STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 23, 2013
v	No. 308871 Wayne Circuit Court
JOSEPH RIVERS, Defendant-Appellant.	LC No. 11-008251-FH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm (felon-in-possession), MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. He was sentenced to serve two years' probation for each of the felon-in-possession and CCW convictions and five years' imprisonment for the felony-firearm conviction. We affirm.

This case arises from an investigatory stop of defendant while police were searching for a carjacking suspect. Defendant first argues that the police violated his rights under the United States and Michigan Constitutions to be free from unreasonable seizures, and that the trial court erred when it denied his motion to suppress evidence of a gun found near him, which led to the CCW charge. We disagree.

"A court's factual findings at a suppression hearing are reviewed for clear error, but the application of the underlying law—the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution—is reviewed de novo." *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011). The Fourth Amendment, as incorporated to the states through the Fourteenth Amendment, protects people from unreasonable searches and seizures. US Const, Ams IV, XIV; see also Const 1963, art 1, § 11. The remedy for violation of the right against unreasonable searches and seizures is the exclusionary rule, which provides that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." *Mapp v Ohio*, 367 US 643, 655; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

"[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889

(1968). "The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity. That suspicion must be reasonable and articulable." *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993) (citations omitted); see also *Terry*, 392 US at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

"[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 US at 19, n 16. "[T]he police can be said to have seized an individual only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988) (internal quotation marks and citation omitted).

Defendant was seized, for the purpose of his rights against unreasonable seizures, when Officer Timothy Simons positioned the police cruiser directly in the path of defendant's bicycle. At that point, and no sooner,[1] a reasonable person in defendant's position would have believed that he was not free to leave. See *Brendlin v California*, 551 US 249, 255; 127 S Ct 2400; 168 L Ed 2d 132 (2007). The prosecution's argument that angling the car in front of defendant in order to stop his progress did not constitute a seizure is unavailing, since that maneuver was unquestionably an example of "physical force or show of authority [that] restrained the liberty of" defendant. *Terry*, 392 US at 19, n 16.

Based on the testimony of three police officers, there was a "reasonable and articulable" suspicion to justify stopping defendant. Each officer testified that they were investigating a suspected carjacking. After chasing a car that fit the victim's description, the car crashed into a truck, and the officers saw three passengers get out of the car. They arrested one immediately, and chased the other two on foot. Of those two, Officer Michael Logan said that one ran away while he arrested the other. The officers continued to search for the missing third passenger from their patrol car. They saw defendant riding a bicycle, and Logan, noticing burrs on defendant's clothing and shoes similar to the ones that stuck to Logan himself after chasing the suspect through the woods, believed that defendant was the third passenger of the stolen Impala. Logan also observed that defendant "was wearing clothing that was similar to the suspect that was seen fleeing the scene from the previous incident."

When the officers identified themselves as police and asked him to stop, defendant, who seemed nervous to the officers, increased the cadence of his pedaling, and the officers thought he was attempting to escape. Simons, who was driving the cruiser, saw that defendant wore

[1] "When . . . an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there has been no restraint on the person's liberty and the person is not seized." *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998).

clothing similar to that of the person Simons had chased, and "sped up in front of" defendant to "cut him off."

The officers reasonably inferred that defendant's nervousness, reluctance to stop, and familiar, burr-covered clothing, were circumstantial evidence tending to establish that he was the carjacked Impala's missing third passenger. These circumstances "yield a particular suspicion that the individual being investigated has been . . . engaged in criminal activity." *Nelson*, 443 Mich at 632. Simons's decision to block defendant's path was based on the fresh memory of having been outrun by the third passenger of the stolen Impala (and the desire not to lose the suspect a second time), and was presumably motivated by his duty to protect the public from a person who may have been associated with a carjacking, and therefore possibly armed. Because the investigatory stop did not violate the constitutional protections against unreasonable seizures, there was no basis for suppressing evidence of the pistol or quashing the charges based on that evidence.

Defendant next argues that the prosecutor's statement during closing argument that the charges of felon-in-possession and felony-firearm went "hand-in-hand" was a misstatement of the law and constituted misconduct. We disagree.

Because defendant failed to contemporaneously object to the claimed error or request a curative instruction, our review is for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial. However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) (citations omitted).

During closing argument, the prosecutor said:

> We also have the felony firearm count. That is while he was committing the crime of being a felon in possession, he had this firearm. Think of it as smelling a flower. To smell a flower you have to breath [sic] and you have to smell. That's felony firearm and felon in possession; they go hand and hand. Now, no DNA, no fingerprints, just common sense. This weapon was in the defendant's waistband, fell from the defendant . . . .

The elements of felony-firearm are (1) that the defendant possessed a firearm (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b; *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011). Felon-in-possession qualifies as an underlying felony for a felony-firearm charge. See *People v Calloway*, 469 Mich 448, 452; 671 NW 2d 733 (2003). Because the parties stipulated that defendant was a convicted felon whose right to

possess a firearm was not restored, defendant was guilty of felon-in-possession if he possessed a firearm. It appears that the prosecutor intended to emphasize that a guilty verdict of felony-firearm followed logically—though not necessarily automatically—from a guilty verdict of felon-in-possession, because felon-in-possession is an underlying felony for felony-firearm and both charges, by definition, require defendant's possession of a firearm. It would require an unfair contortion of the prosecutor's words to conclude that her analogy to smelling and breathing purported to tell the jury how to issue its verdict or misstated the law.

Even if the prosecutor's statement were erroneous, the trial court instructed the jury on the elements of each offense, which was sufficient to cure the error, *Grayer*, 252 Mich App at 357, particularly because it is well established that jurors are presumed to follow the trial court's instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Lastly, defendant argues that trial counsel was ineffective for introducing the irrelevant and prejudicial carjacking incident the police were investigating when they stopped defendant, for failing to move in limine to exclude, under MRE 403, evidence of the carjacking as unfairly prejudicial, for failing to object to the prosecutor's misstatement of the law and mischaracterization of defendant's testimony during closing argument, and for failing to request a fingerprint analysis on the gun. We disagree.

To preserve the issue of ineffective assistance of counsel, defendant must raise the issue in a motion for a new trial or request an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Because defendant did not do either, this Court's review is "limited to mistakes apparent on the record." *Id.* "The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *Brown*, 279 Mich App at 140.

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Vaughn*, 491 Mich at 670 (internal quotation marks and citation omitted). Defense counsel is also given "wide discretion in matters of trial strategy," and this Court "will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Further, declining to raise objections can often be consistent with sound trial strategy, and effective assistance does not require trial counsel to make futile objections. *Unger*, 278 Mich App at 242, 256-257.

Defendant's first ineffective assistance of counsel argument is bifurcated into his trial counsel's failure to move in limine for the exclusion, under MRE 403, of evidence relating to the

police officers' investigation of a carjacking as a pretext for stopping defendant, and counsel's mention of the carjacking in his opening statement. These claims lack merit.

During his opening statement, defendant's trial counsel said that the officers "are going to tell you that on that evening they made a big colossal mistake. They misidentified [defendant] as being a participant in an earlier crime." He said that, while defendant was buying a beverage from a gas station store, "police officers are . . . swarming around looking for . . . car jacking [sic] perpetrators. . . . [Defendant had] no knowledge of this dragnet." To the extent that these statements fulfilled the primary purpose of an opening statement—to summarize the forthcoming evidence for the jury's benefit and to present each party's theory of the case—the statements were sound trial strategy, and not ineffective assistance of counsel. Defendant's theory was that he was not a criminal, and merely in the wrong place at the wrong time while police were aggressively canvassing the area near his home. The officers' response to a carjacking call was apparently the only reason for their interaction with defendant, and "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). For that reason, it was not likely that a motion in limine to exclude evidence of the carjacking investigation would have been granted. The failure to make futile objections is not ineffective assistance of counsel. *Unger*, 278 Mich App at 256-257.

Further, the trial court twice reminded the jury—once after Officer Logan's testimony, and again immediately before deliberations began—that testimony relating to the carjacking investigation was "to explain and to take in the whole situation as to why Logan and his crew made contact with the defendant. It is to be used for that, and that only." The court clearly instructed the jury that it did not "have to decide whether or not [defendant], in fact, [was] or was not the person" the police were seeking. And, as stated, jurors are presumed to follow the trial court's instructions. *Unger*, 278 Mich App at 235.

Defendant next argues that his trial counsel was ineffective for failing to object to the prosecutor's misstatement of the law during closing argument with respect to the elements of felon-in-possession and felony-firearm. Because, as discussed above, the prosecutor did not misstate the law during closing argument, there was no basis for defense counsel to object. Thus, counsel was not ineffective for failing to make a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant also contends that the prosecutor "denigrated" him and misstated his testimony. During closing argument, the prosecutor said:

> [T]hink about how inconsistent the things that [defendant] was saying right here just in court, from when his attorney asked him questions and I asked him questions, and how much he wanted to give you a narrative. Didn't want to say yes or no to questions being asked of him. One minute it was I was going to my girl friend's [sic] house. Then you have other testimony that I was going to my house. You have testimony that they blocked me and I hit the vehicle. When the judge [asked] him he said that the police car hit him. It's a lot of inconsistencies because he's simply not telling the truth.

Rather than "inflaming the prejudices of [the] jury," as defendant describes that excerpt, the prosecutor was highlighting inconsistencies in defendant's testimony that tended to reflect poorly on his credibility. Not only was the prosecutor's summary of defendant's testimony accurate, but it also omitted defendant's full response to Officer Logan, which was that he was bringing groceries to his sick mother. Logan remarked to defendant that he was not carrying any groceries, and defendant said he forgot them. Defendant's assertion that the prosecutor "denigrate[d] [his] character" is unfounded. The prosecutor confined her comment on defendant's credibility to specific examples of inconsistency in his testimony, which is not a question of character. "The prosecutor was permitted to argue from the facts that defendant . . . [was] unworthy of belief." *Dobek*, 274 Mich App at 67. Because an objection to that portion of the prosecutor's closing argument would likely have been overruled, defendant's trial counsel may have made the reasonable strategic decision not to object to not appear rude, or to not receive an adverse ruling from the trial court in front of the jury. Appellate courts afford trial counsel wide discretion in matters of trial strategy, and the effective assistance of counsel does not require counsel to make futile objections. *Unger*, 278 Mich App at 256-257; *Odom*, 276 Mich App at 415. Thus, defense counsel was not ineffective for failing to object to the prosecutor's statement.

Finally, defendant argues that his trial counsel was ineffective for failing to request a fingerprint analysis on the gun recovered near defendant. While failure to conduct a reasonable investigation can constitute ineffective assistance of counsel, *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), defendant has failed to show how defense counsel's failure to request a fingerprint analysis would have changed the outcome of the trial. It is uncertain whether a fingerprint analysis would have assisted defendant given that Officer Logan testified that he did not have an opportunity to put on gloves with which to handle the pistol because it was "immediately necessary for me to recover the weapon so that [defendant] could not access it." Further, Officer Simons saw a gun fall to the ground from defendant's waistband area, and Officer Patrick Tomsic saw a black object fall from the same area of defendant and hit the ground approximately a foot away from defendant. Thus, defendant has not shown that, but for defense counsel's alleged deficient performance, there is a reasonable probability that the result of his trial would have been different.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens