STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2010
v	No. 292634 Washtenaw Circuit Court
DONALD ARTHUR SHUMPERT, III, Defendant-Appellant.	LC No. 08-001183-FC

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of carjacking, MCL 750.529a; conspiracy to commit carjacking, MCL 750.529a and MCL 750.157a; armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; resisting and obstructing, MCL 750.81d(1); fleeing and eluding, MCL 257.602a(3)(a); and carrying a concealed weapon, MCL 750.227(3). The trial court sentenced defendant to serve a two-year prison sentence for the felony-firearm conviction to run consecutively to defendant's remaining, concurrent sentences: 15 to 30 years in prison for the carjacking, armed robbery, and conspiracy convictions; 40 to 60 months in prison for the carrying a concealed weapon and fleeing and eluding convictions; and 12 to 24 months for the resisting and obstructing conviction. Defendant appeals, and we affirm but remand for correction of defendant's judgment of sentence because of inaccuracies noted in this opinion.

I. Facts

Defendant and an accomplice held Jarvis Dixson at gunpoint and demanded his watch and keys. After they robbed Dixson, the two men drove away in Dixson's Suburban. Dixson called 911 and reported that the perpetrators had been driving a white Impala before they stole his vehicle. Police spotted the Suburban and Impala traveling eastbound on I-94. The driver of the Impala pulled over, but a police chase ensued when the driver of the Suburban failed to pull over. After several miles, officers were able to physically stop the Suburban. Defendant attempted to flee on foot, but was ultimately taken into custody. Another occupant of the Suburban escaped. The driver of the Impala, James Robinson, identified defendant as Dixson's assailant and identified the other man as Lexie Taylor.

II. Analysis

A. Sufficiency of the Evidence

Defendant argues that the prosecution presented insufficient evidence to sustain his convictions for carjacking, conspiracy to commit carjacking, armed robbery, and conspiracy to commit armed robbery.[1]

The carjacking statute, MCL 740.529a, provides: "A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years." To obtain a conviction for armed robbery, the prosecution must prove that a defendant (1) used force or violence, or committed an assault or put a person in fear; (2) feloniously took property from the victim's person or presence; and (3) possessed "a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon," or represented, orally or otherwise, that he possessed a dangerous weapon. MCL 750.529; *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004).

Dixson testified that, after the men pointed a gun in his face and stole his keys and watch, he heard someone start his vehicle and drive away. It is reasonable to infer that Dixson was placed in fear when defendant pointed a handgun at his face. Further, police found that the handgun was loaded and it was, therefore, a dangerous weapon. This evidence established all elements of defendant's carjacking and armed robbery convictions. Defendant claims that he was not at the scene of the crime and that Dixson inaccurately described his clothing. However, James Robinson testified about defendant's direct involvement in the crime and identified him as one of the perpetrators of the robbery and carjacking.

Defendant challenges Robinson's testimony and argues that Robinson received a favorable plea. This constitutes a challenge to Robinson's credibility, and we will not interfere with the jury's role of weighing the credibility of witnesses. *People v Bulls*, 262 Mich App 618, 623; 687 NW2d 159 (2004). Further, Robinson acknowledged during his testimony that he had received a substantially favorable plea agreement, so the jury had this information to consider while assessing Robinson's credibility. Moreover, the trial court specifically instructed the jury to consider Robinson's motives in testifying, to examine Robinson's testimony closely, and to be careful about accepting it. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant also argues that Robinson's testimony was "unbelievable." Again, however,

[1] "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

"[t]he credibility of witnesses and the weight accorded to evidence are questions for the jury . . . ." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

We also reject defendant's challenge to the sufficiency of the evidence related to the conspiracy charges for armed robbery and carjacking. "Conspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). It is not necessary to offer direct proof of a conspiracy; it is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact, and circumstantial evidence may be used to establish the existence of the conspiracy. *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). After his arrest, defendant told police that he and Taylor had talked about stealing a car with aftermarket rims that evening and that defendant had a connection in Detroit who would buy the rims. Though defendant maintained that he had stayed at a friend's apartment while Taylor and Robinson went to take the car, Robinson testified that defendant not only participated in the robbery and carjacking, he led the others to target Dixson and his vehicle. Clearly, evidence showed that defendant agreed to combine for the purpose of committing these crimes.

Defendant also maintains that insufficient evidence supported his conviction for felony-firearm. "The elements of felony-firearm are that the defendant possessed a firearm 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 exists when a person knows the location of and has reasonable access to the firearm. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Defendant's argument is premised on his earlier challenges to the sufficiency of the evidence related to the armed robbery and carjacking convictions. Were we to accept those arguments, however, he has not challenged his fleeing and eluding conviction. After defendant was taken into custody, police searched the stolen Suburban and recovered two firearms. The shotgun was wedged against the console between the two front seats and the handgun was found on the floorboards of the front passenger seat. Regardless whether defendant held either weapon during the extended car chase, the location of the weapons constituted constructive possession. This evidence established that defendant was in possession of a firearm during the commission of the felony of fleeing and eluding. Accordingly, we reject defendant's claim that his conviction for felony-firearm should be vacated.[2]

B. Assistance of Counsel

[2] Defendant argues that the prosecutor presented insufficient evidence at the preliminary examination to bind him over for trial. However, because sufficient evidence supported defendant's convictions, if defendant could demonstrate some error at the preliminary examination, he would not be entitled to any relief. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). We also reject this as a basis for defendant's claim of ineffective assistance of counsel. Further, to the extent defendant asserts that the prosecutor engaged in misconduct and that the trial court incorrectly admitted evidence, we treat these issues as abandoned for failure to provide adequate citation to authority and failure to identify either issue in the statement of questions presented. See *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008); *People v Unger (On Remand)*, 278 Mich App 210, 262; 749 NW2d 272 (2008).

Defendant argues that his attorney was ineffective when he failed to object to the trial court's order that he serve his sentence for felony-firearm before the sentences for all of his other convictions.[3] The felony-firearm statute, MCL 750.227b, states: "A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony." Our Supreme Court has interpreted this language to mean that a sentence imposed for a felony-firearm conviction is to be served consecutively only to the sentence for a specific underlying felony. *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). More than one underlying felony can be identified for a single charge of felony-firearm. *Id*. at 464 n 11.

Here, the trial court ordered that all of defendant's sentences be served consecutively with and after his sentence for the felony-firearm conviction, but concurrently to each other. However, the felony information identified only carjacking, armed robbery, and fleeing and eluding as the underlying felonies related to the charge for felony-firearm. Accordingly, defendant is correct that his judgment of sentence is inaccurate and that it should be corrected. Nonetheless, trial counsel's failure to object to this error did not constitute ineffective assistance of counsel because defendant cannot show that, absent the error, the result of the proceedings would have been different. If defendant serves his felony-firearm sentence concurrently with his sentences for conspiracy, carrying a concealed weapon and resisting and obstructing, he must nonetheless serve the felony-firearm sentence before he begins his sentence for carjacking and armed robbery and his earliest release date is not affected by the sentence.

Defendant claims that his counsel was ineffective because he failed to ask Dixson during cross-examination whether he could identify defendant as his assailant. While defendant asserts that Dixson would not have been able to identify him, this is merely speculative.[4] Moreover, Robinson identified defendant as the first gunman, evidence showed that defendant drove the stolen vehicle and engaged police in a high-speed chase to avoid arrest, and defendant admitted that, earlier in the evening, he discussed stealing a vehicle similar to the one taken from Dixson. In light of this evidence, it appears that defense counsel's decision not to ask Dixson whether he

[3] To preserve a claim of ineffective assistance of counsel, a defendant must make a motion for a new trial or request an evidentiary hearing in the trial court. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant did not request a new trial or an evidentiary hearing, so our review is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

[4] We note that defendant's brief indicates, by referencing trial counsel's opening statement, that Dixson was unable to provide an identification on at least one prior occasion. However, a review of the preliminary examination transcript demonstrates that Dixson was never asked to identify defendant. The only time Dixson indicated an inability to identify a suspect was in reference to the second gunman with the shotgun, whose face was covered.

could identify defendant was a matter of trial strategy. "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant claims that his attorney was also ineffective because he failed to move to suppress his statement to police on ground that it was involuntary. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Here, defendant signed a *Miranda*[5] waiver. A *Miranda* waiver is voluntary if it was "the product of free and deliberate choice rather than intimidation, coercion, or deception." *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). Defendant asserts that police coerced his statement because he was tired and dehydrated from running from police and from being tasered. However, defendant's complaints are the result of his own conduct. Defendant cannot establish that his statement was involuntary if he has not demonstrated the existence of *police* coercion. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). Accordingly, it is unlikely that a motion to suppress would have been successful. Trial counsel is not ineffective for failing to file a meritless motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant argues that counsel was ineffective because he failed to call defendant's fiancé as witness and, according to defendant, she could have provided an alibi defense. A decision whether to call a witness is a matter of trial strategy that can constitute ineffective assistance only if defendant shows that it deprived him of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant claims that his fiancé would have testified that he was at home with her earlier in the evening on the day of the crime. However, defendant does not claim that his fiancé could have provided him with an alibi for the time when the armed robbery and carjacking occurred. And, if she so testified, it would contradict defendant's own statements to police that he was at a friend's place when the robbery occurred and that Taylor picked him up there in the stolen vehicle. Accordingly, defendant has failed to show how this testimony would have had any impact on the jury's verdict and we reject his claim of error.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

[5] *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).