STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2009
v	No. 285476 Wayne Circuit Court
BRIAN K. BOYKINS, Defendant-Appellant.	LC No. 07-021072-FC

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, kidnapping, MCL 750.349, carrying a concealed weapon, MCL 750.227, 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 fourth habitual offender, MCL 769.12, to 25 to 50 years for both the armed robbery and kidnapping convictions, five to 15 years for both the carrying a concealed weapon and felon in possession of a firearm convictions, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the evidence was insufficient to support his felon in possession of a firearm conviction. We disagree. We review de novo a challenge to the sufficiency of the evidence, viewing the evidence in the light most favorable to the prosecution and determining "whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

The felon in possession statute:

> makes it a crime for a person who has been convicted of a 'specified felony,' one that either involves a substantial risk of, or contains as an element the threatened, attempted, or actual use of, physical force against a person or property, to possess a firearm until that person has had the right to possess a firearm restored pursuant to MCL 28.424 and fulfilled certain other requirements. [*People v Perkins*, 473 Mich 626, 629; 703 NW2d 448 (2005).]

At issue here is the jury's lack of knowledge of a proposed stipulation that defendant was ineligible to possess a firearm at the time of the commission of the alleged incident. The trial

court articulated its intention to instruct the jury that defendant had been previously convicted of an unnamed felony, but the parties did not formally stipulate to defendant's prior conviction, on the record, in the presence of the jury. At the conclusion of defendant's trial, the trial court did not inform the jury of the intended stipulation. Defendant argues that without knowledge of the stipulation, the jurors must have improperly inferred defendant's prior conviction from the Offender Tracking Information System (OTIS) printout, which was inadmissible when offered for its truth because the information was not trustworthy based on the following disclaimer, which can be found on the home page of the OTIS website:

> The Department of Corrections and the State of Michigan offer this information without any express or implied warranty as to its accuracy. The information on the database may not accurately reflect the most current location, *status*, projected release date or *other information* regarding an offender. Although every effort is made to maintain accurate records on this database, *no action should be taken as a result of information found herein without confirmation with the MDOC, the Michigan State Police through the use of their Internet Criminal History Access Tool (ICHAT) or a review of the court file . . . .* [http://www.state.mi.us/mdoc/asp/otis2.html (emphasis added).]

Assuming, without deciding, that this was error, it was not outcome determinative. Notwithstanding the error, defendant's conviction did not result in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defense counsel did not object to the admission of the OTIS printout into evidence and, in fact, at the beginning of trial, prior to jury selection, the parties agreed to redact the OTIS printout as follows:

> *Q* [By the Prosecution]. Now, Your Honor, there is going to be some mention of some proofs. That is, in our case our complainant once kidnapped and allowed to leave the vehicle of his captor, was able to use his foot to push certain items out of his vehicle that gave rise to his identity. That is, some phone records for Verizon. Also, an OTIS sheet, which has his name, correctional facility, his aliases and his conviction for armed robbery.
>
> We believe that this exhibit should come in. And if there is any objection to it coming in maybe we can just redact those parts that would deprive this individual of a fair trial. But I believe this should come in because this is part and parcel of the [p]eople's case as it goes to identity, and how it is that we were able to ascertain who he was.
>
> *A* [By Defense Counsel]. I agree with [the prosecution] that it [is] part of the case. I also agree with [the prosecution] that it should be redacted.
>
> *Q* [By the Court]. Yes. I think that would be the appropriate thing to do.
>
> *A* [By the Prosecution]. And can we, maybe before the trial starts, just go over, redact what we believe is patently offens[ive]; that would be the unarmed [sic] robbery offense? The other part [should] remain. Do you read the notes to enhance to the jury?

Q [By the Court]. No.

A [By the Prosecution]. Okay. What about the felon in possession? We didn't charge him in that?

Q [By the Court]. Yes, he's charged felon in possession. And it does state convicted of robbery armed, a specified felony. I'll just say a specified felony.

A [By the Prosecution]. All right.

Q [By Defense Counsel]. And we are going to stipulate, or *I will stipulate that he was ineligible*.

A [By the Court]. I have to read the Information. I'm just not going to say robbery armed. I'll just say a specified felony.

The complainant testified that defendant aimed a firearm at him as he stood nearby, and also while inside defendant's vehicle. The complainant's testimony, alone, if believed, established the possession element of felon in possession of a firearm. Defendant was identified as the perpetrator based upon the complainant's description, the Verizon phone bill, which listed defendant's address, and an OTIS printout that included defendant's photograph. When Officer Jackson investigated defendant's address, she observed a white four-door vehicle in the driveway. Moreover, defendant did not contest his status as a fourth habitual offender, which substantiates defendant's felon in possession of a firearm conviction. Viewed in the light most favorable to the prosecution, the evidence was sufficient to support defendant's felon in possession of a firearm conviction.

Defendant also argues that the prosecutor's closing remarks affected his substantial rights because it was intended to elicit a sympathetic response from the jury. We disagree. Because defendant's counsel did not object to the prosecutor's closing remarks, the issue is unpreserved and our review is for "outcome-determinative, plain error." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Reversal is only required "when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

> Prosecutorial [] misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. For example, a prosecutor may not urge the jurors to convict the defendant as part of their civic duty. This type of argument unfairly places issues into the trial that are more comprehensive than a defendant's guilt or innocence and unfairly encourages jurors not to make reasoned judgments. In addition, a prosecutor may not appeal to the jury to sympathize with the [complainant] and his family. [*People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003).]

However, "the prosecution is not required to state inferences and conclusions in the blandest possible terms." *Unger*, *supra* at 240. Here, the prosecutor argued, in relevant part:

> What's telling is, you have an everyday person, everyday man, who[se] name is Nathan Brown, goes to work. Gets off work. Stops at a party store and gets something to drink. Gets some little snuff, and is on his way home. And this individual stops and takes advantage of his good nature, asking him to come to the car. Good nature[d] Nathan Brown comes to the car. Yes? 'Get in the car.'
>
> Now Nathan Brown didn't deserve that. Nathan Brown gets in the car, has a pistol on him. And he takes him around the corner, okay? He'd just moved from the eastside [of Detroit]. He doesn't know the neighborhood.
>
> But this individual, this individual robs him of his little happiness. I got a little happiness. This man is no multimillionaire. He's somebody just trying to enjoy just a little bit of his day.
>
> ***
>
> Now, this man should not be penalized for going to work. Riding the bus. Not jumping in an Escalade [truck]. Drugs falling out of this car, reefer, blunt papers. Just some brandy, some beer, some snuff.
>
> And this person wants to take his wedding vows away from him. This is evidence. Woman sees this ring, she's supposed to stand off. He takes it and puts him out there with him. . . .

Although the prosecutor characterized the complainant as an ordinary, presumably harmless, citizen, the prosecutor did not implore the jury to sympathize with the complainant. Moreover, at the beginning of defendant's trial, the trial court instructed the jury as follows:

> After all of the evidence has been presented, the prosecutor and [] defendant's lawyer will make their closing arguments. Like the opening statements these are not evidence. They are only meant to help you understand the evidence and the way that each side sees the case. You must base your verdict only on the evidence.

"Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Unger*, *supra* at 235 (citations omitted). Accordingly, the prosecutor's closing arguments did not serious affect the fairness or integrity of defendant's proceedings. *Carines*, *supra*.

Finally, defendant argues that the trial court erred in ordering that defendant reimburse the state for his court-appointed trial counsel without *first* assessing his ability to pay. Defendant relies on *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004). However, in *People v Jackson*, 483 Mich 271; __ NW2d __(2009), the Michigan Supreme Court overruled *Dunbar* "to the extent that it required a court to conduct an ability-to pay analysis before imposing a fee for a court-appointed attorney." *Id.* at 275. The ability-to-pay assessment is only necessary when that imposition is enforced and the defendant contests his ability to pay. *Id.* Defendant has not contested the enforcement of an imposed recoupment of court-appointed attorney's fees or his

actual ability to pay. Therefore, the trial court was not required to conduct an ability-to-pay assessment.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro