# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 22, 2010 |
| v | No. 288671<br>Wayne Circuit Court |
| SCOTT CHRISTOPHER JONES,<br><br>Defendant-Appellant. | LC No. 07-007920-FH |

Before: JANSEN, P.J., AND CAVANAGH AND K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a firearm during the commission of a felony (felony-firearm), third offense, MCL 750.227b, felon in possession of a firearm (felon in possession), MCL 750.224f, and carrying a concealed weapon (CCW), MCL 750.227. Defendant was sentenced to two terms of 18 months to 5 years' imprisonment for his felon in possession and CCW convictions and to a consecutive term of ten years' imprisonment for his felony-firearm conviction. We affirm his convictions, but remand to the trial court for resentencing.

## I. BASIC FACTS

In April 2007, police were dispatched to a Detroit home after a citizen called the police. The two officers who arrived on the scene observed defendant, who appeared to be intoxicated, sitting on the steps of the home's porch. According to the officers, when they exited the vehicle and announced themselves as police officers, defendant pulled a gun from his waistband and threw it into the bushes in front of the porch. One of the officers searched the bushes and found a gun matching the one defendant had thrown. Defendant was arrested.

At trial, the testimony created a credibility contest for the jury to resolve. The officers testified that they saw defendant throw a gun into the bushes, while defendant testified that, while he had been on the porch, he did not throw a gun into the bushes. The gun was admitted into evidence. Subsequently, defendant was convicted.

## II. MISTRIAL

Defendant first argues that the trial court erred in denying his motion for a mistrial because the prosecutor made improper remarks during closing argument that deprived him of a

fair trial. We disagree. Although defendant presents his argument as an error regarding his motion for a mistrial, his claim is more properly characterized as a claim of prosecutorial misconduct. Defendant, however, did not object when the prosecutor made the remarks below, albeit defense counsel did move for a mistrial based on those same remarks. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred, (2) the error was plain, and (3) the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). Further, we decide issues of prosecutorial misconduct on a case-by-case basis. In doing so, we examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "The test is whether [the] defendant was denied a fair trial." *Id*.

The conduct defendant complains of includes remarks the prosecutor made during closing and rebuttal closing argument. Specifically, the prosecutor stated that police were dispatched to the home in question "because [defendant] was doing something on that porch that terrified that young lady. . . . Maybe he had a gun. . . . [T]he officers came there, because there was a call about him with a gun." Before trial, defendant moved to preclude testimony that police had been called to the scene because defendant was on the home's porch with a gun on the basis that such testimony would be inadmissible hearsay. The trial court ruled that the officers could give testimony "of the fact that they were given a dispatch to be at a particular location." However, the court ruled that "we're going to have to wait and see how the testimony comes out, as to any degree of specificity . . . ." At trial, no testimony was elicited concerning the substance of the police call or why the officers were called to the scene. Thus, as the prosecution concedes on appeal, the prosecutor improperly remarked upon the substance of the call during closing and rebuttal argument because he was arguing facts not in evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994) (stating that it is improper for a prosecutor to assert a fact not in evidence).

Defendant, however, has not demonstrated that the prosecutor's conduct prejudiced the defense. At trial, two police officers provided eyewitness testimony that they each had observed defendant sitting on a porch and that defendant, upon hearing the police announce themselves, had pulled a gun from his waistband and threw it into the bushes in front of the porch. One of the officers testified that she searched the bushes and found a gun resting in the bushes' branches. The officers' testimonies, combined with the stipulation that defendant was ineligible to possess a firearm at the time of the offenses, was sufficient to prove that defendant committed the offenses of felon in possession, felony-firearm (predicated on the felon in possession conviction), and CCW.[1] Given this overwhelming evidence, it is not reasonably likely that, but

[1] The elements of felon in possession include a previous felony conviction and possession of a firearm. See *People v Perkins*, 473 Mich 626, 629-631; 703 NW2d 448 (2005). The elements of felony-firearm are: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of CCW include proof that defendant carried a weapon and that the weapon was concealed on or about his person. See *People v Hernandez-Garcia*, 477 Mich 1039, 1040; 728

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for the challenged prosecutorial statements, a different outcome would have been reached. Moreover, the trial court specifically instructed the jury that the attorney's arguments were not evidence. Thus, although the prosecution acted improperly, defendant has not shown that the conduct prejudiced him and the trial court did not err in denying defendant's motion for a new trial.

## III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next asserts that his counsel's failure to request a missing witness instruction with regard to two witnesses who were endorsed by the prosecution, but never produced for trial, denied him effective assistance of counsel. We disagree. Because defendant did not move for a *Ginther*[2] hearing or otherwise raise the issue below, our review is limited to mistakes 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 that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

If the prosecution fails to call a listed witness[3] and has failed to delete that witness from the witness list, it may be appropriate for the trial court to read the missing witness instruction. *People v Cook (On Remand)*, 266 Mich App 290, 293 n 4; 702 NW2d 613 (2005). The missing witness instruction, CJI2d 5.12, allows the jury to infer that the missing witness's testimony would have been unfavorable to the prosecution. *Id.* at 293 n 3. The propriety of reading the missing witness instruction "depend[s] on the specific facts of that case." *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003). Instances that would justify the instruction include those where an endorsed witness has not been properly excused or where the prosecution has not provided the defense reasonable assistance securing a witness that would have been unfavorable to the prosecution. *Id*.

After our review of the record, we are not of the opinion that counsel was ineffective for failing to request the missing witness instruction. Nothing in the record indicates that counsel would have been justified in seeking such an instruction or that the court would have granted such a request. First, the record indicates that the police made good faith attempts to serve subpoenas on both Vania Harmon, the individual who called the police, and Reginald Shultz, a neighbor at the scene. Personal service on Harmon was unsuccessful as was service by certified mail. With regard to Shultz, police personally served him with a subpoena but he failed to appear at court. Nothing in the record indicates that the police knew Shultz would not appear.

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NW2d 406 (2007).

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] The prosecution is required by statute to provide defendant with "a list of the witnesses the prosecuting attorney intends to produce at trial." MCL 767.40a(3). Further, "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4).

Second, defendant makes no showing that the witnesses would have provided testimony favorable to him. Harmon in particular would likely have provided unfavorable testimony because Harmon made the call to the police regarding defendant's presence on her front porch. Counsel cannot be ineffective for failing to request an instruction that would not have been justified. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Thus, we are not persuaded that defense counsel's performance fell below an objective standard of reasonableness on account of his failure to request a missing witness instruction. Further, defendant has not established that counsel's alleged mistake prejudiced him. Given the officers' testimonies and the discovery of the gun in the bushes, it is not reasonably likely that, but for counsel's alleged error, a different outcome would have been reached. Accordingly, defendant's claim of ineffective assistance fails.

## IV. SENTENCING

Lastly, defendant contends that he is entitled to resentencing because the trial court did not impose an intermediate sanction pursuant to MCL 769.34(4)(a) or otherwise provide substantial and compelling reasons for departure when it sentenced defendant to 18 months to 5 years' imprisonment for his felon in possession conviction to run consecutively with his felony-firearm conviction. The prosecution concedes this issue and we agree. We review de novo questions of the proper interpretation and application of the legislative sentencing guidelines. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Ordinarily, a trial court must impose a minimum sentence within the sentencing guidelines range. MCL 769.34(2) and (3). Here, the recommended minimum sentence range for defendant's conviction of felon in possession, fourth habitual offender, was 0 to 18 months. If the upper limit of the recommended range is 18 months or less, as is the case here, then

> the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [MCL 769.34(4)(a).]

Thus, the trial court here was required to impose an intermediate sanction or otherwise state substantial and compelling reasons for departure on the record. The trial court, however, departed from the guidelines and sentenced defendant to 18 months to 5 years' imprisonment without articulating substantial and compelling reasons for the departure. This was error that requires resentencing. See *People v Smith*, 482 Mich 292, 319; 754 NW2d 284 (2008). Thus, we vacate defendant's sentence for his felony in possession conviction and remand to the trial court for resentencing. On remand, the trial court must impose an intermediate sanction for the felon in possession conviction in compliance with MCL 769.34(4)(a), or articulate substantial and compelling reasons for departure on the record.

We affirm defendant's convictions, remand to the trial court for resentencing on the felon in possession conviction consistent with this opinion, and affirm defendant's remaining sentences. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly