

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 25, 2014

v

TYRONE MANZELL GENERAL,
Defendant-Appellant.

No. 313426
Wayne Circuit Court
LC No. 12-002332-FH

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b, and reckless driving, MCL 257.626.¹ For the reasons stated below, we affirm.

I. SUFFICIENCY OF THE EVIDENCE²

Defendant unconvincingly maintains that the stipulation that he was convicted of a specified felony was insufficient to prove, beyond a reasonable doubt, felon in possession or felony-firearm, because the stipulation did not specify that defendant was unable to possess a firearm on the date of the incident.

The felon-in-possession statute provides:

¹ Defendant was also charged with carrying a concealed weapon (CCW), MCL 750.227, but was acquitted of this charge at the conclusion of the jury trial.

² A claim of insufficient evidence in a criminal trial is reviewed de novo on appeal. *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011). In determining whether sufficient evidence was presented at trial to sustain a defendant's conviction, this Court must consider the "evidence in the light most favorable to the prosecutor" and determine whether a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010).

A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state *until all of the following circumstances exist*:

(a) The expiration of 5 years after all of the following circumstances exist:

(i) The person has paid all fines imposed for the violation

(ii) The person has served all terms of imprisonment imposed for the violation

(iii) The person has successfully completed all conditions of probation or parole imposed for the violation. [See *People v Perkins*, 473 Mich 626, 635-636; 703 NW2d 448 (2005) (citing MCL 750.224f(2)) (emphasis original).]

The elements of felony-firearm “are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. One must carry or possess the firearm when committing or attempting to commit a felony. Possession of a firearm can be actual or constructive, joint or exclusive.” *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011) (quotation marks and footnotes omitted).

A stipulation may be used to establish that a defendant has been convicted of a specified felony. *People v Dupree*, 486 Mich 693, 704 n 12; 788 NW2d 399 (2010). The prosecution should accept a defendant’s willingness to stipulate to the fact that he was convicted of a specified felony in order to avoid any prejudice the defendant might face if evidence of his conviction was presented to the jury. See *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997).

Defendant’s argument relies on the wording used by the prosecution in reading the stipulation, specifically, that “defendant . . . for purposes of the charge felon in possession of a firearm has been convicted of a specified felony. Further the defendant did not have a right to possess a firearm because he had not met the requirements for regaining eligibility as of September 19, 2012, yesterday’s trial date.” Defendant attempts to read each paragraph of the stipulation separately, when it is meant to be read as a whole. The first paragraph clearly established that defendant was convicted of a specified felony for the purposes of the felon-in-possession charge, and this was sufficient.

Moreover, “[a] defendant should not be allowed to assign error to something that his own counsel deemed proper. . . . To do so would allow a defendant to harbor error as an appellate parachute.” *People v Breeding*, 284 Mich App 471, 486; 772 NW2d 810 (2009). Our Court has directly applied this rule to stipulations used to establish a “specified felony” for felon-in-possession, and found that: (1) the stipulation was permissible; and (2) the defendant could not challenge the stipulation because trial counsel permitted it. See *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998) (quotation marks omitted). The same rule holds true here—defendant agreed to the stipulation (to avoid prejudice in front of the jury) and that he had been convicted of a previous specified felony. The court instructed the jury to: (1) bear in mind that it could “regard such stipulated facts as true” but that it was “not required to do so,” and (2) consider all the elements of the offense. Thus, the stipulation was sufficient to establish the fact that defendant was convicted of a specified felony beyond a reasonable doubt. Because there

was sufficient evidence to support his felon-in-possession conviction, the felony-firearm conviction is also affirmed—the evidence established that defendant was in possession of a firearm during the commission of a felony. See *Johnson*, 293 Mich App at 82-83.

II. PROSECUTORIAL MISCONDUCT³

Defendant also argues, unpersuasively, that the prosecutor committed misconduct during his closing argument and his rebuttal closing argument when he: (1) commented on a police officer witnesses' credibility; and (2) allegedly improperly shifted the burden of proof to defendant.

The test for prosecutorial misconduct is “whether, after examining the prosecutor’s statements and actions in context, the defendant was denied a fair and impartial trial.” *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Generally, “[p]rosecutors are accorded great latitude regarding their arguments and conduct.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). It is proper for the prosecution to “argue from the evidence and inferences to be drawn therefrom . . .” *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). A prosecutor “cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness’ truthfulness.” *Bahoda*, 448 Mich at 276. However, a prosecutor is permitted to “argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief.” *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Defendant asserts that the prosecutor misled the jury and improperly bolstered the police officer witness when he described the police officer’s actions:

He was following Mr. General, was able to close him down. He was using his flashlight. It’s the same guy that from the moment that they began making these observations. And at some point in time he describes, virtually consistent with what he said at the previous hearing that you heard about, what Mr. General did.

Defendant argues that this statement was misleading and improperly bolstered the witness, because the officer’s testimony at preliminary examination—regarding the way in which defendant threw the gun—was not completely consistent with his trial testimony on the same issue. However, the prosecutor properly argued from the facts presented during the case, which he is allowed to do. See *Howard*, 226 Mich App at 548. During trial, the police officer testified that defendant threw the weapon with his right hand, whereas during the preliminary

³ An unpreserved issue of prosecutorial misconduct is reviewed for “plain error that affected . . . substantial rights.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court will only reverse if it determines that “although defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence.” *Id.* (internal quotation marks omitted).

examination, the officer stated that the gun “came from [defendant’s] person.” Thus, in his closing argument, the prosecutor merely reiterated the testimony given by the police officer.

However, even if the prosecutor’s statement was improper, defendant cannot show that he was prejudiced in any way by these remarks. Jury instructions that specify “statements and arguments by counsel were not evidence” eliminate any possible prejudice to the defendant. *People v Dobek*, 274 Mich App 58, 66 n 3; 732 NW2d 546 (2007). Similarly, here, any improper inference that the jury could have drawn as a result of the prosecutor’s remarks was cured by the court’s instruction to the jury that “[t]he lawyers’ statements and arguments are not evidence. They are only meant to help you understand the evidence and each side’s legal theories.” The jurors were also instructed to “decide what the facts of this case are. You must decide which witnesses you believe and how important you think that testimony is.” Further, defense counsel discussed the police officer’s alleged inconsistent statements during his closing argument:

[T]hen the officer, he says what? . . . He says [defendant] throws a gun away with his right hand. What did he say in a previous proceeding? And, once again, I used the transcript. What did he say? He said it came from his person. Okay? It came from his person. It could have come from his waistband. It could have come [sic] from his pocket. It could have come [sic] off his person. That’s what he said. Nothing definitive about he threw it away with his right hand.

Defendant cannot show that he was prejudiced by the prosecutor’s statement, and thus cannot prove that the prosecutor’s statement constituted prosecutorial misconduct.

Defendant further asserts that the following statements, also made by the prosecutor in his closing argument, impermissibly shifted the burden of proof to defendant:

[The police officer] has no reason to say it’s Mr. General. What’s the reason? Nothing, nothing on cross-examination came out to suggest to you that he picked out Mr. General out of thin air just because he didn’t like Mr. General for whatever other reason.

What did you hear to infer, to think that he’s lying? Of all the people in this world, why Mr. General? You didn’t hear anything to tell you that he was lying. And he told you I saw him . . .

Although a prosecutor cannot make statements that indicate that a defendant must prove something, or otherwise shift the burden of proof to the defendant, he is permitted to attack the credibility of a theory and present arguments “regarding the weight and credibility of the witnesses and evidence,” and the latter does not shift the burden of proof to a defendant. *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995). These statements discussed the police officer’s credibility, and also attacked the theory that the police officer was untruthful. Accordingly, the statements were permissible. Statements on witness credibility are permissible if the prosecutor did not use any outside knowledge to “vouch” for the witness’s credibility. See *Bahoda*, 448 Mich at 282-283. The prosecutor did not use outside knowledge when he commented on the police officer’s credibility.

The last statement with which defendant takes issue is the prosecutor's response to defense counsel's insinuations that the police officer witness was untruthful and gave inconsistent statements:

And you're right. You don't have to. You're not obligated to think to yourself why he's inconsistent or anything like that. But I'm urging you why, why would he be, why would this officer lie? Because at the end of the day, that's what the argument that you just heard before me is. The officers are saying that they saw a lion when it was a dog, aka they're lying. I mean, right?

A prosecutor may permissively respond to a defendant's argument that a witness is not reputable. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). That is exactly what the prosecutor did here in his rebuttal closing argument. Accordingly, none of these challenged statements constitute misconduct.

Again, even if prosecutor's statements were impermissible, defendant's argument nonetheless fails because he is unable to show prejudice for any of the prosecutor's statements. As noted, any improper inference that could have been drawn by the jury as a result of the prosecutor's statements during his closing argument was cured by the court's instruction that "[t]he lawyers' statements and arguments are not evidence. They are only meant to help [the jury] understand the evidence and each side's legal theories." These types of instructions mitigate any potential for prejudice. *Dobek*, 274 Mich App at 66 n 3. The jurors were also told to determine which witnesses they believed and how much weight to give the testimony of each witness. Thus, defendant's claim of prosecutorial misconduct must fail because the prosecutor's statements were proper, and even if they were improper, defendant cannot show prejudice.⁴

III. MANDATORY DISCOVERY VIOLATION⁵

⁴ Defendant asserts that his trial counsel's failure to object to these alleged instances of prosecutorial misconduct constitutes ineffective assistance of counsel. However, the trial counsel did not make objections on prosecutorial misconduct because, as noted, there was no prosecutorial misconduct for him to object to. When a prosecutor's comments were proper, "any objection to the prosecutor's arguments would have been futile. Counsel is not ineffective for failing to make a futile objection." *Thomas*, 260 Mich App at 457. Moreover, "any minimal prejudice was alleviated by the trial court's instruction to the jury that the case was to be decided on the evidence and that the comments of counsel were not evidence." *Id.* Defendant's ineffective assistance of counsel claim is accordingly without merit.

⁵ Generally, due process claims are reviewed de novo by this Court. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). However, unpreserved claims are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must prove that the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings

Defendant unconvincingly argues in his standard 4 brief that the prosecution violated his due process rights when it did not produce a dash cam video and fingerprint evidence. A prosecutor, upon request from a defendant, must provide the defendant with “any exculpatory information or evidence known to the prosecuting attorney,” and “any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation.” MCR 6.201(B)(1); MCR 6.201(B)(2); *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). To establish a constitutional violation pursuant to *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), a defendant must prove:

(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [See *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

Defendant bears the burden of proving that the evidence was exculpatory or, in the case of failure to preserve evidence, that the police acted in bad faith. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007).

Here, defendant cannot show that either piece of requested evidence is exculpatory, that the police acted in bad faith, or that the outcome of the proceeding would have been different had he possessed the requested evidence. There is no indication from the record that a dash cam video ever existed.⁶ The police report was read into the record, which stated that the dash cam video was unavailable because the video was not working at the time of the incident. In any event, were any such video to exist, defendant has not explained how it would exonerate him—he merely asserts that it would. Moreover, defendant fails to show any bad faith on the part of the police or prosecutor.

Defendant’s claim that the prosecutor failed to produce fingerprint evidence is equally unavailing. Both defendant and the prosecutor and the prosecutor stipulated that the laboratory technician’s fingerprint report would be read into the record in lieu of her testimony. Defendant misinterprets this report to claim that there were other fingerprints on the gun, when in fact the report states that there were no usable prints on the weapon. The stipulation also stated to the jury that the fact that no prints were discovered on the weapon was not unusual, based on the technician’s experience. Thus, it is not clear from the record that there were any other fingerprints that actually were capable of comparison that the prosecutor did not produce for defendant.

independent of the defendant’s innocence.” *Carines*, 460 Mich at 763–764 (internal quotation marks omitted) .

⁶ The police report, which was read into the record, stated that the dash cam video was unavailable because the video was not working at the time of the incident. Defendant also makes much of an incorrect date in the police report—a discrepancy of which the trial court made note.

In any event, defendant fails to show with a “reasonable probability” that the outcome of his trial would have been different if the prosecutor had produced either piece of evidence. See *Cox*, 268 Mich App at 440, 448. Because defendant’s due process argument lacks merit, his obstruction of justice claim also fails, because he has not shown how the prosecution interfered with the “orderly administration of justice.” *People v Meissner*, 294 Mich App 438, 454; 812 NW2d 37 (2011).

IV. DOUBLE JEOPARDY⁷

Defendant unconvincingly asserts that the trial court violated the provision against double jeopardy when it allowed the jury to consider the CCW charge along with the felon-in-possession and felony-firearm charges.

A criminal defendant has the Fifth Amendment constitutional right to be protected against being placed twice in jeopardy. *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008). The guarantee against double jeopardy protects a defendant from “(1) . . . a second prosecution for the same offense after acquittal; (2) . . . a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.” *Id.* Defendant specifically contends that his guarantee to the third protection—against multiple punishments for the same offense—was violated. The “same offense” test outlined in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), points a Court’s inquiry to “whether the two separate statutes each include an element that the other does not.” See *People v Parker*, 230 Mich App 337, 340; 584 NW2d 336 (1998) (citing *Blockburger*, 284 US at 299). This test is satisfied if each offense requires “proof of a fact that the other does not.” *McGee*, 280 Mich App at 683. If the offenses have the same elements, multiple punishments can still be imposed if “the Legislature clearly intended to impose multiple punishments.” *Id.* In short, there are two ways this Court can find that the guarantee against double jeopardy is not violated: (1) if each offense has an element that the other does not; and (2) if the offenses are the same, but the Legislature has indicated a clear intent to impose multiple punishments.

Here, defendant argues that the trial court violated the guarantee against double jeopardy because it allowed the jury to consider the CCW charge, which he claims he should not have been charged with. But the jury acquitted defendant of the CCW charge—and defendant received no sentence for that crime. Even if defendant were to challenge the multiple punishments for felony-firearm and felon-in-possession, this Court has held that “[b]ecause the felon in possession charge is not one of the felony exceptions in the [felony-firearm] statute, it is

⁷ An unpreserved double jeopardy claim will be reviewed for plain error “that affected the defendant’s substantial rights, that is, the error affected the outcome of the lower court proceedings.” *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). Under this standard, reversal is only appropriate “if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Id.*

clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 775.227b.” *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Thus, because defendant was not convicted, and therefore not punished, for the CCW conviction, the trial court did not violate his guarantee against double jeopardy.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Henry William Saad

/s/ Karen M. Fort Hood