STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 12, 2009
v	No. 286821 Wayne Circuit Court
SHAWN STERLING COATS, Defendant-Appellant.	LC No. 07-024999-FH

Before: Hoekstra, P.J., and Murray and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for carrying a concealed weapon (CCW), MCL 750.227; assaulting or resisting a police officer causing bodily injury requiring medical attention, MCL 750.81d(2); possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant first challenges the sufficiency of the evidence supporting his CCW, possession of a firearm by a felon, and felony-firearm convictions. Specifically, defendant only challenges the element of possession regarding these three convictions. See MCL 750.277, MCL 750.224f, and MCL 750.227b. We review the evidence de novo, in the light most favorable to the prosecution, to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Patterson,* 428 Mich 502, 524-525; 410 NW2d 733 (1987). We defer to the jury's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe,* 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Possession may be actual or constructive, and may be demonstrated with circumstantial evidence. *People v Hill,* 433 Mich 464, 469-470; 446 NW2d 140 (1989). Constructive possession exists where defendant knows the location of the weapon and it is easily accessible to him or where there is proximity to the firearm with indicia of control. *Id.* at 470-471. "Carrying" a weapon for purposes of CCW is similar to possession in that it indicates the defendant has intentional control or dominion over the weapon. *People v Butler,* 413 Mich 377, 390 n 11; 319 NW2d 540 (1982); see also, *People v Adams,* 173 Mich App 60, 62-63; 433 NW2d 333 (1988) (Holding that the defendant was not in actual or constructive possession of the gun for purposes of CCW when it was discovered in her suitcase while on a conveyor belt at an airport).

Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence on which to conclude beyond a reasonable doubt that defendant possessed the gun. After Detroit Police Officers Jason Bradford and Darius Mitchell executed a traffic stop of Joseph Gibson, III's vehicle, defendant, who was sitting in the back seat, fled on foot. Bradford pursued him and felt a gun when he tackled defendant around his waist, knocking the gun out of the front of defendant's waistband as they fell to the ground. Bradford also heard the distinct sound of a metal gun hitting the pavement and saw a blue revolver when he got up from the ground. Mitchell "saw a hand-held object fall into the street" when Bradford tackled defendant, and Mitchell also heard the distinct sound of a metal gun hitting cement. Mitchell thereafter retrieved the gun. A reasonable inference can be drawn from the circumstantial evidence that defendant possessed the gun when he was in the vehicle and when he fled because seconds later it was knocked out of his waistband or hands when Bradford tackled him. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Although defendant argues that Bradford's and Mitchell's testimony was incredible because of inconsistencies, we do not reassess the jury's determinations regarding what weight to give the evidence and the credibility of witnesses, *Wolfe, supra* at 514-515, and we must "make credibility choices in support of the jury verdict[,]" *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant next contends that the trial court erred in refusing to grant his request for a self-defense instruction. Defendant claimed he acted in self-defense when, after fleeing from Bradford a second time, Bradford caught up to defendant in an alley. Another tussle occurred, and defendant bit Bradford on the arm during the struggle. We review for an abuse of discretion the trial court's determination that this instruction was inapplicable to the facts of the case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "[I]f an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002) (internal citations omitted). "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *Id.* at 124.

In the present case, the trial court refused defendant's request for a self-defense instruction because defendant was committing a crime when he bit Bradford. MCL 780.972(2) requires that, in order to claim that use of nondeadly force was justified to defend himself, the individual must not have been engaged "in the commission of a crime at the time he uses" the nondeadly force. Self-defense additionally requires a defendant to hold an honest and reasonable belief that he is in danger; a defendant may not claim self-defense where he used excessive force. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993); MCL 780.972(2). A claim of self-defense also requires that the defendant did not act wrongfully and bring on the assault. *People v Minor*, 213 Mich App 682, 686 n 1; 541 NW2d 576 (1995) (a robber or other wrongdoer engaged in felonious conduct cannot claim self-defense).

In the present case, defendant was engaged in resisting and obstructing a police officer during his "prearrest flight from a police officer." *People v Pohl*, 207 Mich App 332, 333; 523

NW2d 634 (1994). Although defendant did not physically obstruct the officer while fleeing, he engaged in conduct that under the circumstances hindered the officer conducting a police investigation, which is clearly "a police function covered by the resisting and obstructing statute." *Id.* Mitchell instructed the occupants of the car, including defendant, to place his hands on the ceiling after the traffic stop, but defendant instead fled. Bradford tackled defendant and instructed defendant to stop resisting, but defendant fled and continued resisting. The only reason Bradford tackled defendant a second time and the melee ensued was because defendant chose to flee from the police. Consequently, the trial court did not abuse its discretion in determining that a self-defense instruction was not warranted under the circumstances. *Gillis, supra* at 113.[1]

Defendant next asserts that the trial court erred in refusing to allow Carlton Logan, another occupant of Gibson's car, to testify because he was not disclosed before trial. We review a trial court's decision regarding a discovery matter for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). When deciding whether to exclude evidence because of a discovery violation, the trial court "must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks,* 249 Mich App 247, 252; 642 NW2d 351 (2002). The party complaining of the violation must show actual prejudice. *People v Greenfield (On Reconsideration),* 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006).

We conclude that the trial court did not abuse its discretion in precluding Logan's testimony. Defendant did not file a witness list and it was only on the second day of trial after the prosecutor concluded presenting its proofs that defense counsel unsuccessfully requested that the trial court permit Logan to testify. The appropriate remedy of exclusion, adjournment, or recess was within the trial court's discretion. MCR 6.201(J). The trial court had an interest in ensuring the "fairness of the adversary system," which encompasses ensuring that there is a complete and truthful disclosure of the significant facts and ensuring the efficient administration of its docket. *People v Burwick*, 450 Mich 281, 296-297; 537 NW2d 813 (1995). The prosecutor had an interest in having sufficient advance notice to better prepare her case, and having "the opportunity to assay the opponent's evidence" in order to prevent false evidence. *People v Taylor*, 159 Mich App 468, 485; 406 NW2d 859 (1987). Defendant knew of Logan well in advance of trial because he was in the same car as defendant on the night of the incident. The prosecution demonstrated that it would suffer actual prejudice because it had no opportunity to interview Logan, review a witness statement from him, or prepare and present its case knowing that Logan would testify. *Greenfield (On Reconsideration), supra* at 454 n 10. There had been several adjournments of defendant's trial. The trial court's decision to exclude the

[1] An instruction on imperfect self-defense was also unwarranted. There was no murder, and defendant claimed Bradford hit him first. See *People v Wytcherly*, 172 Mich App 213, 221; 431 NW2d 463 (1988). Further, defendant was not entitled to an instruction on self-defense by use of excessive force, as a defendant may not claim self-defense where he used excessive force. *Kemp, supra* at 322-323. We also reject defendant's argument that the prosecutor failed to prove that defendant did not act in self-defense, as self-defense was not an issue and thus the prosecution did not have to disprove it beyond a reasonable doubt.

testimony did not fall outside the range of reasonable and principled outcomes under the circumstances. *Babcock, supra* at 269.

Defendant also challenges the admission of his prior convictions into evidence at trial. Evidentiary rulings are generally reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). "A witness' credibility may be impeached with evidence of prior convictions, MCL 600.2159, but only if the criteria set forth in MRE 609 are satisfied." *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). MRE 609 provides that a prior conviction involving dishonesty, false statement, or theft may be admissible to "attack[] the credibility of a witness" under certain conditions. MRE 609(a).

With respect to defendant's 1999 conviction for possession of cocaine, defendant cannot claim error requiring reversal because he voluntarily introduced evidence of this conviction during his direct examination. See *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (a defendant waives appellate review of an issue where he contributes to the error by plan or negligence). Defendant specifically testified that he used marijuana and cocaine, was arrested because of his narcotics use, had committed a felony in the past, and had committed a felony within the last ten years "for drugs" because he "had a couple packs of crack."

With respect to defendant's other convictions, the trial court ruled that defendant "opened the door" to this evidence in responding to the prosecutor's question whether he had any other convictions besides the 1999 possession conviction. Ultimately, we cannot conclude that this ruling fell outside the principled range of outcomes. *Unger, supra* at 216-217. The prosecutor asked defendant if he had been convicted of anything else beside the 1999 cocaine conviction. Defendant testified, "Since then, no." The prosecutor then delved into defendant's convictions from before 1999. Defendant's response did not directly answer the prosecutor's question, and the testimony implied that he had no other convictions at all. Moreover, during direct examination, defendant voluntarily introduced the topic of his conviction history, minimizing it. "Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995) (citation omitted).

Regardless, we agree that defendant's 1996 conviction for possession of cocaine and 1995 conviction for CCW did not involve an element of dishonesty or theft, and "possessory crimes . . . have a low degree of probativeness[,]" and thus would not be admissible under MRE 609. *People v Allen*, 429 Mich 558, 605, 610; 420 NW2d 499 (1988); MRE 609(a)(1) and (2). But, defendant cannot demonstrate that it was more probable than not that the admission of this evidence effected the outcome of the trial. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). The prejudicial effect of the possession of the 1996 cocaine conviction was lessened in light of the fact that it was dissimilar to the charged offenses, defendant had already admitted to possessing and using cocaine in the past and on the night in question, and to being convicted of possessing cocaine on another occasion in 1999. *People v Meshell*, 265 Mich App 616, 636-637; 696 NW2d 754 (2005); *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1991). Regarding the CCW conviction, although defendant was also charged with CCW in this case, defendant's testimony was corroborated by Gibson's testimony that he did not see defendant with a gun and that Mitchell never retrieved a gun and placed it in the trunk. *Meshell, supra* at 636-637. This reduced its potentially prejudicial effect. *Id.* at 637. Error requiring reversal may

not be based on an evidentiary ruling unless it affected a substantial right. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993).

Regarding his 1986 conviction for breaking and entering, this crime is "moderately probative of veracity . . . ." *Allen, supra* at 610-611; MRE 609(a)(2) and (b). It is also punishable by more than one year in prison. MCL 750.110(1); MRE 609(a)(2)(A). It was also dissimilar to the charged offenses, reducing its potential prejudicial effect, and it did not deter defendant from testifying. *Meshell, supra* at 636; *Daniels, supra* at 671; MRE 609(b). Although the conviction occurred on March 11, 1986, according to the information, there is no indication what sentence defendant received. The trial court noted that he received "some kind of sentence" and the ten year period did not expire until after he was released from that sentence. MRE 609(c). Defendant has not established that the ten-year limitation for the prior conviction had expired. Defendant bore the burden of establishing that an evidentiary error warranted reversal, and he has failed to establish that the trial court's ruling was erroneous. *Elston, supra* at 762. Even if defendant was released from this sentence more than ten years before trial, this Court has found that such an error was harmless. See *People v Sears*, 124 Mich App 735, 739; 336 NW2d 210 (1983). "A trial court's decision on a close evidentiary question generally cannot be an abuse of discretion." *Meshell, supra* at 637, citing *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Additionally, defendant argues that the evidentiary errors resulted in constitutional error by removing his presumption of innocence. Defendant has failed to establish that plain, outcome-determinative error occurred in this regard. *Carines, supra* 763-764. The trial court instructed the jury that defendant was entitled to a presumption of innocence until the prosecutor proved, beyond a reasonable doubt, that defendant was guilty, and that the jury could consider the prior convictions "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." A jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

In his final claim of error, defendant argues that his trial counsel rendered ineffective assistance. Review of defendant's claim is limited to any errors that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness according to prevailing professional norms, and that, absent trial counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Decisions regarding what evidence or defenses to present are presumed to be matters of trial strategy, and defendant bears the burden of overcoming this strong presumption; this Court will not substitute its own judgment for defense counsel's judgment. ; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant first argues that defense counsel's performance was deficient because he failed to adequately investigate, i.e., produce trial witnesses, particularly Logan. Failure to call a witness constitutes ineffective assistance when it deprives a defendant of a substantial defense, i.e., one that might have affected the outcome of the trial. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). On appeal, defendant fails to specify other witnesses, besides Logan, who defense counsel should have called, fails to indicate what testimony they would have

provided, and fails to attach any affidavits in support of their testimony. Defendant bore the burden of establishing the factual predicate for his ineffective assistance of counsel claim, and he has failed to meet this burden. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant also fails to disclose Logan's proposed testimony. Thus, defendant has failed to establish that defense counsel's failure to properly list Logan as a witness and call him at trial deprived him of a substantial defense that may have affected the outcome of the trial. *Rockey, supra* at 76. Even if Logan would have testified that he did not see defendant with the gun, this testimony would merely have been cumulative of Gibson's and defendant's testimony. Defendant cannot establish that he was deprived of a substantial defense.

Defendant next argues that trial counsel failed to properly prepare witnesses for trial or rehabilitate them. Defendant fails to explain in what way defense counsel failed to prepare witnesses, and he has therefore failed to establish the factual predicate for his argument. *Hoag, supra* at 6. We nonetheless note that the record reflects that defense counsel strategically chose to introduce the evidence of prior convictions during direct examination of defendant and Gibson presumably to lessen the impact. Gibson's prior incidents involved false statement and theft and were admissible. MRE 609. Defense counsel's decision regarding what evidence or tactics to present was a matter of strategy, and this Court does not substitute its own judgment on appeal. *Davis, supra* at 368. Further, defense counsel objected each time the prosecutor introduced defendant's other convictions, and he rehabilitated defendant by revisiting on redirect the extent of defendant's injuries at the hands of the police. Although defense counsel did not revisit the prior convictions issue, it may have been better not to draw further attention to this issue. See *Bahoda, supra* at 287 n 54 ("Certainly there are times when it is better not to object and draw attention to an improper comment."). The fact that a chosen strategy does not work does not render defense counsel's performance deficient. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant has not shown that counsel's performance fell below an objective standard of reasonableness or that, but for the alleged error, the outcome of trial would have been different. *Carbin, supra*.[2]

Defendant's final argument is that his counsel failed to object to the prosecutor's questions regarding defendant's medical records. Defendant states that there was an objection during defense counsel's questioning about his injuries, and the trial court determined that defendant could not testify about the medical reports because he was not an expert. However, the prosecutor's objection was based on hearsay grounds, indicating that defendant could not testify to what the doctors told him. Defendant fails to indicate upon what basis defense counsel should have objected to the prosecutor's questions. *Hoag, supra* at 6. Moreover, the record reflects that both the prosecutor and defense counsel questioned defendant about his injuries and the hospital visit. Defendant has failed to establish that defense counsel's performance was deficient, or that defendant suffered any prejudice as a result. *Carbin, supra*.

[2] Defendant also argues that defense counsel failed to properly impeach prosecution witnesses, but he failed to indicate specifically how defense counsel's performance was deficient. *Hoag, supra* at 6. We nonetheless note that defense counsel impeached Bradford with his prior statements during the preliminary examination and extensively cross-examined Mitchell regarding when he retrieved the gun.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly