

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL DERRELE MABIN,

Defendant-Appellant.

UNPUBLISHED

October 29, 2009

No. 286269

Oakland Circuit Court

LC No. 2008-218685-FH

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

PER CURIAM.

A jury convicted defendant Daniel Mabin of felon in possession of a firearm¹ and possession of a firearm during the commission of a felony, second offense.² The trial court sentenced Mabin to 2 to 7-½ years' imprisonment for the felon-in-possession conviction and to five years' imprisonment for the felony-firearm conviction. Mabin appeals as of right. We affirm.

I. Basic Facts And Procedural History

Mabin's convictions stem from the pre-raid surveillance of a Pontiac residence known for drug activity. While conducting surveillance of the home located at 17 Henderson, Pontiac Police Officer Daniel Main saw a Grand Am pull into the driveway and observed the driver get out of the vehicle and walk across the street to a party store, where he talked with Mabin in front of the store. Mabin then walked across the street and stood on the front porch of the home for a few minutes before retrieving an assault rifle from the passenger side of the Grand Am. He pointed the rifle in the air and at the house and then placed the weapon back inside the car. Mabin then walked back across the street but left the area when a police raid van approached. The police conducted a drug raid of the Henderson residence as well as a nearby apartment located at 125 Mary Day, where the police found Mabin.

¹ MCL 750.224f.

² MCL 750.227b.

II. Exculpatory Evidence And Due Process

A. Standard Of Review

Mabin argues that due process requires that the charges against him be dismissed because the police officers failed to preserve potentially exculpatory fingerprint evidence. Because Mabin failed to raise this issue below, he did not preserve it for appellate review. Therefore, our review is limited to plain error affecting his substantial rights.³ We can reverse only if the error resulted in conviction despite Mabin's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence.⁴

B. Legal Standards

A prosecutor's suppression of evidence favorable to a defendant "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."⁵ "However, where the government fails to preserve evidence whose exculpatory value is indeterminate and only 'potentially useful' to defendant, we apply a different test."⁶ A defendant must show bad faith to establish a due process violation resulting from the failure "to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."⁷

In such a case, the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means.^[8]

C. Applying The Standards To Fingerprint Testing

Here, the police did not act in bad faith by failing to preserve the rifle for fingerprint testing and the evidence tended to show that such testing would not have been exculpatory. Officer Main testified that he did not submit the rifle for fingerprint testing because he saw Mabin holding the weapon and, accordingly, there was no need for such testing. Officer Main was certain that Mabin was the individual whom he saw handling the weapon. Moreover, Officer Main testified that firearms are not usually amenable to fingerprint testing because of the

³ *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

⁴ *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

⁵ *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

⁶ *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996), quoting *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

⁷ *Youngblood*, *supra* at 57.

⁸ *Jobson*, *supra* at 218.

manner in which they are held. Thus, Mabin has failed to establish plain error affecting his substantial rights.⁹

Further, because the failure of the police to preserve the rifle for fingerprint testing did not violate Mabin's due process rights, defense counsel was not ineffective for failing to raise this issue below. Defense counsel does not render ineffective assistance by failing to assert futile arguments.¹⁰

D. Applying The Standards To The Pills

Mabin also contends that the prosecutor failed to disclose potentially exculpatory evidence regarding pills found inside a dresser in the Mary Day apartment. Mabin argues that although the prosecutor attributed ownership of the pills to him, no evidence was offered regarding what kind of pills they were, whether they were a prescription medication, or whether they belonged to him. Mabin fails to indicate how the substance of the pills or the identity of their owner could have been exculpatory, considering that he was not charged with possessing any controlled substance. During trial, Officer Main testified that no narcotics were found in the apartment. Moreover, contrary to Mabin's argument, the evidence tended to show that the pills belonged to him. They were found inside the drawer of a dresser on top of which Mabin's keys and cell phone sat. The dresser also contained rounds of ammunition suitable for the rifle that Mabin held outside the Henderson residence as well as an envelope addressed to him. Accordingly, Mabin has failed to establish plain error affecting his substantial rights.¹¹

III. Due Process, Equal Protection, And Prior Bad Acts Evidence

A. Standard Of Review

Mabin argues that he was denied his constitutional due process and equal protection guarantees when the trial court admitted evidence of other crimes, acts, and wrongs that implied that he is a drug dealer. Before trial, Mabin moved unsuccessfully to exclude Officer Main's statements regarding his drug activity observed during Officer Main's pre-raid surveillance. Thus, Mabin has preserved his argument pertaining to such statements for our review. We review a trial court's decision regarding the admission of evidence for an abuse of discretion.¹² An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes.¹³ To the extent that Mabin's argument pertains to evidence regarding

⁹ *Carines, supra* at 763, 774.

¹⁰ *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

¹¹ *Carines, supra* at 763, 774.

¹² *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

¹³ *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

which he made no objection during trial, we review for plain error affecting his substantial rights.¹⁴

B. Standards For The Res Gestae Exception To MRE 404(b)

Mabin contends that evidence regarding his alleged drug trafficking activity was inadmissible under MRE 404(b), which governs the admission of other acts evidence. We hold that such evidence was properly admissible under the res gestae exception to MRE 404(b). This exception allows the admission of evidence of other bad acts when they are so connected to the charged offense that their admission is necessary for the jury to hear the “complete story.”¹⁵ In *Sholl*, the Michigan Supreme Court recognized that “[i]t is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause.”¹⁶ In other words,

“[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.”¹⁷

Thus, MRE 404(b) does not preclude the admission of evidence intended to give the jury an intelligible presentation of the full context in which disputed events occur.¹⁸

C. Applying The Standards

Here, evidence of Mabin’s alleged drug trafficking was properly admitted to explain why the police were investigating him and why they executed drug raids on two residences with which he was associated. Officer Main testified that Mabin was the target of the police officers’ investigation. The testimony regarding drug trafficking in the area of the Henderson residence and the baggies and digital scale found in the Mary Day apartment told the “complete story” surrounding the offenses. Thus, the trial court properly admitted the evidence under the res gestae exception to MRE 404(b). In any event, although Officer Main testified that he observed several narcotics transactions while conducting pre-raid surveillance of the Henderson residence, he also stated that Mabin was not involved in any of the transactions that he witnessed. Further, Officer Main testified that although the police discovered “miscellaneous pills” in the Mary Day apartment, they did not find any narcotics. Accordingly, other than the drug paraphernalia found in the apartment, no evidence directly linked Mabin to drug trafficking. And because the trial

¹⁴ *Carines, supra* at 763, 774.

¹⁵ *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).

¹⁶ *Id.*, quoting *Arizona v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964).

¹⁷ *Id.*, *supra* at 742, quoting *Villavicencio, supra* at 201.

¹⁸ *Id.* at 741.

court properly admitted the evidence, defense counsel was not ineffective to the extent that counsel failed to object to the admission of the evidence below.¹⁹

IV. Prosecutorial Misconduct

A. Standard Of Review

Mabin contends that the prosecutor's remarks during closing argument denied him a fair and impartial trial. Generally, "[w]e review de novo claims of prosecutorial misconduct to determine whether a defendant was denied a fair and impartial trial."²⁰ Because Mabin failed to preserve this issue for appellate review by objecting to the alleged instances of misconduct, however, we review for plain error affecting his substantial rights.²¹ "When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context."²²

B. The Implication Of Drug Dealing

Mabin first challenges the prosecutor's remarks implying that he is a drug dealer. He contends that the evidence did not support the remarks, that they were unrelated to the charged offenses, and that they were offered only to inflame the jurors and appeal to their fears and prejudices. As we previously discussed, Officer Main's testimony supported the prosecutor's theory that Mabin was engaged in drug trafficking and the trial court's admission of the testimony was necessary to tell the complete story and provide the full context regarding the pre-raid surveillance and Mabin's possession of the rifle. Thus, Mabin has failed to establish plain error in this regard.²³

C. The Mary Day Apartment Address

Mabin also challenges the prosecutor's argument that he used the Henderson residence as his "official" address but maintained a second residence at the Mary Day apartment, where he kept his illicit property, such as drug paraphernalia and ammunition. Mabin contends that the prosecutor relied on facts not admitted into evidence to support this argument. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but . . . is free to argue the evidence and any reasonable inferences that may arise from the evidence."²⁴

Here, the evidence admitted during trial, and reasonable inferences therefrom, supported the prosecutor's argument. The evidence showed that Mabin used the Henderson address for

¹⁹ *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

²⁰ *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

²¹ *Id.* at 451.

²² *Id.*

²³ *Id.*

²⁴ *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

purposes of his parole, and representatives from the parole office coincidentally appeared at the Henderson residence on the night of the raid. In addition, in the Mary Day apartment, the police recovered an envelope addressed to Mabin using the Henderson address. The envelope was found in the drawer of a dresser that also contained rounds of ammunition suitable for use with the rifle that Officer Main observed Mabin holding outside the Henderson residence. Also inside the dresser, Officer Main recovered baggies commonly used for packaging narcotics and a digital scale commonly used in narcotics sales. Further, the police found Mabin's keys and cell phone on top of the dresser. The key ring held a key that unlocked the door to the apartment. A tan sweatshirt that Officer Main observed Mabin wearing while he was holding the rifle was hanging near the apartment door.

Thus, the evidence and inferences therefrom showed that although Mabin used "17 Henderson" as his "official" address, he resided at the Mary Day apartment and kept his illicit property there. Mabin argues that the evidence did not support the prosecutor's assertion that baseball hats and condoms were found at the apartment. The prosecutor contends that these items were pictured in photographs taken of the apartment and admitted into evidence during trial. Even if Mabin is correct, however, any error was harmless considering that baseball hats and condoms are generic items that would not have identified him in particular as a resident of the apartment. Accordingly, Mabin has failed to establish plain error affecting his substantial rights.²⁵ Further, counsel was not ineffective for failing to make a futile objection to the prosecutor's argument.²⁶

D. Vouching For Witness Credibility

Mabin also argues that the prosecutor improperly vouched for his witnesses' credibility by implying that he brings cases to court only when all of the elements of an offense have been established. A prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness."²⁷ "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief."²⁸

During rebuttal argument, the prosecutor stated:

We saw him at both locations. And to say we're trying to change a story, no. I can tell you something. We don't focus on things that aren't elements. You are going to hear, you make your decision on the facts, on the elements of the case.

²⁵ *Cox, supra* at 451.

²⁶ *Mack, supra* at 130.

²⁷ *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

²⁸ *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

When read in context, the record shows that the prosecutor's remarks were made in response to defense counsel's argument that the prosecutor's witnesses were not credible. Defense counsel contended that the police arrested Mabin merely because he was the target of their investigation. Counsel theorized that this was why the police did not test the rifle for fingerprints and why Officer Main did not arrest Mabin immediately after he allegedly observed him holding the weapon. A prosecutor may respond to defense counsel's closing argument, and his remarks will be considered in light of those of defense counsel.²⁹ Here, the prosecutor's comments merely responded to defense counsel's assertion and argued that the police officers were credible. Accordingly, no plain error occurred, and defense counsel was not ineffective for failing to object to the remarks.³⁰

V. Prior Felony Convictions

A. Standard Of Review

Mabin argues that the trial court abused its discretion by rejecting his offer to stipulate to the existence of prior felony convictions and instead admitting a record of those convictions as evidence during trial. We review a trial court's decision admitting evidence for an abuse of discretion.³¹

B. Legal Standards

Mabin relies on *Old Chief v United States*,³² which involved facts substantially similar to the instant case. In *Old Chief*, the United States Supreme Court stated:

In dealing with the specific problem raised by [the federal felon-in-possession statute] and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious^[33]

In *People v Swint*,³⁴ this Court found *Old Chief* persuasive and held that the trial court in *Swint* abused its discretion by rejecting the defendant's offer to stipulate that he committed

²⁹ *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

³⁰ *Cox, supra* at 451; *Mack, supra* at 130.

³¹ *Aldrich, supra* at 113.

³² *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997).

³³ *Id.* at 185.

³⁴ *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997).

felonious assault in lieu of informing the jury that he was previously convicted of assault with a dangerous weapon. This Court, however, determined that the error was harmless in light of the overwhelming evidence against the defendant.³⁵

Here, similarly, the trial court abused its discretion by admitting evidence of Mabin's prior convictions of armed robbery and assault with intent to commit murder in lieu of his stipulation to having committed a prior felony. Also similar to *Swint*, however, Mabin has not shown that it is more probable than not that the error was outcome determinative, and, as such, reversal is not warranted.³⁶ Officer Main testified that he saw Mabin retrieve the rifle from the Grand Am and point it in the air and toward the Henderson residence before returning it to the car. Officer Main was positive that Mabin was the person holding the weapon, recognized him from previous investigatory work, and had previously seen him at both the Henderson and Mary Day residences. Officer Main testified that the area was well lit and that he was using binoculars. When the police arrested Mabin at the Mary Day apartment shortly thereafter, he was wearing the same black tee shirt worn by the person who had held the weapon. The police also found the tan sweatshirt worn by the person who handled the weapon hanging near the door of the apartment. It had been raining, and the sweatshirt was wet. As we previously discussed, items the police found in the Mary Day apartment were connected with Mabin. Moreover, once detained, Mabin told the police that he was scared and that he had just been in the area of Huron and Henderson, where the police were raiding a house. Thus, the evidence overwhelmingly established Mabin's guilt.

Further, the trial court provided a cautionary instruction regarding the proper use of the evidence involving Mabin's previous convictions. "It is well established that jurors are presumed to follow their instructions."³⁷ Accordingly, reversal is not warranted.³⁸

VI. Sufficiency Of The Evidence

A. Standard Of Review

Mabin argues that the evidence was insufficient to support his convictions and that his convictions are against the great weight of the evidence. When determining whether sufficient evidence exists to support a conviction, we view the evidence in the light most favorable to the prosecution and determine whether a rational fact-finder could conclude that the prosecutor proved every element of the offense beyond a reasonable doubt.³⁹ We must draw all reasonable inferences and make credibility determinations in support of the jury verdict.⁴⁰ Because Mabin

³⁵ *Id.*

³⁶ *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

³⁷ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

³⁸ *Lukity*, *supra* at 495-496.

³⁹ *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

⁴⁰ *Nowack*, *supra* at 400.

failed to preserve this argument for our review by raising it in a motion for a new trial in the trial court, we review for plain error affecting his substantial rights.⁴¹

B. Applying The Standards

Both of Mabin's challenges lack merit for the reasons previously discussed. Moreover, Mabin's theory of defense was misidentification. He argues that both he and David Harris were arrested for possessing the weapon because the police were unsure which of them had actually done so. The jury apparently rejected this theory, disbelieved Harris's testimony, and credited the testimony of the police officers. The trier of fact is to determine questions regarding witness credibility and the weight of the evidence.⁴²

VII. Attorney Fees

A. Standard Of Review

Mabin argues that the trial court erred by ordering him to pay attorney fees for his court-appointed attorney. Because Mabin failed to object to the order requiring him to pay attorney fees below, we review for plain error affecting his substantial rights.⁴³

B. MCL 769.1k

MCL 769.1k allows a trial court to "impose a fee for a court-appointed attorney as part of a defendant's sentence[.]"⁴⁴ That provision provides, in relevant part:

(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

* * *

(b) The court may impose any or all of the following:

* * *

(iii) The expenses of providing legal assistance to the defendant.

⁴¹ *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

⁴² *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

⁴³ *People v Trapp*, 280 Mich App 598, 601; 760 NW2d 791 (2008), overruled in part on other grounds in *People v Jackson*, 483 Mich 271, 292 n 18; 769 NW2d 630 (2009).

⁴⁴ *Jackson*, *supra* at 283.

MCL 769.1l provides for the enforcement of an attorney fee order against an imprisoned defendant.⁴⁵

C. Applying The Statute

Mabin argues that the attorney fee order must be vacated because the employment and financial information in his presentence investigation report does not show that he has the ability to pay attorney fees either now or in the future. In *People v Dunbar*,⁴⁶ this Court held that if a trial court orders a defendant to reimburse the county for court-appointed attorney fees, the court must provide some indication that it considered the defendant's ability to pay. Recently, in *Jackson*, the Michigan Supreme Court overruled *Dunbar* and held that MCL 769.1k contains no such requirement. Rather, the Court held that a defendant is not entitled to an assessment of his ability to pay until the order imposing the fee is enforced and that trial courts should not entertain challenges based on a defendant's inability to pay until that time.⁴⁷ Thus, although Mabin is free to raise this issue when the attorney fee order is enforced, his argument that the order must be vacated based on his ability to pay at the time of sentencing lacks merit. Therefore, no plain error occurred and defense counsel was not ineffective for failing to object to the attorney fee order.⁴⁸

VIII. Sentencing

Mabin raises several issues pertaining to his sentences. Mabin's five-year felony-firearm sentence is statutorily mandated and, as such, is presumptively proportionate.⁴⁹ Further, because Mabin's two-year minimum sentence for his felon-in-possession conviction is within the appropriate sentencing guidelines range, we must affirm the sentence absent an error in scoring the guidelines or reliance on inaccurate information.⁵⁰ We note that Mabin waived appellate review of these issues by requesting that the trial court follow the sentence recommendation articulated in the PSIR.⁵¹ In any event, as we briefly discuss below, Mabin's arguments lack merit.

Mabin contends that the failure to conduct a substance abuse assessment resulted in his sentence being based on inaccurate or incomplete information. Neither MCL 771.14(2) nor MCR 6.425(A) required that a substance abuse assessment be conducted. Moreover, despite his arguments on appeal, Mabin specifically denied having a substance abuse problem when

⁴⁵ *Id.*

⁴⁶ *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004), overruled in *Jackson*, *supra* at 275, 290.

⁴⁷ *Id.* at 292.

⁴⁸ *Mack*, *supra* at 130.

⁴⁹ MCL 750.227b(1); *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002).

⁵⁰ MCL 769.34(10); *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

⁵¹ See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

interviewed for the purpose of preparing the PSIR. Thus, Mabin has failed to show that he was sentenced based on inaccurate or incomplete information.

Mabin also argues that, based on his addiction to controlled substances, the trial court erred by failing to depart downward from the recommended minimum sentence range. As previously stated, however, we are required to affirm Mabin's felon-in-possession sentence because it is within the appropriate guidelines range and did not result from a scoring error or reliance on inaccurate information.⁵² We also reject Mabin's argument that his sentence is disproportionate and constitutes either cruel or unusual punishment in violation of the state and federal constitutions. MCL 769.34(10) does not apply to claims of constitutional error.⁵³ (We again note that Mabin's request to be sentenced in accordance with the PSIR recommendation waived appellate review of this issue.⁵⁴) A sentence within the guidelines range is presumptively proportionate and a proportionate sentence does not constitute cruel or unusual punishment.⁵⁵ Mabin has failed to overcome the presumptive proportionality of his sentences.

Finally, Mabin contends that he was denied his rights to due process and equal protection when the trial court failed to consider all mitigating evidence, in particular, a substance abuse assessment. As we previously discussed, however, neither MCL 771.14(2) nor MCR 6.425(A) required that a substance abuse assessment be conducted. Further, Mabin fails to cite any constitutional provision requiring that such an assessment be performed. Thus, his argument lacks merit.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck

⁵² MCL 769.34(10); *Endres, supra* at 417.

⁵³ *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

⁵⁴ See *Carter, supra* at 215-216.

⁵⁵ *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).