

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK BOSWELL,

Defendant-Appellant.

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UNPUBLISHED

January 16, 2007

No. 262685

Wayne Circuit Court

LC No. 04-012775-01

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving and concealing stolen property over \$20,000, MCL 750.535(2)(a); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to 28 months to 15 years' imprisonment for the receiving and concealing stolen property over \$20,000 conviction; 28 months to 7 ½ years' imprisonment for the felon in possession of a firearm conviction; and two years' imprisonment for the felony-firearm conviction to run consecutive to the concurrent sentences imposed for the other offenses. Defendant appeals as of right. We affirm.

I. Basic Facts and Procedure

In January, 2004, Detroit police executed a search warrant at 17900 Cliff St., Detroit. Officers had been informed that a fencing operation was taking place and the house contained various stolen items. Upon opening the door, defendant told police the house was his and that he lived there. Officers entered the house and observed exercise equipment in the living room. One interior room was so filled with new clothes that an officer had to move them in order to enter. The room did not contain any furniture. In what appeared to be the den, officers found various items, including boxes of clothes, televisions, and VCRs. The items appeared new as they were in their original boxes. Many of the items still had price tags on them. The basement was a storage area for more items. The garage contained merchandise as well. A tarp in the backyard covered other items, including snow blowers, lawn mowers, and ladders. Police testimony indicated that no one other than defendant lived in the house.

Police searched defendant and found keys that enabled entry to four storage sheds in Warren. Police discovered clothing, drills, tools, construction equipment, DVDs, videotapes,

and 14 guns in the sheds. Police testified that the 10 feet high by 40 feet wide sheds were filled to capacity.

Some of the items in the house and the sheds came from various stores, including: Sears, Kohls, Home Depot, Lowe's, Marshal Fields, J.C. Penny, K-Mart, and American Eagle. A few items were stolen from the Detroit Public Schools. Theodore Lang, a loss prevention manager at Sears, testified that he went to defendant's home and recovered approximately \$12,361.19 worth of Sears items. Lang also went to the police department in order to recover additional Sears items which were found in defendant's house. These items were worth approximately \$9,121.48. Representatives from the other merchants also engaged in recovering various items.

Of the guns found in the house, one was found underneath the mattress in the bedroom. Another was found underneath the living room couch. A third gun, a .22 caliber blue steel revolver, was found wrapped in plastic and on a shelf in the room that was filled with clothing.

Garth Boswell, defendant's brother, testified that he was the owner of the residence where defendant and the items were found. Garth lived elsewhere, but allowed five of his relatives, including defendant, to live there and pay rent. Garth testified that his two uncles, Terry Richardson and Charlie Dwyer, Garth's two nephews, Eddie Jackson and Derrick Boswell, Jr., and defendant, resided in the house. Garth testified that defendant used the family room, sleeping on a rollaway bed. Garth also testified that it was his gun police found under the living room couch. While at the residence, Garth said he put the gun under the couch when he decided to take a nap on the couch. He said he forgot to retrieve it before leaving.

Defendant's son, Derrick Boswell, Jr., testified that he lived in the basement of the residence. He indicated that his living quarters contained a bed, dresser, clothing and the like. Derrick Jr. denied ever seeing defendant with a weapon or purchasing stolen items. He also stated that no gun found in the residence belonged to defendant.

On the first day of defendant's trial, prior to jury selection, defense counsel argued a motion in limine, seeking to exclude evidence regarding what was found at the storage sheds. Defense counsel argued that the evidence amounted to prior bad acts evidence that was irrelevant and unduly prejudicial. The trial court denied the motion, concluding that the evidence was not prior bad acts evidence, but rather, evidence that arose out of the same transaction for which defendant was charged.

## II Analysis

Defendant raises three arguments on appeal. First, defendant contends that the trial court improperly admitted prior bad acts evidence; second, that he was denied the effective assistance of counsel; and, third, that the prosecutor engaged in misconduct.

### 1. Bad Acts Evidence Was Properly Admitted

A trial court's decision to admit evidence will be reversed only for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. *People v Babcock*, 469

Mich 247, 269; 666 NW2d 231 (2003). When the trial court selects one of these principled outcomes, it has not abused its discretion. *Babcock, supra* at 269.

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). A general denial of guilt puts at issue all the elements of a charged offense. *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). The proffered evidence would be unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Crawford*, 458 Mich 376, 397-398; 582 NW2d 785 (1998).

In this case, the purpose of the challenged testimony was to establish the elements of the charged offenses and to convey to the jury the entire picture of the criminal act. As the lower court properly concluded, the evidence concerning the storage sheds is "relevant to the extent that they recovered the keys for those warehouse storage facilities on the defendant at the time that the initial warrants were executed. These were simply other places in which these goods were stored, all part of the same transaction or occurrence." To the extent that the challenged evidence can be considered prior bad acts evidence, the "res gestae" principle allows for prior bad acts evidence to be admitted if the evidence is necessary to convey to the jury the entire picture of the criminal act. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). When the prior bad act is connected to or blended with the charged offense in such a way that proof of one incidentally involves or explains the circumstances of the charged offense, it is properly admitted. *Delgado, supra* at 83. Here, the testimony about the sheds was necessary to tie together the entire story of the offense. The evidence showed one piece of the larger transaction consisting of receiving and concealing of stolen property. *Delgado, supra* at 83.

Additionally, the challenged evidence is relevant because it establishes the elements of the charged offenses. To prove the offense of receiving and concealing stolen property, a prosecutor must prove beyond a reasonable doubt: (1) that the property was stolen; (2) the value of the property; (3) the receiving, possession or concealment of the property by the defendant with the knowledge that the property was stolen; (4) the identity of the property as being that previously stolen; and (5) the constructive or actual knowledge of the defendant that the property received or concealed was stolen. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). The testimony regarding what was found in the storage sheds goes toward establishing the elements of receiving and concealing stolen property because the stolen property defendant is charged with receiving and concealing is alleged to have come from the storage sheds as well as the house. In an effort to prove that the stolen items were worth at least \$20,000, an element of the offense, the prosecution presented evidence that there were stolen items overrunning not only the residence where defendant lived, but also the storage sheds to which he had keys.

Evidence that guns were found in the sheds was also properly admitted. To prove the offense of felon in possession of a firearm, the prosecution must establish that a defendant, who has been convicted of a specified felony, possessed a firearm. *People v Tice*, 220 Mich App 47, 50; 558 NW2d 245 (1996). Although defendant was arrested in his home in Detroit, and some of the guns were found in the sheds, this does not preclude the inference that defendant could have,

at some point, possessed the guns in the sheds, given the presence of keys to the sheds in defendant's pocket. To prove the offense of felony-firearm, the prosecutor must establish the following elements: (1) possession of a firearm (2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Constructive possession of a firearm is proved if the firearm is known to the person and is reasonably accessible to him. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). Similarly, the evidence of guns in the sheds helps establish the inference that defendant possessed at least one of the guns while committing or attempting to commit the offense of receiving and concealing stolen property.

## 2. Defendant Was Not Denied Effective Assistance Of Counsel

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *LeBlanc, supra* at 579. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *LeBlanc, supra* at 579.

In total, 19 guns were found by police, five in defendant's house and 14 in the sheds. Meredith Cartwright, a co-defendant and potential defense witness, was expected to give testimony that he purchased a gun illegally, brought it to defendant's residence, and gave it to someone other than defendant and that someone put it underneath the mattress where it was subsequently found by officers. Cartwright did not testify. Defendant maintained that the investigator, to whom Cartwright gave a statement regarding the gun, should have been called as a witness.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra*, 465 Mich 578.

MRE 804(b)(3) states, in relevant part, "a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." It is not apparent from the record that the foundational requirements of MRE 804(b)(3) were met. There were no witnesses, physical evidence, or any other such evidence presented at trial which would corroborate Cartwright's statement. Second, even assuming that counsel's performance was below an objective standard of reasonableness for failing to call the investigator as a witness, it is unlikely that, but for counsel's error, the result of the proceedings would have been different. Although the testimony sought to be introduced would have tended to show that defendant did not purchase the gun nor place it under the mattress where it was found by officers, it does not preclude a finding that defendant nevertheless "possessed" the gun, sufficient to satisfy the possession element in the felon in possession of a firearm and felony-firearm charges.

Moreover, even if the testimony of the investigator would have precluded a finding that defendant possessed the gun underneath the mattress, a different verdict still would have been unlikely, given the presence of 19 guns in the house and sheds and the other guns in the house. Given these facts, defendant cannot show that counsel's failure to present the testimony in question affected the outcome of the proceeding.

### 3. Prosecutorial Misconduct Did Not Occur

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); however, because defendant did not preserve this issue below, this Court reviews defendant's unpreserved claim of prosecutorial misconduct for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines*, *supra*, 460 Mich 763.

A prosecutor may cross-examine a non-alibi defense witness regarding his failure to come forward prior to trial with information testified to at trial if the information is of such a nature that the witness would have a natural tendency to come forward with it prior to trial. *People v Emery*, 150 Mich App 657, 666; 389 NW2d 472 (1986). Derrick Jr. testified that he did not want defendant to get into trouble and he wanted the truth to come out. Given the father-son relationship, it is presumable that Derrick Jr. would have a natural tendency to come forward to the authorities with any information that might tend to exonerate his father. Accordingly, the prosecutor did not act improperly in exploring the matter. Even assuming that the cross-examination of Derrick Jr. was improper, defendant has the burden of showing that this impropriety affected the outcome of the proceedings. *Barber*, *supra* at 296, citing *Carines*, *supra* at 763. Defendant can make such a showing given the substantial evidence against him.

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Bill Schuette