STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2012
v	No. 300007 Wayne Circuit Court
HENRY BROUSSARD, Defendant-Appellant.	LC No. 10-001837-FH

Before: JANSEN, P.J., and WILDER and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 740.84, assault with a dangerous weapon (felonious assault), MCL 750.82, felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 12 to 25 years for the assault with intent to do great bodily harm less than murder conviction, 8 to 15 years for the felonious assault conviction, 8 to 15 years for the felon in possession conviction, and five years for the felony-firearm conviction. We affirm.

I. BASIC FACTS

This case arises from a shooting that occurred at 4157 North Campbell Street in the city of Detroit on January 29, 2010. The prosecution witnesses testified that defendant sold drugs from the second story of that house through two women who resided there – Malena Garcia and Tasha Williams. On the night in question, defendant became enraged because Brenda Nealy and her boyfriend Chris Peterson purchased drugs from someone other than defendant and proceeded to smoke it in the lower flat of the home. Defendant confronted Nealy and Peterson, left the home, and then returned shortly thereafter armed with a gun. Defendant fired shots into the home and forced Nealy and Peterson to leave at gunpoint. Nealy was shot in the back of her leg.

Garcia testified on defendant's behalf. Contrary to the prosecution's witnesses, she testified that defendant did not fire shots into the home. Instead, defendant and his fiancé, Shavelle Runels, came to the home to pick up Garcia. While there, defendant admonished the prosecution's witnesses that they should be ashamed of themselves for smoking crack cocaine. Nealy and Peterson voluntarily left the home. Garcia denied that any shooting took place.

The jury found defendant guilty of assault with intent to do great bodily harm less than murder, felonious assault, felon in possession, and felony-firearm.[1] He was sentenced as outlined above. Defendant now appeals as of right.

II. PHONE SEX CONVERSATION

Defendant first argues that the trial court abused its discretion when it admitted audiotape of a conversation between defendant and defense witness Garcia, while defendant was in jail. Defendant argues that the conversation, which included "phone sex" between the two, was substantially more prejudicial than probative of an issue at trial. We disagree. A decision regarding whether to admit evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion occurs when the [trial] court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). If a trial court admits evidence that as a matter of law is inadmissible, it abuses it discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's decision on a close evidentiary question, however, is ordinarily not an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Relevant evidence may be excluded under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *People v Feezel*, 486 Mich 184, 197 n 6; 783 NW2d 67 (2010) (quoting MRE 403). In determining the admissibility of evidence, the trial court must first determine whether the proffered evidence is relevant and, secondly, if relevant, whether it is nevertheless inadmissible under MRE 403. *Feezel*, 486 Mich at 198.

Evidence relating to a witness's bias is *always* relevant and a party is entitled to have the jury consider any fact that may have influenced the witness' testimony. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005) (quoting *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995)). Additionally, "the trial court has wide discretion regarding admissibility of bias during cross-examination under MRE 611." *People v Layher*, 464 Mich 756, 765; 631 NW2d 281 (2001).

The record shows that defense witness Garcia first denied having a sexual relationship with defendant. Garcia also denied having phone sex with defendant prior to the playing of the

[1] Defendant was charged with, but acquitted of, an additional count of assault with intent to do great bodily harm less than murder, MCL 740.84, against complainant Peterson. The jury found defendant guilty of two counts of felonious assault. At sentencing, since the jury found defendant guilty of assault with intent to do great bodily harm less than murder, MCL 740.84 against complainant Nealy, the trial court vacated the lesser offense of felonious assault pertaining to Nealy.

audiotape. Garcia later admitted that she had a "one-time thing" with defendant but affirmed that since that time she and defendant were merely friends. The audiotape revealed that defendant and Garcia engaged in phone sex while defendant was incarcerated. Defendant argues that the audiotape only marginally added any probative value since Garcia admitted to having a sexual encounter with defendant. We conclude that the audiotape was probative to show that Garcia lied about never having phone sex with defendant or that their relationship resumed its plutonic status after their sexual encounter. Therefore, we agree with the trial court that the audiotape was relevant as impeachment evidence.

Determinations whether evidence should be excluded under MRE 403 "'are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony' by the trial judge." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008) (quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993)). In assessing the probative value against the prejudicial effect of the proffered evidence, the trial court is required to balance several factors, including "whether the fact can be proved in another manner without as many harmful collateral effects." *Blackston*, 481 Mich at 462. However, the fact that evidence is damaging does not mean it constitutes "unfair prejudice," particularly because "[a]ny relevant testimony will be damaging to some extent." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995) (quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW 2d 347 (1983)). "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *Blackston*, 481 Mich at 462.

We conclude that the probative value of the conversation between Garcia and defendant was not substantially outweighed by its prejudicial effect. The conversation briefly provided enough information to deduce that Garcia and defendant were engaging in phone sex without providing overly excessive or graphic private information. We, therefore, defer to the trial court's determination that the audiotape was admissible over defendant's MRE 403 objection and conclude that the trial court did not clearly abuse its discretion in admitting such evidence.

Defendant also argues that the audiotape interjected evidence of Garcia's and defendant's bad character, that is, evidence of defendant's and Garcia's betrayal of defendant's fiancée, Shavelle Runels. We disagree. Even if we agreed with defendant's contention, "the fact that evidence is admissible for one purpose, but not another, does not make it inadmissible." *McGhee*, 268 Mich App at 639. As discussed above, the audiotape was admissible as impeachment evidence. Further, defendant could have requested a limiting instruction to consider the evidence "only for proper, noncharacter purposes pursuant to MRE 105." *People v Mardlin*, 487 Mich 609, 619; 790 NW2d 607 (2010).

III. SENTENCING

Defendant next argues that since the trial court mistakenly believed that it could not impose a lower maximum sentence for defendant's assault with intent to do great bodily harm less than murder conviction as a matter of law, this Court should remand for resentencing, or at

least remand the issue to clarify the trial court's statement in changing the maximum sentence from 20 years to 25 years.[2] We disagree. Since defendant failed to preserve this issue by objecting during sentencing, we confine our review to plain error. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). In reviewing for plain error, defendant must establish that: (1) an error occurred, (2) the error was plain, and (3) the plain error affected defendant's substantial rights." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

This Court requires resentencing when there is an invalid sentence. *People v Mutchie*, 251 Mich App 273, 274; 650 NW2d 733 (2002). Generally, "a defendant is [also] entitled to resentencing where a sentencing court fails to exercise its discretion because of a mistaken belief in the law." *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). But, "absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001).

When sentencing defendant on his assault with intent to do great bodily harm less than murder conviction, the trial court stated, "And so, I'm going to sentence you to a minimum of twelve to a maximum of twenty years. Wait a minute. No. I can't do that. A minimum of twelve to a maximum of twenty-five years in the Michigan Department of Corrections as a fourth habitual offender." Although defendant claims that the trial court's comment indicates that the trial court believed that it did not have discretion, the record shows that prior to making the statement above, the trial court understood that, as a fourth habitual offender, it could sentence defendant to a maximum of life in prison where normally the maximum sentence for an assault with intent to do great bodily harm conviction would be 10 years. This reflects an understanding of the law that, as a trial court sentencing a fourth habitual offender, it "had broad discretion to sentence [defendant] to any period of incarceration up to life." *People v Crawford*, 232 Mich App 608, 622; 591 NW2d 669 (1998). Since there is no clear evidence that the trial court misunderstood the law and the limits of its discretion during sentencing, we affirm the trial court's sentencing on defendant's assault with intent to do great bodily harm conviction.

IV. DEFENDANT'S STANDARD 4 BRIEF

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that defense counsel provided ineffective assistance of counsel when defense counsel failed to call two exculpatory witnesses at trial. We disagree. An ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *LeBlanc*, 465 Mich at 579. Because defendant failed to preserve this issue in the lower court, we limit our

[2] We denied defendant's motion to remand for resentencing in a prior order for "failure to persuade the Court of the necessity of remand at this time." *People v Broussard*, unpublished order of the Court of Appeals, entered May 12, 2011 (Docket No. 300007).

review to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

To justify reversal of a conviction on grounds of ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient and that such deficiencies prejudiced defendant's case. *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v Dendel*, 481 Mich 114, 124-125; 748 NW2d 859 (2008). Defendant must show that "counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). This Court presumes that defendant received effective assistance of counsel and places a heavy burden on defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Decisions to call and investigate witnesses fall within trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defense counsel is afforded wide discretion concerning matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and this Court will not substitute its judgment for that of defense counsel or review such matters with the added benefit of hindsight, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The failure to call witnesses only constitutes ineffective assistance of counsel if it deprived a defendant of a substantial defense. *Payne*, 285 Mich App at 190. For a defense to be substantial it must be one that "might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

In an affidavit submitted with defendant's Standard 4 Brief on Appeal, defendant claims that he requested defense counsel call two witnesses, Rose Lewis and Raymond Coles, but defense counsel failed to do so. Defendant argues that both witnesses would have served as exculpatory witnesses and there was no strategic reason for failing to call them to the witness stand. We disagree. The record shows that defense counsel did present two witnesses from defendant's witness list, Garcia and Runels, to support the defense's theory that defendant did not return to the North Campbell residence and fire shots at complainants Nealy and Peterson. Because defense counsel did present the theory that defendant was not involved in the shooting by presenting two witnesses supporting such theory, defense counsel did not deprive defendant of a substantial defense by failing to call Lewis and Coles.

Additionally, beyond defendant's subjective belief, defendant failed to establish that the witnesses would have, in fact, provided exculpatory evidence. Defendant implies that since Lewis and Coles were identified as individuals who were present at the North Campbell residence during the incident, they would have attested to the defense's version of the incident. Since there is nothing in the record that the proposed witnesses would have provided favorable testimony, defendant failed to demonstrate that the proceeding would have been different had defense counsel called these witnesses. *Seals*, 285 Mich App at 20-21; *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Defendant fails to establish that he was deprived of effective assistance of counsel.

B. BIND OVER

Defendant next argues that the district court abused its discretion by denying him the opportunity to present four witnesses at the preliminary examination, thereby depriving defendant of his constitutional right to present a defense. Defendant's argument is without merit. We review a district court's decision to bind over a defendant for an abuse of discretion while reviewing questions of law de novo. *People v Flick*, 487 Mich 1, 9; 790 NW2d 295 (2010). The primary function of a preliminary examination is to determine whether there is probable cause to believe that a crime has been committed and that defendant committed it. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003). To warrant reversal of a conviction on the ground that there was an error in the preliminary examination procedure, the defendant must establish that the error affected the bind over and adversely affected the fairness or reliability of his subsequent trial. *People v McGee*, 258 Mich App 683, 698-699; 672 NW2d 191 (2003).

Defendant has not provided any evidence or put forth any argument indicating that the fairness of his trial was affected by the district court's decision to deny defendant the opportunity to present witnesses at the preliminary examination. To the contrary, the record establishes that at trial defendant was presented with an opportunity to present its defense, including the opportunity to call witnesses, thoroughly cross-examine the prosecution's witnesses and present an opening statement and closing argument. Accordingly, we conclude that defendant failed to establish that the alleged error at the preliminary examination affected the fairness or reliability of defendant's trial, and therefore, reversal is not warranted.

Further, "a magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict." *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). On this record, there is sufficient evidence on the record to support defendant's assault with intent to do great bodily harm less than murder, felon in possession, felonious assault, and felony-firearm convictions. At trial, witnesses testified that defendant returned to the North Campbell residence armed with a handgun and fired shots at the North Campbell residence, one shot hitting Nealy in the leg. Defendant then escorted Nealy and Peterson from the residence at gun point. There was physical evidence to substantiate the witnesses' testimony. Defendant also stipulated that at the time of the incident he was unable to carry a firearm as a convicted felon. Defendant fails establish that the alleged error at the preliminary examination affected his right to a fair trial. Further, any alleged error is harmless because there is sufficient evidence to convict defendant of the charged offenses.

C. DOUBLE JEOPARDY

Finally, defendant argues that his felon in possession and felony-firearm convictions violate his double jeopardy rights not to receive multiple punishments for the same offense. We disagree. Although defendant failed to preserve this issue, defendant's double jeopardy claim "presents a significant constitutional question," and we will consider defendant's claim utilizing a plain error standard of review. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). This Court reviews questions of law de novo. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003).

Double jeopardy protects defendants against successive punishments for the same offense and multiple punishments for the same offense. *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). The double jeopardy clause is not violated when a defendant is convicted of both felon in possession and felony-firearm. *People v Dillard*, 246 Mich App 163, 166-171; 631 NW2d 755 (2001). Defendant was not punished twice for the same offense.

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly