

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 15, 2013

v

BRYANT WILLIAMS,

Defendant-Appellant.

No. 302154
Wayne Circuit Court
LC No. 10-010011-FH

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f. The jury acquitted defendant of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court originally sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to a term of 40 months to 10 years' imprisonment. Defendant appealed as of right, challenging both his conviction and his sentence. After defendant filed his brief on appeal, this Court granted his motion to remand to allow him to move for resentencing. The trial court granted defendant's motion for resentencing and resentenced him to a reduced prison term of 32 months to 10 years' imprisonment, with credit for 643 days served. For the reasons set forth in this opinion, we now affirm defendant's conviction.¹

Defendant was convicted of possessing a shotgun that was kept in the home of his girlfriend. The principal witness at trial was defendant's former girlfriend who testified that defendant threatened her with a shotgun during an argument in her house on September 1, 2010. After several hours, she was able to get away from defendant and go to a cousin's house, but she did not report the incident to the police until the next day. According to Detroit police officers who were involved in arresting and questioning defendant, defendant denied pointing a gun at

¹ The claim of sentencing error in defendant's brief is moot in light of defendant's resentencing. *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994). Further, after the trial court granted defendant's motion for resentencing, his appellate counsel notified this Court that she was "dropping the sentencing issue in [defendant's] brief" and would not be filing a brief after remand, thereby abandoning the sentencing issue.

his girlfriend, but stated that he sold a gun that morning at a police buy-back program. The jury found defendant guilty of felon in possession of a firearm, but acquitted him of felonious assault and felony-firearm.

I. ADMISSION OF PHOTOGRAPHS

On the second day of trial, the prosecutor informed defense counsel and the trial court that defendant's former girlfriend had just provided her with photographs that were relevant to the prosecution's case. Specifically, the photographs depicted the shotgun that defendant was alleged to have kept at the girlfriend's house, and injuries to the girlfriend's legs that she claimed to have sustained when she fell while trying to escape from defendant. The trial court admitted the photographs into evidence over defense counsel's objection. Defendant argues that the photographs should have been excluded at trial for the following reasons: (1) the prosecutor's failure to provide discovery under MCR 6.201(A)(6), (2) the prosecutor's failure to establish an adequate foundation to admit the photographs under MRE 901, (3) the violation of defendant's due process rights, and (4) the denial of defendant's right to confront and cross-examine the witnesses against him.

Defendant only partially preserved his arguments for appellate review because he did not raise his constitutional objections in the trial court. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). We review a preserved evidentiary ruling for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome outside the range of reasonable and principled outcomes." *Id.* at 217. Any preliminary questions of law, including the interpretation and application of court rules, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Even if a trial court abuses its discretion, not all trial errors amount to constitutional due process violations, *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000), and "[m]erely framing an issue as constitutional does not make it so," *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008). Evidentiary issues are generally nonconstitutional in nature, unless they implicate a specific constitutional right. *Id.* at 259-261. A preserved nonconstitutional evidentiary error is not a ground for reversal unless it affirmatively appears, after an examination of the entire cause, that it is more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 495-496. An error is outcome determinative if it undermines the reliability of the verdict. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). An unpreserved evidentiary issue is reviewed for plain error affecting substantial rights, even if the claim is constitutional in nature. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

i. Discovery Violation

Defendant argues that the prosecutor violated MCR 6.201(A)(6), which provides in pertinent part, that a party, upon request, must provide "a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any . . . photograph . . . with copies to be provided upon request." The State argues that the relevant court rule is MCR 6.201(H), which provides that, "[i]f at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party." The State contends that the prosecuting attorney

complied with this rule when she immediately notified defense counsel of the photographs upon learning of their existence.

The initial inquiry under MCR 6.201(A)(6) is when the discovery request was made. Here, the record does not contain any defense request for discovery, or any discovery order for defendant's benefit and defendant has not otherwise substantiated his assertion that he requested discovery well before trial. Neither has defendant shown that he made a discovery request for a description and opportunity to inspect any photographs that might be offered at trial. Rather, the record indicates only that the trial court confirmed with defense counsel at trial that she was receiving discovery from the prosecutor without a discovery order. An appellant bears the burden of furnishing a reviewing court with a record to verify his or her factual assertions. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Here, defendant has not established that he made the necessary discovery request to trigger a duty on the part of the prosecutor under MCR 6.201(A)(6).

Even assuming that a proper request was made for a description of and an opportunity to inspect any photographs, there is no indication in the record that the prosecutor obtained the photographs in question or had an opportunity to inspect them before the second day of trial. Because MCR 6.201(A)(6) plainly contemplates that the disclosed tangible physical evidence be in a party's possession, inasmuch as it contemplates that the evidence be made available for inspection to the other party, we reject defendant's claim that the prosecutor had a duty before trial to at least reveal that some photographs might exist. The prosecutor's duty of disclosure, if any, did not arise under MCR 6.201(H) until the prosecutor obtained the photographs on the second day of trial. Because the record indicates that the photographs were promptly disclosed to defendant after the prosecutor received them, the trial court did not err in finding no discovery violation.

ii. Foundation

Defendant argues that the prosecutor failed to establish a proper foundation for introducing the photographs under MRE 901. This evidentiary rule provides in pertinent part, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). "A proper foundation for the admission of photographs is made if someone who is familiar from personal observation of the scene or person photographed testifies that the photograph is an accurate representation of the scene or person." *In re Robinson*, 180 Mich App 454, 460; 447 NW2d 765 (1989). It is not necessary that the photographer testify. *People v Riley*, 67 Mich App 320, 322; 240 NW2d 787 (1976), rev'd on other grounds 406 Mich 1016 (1979).

In this case, defendant's former girlfriend testified that she was familiar with the shotgun that defendant kept in her bedroom for approximately two weeks, that she was also familiar with her own injuries, and that the photographs accurately represented each. Given this testimony, the trial court did not abuse its discretion in finding that a sufficient foundation was established to admit the photographs at trial.

iii. Due Process

Defendant argues that he was deprived of due process because he was unfairly surprised by the incriminating evidence.

A criminal defendant does not have a general constitutional right to discovery. *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011). A due process violation occurs when the prosecution fails to disclose evidence in its possession that is exculpatory and material, even if it was not requested by the defendant. *Id.* at 590-591. Because this case involves incriminating evidence, defendant has not established a due process error. To the extent that defendant believed that more time was needed to investigate the evidence, he should have moved for an adjournment. See *Elston*, 462 Mich at 764 (“[t]he longstanding rule of this state is that, in the absence of a request for a continuance, a trial court should assume that a party does not desire a continuance”).

iv. Right of Confrontation

Defendant argues that the admission of the photographs deprived him of his constitutional right to confront and cross-examine witnesses because the photographs were testimonial in nature and the photographer did not testify.

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him [.]” US Const, Am VI. The Michigan Constitution also affords a defendant this right of confrontation. Const 1963, art 1, § 20; *People v Fackelman*, 489 Mich 515, 525; 802 NW2d 552 (2011). This constitutional protection is concerned with out-of-court statements of witnesses, that is, persons who bear testimony against the defendant. *Id.* at 528.

“As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront the witness.” *Bullcoming v New Mexico*, ___ US ___; 131 S Ct 2705, 2713; 180 L Ed 2d 610 (2011). “To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.” *Bullcoming*, 131 S Ct at 2714, quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). The constitutional concern is out-of-court statements of witnesses, that is, persons who bear testimony against the defendant. *Fackelman*, 489 Mich at 528. Where a photograph in no way involves a witness bearing testimony, it is not testimonial in nature. See *United States v Lopez-Moreno*, 420 F3d 420, 436 (CA 5, 2005) (photograph of identification card is not a testimonial statement); see also *Sevin v Parish of Jefferson*, 621 F Supp 2d 372, 382-383 (ED La, 2009) (“[b]ecause a camera is not a witness that is amenable to cross-examination, and because a photograph of a vehicle is not a ‘testimonial statement,’ introduction of . . . photographs into evidence does not implicate the Confrontation Clause”).

In this case, because the photographs were not testimonial statements, and because the prosecutor did not introduce any out-of-court statements by the photographer, defendant has not established a violation of his constitutional right of confrontation.

II. CONSTITUTIONALITY OF MCL 750.224f.

Defendant next argues that his conviction should be vacated on the ground that MCL 750.224f(1) is constitutionally infirm, both on its face and as applied to his circumstances. Because defendant did not raise this issue in the trial court, it is unpreserved. Accordingly, defendant bears the burden of establishing a plain error affecting his substantial rights. *Carines*, 460 Mich at 763. “Statutes are presumed constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.” *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999).

MCL 750.224f places felons in two different categories depending on whether the felon was convicted of a “felony” or a “specific felony.” *People v Perkins*, 473 Mich 626, 630-631; 703 NW2d 448 (2005). As applicable to defendant, MCL 750.224f provides, in pertinent part:

[A] person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:

- (a) The person has paid all fines imposed for the violation.
- (b) The person has served all terms of imprisonment imposed for the violation.
- (c) The person has successfully completed all conditions of probation or parole imposed for the violation. [MCL 750.224f(1).]

Contrary to defendant’s argument on appeal, the legislative ban on a felon possessing a firearm is not without limitation during the applicable three-year period. A defendant may defend against the charge based on self-defense. See *People v Dupree*, 486 Mich 693, 708; 788 NW2d 399 (2010). This case, however, does not involve a claim of self-defense. This Court’s decision in *People v Swint*, 225 Mich App 353; 572 NW2d 666 (1997), is dispositive of defendant’s claim that MCL 750.224f, on its face, contravenes a person’s right “to keep and bear arms for the defense of himself and the state” under Const 1963, art 1, § 6. Defendant’s claim fails as a matter of law because Const 1963, art 1, § 6, does not guarantee a defendant the right to possess a firearm after he or she is convicted of a felony. *Id.* at 362-363. Further, the limitations imposed by the statute are a reasonable exercise of this state’s police power. *Id.* at 374-375.

We also reject defendant’s argument that MCL 750.224f is facially invalid under the Second Amendment of the United States Constitution, which provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” US Const, Am II. At the time *Swint* was decided, the Second Amendment did not apply to the states through the Fourteenth Amendment. *Id.* at 359-360. That changed in June 2010 when the United States Supreme Court decided in *McDonald v City of Chicago*, ___ US ___; 130 S Ct 3020, 3050; 177 L Ed 2d 894 (2010), that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to possess a handgun in the home for purposes of self-defense, as decided in *Dist of Columbia v Heller*, 554 US 570; 128 S Ct 2783; 171 L Ed 2d 637 (2008).

In *Heller*, 554 US at 592, the United States Supreme Court specifically held that the Second Amendment guarantees an individual the right “to possess and carry weapons in case of confrontation.” See also *People v Yanna*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 304293 & 306144, issued June 26, 2012), slip op at 3. But the Supreme Court also stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 554 US at 626-627. The Supreme Court added that “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n 26. The Court also noted that, whatever is left for a future evaluation, the Second Amendment “surely elevates the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 635.

Based on the limitations in *Heller*, 554 US at 626-627, facial challenges to the constitutionality of 18 USC 922(g)(1), which makes it unlawful for a felon to possess a firearm, have been rejected by a vast majority of the federal circuit courts. See *United States v Smoot*, 690 F3d 215, 220-221 (CA 4, 2012). While this case involves a state statute, given this Court’s decision in *Swint*, 225 Mich App at 374-375, that MCL 750.224f represents a reasonable exercise of this state’s police power, defendant’s facial challenge to MCL 750.224f must fail under both the state and federal constitutions.

Moreover, while the Fourth Circuit Court of Appeals determined in *Smoot*, 690 F3d at 221, that it is possible that a presumptively lawful measure to prohibit a felon from possessing a firearm could still be unconstitutional if confronted with a proper as-applied challenge, defendant has failed to establish that MCL 750.224f(1) is unconstitutional as applied to his particular circumstances. The trial evidence does not support that defendant possessed a shotgun in his own home for protection, as asserted by defendant on appeal. In addition, defendant’s criminal history, as is evident from his fourth habitual offender status and the stipulation at trial that he was convicted of a felony on or about March 27, 2008, is inconsistent with any determination that defendant is a law-abiding responsible citizen. Considering the record as a whole, defendant’s vague and unsubstantiated claim that he possessed a firearm for protection in his home is insufficient to establish that MCL 750.224f(1), as applied to his circumstances, violates the federal or state constitution. Thus, we find no plain error.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens