STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2010
v	No. 286912 Muskegon Circuit Court
ARTHUR CORTEZ GREER, JR., Defendant-Appellant.	LC No. 07-055536-FH

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, carrying a concealed weapon ("CCW"), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 5-1/2 to 15 years for the felonious assault conviction and 5-1/2 to 30 years each for the CCW and felon in possession convictions, to be served consecutive to concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant's convictions arise from a shooting assault of Jomarco Mattox, who was shot once in the shoulder. Mattox admitted that he robbed defendant during the early morning hours on the day of the shooting. According to Mattox, defendant confronted him on the street later that morning and produced a gun. Mattox ran, but was shot in the shoulder. In addition to the weapons offenses, defendant was charged with alternative counts of assault with intent to commit murder, MCL 750.83, and assault with intent to do great bodily harm less than murder, MCL 750.84. At defense counsel's request, the trial court instructed the jury on the lesser offense of felonious assault. The jury acquitted defendant of the greater assault charges, but found him guilty of felonious assault and the weapons offenses.

I. FELONIOUS ASSAULT

We first address defendant's argument that the trial court erred in instructing the jury on felonious assault because it is only a lesser cognate offense, not a necessarily included lesser offense of assault with intent to commit murder.

As defendant correctly observes, felonious assault is a lesser cognate offense of assault with intent to commit murder, *People v Otterbridge*, 477 Mich 875; 721 NW2d 595 (2006), and

MCL 768.32(1) does not permit a court to instruct on uncharged lesser cognate offenses, *People v Cornell*, 466 Mich 335, 353-354; 646 NW2d 127 (2002); *People v Nyx*, 479 Mich 112, 121; 734 NW2d 548 (2007) (TAYLOR CJ.). However, because defense counsel expressly requested the felonious assault instruction, this claim of error is waived. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *Nyx*, 479 Mich at 128 n 43. A waiver extinguishes any error and thus there is no error to review. *Carter*, 462 Mich at 216. Accordingly, defendant's sole avenue for relief is his alternative claim that defense counsel was ineffective for requesting the instruction.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of that issue is limited to mistakes apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below objective standards of reasonableness, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defense counsel has wide discretion in matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The decision whether to request an instruction on a lesser offense is generally a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). To establish that counsel was ineffective, a defendant must overcome the strong presumption of sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140, 659 NW2d 611 (2003).

The principal defense strategy at trial was to attack the credibility of Mattox and the other prosecution witnesses. Although MCL 768.32(1) did not permit the trial court to instruct on felonious assault, a defense attorney has discretion to waive "'a broad array of constitutional and statutory provisions.'" *Carter*, 462 Mich at 217-218 (citations omitted). By requesting the felonious assault instruction, counsel gave the jury a means by which to find defendant guilty of a less serious offense in the event it found the prosecution witnesses credible. Defendant has failed to overcome the strong presumption that counsel's strategy was sound. Thus, defendant's ineffective assistance of counsel claim cannot succeed.[1]

II. MISSING WITNESS INSTRUCTION

Next, we address defendant's argument that the trial court erred in denying his request for a missing witness instruction after the prosecution failed to produce Marlon Ezell, an endorsed witness, for trial. Defendant argues that he was entitled to the instruction because the prosecution failed to exercise due diligence to locate and produce Ezell at trial. We disagree. We review a trial court's determination of due diligence and its decision whether to give a

[1] Defendant also argues that if his felonious assault conviction is vacated, his attendant felony-firearm conviction must also be vacated. Because we conclude that defendant is not entitled to have the felonious assault conviction vacated, there is no need to vacate the corresponding felony-firearm conviction.

missing witness instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). We review for clear error the trial court's factual determinations underlying its due diligence decision. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

The prosecution is obligated to exercise due diligence to produce endorsed witnesses at trial. *Eccles*, 260 Mich App at 388. The test for due diligence "is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). If due diligence is not exercised, a missing witness instruction, CJI2d 5.12, which allows the jury to infer that the missing witness's testimony would have been unfavorable to the prosecution, may be appropriate. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003).

The record discloses that Deputy Robillard attempted to locate Ezell at his grandmother's house, which was the address at which Ezell's mother said he lived and where Ezell had instructed the post office to forward his mail. Numerous attempts were made to contact Ezell at that address, but all were unsuccessful, and Ezell's grandmother later denied that Ezell lived there. Deputy Robillard also ascertained that Ezell was not in jail or at other addresses associated with him, and he also checked the LEIN and Secretary of State databases to see if there were any other addresses listed for Ezell. The record indicates that Ezell had other pending criminal matters and was apparently evading service. Given the circumstances, the trial court did not abuse its discretion in determining that Ezell could not be produced for trial despite the exercise of due diligence. Accordingly, the trial court did not err in denying defendant's request for a missing witness instruction.

III. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that the evidence was insufficient to support his convictions. In reviewing a claim of insufficient evidence, this Court reviews the record de novo by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the charged crimes were proven beyond a reasonable doubt. *Unger*, 278 Mich App at 222.

"The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. *Id*. The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) less than five years elapsed since the defendant's discharge from probation. *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004). To establish the offense of carrying a concealed weapon, the prosecution must prove that the defendant knowingly possessed a concealed weapon without a license. *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 1; 728 NW2d 406 (2007).

At trial, Mattox testified that defendant shot him at close range with a gun that defendant pulled from his waistband. Although Mattox's credibility was challenged during trial, "[t]his

Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "All conflicts in the evidence must be resolved in favor of the prosecution." *Id.* Mattox's testimony, viewed in the light most favorable to the prosecution, alone was sufficient to prove that defendant committed a felonious assault and to establish the possessory elements of the weapons offenses. The testimony did not need to be corroborated. Further, defendant admitted that he had a prior felony conviction for distribution of a controlled substance, which made him ineligible to carry a firearm, MCL 28.422(3)(e), and a certified copy of that conviction was entered into evidence, thereby establishing the remaining elements of the felon-in-possession charge. Accordingly, the evidence was sufficient to support defendant's convictions.

IV. GREAT WEIGHT OF THE EVIDENCE

Defendant also argues that he is entitled to a new trial because the jury's verdicts are against the great weight of the evidence. We review the trial court's decision denying defendant's motion for a new trial based on the great weight of the evidence for an abuse of discretion. *Unger*, 278 Mich App at 232. A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

A motion for a new trial based on the great weight of the evidence should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would result if the verdict were allowed to stand. *Unger*, 278 Mich App at 232. Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Absent exceptional circumstances, issues of witness credibility are for the trier of fact. *Id.* "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* at 645-646 (citation omitted).

We disagree with defendant's argument that the testimony of an eyewitness, Cher'zell Shelby, was contradicted by the forensic evidence. Based on the location of recovered bullet fragments, Detective Orrison surmised that the shooter stood either in the middle of the street or possibly on the west side and shot in an east to southeasterly direction. This testimony was not wholly inconsistent with Shelby's generalization that the shooting occurred across the street from where he stood. Also, defendant's argument assumes that, in Shelby's account, the shooter remained standing in the same direction from which he came as he fired his gun. However, Shelby did not indicate what direction defendant or Mattox were facing when the first shot was fired. Mattox testified that he turned to run when he saw defendant begin to pull a gun from his waistband. Based on the gunshot residue on Mattox's wound and Mattox's testimony that he was shot as he turned to flee, it was reasonable to infer that the first shot Shelby heard was the one that injured Mattox. The bullet that struck Mattox was never found, so Shelby's testimony did not conflict with any physical evidence. Further, Shelby did not testify regarding defendant's movements after the first shot was fired. Shelby fled after the first shot and only heard the subsequent shots.

Defendant also argues that the testimony of Shelby and Mattox was so impeached that neither witness could be believed. We disagree. Shelby's and Mattox's testimony regarding the shooting was largely consistent. Defendant asserted an alibi defense. Some witnesses contradicted specific aspects of Shelby's testimony and other witnesses asserted that Mattox had a reputation for being a liar. Although parts of Shelby's testimony were inconsistent with other witnesses' testimony and Mattox's credibility was impeached, this does not mean that their testimony had no probative value. The determinations of who and what testimony to believe, and the weight of the testimony, were for the jury to resolve. *Lemmon*, 456 Mich at 642-643.

Defendant further argues that Alicia Brooks's testimony regarding her car had no probative value because it was improperly influenced by Detective Bleich's threats and lies. Defendant presented this argument to the jury, which had the benefit of hearing Brooks's police interview to assess for itself whether it may have been influenced by Detective Bleich. It was for the jury to determine the credibility and weight of Brooks's testimony in light of Detective Bleich's statements. *Id.*

Moreover, none of defendant's other arguments support his claim that he is entitled to a new trial. Defendant simply relies on evidence favorable to him and argues that any conflicting testimony was not credible. However, matters regarding conflicting testimony and credibility were properly left to the jury, and are not grounds for granting a new trial. *Lemmon*, 456 Mich at 643. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this basis.

V. DUE PROCESS

Defendant also argues that the he was denied his right to due process and a fair trial because of misconduct by the police and the prosecutor. Specifically, defendant argues that (1) the prosecutor improperly allowed Shelby to give false testimony; (2) that Brooks's testimony was improperly obtained through police threats and lies; and (3) the statements of Mattox and his girlfriend were improperly procured as a condition for the return of their child. We review de novo the constitutional question whether defendant was denied due process. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001).

A. PERJURED TESTIMONY

A prosecutor may not knowingly present perjured testimony and has a duty to correct false evidence when it arises. *Id.* A conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Here, however, the record does not support defendant's claim that Shelby's testimony was false, or that the prosecutor knew it to be false. As previously discussed, Shelby's testimony was not inconsistent with the physical evidence. Further, the mere existence of some inconsistencies within his testimony or with the testimony of other witnesses does not equate to perjury. The record shows that defendant was fully aware of the alleged inconsistencies and contradictions in Shelby's testimony and had an opportunity to explore these matters before the jury at trial. But the mere existence of these inconsistencies does not establish that the prosecutor presented testimony that was known to be false. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998).

B. WITNESS INTIMIDATION

Defendant also argues that Detective Bleich improperly coerced the statements of three witnesses. Prosecutors may not intimidate witnesses, and threats from law enforcement officers may be attributed to the prosecution. Such attempts, if successful, can constitute a denial of due process. *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992). The statements of Mattox and his girlfriend were not presented at trial, and neither witness testified regarding any alleged misconduct by Detective Bleich. Thus, the record does not support defendant's claim of misconduct with respect to these two witnesses.

Defendant also asserts that Detective Bleich threatened Brooks with the loss of her child in order to obtain her statement. However, a review of her interview reveals that Detective Bleich merely informed Brooks that she could possibly be charged as an accessory after the fact and the consequences of not telling the truth. Based on her conduct pursuant to defendant's instructions from jail, an accessory after the fact charge was not baseless. In addition, although Detective Bleich admittedly lied to Brooks when he told her that he knew defendant had used her car, this deception alone is insufficient to taint Brooks's statement. See *People v Hicks*, 185 Mich App 107; 460 NW2d 569 (1990) (a police officer's false statement of fact alone does not render a confession involuntary).

In sum, the record does not support defendant's claims of police and prosecutorial misconduct. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.

VI. JAIL CREDIT

Finally, defendant argues that the trial court erred by failing to award him sentence credit pursuant to MCL 769.11b. Defendant acknowledges that because he committed the instant offenses while on parole, our Supreme Court's recent decision in *People v Idziak*, 484 Mich 549, 552; 773 NW2d 616 (2009), precludes an award of sentence credit against his new sentences. Although defendant argues that *Idziak* was incorrectly decided, this Court is bound to follow that decision. See *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Michael J. Talbot