STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH COOPER,

Defendant-Appellant.

UNPUBLISHED
October 14, 2003

No. 240830
Wayne Circuit Court
LC No. 01-005593-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE D. STOVALL,

Defendant-Appellant.

No. 240831
Wayne Circuit Court
LC No. 01-005593-02

Before: Whitbeck, C.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendants Cooper and Stovall were tried jointly, before separate juries. Defendant Cooper was convicted following a jury trial of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, armed robbery, MCL 750.529, possession of another's financial transaction device with intent to use, deliver, circulate, or sell, MCL 750.157p, possession of a firearm by a person convicted of a felony, MCL 750.224f, and carrying or possessing a firearm when committing a felony, MCL 750.227b. He was sentenced to life imprisonment, to be served consecutively to two years' imprisonment for his felony-firearm conviction. Defendant Stovall was convicted of possession of another's financial transaction device with intent to use, deliver, circulate, or sell, MCL 750.157p, and possession of a firearm by a person convicted of a felony, MCL 750.224f. He was sentenced, as a fourth habitual offender, MCL 769.12, to two to four years' imprisonment for his possession of a stolen credit card conviction, and ten to thirty years' imprisonment for his possession of a firearm by a felon conviction. Defendant Cooper appeals as of right in Docket No. 240830, and defendant Stovall appeals as of right in Docket No. 240831. We affirm defendant Cooper's convictions for felony-murder, possession of another's financial transaction device with intent to use, deliver, circulate,

or sell, felon in possession of a firearm, and felony-firearm, and vacate his convictions for second-degree murder and armed robbery, and remand for correction of defendant Cooper's judgment of sentence to indicate that his felony-firearm sentence cannot be imposed consecutive to his felon in possession of a firearm sentence. We affirm defendant Stovall's convictions and sentences.

I. Defendant Cooper's Claims

A. Sufficiency of the Evidence

Defendant Cooper argues that insufficient evidence was presented at trial for a rational jury to find beyond a reasonable doubt that he committed felony-murder. This Court reviews a sufficiency of the evidence claim de novo by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crimes charged were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of a set of specifically enumerated felonies. *People v Carines*, 460 Mich 750, 754, 597 NW2d 130, 136 (1999).

Viewed in the light most favorable to the prosecution, sufficient evidence was presented at trial for a rational jury to find beyond a reasonable doubt that defendant Cooper shot and killed Lleshaj during an armed robbery. Karen Bright, a friend of Lleshaj who was present at the crime, testified to seeing an African American male shoot Lleshaj with a Tech-9 automatic firearm. Approximately two hours after Lleshaj had been shot, defendant Cooper was in possession of Lleshaj's wallet and making purchases with Lleshaj's credit card. When making the purchases, the Livonia Meijers' video surveillance camera depicted defendant Cooper wearing a vinyl blue Michigan State jacket. The same or similar jacket was found at defendant Cooper's sister's house and contained gunshot residue. Three days after Lleshaj was killed, defendant Cooper was seen wearing a disguise and carrying a Tech-9 that was identified as the type of gun used to kill Lleshaj. Defendant Cooper maintains that it is possible that Lleshaj lost his wallet during the course of the evening or that he came into possession of the wallet sometime after the police secured Lleshaj's person. However, "the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002), citing *People v Konrad*, 449 Mich 263, 273, n 6, 536 NW2d 517 (1995). Therefore, taken in the light most favorable to the prosecution, sufficient evidence was presented at trial for a rational trier of fact to find that defendant Cooper shot and killed Lleshaj during an armed robbery.[1]

[1] In addition, there was evidence presented that defendants were together on the night in (continued…)

B. Ineffective Assistance of Counsel

Defendant Cooper argues that he was denied the effective assistance of counsel when defense counsel did not elicit testimony from Bright that defendant Cooper was not the shooter. Because defendant Cooper failed to move for an evidentiary hearing or motion for new trial before the trial court, this Court will only consider counsel's mistakes to the extent that they are apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that (1) "counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment," and (2) "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 599-600, 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

At trial, Bright testified that although the police showed her many photographs, she could not identify the shooter. She testified that after the police began to pressure her into identifying the shooter, she choose two random photographs, neither of which were defendants. She attended a live line-up at which defendant Stovall was present, but did not identify defendant Stovall as the shooter. She did not identify defendant Cooper or defendant Stovall as the shooter at the preliminary examination.

After the prosecutor's direct examination of Bright, there was a break in the proceedings. During this time, the prosecutor learned that Bright believed that she could identify defendant Cooper as the shooter. The prosecution indicated that it would not elicit an in-court identification of defendant Cooper. Defense counsel believed that if she cross-examined Bright, the prosecution could then ask Bright to identify defendant Cooper as the shooter. The trial court agreed, stating that Bright's previous failures in identifying defendant Cooper did not preclude an in-court identification. Defense counsel decided not to cross-examine Bright and defendant Cooper apparently consented to that decision.

On appeal, defendant Cooper argues that defense counsel's failure to elicit evidence that Bright testified under oath that defendant Cooper was not the shooter constituted ineffective

(…continued)

question, possibly driving a dark car. Further, evidence was presented that indicated defendants' presence at the crime scene. Bright testified that another person was present in the dark car that the shooter had exited. At some point the next day, Tolliver-Wooden asked defendant Stovall where the credit card had come from. He responded, "someone had gotten hurt and not to worry about it." Considering that defendants were together on the night in question, possibly in a dark car, and that defendant Stovall had knowledge that "someone had gotten hurt" in regard to Lleshaj's credit card, there was sufficient evidence to infer that defendants were together at the crime scene.

assistance of counsel. A defendant is presumed to have received effective assistance of counsel, and he bears a heavy burden of proving otherwise. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000), citing *People v Plummer*, 229 Mich App 293, 308, 581 NW2d 753 (1998). Conduct of counsel is presumed to be sound trial strategy and will not be reviewed with the benefit of hindsight. *Id*. That a strategy did not work does not render it ineffective assistance of counsel. *Id*.

First, defense counsel expressed that defendant Cooper agreed with the decision not to cross-examine Bright. Defendant Cooper cannot now claim that this strategy denied him his right to effective assistance of counsel. To allow him to do so would permit him to "harbor error as an appellate parachute." *People v Carter*, 462 Mich 206, 214, 612 NW2d 144 (2000). Thus, defendant Cooper waived review of this issue.

Even if not waived, defendant Cooper fails to establish ineffective assistance of counsel because defense counsel's decision not to cross-examine Bright was a matter of trial strategy. Defendant Cooper maintains that defense counsel could have objected to the trial court's decision to admit Bright's potential in-court identification and argued that Bright's previous misidentifications barred an in-court identification. In support, defendant Cooper notes that defense counsel could have established that the preliminary examination and trial were unduly suggestive procedures and that the in-court identification would not have resulted from a sufficiently independent basis. *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).

However, in each case cited by defendant Cooper, the prosecution elicited an in-court identification as substantive evidence in its case-in-chief. Here, assuming the prosecution would have elicited the in-court identification, the prosecution would only have been challenging the weight given to Bright's previous misidentifications by eliciting testimony that she changed her mind and could identify defendant Cooper as the shooter. "This was a credibility issue that was properly before the jury to determine." *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995). Further, the prosecution would also have been able to impeach Bright's earlier inconsistent trial testimony. Therefore, defense counsel's decision not to cross-examine Bright is a matter of sound trial strategy.

Moreover, defendant Cooper has failed to show that his defense counsel's decision not to cross-examine Bright prejudiced his defense. Bright did not identify him at trial. Rather, she testified that she could not identify the shooter. Even the prosecution, in its closing argument, stated that "Bright didn't know who the shooter was." Thus, defendant Cooper has not demonstrated prejudice and was not denied the effective assistance of counsel.

Defendant Cooper also argues that the trial court's ruling in this regard violated his right to present a defense by limiting his options to cross-examine Bright. Review of this unpreserved claim is for plain error affecting substantial rights. *Carines*, *supra* at 761-762.

A defendant's constitutional right to present a defense and confront his accusers is secured by the right to cross-examination guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). However, the right to present a defense is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984).

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Hayes, supra* at 278-279, citing *Washington v Texas*, 388 US 14, 19, 87 S Ct 1920, 1923, 18 L Ed 2d 1019 (1967).

Defendant Cooper was not denied his right to present a defense. He was permitted to cross-examine Bright to elicit testimony regarding her previous misidentifications. Further, assuming that the prosecution would have then elicited an in-court identification, defendant Cooper could have impeached this testimony through further cross-examination. Thus, defendant Cooper has not shown a plain error affecting his substantial rights.

C. Improperly Admitted Evidence

Defendant Cooper argues that the trial court improperly admitted evidence of gunshot residue taken from a jacket because it lacked probative value and because the prosecutor failed to establish a foundation to admit the jacket. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. "'Relevant evidence' means evidence having 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." MRE 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Evidence of gunshot residue on the jacket was relevant to defendant Cooper's involvement in the crime, and therefore properly admitted. Lleshaj was shot three times with a firearm. That same morning, defendant Stovall called Tolliver-Wooden and asked her to pick up defendant Cooper to go to the store. When Tolliver-Wooden arrived, defendant Cooper was wearing a vinyl blue Michigan State jacket. Tolliver-Wooden and defendant Cooper made several purchases using Lleshaj's credit card. A Livonia Meijers' security camera depicted defendant Cooper wearing a vinyl blue Michigan State jacket inside the store. During a later search of defendant Cooper's sister's house, the police discovered a vinyl blue Michigan State jacket. Since, shortly after Lleshaj was shot, defendant Cooper was seen while making purchases on Lleshaj's credit card in a vinyl blue Michigan State jacket, it is likely that he acquired the credit card from Lleshaj during a robbery which involved a weapon and that there would be gunshot residue on an identical jacket found at his sister's house. Therefore, the gunshot residue was relevant to establishing defendant Cooper's involvement in Lleshaj's death.

Regarding defendant Cooper's contention of a lack of foundation to admit the jacket, "[t]he rule governing the admission of physical evidence requires that a proper foundation be laid and that the articles be identified as that which they purport to be and that the articles are shown to be connected with the crime or with the accused." *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987), citing *People v Hence*, 110 Mich App 154, 161; 312 NW2d 191 (1981). The admissibility of real evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994).

Defendant Cooper specifically notes that the jacket was found in someone else's home almost two months after the offense and had been worn by a police officer before testing for gunshot residue to determine the accuracy of the Livonia Meijers' security camera. Here, the jacket appeared similar to that which defendant Cooper wore at the Livonia Meijers and was found at defendant Cooper's sister's house. Further, there was testimony that if the jacket was stored at a house, the gunshot residue could last for several months regardless of whether a police officer wore the jacket once. Thus, a proper foundation was laid because there was evidence that the gunshot residue found on the jacket was related to the crime and because the gunshot residue could last for several months.

D. Cumulative Error

Defendant Cooper next argues that the cumulative affect of errors requires reversal. In order to avoid forfeiture of an unpreserved issue on appeal, defendant Cooper must show that a plain error affected his substantial rights. *Carines, supra*. Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to error requiring reversal. *People v Morris*, 139 Mich 550, 563; 362 NW2d 830 (1984). "'Cumulative error,' properly understood, actually refers to cumulative unfair *prejudice*, and is properly considered in connection with issues of harmless error." "Only the unfair prejudice of several *actual* errors can be aggregated to satisfy the standards set forth in [*Carines, supra*, 460 Mich 774.]" *Leblanc, supra*, 465 Mich 592 n 12 (emphasis in original). Since there were no errors that resulted in unfair prejudice to defendant, there is no cumulative effect of a number of minor errors. Therefore, defendant has failed to establish plain error affecting substantial rights, and this issue is accordingly forfeited.

E. Double Jeopardy

Defendant argues that his second-degree murder and armed robbery convictions violate double jeopardy. Defendant Cooper failed to raise this issue at trial and therefore failed to preserve it for our review. This Court reviews unpreserved claims of constitutional error for plain error that affected substantial rights. *Carines, supra* at 761-762.

The United States and Michigan Constitutions contain provisions that prohibit "placing a defendant twice in jeopardy for a single offense." US Const, Am V; Const 1963, art 1, sec 15; Const. 1963, art. 1, § 15. This protection against double jeopardy not only attaches to successive prosecutions for the same offense, but also attaches to multiple punishments for the same offense. *People v John Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000).

The jury convicted defendant Cooper of first-degree felony murder, second-degree murder, and armed robbery. The trial court sentenced defendant for each of his convictions.

Defendant Cooper first contends that his convictions for first-degree felony murder and the underlying felony of armed robbery violate his constitutional right against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. We agree. Convicting a defendant of both felony murder and the underlying felony violates the constitutional protections against double jeopardy. *People v Wilder*, 411 Mich 328, 352; 308 NW2d 112 (1981); *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). The appropriate remedy is to vacate the conviction and sentence for the underlying felony. *Id.* Therefore, defendant Cooper's conviction and sentence for armed robbery is vacated.

Defendant Cooper further contends that his convictions and sentences for first-degree felony murder and second-degree murder violate his constitutional right against double jeopardy. We agree. "Multiple murder convictions arising from the death of a single victim violate double jeopardy." *John Clark, supra*. Further, a defendant "cannot properly be convicted of both first-degree murder and the lesser included offense of second-degree murder for the death of a single victim." *Id*. The appropriate remedy is to vacate the conviction and sentence for second-degree murder and affirm his first-degree felony murder conviction and sentence. *Id.,* at 430. Therefore, defendant Cooper's conviction and sentence for second-degree murder is vacated.

F. Sentencing Error

Defendant Cooper last argues that his judgment of sentence must be amended because his conviction for felony-firearm was imposed consecutively to his sentence for felon in possession of a firearm. We agree. "[T]he plain language of the felony-firearm statute [evidences] [] that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony." *People v Rajahaan Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). Thus, a "felony-firearm sentence is consecutive only to the corresponding conviction." *Id*., at 465.

Here, the jury was not instructed that the offense of being a felon in possession of a firearm was a predicate felony to convict defendant Cooper for felony-firearm. Therefore, defendant Cooper's felon in possession of a firearm sentence cannot be imposed consecutive to his felony-firearm sentence. Accordingly, we remand this case to the trial court for correction of the judgment of sentence.

II. Defendant Stovall's Claims

A. Ineffective Assistance of Counsel

Defendant Stovall first argues that defense counsel's failure to stipulate to an unspecified prior felony conviction as the predicate felony for felon in possession of a firearm constituted ineffective assistance. Further, defendant Stovall contends that he suffered prejudice from counsel's decision because that previous conviction was for a crime that he was also charged with at trial. Because defendant Cooper failed to move for an evidentiary hearing or motion for new trial before the trial court, this Court will only consider counsel mistakes to the extent that they are apparent on the record. *Johnson, supra* at 129-130. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *LeBlanc, supra* at 579.

To establish ineffective assistance of counsel, a defendant must show that (1) "counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment," and (2) "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin, supra*, citing *Strickland, supra*.

Although a felony conviction is a required element of establishing a defendant's guilt of a charge of felon in possession, the prosecution and the defense counsel may agree to stipulate that the defendant has been convicted of an unspecified prior felony in order to minimize any prejudice to the defendant. See *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999); *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

A defendant is presumed to have received effective assistance of counsel, and he bears a heavy burden of proving otherwise. *Williams, supra*, citing *Plummer, supra*. Conduct of counsel is presumed to be sound trial strategy and will not be reviewed with the benefit of hindsight. *Id*. That a strategy did not work does not render it ineffective assistance of counsel. *Id*.

We presume that trial counsel's failure to stipulate to an unspecified felony is trial strategy. It is reasonable that defense counsel decided to reveal defendant Stovall's prior felony conviction rather than allow the jury to speculate on the nature of that prior felony. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Thus, defendant Stovall has not shown ineffective assistance of counsel.

B. Prosecutorial Misconduct

Defendant Stovell next argues that the prosecution's comments during its opening statement and closing argument denied him fair trial. Because defendant failed to object to any of the prosecution's comments, this Court review is limited to plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but he/she is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant Stovell cites one instance in the prosecution's opening statement and ten instances in its closing argument where the prosecution stated that the gun used in Lleshaj's murder belonged to defendant Stovell. Defendant Stovall argues that that this was improper because the only evidence presented that connected him to a gun was Bright's testimony that she saw defendant Stovell with the gun one day and saw defendant Cooper with the gun the next day.

However, defendant Stovell fails to mention that the prosecution impeached Bright's testimony with previous testimony taken under oath at an investigative subpoena. During this testimony, Bright admitted that she would "always see" defendant Stovell with the gun. Because the prior testimony was given under oath and was inconsistent with her trial testimony, the previous statement was non-hearsay, and therefore substantive evidence from which the

prosecution could permissibly argue that defendant Stovell possessed the gun on multiple occasions; that he owned the gun. MRE 801(d)(1)(A). Therefore, defendant has failed to show plain error affecting his substantial rights.

C. Instructional Error

Defendant Stovall next argues that the trial court improperly instructed the jury that the date of the offense was "on or about December 24, 2000" rather than "December 24, 2000," because it constructively amended the information which stated the date of the offense was December 24, 2000, and that it permitted the jury to find defendant Stovall guilty of felon in possession of a firearm based on testimony relating to December 28, 2000.

"A party waives review of the propriety of jury instructions when he approves the instructions at trial." *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), citing *Carter*, *supra* at 215. In this case, the trial court instructed the jury that "[i]n this case the charge is that the date of possession is on or about December 24, 2000." Afterwards, the trial court solicited objections from the parties, and the defendant did not object; rather, defense counsel affirmatively approved the "on or about" language. Defendant now asserts that the trial court improperly instructed the jury in regard to this language, but defendant had waived the issue.

Defendant Stovall further argues that defense counsel was ineffective in failing to object to the instruction because it constructively amended the information. To establish ineffective assistance of counsel, a defendant must show that (1) "counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment," and (2) "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, *supra*, citing *Strickland*, *supra*.

Defendant Stovall specifically argues that this supplemental instruction constructively amended the information. MCR 2.114(H), provides in relevant part: "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant."

First, there was no unfair surprise as the jury was instructed that "the evidence must convince you beyond a reasonable doubt the crimes occurred on or about December 24, 2000. . . ." Further, "[a] defendant is not prejudiced by an amendment to the information to cure a defect in the offense charged where the original information was sufficient to inform the defendant and the court of the nature of the charge." *People v Covington*, 132 Mich App 79, 86, 346 NW2d 903 (1984), citing *People v Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980). Here, information was sufficient to inform defendant Stovall of the nature of the charge. Therefore, there was no error in "constructively" amending the information to indicate that the date of the offense was "on or about December 24, 2000," rather than "December 24, 2000." Because there no error in the trial court's conduct, defense counsel need not make a futile objection. Accordingly, defendant Stovall was not denied the effective assistance of counsel.

D. Sufficiency of the Evidence

Defendant Stovall argues that there is insufficient evidence to support his felon in possession of a firearm conviction. This Court reviews a sufficiency of the evidence claim de novo by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crimes charged were proven beyond a reasonable doubt. *Wolfe*, *supra*; *Hampton*, *supra*.

The elements of felon in possession of a firearm are (1) the defendant possessed a firearm, (2) the defendant was convicted of a felony, and (3) less than five years had elapsed since the defendant served the prison term imposed for the conviction of the felony and successfully completed all conditions of parole. MCL 750.224f(2) and (6). Defendant Stovall specifically challenges the possession element of the offense. Possession of a firearm may be either actual or constructive; constructive possession exists " 'if the location of the weapon is known and it is reasonably accessible to the defendant." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

Defendants stopped over Tolliver-Wooden's house a few days after December 24, 2000. Defendant Cooper had an automatic weapon, a Tech-DC9. Tolliver-Wooden testified that she did not know who owned the gun, but that "I know I seen [defendant Stovall] one day and seen [defendant Cooper] with it another day." The prosecution then presented to Tolliver-Wooden her statements taken from an investigative subpoena proceedings, in which the following discourse took place while she was under oath:

> *The Prosecution*: Is that the gun you would always see [defendant Cooper] with when you saw him with the gun or did you observe him with other weapons?
>
> *Tolliver-Wooden*: That's the gun I would always see [defendant Stovall] with, that was the first time ever seeing [defendant Cooper] with that gun.

Tolliver-Wooden then stated that she did not remember having made the statement, but that she did not dispute having given that testimony. Here, Tolliver-Wooden testified at trial and was subject to cross-examination concerning her statement, and the statement was "inconsistent with [her] testimony, and was given under oath subject to the penalty of perjury at a [] proceeding." MRE 801(d)(1). Therefore, the statement is not hearsay, and admissible as substantive evidence. MRE 801(d). Considering this statement in the light most favorable to the prosecution, there is sufficient evidence to find defendant Stovall actually possessed a firearm.

Moreover, although the jury acquitted defendant Stovall of robbery and homicide, there was sufficient evidence to support a finding that defendant Stovall shot and robbed Lleshaj, and thereby possessed the firearm. Juries are permitted to render inconsistent or lenient verdicts. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). Further,

> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to

> believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. [*Id*.]

Tolliver-Wooden's testimony indicates that defendant Stovall possessed the firearm before December 24, 2000. Defendant Stovall knew that the holder of the credit card had been hurt and defendant Stovall had possession of Lleshaj's credit card after Lleshaj was killed, which he then gave to defendant Cooper. Though defendant Stovall was acquitted of robbing and killing Lleshaj, there was sufficient evidence that defendant Stovall possessed the firearm before the offense, was present at the offense in which the gun was used, and a rational jury may have believed beyond a reasonable doubt that defendant Stovall possessed the firearm on December 24, 2000. Thus, sufficient evidence was presented for a rational jury to find beyond a reasonable doubt that defendant Stovall possessed a firearm.

V. Sentencing

Defendant Stovall last argues that the trial court committed several sentencing errors. Since the instant offense occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2). Defendant Stovall was sentenced to ten to thirty years for his convictions. His sentencing guidelines were scored at twenty-four to seventy-six months. Thus, defendant's Stovall's minimum sentence of ten years exceeds his sentencing guidelines range by forty-four months.

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in [MCL 777.1 *et seq*.] if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. [MCL 769.34(3).]

In *People v Babcock*, ___ Mich ___; 666 NW2d 231, 245 (2003), the Supreme Court addressed the applicable standard of review regarding departures from the sentencing guidelines as follows:

> The existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate court as a matter of law. . . . A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes. [internal citations omitted.]

Defendant Stovall first argues that the trial court improperly relied on his criminal history in departing from his sentencing guidelines range because his criminal history is considered in establishing the sentencing guidelines range. We disagree.

The departure sheet does not indicate that the trial court departed from defendant's sentencing guidelines on the basis of his criminal record. The trial court merely explained that

"[g]iven defendant Stovall's past criminal history he was sentenced as a fourth habitual offender to a term of 10-30 years." Notwithstanding this statement, the express reasons stated by the trial court to justify the upward departure do not include criminal history. The trial court's express reasons to justify departure are addressed at the end of the document, after the court observed that defendant Stovall's criminal history supported his sentence as a fourth habitual offender. Thus, defendant Stovall's argument is without merit.

Defendant Stovall next argues that the trial court erred because it found that the evidence presented at trial that implicated him in the robbery and shooting of Lleshaj was a substantial and compelling reason to depart from the guidelines even though defendant Stovall was scored 100 points under Offense Variable (OV) 3 for the death of the Lleshaj.

Where a victim dies, 100 points are assessed under OV 3. MCL 777.33. Further, MCL 777.33(2), states that "[a]ll of the following apply to scoring offense variable 3:

> (a) In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.
> (b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.

Defendant Stovall does not object to being scored 100 points under OV 3. Rather, he argues that OV 3 considers his involvement in the death of Lleshaj and therefore cannot be used as a substantial and compelling reason for departure from his sentencing guidelines. However, OV 3 addresses only the physical harm to a victim and does not consider a defendant's specific actions relating to the crime that results in death. A sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals. *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Further, "[t]he scoring of the guidelines need not be consistent with the jury verdict." *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), citing *People v Ratkov*, 201 Mich App. 123, 125-126; 505 NW2d 886 (1993). Because OV 3 considers only the actual physical harm to a victim and not a defendant's actions leading to that harm, defendant Stovall's contention is inapposite.

Defendant Stovall last argues that the trial court's stated reasons for guideline departure were not substantial and compelling. The trial court stated the following reasons to justify departure from defendant's sentencing guidelines: (1) the evidence at trial implicated defendant Stovall in the robbery and shooting of Lleshaj; (2) discipline; (3) protection of the community; (4) no potential for reformation; and (5) as a deterrent to future crime; (6) the firearm defendant Stovall possessed was an automatic weapon; and (7) and that when he was arrested he was wearing body armor.

> [A] "substantial and compelling reason" must be construed to mean an "objective and verifiable" reason that "'keenly' or 'irresistibly' grabs our attention"; is "of 'considerable worth' in deciding the length of a sentence"; and "exists only in exceptional cases." [*supra, Babcock II* (internal citation omitted).]

We agree with defendant Stovall that discipline, protection of the community, no potential for reformation, and as a deterrent for crime, are not by themselves substantial and compelling reasons. These "reasons [] have been cited in other cases as factors traditionally

considered when imposing any sentence, *People v Coles*, 417 Mich 523, 550, 339 NW2d 440 (1983)." *People v Antolovich*, 207 Mich App 714, 720-721; 525 NW2d 513 (1994). Further, without factual support for these conclusions, these "reasons [] would apply equally to a lesser or greater sentence. . . ." *Id*., at 721 citing *People v Milbourn*, 435 Mich 630, 660; 461 NW2d 1 (1990).

However, we find that defendant Stovall's possession of the automatic machine gun that killed Lleshaj and his wearing body armor when arrested are substantial and compelling reasons for sentencing guideline departure. The record reflects that Lleshaj was killed by the same automatic weapon that defendant Stovall was convicted of possessing. Thus, this reason was objective and verifiable. Moreover, the record reflects that defendant Stovall had possessed Lleshaj's credit cared and had knowledge that Lleshaj was injured. Consequently, defendant Stovall's possession of the weapon that inflicted the damage and his involvement in the robbery and homicide evidence a keen and irresistible reason to depart from the guidelines. And although defendant Stovall was acquitted of the robbery and murder charges, the trial court properly found that his involvement in those offenses was of considerable importance in determining the length of defendant Stovall's sentence.

Furthermore, the circumstances surrounding defendant Stovall's arrest constitute a substantial and compelling reason to justify guideline departure. Sergeant Diaz of the Inkster Police Department attempted to pull over defendant Stovall's vehicle, but defendant Stovall refused to stop even after Diaz activated his overhead lights. Defendant Stovall eventually stopped the vehicle, and was found driving the vehicle while wearing a bulletproof vest. The trial court found that defendant Stovall's fleeing from the police while wearing a bulletproof vest evidenced further involvement in dangerous criminal activity. We agree that the circumstances surrounding defendant Stovall's arrest is a keen and irresistible reason to depart from the sentencing guidelines range. Also, his continued involvement in dangerous criminal activity until arrest for the instant offenses is of considerable worth in deciding the length of his felon in possession of a firearm sentence. Therefore, the trial court properly found that defendant's possession of an automatic weapon that was used in the shooting and robbery of Lleshaj and the circumstances of his arrest constitute substantial and compelling reasons for sentence guideline departure.

Moreover, we also find that "the trial court would have departed, and would have departed to the same degree, on the basis of the actual substantial and compelling reasons alone." *Babcock II*, *supra*. The trial court did not articulate a factual basis in addressing the need to discipline defendant, protect of the community, the absence of potential for reformation, and need to deter crime. Rather, the record reflects that these reasons were stated to parrot those reasons contained in prosecution's sentencing memorandum. Therefore, they appear to have not been given substantial weight. On the other hand, the trial court articulated that defendant Stovall's involvement in the robbery and murder, his possession of the same type of gun that killed Lleshaj, and the circumstances surrounding his arrest, were the basis for its decision to depart from the sentencing guidelines. Therefore, the trial court would have departed, and would have departed to the same degree, on the basis of the actual substantial and compelling reasons alone.

In Docket No. 240830, we affirm defendant Cooper's convictions for felony-murder, possession of another's financial transaction device with intent to use, deliver, circulate, or sell,

felon in possession of a firearm, and felony-firearm, and vacate his convictions for second-degree murder and armed robbery, and remand for correction of defendant Cooper's judgment of sentence to indicate that his felony-firearm sentence cannot be imposed consecutive to his felon in possession of a firearm sentence. In Docket No. 240831, we affirm defendant Stovall's convictions and sentences.

/s/ William C. Whitbeck
/s/ Brian K. Zahra