, 309, 338. To find prejudice a reasonable probability must exist that but for counsel's unprofessional errors the trial outcome would have been different. *Strickland*, *supra* at 694; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

B. Analysis

We find most of defendant's arguments fail to overcome the strong presumption of effective assistance of counsel. But counsel's failure to recognize the admissibly of evidence of defendant's good reputation for being a law-abiding, peaceful person, and to present available character witnesses, fell below objective standards of reasonableness, and could have deprived defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710-711; 538 NW2d 465 (1995), modified on other grounds 453 Mich 902; 554 NW2d 899 (1996). Nevertheless, the trial court did not clearly err by finding that this mistake did not render the result of the trial unreliable. Stated otherwise, it is not reasonably probable that counsel's error in failing to seek admission of evidence of defendant's good reputation for being law-abiding and peaceful, which did not directly relate to the charged offenses, could have overcome the strength of the

prosecution's case. Thus, the instant case is distinguished from cases where counsel failed to discover and present witnesses who could have directly contradicted the prosecution's case. See, e.g., *People v Grant*, ___ Mich ___; ___ NW2d ___ (No. 119500, July 15, 2004), and *People v Johnson*, 451 Mich 115, 118; 545 NW2d 637 (1996). We address defendant's numerous claims.

We note that the record does not support defendant's claim that his trial counsel was so unprepared that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra* at 687. Trial counsel possessed 25 years experience as a criminal defense attorney; counsel had met or talked to defendant several times before trial; and counsel had contacted numerous potential character witnesses who could testify in support of defendant. He filed a list of fourteen character witnesses and three record custodians. Trial counsel also pursued usual discovery for a criminal case, obtaining police reports regarding the offense and a transcript of the preliminary examination, and used both to prepare for cross-examination of witnesses. Counsel also obtained a record of a criminal conviction of the complainant for larceny under $100, attempting unsuccessfully to impeach her. Further, under the Freedom of Information Act (FOIA), counsel obtained copies of recordings of pertinent telephone calls to 911. Thus, in general, defendant has failed to establish trial counsel's lack of preparation fell below objective standards of reasonableness such that the counsel's representation so prejudiced defendant as to deprive him of a fair trial. *LeBlanc, supra* at 578; *Pickens, supra* at 303.

Regarding defendant's specific claim that counsel failed to thoroughly investigate the complainant's involvement in litigation with her ex-spouse, and a neighborhood feud, the record establishes that defense counsel was aware of and spoke to potential impeachment witnesses Holly Dillenbach and Larry Justice before trial. Indeed, counsel listed them and the complainant's ex-spouse as potential defense witnesses. Furthermore, although counsel desired an adjournment of the trial and preferred more time to prepare, defendant makes no claim that the trial court abused its discretion by denying defense counsel's motion to adjourn. In evaluating defendant's claim that counsel seriously erred, this Court may not review counsel's actions with the benefit of hindsight but rather must judge counsel's performance from the perspective of counsel at the time of the alleged error. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland, supra* at 689.

Moreover, this Court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (punctuation and citation omitted); see, also, *LeBlanc, supra* at 579. Further, this Court must presume to be strategic counsel's decisions whether to present certain witnesses and the manner of questioning witnesses that testify. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *Hyland, supra* at 710; *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* But,

this Court will not substitute its judgment for that of trial counsel merely because a strategic decision does not work. *Id*. In other words, counsel's failure to call or question witnesses must be a non-strategic, serious, error, in the absence of which a reasonable probability exits that the trial outcome would have been different. *Strickland, supra* at 694; *Toma, supra* at 302-303.

Regarding potential impeachment witnesses, defendant failed to present any evidence at his motion for new trial to overcome the presumption that counsel's failure to call Justice as a witness was not strategic. Although counsel testified that Justice told him that the complainant had gained a reputation among local attorneys for exaggerating and being manipulative, defendant submitted neither an affidavit nor testimony from Justice at the hearing below to establish that Justice would have so testified if called as a witness at trial. Thus, defendant failed to established either prong of the test for ineffective assistance. *Pickens, supra* at 327.

Further, counsel testified at the *Ginther* hearing that Dillenbach told him that under no circumstances would she testify at defendant's trial. Thus, counsel's decision to not present a reluctant Dillenbach as a witness was reasonable. Defendant failed to overcome the presumption that counsel's actions were strategic.

With respect to the last two impeachment witnesses, Barbara Lindzy and Ted Warren, counsel's actions must be viewed from the perspective of the circumstances facing counsel and information available at the time. Counsel knew that Dillenbach, the apparent main protagonist engaged in a neighborhood feud with the complainant, had refused to testify at trial. It would be reasonable to assume that any similar witnesses counsel might locate through Dillenbach might be clearly biased from being involved in the same neighborhood feud. Further, counsel did not learn about Dillenbach until defendant told him on either the day before or the first day of trial. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland, supra* at 691. Although counsel moved to adjourn the trial to further investigate possible impeachment evidence, the trial court denied the motion. Thus, counsel acted reasonably by not allocating scarce trial preparation time to pursue possible witnesses through Dillenbach.

Moreover, even if counsel seriously erred in not presenting Dillenbach, Justice, Lindzy, or Warren, the trial court correctly determined their testimony would not have rendered a different result reasonably probable. The prosecution's case was very strong. Each complaining witness corroborated the others' testimony. The main complainant contemporaneously reported the incident to the authorities, and part of her immediate description of a handgun was recorded on the emergency telephone system. Both the complaining witness and her son gave accurate descriptions of a handgun to the police that matched that of a handgun recovered from defendant's vehicle stopped within 30 minutes of the offense. Further, defendant admitted he did not know the complaining witnesses, and they could not have otherwise known he possessed a handgun or its type. In addition, both defendant and his firearms expert admitted that because of the number of different gun manufacturers, basic types of handguns (revolvers or pistols), different caliber sizes, different barrel lengths, and different body and handle colors, there are hundreds, or even thousands, of different types of handguns. Impeachment witnesses, on the other hand, offer no direct evidence on whether the offense occurred; for that reason, failing to

present impeachment evidence is generally insufficient to render a different trial outcome reasonably likely. *People v Boynton*, 46 Mich App 748, 750; 208 NW2d 523 (1973). Accordingly, defendant failed to establish prejudice in counsel's failure to discover, or present these impeachment witnesses.

With regard to evidence of defendant's good character, counsel strategically decided to focus on evidence of defendant's good reputation for truth and veracity because even "peaceful and law-abiding citizens do fly off the handle in a great emotional outburst." This decision was not unreasonable because counsel has broad discretion in making strategic choices at trial. *LeBlanc, supra* at 578. But, when the trial court ruled it would not admit reputation evidence of defendant's character for truth and veracity, no strategic reason is apparent for counsel's failure to recognize the admissibly of evidence of defendant's reputation for being a law-abiding, peaceful person. See MRE 404(a)(1); *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). The so-called "mercy rule" allows a criminal defendant an absolute right to introduce evidence of a pertinent trait of his character to prove that he could not have committed the crime. *Id*. Counsel's failure to recognize the admissibility of this favorable character evidence fell below objective standards of reasonableness. But counsel's failure to present reputation evidence of defendant's character for being a law-abiding, peaceful person does not establish a reasonable probability that the trial outcome was unreliable. Evidence of defendant's good character does not relate directly to whether the offense occurred, contrary to the situation involving missing witnesses in *Grant, supra*, and *Johnson, supra*. Here, given the overwhelming strength of the prosecution's case, it is unlikely that the testimony of character witnesses would have produced a different result at trial. As the trial court observed, defendant was permitted to testify extensively regarding his education, successful career as a businessman and teacher, and his proficiency and knowledge of firearms and regulations, gained through training and service as a police reserve officer. From this testimony, the jury could readily infer that defendant possessed good character for being a law-abiding, peaceful person. Accordingly, defendant has failed to establish prejudice necessary to warrant a new trial. *Toma, supra* at 302-303.

Defendant's other assertions of counsel's serious errors warranting a new trial are likewise unmeritorious. For example, counsel's alleged error in not attempting to impeach the complaining witnesses with minor differences in their prior testimony or statements must be presumed to be strategic. *Rockey, supra* at 76. Because such impeachment could have the opposite effect of accentuating the consistency of the major points of the witnesses' testimony, the record here fails to overcome the presumption of effective assistance. Moreover, it is not reasonably likely that the failure to pursue the suggested cross-examination was outcome determinative. *Boynton, supra* at 750. Accordingly, defendant failed to establish that he was so prejudiced that he was denied a fair trial. *Rodgers, supra* at 714.

Defendant further claims counsel erred by failing to investigate whether a third person was in the complainant's car or to obtain a certified record of her car's registration plate to support defendant's version of events. As to the former, defendant failed to establish the factual predicate of his claim; that someone other than the complainant and her son occupied the complainant's car. "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual

predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Other than second- and third-hand hearsay that the complainant may have associated with the suspected third person in Curran, Michigan on the weekend in question, defendant offered no proof that a third person was in the complainant's automobile at the time of the offense. Most telling, defendant did not testify at trial, or at his motion for new trial, that he saw a third person in the complainant's car. Finally, appellate counsel conceded below that he could not prove this claim.

Defendant's assertion that counsel erred by not obtaining a certified record from the Secretary of State to corroborate that he accurately tape recorded the complainant's license plate number is so inconsequential that it cannot establish a reasonable probability of a different result on the facts of this case. It was undisputed that the complainant and defendant were close enough to each other that both would be able to observe, and later report, the license plate number of the other. Whether the complainant could accurately report defendant's license plate, which she did, was relevant to her ability to observe, and therefore, relevant to whether she saw defendant holding a handgun or a tape recorder. But whether defendant could accurately report the complainant's license plate number bore little relation to whether he was telling the truth when he testified he did not aim his .38-caliber, silver revolver at the complainant. Prejudice necessary to warrant a new trial is not established. *Toma*, *supra* at 302-303.

Next, defendant argues that counsel failed to timely object to a misrepresentation by the prosecutor that the witnesses' description of the handgun they testified defendant aimed at them matched the exact gun the police recovered from defendant's vehicle. A prosecutor may properly argue all reasonable inferences arising from the evidence consistent with his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, a prosecutor need not state inferences from the evidence in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Here, the prosecutor theorized that defendant pointed the gun, which the police later seized from his vehicle, at the complainant and her son during a road rage incident. Trial testimony established the witnesses' had substantially described the handgun to the police before it was seized. The prosecutor's argument was proper; counsel's not objecting futilely cannot establish ineffective assistance counsel. *Rodgers*, *supra* at 715.

Defendant also claims that counsel erred by not objecting to the prosecutor's asking defendant if he was taking any drugs or medication on the day of the incident and to which defendant answered he was taking Synthroid and Zoloft. At the hearing below, counsel did not recall this question and answer, but he testified that had he known the prosecutor would question defendant about his medications, counsel would have brought a motion in limine to preclude it. But not objecting to this very brief question and answer could have been a reasonable strategy of not wanting to call attention to the testimony. *Bahoda*, *supra* at 287, n 54. Moreover, the evidence did not show an inherently prejudicial prior bad act; it simply showed that defendant lawfully took prescription medication. If error occurred, prejudice warranting a new trial is not established.

Defendant also asserts counsel erred by not objecting to the trial court's instructing the jury on flight, CJI2d 4.4, and by not requesting an instruction that a handgun may be lawfully transported in a vehicle in certain circumstances. Trial counsel testified that he could not recall

if the trial court instructed the jury on flight, but if it had, he would have objected. But no objection appears in the record. This equivocal evidence fails to overcome the presumption counsel's failure to object was strategic. CJI2d 4.4(2) instructs the jury that a guilty conscience may be evidenced by flight, but the instruction is also balanced by noting that a person may have innocent reasons to flee. Here, defense counsel argued in closing that the evidence proved defendant did not flee after the incident; therefore, defendant did not have a guilty conscience. In essence, counsel argued the reverse of the inculpatory inference permitted by CJI2d 4.4(2). This Court must indulge every presumption that counsel's actions might be sound trial strategy. *Strickland, supra* at 689; *LeBlanc, supra* at 578. An unsuccessful strategy is not a reason to conclude counsel was ineffective. *In re Ayres, supra* at 22. Moreover, given the strength of the prosecution's case, the accurate, balanced flight instruction is not reasonably likely to have affected the outcome of the trial. *Toma, supra* 302-303.

We find without merit defendant's argument that trial counsel should have requested an instruction on lawful methods of transporting a handgun in a vehicle. Defendant relies on MCL 750.231a(1), as it existed in October 2001, which provided:

> (e) To a person while carrying a pistol unloaded in a wrapper or container in the trunk of the person's vehicle from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business, or in moving goods from one place of abode or business to another place of abode or business.
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> (f) To a person while carrying an unloaded pistol in the passenger compartment of a vehicle which does not have a trunk, if the person is otherwise complying with the requirements of subdivision (d) or (e) and the wrapper or container is not readily accessible to the occupants of the vehicle.

Jury instructions must address each element of the offense charged, as well as defenses and theories of the parties that are supported by the evidence. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). But instructions without evidentiary support should not be given. *Id.* Here, defendant testified that he used his handgun for personal protection, and at times, target shooting. Although defendant testified that he "contemplated doing a little target shooting" at his cabin in Harrisville, he admitted he did not possess a valid hunting license, he was not a member of any club with a shooting range, nor was he going to or from a licensed target range. Accordingly, MCL 231a(1)(d), which then provided an exemption for "carrying a pistol unloaded in a wrapper or container in the trunk of the person's vehicle, while in possession of a valid Michigan hunting license or proof of valid membership in an organization having pistol shooting range facilities, and while en route to or from a hunting or target shooting area," did not apply. Further, 750.231a(1)(e) did not apply because defendant admitted he was not going to or from a gun repair facility, and defendant did not testify he was moving goods from one place of abode to another. See *People v Derry*, 23 Mich App 572, 573-574; 179 NW2d 182 (1970). Thus, counsel did not err by failing to request instructions unsupported by evidence. *Rodgers, supra* at 715. But even if counsel erred, the trial court correctly determined defendant was not prejudiced because the jury obviously concluded in finding defendant guilty of assault with a dangerous weapon that defendant did not lawfully transport his handgun in a vehicle.

Finally, the cumulative effect of counsel's alleged errors did not deny defendant a fair trial. See *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Although the "cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not," to reverse on the basis of cumulative error, "the errors at issue must be of consequence." *Id*. (citations omitted). Here, the only error of possible consequence was failing to present character witnesses, which was not so serious that it denied defendant a fair trial. There are no other errors of consequence with which to combine to deny defendant a fair trial.

III. Exclusion of Character Evidence

A. Preservation & Standard of Review

Defendant preserved this issue by objection and offer of proof in the trial court. MRE 103(a)(2); *Aldrich, supra* at 113.

The admission or exclusion of evidence by the trial court is reviewed for a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Preserved, nonconstitutional evidentiary error does not merit reversal unless it involves a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

B. Analysis

Defendant argues that the trial court erred by excluding evidence of his reputation for truthfulness, contending the prosecution "otherwise" attacked defendant's character for truthfulness within the meaning of MRE 608a(2) by objecting to defense counsel's request that defendant perform a demonstration and point the handgun at the jury. According to defendant, the prosecutor's argument was, in essence, an expression of a personal opinion regarding defendant's character for truthfulness, and that defendant could not be trusted. We disagree.

MRE 608(a) controls this issue and provides:

> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
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> (1) the evidence may refer only to character for truthfulness or untruthfulness, and
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> (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

In *Lukity*, *supra*, the defendant was convicted of first-degree criminal sexual conduct

committed against his 14-year-old daughter and argued on appeal that the trial court had abused its discretion by permitting the prosecutor to present character evidence supporting the complainant's credibility. The trial court found that defense counsel's opening statement had attacked the complainant's credibility permitting the prosecutor to call several witness to testify to the complainant's good character for truthfulness. *Lukity*, *supra* at 489-490. Our Supreme Court explained that the trial court failed to distinguish between an attack on credibility and an attack on character for truthfulness, opining:

> The trial court's ruling failed to note the distinction between credibility and character for truthfulness and the implications of this distinction. Credibility is defined as "worthiness of belief; that quality in a witness which renders his evidence worthy of belief." Black's Law Dictionary (6th ed), p 366. Credibility may be attacked in numerous ways, e.g., demonstrating a witness' inability to perceive or remember the event at issue. Attacking a witness' character for truthfulness is one of the means by which a witness' credibility may be attacked. Thus, the two terms are not synonymous; rather, character for truthfulness is a specific aspect of credibility.
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> Here, defense counsel did not accuse complainant of intentionally lying, but he asserted that she had emotional problems that affected her ability to recount and describe and that the charged incident, which she was expected to describe, did not happen. These assertions indicated that her testimony would not be worthy of belief. Accordingly, defense counsel's opening statement did attack her credibility. But it did not attack her character for truthfulness, i.e., it did not suggest that she was lying. An attack on a witness' *credibility*, like the one at issue, that is not an attack on the witness' *character for truthfulness* does not trigger MRE 608(a)(2). In the absence of an attack on complainant's character for truthfulness, the prosecution was not entitled, under MRE 608(a), to support her character for truthfulness. [*Lukity*, *supra* at 490-491 (emphasis in the original).]

In the case at bar, the prosecutor's objection to defense counsel's proposed demonstration involving defendant pointing a handgun at the jury neither attacked the credibility of defendant nor attacked the character of defendant for truthfulness. The prosecutor's comments did not suggest defendant lied in the past or that defendant had testified falsely. Rather, the prosecutor expressed his concern that a person accused of a violent crime be permitted to handle in the courtroom a weapon that could be easily loaded with concealed bullets. Thus, although the prosecutor expressed concern about what defendant might do, the comments did not suggest that defendant had either lied in the past, or intended to in the future. Accordingly, the prosecutor did not attack the character of defendant for truthfulness by "opinion or reputation evidence or otherwise," MRE 608(a)(2), and the trial court did not abuse its discretion by precluding witnesses from testifying regarding defendant's reputation for truth and veracity.

Moreover, even if the trial court abused its discretion, reversal is not warranted in light of

the strength of the prosecutor's case: after an examination of the entire cause, it does not affirmatively appear that it is more probable than not that the alleged error was outcome determinative. *Lukity, supra* at 495-496.

IV. Alleged Misconduct by the Prosecutor

A. Preservation & Standard of Review

Defendant asserts that four of the prosecution's actions denied him a fair trial: (1) interjecting issues broader than guilt or innocence, appealing to sympathy and prejudices, and making a "civic duty" argument by asking a prospective juror during voir dire if she would attempt to resolve conflicts in testimony or wash her hands and "play Pontius Pilate, and say not guilty, lets go home," (2) by intentionally eliciting testimony that defendant was taking the anti-depressant drug Zoloft, (3) by improperly expressing his personal opinion by misrepresenting the complainants' description of the handgun matched the "exact" gun the police recovered from defendant's vehicle, and (4) by shifting the burden of proof to defendant by arguing there was no evidence that defendant accurately recorded the complainant's license plate number and stating that defendant could have, but did not, produce evidence to substantiate this claim. Defendant failed to preserve all of these claims of misconduct except the last.

This Court reviews de novo claims of prosecutorial misconduct, but any factual findings of the trial court are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Only when misconduct viewed in context denies the defendant a fair and impartial trial is reversal warranted. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Further, if a curative instruction could have alleviated any prejudicial effect, error warranting reversal will not be found. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). When a defendant fails to preserve his claim of prosecutorial misconduct, this Court limits its review to plain error affecting the defendant's substantial rights. *Goodin, supra* at 431.

B. Analysis

We find defendant's arguments without merit. In context, none of the four instances that defendant points to was improper. If error occurred, it was or could have been cured by the trial court's instructions. *Bahoda, supra* at 281; *Schutte, supra* at 721-722. Thus, the prosecutor's conduct did not deny defendant a fair and impartial trial. *Goodin, supra* at 431.

First, a prosecutor may not interject issues broader than guilt or innocence, appeal to sympathy and prejudices, or argue it is the jury's civic duty to convict. *Bahoda, supra* at 281; *People v Rohn*, 98 Mich App 593, 596-597; 296 NW2d 315 (1980). But by asking a prospective juror during voir dire if she would attempt to resolve conflicts in testimony or "play Pontius Pilate, and say not guilty, lets go home," the prosecutor did not step over the line of propriety. In context, which included the prosecutor's recognition that conflicting testimony may create a reasonable doubt as to guilt, the question simply asked if the juror would attempt to resolve conflicts and "look beyond what is said, and see who is telling the truth." Thus, there was no appeal to convict on the basis of religious duties, *Rohn, supra* at 597, but rather a permitted use of a well-known biblical story for illustrative purposes, *People v Mischley*, 164 Mich App 478,

483; 417 NW2d 537 (1987). The prosecutor's question was a proper effort to determine if the prospective jurors would employ available methods to resolve conflicting testimony. To the extent that an improper inference could have been drawn form the prosecutor's illustration, it could have been cured by a prompt objection and curative instruction. *Schutte, supra* at 721.

Second, defendant correctly argues that his use of the anti-depressant drug Zoloft was not relevant to his credibility, as the prosecutor argues, without other evidence showing the effect the drug might have. But, the prosecutor is also correct in arguing that his good-faith effort to admit evidence may not be the basis for a claim of misconduct. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Here, defendant filed a motion to adjourn the trial on its first day that alleged he had been in an accident resulting in a closed head injury and amnesia. The motion also attached a hospital discharge summary that included a diagnosis of confusion and amnesia and indicated defendant was using prescribed medications: Zoloft, Synthroid, and Lipitor. Thus, in the absence of any evidence of bad faith, the record supports the conclusion that the prosecutor attempted in good faith to elicit evidence relevant to defendant's credibility. Accordingly, misconduct did not occur. Further, any prejudice from this brief colloquy was not so great that it denied defendant a fair and impartial trial. *Watson, supra* at 586.

Third, as already discussed regarding defendant's claim of ineffective assistance of counsel, the prosecutor properly argued that the evidence and reasonable inferences arising from the evidence supported his theory the case. *Bahoda*, *supra* at 282; *Aldrich*, *supra* at 112.

Fourth, the prosecutor did not shift the burden of proof by arguing no evidence supported defendant's claim that he accurately recorded the complainant's license plate number. This inconsequential fact did not relate to any element of the charged offenses for which the prosecutor bore the burden of proof. Both the prosecutor and the trial court in its instructions reminded the jury that it was the prosecutor's burden to prove guilt beyond a reasonable doubt.

Controlling here is our Supreme Court's decision in *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995), in which the Court observed,

> where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*Id*. at 115.]

Furthermore, the *Fields* Court opined,

> The nature and type of comment allowed is dictated by the defense asserted, and the defendant's decision regarding whether to testify. When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence. [*Id*. at 116.]

In the case at bar, defendant advanced a theory that the complaining witnesses must have

mistaken a cassette tape recorder for a handgun. Defendant supported his theory of the case by estifying that he dictated the complainant's license plate number into the tape recorder during the incident. The cassette tape recording was played at trial with a number defendant asserted was the complainant's license plate number. But no evidence was admitted at trial to verify the recorded number was actually the complainant's license plate number. Thus, the prosecutor's comment that, "there is absolutely no evidence whatsoever that the license plate number that he put on the tape recorder belonged to [the complainant]," was proper commentary on the lack of evidence supporting defendant's theory. *Fields*, *supra*.

The record does not support defendant's additional assertion that the prosecutor knew the tape-recorded plate number was accurate. Further, the prosecutor did not argue that the number was wrong, only that both parties failed to produce evidence to verify its accuracy. The prosecutor, however, inaccurately suggested that defense counsel could have, but did not, ask the investigating officer about the plate number when, in fact, defense counsel did so. But the trial court's instructing the jury that an attorney's arguments and statements are not evidence protected defendant's right to a fair and impartial trial regarding this inconsequential point. *Bahoda*, *supra* at 281; *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997).

In summary, in each instance of alleged misconduct, the comments of the prosecutor were either proper or so inconsequential that defendant was not denied a fair and impartial trial.

V. Jury Instructions

A. Preservation & Standard of Review

Defendant failed to preserve alleged instructional error by not objecting to the trial court's instruction on flight and failing to request an instruction on lawfully carrying of a firearm in a vehicle. MCL 768.29; *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

This Court reviews de novo jury instructions as a whole. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Imperfect instructions will not warrant reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Aldrich*, *supra* at 124. When preserved, the defendant bears the burden of showing that as a result of the alleged error when weighed against the facts and circumstances of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

Alleged instructional error that has not been preserved is forfeited but may be reviewed for plain error. *People v Carines*, 460 Mich 750, 761-763; 597 NW 2d 130 (1999); *Snider*, *supra* at 420. First, there must be an error; second, the error must be plain (i.e., clear or obvious); and third, the error must affect substantial rights (i.e., there must be a showing of prejudice or that the error was outcome determinative). *Carines*, *supra* at 763, 774. Further, reversal is warranted only when plain error results in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*.

B. Analysis

Defendant's arguments fail. Even if the trial court erred in its instructions, defendant has failed to establish that the errors were plain, clear, or obvious, and that they affected the outcome of the trial. *Id*. at 763, 774. In light of the strength of the prosecution's case and because the flight instruction would permit the jury, if it concluded that defendant fled, to draw either an innocent or inculpatory inference, defendant cannot meet his burden of establishing prejudice. Regarding not instructing the jury on lawful methods of transporting a firearm in a vehicle, as the trial correctly concluded, because the jury convicted defendant of felonious assault, it must necessarily have found defendant was not lawfully transporting his handgun because it was readily accessible to him in the vehicle. "'It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.'" *Id*. at 763, quoting *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

VI. Cruel or Unusual Punishment

A. Preservation & Standard of Review

Defendant preserved this issue by first raising it in the trial court. *Carter, supra* at 214. We review constitutional issues de novo. *In re Ayres, supra* at 10.

B. Analysis

Defendant argues that his sentence constitutes cruel or unusual punishment contrary to the Constitutions of Michigan and the United States. US Const, Am VIII; Const 1963, art 1, § 16. We disagree.

In determining whether a sentence is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation.[1] *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996), citing *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992), and *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972). This Court applied the *Lorentzen* test in *Wayne Co Prosecutor v Recorder's Court Judge (People v Meeks)*, 92 Mich App 433, 438-441; 285 NW2d 318 (1979), concluding that the mandatory minimum two-year term of imprisonment on being convicted of felony firearm "does not violate the constitutional prohibition against cruel or unusual punishment." *Id*. at 441. Because defendant focuses on the offender, and not the offense, defendant offers no meaningful argument in contradiction to this Court's analysis in *Wayne Co Prosecutor*. Accordingly, defendant's constitutional argument fails.

[1] The goal of rehabilitation may not be particularly relevant to analysis of the felony firearm statute, which provides for a determinate sentence. Our Supreme Court applied rehabilitation as a factor in analyzing claims of cruel or unusual punishment on the basis of Michigan's legal traditions rooted in indeterminate sentencing. *Bullock, supra* at 34, citing *Lorentzen*, supra at 179-181.

Defendant has advanced no other cognizable sentencing claim. The sentences imposed were within the statutory sentencing guidelines, and defendant does not allege, "an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). Accordingly, appellate relief is not available for defendant's sentences for carrying a concealed weapon or felonious assault. *Id.*; *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003); see, also, *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003). With regard to felony firearm, the trial court was required to impose its mandatory, determinate sentence of two years imprisonment. MCL 769.34(5)[2]

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell

[2] MCL 769.34(5) provides: "If a crime has a mandatory determinant penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime."