STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2010
v	No. 285886 Van Buren Circuit Court
FREDERICK DEONTA WILSON, a/k/a DEONTA FREDERICK WILSON, Defendant-Appellant.	LC No. 07-015836-FH

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions for felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to consecutive terms of 34 months to 10 years' imprisonment for the felon in possession of a firearm conviction, and 2 years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's first argument on appeal involves the admission of evidence concerning the murder of Lee Jackson. Defendant specifically argues that the evidence was irrelevant, that the prosecutor committed misconduct with respect to this evidence, and that his trial counsel was ineffective for failing to object to its admission and to the prosecutor's improper argument regarding this evidence. None of these claims of error were preserved. We generally review the trial court's decision to admit evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). The trial court abuses its discretion when its decision falls outside a range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Unpreserved nonconstitutional error, such as an evidentiary error,[1] however, warrants reversal only where defendant establishes plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Review of defendant's unpreserved prosecutorial misconduct claim is precluded unless a timely objection would have failed to cure the error or a miscarriage of justice would result. *People v Callon*, 256 Mich App 312, 329; 662

[1] Evidentiary error constitutes nonconstitutional error. *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001).

NW2d 501 (2003). Defendant's unpreserved ineffective assistance of counsel claim is limited to a review of the errors that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Pursuant to MRE 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. "All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Evidence is unfairly prejudicial if it is marginally probative and there is a danger that it will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). We must consider the prosecution's statements in the context, and in light of defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Based on defendant's defense at trial, we decline to find plain error requiring reversal because of the admission of this evidence. This case is similar to the circumstances presented in *People v Knapp*, 244 Mich App 361, 377-378; 624 NW2d 227 (2001), where the defendant:

> [n]ot only . . . fail[ed] to object at trial to any testimony regarding his [extramarital] affairs, thereby failing to preserve this issue, but defendant also raised the issue himself during his opening statement. . . . Thus, any testimony elicited by the prosecutor regarding this issue was relevant to the issues raised by defendant. A defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Defendant's unpreserved claim, therefore, does not warrant reversal.

Defense counsel stated during opening statement that the prosecutor's main eyewitness, Jason Anthony, lied about seeing defendant in possession of a gun in a blueberry field approximately one month prior to the murder of Lee Jackson. According to the defense, Anthony lied because he was a close friend of Jackson's and, despite the fact that the prosecutor agreed that defendant was not directly involved with the murder, Anthony still blamed defendant for the murder. Defense counsel argued that Anthony was therefore biased against defendant. The defense, then, made information regarding Jackson's murder relevant.

The evidence was also relevant to identify defendant as the individual with the gun who walked up to Anthony in the blueberry field on March 13, 2007. Identity of the person who committed the crime is an essential element of any crime, and identity may be proven by direct or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Defendant specifically challenged Anthony's identification of him. It was only as a result of the murder investigation, however, that defendant's identity in the March 13th incident came to light. The challenged evidence explained to the jury how the police came to investigate

defendant. "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Based on defendant's arguments and defense theory at trial, we conclude that the evidence was relevant because it had a "tendency" to establish defendant's identity as the perpetrator, explained background information to the jury, and supported Anthony's credibility.

Moreover, the prosecutor's questions and comments regarding this evidence did not create an undue risk that the jury would convict defendant based on the murder evidence. During his questioning of Anthony, the prosecutor elicited testimony that defendant had nothing to do with the murder of Jackson and that the "common denominator" was Elmer Sullivan (an individual involved in both the March 13th incident and Jackson's murder), not defendant. An investigating police officer also testified that defendant was not at all involved in the murder. Because the evidence was relevant, and the prosecutor reinforced the fact that defendant was not involved in the murder, the risk of unfair prejudice was low. This is not a case where there was a danger that marginally probative evidence would be given undue or preemptive weight by the jury. *Ortiz*, *supra* at 306.

In ruling, we emphasize that the prosecutor was permitted to rebut defendant's theory of the case that Anthony was implicating defendant only because he blamed defendant for Jackson's murder. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other gds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (Prosecutor's remarks were proper where they rebutted the defendant's opening statement and allegations that the victim fabricated the story. "Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel."). Viewing the prosecutor's arguments in context, the prosecutor's arguments were responsive to the defense's theories. *Schutte*, *supra* at 721.

We note that defendant also challenges the prosecutor's brief statement in closing argument, telling the jury that it would "have to somewhat speculate" what defendant and the others were doing that night in the blueberry field and then making reference to the Jackson murder. We conclude that this statement does not constitute plain error requiring reversal. The prosecutor did not actually speculate about what they were doing and he repeatedly emphasized that defendant was not involved in Jackson's subsequent murder. Defendant did not object to this statement, and he has not demonstrated that any prejudice could not have been cured by a timely objection and instruction. *Callon*, *supra* at 329-330.

Defendant has failed to demonstrate that any possible error in the admission of or use of the challenged evidence that Jackson was murdered affected his substantial rights, i.e. affected the outcome of the trial. *Carines*, *supra* at 774. Anthony's testimony standing alone, without any testimony or other evidence regarding the murder, was sufficient to establish that he correctly identified defendant as the individual who walked up to him in the blueberry field, displayed a gun, and discharged one unspent bullet. See *People v Thomas*, 7 Mich App 103, 104; 151 NW2d 186 (1967) (Evidence sufficient based on one witness's identification of the defendant).

Lastly, with respect to the murder references, defendant claims his counsel was ineffective. In order to establish this claim, defendant must demonstrate that his trial counsel's

performance fell below an objective standard of reasonableness according to prevailing professional norms, and that, absent trial counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that his trial counsel had a "misguided" trial strategy of not objecting to the murder references and instead choosing a defense theory premised on it, specifically that Anthony was biased against defendant because of the murder. We decline to second-guess defense counsel's trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A mere difference of opinion with respect to trial strategy does not constitute ineffective assistance of counsel. *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987). Moreover, defense counsel's chosen strategy of arguing that Anthony, the only testifying eyewitness to defendant's possession of a gun, was biased against defendant was reasonable given the fact that Jackson was Anthony's close friend, Anthony admitted that he felt hurt by Jackson's murder, and Anthony failed to promptly report the incident in the blueberry field to police. Additionally, as previously discussed, the murder testimony was properly admissible and the prosecutor's arguments concerning the same were not improper. Defense counsel is not ineffective for failing to argue a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next challenges the admission of a .380-caliber gun at trial and defense counsel's failure to object or to move to exclude the gun. Defense counsel indicated that he had "no objection" to the admission of the gun, and defendant has thus waived any claim of error regarding its admission on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Nonetheless, we review this claim because defendant raises a related ineffective assistance of counsel claim.

"The 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). "[T]here must be sufficient evidence of (1) the exhibit's identity and (2) its connection to the crime to support its admission at trial. A witness is not required to positively identify the weapon as being the weapon used in the crime, and it is not error requiring reversal to admit a 'similar' weapon." *People v Hence*, 110 Mich App 154, 162; 312 NW2d 191 (1981) (internal citations omitted).

After reviewing the record, we conclude that the prosecutor presented sufficient evidence to support the admission of the .380-caliber gun at trial. Although the weapon was not found in defendant's possession, it was found on the blueberry field owner's property where defendant was during the incident, i.e., a location to which defendant had access and had, in fact, been present. *People v Kramer*, 108 Mich App 240, 253; 310 NW2d 347 (1981). Furthermore, the gun was discovered the day after the March 13th incident. Anthony's description of the gun defendant possessed was similar to the gun admitted at trial; a darker colored pistol (not a revolver), which was approximately a .32-caliber or .38p-caliber, with a slide action. Anthony was not required to positively identify the gun "as being the weapon used in the crime, and it is not error requiring reversal to admit a 'similar' weapon." *Hence*, *supra* at 162.

Finally, after the gun was discovered, it was immediately turned over to the local police, who then turned it over to the Michigan State Police for further testing. Any challenges

regarding the identification of the gun and its connection to defendant or the chain of custody relate to the weight of the evidence instead of its admissibility. *People v White*, 208 Mich App 126, 130-131; 527 NW2d 34 (1994). Because the gun was properly admitted, a motion to suppress or an objection to its admission would have been futile. Defense counsel was not required to argue a meritless position. *Snider, supra* at 425.

Defendant also argues on appeal that his confrontation rights were violated by Officer Allen Marler's testimony regarding statements made by Elmer Sullivan and Jeffrey Winston. Because defendant raised no objection to this evidence at trial, we review this unpreserved issue for plain error. See *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (A Confrontation Clause violation is subject to the harmless error test.) The Confrontation Clause requires the exclusion of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford, supra* at 53-54; US Const, Am VI; Const 1963, art 1, § 20.

Neither Sullivan nor Winston testified at trial, and the record does not reflect that defendant had a prior opportunity to cross-examine them. *Crawford, supra*. Instead, Marler testified that he asked Sullivan and Winston the identity of the third individual who was walking with them, but ran off into the field that night when Marler ordered them to stop, and they identified a man nicknamed "Shorty" (defendant's nickname). We agree with defendant that the statements made by Sullivan and Winston to Marler, after they were apprehended and Marler began questioning them, were testimonial in nature. "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004), quoting *Crawford, supra* at 52. The admission of these testimonial statements violated defendant's right of confrontation. *Crawford, supra*.

However, we conclude that the error in admitting the statements was harmless, *Shepherd, supra* at 347, given the significant other evidence identifying and implicating defendant. Anthony unequivocally identified defendant as the individual who approached him in the blueberry patch, held the gun, and released the slide to dispense a bullet. Anthony was familiar with defendant and had adequate lighting. A .380-caliber gun was located in the blueberry field the day after the incident, a bullet was found close to where the vehicle in which defendant had been riding was stuck in the field, and it was similar to the bullets that were discovered inside the .380-caliber gun. It cannot be said, then, that the erroneous admission of the statements affected the outcome of the trial.

Defendant next argues that the trial court gave an erroneous felony-firearm instruction by failing to define a "firearm." To prevail on this unpreserved issue, defendant must show manifest injustice. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). "[T]his Court examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997) (Riley, J.).

The trial court instructed the jury, with respect to felony-firearm, that "at the time the Defendant committed the felony of being a felon in possession of a fear arm [sic], did he

knowingly carry or possess a firearm, that is, a pistol?" The model instruction on felony-firearm, CJI2d 11.34, provides in relevant part:

> *[Use any of the following paragraphs when factually appropriate:]*
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> * * *
>
> [(7) A firearm includes any weapon from which a dangerous object can be shot or propelled by the use of explosives, gas, or air.]
>
> [(8) A pistol is a firearm.]
>
> [(9) A firearm does not include smooth bore rifles or hand-guns designed and manufactured exclusively for shooting BBs not exceeding .177 caliber by means of spring, gas, or air.]

The trial court used CJI2d 11.34(8) and instructed the jury that a "firearm" was a "pistol." Instruction CJI2d 11.34(7) or (9) was unwarranted because defendant never argued, and there was no evidence presented, that the weapon Anthony claimed he saw defendant possess or the .380-caliber gun recovered in the blueberry field were BB guns or were not weapons "from which a dangerous object could be shot" by explosives. The trial court's instructions as a whole adequately protected defendant's rights by sufficiently defining a firearm as a pistol. *Dumas, supra* at 396. We note that, contrary to defendant's contentions, the amount of rust on the gun or its exact caliber would not change the fact that it was a firearm.

Defendant next argues that he was erroneously denied credit for time served in jail while awaiting sentencing for the instant offenses.[2] Because defendant raised the issue at the sentencing hearing, it is preserved on appeal. Nevertheless, defendant's argument is unavailing. MCL 769.11b, the jail credit statute, does not apply to parolees who commit new felonies while on parole, such as defendant in this case. *People v Idziak*, 484 Mich 549, 553; 773 NW2d 616 (2009). MCL 769.11b does not apply in such circumstances because the defendant parolee continues to serve out any unexpired portion of his earlier sentence, and was therefore not in jail because he was "denied or unable to furnish bond" for the new offense, but for an independent reason. *Id.* at 559-561, quoting MCL 769.11b. Further, "a sentencing court lacks common law discretion to grant credit against a parolee's new minimum sentence in contravention of the statutory scheme. . . [and]. . . the denial of credit against a new minimum sentence does not violate the double jeopardy clauses or the equal protection clauses of the United States or Michigan constitutions." *Id.*at 552.

Finally, defendant argues that reference to Jackson's murder should be stricken from his presentence investigation report (PSIR) because it is irrelevant information that the trial court did not rely on in imposing sentence. "This Court reviews a trial court's response to a defendant's

[2] Defendant does not dispute that he was on parole at the time he committed the current offenses. The maximum term for defendant's 1998 sentence of 3 to 40 years' imprisonment for his assault with intent to rob while armed conviction had not yet run.

challenge to the accuracy of a PSIR for an abuse of discretion." *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008), citing *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). Although defendant objected to the agent's reference to Jackson's murder in the PSIR, he failed to object to his own reference to the murder in the same PSIR, and that aspect of his challenge is unpreserved. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). When the trial court finds information irrelevant, "it must strike that information from the PSIR before sending the report to the Department of Corrections." *Spanke*, *supra* at 648-649.

We conclude that the references to the fact that the police discovered defendant's responsibility for the charged offenses while interviewing a witness for the murder constituted part of the circumstances surrounding the offenses of which defendant was convicted. The PSIR "must be succinct and, depending on the circumstances, include: . . . (2) a complete description of the offense and the circumstances surrounding it." MCR 6.425(A)(2); *Morales v Mich Parole Bd*, 260 Mich App 29, 46; 676 NW2d 221 (2003). Although the trial court did not sentence defendant on the basis of any alleged connection with Jackson's murder, the trial court explained that this information provided background regarding the investigation into the circumstances surrounding the instant offenses. The trial court's decision not to strike the agent's description referencing the Jackson murder did not fall outside the range of reasonable and principled decisions under the circumstances. *Babcock, supra* at 269. Regarding defendant's own statement in the PSIR, he has not shown on appeal that a plain error requiring reversal occurred because "any statement the defendant wishes to make" may be included in the PSIR. MCR 6.425(A)(8).

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey