

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 1, 2012

v

TYRONE SIMS,

No. 300239
Wayne Circuit Court
LC No. 10-001909-FH

Defendant-Appellant.

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his convictions after jury trial of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third offender, MCL 769.11, for his carrying a concealed weapon and felon in possession of a firearm convictions to 2 to 10 years' imprisonment, consecutive to two years' imprisonment for his felony-firearm conviction. Defendant was ordered to serve five years probation for his conviction of possession with intent to deliver marijuana. We affirm.

Defendant first argues that the prosecution presented insufficient evidence to prove that the handgun was concealed to convict him of carrying a concealed weapon. We disagree.

This Court reviews a claim of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing a claim that the evidence presented by the prosecution was insufficient to support the defendant's conviction, we must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). This Court will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses, and we resolve all conflicts in the evidence in favor of the jury's verdict. *Id.* at 619. Circumstantial evidence and reasonable inferences which arise from it can constitute satisfactory proof of the elements of the crime. *Id.*

Concealment is an essential element of the crime of carrying a concealed weapon. See *People v Reynolds*, 38 Mich App 159, 161; 195 NW2d 870 (1972). The weapon, however, need not be absolutely hidden to be "concealed." *People v Jackson*, 43 Mich App 569, 571; 204

NW2d 367 (1972). Rather, the weapon must merely not be readily observable by persons in the ordinary and usual associations of life. *Id.*

In this case, Officer Williams testified that he saw defendant remove a handgun from his waistband. Williams stated that he could not tell if defendant's shirt had covered it, but saw defendant remove and toss it. Further, Officer Williams described the handgun as being "tucked," which raises a reasonable inference that the gun was not readily observable. We conclude that the prosecution presented sufficient evidence through circumstantial evidence and reasonable inferences, viewed in a light most favorable to the prosecution, for the jury to find beyond a reasonable doubt the element of concealment. See *Jackson*, 43 Mich App at 571, where this Court held that the prosecution presented sufficient evidence of the element of concealment when the evidence showed the defendant placed a handgun in his waistband.

Defendant next argues that the handgun-related convictions are against the great weight of the evidence. We disagree. This Court reviews a trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). A verdict is against the great weight of the evidence when the evidence so heavily preponderates against it that it would be a miscarriage of justice to allow the verdict to stand. *Id.*

Defendant's great-weight argument rests on the witnesses' conflicting testimony. Specifically, Anthony King testified that he threw the gun the police recovered and it was his. Officer Williams, on the other hand, testified that he saw defendant in possession of a handgun and a duffle bag that he tossed while running from the police. The officers later detained defendant and Officer Williams recovered a loaded handgun from the area where he saw defendant throw a handgun.

Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. *People v Lemmon*, 456 Mich 625, 647-648; 576 NW2d 129 (1998). The jury decides witness credibility, and absent evidence that the testimony was patently incredible or was so inherently implausible that it could not have been believed by a reasonable juror, witness credibility is an insufficient basis to grant a new trial. *Lemmon*, 456 Mich at 642-644, 646-647. Officer Williams testified that he saw defendant run, remove a handgun from his waistband, throw it, and continue to run to the auto shop behind the property. Officers later detained defendant in the same area. Williams recovered a loaded handgun from the area where he testified he saw defendant throw one. Because this testimony was not inherently implausible, the handgun related convictions are not against the great weight of the evidence.

Defendant next argues that his trial counsel was ineffective in failing to call a necessary witness and stipulating that defendant was not eligible to carry a firearm. Further, defendant argues the trial court abused its discretion in denying him a *Ginther*¹ hearing. We disagree.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

We review de novo whether a defendant was deprived of his constitutional right to effective assistance counsel. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). Because no *Ginther* hearing was held, review of the issue is limited to the facts contained on the record. *People v Fonville*, 291 Mich App 363, 382-383; 804 NW2d 878 (2011). This Court reviews a trial court's decision whether to conduct an evidentiary hearing for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008).

To prove ineffective assistance of counsel, defendant must overcome the strong presumption that counsel provided reasonable assistance consistent with sound trial strategy. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To do so, the defendant must show that trial counsel's representation fell below an objective standard of reasonableness and that, but for the deficiency, the result of the proceedings would have been different. *Id.*; *Unger*, 278 Mich App at 242. Counsel's failure to call witnesses is presumed to be trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A failed strategy does not constitute deficient performance. *Petri*, 279 Mich App at 412.

Defense counsel's failure to call Gary Allen as a witness therefore falls within the realm of trial strategy. Defendant argues Allen could have testified that he heard a police officer ask King why he threw the gun away. As the prosecution notes, Allen's proffered testimony is inadmissible hearsay. MRE 801(c); MRE 802. Counsel is not ineffective for failing to make a futile effort to present inadmissible evidence. See *Petri*, 279 Mich App at 415.

Additionally, trial counsel's stipulation and argument for directed verdict were not objectively unreasonable, and therefore, defendant fails to show deficient performance. Defense counsel chose to concede the fact that defendant was not eligible to possess a firearm. We will not second-guess trial counsel's strategy of conceding certain elements of the charge at trial. *People v Chapo*, 283 Mich App 360, 369-370; 770 NW2d 68 (2009). Because defendant was not, in fact, eligible to possess a firearm, it was a reasonable trial strategy for counsel to instead focus on whether the handgun was concealed. That the strategy was unsuccessful does not render it unreasonable. *Petri*, 279 Mich App at 412. Defendant has not shown counsel's performance was deficient, or that it was prejudicial. *Id.* at 410; *Unger*, 278 Mich App at 242.

Finally, the trial court did not abuse its discretion by failing to grant defendant a *Ginther* hearing. An abuse of discretion occurs when the trial court chooses an outcome outside the principled range of outcomes. *Unger*, 278 Mich App at 217. The trial court denied defendant's motion for a *Ginther* hearing, which was no more than a request for alternative relief should the trial court deny defendant's motion for new trial. Presumably the trial court found that an evidentiary hearing was unnecessary. Defendant's arguments at the motion hearing were based on his claims regarding counsel employing unsuccessful trial strategy, which does not equate to unreasonable trial strategy. Defendant failed to provide the trial court any specifics on what additional facts might be developed at a *Ginther* hearing. Given these circumstances, the trial court's denial of an evidentiary hearing was not outside of the range of principled outcomes so as to constitute an abuse of discretion. *Id.*

Defendant next argues that the prosecutor committed misconduct in her closing argument by making misstatements of fact and vouching for witnesses' credibility. Additionally,

defendant argues, the prosecutor elicited improper testimony from Officer Williams, denying defendant a fair trial. We disagree.

Defendant failed to object to all but two claims of misconduct—the prosecutor’s mention in her closing argument of the lack of fingerprints and comments regarding Anthony King; therefore, our review is limited to ascertaining whether plain error affected defendant’s substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). The preserved issues are reviewed de novo to determine whether defendant was denied a fair and impartial trial. *Id.*; *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010).

We review a prosecutor’s comments in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). Here, defendant fails to show that in relation to defense counsel’s arguments and the facts of the case, the prosecutor’s statements during closing arguments, that Dajuan Jackson never saw Anthony King with a gun; King never saw his friend arrested, and there were no fingerprints found on the gun, were misstatements of the fact. Prosecutors have wide latitude in arguing the evidence and any reasonable inferences from the evidence, and are not limited to using only the blandest terms possible. *Id.* at 66.

In regard to Jackson, the prosecutor’s argument was that Jackson’s testimony was inconsistent. Jackson’s testimony was indeed inconsistent. His initial testimony was that he had never seen a handgun in the home, and then he testified that he saw King with a gun, but was unsure what kind. Finally Jackson stated that he saw King with a gun and that it was black. Regarding the comments about King, defendant is correct that King never testified that he saw his friend arrested. But the prosecutor’s argument focused on King’s credibility. The prosecutor’s argument was that King did not come forward, knowing his friend was in legal trouble, until trial; this was consistent with King’s testimony. Therefore, the prosecutor’s argument was not meant to be a statement of fact. Finally, the prosecutor’s statement regarding lack of fingerprints on the handgun was also not a misstatement of fact—there were no usable fingerprints found on the handgun. Defendant thus has not shown any misconduct by the prosecutor regarding his preserved arguments; defendant was not denied a fair trial.

Additionally, defendant fails to show how the prosecutor, during her closing argument, improperly vouched for the credibility of witnesses. A prosecutor may not vouch for the credibility of his witnesses by conveying a message to the jury that he had some special knowledge or facts indicating the witness’s truthfulness. *Bennett*, 290 Mich App at 478. But a prosecutor may comment on his witnesses’ credibility and may argue from the evidence and its reasonable inferences in support of a witness’s credibility. *Id.* Here, the prosecutor merely stated that police officers had no reason to lie and compared the officer’s testimony to defendant’s version of events. The prosecutor, therefore, only commented on witness credibility; she did not imply special knowledge or facts indicating witness truthfulness. Defendant therefore fails to show the prosecutor’s statements amounted to misconduct.

Finally, defendant fails to show that the prosecutor improperly elicited from Officer Williams testimony that he had seen defendant before at another raid. Defendant is correct that a prosecutor may not elicit inadmissible testimony relevant only to prove propensity to commit crime. *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004). Here, the question and

answer were for the relevant purpose of identification. Indeed, the prosecutor tailored her questions to specifically limit Officer Williams' answers to his identification of defendant and no more. The questions were therefore properly related to a relevant issue and any prejudice could easily have been cured by a jury instruction. MRE 105; *Unger*, 278 Mich App at 235.

Next, defendant argues that he is entitled to a new trial because the trial court stepped into the shoes of the prosecutor when questioning Officer Williams and thus pierced the veil of impartiality. We disagree.

A criminal defendant's constitutional right to due process and a fair trial requires that the presiding judge act as a "neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (citation omitted). Whether a judge's participation in a trial extends so far beyond its required role of neutral and detached arbiter of the proceedings that it denies defendant his constitutional right to a fair and impartial trial presents a question of law this Court reviews de novo. *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009). We review the record as a whole to determine whether the judge's conduct deprived defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 341; 543 NW2d 342 (1995).

The prosecution in this case attempted to lay the proper foundation for Officer Williams to give his opinion regarding the possible uses—i.e., personal or for sale—of the marijuana found in the duffle bag. The prosecutor's questions were objected to and the objection was sustained each time. Thus, she failed to lay a proper foundation. The prosecutor's questioning, however, brought out fragments of testimony regarding Officer Williams' background.

The trial court responded to resolve confusion with respect Officer Williams' qualifications. Specifically, the trial court asked Williams about any previous training he had in regard to narcotics. A trial court may interrogate witnesses to resolve confusion. MRE 614(b); *People v Davis*, 216 Mich App 47, 49-50; 549 NW2d 1 (1996), citing *United States v Dandy*, 998 F2d 1344, 1354 (CA 6, 1993). Thereafter, Officer Williams testified generally regarding the indicators of whether marijuana is likely to be used personally rather than for sale. The trial court's questions here merely resolved confusion and did not deny defendant a fair and impartial trial.

The test to determine whether a judge's conduct or comments pierce the veil of judicial impartiality is whether the conduct or comments exerted an undue influence over the jury to the point that the defendant was denied his right to a fair and impartial trial. *People v Conley*, 270 Mich App 301, 307-308; 715 NW2d 377 (2006)(citations omitted). Defendant fails to show how the trial court's questioning of Officer Williams regarding his background unduly influenced the jury. Reading Officer Williams' testimony as a whole, the trial court did not seek to elicit the witness's opinion of the use of the marijuana found in this case. Instead, the trial court only asked about Officer Williams' background based on the fragments of testimony the prosecution had elicited after repeated objections. The witness testified regarding his background, and, based on his background, about indicators of marijuana held for use or delivery. The trial court's questioning did not favor one party over the other; it merely resolved confusion. Defendant has not shown that the trial court pierced the veil of impartiality in questioning Officer Williams.

Finally, defendant argues that he is entitled to a new trial due to the cumulative nature of the alleged errors. We disagree.

Even if errors at trial would not individually merit reversal, the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal. *Dobek*, 274 Mich App at 106. To merit reversal, the cumulative effect of the errors must undermine confidence in the reliability of the verdict. *Id.* But here, defendant has not established any errors, and absent a showing of errors, there can be no cumulative effect of errors meriting reversal. *Id.*

We affirm.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey