STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE ANTONY ROCCA,

Defendant-Appellant.

UNPUBLISHED
January 26, 2010

No. 286682
Tuscola Circuit Court
LC No. 07-010484-FH

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right from his convictions for felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to a prison term of 58 months to 30 years for the possession of a firearm conviction and a consecutive two years' imprisonment for the felony-firearm conviction. We affirm.

On the evening of November 29, 2006, a search warrant was executed at a trailer home in Fairgrove, Michigan. Defendant was present inside the trailer at the time of the search. Officers found two weapons in the back bedroom. One, a .38 revolver, was located in a top drawer of a dresser that also contained men's clothing. The other, a rifle, was located under the bed. Testimony revealed that defendant told the officers there were guns in the back bedroom and that he knew he was ineligible to possess them because of his prior felony convictions. Defendant's firearm convictions arise from his constructive possession of the handgun. The jury found him not guilty of the same two crimes stemming from the presence of the rifle.

Defendant first argues that there was insufficient evidence to convict him. To determine whether sufficient evidence has been presented to sustain a conviction in a criminal case, we view the evidence de novo in a light most favorable to the prosecution and determine whether a rational finder of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Odom*, 276 Mich App 407, 418; 740 NW2d 557 (2007).

The element of possession, specifically whether defendant constructively possessed the weapons found, was at issue at trial, as it is on appeal. "Possession may be proven by circumstantial as well as direct evidence." *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Defendant argues that, because he was not armed during the search, he was not in

possession of the firearm. Defendant misstates the law. Possession can be either actual or constructive. *Id.* at 470. "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id*. at 470-471.

Defendant testified that the trailer had belonged to his deceased mother and now belonged to his sister, with whom he had been cleaning out the trailer. At the time of the search, however, defendant was the only one at the residence. The .38 revolver was found in the dresser drawer that contained men's clothing. There was testimony from two police officers that defendant told them that there were weapons in the bedroom.[1] One of these officers testified that defendant even identified to him what type of firearms they were. Accordingly, the record establishes that defendant had knowledge of the presence and location of the .38 revolver. Additionally, under the circumstances of this case, the handgun was "reasonably accessible" to defendant. Moreover, defendant's knowledge of the location of the gun and the evidence that he was in the house with some regularity provides an "indicia of control" over the weapon. All of this is sufficient circumstantial evidence that could lead a jury to conclude that defendant constructively possessed the gun in violation of both firearm statutes.

We also reject defendant assertion that double jeopardy prohibits his conviction for felony-firearm. This argument is based on a misreading of *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007). The *Smith* Court stated as follows:

> In interpreting "same offense" in the context of multiple punishments, federal courts first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed. Where the Legislature does clearly intend to impose such multiple punishments, "'imposition of such sentences does not violate the Constitution,'" regardless of whether the offenses share the "same elements." Where the Legislature has not clearly expressed its intention to authorize multiple punishments, federal courts apply the "same elements" test of [*US v Blockburger*, 284 US 299; 52 S Ct 180, 182; 76 L Ed 306 (1932)] to determine whether multiple punishments are permitted. Accordingly, we conclude that the "same elements" test set forth in *Blockburger* best gives effect to the intentions of the ratifiers of our constitution. [*Id*. at 316 (citations omitted; emphasis omitted by *Smith* Court).]

In cases involving the two offenses at issue here, this Court and the Supreme Court have held that the Legislature intended that a defendant can be convicted of both crimes without violating double jeopardy guarantees. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). This principle remains unchanged by *Smith.*

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[1] Defendant challenges, in part, the credibility of these police officers. However, appellate court's defer to the jury's superior ability to assess the credibility of the witnesses. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Moreover, any evidentiary conflicts must be resolved in favor of the prosecution. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

Defendant next contends that the search warrant was improperly issued and the evidence seized pursuant to the search is therefore inadmissible. "[A]ppellate scrutiny of a magistrate's decision [to issue a search warrant] involves neither de novo review nor application of an abuse of discretion standard. Rather, the preference for warrants . . . requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992) (citations omitted).

The search warrant in this case was not invalid. It identified the property to be searched for and seized as a "Hat with FBI on the front, a Shirt with FBI on the front, a silver colored revolver, any item that looks like a badge, duct tape, cell phones, cash, taser, play station 2, black mask, shoes, rings, ear rings, bow, Elite home entertainment center." Defendant contends that the rifle was not mentioned in the warrant and therefore its seizure was unlawful.[2] Although the search warrant did not list a rifle in items to be seized, the supporting affidavit did specify that the robbery under investigation had been executed using both a revolver and a rifle. Moreover, testimony was given that defendant told the officers there were two weapons in the bedroom and that he knew he was not permitted to possess them. There was also testimony that defendant stated that he used those weapons in Lapeer County (the location of the robbery under investigation). In light of this evidence, the rifle was obviously incriminatory, and the officers properly seized the weapon.

Defendant also argues that the affidavit did not provide sufficient probable cause to support the search warrant because there was a lack of personal knowledge to support the statements made by the affiant. We note that, in the lower court, defendant's challenge was not made on this basis. Rather, in the trial court, defendant asserted that it was error to rely on hearsay when the person providing the information had recently been involved in a fight with the police informants. To warrant a hearing challenging the material omission of information from an allegedly invalid search warrant, a defendant must make a substantial and preliminary showing that the omission was knowingly and intentionally hidden by the affiant and the omission was necessary to the finding of probable cause. See *People v Martin*, 271 Mich App 280, 311; 721 NW2d 815 (2006). The presumption is that the information supporting the search warrant is valid, and to warrant a hearing, the challenge must be more than conclusory and must be supported by more than a desire to cross-examine the witnesses. *Id*. "A search warrant may be issued on the basis of an affidavit that contains hearsay." *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991).

In the present case, defendant presented mere conclusions regarding an altercation and serious injuries. Review of the record reveals that the trial court examined the affidavit and the conclusions made by defendant in challenging the search warrant and the validity of the affidavit. The trial court held that the fact that the affidavit does not contain the underlying incident was an insufficient basis for rendering the search warrant invalid. We cannot conclude that the trial court's holding was clearly erroneous. *Martin*, *supra* at 309. Indeed, information from police officers and crime victims is presumptively reliable, and self-authenticating details

[2] We note that defendant was found not guilty of the two firearm charges centering on the rifle.

also establish reliability. *People v Powell*, 201 Mich App 516, 523; 506 NW2d 894 (1993). Moreover, the informants named by the affiant clearly had personal knowledge sufficient to sustain a finding of probable cause to search the trailer. MCL 780.653. Here, the magistrate reviewed the affidavit and concluded, under the totality of the circumstances, that there was a substantial basis that evidence sought might be found in the specific location. *People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007). The obligation of the reviewing court is simply to determine if the magistrate had a substantial reason for finding that probable cause existed. *Id*. We limit our review to the facts presented to the magistrate and preserved in the lower court record, with great deference to the magistrate's determination. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2001). On this record and as presented in the lower court, we cannot conclude that defendant's challenge has merit.

Defendant next argues that the trial court erred in permitting the use of defendant's prior conviction for receiving and concealing in excess of $100, MCL 750.535, to impeach defendant. Generally, "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted." MRE 609(a). However, during cross-examination, a crime containing "an element of dishonesty or false statement" is admissible for impeachment purposes. MRE 609(a)(1). This crime is indicative of a person's propensity for veracity. Concealing stolen property involves some measure of preventing disclosure. See *Random House Webster's College Dictionary* (1997), p 950 (defining "conceal" to mean, in part, "avoid disclosing or divulging"). Thus, the prior crime clearly has probative value regarding defendant's honesty. Further, defendant's conviction of this crime is less than ten years old. MRE 609(c). Moreover, the firearm crimes charged are quite different from receiving and concealing stolen property, and the jury was not provided any information regarding the prior offense. That distinction is sufficient to distinguish the charged offenses from the prior conviction, and thus minimize the prejudicial impact on the fact-finder's deliberative process. Therefore, the trial court did not err by allowing the impeachment.

Defendant contends that the trial court improperly read to the jury defendant's prior convictions listed in the information. The information sets forth specific prior convictions for the two felon in possession counts. The trial court read two of these prior convictions from the information to the prospective jurors prior to jury selection. Defendant contends that these convictions were not admissible for impeachment under MRE 609, but by presenting them to the jury, they had the prejudicial effect of impeachment.

The trial court made clear to the jurors that the criminal information was not evidence. At the conclusion of the trial, the court also instructed the jury that, in deciding the case, it could "only consider the evidence that has been properly admitted." "It is well established that jurors are presumed to follow their instructions," and thus any potential prejudice was mitigated. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In any event, after the opening statements, the parties stipulated that defendant was convicted of three prior felonies. Defense counsel stated that he reviewed the copies of the convictions and specifically requested that only the judgments be admitted. Certified copies of three judgments of sentence were entered as trial exhibits. Further, defendant admitted that he had been convicted of three felonies during cross-examination, including those mentioned on the information. Accordingly, no plain error affecting substantial rights has been shown. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Next, we reject defendant's assertion that the jury was not properly instructed regarding the definition of "possession" or the impact of an alleged missing witness. We have reviewed the instruction on possession given and hold that there was no error. In accordance with MCL 767.40a, the prosecutor did file a list of witnesses that included the alleged missing witness (a police officer). Although the prosecutor need not actually produce all res gestae witnesses, MCL 767.40a, "CJI2d 5.12 may be appropriate if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused." *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). However, defendant did not object to the absence of the witness; he did not request at any point during the trial that the witness be produced, even at the close of the prosecution's case.

Prior to the commencement of the trial, defendant made a motion in limine to limit any discussion of defendant's possession of the firearms during the robbery that had prompted the search. The trial court granted the motion, but stated that the statement that defendant made to an officer that he possessed those weapons in Lapeer County was admissible. "[G]enerically," the court reasoned, "that's acceptable." Later, when the prosecutor asked one of the officers whether defendant was "in possession of these firearms in Lapeer County" on November 27, 2006, the witness responded that defendant said "that both guns were used by himself and another party." The use of the word "used" by the witness was unresponsive to the prosecutor's proper question. Generally, an unresponsive, volunteered answer that injects improper evidence into a trial is not grounds for a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, there is no allegation that the prosecutor knew that the witness was going to say that defendant "used" the guns or that the prosecutor encouraged him to say so. Although the answer was inappropriate, no further details were given of the prior event. In this case, one misspoken word does not constitute an unfair or partial trial, and the testimony does not warrant reversal.

Defendant also argues that the prosecutor engaged in misconduct that undermined the fairness of his trial. Because there was no contemporaneous objection and request for a curative instruction, our review is limited to ascertaining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). We consider the prosecutor's actions in context, *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004), and evaluate comments made in light of defense arguments and the relationship they bear to the evidence admitted at trial, *Brown*, *supra* at 135.

Although the prosecutor erred by questioning defendant about the credibility of other witnesses, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), it is well-settled that such an error can be cured with an instruction, *id*. at 17-18. Defendant did not object, but if he had, the prejudicial effect of the line of questioning could have been cured. Thus, any error was harmless.

Next, defendant returns to the issue of the reading of the information to the jury venire. The trial court's decision cannot be attributed to the prosecutor, and therefore, a claim of prosecutorial misconduct is without merit. Defendant also argues that his trial counsel's failure to object to the reading of the information containing his prior convictions amounted to ineffective assistance. However, defendant has left it to us to imagine "what is the 'strategy' in

not making the objection[]." A party may not announce a position and leave it to this Court to discover and rationalize the basis for the claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). For the same reason, we reject the remaining generalized claims of ineffective assistance.

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens