

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DESHAWN WALLACE,

Defendant-Appellant.

UNPUBLISHED

May 10, 2012

No. 303036

Muskegon Circuit Court

LC No. 10-059392-FH

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant, Anthony Deshawn Wallace, appeals as of right his convictions, following a jury trial, for felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 3 to 20 years' imprisonment for the felon in possession of a firearm conviction, two years' imprisonment for the felony-firearm conviction, and 38 days for the possession of marijuana conviction. For the reasons stated in this opinion, we affirm.

I. FACTUAL BACKGROUND

This case stems from the discovery of a gun and quantity of marijuana in defendant's bedroom. On August 12, 2009, defendant was allegedly living with his mother, Penny Wallace, who discovered the gun and marijuana in her home while cleaning. Penny called her West Michigan Therapy case manager, Ann Dean, because Penny was receiving rental assistance and was worried she would lose her home if a gun and marijuana were found in it. Dean described Penny as "frantic" when she called. Dean arrived at Penny's residence a short time later, and found Penny pacing nervously in the yard. Dean told Penny the gun needed to be removed and Dean called 911. Penny was on parole at the time, and Dean also contacted Penny's parole agent, Brandi Sones, who arrived a short time later. Dean and Sones both testified that defendant was living at Penny's residence during the summer of 2009.

Steven Stout, a police officer, arrived in response to the 911 call sometime between 1:00 p.m. and 2:00 p.m. When Stout arrived, he was greeted by Penny and Dean. Stout noticed that Penny appeared to be "quite upset." Penny told Stout that she found a gun when she was cleaning defendant's room. Stout followed Penny inside and Penny retrieved the gun, which was a .38-caliber special revolver. Penny also turned over a shoebox that contained the marijuana.

Stout took both the marijuana and the gun into custody. During the time Stout was at the residence, defendant was not present.

Defendant's fingerprint was found on the revolver seized. No prints were found on the marijuana bags, but a detective specializing in evidence, testified that it was not common to find prints on low quality "sandwich baggies" like those containing the marijuana.

Testimony was presented at trial regarding evidence relating to defendant having a concealed weapon in a vehicle. This incident occurred in 2001 and was admitted pursuant to MRE 404(b). Two different officers testified regarding their involvement in a traffic stop involving defendant in 2001. The officers indicated that defendant was combative and uncooperative, and that after defendant was taken into custody, a .44-caliber revolver was discovered hidden in the vehicle. Both officers testified that the .44-caliber revolver found in 2001 was similar to the .38-caliber revolver found in defendant's bedroom.

Defendant's longtime friend, Antwann Ray, testified at trial that he saw Penny and defendant fighting sometime in early August 2009. Ray claimed he saw Penny and defendant fighting at approximately 11:30 p.m. and Ray believed he saw Penny brandishing something that "looked like a gun."

Defendant also testified at trial. Defendant acknowledged he had a prior felony conviction. Defendant claimed he was not living at his mother's house on August 12, 2009, but instead was living at a different address with an unspecified aunt between June 2009 and August 2009. Defendant claimed he never lived with Penny. Defendant also asserted the gun and marijuana found at Penny's residence did not belong to him. Defendant provided a number of theories for how his fingerprint ended up on the gun found, including that he might have "swatted" it during a dispute with Penny. Defendant's testimony was inconsistent because, while he contended he likely touched the gun inadvertently during a conflict with Penny, he maintained he had never seen the weapon before trial. Defendant said he had an altercation with his mother in early August 2009, where his mother asked him for money for "crack" and, when he refused, she brandished a gun at him. Defendant testified he believed his mother was "setting him up" in retaliation for refusing to provide her with money for "crack."

In rebuttal, the prosecutor recalled the sergeant at the state police crime lab who testified that, in his expert opinion, it was unlikely that the print found on the gun could have been the result of someone "swatting" at the gun, as defendant indicated he may have done.

On the second day of trial defendant called Penny's sister, Joanie Annette Wallace, as a witness and the prosecution immediately objected. The jury was excused. Defendant argued that Joanie should be permitted to testify that Penny allegedly told her, while they were fighting months after defendant's arrest, "I'm going to set you up like I set up Cheesy." Defendant's trial counsel claimed "Cheesy" was a nickname for defendant. The prosecutor argued that the testimony would constitute impermissible hearsay. The trial court eventually determined that the testimony was improper hearsay, and ruled that Joanie would not be permitted to testify regarding the conversation.

II. ADMISSION OF PRIOR BAD ACTS EVIDENCE

Defendant first argues the trial court erred in admitting evidence relating to a prior bad act involving a 2001 traffic stop where defendant was found to be in possession of a concealed weapon.

We review a trial court's decision to admit evidence, including evidence admitted pursuant to MRE 404(b) for "an abuse of discretion." *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010) (quotation omitted); see also *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). "[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Questions of law are reviewed de novo. *Id.* "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.*

Generally, evidence of prior bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). However, evidence of prior bad acts or crimes may be admissible to show "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." MRE 404(b)(2). In order for evidence to be admitted under MRE 404(b), the prosecution must first establish the evidence "is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity." *Mardlin*, 487 Mich at 615. "[T]he prosecution may not mechanically recite a permissible reason [pursuant to MRE 404(b)] without explaining how the evidence is relevant." *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford*, 458 Mich at 387; see also MRE 401.

In the present case, the prosecutor offered the evidence under both a "knowledge" theory and an "absence of mistake or accident" theory.

In *Crawford*, 468 Mich at 380, the Court addressed the "knowledge" theory of admission. In that case, the defendant was charged with possession with intent to deliver cocaine. *Id.* The prosecutor sought the admission of evidence of a "prior drug crime" of defendant pursuant to MRE 404(b). *Id.* The prosecutor argued the prior drug crime was relevant to show the defendant had "knowledge" of the cocaine hidden in his vehicle relating to the pending charges. *Id.* at 381. In *Crawford*, the defendant contended he was not aware of the drugs found in his vehicle for purposes of the pending charge and that he had purchased the vehicle "just five to ten days before his arrest." *Id.* at 382.

The *Crawford* Court determined that the evidence of the prior bad act in 1988 was not admissible to show likely knowledge of drugs hidden in the defendant's vehicle because the incidents were dissimilar. *Id.* at 395-396. The 1988 bad act involved the defendant selling drugs to an undercover police officer, whereas the charged offense in *Crawford* involved a hidden cache of drugs in the dashboard of the defendant's vehicle. *Id.* at 396. Our Supreme Court found the similarity between the two offenses to be "too remote for the jury to draw a

permissible intermediate inference.” *Id.* The Court further stated in *Crawford*, 458 Mich App at 396-397:

The prior conviction only demonstrates that the defendant has been around drugs in the past and, thus, is the kind of person who would knowingly possess and intend to deliver large amounts of cocaine. To the extent that the 1988 conviction is logically relevant to show that the defendant was also a drug dealer in 1992, we believe it does so solely by way of the forbidden intermediate inference of bad character that is specifically prohibited by MRE 404(b). Thus, the defendant’s prior conviction was mere character evidence masquerading as evidence of “knowledge” and “intent.” Because MRE 404(b) expressly prohibits the use of prior bad acts to demonstrate a defendant’s propensity to form a certain mens rea, we hold that the trial court abused its discretion in admitting evidence of the defendant’s prior conviction and reverse and remand the case for a new trial.

We conclude that the present case is similar to *Crawford*. The possession of a gun by defendant approximately ten years earlier, found hidden in his vehicle during a stop by police, has little similarity to defendant’s acts forming the basis of his conviction. Accordingly, the evidence of defendant’s 2001 gun possession was not properly admitted to show “knowledge” under MRE 404(b) because, as in *Crawford*, the evidence is too dissimilar from the charged offense to be properly admitted. *Id.* at 396. This is not a case where defendant’s knowledge of some element of an offense is a point of contention and the evidence was not admissible to demonstrate defendant’s “knowledge” under MRE 404(b). See *People v Werner*, 254 Mich App 528, 529, 539-540; 659 NW2d 688 (2002).

Additionally, we conclude that the 2001 gun possession was not admissible to show “absence of mistake or accident.” This is not a case where defendant contends he did not know what a gun was or did not know the gun was somewhere within his admitted control. Instead, defendant denied living at Penny’s residence and denied ever possessing the gun in question. In *People v Sabin (After Remand)*, 463 Mich 43, 69; 614 NW2d 888 (2000), our Supreme Court determined that absence of mistake was not a proper purpose where the “defendant’s theory of defense was not that the complainant mistakenly perceived his actions, but that the entire incident did not take place.” See also *Yost*, 278 Mich App at 403.

The present case is also not one where defendant admits to possessing the gun, but claims it was by mistake. Defendant denied ever possessing the gun or living at Penny’s residence. Consequently, “absence of mistake or accident” was not a proper purpose for admitting the 2001 gun possession incident. Thus, we conclude that the trial court abused its discretion in admitting this evidence.

Having concluded that the evidence was improperly admitted, we must determine whether the introduction of the improper evidence constitutes error warranting reversal. For preserved, “nonconstitutional error,” as here with an evidentiary question, the burden is on defendant to demonstrate that “after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice.” *Lukity*, 460 Mich at 491, 495. In order to demonstrate that reversal is required, a defendant must show that “such an error is prejudicial” and “the appropriate inquiry focuses on the nature of the error and assesses its

effect in light of the weight and strength of the untainted evidence.” *Id.* at 495. (quotation omitted). “[A] defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative.” *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

In *McGhee*, 268 Mich App at 621, evidence was improperly admitted under MRE 404(b), and the defendant argued that reversal was required because:

[T]he improperly admitted evidence affected the outcome of the trial because the prosecution could not place defendant in contact with the drugs, others had access to the house and garage, the circumstantial proof of the residency documents was not decisive, and even with the improper admission of the inadmissible evidence, the jury at one point informed the court that it could not reach a verdict.

This Court concluded that reversal was not required under the standard for preserved nonconstitutional errors because the other, untainted evidence was sufficient to convict the defendant. *Id.* at 621-622.

Similarly, the untainted evidence in this case demonstrated that defendant lived in the bedroom where the gun and marijuana were found and that defendant’s fingerprint was found on the gun. While defendant contended his print might have been on the gun because he “swatted” at a gun when Penny allegedly brandished a gun at him, the fingerprint expert, during rebuttal, testified that the nature of the fingerprint was inconsistent with someone swatting at the gun. The untainted evidence was sufficient to find defendant guilty beyond a reasonable doubt, as discussed more fully *infra*. Accordingly, reversal is not required because the untainted evidence was sufficient to convict defendant. *Id.*

Additionally, the jury was instructed regarding the limitations on the use of the MRE 404(b) evidence. “Jurors are presumed to follow instructions, and instructions are presumed to cure most errors.” *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). Even where evidence is erroneously admitted pursuant to MRE 404(b), the limiting instruction reduces the “jury’s reliance on the evidence.” *McGhee*, 268 Mich App at 621. Because defendant has failed to demonstrate that “it is more probable than not that the error in question was outcome determinative,” reversal is not required. *Elston*, 462 Mich at 766.

III. EXCLUSION OF TESTIMONY

Defendant next argues the trial court erred in excluding the testimony of Joanie, Penny’s sister. Defendant maintains Joanie would have testified that, months after the gun was found in defendant’s bedroom, Penny stated she would set Joanie up just like she set up defendant. On appeal, defendant argues the testimony was admissible pursuant to MRE 803(3), MRE 804(B)(3), and, even if inadmissible under the rules of evidence, defendant was entitled to present the evidence pursuant to his constitutional right to present a defense.

We review defendant’s preserved argument regarding MRE 803(3) for “an abuse of discretion.” *Mardlin*, 487 Mich at 614 (quotation omitted). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *Yost*, 278 Mich App at 379. “[D]ecisions regarding the admission of evidence frequently involve preliminary

questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence.” *Lukity*, 460 Mich at 488. Questions of law are reviewed de novo. *Id.*

Defendant failed to raise his arguments regarding MRE 804(b)(3) and his right to present a defense in the trial court; accordingly, those arguments are not properly preserved for appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review defendant’s unpreserved arguments for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). To demonstrate plain error, a defendant must show: (1) error occurred; (2) the error was plain; and (3) the plain error affected substantial rights. *Id.* at 763. “The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.* The burden is on defendant to demonstrate prejudice. *Id.*

Defendant first argues the testimony should have been admitted pursuant to MRE 803(3), which provides an exception to the hearsay rule. It is not disputed that the proposed testimony constituted hearsay. “‘Hearsay’ is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c).

MRE 803(3) provides that hearsay is admissible if it is a “statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed”

Joanie’s testimony that Penny admitted to setting up defendant was a hearsay statement regarding Penny’s past actions. MRE 803(3) does not allow for the admission of statements of past actions or events. *People v Moorner*, 262 Mich App 64, 72-73; 683 NW2d 736 (2004). “[A] statement explaining a past sequence of events, from the standpoint of the declarant at the time of the statement, is a ‘statement of memory or belief’ that is explicitly excluded from the exception.” *Id.* at 73. Therefore, we conclude that the trial court did not err in excluding the testimony.

Next, defendant argues that Penny’s statement would be admissible pursuant to MRE 804(b)(3) as a statement against her penal interest.

MRE 804(b)(3) provides:

Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Defendant’s entire argument focuses on the fact that the statement allegedly made by Penny that she “set up” defendant was against Penny’s penal interest because it must mean she

filed a false police report or committed perjury. While the statement would appear to be one against penal interest, defendant's argument on appeal fails to acknowledge that the hearsay exceptions of MRE 804, including MRE 804(b)(3), only apply where the declarant, in this case Penny, is unavailable as a witness. MRE 804(b); see also *People v Taylor*, 482 Mich 368, 379; 759 NW2d 361 (2008).

MRE 804(a) defines when a witness is unavailable. Penny was not unavailable for purposes of MRE 804 because Penny testified at trial. Therefore, we conclude that the trial court did not plainly err in failing to admit the evidence under MRE 804(b)(3). See *Carines*, 460 Mich at 764-765.

Finally, defendant argues that the preclusion of the testimony violated his right to present a defense.

Our Supreme Court has recognized that, “[i]t is well settled that the right to assert a defense may permissibly be limited by established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000) (quotation omitted). Moreover, to succeed on a claim that a trial court denied defendant's right to present a defense, defendant must demonstrate he was deprived of a “substantial defense.” *Petri*, 279 Mich App at 420.

Defendant fails to present any argument regarding why Michigan's hearsay rules should be disregarded and, instead, merely argues that the present case is similar to the facts of *Chambers v Mississippi*, 410 US 284, 296; 93 S Ct 1038; 35 L Ed 2d 297 (1973). *Chambers* involved the denial of the defendant's right to cross-examine his own witness because “of a Mississippi common-law rule that a party may not impeach his own witness.” The trial court also excluded other witnesses the defendant in *Chambers* wished to call. *Id.* at 298. The three excluded witnesses would have testified that another individual, shortly after the crime, admitted to the murder that the defendant in *Chambers* was accused of committing. *Id.*

The instant case is distinguishable from *Chambers*, in that Mississippi, at the time, did not recognize a statement against penal interest exception, did not allow for cross-examination of witnesses called by a party, and involved three different individuals hearing a direct confession from another individual that he committed the crime defendant was accused of committing. *Id.* at 300-301. In the present case, the statement at issue was allegedly made almost a year after the gun was found in defendant's room, was only made to one witness, and, even though Michigan provides that statements against penal interest may be admissible, the statement in the present case was not admissible, for the reasons discussed above. There was no denial of defendant's right to present a substantial defense and even *Chambers* recognized that an accused must generally “comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id.* at 302. The evidence in the present case was less reliable and less critical than the evidence excluded in *Chambers*.

Accordingly, because the evidence in this case was not admissible under established rules of procedure, defendant has failed to demonstrate the existence of a plain error affecting his substantial rights.

IV. DEFENDANT'S STANDARD 4 BRIEF

In his Standard 4 brief, defendant first argues the evidence was insufficient to support his convictions. Specifically, defendant argues the evidence was insufficient to demonstrate that he possessed a firearm.

We review a challenge to the sufficiency of the evidence de novo. *McGhee*, 268 Mich App at 622. We consider the evidence in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). We will “not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

In order to convict a defendant for felon in possession of a firearm, the prosecutor must demonstrate that: (1) defendant possessed a firearm, (2) defendant has been convicted of a prior specified felony, (3) and defendant has not regained his eligibility to possess a firearm. MCL 750.224f, see also *People v Parker*, 230 Mich App 677, 684-685; 584 NW2d 753 (1998).

“[T]he term ‘possession’ includes both actual and constructive possession. . . . [p]ut another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Physical possession is not necessary as long as the defendant has constructive possession.” *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (quotation omitted).

In the present case, viewing the evidence in a light most favorable to the prosecution, the circumstantial evidence demonstrated that defendant constructively possessed the gun found hidden in his bedroom at his mother’s house. *Aldrich*, 246 Mich App at 124. Penny testified that defendant was living with her on August 12, 2009, the day the gun was found. The gun was found hidden in defendant’s bedroom. Defendant’s fingerprint was found on the gun. Additionally, men’s cologne and deodorant were found in the room where the gun was found, indicating a man lived in that room. Viewing these “evidentiary facts not in isolation, but in conjunction with one another, in a light most favorable to the prosecution,” *Nowack*, 462 Mich at 404, we find there was “sufficient evidence to justify a rational trier of fact in finding that” defendant constructively possessed the gun because it was in a location known and readily accessible to him, *People v Phelps*, 288 Mich App 123, 131-132; 791 NW2d 732 (2010). Moreover, “[c]ircumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.” *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993) (citations omitted).

A defendant may be convicted for felony-firearm where “the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); MCL 750.227b. Because the evidence discussed above demonstrates that defendant possessed a firearm during the commission of the felony of felon in possession of a firearm, the evidence was sufficient to convict defendant of felony-firearm.

Defendant additionally argues that the evidence was not sufficient to prove that he possessed marijuana.

MCL 333.7403(2)(d) criminalizes the possession of marijuana. An individual violates MCL 333.7403(2)(d) if he “knowingly or intentionally possess[es]” marijuana.

The substance found in defendant’s bedroom was identified at trial as marijuana. An individual may be convicted based on the constructive possession of marijuana. See *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). “Possession may be either actual or constructive, and may be joint as well as exclusive. The essential question is whether the defendant had dominion or control over the controlled substance.” *Id.* (citation omitted).

Where, as here, the evidence demonstrates that defendant used a particular bedroom in a residence where the controlled substance was found and a gun with defendant’s fingerprint on it was found in the same bedroom, there is sufficient evidence to support a conviction. *Id.* at 516; see also *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000). When viewed in a light most favorable to the prosecution, the evidence demonstrated that defendant resided with Penny and that marijuana was found hidden in defendant’s bedroom along with male hygiene products, establishing constructive possession of the marijuana by defendant because it was found in his room.

Next, defendant argues that the trial court erred in admitting the testimony of the fingerprint expert concluding that defendant’s fingerprint was found on the gun. Defendant’s trial counsel stipulated to the fact that the fingerprint found on the gun matched defendant’s fingerprint. A stipulation constitutes a waiver of any alleged error. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver is “the intentional relinquishment or abandonment of a known right.” *Id.* (quotations omitted). Accordingly, we conclude that defendant’s stipulation extinguished any claim of error.

Defendant next argues his “arguments” were preserved by moving for a judgment of acquittal, but defendant fails to address this contention in the body of his brief. A party may not merely announce a position and leave it to this Court to rationalize that position. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Accordingly, we decline to address this issue because it is abandoned.

Defendant next argues his constitutional right to remain silent was improperly commented on by the prosecutor. Defendant has failed to cite to the record for this unpreserved claim and we find no obvious instances in the record of the prosecutor improperly commenting on defendant’s constitutional right to remain silent. Defendant also argues the trial court erred in allowing the prosecutor to call a rebuttal witness, but again fails to cite to any factual or legal basis for this claim. A “[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position.” *Petri*, 279 Mich App at 413. Further, a party may not merely announce a position and leave it to this Court to rationalize that position. *Harris*, 261 Mich App at 50. We decline to address these abandoned and unpreserved arguments.

Defendant next argues the trial court erred in failing to read an instruction with respect to his theory of the case.

Because this issue was not preserved, we review it for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764-765. Additionally, to the extent interpretation of the court rules is necessary, review is de novo. *People v Lacalamita*, 286 Mich App 467, 472; 780 NW2d 311 (2009).

A claim of instructional error is generally reviewed de novo. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). Challenges to jury instructions are considered "in their entirety to determine whether the trial court committed error requiring reversal." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Instructions must include "all the elements of the charged offense." *Id.* However, even imperfect jury instructions "do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id.*

"When interpreting a court rule, the first step is to consider the language of the rule. If the language of the court rule is clear and unambiguous, then no further interpretation is required or allowed." *Id.* (quotations omitted). The use of the term "'may' is permissive, as opposed to the term 'shall,' which carries a mandatory, nondiscretionary connotation." *People v Brown*, 249 Mich App 382, 386; 642 NW2d 382 (2002).

MCR 2.512(A)(2) provides that a party may submit their theory of the case to be read to the jury. MCR 2.512(B)(2) provides: "Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case."

Accordingly, MCR 2.512(B)(2), by using the word "shall," only requires that the trial court to provide a theory of the case "if a party requests" it in accordance with MCR 2.512(A)(2). Defendant did not submit a written theory of the case instruction. The plain language of the rule is that a party is not entitled to an instruction unless they submit a written theory of their case. See MCR 2.512(B)(2).

Further, to the extent defendant implies the jury instructions did not adequately inform the jury that he could not be convicted if he merely "swatted" at the gun, we disagree. The jury was instructed that defendant needed to have possessed the gun and the jury was instructed that possession meant that defendant needed to either have "control" of the gun or the right to "control it." "Jurors are presumed to follow their instructions." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). We find that the instructions herein "fairly presented the issues for trial" and that defendant has failed to demonstrate error occurred. *Canales*, 243 Mich App at 574. Therefore, defendant is not entitled to any relief in regard to the instruction of the jury.

Defendant next argues the prosecutor engaged in misconduct.

All but one of defendant's prosecutorial misconduct arguments has been abandoned because defendant has failed to provide a factual or legal basis for his arguments. See *Petri*, 279 Mich App at 413; see also *Harris*, 261 Mich App at 50. Accordingly, we will address only defendant's claim that the prosecutor improperly referenced the 2001 traffic stop, admitted pursuant to MRE 404(b), addressed *supra*.

We review this unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

While we have found that this 2001 traffic stop was not properly admissible under MRE 404(b), a "prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). In this case there is no evidence to suggest that the prosecutor acted in bad faith in admitting the evidence. Consequently, defendant has failed to demonstrate plain error affecting his substantial rights.

Defendant next argues the trial court erred in denying a request by the jury, during deliberations, to be provided with the testimony of a witness. Because defendant failed to preserve this issue, it is reviewed for "plain error affecting his substantial rights." *People v Holmes*, 482 Mich 1105; 758 NW2d 262 (2008), citing *Carines*, 460 Mich at 763. At the time of defendant's trial, MCR 6.414(J)¹ provided the guidelines relating to jury requests to review testimony.

MCR 6.414(J) provided:

Review of Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

"When interpreting a court rule, the first step is to consider the language of the rule. If the language of the court rule is clear and unambiguous, then no further interpretation is required or allowed." *Lacalamita*, 286 Mich App at 472_(quotations omitted). In the present case, the trial court informed the jury it wanted them to deliberate further and make an effort to remember the testimony, but also stated that if the jury deliberated further and still found the testimony was necessary that it would be provided. MCR 6.414(J) plainly allowed the trial court to "order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." Therefore, we find no error.

Defendant next argues that his conviction of felony-firearm, predicated on the felon in possession of a firearm conviction, violates double jeopardy. We have previously addressed this exact issue and determined that "the Legislature clearly intended to permit a defendant charged with felon in possession to be properly charged with an additional felony-firearm count." *People v Dillard*, 246 Mich App 163, 168; 631 NW2d 755 (2001). Accordingly, no error occurred.

¹ MCR 6.414 was repealed by order of the Michigan Supreme Court on June 29, 2011, effective September 1, 2011. See *Order Amending Rules 2.512, 2.513, 2.514, 2.516, and 6.414 of the Michigan Court Rules*, 489 Mich lviii, entered on June 29, 2011 (File No. 2005-19).

Defendant's final argument is that his sentence, which was within the minimum guidelines range, was disproportionately harsh.

A claim that a sentence is disproportionate is generally reviewed by this Court for an abuse of discretion. *People v Armisted*, ___ Mich App ___; NW2d ___ (Docket No. 302902, issued December 6, 2011), slip op at *10. However, because this issue was not preserved, it is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

"[A] sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008); MCL 769.34(10). "[A] sentence within the guidelines range is presumptively proportionate." *Powell*, 278 Mich App at 323.

In this case, defendant was sentenced to a minimum sentence of 36 months, which was within the recommended minimum sentence range under the legislative guidelines. Defendant's argument on appeal is predicated on his reference to the sentences given to other individuals that are entirely unrelated to his case and have no bearing on his sentence. Accordingly, defendant has failed to overcome the presumption that his sentence was proportionate and has not demonstrated plain error affecting substantial rights.

We decline to address defendant's remaining arguments regarding ineffective assistance of counsel and his claim that he was improperly sentenced as a habitual offender, fourth offense, because these issues were not raised in defendant's statement of questions presented. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Joel P. Hoekstra