STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2010
v	No. 287181 Oakland Circuit Court
DAVID CALVIN HARDY, Defendant-Appellant.	LC No. 07-214885-FH

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his convictions following jury trial of being a felon in possession of a firearm, MCL 750.224f, felony firearm (supported by the felon in possession charge), MCL 750.227b, carrying a pistol in a vehicle (CCW), MCL 750.227(2), driving while license suspended, MCL 257.904(1)(b), and unlawful use of a license plate, MCL 257.256. The trial court sentenced defendant to two years' imprisonment for felony firearm consecutive to imprisonment of three to twenty years for felon in possession of a firearm. Defendant was also sentenced to three to twenty years' imprisonment for CCW and 22 days in jail with credit for time served on the two misdemeanor convictions. Defendant argues error warranting reversal occurred in the admission of similar acts evidence, his trial counsel having rendered ineffective assistance, and that he was denied due process when the police failed to preserve digital surveillance recordings of the booking area of the police station where defendant was interviewed. Defendant also asserts 14 issues in a "Standard 4" brief. We conclude that none of defendant's asserted errors warrant reversal; consequently, we affirm.

I. Summary of Trial

On April 19, 2007, Pontiac police officer Mark Ferguson stopped defendant who was accompanied by two female passengers while he was driving a 1992 Buick with improper license plates. The Buick was registered to defendant's mother. Officer Ferguson approached defendant and asked him for his license, registration and insurance. Defendant provided Ferguson his driver's license, but claimed that he had no other paper work. Ferguson asked defendant to look inside the glove box two or three times, but defendant kept insisting he had no further paperwork. Ferguson testified that while being asked to look for the paperwork, defendant was hesitant, nervous, and sweating. Defendant admitted at trial that he was nervous during his encounter with Ferguson, not because he had done something wrong, but only from the fact of being stopped by the police. After Ferguson determined defendant's license was suspended, he

arrested defendant and placed him in the back of the patrol car. Ferguson released the passengers, impounded the Buick, and conducted an inventory search pursuant to police department policy. Ferguson found a loaded .38 caliber revolver in the glove box of the Buick.

While being transported to the police station, defendant told Ferguson that the gun belonged to his father, who had a permit for it. Defendant also told Ferguson that he had been jumped on the street two times. Defendant testified that he did not make a statement in the exact words to which Ferguson testified, but rather that he said, "If there was [a gun] in there it was my father's." Defendant acknowledged that he told Ferguson the gun was registered and also that the gun admitted at trial looked like his father's gun.

Oakland County Sheriff's Deputy Robert Charlton testified as a firearms expert that the .38 caliber six-shot revolver seized by the police in this case was registered to defendant's father, Lawrence Hardy. Charlton described the gun as clean and in good working order.

Sergeant Brian McLaughlin contacted defendant in a holding cell in the booking area of the police department. McLaughlin interviewed defendant after taking him out of the holding cell and moving to a table and chairs in the back of the booking area. McLaughlin testified that he advised defendant of his *Miranda*[1] rights from a police department form that defendant signed. Defendant stated that the gun was in the glove box about one and a half years after having been placed there by an old girlfriend of his. Defendant also stated he thought that the gun was loaded. McLaughlin asked defendant why the gun was in the Buick. Defendant responded that he had been jumped and assaulted and that everyone had the right of self-protection. McLaughlin testified defendant never did acknowledge putting the gun in the car. After the oral interview, McLaughlin asked defendant to write out a statement. Defendant's hand-written statement was admitted as an exhibit at trial and reads as follows:

> Over 2 years ago I had gotten jumped for no reasons . . . an ex girlfriend told me I should have protection and to the best of my knowledge, WHILE I WAS GONE[2] from 10/05 to 8/06, SHE HAD TOLD ME AS LONG AS SHE WAS AROUND SHE WOULD NOT LET ANYTHING HAPPEN TO ME . . . I HAD KNOWN THAT MY FATHER'S HANDGUN (which IS REGISTERED) was missing I suspected she had it, but I did not KNOW WHERE SHE HAD HIDDEN IT, NOR DID I TAKE . . . BUT I DO NOT LIKE THIS OFFICER IMPLYING THAT I KNEW THAT GUN WAS THERE . . . IN FACT, MY MOTHER'S CAR HAD NOT BEEN DRIVEN FOR MONTHS. /S/

