

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS FRANSWORTH BUCHANAN,

Defendant-Appellant.

UNPUBLISHED

October 7, 2004

No. 247138

Wayne Circuit Court

LC No. 02-004079

Before: Donofrio, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was charged with carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, defendant was convicted of felon in possession of a firearm and felony-firearm and later sentenced as an habitual offender, fourth offense, MCL 769.12, to consecutive prison terms of one to five years and two years, respectively. Defendant appeals his convictions as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in instructing the jury on the elements of the offenses of felon in possession of a firearm and felony-firearm with the result that the jury became so confused that it rendered inconsistent verdicts. Defendant failed to object to the instructions below and thus the issue has not been preserved. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003). Therefore, review is limited to plain error affecting the defendant's substantial rights. *Id.* at 643; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The court must "instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The instructions must include all elements of the charged offense and must not exclude material issues, defenses and theories if there is evidence to support them. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). This Court reviews a claim of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). As defendant asserts, the trial court did initially misstate the

instruction on felon in possession. However, the court later corrected its mistake and gave a second, complete instruction on felony-firearm predicated on felon in possession. Under these circumstances, we find that any error did not affect defendant's substantial rights.

Defendant next contends that trial counsel was ineffective because counsel did not offer to stipulate that defendant had been convicted of a specified felony, thereby entitling the prosecutor to present evidence of that conviction. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

If a defendant offers to stipulate to the fact of a prior felony conviction, it is error for the court to allow the prosecutor to admit evidence regarding the name and nature of that conviction. In light of such an offer, MRE 403 precludes admission of such evidence to prevent "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged" *People v Swint*, 225 Mich App 353, 378; 572 NW2d 666 (1997), quoting *Old Chief v United States*, 519 US 172, 180; 117 S Ct 644; 136 L Ed 2d 574 (1997). The risk of such unfair prejudice is heightened where the prior conviction was for a weapons offense or another felony similar to a pending charge. *Swint, supra* at 378. Absent such a stipulation, the prosecution is entitled to present evidence to prove that defendant had a prior felony conviction. *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999).

Counsel's decision is presumed to be a matter of trial strategy. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). Counsel may have determined that it was less prejudicial to reveal the nature of defendant's prior conviction rather than allow the jury to speculate about it. "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 Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Even if counsel erred in failing to stipulate because the prior felony conviction was identical to one of the charges pending against defendant, defendant is not entitled to relief unless he can show that he was prejudiced by counsel's error. *Watkins, supra*. Although defendant was previously convicted of possession of cocaine, it is clear that the jury did not draw any impermissible inferences regarding defendant's character because it acquitted defendant of the pending controlled substance charges.

Affirmed.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot