

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LAMAR CHAPMAN,

Defendant-Appellant.

UNPUBLISHED
September 27, 2012

No. 305465
Saginaw Circuit Court
LC No. 09-033172-FH

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions and sentences for attempted felon in possession of a firearm, MCL 750.92 and MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 11 to 45 months' imprisonment for the attempted felon in possession of a firearm conviction, and to two years' consecutive imprisonment for the felony-firearm conviction. Defendant was granted sentence credit for one day served. We affirm defendant's convictions and sentence but remand for a determination of proper sentence credit for time served.

This matter arose out of a reported home invasion at defendant's house. The police searched the house for the perpetrator and found a loaded shotgun in defendant's bedroom. At the time, defendant informed the police that the shotgun was owned by his cousin and that defendant was keeping it for home protection. Subsequent investigation determined that defendant was a convicted felon and therefore ineligible to possess the shotgun. Defendant's theory was that the perpetrator must have left the shotgun in his bedroom when the burglary was unexpectedly interrupted. Defendant subsequently admitted that his story about his cousin had been a lie, and he contended that he had been scared and shocked at the time due to the home invasion and he had wanted to keep the gun. The jury convicted defendant of felon in possession of a firearm and felony-firearm. Defendant appeals his conviction and sentences.

Defendant argues that he was entitled to more than one day of credit for time served. We are unable to determine whether defendant is correct on this record, and we therefore remand for further investigation and, if the trial court deems it appropriate, a recalculation of his credit for time served.

The Presentence Investigation Report (PSIR) indicated that defendant was entitled to sentence credit for one day served, despite the fact that defendant was incarcerated in the county jail for approximately 16 months before sentencing. The prosecutor asserted during sentencing that defendant was on parole for previous federal offenses. Under MCL 769.11b, a defendant is entitled to credit for time spent in jail before sentence is imposed:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

A defendant is not entitled to credit for time served while in jail for an unrelated offense. *People v Idziak*, 484 Mich 549, 560; 773 NW2d 616 (2009). When “the defendant has served time not as a result of his inability to post bond for the offense for which he seeks credit, but because of his incarceration for another offense, [MCL 769.11b] is simply not applicable.” *Id.* at 561 (quotation omitted) (alteration in original). Accordingly, when a parolee commits a new crime while on parole, the time he or she spends in jail awaiting sentence for the new crime is credited against the paroled crime. *Id.* at 572; MCL 791.238(2).

The PSIR does not provide any clear resolution of this issue. According to the list of defendant’s history of offenses, on April 8, 2009, he committed two offenses, and his status was listed as “None” for one of them but “Federal Parole” for the other. By May 5, 2011, the date of the last listed offense, his status was again listed as “None.” Defendant was sentenced somewhat less than two months later. It seems likely that defendant was, in fact, on parole during some portion of the 16 months he was incarcerated, but the PSIR does not show that he was on parole for the entirety of that time. On appeal, the prosecution asserts that there was evidence in the record tending to show that defendant was being held pending federal charges, and so any credit he received for that incarceration should be credited toward his eventual federal sentence. Again, it does seem likely that at least some of defendant’s incarceration should be credited toward his federal sentence, although we have no knowledge of whether he did actually receive any applicable credit toward that sentence.

We emphasize that defendant’s one day of credit may be accurate. However, when defense counsel raised this issue during sentencing, the trial court was obligated to investigate. See *People v Waclawski*, 286 Mich App 634, 690; 780 NW2d 321 (2009). On this record, we are simply unable to determine whether defendant’s credit is accurate, and it does not appear to us that defendant was afforded an “adequate opportunity to rebut any matter he or she believes to be inaccurate.” *Id.* Therefore, we remand for proceedings to determine defendant’s proper credit for time served.

Defendant next argues that there was insufficient evidence to support his conviction of felony-firearm. We disagree.

“The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). When reviewing a claim of insufficient evidence, we view the evidence

in the light most favorable to the prosecution to determine whether the trier of fact, drawing all reasonable inferences in support of its verdict, could have found the elements of the offense proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). “This Court should not interfere with the jury’s role of determining the weight of the evidence or the credibility of the witnesses.” *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003).

The underlying felony for defendant’s felony-firearm conviction was attempted felon in possession of a firearm, MCL 750.92 and MCL 750.224f. Defendant stipulated that he had a prior felony conviction, so if defendant possessed the shotgun, he would be guilty of being a felon in possession of a firearm. If defendant was guilty of felon in possession of a firearm, then he may have simultaneously been guilty of felony-firearm. See *People v Calloway*, 469 Mich 448, 449-452; 671 NW2d 733 (2003). That possession may be “actual or constructive, joint or exclusive.” *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). “[A] person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.*, quoting *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989).

Viewed in the light most favorable to the prosecution, a rational trier of fact could have found that the evidence established that the elements of felony-firearm were proven beyond a reasonable doubt. The officer testified that defendant admitted possessing, borrowing, or owning the shotgun before he had left his house on the night of the home invasion. The officer also testified that defendant admitted placing and keeping the shotgun in his bedroom closet for “home protection.” A rational jury could have believed the officer’s testimony and found that defendant possessed the shotgun on that day. Defendant’s exercise of control over the shotgun on that day, even if temporary, was sufficient to establish “possession” under Michigan law. See *People v Flick*, 487 Mich 1, 12-15; 790 NW2d 295 (2010) (discussing the meaning of “possession”). A rational jury could also have credited the same testimony and found that defendant possessed the shotgun during his commission of the crime of felon in possession of a firearm. The officer’s testimony was therefore legally sufficient evidence to support defendant’s conviction for felony-firearm.¹ Defendant correctly points out that the record also contains exculpatory testimony, but we do not invade the jury’s role of evaluating witness credibility.

Moreover, we note that defendant’s convictions were supported by his admittedly false story about his cousin who supposedly owned the shotgun. False exculpatory statements to law enforcement are admissible as circumstantial evidence of guilt. *People v Wackerle*, 156 Mich

¹ We note that the jury found defendant guilty of felony-firearm and *attempted* felon in possession of a firearm. Thus, the jury reached an inconsistent verdict. However, “[a] jury in a criminal case may reach *different* conclusions concerning an *identical* element of two different offenses.” *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994). Accordingly, we affirm defendant’s convictions notwithstanding the verdict’s inconsistency.

App 717, 720; 402 NW2d 81 (1986); see *People v Cutchall*, 200 Mich App 396, 400-405; 504 NW2d 666 (1993), overruled in part on other grounds as stated in *People v Edgett*, 220 Mich App 686, 691-695; 560 NW2d 360 (1996) (misleading or false statements by a defendant may be circumstantial evidence of consciousness of guilt). Defendant admittedly lied to the officer about the true owner of the shotgun on the night of the home invasion. Defendant's lie therefore could be used to further infer his guilt as the possessor of the shotgun.

Defendant argues that the prosecutor committed an abuse of power by charging him with the instant offenses. We disagree.

A prosecutor's decision to charge a defendant is reviewed "under an 'abuse of power' standard to determine if the prosecutor acted contrarily to the Constitution or law." *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005). Judicial review of a prosecutor's charging decision is especially narrow because the separation of powers doctrine restricts a court's authority to control a prosecutor absent unconstitutional, ultra vires, or illegal activity. *People v Jones*, 252 Mich App 1, 6-7; 650 NW2d 717 (2002). The prosecutor has the "executive discretion" to file charges, and exercise of this discretion "will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification." *In re Hawley*, 238 Mich App 509, 512; 606 NW2d 50 (1999). Defendant makes the broad and unsupported assertion that the prosecutor had an unfair and unconstitutional motive in filing the charges, but he has not identified or specifically argued any actual discrimination. We find nothing to suggest that the prosecutor brought the charges against defendant for any unconstitutional reason. See *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). Furthermore, the prosecutor presented sufficient evidence to support the charges, which indicates that the prosecutor did not commit an "abuse of power" by filing the charge. See *Russell*, 266 Mich App at 316.

Defendant argues that the prosecutor's charging decision violated his equal-protection rights as a felon. A decision to prosecute does not violate equal protection when the prosecution is not on the basis of a suspect classification or the exercise of a fundamental right. See *In re Hawley*, 238 Mich App at 513. There is no case law to suggest that felons are a suspect class. In fact, this Court has held just the opposite in regard to prisoners. See *People v Groff*, 204 Mich App 727, 731; 516 NW2d 532 (1994) (holding that prisoners are not a suspect class). In addition, convicted felons may be prohibited from owning or possessing firearms. *People v Swint*, 225 Mich App 353, 374; 572 NW2d 666 (1997). Thus, charging a convicted felon with felon in possession of a firearm does not implicate the exercise of a fundamental right. See *id.* at 374-375. Because there is no legitimate contention that the prosecutor charged defendant on the basis of a suspect classification or exercise of a fundamental right, the prosecutor did not violate defendant's equal-protection rights by filing the charges.

Defendant argues that the delay between the home invasion and his arrest violated his due-process rights. We disagree.

To prevail on a due process claim premised on a delay, "defendant must show that the delay caused actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Reid (On Remand)*, 292 Mich App 508, 511-512; 810 NW2d 391 (2011) (citation and quotation marks omitted). "A general claim

that the memories of witnesses have suffered is insufficient to demonstrate prejudice.” *People v Musser*, 259 Mich App 215, 220; 673 NW2d 800 (2003). “Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence.” *People v Tanner*, 255 Mich App 369, 414; 660 NW2d 746 (2003), rev’d on other grounds 469 Mich 437; 671 NW2d 437 (2003). The burden is on the defendant to set forth “specific references to instances of prejudice-generating occurrences[.]” *People v Loyer*, 169 Mich App 105, 120; 425 NW2d 714 (1988).

Defendant contends that he was prejudiced by the delay because the prosecutor was not forced to develop stronger factual support for the charges. Even presuming the delay did, in fact, weaken the prosecution’s case, this would only have helped defendant. Likewise, defendant’s contention that the officer’s memory had faded, in addition to being an insufficient general assertion of memory loss, would also have only helped defendant by undermining the officer’s credibility as a witness. Finally, defendant’s claim that he lost valuable exculpatory evidence is unsupported by any explanation of what that evidence might have been. We therefore reject defendant’s claim of violation of due process.

Defendant argues that the trial court erroneously scored Prior Record Variable (PRV) 2 at five points. We appreciate why defendant might have read MCL 777.50(1) to draw that conclusion, but we disagree. Unpreserved claims of incorrectly scored sentencing variables are reviewed for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Interpretation of statutory sentencing guidelines is reviewed de novo. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

PRV 2 should be scored at five points for one “low severity felony” conviction. MCL 777.52(1); *People v Meeks*, 293 Mich App 115, 117; 808 NW2d 825 (2011).² However, in scoring PRV 2, the court may “not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant’s commission of the next offense resulting in a conviction or juvenile adjudication.” MCL 777.50(1). Therefore, the sentencing court must determine “whether, starting with the present offense, there was ever a gap of 10 or more years between a discharge date and a subsequent commission date that would cut off the remainder of [the] prior convictions or juvenile adjudications.” *People v Billings*, 283 Mich App 538, 552; 770 NW2d 893 (2009).

We appreciate that a casual reading of the above statutes could lead the reader to conclude that no felony may be used as a scoring basis if the discharge date for that felony was more than ten years earlier than the sentencing offense. However, it is significant that the Legislature referred in MC 777.50(1) to “a conviction” and “a discharge date,” rather than, for example, “the conviction.” To clarify *Billings*, the proper reading of MCL 777.50(1) is that the discharge date for the felony must have been at least ten years prior to *any conviction*

² The term “low severity felony conviction” refers to crimes in offense class E, F, G, or H. MCL 777.52(2)(a). Defendant’s 1993 crime of possession of a controlled substance less than 25 grams, MCL 333.7403(2)(A)(v), was in offense class G. MCL 777.13m.

whatsoever. In other words, rather than automatically cutting off any felonies more than ten years old altogether, felonies are cut off only if there was at least a ten-year gap between *any* intervening discharge and subsequent conviction.

Our review of the record indicates that the trial court correctly scored PRV 2 at five points. The instant offenses were committed on January 7, 2008. Under MCL 777.50, the trial court was then required to determine whether defendant was discharged from any offense resulting in a conviction or juvenile adjudication within the 10-year gap between January 7, 1998, and January 7, 2008. Defendant's earliest discharge within this 10-year gap occurred on April 23, 1999. Consequently, any "low severity felony conviction" between April 23, 1989, and April 23, 1999, should be scored for PRV 2. Because defendant had one prior low severity felony conviction within this time period, the trial court properly scored PRV 2 at five points.

Defendant finally argues that he received ineffective assistance of counsel at sentencing. Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002).

Defendant first argues that counsel was ineffective for failing to note that his PSIR incorrectly reflects that his offense was committed on January 7, 2009, rather than January 7, 2008. Remand is required for the administrative task of correcting this error. *People v Russell*, 254 Mich App 11, 22; 656 NW2d 817 (2002). Defendant contends that counsel was ineffective for failing to object to the scoring of PRV 2. However, PRV 2 was correctly scored. "[C]ounsel is not required to make a groundless objection at sentencing." *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Therefore, defendant was not denied the effective assistance of counsel with respect to the scoring of PRV 2. *Id.* at 355-356. Finally, defendant contends that counsel was ineffective for failure to present a stronger case for additional credit for time served. Because we have already concluded that defendant is entitled to remand on this issue, a finding that counsel was ineffective would not change the relief to which defendant is entitled, and we therefore decline to do so. See *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995) ("The remedy for deprivation of the Sixth Amendment right to counsel must be tailored to the injury suffered.").

We affirm defendant's convictions and sentences but remand for (1) a correction of the offense date as stated in the PSIR, and (2) a determination of defendant's credit for time served. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause