STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2004
v	No. 248636 Wayne Circuit Court
JAMES MITCHELL, Defendant-Appellant.	LC No. 02-010881-01

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions by a jury of carrying a concealed weapon (CCW), MCL 750.227, being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant argues he was denied his right to counsel of choice, the trial court erred by communicating with the jury during its deliberations, the prosecutor's misconduct denied him a fair trial, and he was denied the effective assistance of counsel. We find done of these alleged errors merit a new trial. Defendant also argues that his convictions and sentences for being a felon in possession of a firearm and felony-firearm arising out of the same event violated his rights under the Double Jeopardy Clauses of the United States and Michigan Constitutions. We affirm.

This case arises out of a traffic stop at 3:45 a.m. in the city of Detroit. At trial, two Detroit police officers testified defendant was a passenger in the vehicle and possessed open beer. The driver of the vehicle, Ricky Boyer, did not have a driver's license. Both Boyer and defendant were frisked for weapons at the rear of the vehicle. The officer who frisked defendant testified that he found a pistol in one of defendant's socks. The officer removed the gun to the street, yelled "gun" to alert his partner, and pushed defendant against the car. After a brief struggle, the officers secured defendant. At the police station, defendant refused to sign an interview form that contained identification information.

At trial, the prosecution and defense stipulated that defendant had previously been convicted of a specified felony and that defendant had not had his firearm's rights stored.

Defendant testified. He denied that he possessed or carried the pistol in his sock but acknowledged that he possessed open beer; defendant also admitted that he had been drinking

beer since the afternoon before his arrest. Defendant also testified that Boyer was a friend of his whom defendant could contact by "asking around." Boyer did not testify.

Defendant first argues that the trial court abused its discretion denying defense counsel's first-day-of-trial motion to adjourn to permit defendant to retained counsel. We disagree.

This Court considers four factors to determine whether a trial court abused its discretion in denying a defendant's motion for adjournment to retain counsel. *People v Peňa*, 224 Mich App 650, 660-661; 569 NW22d 871 (1997), modified on other grounds 457 Mich 885; 586 NW2d 925 (1998). These factors are: (1) whether the defendant was asserting a constitutional right, (2) whether the defendant had a legitimate reason for asserting the right, (3) whether defendant was guilty of negligence, and (4) whether defendant had previously caused the trial to be adjourned. *Id.* at 661. Even if these factors indicate the trial court abused its discretion, defendant must still establish that he was prejudiced by the decision. *Id.*, citing *People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976).

Although defendant asserts the constitutional right to counsel, the Sixth Amendment does not provide defendants with an absolute right to an attorney of their choice. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003); *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). Rather, courts must balance an accused's right to counsel of his choice with "the public's interest in the prompt and efficient administration of justice." *Id.*

Here, defendant had not previously caused the trial to be delayed, but our review of the other *Peňa* factors convinces us that the trial court did not abuse its discretion in denying defendant's motion to adjourn. Contrary to defendant's assertions, the record fails to show that defendant had a legitimate reason for asserting his right to choose new counsel. Defense counsel stated that although he had repeatedly attempted to contact defendant, defendant had not contacted counsel in the 46 days between the final pretrial conference and the first day of trial. Also, counsel noted he had requested but defendant had not provided him with the driver's (Boyer's) address or telephone number. Defendant indicated that he wished to reject the final plea bargain offered by the prosecution. Nothing in the record indicates the existence of an irreconcilable difference of opinion between defendant and his attorney. See *People v Williams*, 386 Mich 565, 575-578; 194 NW2d 337 (1972).

Defendant was also guilty of negligence. In general, it is not an abuse of discretion to deny a motion to adjourn at trial when the reason for the request is known before trial. See, e.g., *Krysztopaniec*, *supra* at 598, and *People v Stinson*, 6 Mich App 648, 653; 150 NW2d 171 (1967). In moving to adjourn, defense counsel stated he had not been told until the first day of trial that defendant had been represented by other counsel when the instant charges had been dismissed without prejudice because one of the officers was unavailable to testify. The clear inference from this record is that defendant never informed defense counsel of a desire to retain other counsel until the first day of trial.

Based on our review of the *Peňa* factors, we conclude that the trial court did not abuse its discretion in denying defendant's motion to adjourn. The record does not support defendant's contention that he had a legitimate reason for substituting new counsel, defendant was negligent

for not having attempted to retain or express a desire for other counsel earlier, and this record demonstrates no discernable prejudice.

Next, we reject defendant's claim that the trial court denied him a fair trial by providing a written response to a written question by the jury without notice to or consent by the parties.

MCR 6.414(A) provides in pertinent part as follows:

> The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

In *People v France*, 436 Mich 138, 142; 461 NW2d 312 (1990), our Supreme Court held that communications with a jury in the process of deliberation must be limited, but based on the "realities of trial practice," a rule requiring automatic reversal when such communications occur "goes beyond the limits necessary to safeguard the right of a defendant to a fair trial." Only if an ex parte communication prejudices a defendant may a reviewing court reverse. *Id*. at 163. The reviewing court must first categorize the communication into one of three categories: (1) substantive communications, including supplemental instructions on the law, (2) administrative communications, including those regarding the availability of evidence and instructions that encourage a jury to continue its deliberations, or (3) housekeeping communications, which may concern matters such as meals and restroom facilities. *Id.* at 163-164. A substantive communication creates a presumption of prejudice; administrative communications are presumed harmless; and housekeeping communications carry a presumption of no prejudice. *Id.*

In this case, the jury sent the trial court a note asking two questions. First, it wanted to know whether it is "standard operating procedure for police to check [for] fingerprints on a weapon when it is found on a person." Second, it asked for the definition of "reasonable doubt." In response to the first question, the trial court wrote "rely on evidence + general knowledge and common sense." The trial court responded to the second question as follows:

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not a flimsy or fanciful doubt, but a doubt based on reason and common sense. A reasonable doubt is just that -- a doubt that is reasonable, after a careful and considered examination of the facts and circumstances in this case.

The parties agree that the trial court's responses constituted supplemental instructions on the law and were therefore substantive communications. But the prosecution correctly argues that it may rebut the resulting presumption of prejudice by making a "firm and definite showing of an *absence* of prejudice." *France*, *supra* at 143 (emphasis in original). We conclude that the prosecutor has rebutted the presumption of prejudice because both of the trial court's responses constitute restatements of instructions it previously gave to the jury without objection from defendant.

Next, defendant contends that the prosecutor denied him a fair trial by improperly arguing facts not in evidence, by improperly vouching for the credibility of her witnesses, and by expressing her personal disdain for defendant. Because defendant failed to preserve these

claims, we review them for plain error affecting his substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). To avoid forfeiture, defendant must establish (1) misconduct by the prosecutor; (2) that the misconduct was plain (i.e., clear or obvious); and (3) prejudice or that the misconduct was outcome determinative. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We find no plain, outcome-determinative misconduct here. Moreover, even if plain misconduct is found, we may reverse only when the misconduct resulted in the conviction of an actually innocent defendant or when the misconduct seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We cannot say that the alleged misconduct here resulted in the likely conviction of an innocent defendant; nor can we say that the alleged misconduct seriously affected the fairness, integrity, or public reputation of the judicial proceedings, independent of the defendant's innocence. *Id*.

When reviewing claims of prosecutorial misconduct, this Court examines the pertinent portion of the lower court record and evaluates the alleged misconduct in context to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). "The prosecution is free to comment with respect to the evidence and all reasonable inferences that may be drawn from the evidence as it relates to its theory of the case." *Id.* at 284, citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, prosecutors are accorded wide latitude in making their arguments and need not use the blandest of all possible terms. *Id*.; *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). But a defendant's opportunity for a fair trial may be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). We also note that otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003).

Defendant first contends that the prosecutor improperly argued facts not in evidence. At trial, the arresting officer testified that at the time of defendant's arrest his patrol car was parked directly behind the vehicle in which defendant had been riding. The officer further stated that the patrol car was equipped with a video camera that continues to run once a traffic stop has been made. But the officer did not know if the patrol car's camera was working on the morning of defendant's arrest or if anyone preserved the video tape. During closing arguments, when commenting on the credibility of the arresting officers, defense counsel argued that although all police cars are now equipped with cameras, "[e]very time [video tapes] show something negative about a client of mine, they've got it" but when a video tape "doesn't show anything or maybe shows something favorable, they didn't preserve [it]" or the "camera wasn't working" or the patrol car "isn't equipped with [a camera]." Defendant claims the prosecutor committed misconduct when she responded in rebuttal argument:

> Ladies and Gentlemen, like you today I heard for the first time that this car had a video camera. I love those cameras. I mean they either help my case or under the law if they hurt my case, I must give it to the defense. And if it hurts my case by showing the officers are liars, then I dismiss my case. I love those tapes. It either makes my job easy because it corroborates everything the officers say and I win or it makes my job easy because I can dismiss the case because the

officers lied. So I win, I mean I love those videotapes. I always ask for videotapes if I know they exist. Unfortunately, I didn't know.

We find defense counsel's argument insinuated that the police failed to preserve favorable evidence or the prosecution failed to present the video tape from the patrol car's camera because it would tend to exonerate defendant. This invited the prosecutor's response. We find both counsels' argument improperly rested on their past experience and not on evidence properly presented to the jury. Because the prosecutor's argument was proportionate and responded to defense counsel's argument the prosecutor's misconduct does not merit reversal under the doctrine of invited response. *Jones, supra* at 353. Further, defendant has failed to establish that this unpreserved error was outcome determinative. *Carines, supra* at 763. The trial court instructed the jury, before, during, and after closing arguments, that the attorney's statements and arguments were not evidence. Thus, the trial court's instructions cured any prejudice to defendant. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004), citing *Bahoda, supra* at 281, and prosecutorial misconduct did not deny defendant a fair trial, *McElhaney, supra* at 284.

Next, defendant asserts that the prosecutor improperly vouched for the truth of the allegations against defendant and the credibility of the police witnesses. A prosecutor may not attempt to bolster her theory of the case by conveying a message that she has some special knowledge that the witness is testifying truthfully. *Bahoda, supra* at 267. But a prosecutor may argue from the evidence that a witness is worthy or not worthy of belief. *Thomas, supra* at 455; *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Here, the prosecutor argued that the arresting officers had nothing to gain from planting a gun on defendant or lying under oath during their testimony. In contrast, the prosecutor asserted that defendant had a great deal to gain by saying the gun did not belong to him. Further, the prosecutor argued that the officers' accounts of the events surrounding the arrest were more reliable because they were sober at the time while defendant was highly intoxicated. The prosecutor's statements did not imply that she had any special knowledge of defendant's guilt. Rather, she merely argued that the officers' testimony was more worthy of belief than defendant's testimony. The prosecutor did not engage in misconduct by arguing credibility based on the facts, especially when the testimony conflicted. *Thomas, supra* at 455.

Next, defendant argues that the prosecutor improperly voiced personal disdain for defendant and interjected character issues by arguing defendant had a bad attitude and was a "scary" man. It is improper for a prosecutor "to comment on the defendant's character when his character is not in issue." *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992). Thus, when evidence of a defendant's prior bad act is admitted for a limited purpose under MRE 404(b), a prosecutor may deprive the defendant of a fair trial by arguing that the jury should consider the evidence as substantive evidence of the defendant's guilt. *Id.* Here, the prosecutor did not base her argument on evidence admitted for a limited purpose and did not ask the jury to draw a prohibited character to conduct inference. *McElhaney, supra* at 285.

In the context of a credibility contest between the police officer witnesses and defendant, the prosecutor made the following rebuttal argument:

> He is a felon who disregards the law, Mr. Mitchell thinks he's above the law, thinks hey, who cares if it's against the law to have open beers in cars. I'm above the law. I can travel around with beer. Who cares if it's against the law because I'm a felon to carry a gun. I'm going to carry it anyway. His attitude has shown over and over and corroborates what the officers said when they find a gun and go to arrest him, he resists. He stops cooperating. He doesn't cooperate at the precinct. He doesn't cooperate when Investigator McLemore interviews him. Put your signature on paper. Oh no, I'm refusing.
>
> That goes along with his whole attitude that it's okay for me to carry a gun without getting a permit. It's okay for me to carry a gun even though I've got a prior felony conviction. And it's okay for me to drive around with open beer. Mr. Mitchell is a scary man who doesn't want to own up to his responsibilities, who doesn't want to own up to his actions and say I did it. I'm guilty. I'm asking you to do it for him by finding him guilty.

In context, the prosecutor was not arguing that the jury should convict defendant of the instant charges because he had a prior felony conviction, although that was an element necessary to one of the charges, but rather that the facts and circumstances shown by the evidence corroborated the officers' testimony. A prosecutor during closing argument may use emotional language based on the evidence and reasonable inference; such argument is an important tool in the prosecutor's forensic arsenal. See *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003), and *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Further, we read the prosecutor's "scary" man comment as not urging the jury to convict because of character but that "because defendant committed *these* crimes, not other crimes or bad acts, he was" "scary." *McElhaney*, *supra* at 285 (emphasis in the original).

Moreover, even if the prosecutor's comments were improper, we conclude that defendant has not met his burden of establishing that the unpreserved error resulted in prejudice. *Carines, supra* at 763. As noted above, the trial court repeatedly instructed the jury that the attorney's statements and arguments were not evidence. Further, the trial court instructed the jury on the presumption of innocence, reasonable doubt, how to determine credibility, and most importantly in this context, that its verdict must be based only on the evidence properly admitted in the case. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Consequently, any prejudicial effect of the prosecutor's argument was dispelled by the trial court's instructions. *Bahoda, supra* at 281; *Thomas, supra* at 456.

Defendant also argues that the cumulative effect of the prosecutor's misconduct denied him a fair trial. The cumulative effect of several minor instances of prosecutorial misconduct may warrant reversal although the individual errors would not. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). "Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *Id.*, citing *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Having concluded that the alleged individual instances of misconduct either were proper or do not warrant reversal because they did not deny

defendant a fair trial, we likewise conclude the alleged instances of misconduct did not combine to deny defendant a fair trial. *McLaughlin, supra*; *McElhaney, supra* at 285.

Next, defendant argues that he was denied the effective assistance of counsel. In particular, defendant asserts he was denied a fair trial by: (1) counsel's failure to produce as a witness, or request the assistance of the prosecutor and police in locating, Ricky Boyer, the driver of the vehicle in which defendant was riding, (2) counsel's stipulating that defendant had a prior specified felony conviction and that his right to possess a firearm had not been restored, (3) counsel's failure to request a cautionary instruction that the jury was to consider defendant's prior felony conviction only for purposes of the felon in possession of a firearm charge, and (4) counsel's failure to object to the alleged improper remarks by the prosecutor.

Effective assistance of counsel is presumed and the defendant bears the burden of overcoming this strong presumption. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). To establish ineffective assistance of counsel, defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *Id.*

We address defendant's last claim first. Because we have found no outcome-determinative prosecutorial misconduct, it follows that counsel's failure to object to the alleged misconduct was also not outcome-determinative nor did it result in a fundamentally unfair or unreliable trial. Accordingly, defendant's claim that his trial counsel was ineffective for failing to object to the prosecutor's remarks fails. *Thomas, supra* at 457; *Goodin, supra* at 433.

Defendant has also failed to establish that he suffered any prejudice even if counsel erred by not producing or requesting the assistance of the police to produce Boyer as a witness. Defendant's claim that Boyer's testimony would have been favorable is merely a bald assertion without any support; defendant has provided no affidavit from Boyer or offer of proof regarding Boyer's supposed testimony. See *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994), and *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002).

Moreover, the record establishes that counsel wanted to contact Boyer six weeks before trial but defendant failed to provide counsel with Boyer's address or telephone number. Yet defendant testified at trial that Boyer was his friend whom he had the ability to contact. Thus, defendant has failed to establish either that counsel erred or that the error was prejudicial; either failing is fatal to defendant's claim of ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Pickens, supra* at 302-303.

Defendant's contention that counsel seriously erred by stipulating that defendant had a prior specified felony conviction and that his right to possess a firearm had not been restored also fails. We note that it is reasonable trial strategy to concede some points at trial while contesting others. See, e.g., *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994), and *Krysztopaniec, supra* at 596. Indeed, defendant concedes that counsel had a legitimate reason for stipulating that he had previously been convicted of a specified felony.

Defendant has also failed to establish any prejudice from counsel's failure to request a limiting instruction. As discussed above, defendant's prior conviction was not used for an improper purpose. Finally, this Court has recently held that when a defendant is charged with violating MCL 750.224f(2), the prosecution "must prove that the defendant's right to possess a firearm has not been restored only if the defendant produces some evidence that his right has been restored." *People v Perkins*, 262 Mich App 267, 271; 686 NW2d 237 (2004). Because defendant does not suggest that evidence exists that his firearms rights had been restored, his claim of ineffective assistance of counsel on this point is meritless.

Last, defendant argues that his convictions and sentences for both being a felon in possession of a firearm and felony-firearm arising out of the same event violated his rights under the Double Jeopardy Clauses of the United States and Michigan Constitutions. This Court and our Supreme Court have already held to the contrary. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 166; 631 NW2d 755 (2001).

We affirm.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey