STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2011
V	No. 296846 Monroe Circuit Court
ZACHARY THOMAS, Defendant-Appellant.	LC No. 08-037294-FH

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Zachary Thomas was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, malicious destruction of property greater than $1,000 but less than $20,000, MCL 750.377a(1)(b)(i), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 58 to 240 months' imprisonment for the felon in possession of a firearm conviction, 58 to 240 months' imprisonment for the malicious destruction of property conviction, and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions and sentences, but remand for the ministerial task of correcting the judgment of sentence regarding concurrent sentencing.

Defendant's convictions arise from an altercation with the victim, Joseph Montague. Montague was visiting his cousin, Bobbie Sutton, at her home. He went outside to smoke and saw defendant sitting on his vehicle. When defendant failed to get off his vehicle, Montague pulled him off the car, and the two men began to fight, but the fight was broken up by others. Montague testified that defendant left with two other men, but they returned with a gun. Despite challenges by defense counsel, Montague testified that he saw defendant fire shots at his vehicle. Defendant also broke out windows of the vehicle and threw the victim's possessions from the vehicle onto the street. Defendant was convicted as charged.

I. Admission of Defendant's Prior Felony Convictions

Defendant first alleges that the trial court erred by allowing admission of two prior drug-related convictions to establish the felon requirement of the felon in possession charge. We disagree. To support a conviction for felon in possession of a firearm, the prosecutor must prove that the defendant possessed or used a firearm, was previously convicted of a specified felony, and less than five years lapsed since the defendant paid the fines, served the imprisonment, and successfully completed all conditions of probation or parole imposed for the violation. *People v*

Perkins, 473 Mich 626, 635-636; 703 NW2d 448 (2005). The defendant bears the burden of proving that his firearm rights have been restored. *Id*. at 635-640.

When a defendant is charged with felon in possession, to obtain a fair trial, he is not entitled to a separate trial on the felon in possession charge alone despite the fact that the jury is presented with evidence that defendant is already a felon. *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). A separate trial is not required because adequate safeguards ensure that the defendant suffers no unfair prejudice. *Id*. at 659. To eliminate any prejudice, the fact of defendant's conviction could be introduced by a stipulation, a limiting instruction could be provided emphasizing that the jury must give separate consideration to each count of the information, and the jury could be instructed that the prior conviction is considered only in relationship to the felon in possession charge. *Id*. at 659-660 (further citation omitted). When a defendant fails to avail himself of these safeguards, he is not entitled to appellate relief. *Id*. at 660-661. Furthermore, a convicted felon is an element of the crime of felon in possession of a firearm, and the issue of whether a defendant was a convicted felon for purposes of that crime presents an issue for the jury. *People v Tice*, 220 Mich App 47, 54-55; 558 NW2d 245 (1996). Because adequate safeguards are in place at the trial level, manifest injustice does not result from the failure to review this issue. *People v Green*, 228 Mich App 684, 692; 580 NW2d 444 (1998).

In the present case, defendant failed to avail himself of any of the safeguards in place to ensure a fair trial by refusing to stipulate that a prior felony had been committed. Consequently, the issue of whether defendant was a convicted felon, for purposes of MCL 750.224f, presented an issue for the jury, *Tice*, 220 Mich App at 54-55, and the trial court did not err in allowing evidence of his prior convictions to be submitted to the jury in the absence of any stipulation. In any event, the trial court provided a limiting instruction regarding the appropriate use of the evidence of the prior convictions.[1] Accordingly, this claim of error does not entitle defendant to appellate relief. *Green*, 228 Mich App at 692.

II. Motion for Mistrial

Next, defendant asserts that the trial judge abused his discretion when he denied defendant's motion for a mistrial. We disagree.

We review the trial court's decision whether to grant a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). A trial court abuses its discretion when its decision falls outside the range of

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[1] We note that counsel for defendant indicated that he would not raise a "rehabilitation defense." However, counsel for defendant failed to explain this defense, and the trial court indicated that it was unaware of the discovery between the parties addressing the validity of the convictions. In light of the failure to specify whether a collateral attack on the prior convictions would occur, we cannot conclude that the trial court abused its discretion. *People v Blackston*, 481 Mich 451, 467; 751 NW2d 408 (2008).

reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

Assuming that statements regarding defendant's parole status were improperly introduced at trial, defendant has failed to establish resulting prejudice. We conclude that the trial judge's curative instructions, both at the time of the testimony and after the statements regarding defendant's status as a parolee, eliminated any prejudicial effect of the testimony. We presume that a jury follows instructions to disregard evidence inadvertently presented to it unless there exists (1) an overwhelming probability that the jury is unable to follow the court's instructions and (2) a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001). The trial judge in this case instructed the jury to disregard the reference to defendant's status as a parolee. Although the trial judge did not specify which reference the jury was to disregard, the witness's or his own, it can be presumed that the jury understood the instruction to pertain to all references to defendant's status as a parolee. It would make no sense for a trial judge to instruct a jury to disregard a witness's inadmissible testimony but not his own statement to the same effect. Here, there was not an overwhelming probability that the jury was unable to follow the court's instructions. The instructions also reduced the likelihood that the evidence would be devastating to defendant. Given the prompt cautionary instruction, the trial judge did not abuse his discretion in finding that the extreme measure of declaring a mistrial was not required in this case. *Schaw*, 288 Mich App at 236.

III. Prosecutorial Misconduct

Defendant alleges four instances of prosecutorial misconduct in support of his assertion that he did not receive a fair trial. We disagree.

Generally, we review issues of prosecutorial misconduct de novo, on a case-by-case basis, to determine whether such acts denied the defendant his right to a fair and impartial trial. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). We review unpreserved claims of prosecutorial misconduct, as here, however, for plain error. *People v Odom*, 276 Mich App 407, 413; 740 NW2d 557 (2007). "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." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant first argues that the prosecution engaged in misconduct by eliciting testimony that defendant was using drugs at the time of the incident. The prosecution generally may not prove a defendant's bad character or lack of morality with specific instances of past misconduct. MRE 404(b)(1); *People v Crabtree*, 87 Mich App 722, 726; 276 NW2d 478 (1979). Here, however, the evidence of defendant's marijuana use was not evidence of past bad acts. The testimony provided that defendant was rolling a blunt on the complainant's vehicle just moments before the altercation occurred. Further, defense counsel failed to object to the testimony or request a limiting instruction, and the trial judge is under no obligation to provide such instruction sua sponte. MRE 105; *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). In any case, considering that several witnesses implicated defendant in the shooting and his fingerprints were found on the hood of the complainant's vehicle, it cannot be

said that the alleged error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Callon*, 256 Mich App at 329. Thus, on this ground, reversal is unwarranted.

Defendant next argues that the prosecution improperly vouched for the credibility of a key witness, Darrell Coleman. We disagree. The great latitude given to prosecutors allows them to argue the evidence and all reasonable inferences derived from that evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "[A] prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Callon*, 256 Mich App at 330. For claims of prosecutorial misconduct, the question is whether the prosecution's statements had the effect of denying the defendant a fair trial. *Bahoda*, 448 Mich at 263.

Prosecutors cannot vouch for their witness's credibility in a manner that suggests that they have special knowledge regarding the witness's truthfulness. *Bahoda*, 448 Mich at 276. It is not misconduct, however, for a prosecutor to appeal to the jury's common sense. See *People v Fisher*, 220 Mich App 133, 160-161; 559 NW2d 318 (1996) overruled in part on other grounds in *People v Houthoofd*, 487 Mich 568, 583-584 (2010). A review of the record reveals that the prosecutor did not commit misconduct. Read as a whole, it is apparent that the prosecution was merely appealing to the jurors' common sense, that they should observe Coleman's comfortable demeanor and how frankly Coleman revealed information regarding his relationship with his ex-girlfriend in deciding how much weight to give his version of the events. Moreover, the prosecution's commentary responded to defense counsel's anticipated attack on Coleman's credibility. See *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997) (holding that "[a] prosecutor's comments must be considered in light of defense arguments"). Defense counsel spent a considerable time during his closing remarks suggesting to the jury that Coleman lacked credibility and had a motive to lie to implicate defendant in the shooting. Defendant has not shown plain error.

Defendant next argues that the prosecution misstated testimony with the purpose of eliciting inculpatory statements. Specifically, he contends that, once Montague indicated that he never saw defendant with the gun, it was improper to ask him who he saw shoot his vehicle because this assumed a fact not in evidence. We disagree. The prosecution did not assume in her question that Montague saw defendant shoot his vehicle, but appropriately asked, "[D]id you see who shot your vehicle?" The fact that Montague responded that he saw defendant shoot his car, which was inconsistent with his earlier statement, was not improperly elicited by the prosecution. Inconsistencies in testimony may be considered by the jury in determining a witness's credibility, but this does not reflect any error on the part of the prosecution.

Defendant lastly argues that the prosecution engaged in misconduct when it elicited improper leading and hearsay testimony from police officers with the intent to indirectly implicate defendant. Assuming that the evidence constituted hearsay, however, defendant has not shown plain error. Sufficient and more compelling evidence existed that defendant perpetrated the crime aside from Officer Flora's statement that Bramlett exculpated Demarco (known as "Debo") Smith and Paris Smith. Montague and Coleman offered direct testimony that defendant perpetrated the crime. Further, Montague also exculpated Demarco and Paris in his testimony, telling officers that they merely accompanied the shooter. Accordingly, even

assuming that admission of hearsay testimony was improper, the error was harmless. Having concluded that all of the alleged instances of prosecutorial misconduct were either not error or harmless, defendant's argument that the cumulative effect of the errors denied him a fair trial is unavailing.

IV. Scoring of Offense Variable 9

The trial judge in this case assessed defendant ten points for OV 9. As set forth in MCL 777.39, OV 9 refers to the number of victims, and provides that a defendant shall be assessed ten points in cases where "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c); *People v McGraw*, 484 Mich 120, 132; 771 NW2d 655 (2009). Defendant argues that the trial judge clearly erred in concluding that Montague and defendant's girlfriend, Jamara Overstreet, were placed in danger of injury because no evidence existed that they were near the vehicle or in the line of fire when the shooting occurred. According to defendant, the testimony at trial indicated that the shooting placed only one individual, Coleman, in danger of injury. We disagree.

Factual findings at sentencing are reviewed for clear error, and the trial court's decision to score an offense variable is reviewed for an abuse of discretion. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005). The ultimate question for this Court is whether the trial court properly exercised its discretion and whether the evidence on the record adequately supports the particular score given. *Id*. A sentencing court properly includes individuals in close proximity to the crime as "victims" for the purpose of scoring OV 9, even though the individuals are not themselves "victims" of the underlying crime. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004).

In the present case, the trial court noted that the shooting occurred in a residential area where people were gathered because of parties held in the area. The trial judge's findings of fact are supported by the record, and he did not abuse his discretion in concluding that at least two victims were placed in danger of injury. First, Montague testified that he saw defendant obtain the gun from one of the individuals with him, and then saw defendant shoot at his vehicle. According to Montague, he was outside when the shooting first began and returned inside only after the shooting had already started. Montague, therefore, is a victim for the purpose of scoring OV 9. Second, Coleman testified that he was standing right next to Montague's vehicle when defendant began shooting; Coleman was too scared to run. According to Coleman, he then watched defendant break out Montague's window, and pulled Overstreet away. Therefore, Coleman and Overstreet may also properly be considered victims for the purpose of scoring OV 9. In fact, the record reveals that several more individuals were placed in danger of injury. Montague's cousin testified that she heard someone shout out, "He got a gun," at a time when approximately 30 to 40 people were standing outside, and Coleman testified that the crowd did not scatter until police cars approached. Accordingly, the trial judge properly assessed defendant ten points under OV 9.

V. Sentencing Error

Defendant next argues that the trial judge erred in ordering that his two-year sentence for felony-firearm run consecutive to both underlying offenses, felon in possession of a firearm and malicious destruction of property. We remand to the trial court for the ministerial task of correcting the judgment of sentence.

The decision whether the trial court may impose a consecutive sentence on the defendant raises a question of statutory interpretation subject to de novo review. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003). Generally, however, we review unpreserved claims, as here, for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We reverse only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Id.*

The felony-firearm statute, MCL 750.227b, provides:

> (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony and shall be imprisoned for 2 years. . . .
>
> (2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

Our resolution of this issue is governed by *People v Clark*, 463 Mich 459; 619 NW2d 538 (2000), which addressed the issue in dispute regarding interpretation of the above statute. As the Michigan Supreme Court explained in *Clark*, 463 Mich at 463-464, the statute's plain meaning indicates that a felony-firearm sentence may run consecutively only with the sentence for the specific underlying felony supporting the felony-firearm conviction. Subsection 2 provides that a sentence for felony-firearm be served consecutively with "the felony," not just any felony. *Id.* "No language in the statute permits consecutive sentencing with convictions other than the predicate offense." *Id.* at 464.

In *Clark*, the jury found the defendant guilty of all charged offenses, but only specifically found that the defendant possessed a firearm while he possessed two bombs with unlawful intent. *Clark*, 463 Mich at 462. Applying the pertinent statute as written, the Court held that each felony-firearm sentence should run consecutively only with the corresponding conviction for possession of a bomb with unlawful intent. *Id.* at 465.

Here, it is not clear whether the jury found that defendant possessed a firearm when he maliciously destructed property. Of course, it must have found that defendant possessed a firearm for the purpose of the felon in possession conviction, since possession is a requisite element of the offense. This is not necessarily true, however, with regard to the malicious destruction of property conviction. The trial judge improperly assumed that the jury believed that defendant possessed a firearm when he maliciously destructed property. This is not an unreasonable assumption, considering that the record indicates that the defendant accomplished

the destruction of property at issue, in part, by shooting a firearm. Nonetheless, "neither a trial court nor an appellate court can supply its findings with regard to the factual elements that have not been found by a jury." *Clark*, 463 Mich at 464. As in *Clark*, it is irrelevant whether "it might appear obvious that the defendant also possessed a firearm while committing the other crimes of which he was convicted . . . ." *Id.*

Because the jury could have convicted defendant of felony-firearm based on the underlying offense of felon in possession of a firearm, and not based on the underlying offense of malicious destruction of property, we remand for the trial court to correct defendant's sentence to provide that only his felon in possession sentence is served consecutive to his felony-firearm sentence.

VI. Defendant's Standard 4 Brief[2]

Defendant first alleges that the trial court abused its discretion by admitting evidence of fingerprints from the hood of the victim's vehicle that matched defendant where the chain of custody was not adequately established. The trial court did not abuse its discretion by admitting this testimony because any deficiency in the chain addresses the weight of the evidence, not admissibility. *People v White*, 208 Mich App 126, 130-131; 527 NW2d 34 (1994). More importantly, defendant's girlfriend, Jamara Overstreet, placed defendant on the hood of the vehicle when she testified that he sat there when the victim began to yell at him.

Unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). We reject defendant's claims of ineffective assistance of counsel because they are not apparent from the record. Additionally, defendant failed to adequately support his challenge to the performance of counsel, the conduct of the prosecutor, the issuance of the complaint and warrant, and the instructions by the trial court. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). The challenge to the instruction is also without merit. See *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). Consequently, defendant's standard 4 brief does not entitle him to appellate relief.

Defendant's convictions and sentences are affirmed. We remand for the ministerial task of correcting the judgment of sentence for purposes of addressing concurrent sentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause

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[2] See Administrative Order No. 2004-6, Standard 4.