

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK RICKI REID,

Defendant-Appellant.

UNPUBLISHED

July 31, 2014

No. 315085

Ingham Circuit Court

LC No. 11-000418-FH

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of being a felon in possession of a weapon, MCL 750.224f, carrying a concealed weapon, MCL 750.227(2), fleeing and eluding, third degree, MCL 257.602a(3)(b), and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 20 to 60 months for the first three convictions and 24 months for the fourth. Defendant now appeals by right. We affirm.

I. BACKGROUND

The incidents which led to defendant's convictions occurred on December 6, 2010, and arose out of an altercation defendant had with individuals at the home of his then girlfriend, Candra McCool.

Defendant's jury trial began on November 15, 2012, after two granted adjournments both at the defendant's request, which delayed the trial almost two years. The prosecution presented two witnesses on behalf of the People. The first was Tiffany White, who did not personally know the defendant, but was familiar with him because she lived next door to McCool. The second witness was Officer Bryan Curtis. White testified to having seen the defendant at least 20 times in the past and that on December 6, 2010, she witnessed the defendant arrive next door in a "blue four-door older model car." She observed defendant pull in and out of the driveway four or five times before parking in the middle of the street. White testified she watched defendant exit the blue vehicle, walk up to the house and "show[] somebody in the house the gun, like he had a gun." She described the gun as silver with a black handle and "a spin thing on it." White stated she saw defendant pull the gun from his right coat pocket. She remembered hearing gun shots, crouching down and calling 911. White testified she saw defendant run to his car, get in, and put "his left hand on the steering wheel. His right hand across his left hand with

the gun out the window.” She then heard another gunshot, but could not identify which direction it came from. After defendant drove away, White observed two men exit the neighboring house carrying “a long big object wrapped in a coat or something” that she believed was a gun.

Officer Curtis testified he responded to the 911 call. He observed the described blue four door vehicle soon after being dispatched to the area. He initiated pursuit and thereafter, defendant exited the vehicle and fled on foot. Officer Curtis testified that two handguns were recovered in the area that he had observed the vehicle make a slow left-hand turn. One of the recovered handguns was identified by both Officer Curtis and White. In his case-in-chief and closing argument, defendant attempted to distance himself from the handguns by arguing that defendant’s DNA could not be found on one of them.

Defendant attempted to have Matthew Ramone Thomas, an endorsed prosecution witness, testify but Thomas failed to respond to subpoena and could not be located by law enforcement. Defendant then requested that a written statement, which he attributed to Thomas, be admitted into evidence. The trial court denied the statement’s admission based on its lack of trustworthiness, compliance with the Michigan Rules of Evidence and defendant’s failure to disclose its existence to the prosecution.

The case was submitted to the jury which later returned unanimous guilty verdicts on each of the four counts.

II. ADMISSIBILITY OF EVIDENCE

Defendant first argues that he was deprived of his right to present a defense when the court refused to admit the written statement of Matthew Thomas, a witness who was under subpoena but failed to appear at trial. The trial court would not allow the statement into evidence or allow it to be read to the jury in lieu of Thomas’ live testimony, concluding that the statement was not admissible under either MRE 804 (declarant unavailable hearsay exception) or 803(8) (public records/reports hearsay exception).

“We review a trial court’s decision to admit evidence for an abuse of discretion.” *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). “A trial court abuses its discretion when its decision falls ‘outside the range of principled outcomes.’” *Id.* (citation omitted).

Both the US Constitution and the Michigan Constitution recognize the right of a criminal defendant to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, §§ 17, 20; *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). Indeed, the US Supreme Court has recognized that “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). That right however, “must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id.* States are “afforded the power under the constitution to establish and implement their own criminal trial rules and procedures.” *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008), citing *Chambers*, 410 US at 302-303. Michigan’s rules of evidence do not infringe “an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Id.*, quoting *United States v Scheffer*, 523 US 303, 308;

118 S Ct 1261; 140 L Ed 2d 413 (1998). “[P]erhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay” and its tailored exceptions. *Chambers*, 410 US at 302.

The trial court did not abuse its discretion in refusing to admit the statement. To the contrary, the court expressed valid concerns over the statement’s compliance with the rules of evidence, its reliability and trustworthiness and the fact that the statement had not been disclosed to the prosecution. There is no credible evidence that Thomas’ statement was part of a public record covered by MRE 803(8). The prosecutor indicated that he had not previously seen Thomas’ statement, and that it was not from any police report in his possession. Further, although defense counsel initially indicated the statement “was compiled by the police and annexed in the police report”, he later acknowledged that he received the statement “with the file that came from . . . [defendant]’s previous counsel.” No one authenticated the statement. The statement was handwritten. Indeed, defense counsel was equivocal about its’ origin and stated it was “in Mr. Thomas’ handwriting, *as I understand it.*” (Emphasis added.) It was not outside the range of principled outcomes for the trial court to deny its admission.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied effective assistance of counsel because 1) defense counsel did not use peremptory challenges to dismiss jurors counsel challenged for cause, and 2) counsel erred in allowing admission of defendant’s full prior convictions, rather than simply making a general admission that defendant had a prior felony conviction. We disagree.

A claim of ineffective assistance of counsel under either the Sixth Amendment of the United States Constitution or under our Michigan Constitution, Const 1963, art 1, § 20, is analyzed under the standard established in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). In accord with *Strickland*, two components must be shown by defendant:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. . . . [466 US at 687.]

“[A] defendant must also overcome the presumption that the challenged action was trial strategy, and must establish a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” *Hoag*, 460 Mich at 6 (citation and quotation marks omitted). In that regard, it is defendant who “has the burden of establishing the factual predicate for his” ineffective assistance claim. *Id.*

A defense attorney enjoys great discretion in matters of trial strategy and tactics. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). “The decisions on what witnesses to call,

whether and how to conduct cross-examination, *what jurors to accept or strike*, what trial motions should be made, *and all other strategic and tactical decisions are the exclusive province of the lawyer* after consultation with his client.” *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986) (emphasis in original). Among “the most important criteria in selecting a jury include a potential juror’s facial expressions, body language, and manner of answering questions,” which are impossible for this Court to review on a paper record. *Unger*, 278 Mich App at 258. Therefore, “this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney’s failure to challenge a juror.” *Id.*

Defendant questioned the prospective jurors regarding how or whether they could convict a defendant depending upon the elements and how they were proven. Specifically, the following exchanges occurred:

Defense counsel: I’m positing it for purposes of this discussion, the analysis of one charge, consisting of five elements, four of which are clear in your mind beyond all reason and rational. The fifth element, you are not quite certain, but you think the fifth element might be present. What is your vote on that count in that circumstance?

Juror A: I would say that constitutes all the way through.

Defense counsel: What is your vote on the verdict? I’m sorry. When you say that constitutes all the way through, I don’t know what that means.

Juror A: Constitutes guilty all the way through.

Defense counsel: Four elements of five were proved, and the fifth element was wanting the element of proof, you would vote for conviction; is that correct?

Juror A: Yes.

Defense counsel: Your Honor, I would ask that [juror A] be removed for cause.

The Court: I’ll deny that. Would you be able to follow the instructions of the Court as given by the Court . . . ?

Juror A: Yes, I would, Your Honor.

The Court: I will deny the motion.

After briefly engaging another juror, defense counsel then asked the same question to the jury generally.

Defense counsel: Anyone here, anyone other than [juror A], in agreement with the idea that a missing element, 4 or 5 features in a crime, a specific crime charged, are proved beyond a reasonable doubt, and the fifth element is missing?

Anyone, any one of you have trouble arriving at the conclusion that the Prosecution has not met its burden of proof?

Juror B: I agree with [juror A].

Defense counsel: You agree . . . ? Your honor, I am going to ask to have . . . [juror B] be thanked and excused for cause.

The Court: If the Court instructs you on the status of the law and says all the elements have to be proven beyond a reasonable doubt could you follow that instruction, sir?

Juror B: Yes.

The Court: I'll deny the motion.

Subsequently, the court asked defendant if he had any additional challenges for cause or any peremptory challenges. Defense counsel did not make any additional challenges for cause, but did take the opportunity to dismiss one juror (neither juror A or B) with a peremptory challenge. Further defense counsel asked juror C counsel's hypothetical about one of five elements being doubtful and whether she would find a person guilty under such a scenario, and juror C replied that "[i]t would depend." Defendant responded by asking the court to instruct that each element be proved beyond a reasonable doubt, which the court indicated it would. Additionally, the court asked juror C whether she would follow the court's instructions, to which she replied, "I can follow your instructions." Defendant stated he had no additional challenges and that he was "satisfied with the jury."

Counsel for defendant may have been satisfied by the jurors' acknowledgment of the authority of the court and their willingness to follow the court's instructions. Indeed, counsel could reasonably presume that the jurors would follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, given counsel's challenge for cause, the court's inquiry, and the court's instructions to the jury, counsel could have concluded that to peremptorily strike the jurors he had tried to remove for cause might have caused the other jurors to question counsel's motivation. The Court should not second-guess counsel's strategy employed in seating the jury.

Defendant also claims his counsel provided ineffective assistance by stipulating to the admission of his precise prior felony convictions, rather than simply admitting generically that he had committed a qualifying felony for purposes of the felon in possession charge. Defendant relies upon *Old Chief v United States*, 519 US 172, 117 S Ct 644; 136 L Ed 2d 574 (1997) where the issue was

whether a district court abuses its discretion if it spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction. [.]Id,174.

Old Chief held that “it was an abuse of discretion to admit the record *when an admission was available.*” *Id.* at 191 (emphasis added). Here, defense counsel allowed by stipulation certified copies of two prior convictions.

The record reflects that counsel chose to emphasize the uncontested nature of the prior convictions. This is a legitimate trial strategy. By openly admitting the prior record, counsel was effectively communicating that defendant has nothing to hide—it’s “a matter of record.” In essence, counsel adopted a strategy indicating that the prior records have no impact on the current case because they do “nothing to tie him to these guns.” Counsel’s decision to admit the certified copies by stipulation was a proper exercise of trial strategy.

IV. STANDARD 4 BRIEF ARGUMENTS

Defendant also advances several claims in his Standard 4 brief. First, defendant argues the trial court abused its discretion when it denied his request for a pretrial adjournment. We disagree. A trial court’s ruling regarding a defendant’s request for an adjournment or continuance is reviewed for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). “A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes.” *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007).

Statute and caselaw agree that “[n]o adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown” and in accordance with proper procedure. MCL 768.2; see *Coy*, 258 Mich App at 18. To determine good cause, a court considers whether defendant “(1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.” *Coy*, 258 Mich App at 18. An adjournment may not be denied simply because the trial court wishes to proceed. *People v Battles*, 109 Mich App 487, 490; 311 NW2d 779 (1981). Additionally, a “trial court’s denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion.” *Coy*, 258 Mich App at 18-19.

There is no evidence of record that defendant demonstrated good cause for the adjournment he requested or suffered prejudice in not receiving the adjournment. Defendant’s case was scheduled twice previously for trial. On the first scheduled day for trial, defendant requested and was granted a six to seven month adjournment for a DNA evaluation. The second time the court scheduled the matter for trial, defendant appeared, requested an adjournment for purposes of obtaining new counsel and it was granted. Defendant hired new counsel but requested yet another adjournment to allow that attorney to prepare for trial. Counsel indicated on the record “we are prepared for trial”. Additionally it appears that the request for an adjournment was made to allow counsel the opportunity to file a motion to have the case remanded to the district court. It was not an abuse of discretion to deny a third request for adjournment under this circumstance.

Second, defendant argues that the court violated his state and federal constitutional rights by failing to give a “missing witness” instruction. Again, we disagree.

Defendant preserved this issue for review by requesting the instruction at trial. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defendant requested the instruction because one of the prosecution's endorsed witnesses, Thomas, failed to appear. The missing witness instruction would have instructed the jury that it was allowed to infer that the missing witness' testimony "would have been unfavorable to the prosecution." *People v Eccles*, 260 Mich App 379, 389-391; 677 NW2d 76 (2004). A decision to deny a missing witness jury instruction is reviewed for an abuse of discretion. *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). When a prosecutor endorses a witness, they are obligated to execute due diligence to produce that witness at trial. *Eccles*, 260 Mich App at 388. When a witness fails to appear, the prosecutor may "show that the witness could not be produced despite the exercise of due diligence." *Id.* Due diligence requires that a good faith effort be made, not that every possible effort be made. *Id.* at 391. If the court finds due diligence was exercised, the instruction is not required. *Id.* at 385.

The record indicates that the prosecution exercised due diligence to obtain Thomas' appearance. A subpoena was sent to the witness. Police officers were dispatched to the witness' last known address and determined that as of June, the witness had been attending school in South Carolina. An address in South Carolina was investigated, but the witness was never found. In light of the prosecution's due diligence, the trial court did not abuse its discretion in refusing defendant the missing witness instruction.

Finally, defendant argues that there was insufficient evidence to support his convictions of carrying a concealed weapon, felony-firearm, and felon in possession of a firearm. We conclude otherwise.

Here, defendant only challenges whether the evidence was sufficient to show, under each charge, that he was in possession of a firearm. A defendant challenging the sufficiency of the evidence "invokes his constitutional rights to due process of law" and thus review is de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). A prosecutor must "introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt" to secure a conviction. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). "The concept of sufficiency . . . is designed to determine whether all the evidence, considered as a whole, justifies submitting the case to the trier of fact or requires a judgment as a matter of law." *Id.* at 367. Viewing "the evidence in the light most favorable to the prosecution, the question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002).

Whether identification testimony is credible is a question for the trier of fact. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). A "positive identification by witnesses may be sufficient to support a conviction of a crime." *Id.* Although certain cases have discussed the unreliability of eyewitness testimony, those comments are not "a general proscription against the use of such testimony." *Id.* at 706.

The evidence here was sufficient for a jury to find beyond a reasonable doubt that defendant possessed a firearm. White testified that she was familiar with defendant and saw him holding a gun described as silver with a black handle with "a spin thing on it." She identified the

gun at trial. After shots were fired White saw defendant run to his car, get in, and put “his left hand on the steering wheel. His right hand across his left hand with the gun out the window.” And Officer Curtis testified he clearly saw the defendant from his squad car before the chase ensued.

Viewing the evidence in the light most favorable to the prosecution, this eyewitness testimony was sufficient for a jury to conclude beyond a reasonable doubt that defendant possessed a weapon, that the weapon was concealed or in a vehicle, and that defendant possessed the weapon during the commission of a felony.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Kurtis T. Wilder

/s/ Cynthia Diane Stephens