

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AL LEONARD WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

October 17, 2006

No. 261836

Wayne Circuit Court

LC No. 04-010905-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK DEANGELO MCINTYRE,

Defendant-Appellant.

No. 261900

Wayne Circuit Court

LC No. 04-010905-01

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

In Docket No. 261836, defendant Al Williams appeals as of right his convictions for carrying a concealed weapon (CCW), MCL 750.227, possession of a firearm by a person convicted of a felony, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced Williams to serve four years' probation for the CCW and felon-in-possession convictions, and two years in prison for the felony-firearm conviction. In Docket No. 261900, defendant Frederick McIntyre appeals as of right his convictions for CCW, MCL 750.227, felon-in-possession, MCL 750.224f, felony-firearm, second offense, MCL 750.227b, and possession of body armor without written permission, MCL 750.227g. The trial court sentenced McIntyre to serve nine months to five years in prison for the CCW and felon-in-possession convictions, five years in prison for the felony-firearm conviction, and eight days in jail for the possession of body armor conviction. In both cases, we affirm.

I. Docket No. 261836

A. Prosecutorial Misconduct

Williams first argues that he was denied a fair trial by several instances of prosecutorial misconduct. Generally, this Court reviews de novo claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, because Williams failed to object to the prosecutor's alleged misconduct at trial, our review is limited to determining whether Williams has demonstrated plain error affecting his substantial rights. *Id.*; see also *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

In challenging the conduct of the prosecutor at trial, Williams first claims that the prosecutor improperly vouched for the credibility of Officer Neil Gensler during rebuttal argument. Because the propriety of a prosecutor's remarks depend upon the particular facts of each case, we must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context and in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

During closing argument, counsel for defendant questioned Gensler's testimony regarding having observed Williams discard a gun by throwing the item over a fence while being pursued by the officer. As part of this challenge, counsel asserted that Gensler and his companion officers were intent on making arrests that night, and that Gensler could not return empty-handed from the chase after having injured Williams during the pursuit. After recounting the evidence relied on by the defense to support its claim that Gensler's testimony was not truthful, the prosecutor responded to these claims by asserting to the jury that Gensler "was telling you the truth that he followed this defendant and he followed him and he saw him take the gun from his waistband and toss it over the privacy fence into that backyard." We find no error, plain or otherwise, in these remarks by the prosecutor.

Generally, a prosecutor is permitted to argue from the evidence that a witness is worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). However, "the prosecutor cannot vouch for the credibility of his witnesses to the effect that [s]he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Here, the prosecutor's remarks were responsive to defense counsel's attack on Gensler's credibility and, when considered in light of these attacks by the defense, were not improper. *Callon, supra*; see also *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995) (the prosecution is entitled to make a "fair response" to issues raised by the defense). Moreover, contrary to Williams' assertion, the prosecutor's statement that Gensler had testified truthfully did not improperly communicate her personal belief of Gensler's testimony. Rather, when viewed in context, it is clear that this remark simply posited to the jury that Gensler should be believed. Because such comment is not improper, *Launsburry, supra*, we find no error in the challenged remarks. *Ackerman, supra*.

Williams also argues that the prosecutor impermissibly argued facts not in evidence by mischaracterizing testimony regarding his use of an alias. We again find no error in the prosecutor's remarks.

During cross-examination Williams admitted that he had previously used the surname "Hill" during contacts with the police, but explained that he had legally changed his last name to

“Williams” shortly before he was arrested in the instant case. He repeatedly failed, however, to directly answer questions from the prosecutor regarding whether he had, at times prior to his name having been legally changed, given the name “Williams” to police. After he nonetheless acknowledged that his name was not legally “Williams” in 2000, the prosecutor confronted Williams with documentation from that year in which he had used that name during a contact with police. Relying on this testimony, the prosecutor asserted during rebuttal argument that Williams was not “entirely forthcoming” and had been caught in a “lie” during his testimony on cross-examination.

Given the exchange outlined above, we reject Williams’ assertion that the prosecutor was without an evidentiary basis for the challenged remarks. Nor are we persuaded that the prosecutor mischaracterized Williams’ testimony when she stated that he lied or was otherwise not “entirely forthcoming” regarding his use of an alias. Although prosecutors may not argue the effect of testimony that was not entered into evidence at trial, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), they are “free to argue the evidence and all reasonable inferences arising from the evidence,” *Bahoda, supra* at 282, and need not do so by using the “blandest” of all possible terms, *Launsburry, supra*. With these principles in mind, we find no merit to Williams’ challenge to the prosecutor’s remarks concerning his veracity while testifying on cross-examination.

We also reject Williams’ assertion that the prosecutor incorrectly informed the jury that it could use his purported deception while testifying, as well as his admission that he had previously been convicted of an offense involving theft or dishonesty, as substantive evidence of his guilt when she stated that she was not asking the jury to convict him “just on those things.” This comment too must be viewed in context, which was clearly a credibility discussion during rebuttal argument. See *Bahoda, supra* at 266-267. Viewed in this context, the prosecutor’s argument was not improper and, thus, not plain error. *Id.*; *Ackerman, supra*.¹

In any event, we note that the trial court instructed the jury that the attorneys’ statements and arguments are not evidence. Because jurors are presumed to follow the trial court’s instructions, any prejudice arising from the prosecutor’s remarks was cured by the jury instructions. See *People v Houston*, 261 Mich App 463, 469-470; 683 NW2d 192 (2004). Accordingly, the prosecutor’s remarks, even if error, did not affect Williams’ substantial rights by denying him a fair trial.

B. Impeachment by Prior Conviction

Williams next contends that he was denied a fair trial by having been impeached with his prior conviction of a crime involving theft or dishonesty. Because Williams failed to object to

¹ In reaching this conclusion, we reject Williams’ assertion that a jury question regarding the trial court’s CCW instruction shows that the jury improperly considered his prior conviction as substantive evidence of his guilt of the instant offenses. The record indicates that the jury sought clarification of the term “about,” which the trial court explained means “on his person.” See MCL 750.227. There was, however, no mention of any prior conviction during the discussion of this question, and the trial court’s answer apparently satisfied the jury.

the admission of testimony concerning this conviction, this issue has not been properly preserved for our review and will be reviewed for plain error affecting Williams' substantial rights. *Carines, supra*.

“MRE 609 permits a prosecutor to introduce evidence regarding prior convictions of crimes involving dishonesty or theft, for the purpose of attacking a witness' credibility.” *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). However, pursuant to MRE 609(a)(2), for a prior conviction involving theft to be admissible for this purpose, it must be punishable by imprisonment in excess of one year or death and, where the witness against which the conviction is to be used is a defendant in a criminal trial, the trial court must also determine that the evidence has significant probative value on the issue of credibility and that the probative value of the evidence outweighs its prejudicial effect. With respect to this determination, MRE 609(b) further provides:

For purposes of the probative value determination . . . , the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify.

As previously indicated, Williams admitted during cross-examination that he had been convicted of a crime involving theft or dishonesty during the previous ten years. However, because Williams failed to object to the admission of such evidence, the trial court did not conduct a determination with regard to the probative value and prejudicial effect of such testimony under MRE 609(b). The record, therefore, contains no clear evidence regarding the nature of the crime to which Williams acknowledged having been convicted, its probative value as to his veracity, or its prejudicial effect.

Under the plain error doctrine a defendant must show that an error occurred, and that such error was “clear or obvious” and affected his substantial rights. *Carines, supra* at 763-764. While Williams asserts in his brief on appeal that he was impeached with evidence of a conviction of larceny in a building, our review is limited to the record created in the trial court. See MCR 7.210(A). Thus, because there is no evidence in the lower court record regarding the conviction with which Williams was impeached, he has failed to show any error, plain or otherwise, in the admission of the evidence of his prior conviction.

Williams also argues that he was prejudiced by the admission of his prior conviction because no jury instruction limiting its use to impeachment of his trial testimony was given by the trial court. The record indicates that although the trial court informed the parties that it would provide such an instruction, it failed to in fact to do so. Counsel for defendant, however, expressly approved the jury instructions as given, thereby waiving any claim of instructional error. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (one who waives his rights may not seek appellate review of a claimed deprivation of those rights, for his waiver extinguishes any error).

C. Ineffective Assistance of Counsel

Williams next contends that he was denied the effective assistance of counsel at trial when defense counsel failed to object to the prosecutor's use of his prior conviction and alleged misconduct during rebuttal argument. Although Williams moved this Court to remand for a *Ginther*² hearing, his motion was denied. Therefore, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Rodgers, supra* at 714. To overcome this presumption, a defendant must show that his counsel's performance was defective and that there is a reasonable probability that, but for counsel's defective performance, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Under this standard Williams must show that if defense counsel had objected to the prosecutor's rebuttal argument and elicitation of evidence concerning his prior conviction, there is a reasonable probability that he would have been acquitted of the charges. As discussed above, however, none of the instances of prosecutorial misconduct alleged by Williams in this case have merit. Counsel was not, therefore, ineffective for failing to object on those bases. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002) (defense counsel "is not ineffective for failing to advocate a meritless position"). As also discussed above, Williams has failed in his burden to show error in the admission of evidence concerning his prior conviction. He has, therefore, failed to overcome the presumption that his defense counsel's representation was effective. *Rodgers, supra*.

II. Docket No. 261900

A. Sufficiency of the Evidence

McIntyre argues that there was insufficient evidence to support his CCW, felon-in-possession, and felony-firearm convictions.³ Challenges to the sufficiency of the evidence in criminal trials are reviewed de novo to determine whether, viewing the evidence in a light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Warren*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

In challenging the evidence to support his convictions, McIntyre argues only that the evidence was insufficient to show that it was he who possessed the firearm found by the police shortly after arriving at the scene. We disagree.

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

³ Although his statement of the question presented appears to reference each of the offenses of which he was convicted, McIntyre does not address the sufficiency of the evidence regarding his possession of body armor conviction in his brief of appeal. Therefore, we find any challenge to the sufficiency of the evidence to support that conviction to be abandoned. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

Along with Gensler, officers James Pierce and Victoria Eschen each testified at trial that upon approaching a crowd in which McIntyre was standing, they noticed McIntyre begin to back away from the crowd while holding or grabbing the right side of his waist, and concluded that he was likely holding a weapon or some other form of contraband. Pierce additionally testified that he saw McIntyre drop a heavy object from the right side of his waist in an area where no one else was around, and that he recovered a loaded .357 Magnum from that area. Although Gensler and Eschen both acknowledged that they never saw McIntyre with a weapon, Pierce testified that he had no doubt that McIntyre was the one who dropped the handgun. Although it was dark in the area and the views by Gensler and Eschen were obstructed, absent exceptional circumstances, issues of witness credibility and the weight to be afforded evidence produced at trial are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). This Court will not interfere with the role of the trier of fact in determining the weight of the evidence or the credibility of witnesses. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). Viewing the evidence in a light most favorable to the prosecutor, a rational trier of fact could have found beyond a reasonable doubt that it was McIntyre who possessed the firearm found by Pierce.

B. Great Weight of the Evidence

McIntyre also contends that his CCW, felon-in-possession, and felony-firearm convictions are against the great weight of the evidence. To preserve an argument challenging the great weight of the evidence, a defendant must file a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Because McIntyre failed to file a motion for a new trial, this issue has not been preserved for appellate review and will be reviewed for plain error affecting substantial rights. *Id.*

The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Lemmon, supra* at 647. In order to discount testimony that supports a verdict and grant a new trial, the testimony must either contradict indisputable physical facts, or be so patently incredible or inherently implausible that a reasonable juror could not believe it. *Id.* at 643-644. As discussed above, testimony offered by the police officers present at the scene was sufficient to support a reasonable juror in concluding that McIntyre possessed the gun found by one of the officers in an area where no one but McIntyre had been seen. Because the testimony of these officers was not devoid of probative value and did not contradict indisputable physical facts or defy physical realities, the verdict was not against the great weight of the evidence. *Id.* As a result, there was also no plain error affecting Williams’ substantial rights. *Musser, supra* at 218-219.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio