

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 17, 2012

v

LESTER BROOKS MOSLEY III,
Defendant-Appellant.

No. 304448
Wayne Circuit Court
LC No. 10-011785-FH

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm (felon-in-possession), MCL 750.224f, and assault and battery, MCL 750.81.¹ He was sentenced, as a second habitual offender, MCL 769.10, to two to seven and one-half years' imprisonment for his felon-in-possession conviction and to time served for his assault and battery conviction. Defendant appeals by right. We affirm.

On May 23, 2010, just before midnight, Joseph Arnold was at a liquor store when defendant approached and asked him to hold defendant's two dogs. One of the dogs broke free, and Arnold was unable to retrieve the dog. Arnold went back to the liquor store and returned the other dog to defendant. Defendant punched Arnold. When Arnold's mother, Alisha Jubenville, came to pick up her son from the store, defendant threatened to kill Arnold and called Jubenville a derogatory name. Jubenville recognized defendant from the neighborhood. Later that evening, shots were fired in the front of the Jubenville home while mother and son were in the backyard. After the shots were fired, Jubenville saw defendant drive by with a gun, and he threatened to return and kill Arnold. Although it was dark, Jubenville recognized defendant based on his silhouette and the sound of his voice. A few days later, Jubenville identified defendant as the person that shot at her home.

First, defendant argues that he was denied the effective assistance of counsel because of the failure to advance defendant's alibi defense in conjunction with the misidentification defense,

¹ Defendant was also charged with, and acquitted of, possession of a firearm during the commission of a felony, MCL 750.227b, and discharging a firearm at a building, MCL 750.234b.

and counsel's stipulation to the fact that defendant was not eligible to possess a firearm at the time of this incident because of a prior felony conviction. We disagree.

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, the defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *Id.* Decisions regarding whether to call and question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). In the absence of an evidentiary hearing, this Court's review of a defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

The contention that defendant had an alibi defense is not a mistake apparent on the record. *Id.* Although defendant filed affidavits with the brief on appeal to support this theory, they were not made a part of the lower court record. Moreover, a review of the lower court record reveals that the trial court granted defendant's motion for a court appointed investigator. Curiously, the court appointed investigator did not file an affidavit to support the claim of ineffective assistance for failing to raise the alibi defense. Accordingly, defendant has failed to overcome the presumption that defense counsel was effective and engaged in trial strategy. Furthermore, during closing argument, defense counsel argued that defendant was not involved in this shooting and that Jubenville could not clearly identify him. Thus, defendant was not denied a substantial defense. Therefore, defendant cannot establish that defense counsel's performance fell below an objective standard of reasonableness, which denied him the effective assistance of counsel. *Armstrong*, 490 Mich at 289-290.

The parties stipulated that defendant was not permitted to possess a firearm on May 24, 2010, at the time of this incident, because of a prior felony conviction. Defendant argues that this stipulation denied him the effective assistance of counsel. However, this Court has described the introduction, by stipulation of fact, of a defendant's previous conviction as a safeguard to prevent unfair prejudice. See *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Furthermore, we disagree that defense counsel's stipulation conceded defendant's guilt to felon-in-possession because defense counsel did not concede that defendant possessed a gun in this incident. On the contrary, defense counsel argued that defendant was not at all involved in the shooting in front of Jubenville and Arnold's home. Defense counsel only conceded that defendant was ineligible to possess a firearm at the time of this incident because of a previous felony, which prevented the details of his prior felony conviction from being revealed to the jury. This stipulation failed to impact defendant's defense that he was not involved in this shooting and did not possess a firearm. Therefore, defendant did not establish that defense counsel's stipulation regarding his prior felony constitutes ineffective assistance. *Armstrong*, 490 Mich at 289-290.

Next, defendant argues that the prosecutor committed misconduct when he introduced the parties' stipulation regarding defendant's inability to possess a firearm at the time of this incident because of a prior felony conviction. He also alleges that the prosecution improperly asserted this stipulation during its opening statement and closing argument. We disagree.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error that affected defendant's substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

"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). The prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case. *Id.* at 66. Also, a defendant cannot stipulate to a matter and then argue on appeal the action was an error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

During his opening statement, the prosecutor stated that "the Defense and I have agreed that, on that day, he legally was not permitted to have a handgun because of a prior felony conviction." The parties later stipulated on the record that defendant was not permitted to possess a firearm on May 24, 2010, at the time of this incident, because of a prior felony conviction. During closing argument the prosecution argued as follows:

Then we have the felon in possession of a weapon. The People believe it's a handgun. The possession by Mr. Mosley when he was, by stipulation, entirely not allowed to do so [sic]. Illegal because of a prior conviction for a felony [sic].

The prosecution did not commit an error by arguing that defendant was ineligible to possess a firearm at the time of this incident because of a prior felony conviction and referring to this stipulation in its opening statement because defendant stipulated to this fact. See *McCray*, 210 Mich App at 14. Furthermore, the prosecution did not commit error by referring to this stipulation in its closing argument because the prosecution is free to argue the evidence as it relates to its theory of the case. *Dobek*, 274 Mich App at 66.

Defendant also argues that defense counsel was ineffective by failing to object to the prosecution's references during its opening statement and closing argument to the parties' stipulation. Because the prosecution did not commit error by making these references, defense counsel was not ineffective by failing to raise futile objections to the references. *People v Orlewicz*, 293 Mich App 96, 108; 809 NW2d 194 (2011).

Lastly, defendant argues that there was insufficient evidence for a rational jury to convict him of felon-in-possession. We disagree.

"This Court reviews de novo challenges to the sufficiency of the evidence to determine whether any rational trier of fact could have found that the essential elements of the crime were

proven beyond a reasonable doubt.” *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012) (internal quotation marks and citation omitted). This Court reviews the evidence in the light most favorable to the prosecution. *Id.*

“Under MCL 750.224f, a person who has been convicted of a felony may not ‘possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm’ unless certain conditions are met.” *People v Dupree*, 284 Mich App 89, 102; 771 NW2d 470 (2009). The positive identification of a defendant by a witness may be sufficient to support a defendant’s conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony presents a question for the trier of fact that this Court does not resolve anew. *Id.* Additionally, “[c]ircumstantial evidence and reasonable inferences drawn [from it] may be sufficient to prove the elements of a crime.” *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009) (quotation marks and citation omitted).

Defendant only challenges his felon-in-possession conviction with respect to the identification element of the charge. There is evidence that Jubenville did not initially identify defendant to police as the shooter. Rather, she initially told police that defendant was a “person of interest that could have done it.” However, a few days later, Jubenville identified defendant in a lineup as the person that shot at her home. Furthermore, Jubenville testified that she “saw” defendant hanging out of a car with what appeared to be a gun when he verbally threatened her. She only knew it was defendant by his silhouette and his voice. After the incident, Arnold and Jubenville observed bullet holes in their home.

The credibility of this testimony presented an issue for the jury. *Davis*, 241 Mich App at 700. Also, the jury may have reasonably inferred from Jubenville’s testimony that defendant was hanging outside of a car window with a firearm on May 24, 2010. Therefore, in the light most favorable to the prosecution, there was sufficient evidence to convict defendant of felon-in-possession.

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello