STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 14, 2013
v RINNER JABBAR HAULCY, Defendant-Appellant.	No. 310302 Saginaw Circuit Court LC No. 10-034174-FH

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of carrying a concealed weapon (CCW), MCL 750.227; possession of a controlled substance (methamphetamine), MCL 333.7403(2)(b)(*i*); possession of a controlled substance (marijuana), MCL 333.7403(2)(d); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to serve 150 days in jail and 3 years' probation for the CCW, possession of methamphetamine, and felon in possession convictions. Defendant was also sentenced to serve 150 days in jail for the possession of marijuana conviction. For the felony-firearm conviction, defendant was sentenced to serve two years in prison, which was to be served preceding and consecutive to the CCW, possession of methamphetamine, and felon-in-possession convictions, but concurrent with the possession-of-marijuana conviction. We affirm defendant's conviction, but remand for entry of a corrected judgment of sentence indicating that defendant's felony-firearm sentence runs consecutive to the possession of methamphetamine and felon-in-possession convictions (the predicate felonies for the felony-firearm conviction), while all other sentences run concurrently.

I. BASIC FACTS AND PROCEDURAL HISTORY

Michigan State Police Trooper Timothy Larrison testified that around 12:05 a.m. on April 4, 2010, he and Trooper Kenneth Campbell stopped a vehicle driven by defendant, because it had a brake light out and was driving down the middle of the road. Larrison testified that when defendant rolled the window down, he smelled burnt marijuana coming from inside the vehicle. Upon searching the vehicle, Larrison found a bag of marijuana that was inside a black bag on the passenger seat. Inside the bag was an Advil bottle containing a single pill, which was later

determined to be methamphetamine. Larrison also found a loaded, semi-automatic 9-millimeter pistol under the front seat on the floor. Larrison testified that defendant told him that he smokes marijuana every day because of a herniated disc and that he had been smoking marijuana while watching a basketball game earlier that evening. Larrison also testified that defendant stated he bought the pistol a week earlier for protection.

Defendant denied making these statements, and denied ownership of the marijuana, gun, and methamphetamine. Defendant called a witness who testified that defendant was at his house drinking beer that evening, but that no one had smoked marijuana. Defendant also testified that he gave his car keys to a person named "Short" or "Shorty" to go on a beer run. Defendant acknowledged that he never told the police that "Shorty" was in his car that night.

II. ADMISSION OF INVESTIGATIVE NOTES

During cross-examination of Larrison, defense counsel asked if Larrison kept handwritten notes from his interview with defendant. Larrison stated that he "should have" the notebook in which he took notes of the interview. Defense counsel told the officer to produce the notes on the next day of trial, which Larrison did, although the notes apparently were not given to defense counsel until after Larrison testified on rebuttal about the notes. The trial court admitted the notes into evidence over defendant's objection. Defendant objected to the admission of the notes on the grounds that they had not been produced pursuant to his discovery request.

Defendant argues on appeal that the trial court abused its discretion in admitting the interview notes because his right to discovery was violated. A trial court's decision to admit evidence that violated a discovery requirement is reviewed for an abuse of discretion. MCR 6.201(J); *People v Jackson*, 292 Mich App 583, 591; 808 NW2d 541 (2011). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

"Defendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment." *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). However, criminal defendants do not have a general constitutional right to discovery. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). Accordingly, the erroneous admission of evidence in violation of the mandatory disclosure rule is nonconstitutional error where that evidence is not "favorable to the accused." *Id.* at 765-766 n 6.

"'The purpose of broad discovery is "to promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate the vestiges of trial by combat."'" *People v Johnson*, 356 Mich 619, 621; 97 NW2d 739 (1959), quoting *State v Tune*, 13 NJ 203, 210; 98 A2d 881 (1953) (quoting *Pre-trial disclosure in criminal cases*, 60 YLJ 626, 626 (April, 1951)). MCR 6.201(A)(6) makes it mandatory, upon request, for a party to provide another party with "a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial."

> If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. . . . [MCR 6.201(J).]

"When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

Although defense counsel did not specifically request the officer's interview notes, he did request "any and all investigative notes" and "any and all statements or admissions made by Defendant," as well as a list of and the opportunity to inspect all physical evidence to be used at trial. The officer's interview notes could fall into either one of these categories because the notes were used in the course of the investigation, they contained statements made by defendant, and they were introduced as evidence at trial (albeit in rebuttal to defendant's claim that no notes had been taken). Thus, the prosecution arguably should have produced these notes in response to defendant's discovery demand. MCR 6.201(A)(6).

However, the trial court's decision to admit the notes into evidence was within the court's discretion. MCR 6.201(J) explicitly recognizes a range of options available to the court for violation of the discovery rules. While the court could have prohibited the admission of the evidence ("prohibit the party from introducing in evidence the material not disclosed"), allowing defendant to inspect the documents prior to admission—and here prior to cross-examination—was also an acceptable remedy ("permit the inspection of materials not previously disclosed"). *Id*. This is particularly true when defendant himself, through defense counsel, told Larrison to produce the book on the second day of trial. Moreover, defendant cannot establish that he was prejudiced by any possible error. *People v Bartlett*, 231 Mich App 139, 158-159; 585 NW2d 341 (1998). The content of the notes contained the same information that Larrison testified to and added nothing new to the evidence.[1]

III. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor committed misconduct when he argued testimony not in evidence during closing argument. Specifically, defendant argues that it was misconduct for the prosecutor to state, after reminding the jury that no fingerprints were found on the sandwich bag containing marijuana:

---

[1] Defendant's theory of the case was that his alleged admissions were a fabrication. Defense counsel was able to use the notebook itself, produced, according to him, at the last minute, to argue that defendant had made no such admissions and that police testimony to the contrary should not be believed.

> And what did he [presumably Larrison] testify to in all my years of experience in most cases fingerprints are not found on weapons. They're not found on the baggies, that's been my experience. That's what that officer—the trooper testified to.

Because defendant failed to preserve this issue for appellate review, it will be reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is only warranted if defendant was actually innocent and the plain error caused defendant to be convicted or "if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,'" regardless of defendant's innocence. *Id.* at 454, quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

"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). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64.

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial[,]" *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008), and "need not confine argument to the blandest possible terms," *Dobek*, 274 Mich App at 66. However, prosecutors may not make statements of fact that are not supported by the evidence. *Stanaway*, 446 Mich at 687. This does not mean that prosecutors are confined to a simple recitation of the testimony itself. Rather, they can "argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236. In addition, "[a] prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Dobek*, 274 Mich App at 64.

Larrison testified that he had previously testified 10 to 15 times regarding fingerprints on a firearm, and that only once were prints able to be developed on a firearm. He did not testify similarly about sandwich bags, but merely testified that defendant's prints were not found on the bag, that in fact no one's prints were found on the bag, and that common sense indicated that at some point someone's hands had touched the bag. The prosecution's statement that a trooper had testified that in his "years of experience" fingerprints were "not found on the baggies, that's been my experience" is thus a statement of fact not supported by the evidence, because no trooper so testified.

However, even though the prosecutor's statement is a statement of fact not supported by the evidence, defendant was not denied a fair and impartial trial. The trial court instructed the jury that the attorneys' arguments were not evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Additionally, we decline to find plain error where "a timely objection and curative instruction could have alleviated any prejudicial effect the improper prosecutorial comments may have had." *Unger*, 278 Mich App at 238.

IV. CONSECUTIVE SENTENCING

Finally, defendant argues that his felony-firearm sentence should run concurrently with the CCW sentence, and not consecutively. Defendant failed to preserve this issue; therefore, it is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). We find that the trial court plainly erred in this instance.

The felony-firearm statute, MCL 750.227b(2), provides:

> 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. [Emphasis added.]

Here, defendant was sentenced to serve two years in prison for the felony-firearm conviction, which was to be served prior and consecutive to the CCW, possession-of-methamphetamine, and felon-in-possession convictions, but concurrent with the possession-of-marijuana conviction. However, defendant's CCW conviction could not be the predicate felony of his felony-firearm conviction. See *People v Clark*, 463 Mich 459, 463 n 8; 619 NW2d 538 (2000). The trial court thus plainly erred in ordering that defendant's felony-firearm sentence run consecutive to his sentence for CCW.[2] We therefore hold that the case must be remanded for correction of the judgment of sentence to reflect that the felony-firearm and CCW sentences are concurrent, not consecutive.

Affirmed, but remanded for the administrative task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra

---

[2] We note that the jury was instructed that either possession of methamphetamine "and/or" felon-in-possession could be found to be the predicate felonies for the felony-firearm charge. Language in *Clark* endorses the practice of linking multiple predicate felonies to a single felony-firearm charge, allowing the sentence on that single count to be consecutive to all the listed felonies for that count. See 463 Mich at 464 n 11 ("At the discretion of the prosecuting attorney, the complaint and the information could have listed additional crimes as underlying offenses in the felony-firearm count . . . .). We therefore find no plain error in the trial court's order that the felony-firearm sentence be consecutive to both the felon-possession sentences and possession of methamphetamine sentences.