# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 29, 2016 |
| v | No. 326901<br>Oakland Circuit Court |
| KIMARLO DONELL MCNEAL,<br><br>Defendant-Appellant. | LC No. 2014-251240-FH |

Before: BORRELLO, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

A jury found defendant guilty of felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to 2 to 20 years' imprisonment for felon-in-possession. The court also sentenced defendant to a consecutive sentence of five years' imprisonment for felony-firearm, second offense. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

## I. FACTS

Oakland County Sheriff's Detective Jason Teelander of the Oakland Narcotics Enforcement Team, testified that he was the officer in charge of an investigation involving 542 Nebraska Street in the City of Pontiac. On July 10, 2014, Teelander executed a search warrant on the address along with other officers on the Narcotics Enforcement Team. Teelander testified that the address in question was a small house that had "armor guard" on its side and front doors, which made entry into the home difficult. Teelander testified that officers found the defendant lying face down in the home's bathroom. He asserted that officers also found Steven Armstrong

[1] The jury acquitted defendant of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and a related felony-firearm charge. The jury was unable to reach a verdict on possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v), and a related felony-firearm offense. The trial court declared a mistrial with respect to the heroin charge and the associated felony-firearm charge, and at sentencing the court dismissed those charges on the motion of the prosecution.

in the hallway of the home while Antonio Williams, who was dependent on a wheelchair, was discovered in the home's northwest bedroom. Both defendant and Armstrong possessed keys to the residence according to Teelander.

Teelander explained that officers searched the kitchen and discovered a box of .9mm ammunition in a drawer; he explained that the box also contained one .22 caliber bullet and that in another drawer officers discovered a large number of baggies with corners missing, a few pairs of scissors, three digital scales, and lottery folds. Teelander explained that drug dealers often use the corners of plastic baggies or folded lottery tickets to package narcotics, and use scales to weigh drugs, and that he observed residue on the three scales seized from the house. Teelander testified that he discovered a Magic Bullet blender on the kitchen counter, and he asserted that drug dealers use blenders to mix narcotics with "cutting agents." Officers also discovered about an ounce of marijuana in a cupboard above the stove.

Teelander explained that in the garbage he discovered an empty box of Dormin, which he described as an over-the-counter sleep aid commonly used to cut heroin. He also observed a glass plate sitting on a chair in the living room that had a mound of white powder on it. According to Teelander, there was also a bottle of Dormin on the chair and several capsules were broken open. Teelander also testified that officers discovered a DTE Energy bill in a hallway closet addressed to defendant at the Nebraska Street address.

Teelander testified that he interviewed defendant in the southwest bedroom of the home after securing a waiver of defendant's *Miranda*[2] rights. According to Teelander, defendant told him that he had lived at the home with his uncle, Antonio Williams, "since October," and that he used the northeast bedroom of the home. Teelander asserted that defendant claimed ownership of surveillance cameras outside the home and the related monitor screens that were discovered in the living room, but then admitted that defendant told him "what the cameras were for and why he had them," which "just impl[ied] they were his." According to Teelander, defendant stated that his residence was on Colorado Street in Pontiac and that the white powder found on the living room chair was "just cut" and was not heroin. Teelander testified that this was consistent with the lab results for the powder, which did not test positive for any controlled substance.

Teelander explained that he investigated the area outside of the northeast bedroom window because he noticed that the window screen was "bent" and a corner of it was not attached. Outside of the window, he testified, he discovered a .9mm Ruger handgun. He asserted that the gun had ten bullets in the magazine and one in the chamber when he found it lying in the yard. He described the gun as being "four to six feet" away from the side of the home, but from the window it was "12 to 15 feet away . . . off to the west." Teelander said that it did not appear as if the gun was in the grass for a long period because the grass was not "grown up over it" or "coming up . . . through the trigger guard," and it was not wet or rusted. Teelander also testified that officers discovered a firearm concealed in a pair of pants that was in the southwest bedroom.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Officer Charles Janczarek testified that the northeast bedroom contained a bed and two monitors with a live feed to cameras placed outside of the house. Janczarek explained that the bedroom closet contained clothing "pretty consistent with [defendant's] size," and had a dresser with shoeboxes on it. He testified that inside one of the closed shoeboxes he discovered a Beretta semi-automatic handgun. Janczarek testified that the top right dresser drawer contained a dog tag, a plastic baggie, and two bullets. He asserted that the two bullets were .9mm rounds "similar to the ones found in the firearm in the backyard." Janczarek discovered a collision repair estimate relating to a 2007 Chevrolet Uplander addressed to defendant at a Colorado Street address in Pontiac. Janczarek also found the title to the Uplander, which was in defendant's name and listed defendant's address as being in Waterford, Michigan. He further testified that he discovered a DTE Energy "appliance bill" dated November of 2013 that was addressed to defendant at the Nebraska Street residence.

Defendant was convicted and sentenced as set forth above. This appeal ensued.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to convict him of felon-in-possession and felony-firearm.

We review a sufficiency of the evidence challenge de novo. *People v Cline*, 276 Mich App 634, 642, 741 NW2d 563 (2007). When reviewing a challenge to the sufficiency of the evidence, we review "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). "Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Schumacher*, 276 Mich App 165, 167; 740 NW2d 534 (2007).

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *Avant*, 235 Mich App at 505. The elements of felon-in-possession are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a specified felony, and (3) less than five years have elapsed since the defendant paid all fines, completed all terms of probation or parole, completed all terms of imprisonment, and satisfied certain other requirements. MCL 750.224f(2)(a); *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004).

Defendant argues that there was insufficient evidence to support that he possessed a firearm for purposes of both offenses.[3] Possession of a firearm may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469, 470; 446 NW2d 140 (1989). "[A] person has constructive possession if there is proximity to the article together with indicia of control." *Id.* at 470. With respect to possession and felony-firearm, the time of

[3] The parties stipulated that defendant was not legally permitted to possess a firearm because of a previous felony conviction.

the offense or felony controls, not the time of the arrest or search. *People v Burgenmeyer*, 461 Mich 431, 439; 606 NW2d 645 (2000).

The evidence presented, when viewed in the light most favorable to the prosecution, was sufficient to allow a rational jury to conclude beyond a reasonable doubt that defendant possessed a firearm. The police discovered a firearm inside of a shoebox on the dresser in the northeast bedroom of the home. Police also discovered a firearm outside a window of the northeast bedroom. Defendant admitted to police that he resided in the bedroom and other evidence supported that defendant exercised control over and resided in the northeast bedroom. The title to defendant's car, a repair bill for the same, and an electric bill addressed to defendant were all found in that room. While mere proximity is not enough to show constructive possession there was "some additional connection" between defendant and the firearms. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Here, while defendant did not have the firearm on his person, he was in close proximity to the firearm while inside the house. The jury could reasonably infer that defendant knew the firearm was inside of the shoebox and had control over it because it was located in his bedroom. That the firearm was in the defendant's own bedroom provides the additional connection beyond mere proximity required to demonstrate constructive possession. *Id*.

Additionally, the jury could have reasonably concluded that defendant possessed the firearm discovered outside of his bedroom window. The window screen was "bent" and a corner of it was not attached to the window frame. The police discovered a .9mm Ruger handgun outside in the grass. Janczarek testified that two bullets found in the dresser inside the northeast bedroom were .9mm rounds "similar to the ones found in the firearm in the backyard." Grass had not grown up over the gun or grown through the trigger guard, suggesting that the firearm had not been in the yard for a long time. The jury could reasonably have inferred that defendant broke the window screen and disposed of the gun by throwing it out the window when he realized the police were trying to enter the home. Thus, there was sufficient evidence for the jury to conclude beyond a reasonable doubt that defendant possessed a firearm, fulfilling the elements of felon-in-possession and felony-firearm.

## III. GREAT WEIGHT OF THE EVIDENCE

Next, defendant argues that the verdict was against the great weight of the evidence.

The test to determine whether a verdict is against the great weight of the evidence is whether "the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *Id*. at 637. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id*. at 647. In general, "a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

For the same reasons set forth above with respect to defendant's sufficiency of the evidence challenge, the verdict was not against the great weight of the evidence. Given the

connections between defendant and the northeast bedroom of the home, the evidence did not clearly preponderate against the conclusion that defendant exercised possession and control of either or both of the firearms in the box or the one outside the window. *Lemmon*, 456 Mich at 627.

## IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel.

Because there was no evidentiary hearing below, *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012), review of this claim is limited to mistakes apparent on the record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

"To prove that defense counsel was not effective, the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *Heft*, 299 Mich App at 80-81. "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id*. at 81. "The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

On the first day of trial defense counsel moved for an adjournment, stating that witness Antonio Williams was hospitalized. The court asserted, "[t]here's been no notice to anybody about him being ill or being hospitalized." The court inquired when Williams was hospitalized, and Lawrence asked defendant, who responded that Williams had been in the hospital for "probably about a month now," explaining that "he had surgery." The court denied the motion for an adjournment, reasoning that the motion was untimely under the circumstances.

On the second day of trial, counsel objected to the court's refusal to adjourn the trial, asserting that Williams was an "essential witness" and that he had interviewed Williams "within the last couple weeks." When asked when he met with Williams, counsel explained that he may have interviewed Williams the day before the trial began, on the first day of trial, or even after jury selection, explaining that he was "not certain." The court inquired whether counsel knew that Williams was in the hospital, and counsel affirmed that he did. Counsel produced a doctor's note stating that Williams was paraplegic and hospitalized with a contagious infection, but the letter did not state the date of admission or anticipated discharge as the court requested. The court made no specific ruling after reading the doctor's note and proceeded to call in the jury.

The crux of defendant's argument is that counsel provided ineffective assistance by failing to timely move to adjourn the trial in order to secure Williams as a witness.

"Defense counsel's failure to present certain evidence will only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense." *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In this case, counsel's performance fell below an objective standard of reasonableness. Counsel admitted that he failed to interview Williams until shortly before trial and then he failed to move for adjournment until the first day of trial. However, defendant has failed to demonstrate that, but for counsel's deficient performance, the result of the proceeding would have been different. *Heft*, 299 Mich App at 80-81. Here, counsel's failure did not deprive defendant of a substantial defense. Counsel argued that Williams would testify to "ownership or some kind of control of the household." However, even if Williams testified that he owned the home, there is not a reasonable likelihood that the outcome of the trial would have been different. Defendant admitted to the police that he lived in the house with Williams, his uncle, and that he stayed in the northeast bedroom. The evidence showed that defendant had constructive possession of the firearms that police found in the bedroom and outside the bedroom's window. Moreover, in any event, the jury was made aware that Williams owned the home, thus, Williams' testimony as to that fact would have been cumulative. In short, defendant failed to demonstrate ineffective assistance of counsel because defendant cannot show that counsel's deficient performance prejudiced the defense. *Heft*, 299 Mich App at 80-81.

## V. PROSECUTORIAL MISCONDUCT

Next, defendant contends the prosecutor committed misconduct that denied him a fair trial.

"To preserve a claim of prosecutorial misconduct, a defendant must contemporaneously object to the alleged misconduct and ask for a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant did not contemporaneously object to the challenged comments. "Unpreserved issues are reviewed for plain error affecting substantial rights." *Id*. "Reversal is warranted only if the unpreserved error resulted in the conviction of an actually innocent defendant or where the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "[W]here a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

During closing arguments, defense counsel challenged the credibility of the testifying detectives, asserting that they were biased, not entirely truthful, and omitted information from their reports to bolster the probability that the defendant would be convicted. During rebuttal, the prosecutor stated:

> On the topic of accusations of dishonesty by these two fine officers that testified during the course of this trial I want you to think about what evidence you have that their credibility should be disregarded.

> Both of them have reputations and professions longstanding. Did you ever hear one shred of evidence of a motive for them to make up stuff about this defendant? Nothing.

The crux of defendant's argument is that the prosecutor improperly vouched for the credibility of the two testifying detectives in her rebuttal. A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, "a prosecutor may comment on his or her own witnesses' credibility, especially when credibility is at issue." *Bennet*, 290 Mich App at 478. "[P]rosecutorial arguments regarding credibility are not improper when based on the evidence, even if couched in terms of belief or disbelief." *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008). The challenged prosecutorial remarks must be examined "in context, and in light of defendant's arguments." *Thomas*, 260 Mich App at 454.

Here, in context, it is clear that the prosecutor's remarks were a response to the defendant's attack on the credibility of the two detectives. Although the prosecutor referenced their reputations and characterized the witnesses as "fine" officers, she did not imply that she had special knowledge regarding the truthfulness of their testimonies. Instead, the thrust of her argument was that the jurors should look to the evidence to determine credibility and that there was no evidence that the detectives were motivated to be untruthful. "[P]rosecutorial arguments regarding credibility are not improper when based on the evidence, even if couched in terms of belief or disbelief." *Unger*, 278 Mich App at 240. Because the prosecutor's argument was tied to the evidence—or rather the lack thereof regarding the detectives' motivation to be untruthful—her statements, in context, were a permissible response to the defendant's attack on the detectives' credibility.

Defendant also argues that the prosecutor's comment was particularly improper because the trial court—through an evidentiary ruling—precluded defendant from presenting evidence that a separate court had found that Teelander did not offer credible testimony in a different case. This argument is unpersuasive because the evidentiary ruling appears to have no bearing on whether the prosecutor's remark was improper. Regardless of whether Teelander's testimony was found not credible in a different case, it did not establish that the prosecutor committed misconduct when she suggested that the jurors should decide his credibility in this case based on the evidence before them.

Even if we were to find some evidence of misconduct in these remarks, there is no indication that the assistant prosecutor's remarks denied defendant a fair trial or affected his substantial rights. The trial court instructed jurors that arguments made by the attorneys were not evidence and that the testimony of the police officers "is to be judged by the same standards you use to evaluate the testimony of other witnesses." "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). In short, defendant cannot show that the assistant prosecutor's remarks denied him a fair trial.

## VI. RIGHT TO PRESENT A DEFENSE

Defendant also contends that the trial court denied him the right to present a defense.

Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 764; 597 NW2d 130 (1999).

"There is no question that a criminal defendant has a state and federal constitutional right to present a defense." *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). "Although the right to present a defense is a fundamental element of due process, it is not an absolute right." *Id*. at 279. "The accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id*. (Internal quotation marks and citation omitted).

Defendant first argues that the trial court denied him a right to present a defense when it declined to adjourn the trial to allow Antonio Williams to testify. A motion to adjourn because a witness becomes unavailable "must be made as soon as possible after ascertaining the facts." MCR 2.503(C)(1). Additionally, "an adjournment may be granted on the ground of unavailability of a witness . . . only if the court finds . . . that diligent efforts have been made to produce the witness . . . ." MCR 2.503(C)(2). Additionally, "[n]o adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown in the manner provided by law for adjournments, continuances and delays in the trial of civil causes in courts of record. . . ." MCL 768.2. A court has discretion to decide whether to adjourn a trial. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

In this case, Williams had been hospitalized about a month before trial, and defense counsel knew that Williams was hospitalized. Yet, defense counsel waited until the first day of trial to move for an adjournment. Under these circumstances, it was reasonable for the trial court to exercise its discretion and deny the motion to adjourn because defense counsel failed to show good cause for his delay in moving for adjournment and he did not make the motion "as soon as possible after ascertaining the facts." MCR 2.503(C)(1). Thus, the court did not deny defendant his right to present a defense; it merely exercised its discretion in accordance with the established rules of procedure. *Hayes*, 421 Mich at 279. In any event, for the same reasons discussed relating to defendant's ineffective assistance of counsel argument, the trial court's denial of the motion to adjourn did not prejudice defendant, affect his substantial rights, or alter the outcome of the trial. Accordingly, defendant has failed to show plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

Defendant also argues that the trial court denied him a right to present a defense when it granted the prosecution's motion in limine to prevent defendant from referencing Teelander's alleged untruthfulness at a suppression hearing in an unrelated case. The motion also requested that the trial court strike witness Richard Taylor—the defense attorney present at the unrelated suppression hearing. The trial court issued an order granting plaintiff's motion in limine and striking Taylor from the witness list.

On the first day of trial, the parties discussed the motion in limine and the possibility that defendant would attempt to introduce evidence that the Oakland Circuit Court previously found that Teelander was not a credible witness in the unrelated case. The trial court clarified its ruling on the motion in limine, stating:

> It's not going to happen. I'm going to stop it right now. The court has reviewed the opinion and order of [the Oakland Circuit Court] in a completely separate case. And the court rules do not permit extrinsic evidence of specific instances of conduct except with discretion of the court.
>
> In this case after reading it, I'm not even sure what [the judge] was saying about the officer's testimony, it certainly isn't clear. It would require a trial within a trial. It would be highly confusing to the jury. It would be more prejudicial than probative. The Court is not going to allow any discussion or mention of that.

Defendant essentially challenges the court's evidentiary ruling. "This Court reviews a trial court's evidentiary rulings for abuse of discretion." *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). Preliminary questions of law such as whether evidence is admissible under the rules of evidence are reviewed de novo. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). "A trial court necessarily abuses its discretion when it makes an error of law." *Id*.

MRE 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witnesses' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

MRE 403(b) provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In this case, the trial court did not abuse its discretion in excluding the proffered evidence under MRE 608 and MRE 403. Here, the proffered evidence was not reliable and was of low probative value. Specifically, the prior case concerned the Oakland Circuit Court's findings of fact related to a wholly unrelated set of facts—whether Teelander obtained consent to search a house in an unrelated case. See *People v McKinney*, unpublished per curiam opinion of the Court of Appeals, issued August 7, 2014 (Docket No. 315483); *People v Tillis*, unpublished per curiam opinion of the Court of Appeals, issued August 7, 2014 (Docket No. 315484) (slip op. at 5). Merely because the Oakland Circuit Court found another witness' version of events more credible than Teelander's account of the events does not have bearing in this case. The Oakland Circuit Court did not find that Teelander perjured himself or attempted to mislead the jury. Instead, that court simply found another witness more credible, a finding which had no bearing

on the credibility of the witnesses in this case. The trial court's decision to exclude this evidence under MRE 608 and MRE 403 did not constitute an abuse of discretion.

Defendant couches his argument as a claim that he was denied his constitutional right to present a defense. However, the right to present a defense is "not an absolute right." *Hayes*, 421 Mich at 279. "The accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id*. (Internal quotation marks and citation omitted). Here, because the trial court did not abuse its discretion in excluding the evidence under MRE 608 and MRE 403, defendant has not shown that the trial court denied him the right to present a defense.

Affirmed.

/s/ Stephen L. Borrello
/s/ Jane E. Markey
/s/ Michael J. Riordan