Pursuant to a successful pretrial motion, the prosecutor also admitted evidence of a similar incident that had occurred on May 7, 2005. Farmington Hills Detective Michael Connolly testified that on that day he was working as a patrol officer when he contacted

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The trial court denied defendant's pretrial motion to suppress his statements after conducting a hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] The parties agreed to redact the words "IN JAIL" and insert the phrase "WAS GONE."

defendant regarding a 1992 Buick that was illegally parked in a handicapped space in front of a 7-11 store. Defendant was the driver of the Buick, in which there were two passengers. Defendant was seated in the driver's seat when Connolly approached. Connolly testified he smelled and saw open intoxicants inside the Buick. He asked defendant to step out of the car, and asked for and received consent to a search the vehicle. Connolly testified he found a loaded, six-shot, .38 caliber revolver in a canvas bag with over 50 rounds of ammunition and also additional loose ammunition in the center console of the car. Defendant told Connolly that an unknown person had placed the gun in his car.

Defendant called his mother, Gladys Hardy, as a witness. Mrs. Hardy testified that she lived in Pontiac with her husband, who died before the start of the trial. She owned the 1992 Buick and at some point she allowed the registration plate to expire. Mrs. Hardy testified she allowed defendant, who lived with her, to drive the Buick. She recalled the police had stopped defendant while driving it in 2005. Her husband owned a .38 caliber revolver that he kept in a desk drawer that had a broken lock. Mrs. Hardy did not put her husband's gun in the Buick and had no knowledge how it might have gotten there. Sometimes, defendant had friends at the house, but they did not spend the night. If one of them had a key, she did not know about it. She also did not know anything about defendant being beaten up or being robbed.

Defendant chose to testify in his own defense. Defendant admitted that he lived with his mother and was driving her 1992 Buick in May 2005, when the Farmington Hills police arrested him. He disagreed, however, with Detective Connolly's version of events, noting that he intended to appeal that case. He denied that he consented to a search of the Buick but admitted Connolly found a gun in the car, he thought, "under the back area." Defendant testified to his version of the events of that incident; he denied that he knew there was a gun in the car on that occasion.

Defendant further testified that on April 19, 2007, he was again driving his mother's 1992 Buick with two passengers; he knew that the license plate for the Buick was improper because he put "tags" from a truck on it. Defendant also disagreed with Ferguson's version of events and the statement he made to Ferguson in the patrol car, as noted already. Defendant denied that he placed the gun in the Buick's glove box, denied seeing anyone else place it there, and denied knowing the gun was there when Ferguson stopped him.

Regarding his statements at the police station, defendant testified that McLaughlin took him from a holding cell to the booking cage to advise him of his *Miranda* rights. Then when defendant told the officer he wanted an attorney, the officer's demeanor changed. Defendant claims McLaughlin told him, "I got some Detectives upstairs they [sic] can pin a murder case on you." Defendant claims the officer then put him in the little cage (holding cell) in the booking area with a piece of paper and told him to write out a statement. Defendant testified that he just started scribbling stuff. Although he acknowledged writing the statement admitted at trial, defendant asserted the only truthful parts of it were that he did not like the officer's implying that he knew that the gun was in the car and that his mother's car had not been driven for months. Defendant claimed that he did not recall talking much to McLaughlin and denied stating that he knew the gun was in the car.

At the conclusion of the proofs, defense counsel moved for but was denied a directed verdict. Counsel also placed on the record that before the start of the trial, she had counseled

defendant regarding his right to testify and his right to remain silent. Defendant acknowledged this talking with her, and that it was his free and voluntary choice to testify.

II. Similar Acts Evidence

Defendant argues that the trial court abused its discretion by permitting the prosecutor to present evidence of the May 2005 incident under MRE 404(b). Specifically, defendant argues that the evidence was relevant only through an impermissible character inference, that the earlier incident shared insufficient common features with the charged offense to be admissible to show scheme, plan, or system, and, even if relevant for a proper purpose, the probative value of the evidence was substantially outweighed by its danger of unfair prejudice and confusion of the issues. MRE 403. The trial court accepted the prosecutor's contention that the evidence of the 2005 incident was properly admissible to show defendant's scheme, plan, or system in doing an act, being relevant to show defendant's knowledge of the revolver in the car he was driving, and also to show the absence of mistake. The trial court also instructed the jury regarding the evidence's limited purpose. We conclude that the trial court did not abuse its discretion.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion when its decision is outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Even if preserved, trial error of a nonconstitutional nature will not merit reversal unless, in light of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *Lukity, supra* at 495-497.

Under MRE 402 all relevant evidence is admissible, irrelevant evidence is not. *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). But evidence of a person's character or a trait of character is inadmissible to prove action in conformity with the trait of character. *Id*. at 494; MRE 404. Thus, as a general rule, evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). But such evidence may be admitted under MRE 404(b)(1) to show "scheme, plan, or system in doing an act, knowledge . . . or absence of mistake or accident when the same is material . . . ." To be admissible, other acts evidence: (1) must be offered for a proper purpose, i.e., to prove something other than a character or propensity theory; (2) must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "Finally, the trial court, upon request, may provide a limiting instruction under MRE 105." *Id*.

Our Supreme in *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000), held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." But more than similarity between the charged and uncharged acts is necessary to establish the existence of a scheme, plan, or system. *Id*. at 64. There must not merely be a similarity in the results "but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*" *Id*. at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis in Wigmore). "'To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed

need not be distinctive or unusual.'" *Sabin*, *supra* at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 402; 867 P2d 757 (1994). Here, on two occasions defendant was driving his mother's 1992 Buick with two passengers when stopped by the police. Both times a loaded .38 caliber revolver was found in the car. We find that there are sufficient similarities between the two incidents such that the trial court did not abuse its discretion in concluding the similar acts were relevant to show both defendant's knowledge of the revolver and absence of mistake.

We also reject defendant's argument that because the probative value of the similar acts evidence arises through the doctrine of chances, it should have been excluded as propensity evidence. Defendant bases his argument by analogy to our Supreme Court's decision in *Crawford*, *supra*. There the Court discussed the "'doctrine of chances,' also known as the 'doctrine of objective improbability.'" *Id*. at 392. The Court explained that where relevant to the required mental element of a charged crime, the doctrine of chances "rests on the premise that 'the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently.'" *Id*. at 393, quoting Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p. 45. Moreover,

> . . . the forbidden intermediate inference to defendant's subjective character is not implicated:
>
> > "[T]his theory of logical relevance does not depend on a character inference. The proponent is not asking the trier of fact to infer the defendant's conduct (entertaining a particular mens rea) from the defendant's personal, subjective character. The intermediate inference is an objective likelihood under the doctrine of chances rather than a subjective probability based on the defendant's character." [*Crawford*, *supra* at 393, quoting Imwinkelried, Uncharged Misconduct Evidence, § 5:05, p. 12.]

Finally, we are unable to conclude that the trial court abused its discretion by declining to exclude the evidence under MRE 403. Other acts evidence may present a danger of unfair prejudice when it is only marginally probative and might be given undue or preemptive weight by the jury. *Crawford*, *supra* at 398. Applying an MRE 403 analysis "requires a balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). MRE 403 determinations are best left to the trial court's "'contemporaneous assessment of the presentation, credibility, and effect of testimony.'" *Id*., quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993). Here, the evidence was more than marginally probative, it operated through proper inferences, and the trial court gave a limiting instruction to the jury. All trial evidence was presented in one day through six witnesses. We agree with the trial court that the similar acts evidence here was not unfairly prejudicial, nor such as would lead to "confusion of the issues, or misleading the jury, or . . . undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

In sum, we conclude that the trial court's decision to admit the similar acts evidence under MRE 404(b) was not an abuse of discretion. *Lukity*, *supra* at 488; *Babcock*, *supra* at 269.

We decline to address the prosecutor's argument that, even if error occurred, it does not merit reversal. MCL 769.26; *Lukity, supra* at 495-497.

III. Ineffective Assistance of Counsel

Defendant argues that he received ineffective assistance of counsel at trial. Specifically, defendant contends trial counsel pursued the unsound strategy of asking defendant whether he disputed the police testimony regarding the 2005 incident. According to defendant, this "tactic opened the door to extensive cross-examination about [defendant's] version, complete with impeachment with his testimony from that trial," and permitted "the prosecutor to show that [defendant] was the one who was lying." The prosecutor argues that it was defendant's choice to testify, and counsel cannot be found ineffective on the basis of defendant having chosen to testify and being subject to cross-examination. More bluntly, the prosecutor argues that counsel is not ineffective when defendant is his own worst enemy while testifying. We find this issue lacks merit; defendant has not overcome the presumption that he received constitutionally mandated effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

The right to counsel guaranteed by both the United States and Michigan Constitutions, includes the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). A defendant must not only prove "the factual predicate for his claim of ineffective assistance of counsel," *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), but as noted, overcome the "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *LeBlanc*, *supra* at 578, quoting *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In this regard, our review is limited to mistakes apparent on the record because defendant has not created a record at a *Ginther* [3] hearing or a motion for new trial. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Defendant correctly notes that an attorney's strategic decision may form the basis for a claim of ineffective assistance of counsel if the strategy was not sound or reasonable. *Cline*, *supra* at 637. But because a strategy is unsuccessful does not mean it was unsound or unreasonable. This Court will not substitute its judgment for that of counsel, nor assess counsel's performance on the basis of hindsight. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Moreover, counsel's strategic decisions are often influenced by the defendant's decisions and the information the defendant provides counsel. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, *supra* at 691. Here, the record reflects that it was defendant's free and voluntary choice to testify. The

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

record also reflects that trial counsel reviewed with defendant both his right to testify and his right not to testify. We must presume from this record that counsel reviewed with defendant both the potential benefits and potential hazards of his testifying in his own defense. Even had counsel believed that it would be unwise for defendant to testify, defendant's decision would control over counsel's objections. See *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). Because defendant chose to testify, trial counsel cannot be faulted because the prosecutor was effective at cross-examination.

Furthermore, to the extent counsel decided to question defendant regarding the 2005 incident, his decision was reasonable strategy. Once defendant decided to testify, counsel's strategic decisions were limited. *Strickland*, *supra* at 691. Counsel knew that the similar acts evidence would be admitted, that the police would testify defendant made admissions to them regarding his knowledge of the gun found in the Buick, and that defendant intended to testify that he was the victim of circumstances and of police misconduct. Given defendant's decision to testify and the evidence counsel knew would be presented, it was reasonable strategy to extend defendant's defense to the prior incident. That a strategy fails does not render counsel ineffective or the strategy unreasonable or unsound. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

In sum, defendant has not established his claim that counsel pursued an unsound or unreasonable trial strategy. *Hoag*, *supra* at 6; *Unger*, *supra* at 242-243. Further, defendant has not overcome the presumption counsel's performance fell within the wide range of reasonable professional assistance given the information provided by and decisions defendant made. *LeBlanc*, *supra* at 578; *Strickland*, *supra* at 689, 691.

IV. Due Process

Defendant argues that the police's failing to preserve digital recordings made at the Pontiac police department denied him due process. Defendant testified that when he arrived at the police station, he was initially placed in a holding cell, not the booking (fingerprinting) cage. According to defendant's testimony at the *Walker* hearing, officers McLaughlin and Ferguson "wanted to talk to me and they took me out of the holding cell to the cage cell like where they fingerprint you."[4] It was in the booking or fingerprinting area where defendant was advised of and according to the police waived his *Miranda* rights and made oral admissions. Defendant contends this is where he was threatened and then placed back in the holding cell to write out the statement that was admitted at trial. This issue arises from McLaughlin's testimony as follows:

> *Q*. And, your entire interview was about twenty minutes, is that what you said earlier?
>
> *A*. Twenty (20) minutes, half an hour, approximately.
>
> *Q*. Okay. Approximately. Did you put him back in the case [sic] to finish the [written] statement?

[4] Defendant's testimony at trial was similar.

A. Yes.

Q. And is that booking area taped at all? The cage?

A. Yes, it is.

Q. Video taped?

A. Um --- it's digitally recorded, but I don't think it is stored any longer than thirty (30) days.

Q. That --- to your knowledge, you don't have that recorded section of tape.

A. No, we don't.

Q. You taped over?

A. Yes.

Q. And, would that, if you know, have taped up the area where you were interviewing him?

A. Yes, there are three cameras in the booking room.

Q. When you get a confession ---

A. Yes.

Q. (Continuing) . . . of a suspect, do you --- do you tag that portion of the video so it is preserved?

A. No.

The prosecutor argues that at most the record establishes that a recording of defendant drafting his written statement in the holding cell was not preserved. Therefore, the prosecutor argues, defendant cannot establish that he was prejudiced by unpreserved plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The prosecutor also argues that even assuming a recording existed of the police station oral interview that was routinely destroyed, defendant cannot establish that the police acted in bad faith; therefore, defendant's due process claim fails. We agree with the latter argument.

The "'suppression by the prosecution of evidence [requested by and] favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *People v Banks*, 249 Mich App 247, 254-255; 642 NW2d 351 (2002), quoting *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). But defendant cannot establish a *Brady* violation because he cannot prove the unpreserved police station recordings would have been favorable to him, nor did he request that the recordings be preserved. It its also doubtful the recordings can be considered material within the meaning of *Brady* because there is no reasonable probability that had the

recordings been disclosed to the defense the result of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). At best, defendant likely would have succeeded in obtaining a ruling suppressing his police stationhouse statements. But the remainder of the prosecution's strong case, including the testimony of officer Ferguson and the similar acts evidence, would have been unaffected.

Because there is only a possibly that the unpreserved evidence might have been helpful to defendant, the proper test to determine if defendant's right to due process has been violated is stated in *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). The Court held "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id*. at 58; see also *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). This Court has held that "the routine destruction of taped [material], when the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992); see also *People v Albert*, 89 Mich App 350, 353; 280 NW2d 523 (1979) ("The pertinent inquiry . . . is whether the action of [the police] in 'discarding' the tape-recorded confession was performed in bad faith or for the purpose of destroying evidence for a forthcoming trial."). Thus, in general, showing that evidence has been routinely destroyed pursuant to a policy does not establish that the police acted in bad faith. *People v Petrella*, 124 Mich App 745, 753; 336 NW2d 761 (1983). Here, the record establishes at most the routine destruction of the station house recordings pursuant to policy, not intentional action to deprive the defendant of evidence that might be helpful to his defense. Consequently, defendant has not established a due process violation because he has not shown that potential helpful evidence was destroyed in bad faith. *Youngblood*, *supra* at 58; *Hunter*, *supra* at 677; *Petrella*, *supra* at 753.

V. Defendant's In Propria Persona Issues

Defendant also asserts 14 issues in a "Standard 4" brief.[5] Defendant's claims are rambling, and as near as we can understand them, we conclude they all lack merit.

Defendant first asserts the police seized the revolver in an unconstitutional search of his mother's car. Defendant was lawfully arrested for operating without a driver's license, and it is undisputed that the car did not have a proper registration plate and that its owner was not present. Officer Ferguson properly impounded the car and conducted an inventory search pursuant to standard police department policy. This search was lawful under the Fourth Amendment. *People v Green*, 260 Mich App 392, 412-413; 677 NW2d 363 (2004), overruled on other grounds *People v Anstey*, 476 Mich 436, 447 n 9; 719 NW2d 579 (2006).

Next, defendant argues that the admission of evidence regarding the 2005 gun incident under MRE 404(b) violated his constitutional right to not be twice placed in jeopardy. Both the United States and Michigan Constitutions prohibit a person from twice being placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Conley*, 270 Mich App 301, 311; 715 NW2d 377 (2006). These constitutional provisions afford protection against: 1) a

[5] See Administrative Order 2004-6, 471 Mich cii.

second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. Neither multiple prosecutions nor multiple punishments are involved in this case. *Id*. Rather, evidence regarding the 2005 incident was properly admitted because it was relevant to the charge that defendant on the day he was stopped in 2007, was knowingly carrying a pistol in the vehicle he operated or occupied. MCL 750.227(2). This issue is without merit.

Defendant claims he was denied a fair trial because possible recordings of his encounter with the police were suppressed. We have already rejected this claim. Defendant also asserts it was erroneous to exclude from evidence a typed statement his father purportedly signed three months before his death. The constitutional guarantee of due process does not accord a defendant "an unlimited right to admit all relevant evidence or cross-examine on any subject." *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). Defendant presents no meaningful argument that his father's purported hearsay statement was admissible. Consequently, we deem this issue abandoned. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

Defendant next claims that both of his appointed trial counsel provided constitutionally deficient assistance. Defendant must overcome the presumption that the challenged actions were reasonable trial strategy, and also that a reasonable probability exists that, but for counsel's professional errors, the result would have been different. *Hoag*, *supra* at 6. Defendant first asserts counsel erred by not timely requesting any recordings of his encounter with the police on the day of his arrest, April 19, 2007. Defendant claims that he begged his counsel "to subpoena the video tapes" as far back as the preliminary examination. But the record indicates the only recordings that might have existed were of the police station booking area, which were routinely recorded over after 30 days. The preliminary examination was held in this case on May 31, 2007, at which point the digital recordings would already have been routinely destroyed. Defendant has not established the factual predicate for his claim of ineffective assistance of counsel. *Id*. Further, defendant cannot establish the outcome of this case would likely have been different. There was overwhelming evidence of defendant's guilt, and the recordings at best related to the credibility of Officer McLaughlin and defendant concerning defendant's oral statements at the police station. Defendant has not overcome the presumption of reasonable strategy regarding other purported trial errors by counsel. *Id*.

Next, defendant claims that the judicial proceedings in this case were a "sham." Defendant's argument appears to be a variation of his claim that he received ineffective assistance of counsel. Defendant also asserts that police witnesses presented false testimony; the prosecutor committed misconduct; and both the district court and the circuit court abused their discretion. Defendant does not support these claims with citation to the record. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant also argues that the trial court abused its discretion by denying his motion to suppress his statements. Defendant argues that he was coerced into waiving his right to counsel and also that he made up a story because the police threatened to frame him for murder. The trial court heard the testimony of the police officers and that of defendant at the *Walker* hearing. The court found the police were credible but that defendant was not. We accord deference to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and will not

reverse the trial court's findings unless they are clearly erroneous. MCR 2.613(C); *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). We are not left with a definite and firm conviction that the trial court made a mistake. *Id*. at 373.

Defendant next argues that delay in his initial arraignment and in conducting a preliminary examination warrants reversal. We disagree. Any procedural error in the district court is harmless in light of defendant's subsequent conviction after a fair trial in circuit court. See MCL 769.26; *People v Hall*, 435 Mich 599, 600-601, 613, 616; 460 NW2d 520 (1990); *People v McGee*, 258 Mich App 683, 685, 696-699; 672 NW2d 191 (2003).

Next, defendant argues he was denied due process by police misconduct. This argument is a restatement of defendant's claims that the police suppressed recordings of his interaction with them during the booking process and that the police coerced him into making a statement. We have already rejected these meritless claims.

Defendant also argues the prosecutor's misconduct denied him a fair trial. Defendant asserts the prosecutor participated in the police misconduct alleged above. Nothing in the record supports defendant's claims, which therefore fail. *Kelly*, *supra* at 640-641. Defendant also asserts misconduct because the prosecutor, with defense counsel's consent, redacted from defendant's written statement that defendant had previously been "in jail" and inserted in its place the words "was gone." We are unable to understand defendant's claim of prejudice from this action. Moreover, any error has affirmatively been waived.[6] Finally, defendant asserts misconduct regarding several of the prosecutor's arguments at trial. We conclude that the prosecutor only argued the evidence and reasonable inferences from the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

Next, defendant asserts the trial court failed instruct the jury on all the elements of the charged offenses. The trial court in a criminal case must instruct the jury on all elements of the charged offenses and any material issues, defenses, and theories of the parties that are supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Our review of the record discloses that defendant's claim in this regard is patently false.

Defendant next contends his trial counsel denied him a fair trial by, among other things, not preserving the testimony of defendant's father, who allegedly would have claimed responsibility for placing the revolver in the glove box of his wife's car and also would have expressed doubts that defendant knew the gun was there. But the prosecutor was not required to prove who placed the revolver in the glove box, only that defendant knew it was in the vehicle that he operated or occupied, and that defendant participated in "carrying" the gun. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). In light of the considerable evidence the prosecutor presented to establish defendant's guilty knowledge, including defendant's demeanor when refusing to look for paperwork in the glove box, his statements to the police on the way to and at the police station and the similar acts evidence, and in light of the jury's clear rejection of defendant's testimony, we conclude there is no reasonable probability that presenting

[6] The record reflects that both trial counsel and defendant agreed to the redaction.

the opinion of defendant's father to the jury—even assuming it admissible—would have changed the result in this case. *Hoag*, *supra* at 6. Defendant also claims that trial counsel somehow convinced his mother to falsely testify that the desk drawer in which her husband's revolver was kept had been broken into. Defendant has failed to substantiate this allegation.[7] *Id*.

Defendant argues the trial court abused its discretion sentencing him for his felony firearm conviction, MCL 750.227b, when that statute specifically precludes its application where the underlying felony is carrying a concealed weapon, MCL 750.227. While this is true, defendant's conviction for felony firearm was supported by his conviction for being a felon in unlawful possession of a firearm, MCL 750.224f. Conviction and sentence for violating both MCL 750.224f and MCL 750.227b does not violate double jeopardy as defendant suggests. "Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b." *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

We decline to consider defendant's challenges to the scoring of the sentence guidelines. The record indicates that the trial court imposed a sentence that was within the guidelines recommended range, and defendant did not object at the time of sentence or bring a timely motion for resentencing regarding the claims he now asserts. MCL 769.34(10). Consequently, defendant has not preserved for appeal his challenge to the scoring of the guidelines. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Defendant next asserts that appellate counsel has rendered ineffective assistance. A defendant convicted in a criminal case pursuing an appeal of right has the right to appointed appellate counsel, which encompass the right to effective assistance of appellate counsel. *People v Pauli*, 138 Mich App 530, 534; 361 NW2d 359 (1984). The constitutional standard for ineffective assistance of appellate counsel is the same as that for trial counsel. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). That is, a defendant must show (1) appellate counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the appeal would have been different. *Uphaus*, *supra* at 185-186. Defendant must overcome the presumption that alleged errors by appellate counsel were reasonable strategy. *Id*. at 186. It is reasonable strategy to "winnow out weaker arguments in order to focus on those arguments that are more likely to prevail." *Id*. at 186-187.

Defendant argues appellate counsel failed to fulfill Standard 3, Administrative Order 2004-6, 471 Mich cii, which provides:

> Counsel should raise those issues, recognizable by a practitioner familiar with criminal law and procedures on a current basis and who engages in diligent legal research, which offer reasonable prospects of meaningful postconviction or

[7] In fact, our review of the record fails to reveal any such testimony. Gladys Hardy testified only that the lock on the desk drawer where her husband kept his .38 caliber revolver did not work.

> appellate relief, in a form that protects where possible the defendant's option to pursue collateral attacks in state or federal courts. If a potentially meritorious issue involves a matter not reflected in the trial court record, counsel should move for and conduct such evidentiary hearings as may be required.

Specifically, defendant argues that appellate counsel should have pursued an evidentiary hearing regarding defendant's claim that trial counsel procured false testimony from his mother that the desk drawer in which her husband's revolver was kept had been broken into. This claim, however, is not a "potentially meritorious issue." See n 7, *supra*. There is no factual basis for a claim of ineffective assistance of appellate counsel. *Hoag*, *supra* at 6.

Defendant also argues generally that appellate counsel should have investigated and pursued some or all of the issues he has raised in his Standard 4 brief. Ineffective assistance of counsel cannot be predicated on the failure of counsel to pursue frivolous or meritless issues. *Riley*, *supra* at 142. Defendant has not overcome the presumption that counsel acted reasonably to restrict appellate issues to those most likely to prevail. *Uphaus*, *supra* at 186-187.

Finally, defendant argues that the cumulative effect of the multiple errors warrants reversal of his convictions. This argument has no merit. Several trial errors that standing alone would not warrant reversal may combine to deny an accused a fair trial. *Ackerman*, *supra* at 434. But, defendant must identify actual errors that are prejudicial before they may combine to warrant reversal. *LeBlanc*, *supra* at 591-592, n 12. Here, there can be no cumulative effect of multiple prejudicial errors because none have been identified. *Unger*, *supra* at 210.

We affirm.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello