STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILBERT TODD VANCE,

Defendant-Appellant.

UNPUBLISHED
August 17, 2010

No. 290686
Kent Circuit Court
LC No. 07-013482-FH

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] He was sentenced as a fourth habitual offender, MCL 769.12, to 46 to 240 months in prison for the CCW conviction, and to two years in prison for the felony-firearm conviction.[2] We affirm defendant's convictions and sentences, but remand for correction of the amended judgment of sentence consistent with this opinion.

On the evening of July 19, 2007, police were dispatched to an alley in Grand Rapids where people had gathered and guns were being fired. Upon arriving at the scene, a police officer approached a group of people including defendant. Defendant was near a parked Ford

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[1] The jury acquitted defendant on a charge of receiving and concealing a stolen firearm (receiving-and-concealing), MCL 750.535b(2). This receiving-and-concealing charge was the underlying felony charge upon which defendant's felony-firearm charge was predicated.

[2] The two-year sentence for defendant's felony-firearm conviction was originally set to run consecutively to defendant's CCW sentence. However, the circuit court subsequently amended the judgment of sentence to indicate that the two sentences would run concurrently. This was correct. We note that defendant's felony-firearm charge had been predicated on the charged felony of receiving-and-concealing only, and had not been predicated on the charged felony of CCW. Indeed, a charge of felony-firearm *may not* be predicated on the underlying felony of CCW. MCL 750.227b(1). Thus, because defendant was acquitted on the receiving-and-concealing charge, the circuit court correctly determined that his sentences for CCW and felony-firearm should run concurrently rather than consecutively. *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

Explorer when the officer arrived. Thereafter, defendant disappeared behind a garage for a few seconds before reappearing in the alley. After a subsequent search of the area, police found several rounds of ammunition near the Ford Explorer and a loaded .357 magnum handgun under a wading pool behind the garage in question.

The owner of the firearm was located. He testified at trial that the gun had been stolen from his home. He stated that he had never seen defendant before.

A fingerprint examiner testified that one of defendant's fingerprints was discovered on the recovered firearm. Defendant had told police that he knew nothing about the gun and that he never touched it. Defense witnesses testified that they had been present at the gathering, but that they had never seen defendant with the gun. Defendant, himself, testified that he had been present at the gathering and that another person in attendance had shown him the gun. However, he denied having handled the firearm.

As noted previously, the jury convicted defendant of CCW and felony-firearm, but acquitted him on a charge of receiving-and-concealing.

I

Defendant first argues that the evidence was insufficient to support his CCW conviction because there was no evidence that he had "concealed" the firearm. We disagree. We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that all elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the jury to determine what inferences may be drawn from the evidence and how much weight should be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). We must resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendant contends that there was no evidence that he concealed the gun on or about his person. The elements of CCW are (1) that the defendant carried a weapon (here a handgun), and (2) that the weapon was concealed on or about the defendant's person. MCL 750.227; *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979). As defendant correctly points out, "[c]oncealment is an essential element of the crime of carrying a concealed weapon," *People v Jackson*, 43 Mich App 569, 571; 204 NW2d 367 (1972), and the act of carrying a handgun in one's hand without any additional concealment is not sufficient to violate the CCW statute, see *People v Kincade*, 61 Mich App 498, 504-505; 233 NW2d 54 (1975).

The problem with defendant's argument in this regard is that the evidence gave rise to a strong inference that the gun was concealed on or about his person when he walked away from the alley and disappeared behind the garage. No one who was present at the gathering, including the police officer, reported having seen defendant carrying the gun while he walked toward the garage. Yet the firearm was later discovered hidden behind the garage, and it bore one of defendant's fingerprints. The jury could have logically inferred from this evidence that defendant concealed the firearm on his person before he took it behind the garage and hid it under the wading pool. See *Hardiman*, 466 Mich at 428. Indeed, the fact that no one saw the gun in defendant's possession was strong evidence that it was concealed at the time. *People v*

Jones, 12 Mich App 293, 296; 162 NW2d 847 (1968) (stating that "a weapon is concealed when it is not discernible by the ordinary observation of persons coming in contact with the person carrying it, casually observing him, as people do in the ordinary and usual associations of life"). It is well settled that "[c]ircumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found beyond a reasonable doubt that defendant had the firearm concealed on his person while he was carrying it behind the garage to hide it.

II

Defendant next argues that the circuit court erred by allowing the prosecution to introduce evidence of a conversation between defendant and his original attorney, in which defendant and his attorney discussed possible defenses and during which defendant apparently told his attorney that he had grabbed or touched the gun in the process of disarming someone else. Defendant claims that this conversation with his original attorney was made during the course of plea negotiations, and that any evidence of the conversation was therefore inadmissible under MRE 410. Defendant also claims that any evidence of his conversation with his original attorney was inadmissible because it constituted hearsay, MRE 801(c); MRE 802, and because its probative value was substantially outweighed by the dangers of unfair prejudice and misleading the jury, MRE 403. We review for an abuse of discretion the circuit court's decision to admit or exclude evidence. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). However, we review de novo any underlying questions of law. *Id*. at 670-671.

Defendant asserts that his conversation with his original attorney was made during the course of plea negotiations and was therefore inadmissible under MRE 410, which provides in pertinent part:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
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> * * *
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

It is true that defendant's original attorney wrote a letter in which he stated that "any conversation" he had with the prosecution "regarding [defendant] touching any weapon" had occurred solely for the purpose of "attempting to negotiate a favorable plea deal for [defendant]." However, given the limited specific facts available, we simply cannot determine whether defendant's original attorney had a reasonable expectation of negotiating a plea deal at the time he disclosed the contents of his conversation with defendant to the prosecution. See *People v Dunn*, 446 Mich 409, 415-416; 521 NW2d 255 (1994).

More importantly, we note that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." MRE 103(a).

Thus, claimed evidentiary error is subject to a harmless-error analysis. MCL 769.26; *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999). A defendant pursuing a claim of preserved, nonconstitutional error has the burden of establishing a miscarriage of justice under a "more probable than not" standard. *Id*. at 495; see also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). After reviewing the entire record in this case, we simply cannot say that the admission of evidence concerning defendant's conversation with his original attorney—even if somehow erroneous—in any way undermined the reliability of the jury's verdict. *Lukity*, 460 Mich at 495. If anything, evidence of the conversation between defendant and his original attorney may have actually helped defendant by providing an explanation for why his fingerprint was on the gun. Defendant has failed to show that this evidence, even if technically admitted in violation of MRE 410, more probably than not affected the outcome of his trial. *Id*. at 495-496.

Defendant also asserts that any evidence of his conversation with his original attorney was inadmissible because it constituted hearsay, MRE 801(c); MRE 802, and because its probative value was substantially outweighed by the dangers of unfair prejudice and misleading the jury, MRE 403. But defendant disregards that fact that his original attorney's statements to the prosecution concerning the conversation with defendant constituted adoptive party admissions. MRE 801(d)(2)(D); see also *Guerrero v Smith*, 280 Mich App 647, 661; 761 NW2d 723 (2008). Nor can we conclude that evidence of the conversation between defendant and his original attorney should have been excluded under MRE 403. Defendant argues in his brief on appeal that "[t]he claim that [defendant and his original counsel] had moved forward inconsistent defenses prior to trial was deliberately placed before th[e] jury in order to shift the burden of proof and undermine the credibility of [defendant] and the defense." However, as explained previously, the evidence of the conversation between defendant and his original attorney—including evidence that defendant initially claimed to have touched the firearm while disarming someone else—may have actually helped defendant by providing an explanation for why his fingerprint appeared on the gun. Beyond this, defendant does not explain how the evidence unfairly prejudiced him or how the evidence could have confused the jury. As with defendant's earlier argument concerning MRE 410, we conclude that defendant has failed to show that the evidence, even if admitted in error, more probably than not affected the outcome of his trial. *Lukity*, 460 Mich at 495-496.

III

Defendant also argues that the prosecutor committed misconduct during his closing and rebuttal arguments by stating that defendant had attempted to "negotiate" with the police and by stating that defendant did not adequately "explain" why he spoke freely with his own attorney but not with the police. Defendant argues that the prosecutor's allegedly improper remarks were intended to "shift the evidentiary burden onto the defense."

Defendant failed to preserve these claims of prosecutorial misconduct by way of timely, specific objections at trial. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Indeed, we have thoroughly examined the trial transcripts in this case, paying especially close attention to those portions containing the prosecutor's closing and rebuttal arguments. At no point did defendant object to any of the prosecutorial remarks that he now challenges as improper.

The general rule is that claims of prosecutorial misconduct are reviewed on a case-by-case basis and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, because the challenged prosecutorial statements in this case were not preserved, appellate review is for outcome-determinative, plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008); see also *Carines*, 460 Mich at 763-764. "'[W]e cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect.'" *Unger*, 278 Mich App at 235, quoting *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

"'Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial.'" *Unger*, 278 Mich App at 236, quoting *Bahoda*, 448 Mich at 282. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions[.]" *Unger*, 278 Mich App at 235 (citations omitted).

The problem with defendant's claim, of course, is that the defense made no objections and requested no curative instructions with respect to the challenged prosecutorial remarks in this case. See *id*. Moreover, the remarks were isolated and confined to the prosecutor's closing and rebuttal arguments. "[A] well-tried, vigorously argued case ought not to be overturned due to isolated improper remarks which could have been cured had an objection been lodged." *People v Duncan*, 402 Mich 1, 17; 260 NW2d 58 (1977). As our Supreme Court has specifically noted, "[w]hether the defense strategy was to forego objection and hope that the objectionable portions of the prosecutor's argument would engender sympathy in the jury, or to invite error as a foundation for subsequent reversal, we will not now review assignments of error so waived." *Id*. Because a timely objection and curative instruction could have alleviated any prejudicial effect of the challenged prosecutorial comments, we can find no error requiring reversal. *Unger*, 278 Mich App at 238.[3]

IV

Defendant next argues that the amended judgment of sentence should be corrected to indicate that he was entitled to 219 days of jail-time credit with respect to *both* his CCW sentence and his felony-firearm sentence. We agree, as does the prosecution. Indeed, as the prosecution has stipulated in its brief on appeal, "defendant should be given 219 days credit on both of his convictions." Because defendant's sentences for CCW and felony-firearm must run concurrently rather than consecutively, *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994), defendant is entitled to 219 days of jail-time credit against *both* sentences, see *People v Clark*, 463 Mich 459, 465 n 14; 619 NW2d 538 (2000). On remand, the circuit court

[3] In addition, we note that the circuit court specifically instructed the jury that the attorney's arguments were not evidence. This instruction "dispelled any prejudice." *Bahoda*, 448 Mich at 281. Furthermore, the challenged prosecutorial remarks were based on the evidence and the reasonable inferences arising therefrom. See *id*. at 282.

shall correct the amended judgment of sentence to indicate that defendant is entitled to 219 days of jail-time credit against *both* of his sentences. The circuit court shall forward a copy of the corrected judgment of sentence to the department of corrections.

V

Having found no error requiring reversal with respect to defendant's CCW conviction, we need not consider defendant's remaining argument that his felony-firearm conviction must be vacated on the basis of logical inconsistency.

We affirm defendant's convictions and sentences, but remand for correction of the amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen