

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

LONDELL JENKINS,

Defendant-Appellant.

UNPUBLISHED
November 9, 2010

No. 293668
Wayne Circuit Court
LC No. 09-009113-FH

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

PER CURIAM.

Londell Jenkins appeals as of right his jury trial convictions of felon in possession of a firearm¹, carrying a concealed weapon (“CCW”)², and possession of a firearm during the commission of a felony, second offense.³ He was sentenced as a fourth habitual offender⁴ to concurrent prison terms of 3-1/2 to 15 years each for the felon in possession and CCW convictions, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. We affirm Jenkins’ convictions and sentences, but remand for correction of the judgment of sentence to reflect that the sentences for felony-firearm and CCW are to run concurrently.

The prosecution presented testimony that Jenkins was driving a vehicle in Detroit and that police observed that he was not wearing a seatbelt. After a police semi-marked vehicle made a U-turn and began following Jenkins’ vehicle, Jenkins quickly turned onto a residential street, pulled near the curb, and fled from his vehicle. Detroit Police Officer William Zeolla, one of four officers in the patrol car, observed Jenkins carrying a dark handgun. The officers pursued but lost sight of Jenkins for approximately 20 minutes. Jenkins was eventually located hiding under a residential deck. Officer Robert Skender, who had joined the other four officers in the search, recovered a handgun from an alley behind the residence. Officer Skender also

¹ MCL 750.224f.

² MCL 750.227.

³ MCL 750.227b.

⁴ MCL 769.12.

confiscated a black ski mask from the front seat of Jenkins' vehicle. Jenkins voluntarily stated to Officer Jason Kile that he had the gun because he thought someone was going to rob him. Jenkins later gave a written statement in which he denied carrying a handgun. The defense theory at trial was that Jenkins never possessed a firearm, and that the testimony of Officers Zeolla and Skender was not credible.

I. ADMISSION OF EVIDENCE

Jenkins first argues that the trial court erred when it allowed the prosecutor to admit evidence of the ski mask that was found inside Jenkins' vehicle. Jenkins argues that the ski mask was not relevant to the charged offenses, and there was no evidence that he possessed or wore it. We disagree.

Jenkins objected to the admission of the ski mask on relevancy grounds only. His additional claim that the prosecutor failed to establish that he actually possessed the ski mask is not preserved.⁵ A trial court's decision to admit evidence is generally reviewed for an abuse of discretion.⁶ "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes."⁷ Jenkins' unpreserved claim is reviewed for plain error affecting his substantial rights.⁸

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁹ Relevant evidence may be excluded under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403 is not intended to exclude "damaging" evidence, as "[a]ny relevant [evidence] will be damaging to some extent."¹⁰ It "is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded."¹¹ Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury" or "it would be inequitable to allow the proponent of the evidence to use it."¹²

The principal issue at trial was whether Jenkins possessed a handgun. Officer Zeolla testified that he saw Jenkins carrying a handgun as he fled from the vehicle. Officer Kile, the driver of the patrol car, testified that he did not see Jenkins carrying a handgun. During the chase, the officers lost sight of Jenkins for about 20 minutes. When Jenkins was apprehended,

⁵ *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

⁶ *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

⁷ *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

⁸ *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

⁹ MRE 401; *Yost*, 278 Mich App at 355.

¹⁰ *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

¹¹ *Id.* (emphasis in the original).

¹² *Id.* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

he was not in possession of a handgun. A handgun was recovered in an area behind the house where Jenkins was hiding. Officer Kile testified that immediately after his arrest, Jenkins voluntarily stated that he had a handgun. In a later statement, Jenkins denied carrying a handgun. Under these circumstances, the evidence that there was a ski mask in the front seat of the vehicle from which Jenkins fled made it more probable that Jenkins possessed a weapon as he fled from the vehicle. The absence of direct evidence that Jenkins was seen disposing of the gun during the chase enhanced the value of the evidence. The evidence was not inadmissible simply because the nature of the evidence was potentially prejudicial. Jenkins has not demonstrated that he was unfairly prejudiced by the evidence. Before the evidence was admitted, the prosecutor focused on the proper purpose for which the evidence was admissible. Moreover, in his opening statement, the prosecutor advised the jury that “the ski mask is something that’s not illegal to carry,” and that he was not suggesting “in any way that the [Jenkins] was going to do anything with this ski mask.” Under the circumstances, the trial court’s decision to admit the evidence of the ski mask did not fall outside the range of reasonable and principled outcomes.¹³

We also disagree with Jenkins’ unpreserved claim that the ski mask was inadmissible because the prosecutor failed to establish that he possessed or wore it. Jenkins did not challenge the ownership of the ski mask below. Because the ski mask was found in the front seat of the vehicle that Jenkins was driving, it supported an inference that Jenkins possessed it.

II. TRIAL COURT’S CONDUCT

Jenkins next argues that the trial court’s conduct denied him a fair trial. Jenkins contends that the trial court pierced the veil of impartiality by excusing the prosecutor’s failure to produce a patrol car video recording of the incident. We disagree.

On cross-examination by defense counsel, Officer Zeolla testified that he “no idea” of the whereabouts of any patrol car video recording of the incident. On redirect examination, the officer testified that he did not know if there had been a request to produce a recording or whether the video system was even working that night. The officer explained that he was not familiar with the operability of the video recording system because he was not trained in that area. On recross-examination, defense counsel questioned the officer about his training, the federal mandate of patrol cars being equipped with recording systems, and the purpose of the recording equipment. The officer testified that the police department is mandated to have recording systems in patrol cars and that the purpose of the recording devices is to protect the officers, but again testified that he had not received training in that area. The trial court interjected as defense counsel attempted to further inquire about the officer’s knowledge of criminal law, the purpose of the mandate, and his training at the police academy. In the context of discontinuing this line of questioning, the trial court remarked that the police department had a policy to maintain recordings for 30 days, and that there had not been a timely request to preserve the recording in this case, so there was no recording still in existence.

¹³ *Yost*, 278 Mich App at 379.

It is well established that the trial court has a duty to control trial proceedings in the courtroom, and has wide discretion and power in fulfilling that duty.¹⁴ But a court's conduct may not pierce the veil of judicial impartiality.¹⁵ "If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed."¹⁶ "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'"¹⁷

The trial court's remarks were not of such a nature as to unduly influence the jury. Defense counsel acknowledged the trial court authority to take judicial notice of certain facts, and Jenkins does not argue that the trial court's remarks regarding the Detroit Police Department's policy of maintaining video recordings for 30 days was incorrect. The record shows that the trial court appropriately exercised its duty to control the trial to prevent excessive questioning about the existence or nonexistence of a recording that had not been requested, and to foreclose "quasi legal opinions" about the purpose and scope of the federal mandate. At the juncture that the trial court intervened, defense counsel had questioned the officer at length about the matter, the prosecutor had addressed the matter on redirect examination, and the officer had made clear that he had no knowledge of the existence of a recording and had no training in the area of video recording systems. The trial court's remarks were not calculated to cause the jury to believe that the court had any opinion regarding the case, nor were they critical or disapproving of counsel. In fact, the court stated that it was not blaming present defense counsel for failing to request the recording.¹⁸

The officer in charge later testified that the patrol car used in this case was an older vehicle that had outdated equipment that was inoperable, so even if there had been a timely request, no recording existed. The trial court also instructed the jury that its comments are not evidence, that it is not trying to influence the jury's vote or express a personal opinion about the case when it made a comment and that if the jury believed that the court had an opinion, that opinion must be disregarded. "Jurors are presumed to follow their instructions."¹⁹ Consequently, Jenkins has not demonstrated that the trial court's comments deprived him of a fair trial.

¹⁴ *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006).

¹⁵ *Id.* at 308.

¹⁶ *Id.* (citations omitted).

¹⁷ *Id.* (citations omitted).

¹⁸ Defense counsel noted that he was first retained approximately 60 days after Jenkins' arrest, and the trial court stated that it was not implying that defense counsel had a personal obligation in that regard.

¹⁹ *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

III. DOUBLE JEOPARDY

Jenkins next argues that his convictions and sentences for both felon in possession of a firearm and felony-firearm violate his double jeopardy right not to be subjected to more punishment than the Legislature intended. We disagree. We review this unpreserved constitutional claim for plain error affecting substantial rights.²⁰

The validity of multiple punishments under the double jeopardy provisions of the United States and Michigan Constitutions is generally determined under the “same-elements test,” which requires the reviewing court to determine “whether each provision requires proof of a fact which the other does not.”²¹ But if the Legislature has clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements.²² Our Supreme Court has determined that multiple convictions of felon in possession of a firearm and felony-firearm do not violate the constitutional double jeopardy protections.²³ Despite Jenkins’ assertion of error by our Supreme Court, this Court is bound to follow decisions of our Supreme Court.²⁴

IV. CONSECUTIVE SENTENCING

We agree with Jenkins that the trial court erred in ordering his sentences for CCW and felony-firearm to be served consecutively. A sentence for felony-firearm must be served consecutively and prior to only the sentence for the underlying felony, which in this case is felon in possession of a firearm.²⁵ The offense of CCW cannot serve as the underlying felony for felony-firearm.²⁶ Because Jenkins’ felony-firearm conviction should run consecutively to the felon in possession conviction, but concurrently with the CCW conviction, we remand this case for the sole purpose of amending the judgment of sentence to reflect that Jenkins’ sentences for felony-firearm and CCW are to run concurrently.

V. STANDARD 4 BRIEF

Jenkins raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

²⁰ *Carines*, 460 Mich at 763-764.

²¹ *People v Smith*, 478 Mich 292, 305, 315-316; 733 NW2d 351 (2007) (citation omitted).

²² *Id.* at 316.

²³ *People v Calloway*, 469 Mich 448, 450-452; 671 NW2d 733 (2003); see also *People v Dillard*, 246 Mich App 163, 169-171; 631 NW2d 755 (2001).

²⁴ *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

²⁵ *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000).

²⁶ MCL 750.227b(1); *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

A. VENUE

Jenkins argues that the trial court's jury instruction that the city of Detroit is located within the county of Wayne improperly invaded the jury's province to determine the factual question of venue, and that defense counsel was ineffective for failing to either object to this instruction or move for a mistrial.

We review Jenkins' unpreserved instructional claim for plain error affecting his substantial rights.²⁷ Because Jenkins did not raise his ineffective assistance of counsel claim in the trial court, our review of that claim is limited to mistakes apparent on the record.²⁸ "Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise."²⁹ To establish ineffective assistance of counsel, Jenkins must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error.³⁰

It is the jury's responsibility to determine the facts and apply them to the law, and a trial court's instruction must not improperly invade the province of the jury.³¹ Venue must be proven beyond a reasonable doubt, and the determination regarding venue presents a factual issue for the jury.³² Jenkins does not dispute that the offense took place in Detroit. Although Jenkins properly observes that no testimony was offered indicating that Detroit is in Wayne County, the trial court could properly take judicial notice of the fact that Detroit is a city within Wayne County. A court may take judicial notice of facts that are "generally known within territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."³³ A court may take judicial notice of such matters on its own initiative at any time.³⁴ The trial court's instruction did not invade the province of the jury and, accordingly, Jenkins has not demonstrated a plain error.

For the same reasons, we reject Jenkins' related ineffective assistance of counsel claim. Because there was no basis for an objection or a mistrial, Jenkins' ineffective assistance of counsel claim cannot succeed.³⁵

²⁷ *Carines*, 460 Mich at 763-764.

²⁸ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

²⁹ *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

³⁰ *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

³¹ See *People v Gaydosh*, 203 Mich App 235, 237-238; 512 NW2d 65 (1994).

³² *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009).

³³ MRE 201(b).

³⁴ MRE 201(c) and (e).

³⁵ See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We further reject Jenkins' related claim that his convictions should be reversed because the prosecution failed to prove venue beyond a reasonable doubt. Because there was testimony that the crime was committed within the city of Detroit and the trial court properly took judicial notice of the fact that Detroit is located within Wayne County, venue was sufficiently established.³⁶

B. PROSECUTOR'S CONDUCT

Jenkins next argues that the prosecutor knowingly used the perjured testimony of Officers Zeolla and Skender to secure his conviction. We review this unpreserved claim for plain error affecting Jenkins' substantial rights.³⁷

A prosecutor has a constitutional duty to inform the trial court and a criminal defendant when a government witness offers perjured testimony.³⁸ A prosecutor may not knowingly use false testimony to obtain a conviction and must correct false evidence when it is presented.³⁹ But absent proof that the prosecutor knew that trial testimony was false, reversal is unwarranted.⁴⁰

Jenkins argues that the prosecutor knowingly used Officer Zeolla's perjured testimony that he saw Jenkins carrying a gun as he fled from the vehicle. Jenkins argues that Officer Zeolla's testimony had to be perjury because Officer Kile, who was the driver of the patrol vehicle and had a better view of Jenkins, testified that he did not see Jenkins with a handgun. Mere proof of conflicting testimony is insufficient to support a claim of perjury⁴¹, and the fact that certain testimony may be contradicted by other witnesses does not compel the prosecutor to disbelieve his own witness and correct his testimony.⁴² The mere fact that Officer Kile testified that he did not see Jenkins with a gun does not establish that Officer Zeolla's testimony was false, let alone that the prosecutor knew it to be false. Jenkins' argument is a matter of witness credibility, which was for the jury to resolve. The jury was informed of the different observations of each officer, the position of each officer in the patrol car, and the ability of each officer to observe Jenkins from his vantage point.

Jenkins further claims that the prosecutor knowingly used the perjured testimony of Officer Skender, who testified that he recovered a handgun from an alley. Jenkins argues that this testimony was false because a defense witness testified that there was no alley where the gun was supposedly found. But the mere fact that there was contradictory testimony does not support a claim of perjury.

³⁶ *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

³⁷ *Carines*, 460 Mich at 763-764.

³⁸ *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998).

³⁹ *Id.* at 277.

⁴⁰ *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001).

⁴¹ *People v Kozyra*, 219 Mich App 422, 429; 556 NW2d 512 (1996).

⁴² *Lester*, 232 Mich App at 278-279.

Jenkins also argues that at the preliminary examination, Officer Zeolla offered perjured testimony when he testified that the firearm recovered was “identical” to the one he saw in Jenkins’ hand, but he could not say for certain that it was the same gun. Jenkins has not explained why this testimony should be considered false, and we can discern no indication of perjury from the record. Because there is no indication that the prosecutor engaged in any misconduct, Jenkins has failed to demonstrate plain error.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Jenkins lastly argues that he was denied the effective assistance of counsel at trial because defense counsel was not prepared to try the case, as shown by his inaction on certain matters. Because Jenkins did not raise this issue in the trial court our review is limited to mistakes apparent on the record.⁴³

“A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.”⁴⁴ When claiming ineffective assistance due to defense counsel’s unpreparedness, a defendant must show prejudice resulting from the lack of preparation.⁴⁵ Contrary to Jenkins’ argument that his counsel was not adequately prepared to challenge the ski mask, defense counsel objected to this evidence on relevancy grounds. Jenkins claims that it would have been more proper to object under MRE 404(b), but because evidence of a ski mask, standing alone, is not evidence of “other crimes, wrongs, or acts,” any objection on the basis of MRE 404(b) would have been futile. Defense counsel also questioned Officers Zeolla and Kile about their respective locations and vantage points when Jenkins fled from his vehicle, and presented a defense witness who contradicted Officer Skender’s testimony about where the gun was recovered. To the extent that Jenkins relies on the fact that defense counsel’s strategy was not successful, nothing in the record suggests that his attorney’s actions were unreasonable or prejudicial. This Court will not second-guess counsel with respect to matters of strategy, such as decisions about what questions to ask and what evidence to present, and the fact that a chosen strategy does not work does not constitute ineffective assistance of counsel.⁴⁶ The record also fails to support Jenkins’ claim that Officers Zeolla and Skender offered perjured testimony, and Jenkins has not demonstrated that additional investigation would have shown a different result. Defense counsel’s questions, remarks, and arguments throughout trial demonstrate that he was familiar with the case and prepared for trial and the record does not support Jenkins’ assertion that defense counsel was unprepared to try the case.

⁴³ *Ginther*, 390 Mich at 443; *Sabin (On Second Remand)*, 242 Mich App at 658-659.

⁴⁴ *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

⁴⁵ *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

⁴⁶ *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Affirmed and remanded for correction of the judgment of sentence to reflect that Jenkins' sentences for felony-firearm and CCW are to run concurrently. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Kathleen Jansen

/s/ Michael J. Talbot