

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT CHARLES WEBBER,

Defendant-Appellant.

UNPUBLISHED

July 15, 2008

No. 276350

Isabella Circuit Court

LC No. 06-000458-FC

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was acquitted of assault with intent to commit murder, MCL 750.83, but convicted of felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to one to five years' imprisonment for the felon-in-possession conviction and to a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant's convictions arise from an incident in which he alleged shot Terry "T-Bone" Thomas. Thomas testified that he went to defendant's home to purchase drugs. According to Thomas, defendant was upset that Thomas had spoken to the police approximately a week earlier and was concerned that Thomas was a "snitch." While at defendant's home, the two became involved in an argument. According to Thomas, defendant then pulled a gun and shot him.

Defendant claimed that Thomas arrived at his house visibly drunk and out of control, demanding money and threatening him. According to defendant, the men were arguing on defendant's front porch when Thomas pulled a gun, so defendant approached Thomas and knocked the gun out of his hand. Defendant testified that he picked up the gun and demanded that Thomas leave, but Thomas swung a flashlight at him and struck defendant's hand with the gun, causing it to accidentally discharge. Defendant maintained that he thereafter went back into his house, not realizing that Thomas had been shot.

I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to support his convictions because his testimony was corroborated and the complainant's testimony was not credible.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Thomas's testimony that defendant pulled a gun and shot him, and the stipulation that defendant was a convicted felon, were sufficient to support defendant's convictions of felon-in-possession and felony-firearm. MCL 750.224f; MCL 750.227b. The credibility of Thomas's testimony was for the jury to resolve; it is not a basis for overturning defendant's convictions on sufficiency grounds. See *People v Crump*, 216 Mich App 210, 215; 549 NW2d 36 (1996).

II. Double Jeopardy

Defendant's dual convictions and sentences for both felon-in-possession and felony-firearm do not violate defendant's constitutional protection against double jeopardy. *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001).

III. Evidentiary Issues

Defendant challenges several of the trial court's evidentiary rulings. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). "However, whether a rule or statute precludes admission of evidence is a matter of law and is reviewed de novo." *Id.* A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

A. Thomas's Testimony

Defendant argues that the trial court erred by permitting Thomas to testify that he went to defendant's house to purchase drugs. We disagree. The evidence was admissible under MRE 404(b)(1) because it was relevant to defendant's motive for the shooting, a proper noncharacter purpose. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). It was the prosecutor's theory that defendant was angry with Thomas, who regularly purchased drugs from him, because Thomas had recently spoken to the police and defendant was concerned that Thomas was a "snitch." Additionally, Thomas's testimony regarding his purpose in going to defendant's house was admissible as part of the res gestae of the offense. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996); *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). The trial court did not abuse its discretion by admitting that evidence.

B. Thomas's Character

Defendant also argues that the trial court erred by excluding evidence of Thomas's character and propensity for violence. The trial court did not err by determining that MRE 404(a)(2) was not applicable because that rule explicitly permits evidence of a victim's character only in homicide cases. Moreover, the trial court did not abuse its discretion by determining that evidence of Thomas's intoxication and threats against defendant and others on prior occasions

was inadmissible under MRE 404(b)(1); such evidence did not rise to the level of showing that Thomas's conduct during the charged incident was characteristic of a general scheme, plan, or system. See *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Further, although the trial court did not allow such evidence under MRE 404(b)(1), the court permitted defendant to testify about Thomas's prior threatening conduct against him as it pertained to defendant's claim of self-defense. These evidentiary decisions reflect a reasonable and principled approach based on the evidence and the parties' theories. They accordingly did not constitute an abuse of discretion.

C. Exclusion of Defense Witness

Although the trial court permitted defendant to testify about a prior incident in which Thomas allegedly appeared at his home and acted in a threatening manner, it precluded another defense witness from testifying about the prior incident. Defendant argues that the exclusion of this witness's testimony was an abuse of discretion and denied him his constitutional right to present a defense.

All logically relevant evidence is admissible at trial, except as otherwise prohibited by the rules of evidence, the state or federal constitutions, or other court rules. MRE 402; *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. As our Supreme Court explained in *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995), "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact."

Here, the witness's testimony would have been relevant to corroborate defendant's testimony regarding the prior incident. Even if the trial court erred in excluding the evidence, however, the error was harmless. A preserved nonconstitutional error is not a ground for reversal unless 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). If the error is constitutional, the beneficiary of the error must establish that it is harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). The relevancy of the evidence related to defendant's claim of self-defense and to the assault-with-intent-to-commit-murder charge. Because the jury acquitted defendant of that charge, we must conclude that any error did not affect the outcome and was harmless beyond a reasonable doubt.

D. Felon-in-Possession Stipulation

As permitted by *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998), defendant agreed to stipulate to the existence of a prior conviction for purposes of establishing his status as a convicted felon for the felon-in-possession charge. But because the information listed two prior felony convictions in support of that charge, the trial court ruled that the stipulation was required to reflect the existence of two prior convictions. We find merit to defendant's argument that the trial court erred by requiring that the stipulation reflect two prior convictions. Only a single prior conviction was necessary to establish defendant's status as a

convicted felon, and defendant's willingness to stipulate to that fact eliminated the prosecutor's need to present proof on this element. Thus, the need to list a second conviction was unnecessary, and doing so contravened the purpose of the stipulation, which was to minimize the prejudice to defendant. *Id.* at 691; see also *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997).

Again, however, we conclude that reversal is not required with respect to this issue. The potential prejudice of the additional conviction was that it portrayed defendant as a repeat felony offender, creating a risk that the jury might convict him of the other substantive assault charge because of his criminal status. However, the fact that the jury acquitted defendant of that charge indicates that it was not improperly influenced by the evidence. Thus, it is not more probable than not that any error affected the outcome and any error was harmless. *Lukity, supra* at 495-496.

IV. Jury Instructions

Defendant next argues that the trial court failed to adequately instruct the jury on the element of possession and the requisite mens rea necessary to be guilty of felon-in-possession and felony-firearm. Because defendant did not object to the trial court's jury instruction, this issue is not preserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Jury instructions are reviewed in their entirety to determine whether there was error requiring reversal. *Id.* We will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Here, the trial court's instructions adequately explained the concept of possession. See *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993). Additionally, because the firearm offenses are general intent crimes, as opposed to specific intent crimes, they do not require a criminal intent beyond the act done. *People v Fennell*, 260 Mich App 261, 266; 677 NW2d 66 (2004); *People v Disimone*, 251 Mich App 605, 610-611; 650 NW2d 436 (2002). Therefore, the prosecutor merely had to prove that defendant knowingly possessed a firearm. *People v Hernandez-Garcia*, 266 Mich App 416, 418-420; 701 NW2d 191 (2005), *aff'd in part and vacated in part* 477 Mich 1039 (2007). The trial court instructed the jury that defendant must have "knowingly carried or possessed a firearm" in order to be convicted. We perceive no plain error.

V. Sentencing

A. Offense Variable 1

Defendant presents several arguments in support of his claim that the trial court erred by scoring 25 points for offense variable (OV) 1.

Initially, we reject defendant's reliance on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), to argue that the trial court improperly relied on facts not found by the jury to score OV 1, thereby violating his Sixth Amendment rights. Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v*

Drohan, 475 Mich 140, 159-160; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Defendant also argues that the evidence did not support a score of 25 points for OV 1. We disagree. In scoring a particular offense variable, a trial court's determination need only be supported by a preponderance of the evidence. *Drohan, supra* at 142-143. Twenty-five points may be scored for OV 1 if "a firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon." MCL 777.31(1)(a). Thomas testified that defendant shot him during an argument, and Thomas was subsequently treated for a gunshot wound. This evidence amply supported the trial court's scoring decision.

The fact that the jury acquitted defendant of assault with intent to commit murder did not preclude the trial court from finding by a preponderance of the evidence that a firearm was discharged toward a human being. *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993). And by scoring 25 points for OV 1, the trial court did not impermissibly make an independent finding that defendant was guilty of the higher assault offense and then sentence defendant on that basis. See *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996). Nor did the trial court's scoring decision violate defendant's double jeopardy rights. Defendant neither endured successive prosecutions for the same offense nor multiple punishments for the same offense. See *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). We find no error in the scoring of OV 1.

B. Habitual Offender Status

Defendant argues that he was improperly sentenced as a fourth habitual offender because the habitual offender information was not timely filed. Because defendant never moved to dismiss the supplemental information or objected to his habitual offender status in the trial court, this issue is not preserved. Therefore, defendant must establish a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The record supports defendant's claim that the habitual offender notice was not timely filed, thereby establishing a plain error. *People v Bollinger*, 224 Mich App 491, 492-493; 569 NW2d 646 (1997). We conclude, however, that defendant's substantial rights were not affected. Although the habitual offender statute, MCL 769.12, would have permitted defendant's statutory five-year maximum sentence for felon-in-possession to be increased, the trial court did not impose an enhanced sentence. Further, the sentence imposed, one to five years, was within the appropriate guidelines range of 10 to 23 months for the felon-in-possession offense. MCL 777.66. Because the untimely habitual offender notice did not affect defendant's substantial rights, appellate relief is not warranted in this regard.

VI. Effective Assistance of Counsel

Defendant argues that he did not receive the effective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or by requesting a *Ginther*¹ hearing,

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

our review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To justify reversal under either the federal or state constitution, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, the defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 600. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defendant first contends that counsel was ineffective for failing to object to the trial court's deficient instructions. As previously discussed, the jury instructions were sufficient, so defense counsel was not ineffective for failing to object to them. Counsel was not required to make a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant next contends that counsel was ineffective for failing to object to the untimely supplemental information. As previously discussed, however, the trial court did not enhance defendant's sentence under MCL 769.12, and defendant was sentenced within the appropriate guidelines range for the underlying offense. Therefore, defendant has not shown the requisite prejudice to establish a claim of ineffective assistance of counsel.

Defendant also contends that counsel was ineffective for failing to object to evidence on the ground that it was unduly prejudicial. It is not apparent from the record that the challenged evidence was inadmissible or prejudicial. Evidence of marijuana that was found in defendant's home was relevant to the issue of defendant's drug-dealing activities, which in turn were related to defendant's alleged motive for shooting Thomas. The two guns that were found in a bedroom dresser were described as a BB gun and a paint-ball gun, and there was no suggestion that either was related to the charged offense. Similarly, there was no suggestion that either a baton or "SAP" weapon found in defendant's house was connected to the charged offense. Even if counsel should have moved to exclude evidence of the weapons, we cannot conclude that there is a reasonable probability that the result of the proceeding would have been different had the evidence been excluded.

Defendant lastly contends that counsel should have argued to the jury that "they can find whatever facts they wish and if they didn't believe the Defendant should be convicted, they don't have to convict him." Defendant essentially argues that trial counsel should have presented a jury nullification argument. "Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence." *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). While a jury has the power to exercise jury nullification, it does not have the right to do so. *Id.* at 207. Because defendant had no right to assert a jury nullification defense, see *id.* at 208, counsel was not ineffective for failing to argue it.

VII. Defendant's Supplemental Brief.

Defendant raises two additional issues in a supplemental brief filed *in propria persona*, neither of which has merit.

A. Accuracy of the Presentence Report

Defendant argues that the trial court erred in its response to his challenges to the accuracy of the presentence report, and that he was therefore sentenced on the basis of inaccurate information. We disagree.

A trial court's response to a challenge to the accuracy of the information in a presentence report is reviewed for an abuse of discretion. *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008).

At sentencing, defendant argued that his presentence report inaccurately indicated that he was single, unemployed, and had only one year of college. The trial court agreed to correct the mistakes. Although defendant contends that the corrections were never made, the copy of the presentence report received by this Court indicates that defendant is married, received income from playing in a band and from rental property, and attended four years of college, consistent with the corrections defendant requested at sentencing. Accordingly, we find no error in this regard.

Defendant further objected to the accuracy of a statement in the "Evaluation and Plan" section of the presentence report, which indicated that the offense appeared to arise from drug sales. The trial court declined to change this statement, concluding that it was not inaccurate. Because the statement is consistent with the evidence at trial, the trial court did not abuse its discretion by declining to change the statement.

In addition, defendant objected to the accuracy of the "Agent's Description of the Offense" in the presentence report. The trial court also declined to change this section because it was supported by the trial testimony. Because this portion of the report conforms to the evidence presented at trial, we cannot conclude that the trial court abused its discretion by refusing to change it. Further, we note that defendant was not entitled to add information to this section of the presentence report to convey his version of the events. Defendant's version was already included in another section of the presentence report and the challenged portion accurately stated that it was only the "Agent's Description" of the offense.

B. Prosecutorial Misconduct

Defendant lastly argues that the prosecutor's conduct denied him a fair trial. We disagree.

Questions of misconduct by the prosecutor are decided case by case. This Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Here, however, defendant did not object to the prosecutor's conduct. Appellate review of allegedly improper conduct is precluded where the

defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

Defendant first asserts that the prosecutor improperly introduced irrelevant and prejudicial information. However, evidence that Thomas feared defendant and that scales found in defendant's home were for narcotics was relevant to the prosecutor's theory that defendant shot Thomas because he was concerned that Thomas was talking to the police about his activities. The prosecutor was entitled to comment on this evidence, as well as the evidence concerning weapons in defendant's home. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Defendant has failed to show that the prosecutor's questioning of Douglas and Darcy Hovey was improper or affected his substantial rights. Defendant also argues that the prosecutor improperly insisted that the stipulation show two prior felony convictions rather than one. However, as previously discussed, even if improper, defendant was not prejudiced by this stipulation.

Defendant also asserts that the prosecutor improperly vouched for his witnesses. A prosecutor properly may argue from the evidence that a witness is credible, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). But a prosecutor may not vouch for the credibility of a witness by suggesting that the government has some special knowledge that the witness's testimony is truthful. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

To the extent that the prosecutor's questioning of Darcy Hovey could be considered improper vouching, it did not affect defendant's substantial rights because Hovey did not provide any testimony concerning the charged offenses. Further, we find no error requiring reversal in the prosecutor's argument that the Hoveys' appearances and demeanor while testifying indicated that they were credible. Even if erroneous, this argument was not decisive to the outcome of defendant's trial.

Next, we have concluded that the prosecutor correctly and accurately informed the jury that constructive possession sufficed to prove the element of possession in this case. See, e.g., *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995), overruled on other grounds *People v Burgenmeyer*, 461 Mich 431; 606 NW2d 645 (2000).

Lastly, we find no merit to defendant's argument that the prosecutor repeatedly argued facts not supported by the evidence. Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence. *Watson*, *supra* at 588. Moreover, the prosecutor is not required to state his inferences in the blandest possible terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Here, the challenged remarks were supported by the evidence and reasonable inferences arising from the evidence. Accordingly, there was no plain error.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra