

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT PHILLIP CARICO,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 263155

Jackson Circuit Court

LC No. 04-001070-FH

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to three concurrent prison terms of two years each for the felony-firearm convictions, to be served consecutive to three concurrent prison terms of 58 months to 180 months for the felon in possession and felonious assault convictions, all sentences to be served consecutive to a sentence defendant was already serving for a prior conviction of felon in possession of a firearm. Defendant appeals as of right. We affirm defendant's convictions, but remand for an evidentiary hearing regarding the use of prior uncounseled convictions at defendant's sentencing.

Defendant first challenges the trial court's decision prohibiting him from introducing a letter written by a witness, or from using the letter only for impeachment. Defendant concedes that he failed to comply with the prosecutor's discovery request for the letter, but argues that the trial court abused its discretion by foreclosing use of the letter completely, rather than fashioning some other remedy for the discovery violation.

A trial court's decision concerning the appropriate remedy for a discovery violation is reviewed for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). In exercising its discretion, "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). In this case, defendant received the letter several months before trial and the prosecutor had requested a copy of the letter. There was no good reason for failure to comply with the prosecutor's discovery request.

But even if the trial court abused its discretion by not permitting defendant to use the letter, the error was harmless. The letter was not as crucial as defendant argues. The witness did not deny the existence of the letter or its contents, and the witness admitted that he told defendant in the letter that he had lied to the police. As the prosecutor argues, the substance of the letter was disclosed to the jury. The witness claimed, however, that defendant's friend threatened and forced him to write the letter and instructed him what to write. Thus, the credibility of the witness depended more on the credibility of the witness's account of the circumstances surrounding the letter, not the contents of the letter itself. Additionally, there were many other witnesses to this offense and the letter was not relevant to the credibility of these other witnesses. Also, the police found a firearm in defendant's truck when they responded to the scene, and defendant admittedly could not remember what happened. Under these circumstances, it is not more probable than not that the exclusion of the letter was outcome determinative. Any error was harmless. *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Next, defendant argues that the trial court did not have the authority to make his felony-firearm sentences consecutive to the sentence he was already serving for a prior conviction. Although defendant correctly states that consecutive sentencing was not authorized by the felony-firearm statute, MCL 750.227b(2), it is undisputed that defendant was on bond when he committed the instant offenses. In this circumstance, consecutive sentencing was authorized by MCL 768.7b(2)(a). Thus, the trial court had the authority to make defendant's felony-firearm sentences consecutive to the sentence defendant previously received for the offense for which he was on bond when he committed the instant offenses.

Defendant next argues that his dual convictions for felon in possession of a firearm and felony-firearm violate his constitutional double jeopardy protection against multiple punishments for the same offense. Our Supreme Court squarely rejected this argument in *People v Calloway*, 469 Mich 448, 449-450, 452; 671 NW2d 733 (2003). Thus, there is no merit to this issue.

In a pro se supplemental brief, defendant argues that the trial court erred by failing to instruct the jury on self-defense, duress, or a defense based on the operability of a firearm, and erroneously instructed the jury that voluntary intoxication was not a defense to the crimes charged. We disagree.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). A trial court must instruct the jury concerning any defense theories or defenses that are supported by the evidence. *People v Lemons*, 454 Mich 234, 246, 248, 250; 562 NW2d 447 (1997).

The use of deadly force in self-defense is justified if a person "honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). However, unless attacked inside one's own home, or subjected to a sudden, fierce, and violent attack, a person has a duty to retreat, if possible, as far as safely possible. *People v Riddle*, 467 Mich 116, 118-121; 649 NW2d 30 (2002).

Defendant's testimony, if believed, showed that he may have been in reasonable fear of imminent danger earlier in the day, but there was no evidence supporting an inference that

defendant reasonably believed that he was in imminent danger at the time the offenses were committed later. Because the evidence did not support defendant's claim of self-defense, the trial court did not err in refusing to give a self-defense instruction.

Similarly, to establish duress, there must be some evidence from which the jury could find each of the following:

(A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

(B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

(C) The fear or duress was operating on the mind of the defendant at the time of the alleged act; and

(D) The defendant committed the act to avoid the threatened harm. [*Lemons, supra* at 247, quoting *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).]

A threat of future injury is insufficient; the threatening conduct or compulsion must have been "present, imminent or impending." *Lemons, supra* at 247, quoting *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920).

In this case, the evidence failed to show that defendant was faced with a present, imminent threat of injury at the time he committed these offenses. Additionally, a defendant's right to present inconsistent defenses is limited. *Lemons, supra* at 245. Defendant's refusal or inability to admit that he committed the acts charged precludes him from establishing that he committed the acts out of a reasonable and actual belief that he was choosing the lesser of two evils. *Id.* at 249; *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003). The trial court did not err in refusing to instruct the jury on the defense of duress.

We also reject defendant's claim that the inoperability of the firearm could have provided a defense to the crimes charged. Our Supreme Court recently held that the inoperability of a firearm is not a defense to a felon-in-possession charge or a felony-firearm charge. *People v Peals*, 476 Mich 636, 638, 650, 653-655; 720 NW2d 196 (2006). Further, inoperability is not a defense to a felonious assault charge. *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998). Thus, the trial court did not err in refusing to give an instruction concerning inoperability.

Regarding defendant's intoxication, MCL 768.37 states:

(1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.

(2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.

In this case, defendant testified that he drank whiskey, not that he drank some substance whose intoxicating effects were reasonably unknown to him. Thus, subsection (2) does not apply.

Contrary to defendant's argument on appeal, defendant did not testify that he drank under duress, i.e., that someone forced him to drink under threat of imminent harm. Rather, he testified that he drank to calm his fears. MCL 768.37(1) clearly states that voluntary intoxication is not a defense "to any crime." Because the trial court was obligated to "instruct the jury concerning the law applicable to the case," MCL 768.29, it did not err in giving an instruction consistent with MCL 768.37(1).

Defendant next argues that a new trial is required because the trial court interfered with defense counsel's ability to conduct voir dire. We disagree.

A trial court's decision concerning the conduct and scope of voir dire will not be reversed absent an abuse of discretion. *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996). The goal of voir dire is to uncover potential juror bias so that a defendant may be tried by a fair and impartial jury. *Id.* at 186-187. In this case, the record does not support defendant's claim that the trial court interfered with his ability to obtain sufficient information from the jurors to enable him to determine whether the jurors could be fair and impartial. Rather than interfering, the court helped defense counsel make his point concerning the presumption of innocence. Although the court expressed a preference to move on, it allowed defense counsel to ask several more questions on the subject counsel was pursuing, until defense counsel decided to move on. There was no abuse of discretion.

Next, defendant argues that he was deprived of the effective assistance of counsel at trial. Because defendant did not raise this issue in an appropriate motion for a new trial or evidentiary hearing under *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 312, 314. That is, defendant must show that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314.

Defendant first asserts that defense counsel was ineffective for failing to impeach various witnesses with their preliminary examination testimony or their criminal records.

Decisions concerning whether and how to impeach a witness is a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). In order to overcome the presumption of sound trial strategy, defendant must show that counsel's alleged impeachment error may have made a difference in the outcome of the trial by, for example, depriving defendant of a substantial defense. See *id.*; see also *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Our review of the witnesses' preliminary examination testimony fails to disclose testimony so damaging or inconsistent that its use for impeachment at trial might have changed the outcome of defendant's trial. Defendant has not demonstrated that he was prejudiced by counsel's inaction in this regard.

The record does not indicate whether the witnesses had any prior convictions, let alone convictions that properly could be used for impeachment under MRE 609, nor has defendant made an offer of proof to this effect. Thus, this alleged deficiency by counsel is not apparent from the record.

Defendant also argues that defense counsel was ineffective for failing to locate a witness who allegedly could have corroborated his claim that one of the victims went to defendant's house and threatened him with a gun.

"Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); see also *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *Flowers, supra* at 737.

Defendant has submitted a letter that he wrote to his attorney approximately a month before trial in which he asked his attorney whether he had "contacted the eye witness who had seen the alleged victim in my case, come down to my house with a gun[?]" But there is no indication in the record whether counsel attempted to locate this witness, whether the witness's identity was ever ascertained, or what the witness would have actually testified to at trial. Furthermore, even if the witness existed and would have testified as defendant asserts, the testimony would not have supported a substantial defense. While the witness's testimony might have shown that defendant may reasonably have feared imminent harm earlier in the day, the testimony would not have shown that defendant was in reasonable apprehension of imminent harm when he committed the offenses later in the day. Thus, on this record, there is no basis for concluding that defense counsel's conduct was deficient, or that the failure to produce the alleged witness deprived defendant of a substantial defense.

Lastly, defendant argues that the trial court improperly considered several prior uncounseled convictions in imposing sentence.

In determining a defendant's sentence, a court may not consider a prior conviction obtained in violation of the defendant's right to counsel. *People v Carpentier*, 446 Mich 19, 28-30; 521 NW2d 195 (1994); see also *People v Alexander*, 234 Mich App 665, 670; 599 NW2d

749 (1999). “[W]here a defendant . . . challenges a prior conviction for lack of counsel or proper waiver of counsel[,] . . . [the] defendant must present prima facie proof that a prior conviction violated [his right to counsel], or present evidence that the sentencing court either ‘failed to reply’ to a request for or ‘refused to furnish’ requested copies of records and documents.” *Carpentier, supra* at 31-32, citing *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974). If the defendant succeeds in meeting his burden of proof under *Moore*, he is entitled to a hearing where the prosecutor would have the burden of proving the validity of the defendant’s prior conviction. See *Carpentier, supra* at 28, 31 (citation omitted); see also *Alexander, supra* at 670-671. “[A] defendant is entitled to resentencing only where a sentencing court has relied on an invalid conviction in imposing sentence.” *Id.* at 671.

The presentence report (PSIR) indicates that defendant was represented by counsel in three of his five prior felony conviction cases. In its scoring of the sentencing guidelines, however, the trial court awarded 30 points for prior record variable 2 (four or more felony convictions). If only three of the prior convictions are scored, defendant’s score for PRV 2 would be reduced to 20 points, and the ultimate guidelines range would be reduced from 14 to 58 months to 12 to 48 months.¹ The prosecutor concedes that defendant’s assertion that there was no valid waiver of the right to counsel was sufficient to satisfy defendant’s burden under *Moore*, and that, under the circumstances, defendant is entitled to a *Moore/Tucker* hearing to determine the constitutional validity of his prior convictions. Accordingly, we remand for an evidentiary hearing at which the prosecutor shall be given an opportunity to establish the validity of defendant’s prior convictions.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

¹ The PSIR also indicates that defendant has 18 prior misdemeanor convictions. Defendant was represented by counsel in one of those misdemeanor cases, and was not sentenced to incarceration in seven others. Thus, each of those misdemeanor convictions properly may be considered at sentencing. See *Nichols v United States*, 511 US 738, 748-749; 114 S Ct 1921; 128 L Ed 2d 745 (1994).