STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2010
v	No. 292074 Kent Circuit Court
MICKI MARCEL FOWLER, Defendant-Appellant.	LC No. 08-011587-FH

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions of carrying a concealed weapon (CCW), MCL 750.227, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to two to seven years and six months' imprisonment for each conviction. We affirm.

Defendant argues that there was insufficient evidence to support his convictions. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, we construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime." *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

Defendant was convicted of felon in possession pursuant to MCL 750.224f, which provides in relevant part: "[a] person convicted of a specified felony shall not possess … a firearm in this state …." MCL 750.224f(2). At trial, the parties stipulated to defendant's prior felony conviction. On appeal, defendant argues that there was insufficient evidence to show that he possessed a firearm. We disagree. In this case, Sergeant James Wojczynski testified that when he drove his police cruiser near the scene of a reported fight at a nightclub he observed defendant standing and clenching the right side of his body near his waist. When defendant saw Wojczynski, he fled on foot and as he ran, he removed a large black object from his waistband. Two other officers testified that defendant attempted to elude police. Defendant discarded his white polo shirt as he attempted to escape, and police later found him hiding in some bushes. Both of these actions were relevant to show defendant's consciousness of guilt. *People v*

Cutchall, 200 Mich App 396, 398-401, 404-405; 504 NW2d 666 (1993) (defendant's attempts to conceal involvement in a crime are probative of his consciousness of guilt and are thus relevant). Additionally, police discovered a large revolver hidden under a wooden staircase behind a tavern where defendant ran away from police, and after defendant was detained in a police cruiser, he made comments on his cellular telephone that implied that he possessed the gun that was found. On this record, we conclude that a rational trier of fact could convict defendant of felon in possession beyond a reasonable doubt.

Defendant was convicted of CCW pursuant to MCL 750.227, which provides in relevant part, "A person shall not carry a pistol concealed on or about his or her person … without a license to carry the pistol as provided by law…." MCL 750.227(2). For purposes of the statute, "concealment" does not require proof that the weapon was invisible. *People v Jones*, 12 Mich App 293, 295; 162 NW2d 847 (1968). Instead, a weapon is "concealed" when it is "not discernible by the ordinary observation of persons coming into contact with the person carrying it, casually observing him, as people do in the ordinary and usual associations of life." *Id.* at 296. We find that there was sufficient evidence to show that defendant carried a handgun on his person in a concealed manner in that it was carried in such a way that a person, upon casual observation, could not discern the weapon. *Jones*, 12 Mich App at 296. Wojczynski testified that when he first saw defendant, defendant pressed his right forearm against his body. Wojczynski testified that he saw defendant "holding his waistband with his forearm" and stated that defendant's right arm was in a "bent" position. Wojczynski subsequently saw defendant remove a large black object as he was running. Although neither Wojczynski nor another police witness could positively identify what the object was, the reasonable inferences on the record before us are that the object was a gun. On this record, we conclude that a rational trier of fact could convict defendant of CCW beyond a reasonable doubt.

Next, defendant raises ten separate claims of prosecutorial misconduct. Defendant failed to preserve any of these claims for review because he did not make a contemporaneous objection or request for a curative instruction on the same basis at trial. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* "The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

Defendant first argues that the prosecutor acted improperly when he informed the jury that the gun police found under the stairway was stolen and that bullets found at another crime scene matched the gun. We agree that the prosecutor's introduction of evidence that the gun was stolen was improper because the danger of unfair prejudice substantially outweighed its probative value. See MRE 403. Nevertheless, the impropriety did not deny defendant a fair trial where there was a significant amount of other evidence to support the jury's verdict in this case and where the jury was already informed that defendant had a prior felony conviction. *Callon*, 256 Mich App at 329. With respect to the police witness' testimony concerning other crime scenes, there was no error where, contrary to defendant's claim on appeal, the witness did not testify that the gun was linked to other crimes.

Second, defendant claims that the prosecutor committed misconduct by introducing statements made by the individual who called 9-1-1 as relayed to police by radio dispatch. Defendant contends that this evidence amounted to hearsay and a violation of his constitutional right of confrontation. Evidence of the radio dispatch was admissible to show Wojczynski's motive to pursue a specific course of action. *People v Lewis*, 168 Mich App 255, 267; 423 NW2d 637 (1988). The prosecutor's use of the evidence to prove defendant's guilt, however, was improper hearsay within hearsay. MRE 801(c); MRE 805. See *People v Eady*, 409 Mich 356, 360-361; 294 NW2d 202 (1980). However, we find that this did not amount to plain error affecting defendant's substantial rights. *Callon*, 256 Mich App at 329. Therefore, defendant's claim that the hearsay evidence violated his constitutional right of confrontation also fails. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Third, defendant argues that the prosecutor acted improperly when he introduced evidence that a police officer thought defendant was holding a gun. Defendant's argument fails because defense counsel introduced this evidence.

Fourth, defendant claims that the prosecutor committed misconduct when he questioned two police witnesses concerning whether there were any other complaints reported to police that involved men with guns at the nightclub. The prosecutor did not commit misconduct in this context where the challenged evidence was relevant and did not amount to hearsay.

Fifth, defendant contends that the prosecutor committed misconduct when a police witness testified that defendant did not want to talk with him after defendant was taken into custody and when the officer testified that he obtained a warrant. Any impropriety on the part of the prosecutor amounted to no more than harmless error where the testimony was brief and the trial court instructed the jury that a criminal defendant was presumed innocent, had the right not to testify, and that the jury was not to consider the fact that defendant was charged with several crimes as evidence of his guilt. See *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008) ("[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements … and jurors are presumed to follow their instructions" *id*. at 235).

Sixth, defendant argues that the prosecutor committed misconduct when he referenced statements defendant made on a recorded telephone call that was admitted at trial and when he argued that defendant did not deny guilt during the conversation. Here, defendant's silence, i.e. failure to deny guilt, was not constitutionally protected where he waived his Fifth Amendment right of silence and agreed to answer police questions after he was arrested, and where the telephone conversation did not involve custodial interrogation. *People v Schollaert*, 194 Mich App 158, 166; 486 NW2d 312 (1992); *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). The comment was relevant and admissible as conduct evincing a consciousness of guilt. See *Solmonson*, 261 Mich App at 665-667 (a prosecutor may comment on what a defendant said in combination with what a defendant did not say). Similarly, the prosecutor did not act improperly when he referenced certain statements defendant made during the telephone conversation. See *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996) ("A prosecutor is free to argue the evidence and all reasonable inferences from the evidence ….")

Seventh, defendant argues that the prosecutor committed misconduct and attempted to shift the burden of proof when he argued that defendant did not offer an explanation to police as

to why he ran. The prosecutor did not act improperly in referencing defendant's flight. *People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005) ("a prosecutor may comment on the inferences that may be drawn from a defendant's flight"). In addition, the comment served to rebut the defense theory that defendant ran merely because of his previous encounters with police and it did not improperly shift the burden of proof. *Id*.

Eighth, defendant argues that the prosecutor committed misconduct when he stated during closing argument that a security guard at the nightclub could have identified defendant but was apprehensive that night because of the large crowd at the scene. The prosecutor appears to have improperly attributed the security guards' testimony to one of the officers, but the testimony referenced was accurate, and it was proper comment concerning that testimony. The security guard stated that he declined an officer's invitation to identify a suspect at the scene because there were a number of other bystanders present at the time. The security guard agreed that he "very well could have" had a conversation with a police officer on the date of the incident wherein he stated that he "witnessed a subject with a firearm." The inference that the security guard was apprehensive and did not want to identify a suspect in the presence of numerous nightclub patrons was a reasonable comment concerning the security guards' testimony. See *Fisher*, 220 Mich App at 156 ("A prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case"). The prosecutor did not commit misconduct in making this inference, even though mistakenly attributed to a different witness, during his closing argument.

Ninth, defendant asserts that the prosecutor argued facts not in evidence on several separate occasions. The prosecutor improperly argued that two police officers testified that they thought defendant held a gun while he ran from police. The record indicates that only one officer offered this testimony. Thus, there was a plain error where the prosecutor argued a fact not in evidence. *Unger*, 278 Mich App at 241. Nevertheless, any error in this respect did not deny defendant a fair trial because it did not affect his substantial rights. *Callon*, 256 Mich App at 329. We have reviewed the record and conclude that the remaining challenged statements were reasonable inferences arising from the evidence at trial. *Fisher*, 220 Mich App at 156.

Tenth and finally, defendant contends that the prosecutor denigrated defendant when he referenced defendant's flight and argued that defense counsel wanted the jury to focus on red herrings. As discussed above, the prosecutor did not act improperly in referencing defendant's flight. *McGhee*, 268 Mich App at 634-635. Similarly, the prosecutor did not commit misconduct when he used the phrase "red herrings." See *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995) (a prosecutor may comment on the weakness of the defendant's theory); *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001) (a prosecutor need not limit his argument to the "blandest of all possible terms").

Defendant additionally argues that all of the instances of prosecutorial misconduct in the aggregate served to deny him a fair trial in this case and amounted to error requiring reversal. We find that the combined effect of the errors discussed above did not amount to serious prejudice warranting reversal. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

Defendant next argues that his sentences are invalid pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant's argument lacks legal merit.

See *People v Drohan*, 475 Mich 140, 143, 145-146, 159, 164; 715 NW2d 778 (2006) (rejecting identical argument).

Next, defendant argues that the trial court improperly scored the legislative sentencing guidelines offense variable (OV) 1, aggravated use of a weapon, and OV 19, interference with administration of justice or emergency services. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

The trial court assessed five points for OV 1 and defendant argues that the variable should not have been assessed any points. MCL 777.31 governs the scoring of OV 1 and provides in relevant part that the trial court assess five points if "[a] weapon was displayed or implied." MCL 777.31(1)(e). In this case, evidence showed that defendant was clenching the right side of his body near his waist when Wojczynski pulled up in his police cruiser. Defendant then immediately fled on foot and Wojczynski saw defendant remove a large black item from his waistband and hold it in his right hand. Another police officer testified that she saw defendant running with an object in his right hand. Shortly thereafter, police discovered a large revolver hidden underneath a stairway near where defendant tried to elude police. This evidence supports the trial court's scoring of OV 1. *Endres*, 269 Mich App at 417.

MCL 777.49 governs the scoring of OV 19, interference with administration of justice or emergency services, and provides in relevant part that the trial court assess 15 points when, "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." MCL 777.49(b).[1] Defendant argues that the trial court erred in scoring OV 19 at 15 points. For purposes of OV 19, "interfering with a police officer's attempt to investigate a crime constitutes interference with the administration of justice." *People v Passage*, 277 Mich App 175, 180; 743 NW2d 746 (2007). Here, defendant interfered with police attempts to investigate the complaint when he ran from police, hid in some bushes, and refused to comply with an officer's commands. Additionally, evidence showed that defendant's use of the threat of force interfered with police attempts to investigate the complaint. Wojczynski saw defendant holding the right side of his body near his waist and he saw defendant remove a large black object from his waistband after he started running. The officer had to slow his pursuit of defendant and proceed with caution because defendant was armed with a deadly weapon. This evidence supports the trial court's scoring of OV 19 at 15 points. *Endres*, 269 Mich App at 417.

[1] We reject defendant's argument that OV 19 is void for vagueness. The wording of the statute does not require heightened intelligence to understand what conduct is prohibited and does not require a reasonable person to speculate about its meaning. See *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004).

Defendant also argues that his sentences violate the principal of proportionality. The sentencing guidelines recommended minimum sentencing range for the sentencing offense in this case (felon in possession) is 10 to 28 months. See MCL 750.224f; MCL 777.66; MCL 777.21. The trial court did not depart from this recommended minimum range when it sentenced defendant to two to seven years and six months' imprisonment for the sentencing offense. Therefore, defendant's sentence did not violate the principal of proportionality. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) ("[A] sentence within the guidelines range is presumptively proportionate").

Finally, defendant raises an ineffective assistance of counsel claim but his failure to cite to the record and failure to discuss or explain his argument constitutes abandonment of this issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("[a]n 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").

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray