

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAREEM REMAR JEFFERSON,

Defendant-Appellant.

UNPUBLISHED

January 29, 2013

No. 307388

Calhoun Circuit Court

LC No. 2011-001365-FC

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; third-degree fleeing and eluding a police officer, MCL 257.602a(3); carrying a concealed weapon, MCL 750.227; and possession of a controlled substance, MCL 333.7403(2)(d). We affirm defendant's convictions, but remand for correction of the judgment of sentence to reflect that defendant's sentence for third-degree fleeing and eluding is to run concurrently to his sentence for felony-firearm.

On the night of March 14, 2011, defendant drove a white car to the victim's house. Defendant's friend, Melvin Nelson, rode in the passenger seat of the car. Defendant and Nelson were the only occupants of the car that night. The victim was hosting a party at her house that night. As defendant drove by the victim's house, multiple gunshots were fired from defendant's car, one of which struck the victim in the abdomen. Defendant then sped away from the victim's house. Police officers in the area heard the gunshots and observed defendant speeding away from the scene. The police pursued defendant and activated their sirens and lights, but defendant continued the high speed car chase through a residential neighborhood. Defendant eventually stopped his car, and defendant and Nelson fled on foot. Both defendant and Nelson were apprehended a short time later. Detective Tim Lepper interviewed defendant at the police station that night after defendant waived his *Miranda*¹ rights. The police recovered one handgun from the scene of defendant and Nelson's apprehension, multiple spent cartridge casings from the scene of the shooting, and one bullet from the victim's body and a second bullet from the

¹ *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

victim's front porch. This evidence was sent to the crime laboratory for testing. At trial, defendant claimed that Nelson fired multiple gunshots toward the victim's house, but that defendant never had a gun or any knowledge that Nelson intended to shoot anyone.

Defendant argues that the trial court violated his due process right to a fair and impartial jury by allowing the jurors to ask questions of witnesses during the trial. We disagree. Because defendant did not object when the trial court permitted the jurors to submit questions for witnesses, this issue is not preserved. See *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCR 2.513(I) permits jurors to ask questions of trial witnesses:

The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

In *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972), our Supreme Court permitted trial courts, in their discretion, to allow jurors to ask questions of trial witnesses. According to this Court,

[t]he practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court. It would appear that in certain circumstances, a juror might have a question which could help unravel otherwise confusing testimony. In such a situation, it would aid the fact-finding process if a juror were permitted to ask such a question. We hold that the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. [*Id.*]

In this case, defendant does not argue that the trial court failed to employ an appropriate procedure for the juror questions or that any juror question was improper under Michigan court rules or case law. Rather, defendant argues that, "as a matter of law reform," the practice of permitting jurors to ask questions of trial witnesses should stop. In support of this proposition, defendant relies on the Minnesota Supreme Court's decision in *State v Costello*, 646 NW2d 204, 215 (Minn, 2002). However, we are not bound by the decisions of courts of other states, such as *Costello*. *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011). Rather, we are bound by the Michigan Supreme Court's decision in *Heard*. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007); *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Given that Michigan law permits jurors to ask questions of trial witnesses and that defendant does not claim, and the record does not support, that any of the juror questions in this case were improper under Michigan law, defendant has not established plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764. Accordingly, we reject defendant's claim that the trial court violated his right to due process by permitting the jurors to ask questions of the trial witnesses.

Defendant next raises two claims of ineffective assistance of counsel. Defendant argues that he was denied the effective assistance of counsel where counsel failed to move to suppress defendant's statement to the police at the time of his apprehension and where counsel failed to object to testimony that the prosecution's witnesses were threatened and bribed. We disagree. Defendant preserved his claims of ineffective assistance of counsel by moving to remand for a *Ginther*² hearing. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008) (citation omitted). However, because we denied defendant's motion to remand for a *Ginther* hearing, our review of defendant's claims are limited to errors apparent in the record. *Horn*, 279 Mich App at 38.

"[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Defendant's first claim of ineffective assistance of counsel is premised on his assertion that his statement to the apprehending police officer, Officer Todd Rathjen, violated defendant's *Miranda* rights and was thus inadmissible. Specifically, in response to Officer Rathjen's questioning about the second suspect, defendant gave a false physical description of Nelson.

In *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court established "procedural safeguards . . . to secure the privilege against self-incrimination." Specifically, "under *Miranda*, every person subject to interrogation while in police custody must be warned, among other things, that the person may choose to remain silent in response to police questioning." *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). However, in *Dickerson v United States*, 530 US 428, 441; 120 S Ct 2326; 147 L Ed 2d 405 (2000), the Supreme Court "explained that the *Miranda* rule was not 'immutable.'" *Id.* at 669. "The United States Supreme Court has recognized that in certain situations, the benefits afforded by *Miranda* are outweighed by the detrimental consequences of excluding evidence obtained in violation of those protections." *People v Cheatham*, 453 Mich 1, 20; 551 NW2d 355 (1996). Specifically, in *New York v Quarles*, 467 US 649, 651; 104 S Ct 2626; 81 L Ed 2d 550 (1984), the Supreme Court "conclude[ed] that 'overriding considerations of public safety' justified the officer's failure to provide *Miranda* warnings before asking" certain questions. *Attebury*, 463 Mich at 670, quoting *Quarles*, 467 US at 651. The "use of the phrase 'public safety' clearly encompassed the safety of the officers as well as the general public." *Id.* at 671. In order for the public safety exception to apply, "the police inquiry must

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

have been an objectively reasonable question necessary to protect the police or the public from an immediate danger.” *Id.* at 671-672.

In this case, Officer Rathjen heard multiple gunshots, after which a car driven by defendant sped away from the scene of the shooting. Officer Rathjen drove after defendant and, following the car chase, pursued defendant on foot. The pursuit took place in a residential neighborhood. Officer Rathjen knew that there was a second suspect who also fled defendant’s car. At the time Officer Rathjen questioned defendant, Nelson’s whereabouts were still unknown. Moreover, the challenged statements made by defendant were in response to questions specially directed at enabling the police to locate and apprehend Nelson. These questions were “reasonably prompted by a concern for the public safety[.]” *Quarles*, 467 US at 656, and “related solely to neutralizing this danger,” *Attebury*, 463 Mich at 674. The questions were “objectively reasonable” and were “necessary to protect the police or the public from an immediate danger.” *Id.* at 671-672. Accordingly, we find that the public safety exception to the general *Miranda* rule applied to Officer Rathjen’s questioning of defendant and to defendant’s response, and the trial court properly admitted these statements. See *id.* at 668-674. Thus, we find that defendant’s counsel was not ineffective for failing to object to the challenged statements. “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant next claims that his trial counsel was ineffective for failing to object to purportedly inadmissible testimony from three of the prosecution’s witnesses regarding threats or bribes that they received in an effort to keep them from testifying at trial. None of the witnesses testified that defendant was responsible for the threats or bribes, and defendant testified that he and his family had not threatened any of the witnesses. Defendant fails to cite supporting authority or persuasively articulate why these statements were inadmissible. “[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Moreover, even assuming that the witnesses’ challenged testimony was inadmissible, defendant must still “overcome the strong presumption that his counsel’s” decision not to object “constituted sound trial strategy under the circumstances.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There are times when it is better not to object and draw attention to improper information. *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008). Defendant has not “overcome the strong presumption” that his trial counsel’s decision not to object “constituted sound trial strategy under the circumstances.” *Toma*, 462 Mich at 302. See also *Horn*, 279 Mich App at 40.

Further, with regard to both of defendant’s claims of ineffective assistance of counsel, we find that defendant has not shown that “there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *Yost*, 278 Mich App at 387. Brown testified at trial that she saw two guns being fired from the white car, including one that was fired near the driver’s side mirror. The ballistics expert testified that two guns were involved in the shooting, and that the gun that fired the bullet into the victim and into her porch was not the gun that the police recovered. Officer Broughton estimated that the gun he recovered from the scene of defendant and Nelson’s apprehension was discarded from the passenger side of the car. It was uncontested that defendant was the driver and Nelson was the passenger on the night in question. Further, defendant admitted that he sped away from the

scene, led police on a high speed car chase, and fled the police on foot. Evidence of flight supports an inference of “consciousness of guilt.” *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008); *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Defendant also admitted at trial that he did not tell Detective Lepper the truth during the first part of defendant’s interview with Lepper. In light of the foregoing evidence, we find that even if defense counsel erred in the ways identified by defendant, defendant fails to demonstrate “that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *Yost*, 278 Mich App at 387.

Defendant also argues that the trial court erred in denying defendant’s motion for a mistrial despite evidence a juror shared with the rest of the panel that a hung jury would result in a retrial before a new jury. We disagree. Defendant preserved this claim of error by moving for a mistrial below. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

As observed in *People v Shaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010) (citations and quotation omitted),

[w]e review for an abuse of discretion a trial court’s decision regarding a motion for a mistrial. This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes. A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.

Following a day of jury deliberations, one of the jurors asked a friend of the court attorney if a hung jury would cause defendant to be set free. The attorney told the juror that defendant would not be set free, but that there would be a retrial before a new jury. The juror then shared that information with other jury members. Upon learning of this, defense counsel moved for a mistrial. The trial court denied the motion, finding that there was no “substantial connection between the jury’s learning of the result of a hung jury and the subsequent verdict of guilty.” We find that the trial court’s denial of defendant’s motion was not “outside the range of principled outcomes[,]” given that juror’s conduct was not “an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *Shaw*, 288 Mich App at 236. We agree with the trial court that it stands to reason that learning that a hung jury would result in a new trial before a different jury, rather than a full acquittal for defendant, would not influence a juror to change his or her vote from not guilty to guilty. The trial court did not abuse its discretion by denying defendant’s motion for a mistrial.

Finally, defendant argues that the trial court erred in ordering that his sentence for his third-degree fleeing and eluding conviction run consecutively to his sentence for his felony-firearm conviction. The prosecution concedes that the trial court erred, and we agree with defendant and the prosecution. “[C]oncurrent sentencing is the norm.” *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). “A consecutive sentence may be imposed only if specifically authorized by statute.” *Id.*

In *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000), our Supreme Court explained:

[f]rom the plain language of the felony-firearm statute,^[3] it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony. Subsection 2 clearly states that the felony-firearm sentence “shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or attempt to commit the *felony*.” It is evident that the emphasized language refers back to the predicate offense discussed in subsection 1, i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense.

In this case, as defendant argues and the prosecution concedes, defendant’s third-degree fleeing and eluding conviction was not a predicate offense of defendant’s felony-firearm conviction. Accordingly, we remand this case to the trial court with instructions to amend the judgment of sentence to reflect that defendant’s sentence for felony-firearm is to run concurrently with his sentence for third-degree fleeing and eluding.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Michael J. Kelly

³ MCL 750.227b.