STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2012
v	No. 305036 Oakland Circuit Court
KLYN JOSEPH SIMPSON, Defendant-Appellant.	LC No. 2011-235230-FH

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of carrying a concealed weapon (CCW), MCL 750.227; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent sentences of 7 to 120 months' imprisonment each for the CCW and felon in possession of a firearm convictions, to be served consecutively to a sentence of 24 months' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's conviction arises out of a police officer's discovery of an Uzi sub machine gun in a minivan following a traffic stop. Defendant was a passenger in the vehicle, and the gun was found by defendant's feet, covered by a coat. At trial, defendant stipulated that he had a prior felony conviction. On appeal, defendant contends that he was denied effective assistance of counsel when his trial counsel (1) failed to object to the prosecutor's misconduct in presenting a police officer's testimony regarding the results of a records check completed during the traffic stop and (2) failed to request that the jury be provided a limiting instruction regarding defendant's prior felony conviction. Because defendant failed to request a new trial or an evidentiary hearing, review of this claim is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, defendant must "show that (1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant must overcome a strong presumption that defense counsel provided effective assistance and that counsel's actions might be considered sound trial strategy. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v*

Unger, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Trial counsel's decisions about trial strategy are afforded wide discretion; a reviewing court "will not second-guess matters of strategy." *Odom*, 276 Mich App at 415.

Where, as here, a defendant stipulates to the fact of a prior conviction, admission of evidence as to the name or nature of the prior conviction may result in prejudicial error. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). In this case, it is undisputed that neither the name nor the actual nature of defendant's prior conviction for fleeing and eluding was disclosed during trial testimony. However, defendant argues that defense counsel should have objected to testimony about an "ATF hit" – an alert issued by the Bureau of Alcohol, Tobacco and Firearms – that was noted when a police officer ran defendant's name through a computer during the traffic stop. Defendant contends that the testimony was unnecessary and impermissibly misled the jury into believing that defendant's prior conviction involved a gun. We disagree.

All relevant evidence is admissible subject to certain exceptions not relevant in this case. MRE 402. "Relevant evidence" is defined as "evidence having 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." MRE 401. The officer testified that when he ran defendant's name through the computer, it returned an ATF hit. The prosecutor then asked the officer if he was alerted to any criminal history, but specifically instructed the officer not to disclose the specifics of the history. The officer indicated that defendant had been convicted of a felony. The officer then testified that the ATF wanted to be notified if anyone in the vehicle was in possession of a firearm. The officer was then concerned that defendant "had a past or maybe [] had a firearm." The officer testified that he relayed the information to another officer and decided to get defendant out of the vehicle before the other occupants because of the ATF hit. This testimony was relevant to explain why the officers pursued the course of action of removing defendant first from the vehicle. Given defendant's claim that the officers focused on defendant before a gun was even found and thus determined the gun was his because he had been in trouble before, the challenged testimony was relevant and necessary. In fact, the officer acknowledged that he never saw defendant holding the gun, nor did defendant ever admit possessing the gun. "When I took [defendant] out I had no idea there was a gun by his feet." Defense counsel then had the following exchange with the officer:

> Q: Now, we talked about this a little bit before. You stated that when you ran my client's name you noticed that he had an ATF hit, correct?
>
> A: That's correct.
>
> Q: Okay. And that means that he had been in some sort of trouble before?
>
> A: Felon. Felony trouble.
>
> Q: Now, the fact that he had something on his record caused you to believe that he was the one responsible for this gun, did it not?
>
> A: No, absolutely not.
>
> Q: Not at all?

A: No. That's why I completed a thorough investigation after I found the gun.

Clearly, defense counsels theory at trial was that the police officer jumped to a conclusion, a theme that carried throughout the entire trial.

Moreover, contrary to defendant's claim, the evidence did not impermissibly mislead the jury into believing that defendant's prior conviction involved a gun. His prior conviction could have involved any activity of interest to the ATF. Defendant has not established that the prosecutor's questions and elicitation of the challenged testimony was objectionable. A prosecutor's good faith effort to admit evidence does not constitute misconduct. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) (citation omitted). Thus, defense counsel was not objectively unreasonable in failing to object. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (citations omitted) ("[D]efense counsel is not required to make frivolous or meritless motions or objections.").

Defendant also argues that the officer's testimony should have been excluded as inadmissible hearsay because it relayed what the ATF agency told the officer. Defendant offers no argument or legal authority in support of his position and, as such, has failed to properly present this argument for review. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Regardless, this claim is without merit. Pursuant to MRE 801(c), hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Our review of the record indicates that the challenged testimony was presented to explain the circumstances surrounding the officer's search of the vehicle and discovery of the gun and not to prove the truth of any "statements" made to the officer by the ATF. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) (citation omitted) ("[A] statement offered to show why police officers acted as they did is not hearsay."). Because the testimony did not constitute inadmissible hearsay, any objection to the testimony on those grounds would have been futile. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010); see also *Knapp*, 244 Mich App at 386. Because the challenged testimony was relevant and admissible, defense counsel's failure to object to the testimony did not fall below an objective standard of reasonableness. *Odom*, 276 Mich App at 415.

Defendant also cannot overcome the presumption that defense counsel's failures to object and to request a limiting instruction were consistent with sound trial strategy. Trial counsel's decisions not to object and not to request a specific limiting instruction are the type of strategic decisions that we will not second-guess on appeal. *Unger*, 278 Mich App at 242; *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). The defense strategy in this case was to argue that the police focused on defendant and concluded that defendant possessed the gun solely because defendant had a prior conviction. The evidence that the officer learned of defendant's prior conviction before he found the gun supported this strategy. In closing, defense counsel emphasized that defendant's prior conviction did not establish his guilt of the instant offenses. On this record, defense counsel may well have concluded that the limiting instruction, which would instruct the jury that it *could* consider defendant's prior conviction in the context of the felon-in-possession charge, would result in juror confusion and could potentially undermine

the defense strategy. Given the deference to be afforded to counsel's decisions as to trial strategy, it is not apparent on the record that counsel's performance fell below an objective standard of reasonableness. *Odom*, 276 Mich App at 415.

Affirmed.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra