

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS DEON OGDEN,

Defendant-Appellant.

UNPUBLISHED

July 31, 2008

No. 278372

Kalamazoo Circuit Court

LC No. 06-001566-FC

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of carrying a dangerous weapon with unlawful intent, MCL 750.226, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, first-degree home invasion, MCL 750.110a(2), assault and battery, MCL 750.81, criminal sexual conduct in the third degree, MCL 750.520d(1)(b), cutting/tapping a telephone line, MCL 750.540, resisting and obstructing a police officer, MCL 750.81d(1), aggravated stalking, MCL 750.411i, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

According to complainant, she and defendant began dating in January of 2006. Defendant moved in with complainant in February. Toward the end of March she noticed that defendant “had an aggressive side” and decided to end their relationship. Defendant moved out in May, but they continued to see each other occasionally and to speak on the phone. On July 9, 2006, she left her house and found defendant standing next to a nearby tree. He lifted his shirt, and complainant saw what appeared to be a pistol grip. He told her not to call the police. Defendant came to her front porch, and she joined him. They spoke, and defendant began to curse at her. He left five minutes later. He went across the street and again began to curse at her. He pulled an object from his waistband, and complainant started to run away from the house. She heard a gunshot as she reached the driveway. She ran to her neighbor’s home and called the

¹ Defendant was acquitted of additional charges of felonious assault, MCL 750.82, felony-firearm based on the assault, and assault with intent to murder, MCL 750.83.

police. For the next few days, defendant continually called complainant and drove by her home, but did not leave his car when she told him that she would call the police.

On July 12, 2006, complainant and her children returned from her neighbor's home at approximately 1:00 a.m. After she entered her home and locked the front door, she heard a noise in her kitchen. She tried to reopen the door, but defendant slammed the door shut. He asked her where she had been and told her to put the children to bed. She did so. Defendant then accused her of having sex with another man. He made her disrobe, followed her to her living room, and threw her on her bed. He straddled her chest and began to choke her. He held her down and had vaginal intercourse with her. When he finished, he fell asleep. Later that morning, complainant took one of her children to summer school and called the police from the parking lot. She returned to her home. Defendant saw police officers arrive and ran out the back door of the home. Defendant failed to stop in response to a police order to do so, but was apprehended.

On appeal, defendant raises three claims of ineffective assistance of counsel concerning the use at trial of his previous felonious assault conviction. In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is "limited to mistakes apparent on the record." *Id.* "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing before the trial court, our review of his ineffective assistance claim is limited to mistakes apparent on the record. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* (internal citations omitted.) "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*

Defendant argues that his counsel was ineffective for failing to object to an erroneous jury instruction. The trial court instructed the jury, pursuant to CJI2d 3.4, that:

There is evidence that the defendant has been convicted of a crime in the past. You may consider this evidence only in deciding whether you believe the defendant is a truthful witness. You may not use it for any other purpose. A past conviction is not evidence that the defendant committed the alleged crime in this case.

MRE 609 provides, in part, that the credibility of a witness may be attacked through presentation of a prior conviction if that crime involved an element of dishonesty, false statement, or theft. MRE 609(a). Because defendant's prior conviction for felonious assault does not involve an element of crime or dishonesty, the trial court's instruction was erroneous.²

We agree with defendant that defense counsel should have objected to this instruction. However, we find that defendant has not shown that he was provided ineffective assistance because he has not established a reasonable probability that the outcome would have been different but for counsel's error. Strong evidence was introduced at trial that defendant committed the crimes charged. This evidence included complainant's testimony, the testimony concerning the discovery of the spent shell casing where defendant was standing when he allegedly fired at complainant, the DNA and other physical evidence supporting complainant's testimony about the sexual assault, defendant's flight, and defendant's letter to his current girlfriend outlining his attempt to influence witness testimony and falsify an alibi.

We also note that a major purpose behind MRE 609 is the recognition that "the relationship of the commission of a crime to veracity is often present only when seen through the prejudicial conclusion that the witness-accused is of bad general character." *People v Allen*, 429 Mich 558, 593; 420 NW2d 499 (1988). It was also designed in part to remove "the burden placed upon truth finding when a defendant chooses not to testify out of fear of prior conviction impeachment." *Id.* at 603. See also MRE 609(b). In this case, however, the jury was already permitted to discover the nature of defendant's prior offense, because it formed an element of the felon in possession charge, and defendant did not stipulate to the introduction of an unspecified felony conviction. See *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999); *People v Mayfield*, 221 Mich App 656, 659-660; 562 NW2d 272 (1997).³ Defendant cannot claim he suffered an improper testimonial burden due to the erroneous instruction. In addition, the instruction correctly informed the jury that it could not use defendant's prior conviction as propensity evidence or as evidence that defendant committed any crime charged, other than felon in possession. Thus, the major prejudicial effects of the introduction of defendant's prior conviction were properly addressed. While the trial court erroneously instructed the jury that it could consider irrelevant evidence in deciding whether defendant was a credible witness, see *Allen*, *supra* at 593-596, this does not rise to the level of outcome-determinative error. Other prejudicial evidence was properly introduced that had a greater negative bearing on defendant's credibility, including his inculpatory written statements after his incarceration. Under the circumstances, the possible contemplation of this irrelevant credibility evidence appears minor. Based on the record before us, we cannot conclude defendant was prejudiced by counsel's error.

² The trial court's instruction was also erroneous in that the jury could use this conviction substantively to satisfy an element of the felon in possession charge. However, as this error arguably ran to defendant's benefit, we find that it is not a ground for reversal.

³ Defendant intimates that counsel's failure to so stipulate was arguably improper. However, because a stipulation could have left the jury wondering whether defendant had been convicted of a more serious offense, the decision to not stipulate could be considered a valid trial tactic.

In a related issue, defendant appears to argue that counsel provided ineffective assistance for failing to object to the trial court's jury instruction on other acts evidence. However, defendant does not develop this claim in any detail. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority. Such cursory treatment constitutes abandonment of the issue." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (quotations omitted). Thus, defendant has not provided a basis for this Court to address this issue. We also note that the trial court's instruction was generic and was applicable to defendant's other prior acts, including criminal acts, which were properly introduced at trial. The instruction was not erroneous.

Defendant also asserts that the prosecutor improperly urged the jury to find that he was guilty in the instant case because he had engaged in assaultive behavior in the past. The prosecutor appears to have actually attempted to argue the opposite, in response to defense counsel's argument that the jury should disbelieve complainant's testimony solely because she had prior convictions for retail fraud and filing a false report. During closing arguments, defense counsel stated:

Keep in mind we're dealing with a person who testified for like several hours—[complainant]—who is a liar, a convicted liar and a convicted thief. It's not that you folks have to determine whether or not she was convicted of those things; she, in fact, was. That's been determined. And you folks have to keep that in mind. Once a liar, always a liar; once a thief, always a thief.

During rebuttal, the prosecutor responded:

Was [complainant] convicted on—I don't know—six or seven years ago when she was about 20 of telling the police a false statement? Yep. About 20 years old, she gave some kind of false statement. I don't know what it was.

* * *

We're not talking about who lied to the police seven years ago; we're talking about who's lying to the jury today.

* * *

Defense counsel also made a statement, wow, she's a proven liar: once a liar, always a liar; once a thief, always a thief. Hmm, I don't like that analogy. I don't know if I do.

Once somebody assaults with a weapon, they always assault with a weapon? Are we going to carry the logic that far? If we are, he's the one who's been convicted of assault with a dangerous weapon before.

The thrust of the prosecutor's statements was that the fact that complainant had lied in her distant past did not mean that she was lying about defendant's assault. When the prosecutor's comments are considered in light of defendant's arguments, *People v Messenger*, 221 Mich App

171, 181; 561 NW2d 463 (1997), they were arguably a proper, if perhaps somewhat inarticulate, attempt to rehabilitate her witness, not a claim that the jury should find defendant guilty only because he had a prior conviction. We find that defense counsel did not act objectively unreasonably in choosing not to object. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Moreover, even were we to determine that defense counsel should have objected to this statement, we would nevertheless hold that defendant has not met his burden of proving ineffective assistance. As noted above, the evidence of guilt was substantial. Also, the trial court's instruction quoted above correctly warned the jury to not use defendant's prior conviction as propensity evidence. In addition, defendant was acquitted of the charge of felonious assault, the most similar charge to defendant's prior conviction. This supports a finding that the jury did not use defendant's prior conviction as propensity evidence of defendant's guilt in this case.

Under the circumstances, we find that defendant has not established ineffective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello