STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2008
v	No. 276599 Oakland Circuit Court
AKILI EUGENE ARMSTRONG, Defendant-Appellant.	LC No. 2006-207259-FH

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f(1), possession of a firearm during the commission of a felony, second offense, MCL 750.227b(1), resisting or obstructing a police officer, MCL 750.81d(1), and operating a vehicle under the influence of liquor (OUIL), second offense, MCL 257.625(1) and (9). Defendant was sentenced as a third-felony habitual offender, MCL 769.11, to concurrent prison terms of two to ten years for the CCW conviction, five years for the felony-firearm conviction, and two to four years for the resisting or obstructing conviction, to be served consecutively to a prison term of two to ten years for the felon in possession conviction, those sentences to be served consecutively to a sentence for a prior offense that defendant was serving while on parole. Defendant also received a sentence of 365 days for the OUIL conviction, with credit for 384 days served. He appeals as of right. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

I. Defendant's Sentencing Issues

Defendant first argues, and the prosecutor agrees, that the judgment of sentence inaccurately specified the order in which defendant's sentences are to be served. Defendant's felony-firearm sentence is required to be served "consecutively with and preceding any term of imprisonment imposed for the conviction of the [predicate] felony," here the felon in possession sentence. MCL 750.227b(2). Additionally, the felony-firearm sentence is to be served concurrently with defendant's remaining sentences. *People v Clark*, 463 Mich 459, 463-465; 619 NW2d 538 (2000). Thus, the felony-firearm sentence is to be served first, and concurrently with defendant's sentences for CCW, resisting or obstructing, and OUIL, and the felon in

possession sentence shall be served consecutively to the felony-firearm sentence.[1] Accordingly, we remand for correction of the judgment of sentence consistent with this opinion.

Defendant next argues that the trial court erred by failing to award him credit for time served against each of his sentences. We disagree.

Defendant argues that he is entitled to credit under MCL 769.11b, which provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing *because of being denied or unable to furnish bond for the offense of which he is convicted*, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing. [Emphasis added.]

In this case, however, defendant committed the offenses while on parole. Therefore, after his arrest, he was held on a parole detainer and, pursuant to MCL 768.7a(2), his sentences in this case were required to be served consecutively to "the remaining portion of the term of imprisonment imposed for the previous offense." This Court has repeatedly held that a person sentenced for a crime committed while on parole is entitled to sentence credit only against the time remaining on the sentence for which he was on parole, not against the new sentences. *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006); *People v Seiders*, 262 Mich App 702, 705-707; 686 NW2d 821 (2004). That is because "[a] parolee who is arrested for a new offense and is incarcerated on a parole detainer serves jail time on the paroled offense," not because he was denied or unable to post bond for the new offense. *Id*. at 707.

We reject defendant's argument that it is a double jeopardy violation to deny him sentence credit against his new sentences. Defendant's argument is based on the inaccurate assumption that because he had already served the *minimum* portion of his sentence for the paroled offense, credit could not be given against that sentence. Even if defendant had served the minimum portion of his prior sentence, he was still liable to serve out the unexpired portion of his maximum sentence for the paroled offense. *Id*. at 706. It is against that sentence that defendant receives credit for his time served.

Defendant's reliance on *People v Vassar*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2003 (Docket No. 231246), to argue that he may be entitled to credit against his new sentences is misplaced. Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). Further, this Court has rejected arguments for credit predicated on *Vassar* in other cases. See *People v Walker*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2007 (Docket No. 263278), slip op at 6, and *People v Musafir*, unpublished opinion per curiam of the Court of Appeals, issued October 31, 2006 (Docket No. 262940), slip op at 3. More significantly, *Vassar* is inconsistent with *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994), in which this Court held that time

[1] Additionally, because defendant was on parole when he committed the offenses, all sentences are required to be served consecutively to defendant's sentence for the parole offense. MCL 768.7a(2).

served on a parole detainer is still credited against the prior sentence, even if parole violation proceedings are later abandoned.

Here, there is no indication, nor does defendant assert, that defendant was discharged from his prior sentence before being sentenced in this case. Thus, during his incarceration, defendant continued to serve the remaining portion of his prior sentence, and he was entitled to credit only against that sentence for the time served. We note that the trial court did award defendant credit for 384 days served, but only against his OUIL sentence. Although it appears that defendant was not entitled to that award of credit, the prosecutor has not raised this issue in a cross-appeal, so we will not disturb it.

In a supplemental brief filed in propria persona, defendant argues that the trial court erred by not specifically crediting the 384 days served against his prior sentence. Although we agree that the 384 days is to be credited against defendant's prior sentence, neither the trial court nor this Court has jurisdiction to enter an order affecting the prior case. See *People v Watts*, 186 Mich App 686, 687 n 1; 464 NW2d 715 (1991). If defendant believes that time was not properly credited against his prior sentence, he may enforce his rights in an appropriate proceeding. *Id*.

In sum, because defendant committed the present offenses while on parole, he was not entitled to credit for time served against his new sentences.

Defendant also argues in his supplemental brief that the trial court erroneously assessed costs of $320 and a fee of $60. Defendant did not object to these costs and fee at sentencing. Therefore, this issue is unpreserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

As defendant correctly argues, a court may not impose costs unless costs are specifically authorized by statute. *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). Contrary to defendant's assertion, however, the trial court did not award the costs and fee as restitution to a crime victim. Rather, MCL 257.625(13) authorized the trial court to order defendant to pay the costs associated with his prosecution for OUIL. Further, the crime victim's rights act, MCL 780.905(1)(a), required the trial court to assess a fee of $60 upon defendant's conviction of a felony. Therefore, the trial court's assessment of the costs and fee was not plain error.

II. Defendant's Remaining Issues in his Supplemental Brief

A. Effective Assistance of Counsel

Defendant argues that defense counsel committed numerous errors that, individually and cumulatively considered, deprived him of the effective assistance of counsel. We disagree.

Because defendant failed to raise this issue in a motion for a new trial or request for a *Ginther*[2] hearing, our review is limited to mistakes apparent from the record. *People v Hurst*,

[2] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

205 Mich App 634, 641; 517 NW2d 858 (1994).[3] To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct is sound trial strategy and must further show that he was prejudiced by the error in question (i.e., demonstrate a reasonable probability that but for counsel's error the outcome of the proceedings would have been different). *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* 312-314. Defendant must also demonstrate that the proceedings were fundamentally unfair or unreliable. *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Where counsel's conduct involved a choice of strategies, it was not deficient. *LaVearn*, *supra* at 216. Every effort must be made to eliminate the effects of hindsight. *Id*.; see also *People v Stanaway*, 446 Mich 643, 688; 521 NW2d 557 (1994).

1

Defendant argues that defense counsel was ineffective for failing to stipulate to his prior conviction, thereby allowing the nature of the prior conviction, for felon in possession of a firearm, to be mentioned at trial, and thereby allowing the introduction of exhibits relating to the prior conviction.

As defendant correctly argues, when a defendant is charged with felon in possession of a firearm, it is permissible for a defendant to stipulate to the existence of a prior felony conviction, without disclosing the nature of the prior conviction. *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997). In this case, however, the record discloses that defendant informed his attorney before trial that he was not willing to make any stipulations with the prosecutor and instead wished "to proceed with all proofs in all aspects of the trial, so it's necessary to put in all evidence." Accordingly, there is no merit to defendant's argument that defense counsel was ineffective for failing to stipulate to defendant's prior felony conviction.

Similarly, defense counsel was not ineffective for failing to move to sever the felon in possession charge from the remaining charges. Because the charge arose from the same conduct as the remaining charges, severance would not have been appropriate. MCR 6.120(B)(1); *People v Girard*, 269 Mich App 15, 17-18; 709 NW2d 229 (2005). Defense counsel was not ineffective for failing to make a futile motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant also argues that counsel was ineffective for failing to request a cautionary instruction advising the jury of the limited, permissible use of defendant's prior felon in possession conviction. Counsel reasonably may have chosen not to ask for a cautionary instruction to avoid drawing additional attention to the prior conviction. Defendant has not

[3] Defendant indicates that a remand is necessary in order for him to further develop his ineffective assistance of counsel claim. We note that this Court previously denied defendant's motion for a remand, and we decline to revisit that decision.

overcome the presumption of sound trial strategy. Further, the prior conviction was admissible to prove the felon in possession charge, and there is no indication in the record that the prosecutor attempted to use the prior conviction for an improper purpose. Therefore, defendant was not prejudiced by the absence of a cautionary instruction.

2

Defendant argues that defense counsel was ineffective for failing to object when the trial court referred to a dismissed charge of possession of a firearm while under the influence of liquor, MCL 750.237(2), during its jury instructions. We disagree.

The decision whether to object is presumed to be a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The court started to refer to a sixth count, but then corrected itself and remarked, "Strike that." Only someone already familiar with the dismissed charge would have interpreted the court's brief misstatement as referring to that charge. Under the circumstances, it was reasonable for counsel to conclude that there was no basis for any objection. Accordingly, counsel was not ineffective for failing to object. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

3

Defendant next argues that counsel was ineffective for failing to request a cautionary instruction concerning the proper use of evidence that defendant refused to take a Breathalyzer test. As defendant observes, MCL 257.625a(9) provides that a person's refusal to submit to a chemical test is admissible only to show that a test was offered, not as evidence of guilt. MCL 257.625a(9) further requires that the jury be instructed accordingly.

In this case, defendant stipulated to the results of his blood-alcohol test, and to the fact that he declined to submit to a Breathalyzer. Defense counsel may have decided not to request a cautionary instruction to avoid drawing additional attention to defendant's lack of cooperation after his arrest. Further, the prosecutor never argued that defendant's refusal to submit to a Breathalyzer was evidence of guilt for the OUIL charge, but instead relied on defendant's .16 blood-alcohol level. Under the circumstances, defendant has failed to overcome the presumption of reasonable trial strategy, nor has he demonstrated a reasonable probability that the outcome of the trial would have been different if a cautionary instruction had been given.

4

We next reject defendant's claim that defense counsel was ineffective for failing to make an opening statement. The decision whether to make an opening statement is a matter of trial strategy. *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007). The purpose of an opening statement is to tell the jury what the party intends to prove. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 503; 668 NW2d 402 (2003).

In this case, defense counsel reserved his opening statement. When defendant later decided not to testify, defense counsel waived his opening statement and the defense rested without calling any witnesses. Defendant has failed to overcome the presumption that defense counsel reserved his opening statement as a matter of sound trial strategy, because of uncertainty

over whether defendant would testify, and then later reasonably waived the opening statement because the defense did not intend to present any evidence.[4]

5

Defendant next argues that defense counsel was ineffective for failing to present a substantial defense, such as one based on racial profiling. We disagree.

An attorney is ineffective if he makes a serious error that deprives a defendant of a substantial defense, i.e., one that might have changed the outcome of the case. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). In this case, however, the record does not support defendant's claim that a defense based on racial profiling would have been viable. On the contrary, defendant's girlfriend, who was a passenger in defendant's car when he was stopped, testified that defendant was intoxicated, that he was weaving in traffic, and that the police justifiably stopped his vehicle. Defense counsel was not ineffective for failing to pursue a meritless defense. See *People v Lloyd*, 459 Mich 433, 447-451; 590 NW2d 738 (1999). For this same reason, there is no merit to defendant's claim that defense counsel was ineffective for failing to move to suppress evidence or object to its admission at trial on the basis that the police impermissibly stopped his vehicle because of racial profiling. *Kulpinski*, *supra* at 27.

Further, it is apparent from the record that defense counsel pursued a strategy at trial of attempting to establish a reasonable doubt concerning whether defendant possessed the firearm that the police found under defendant's car. Given the undisputed evidence of defendant's blood-alcohol level and his prior conviction, and the struggle between defendant and the police officers that was depicted on a police videotape, counsel's strategy was not unreasonable. The fact that counsel's strategy did not work does not prove that counsel was ineffective. *Matuszak*, *supra* at 61.

6

Defendant also argues that defense counsel was ineffective for opening the door to the admission of the original parole order indicating that defendant had been informed that he was ineligible to possess a firearm.

Defendant's parole officer produced it in response to defense counsel's questions concerning his knowledge of the case. Defense counsel questioned the officer about the document and did not oppose its admission. At that point, however, the fact of defendant's prior conviction had already been admitted, as well as another prior order informing defendant that he was ineligible to possess a firearm. Therefore, defendant was not prejudiced by the introduction of the new document.

[4] It is possible that defendant's failure to testify precluded defense counsel from giving a viable opening statement.

7

Next, defendant has not overcome the presumption that defense counsel reasonably stipulated to the qualifications of the prosecutor's fingerprint expert as a matter of trial strategy, in an attempt to avoid highlighting the witness's qualifications to the jury. Further, defendant has not shown that the witness would not have been qualified to testify as an expert, so there is no basis for concluding that defendant was prejudiced by counsel's stipulation.

We also find no merit to defendant's claim that counsel was ineffective for failing to secure his own fingerprint expert. The evidence showed that no usable fingerprints were found on the items tested. Thus, there is no basis for concluding that a fingerprint expert could have provided a substantial defense. See *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002).

8

Defendant also argues that defense counsel was ineffective for failing to properly investigate and research this case. An attorney's failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). In this case, however, defendant does not explain how additional investigation would have produced evidence to support his evidence-tampering theory. Further, defendant's unsupported claim that the police altered the videotape is inconsistent with his girlfriend's testimony that she saw the handle of a gun protruding from a pouch on the driver's door of defendant's car. Thus, we find no merit to this claim.

9

We also reject defendant's claim that defense counsel was ineffective for failing to impeach Officers VanLacken and Langewicz with their preliminary examination testimony.

The preliminary examination transcript does not support defendant's argument that the videotape that was played at the preliminary examination did not depict the "dark spot" in defendant's car door. There was no questioning on this subject. Moreover, if defense counsel had attempted to impeach the officers on this subject at trial, it may have opened the door for the prosecutor to question them concerning how the dark spot was eventually discovered. Defendant has not overcome the presumption of sound trial strategy, nor has he shown that he was prejudiced by the alleged deficiency.

10

Defendant also argues that defense counsel was ineffective in failing to object to the prosecutor's misconduct discussed in section II(B), *infra*. Because defendant's claims of prosecutorial misconduct lack merit, defense counsel was not ineffective for failing to object. *Kulpinski, supra* at 27.

Defendant lastly argues that defense counsel was ineffective for failing to object at sentencing to the trial court's decision not to award credit for time served. As explained in section I, *supra*, defendant was not entitled to credit for time served against his new sentences. Therefore, counsel was not ineffective for failing to object. *Id*. To the extent that defendant is arguing that counsel failed to ensure that credit was applied to his prior sentence, we reiterate that the lower court was not empowered to enter orders with regard to the prior sentence. If defendant believes that time was not properly credited against his prior sentence, he may enforce his rights in an appropriate proceeding. *Watts*, *supra* at 687 n 1.

B. Prosecutorial Misconduct

Defendant argues that the prosecutor bore equal responsibility with defense counsel for the alleged deficiencies discussed in section II(A), thereby committing misconduct that deprived defendant of a fair trial. Defendant adds that the prosecutor also committed misconduct by raising the issue of defendant's prior conviction and bad character in his opening statement, by breaching an agreement to stipulate to exhibit 23, by coercing or leading defendant's girlfriend to lie about seeing a gun in defendant's car, and by vouching for her credibility during closing argument. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Because defendant did not object to any of the challenged conduct, however, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. "[A]ppellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *Noble*, *supra* at 660.

We find no merit to defendant's claims attempting to attribute the alleged deficiencies by defense counsel to the prosecutor. Furthermore, having determined that defendant's ineffective assistance of counsel claims lack merit, we similarly conclude that his claims of prosecutorial misconduct, premised on the same alleged underlying errors, e.g., the introduction of defendant's prior conviction to prove the felon in possession charge, the introduction of exhibits, and allegations of evidence tampering, also lack merit.

Likewise, there is no merit to defendant's claim that the prosecutor breached his agreement to stipulate to defendant's blood-alcohol level of .16. By arguing that defendant's blood-alcohol level was twice the legal limit, the prosecutor made a permissible argument based on the stipulated evidence. See *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), remanded on other grounds 439 Mich 896 (1991).

The record also fails to support defendant's claims that the prosecutor improperly coerced or caused defendant's girlfriend to lie about seeing a gun in the door of defendant's car, or that the prosecutor improperly vouched for her credibility during closing argument. At trial, defendant's girlfriend testified consistently with her prior statement that she saw a gun in the pouch of the driver's door. She also identified her statement and agreed that it was true and

accurate, and that she had signed it. In closing argument, the prosecutor properly argued, based on the evidence, that defendant's girlfriend was telling the truth. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). There was no misconduct.

Lastly, the record does not support defendant's claim that the prosecutor knowingly presented perjured testimony. The mere fact that there were some perceived inconsistencies in some of the witnesses' testimony, or that some witnesses omitted certain details in their testimony at the preliminary examination, does not establish that the witnesses committed perjury or that the prosecutor was aware of any perjury. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998).

C. Defendant's Remaining Arguments

Because defense counsel expressed satisfaction with the court's jury instructions, defendant's claims of instructional error are waived. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). In any event, contrary to defendant's argument, the trial court did not improperly refer to the dismissed charge in its instructions. Defendant's remaining claims of instructional error are devoid of any detail concerning what specific errors are alleged. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), lv den 465 Mich 933 (2001).

As previously discussed, there is no record support for defendant's claims that the police tampered with evidence and committed perjury.

Lastly, there is no merit to defendant's unpreserved claim that the jury's verdict was against the great weight of the evidence. Defendant has failed to show that the witnesses' testimony was so improbable or so far impeached that it could not be believed; accordingly, there is no justification for overturning the jury's verdict. *People v Lemmon*, 456 Mich 625, 643-647; 576 NW2d 129 (1998).

Affirmed and remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder