

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD LAVON GILLAM, a/k/a
REGINALD LAVON GILLIAM,

Defendant-Appellant.

UNPUBLISHED
November 20, 2007

No. 270760
Kalamazoo Circuit Court
LC No. 05-002430-FH

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions and sentences for second-degree home invasion, MCL 750.110a(3), malicious destruction of a building, MCL 750.380(3)(a), malicious destruction of personal property, MCL 750.377a(1)(b)(i), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to 3 to 30 years' imprisonment for the second-degree home invasion conviction, 1 to 10 years' imprisonment for the malicious destruction of a building conviction, 1 to 10 years' imprisonment for the malicious destruction of personal property conviction, and 1 to 2 years' imprisonment for the possession of marijuana conviction. We affirm defendant's convictions, but remand for resentencing.

Defendant first argues that there was insufficient evidence to sustain his convictions for home invasion, malicious destruction of property and malicious destruction of a building. Specifically, defendant contends that the prosecution failed to present sufficient evidence that he was the person who entered the victims home and caused the damage. We disagree.

This Court reviews insufficient evidence claims by considering the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). The standard is deferential and the reviewing court must draw "all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Identity is always an essential element of a crime, and it can be proven beyond a reasonable doubt by circumstantial evidence. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient circumstantial evidence to sustain the jury's conclusion that defendant was the perpetrator of the second-degree home invasion and underlying felonies beyond a reasonable doubt. See *Hardiman, supra*. There was no evidence of forced entry into the victim's home. Defendant had a key to the victim's house. The police found defendant's fingerprint in the victim's daughter's room, which defendant did not normally enter. Also, there was evidence that defendant and the victim argued the night the crime occurred, and defendant thereafter left the victim a voicemail message, stating that she would "see what [she] deserves" when she got home. This evidence amply supports the prosecution's theory that defendant was the person who entered the victim's house and caused the damage.

Next, defendant argues that the trial court erred by precluding him from presenting testimony from an alibi witness and by excluding evidence of a subsequent break-in at the victim's house. We review preserved evidentiary errors for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Under MCL 768.20, a defendant must give the prosecutor written notice of intent to present an alibi at least ten days before the start of the trial. The purpose of the notice requirement is to allow the prosecution "to investigate the merits of such a defense prior to trial, and not to alert the jury of the defendant's proposed defense." *People v Shannon*, 88 Mich App 138, 144; 276 NW2d 546 (1979). A trial court has the discretion to exclude alibi testimony when the defendant violates the notice provisions of MCL 768.20. *People v Travis*, 443 Mich 668, 678-680; 505 NW2d 563 (1993). In exercising its discretion to exclude an alibi witness, the trial court should consider: 1) the amount of prejudice that resulted from the failure to disclose, 2) the reason for nondisclosure, 3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, 4) the weight of the properly admitted evidence supporting the defendant's guilt, and 5) other relevant factors arising out of the circumstances of the case. *Id.* at 682.

It is undisputed that defendant failed to comply with the notice provisions in MCL 768.20. The question then becomes whether the trial court abused its discretion by denying defendant's motion to add a late alibi witness. We conclude that the trial court did not abuse its discretion.

First, the prosecution would have suffered substantial prejudice had the trial court allowed the alibi witness to testify. *Travis, supra*. The prosecution did not have prior knowledge of the alibi witness, and, therefore, was completely unprepared to challenge or discredit her testimony. Furthermore, the prosecution was fully prepared to start trial the day defendant moved to add the alibi witness and delaying the trial would have inconvenienced the prosecution's witnesses. Second, defendant did not have a good reason for failing to disclose the alibi witness. See *id.* Defendant claimed that he had trouble locating the witness because she moved while he was incarcerated. But defendant posted bond two months before trial. Thus, defendant had ample time to locate the witness and notify his attorney of her existence. The record reveals, however, that he did not mention the witness until shortly before trial. Third, defendant could have testified and provided an alibi for himself. Thus, he was not deprived of presenting an alibi defense. Fourth, the properly admitted evidence supported defendant's guilt. *Id.* At trial, the prosecution presented strong evidence linking defendant to the crime. In light of this evidence, it is unlikely that one witness's "partial alibi" testimony that defendant was with

her that night would have outweighed the evidence against him. Finally, we find it significant that defendant told his attorney conflicting accounts about his location on the evening of the crimes. The inconsistencies of defendant's accounts give rise to doubts about the credibility of his alleged alibi witness. On consideration of all of the factors, we conclude that the trial court's decision to exclude the witness was within the range of principled outcomes. See *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007).

We also hold that the trial court did not err by excluding, as irrelevant, evidence regarding a subsequent home invasion at the victim's home. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. The evidence of a dissimilar second home invasion, occurring shortly after the crimes for which defendant was convicted, was not relevant because it does not make it less likely that defendant committed the first home invasion. See *id.* In the first home invasion, there was no sign of forced entry, and the perpetrator trashed the house but did not steal anything. In contrast, the perpetrator of the second home invasion broke into the victim's house through the kitchen window and stole items from her home. Because the crimes were not similar, and defendant had the opportunity to commit both home invasions, evidence of the second home invasion would not have made it less likely that defendant committed the first home invasion. Thus, the trial court did not abuse its discretion when it excluded this evidence. See *Farquharson*, *supra*.

Defendant also argues that he was denied his constitutional rights to due process and a fair trial, when the trial court allowed the admission of testimony regarding his post-arrest, post-*Miranda*¹ silence. Defendant further argues that trial counsel was ineffective for failing to object to the testimony. These issues are unpreserved on appeal because defendant did not object to the admission of the testimony, nor did he move for an evidentiary hearing or a new trial in order to preserve his claim of ineffective assistance. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006); *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

This Court reviews unpreserved claims of constitutional error for plain error affecting substantial rights. *Pipes*, *supra* at 274. To avoid forfeiture under the plain error rule, a defendant must show "actual prejudice." *Id.* The defendant bears the burden with respect to establishing prejudice and must show that the error "affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant's unpreserved claim of ineffective assistance of counsel is reviewed for mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

A defendant's right to due process guaranteed by the Fourteenth Amendment, US Const, Am XIV, is violated when the prosecutor uses his post-arrest, post-*Miranda* warning silence for impeachment, or as substantive evidence unless it is used to contradict the defendant's trial testimony that he made a statement, that he cooperated with police, or that trial was his first opportunity to explain his version of events. *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed2d 91 (1976); *People v Dennis*, 464 Mich 567, 573 n 5; 628 NW2d 502 (2001). Here,

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

there is nothing in the record that indicates that defendant invoked his constitutional right to remain silent. On the contrary, he answered all of the questions the police asked. Defendant did tell the questioning officer to move on to a different topic. However, this action by defendant cannot hardly be construed as an invocation of his right to remain silent, when defendant continued to answer questions. See, e.g., *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990). The right to due process is implicated only where the defendant's silence is attributable to either an invocation of his Fifth Amendment right or his reliance on the *Miranda* warnings. *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992). Therefore, where the record does not support that defendant invoked his right to remain silent, "no constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant's Fifth Amendment privilege." *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). In this case, there has been no showing that defendant was silent, or that his silence was attributable to the invocation of his Fifth Amendment privilege. Consequently, defendant's right to due process was not violated by the prosecutor's questions. Likewise, because there is no constitutional problem with the prosecutor's questions, trial counsel was not ineffective for failing to object to the testimony on constitutional grounds. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant next claims that the prosecutor committed misconduct when he argued in closing that the fingerprint evidence in the case was undisputed, impermissibly commented on defendant's failure to testify, and personally vouched for the credibility of one of the witnesses. We review these unpreserved allegations of prosecutorial misconduct for plain outcome determinative error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Defendant first argues that the prosecutor committed misconduct when he argued in closing that the fingerprint evidence was undisputed, which constituted impermissible argument on defendant's failure to testify. Defendant cites *People v Centers*, 141 Mich App 364, 367 NW2d 397 (1985), rev'd on other grounds 453 Mich 882 (1996), in support of his position. In *Centers*, the prosecutor told the jury in closing arguments that the fingerprint evidence in the case was "totally uncontradicted" and "completely unexplained." *Id.* at 377. The *Centers* panel held, however, that the prosecutor's argument was generally proper, unless the contradiction or explanation could only come from defendant. *Id.* at 378. In *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), this Court reaffirmed that "a prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment on defendant's failure to testify, particularly where someone other than the defendant could have provided contrary testimony."

In this case, the prosecutor's argument was proper because he merely stated that the fingerprint evidence was not "in dispute," which was true, because defendant did not present his own fingerprint expert. See *id.* Also, defendant was not the only one who could explain the presence of his fingerprint at the crime scene. The victim testified that defendant was at her house the weekend before the crime occurred, and admitted on cross-examination that, although she never saw him go into her daughter's bedroom, defendant was not always in her presence when he was at her house. Because the prosecutor correctly argued that the fingerprint evidence was not disputed, and an alternative explanation for the presence of his fingerprint was offered at

trial, the prosecutor's argument did not constitute impermissible argument on defendant's failure to testify.

Next, defendant argues that the prosecutor committed misconduct when he argued, "[a]nd it's not claimed that he had permission to be there. The only evidence is all to the contrary." Defendant claims that this argument was improper because it constituted an impermissible comment on his failure to testify. We disagree. The argument was proper. The prosecutor merely reminded the jury that the victim testified that defendant did not have permission to be in the house that night. The prosecutor is free to argue the evidence and all reasonable inferences arising from it. *Ackerman, supra* at 450.

Defendant's third allegation of prosecutorial misconduct is that the prosecutor improperly vouched for the credibility of the victim in closing argument. In closing, the prosecutor asked the jury to evaluate the victim's credibility based on the evidence presented at trial. While the prosecution may not vouch for the credibility of its witnesses, it may argue a witness is credible based on the facts and evidence in the case, which is exactly what the prosecutor in this case argued. See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

There were no plain errors warranting relief. *Jones, supra*.

Defendant also argues on appeal that the court reporter denied him due process of law by omitting testimony from the transcript. We find no merit to this argument.

Trial transcripts are presumed accurate. *People v Abdella*, 200 Mich App 473, 475; 505 NW2d 18 (1993). In order to overcome the presumption that certified trial transcripts are accurate and be entitled to relief, a defendant must satisfy the following requirements: (1) seasonably seek relief from the trial court; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; [and] (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure postconviction relief. *Id.* at 475-476.

Defendant has failed to satisfy the requirements necessary to overcome the presumption that the trial transcript is accurate. First, defendant had to timely seek relief from the trial court, in order to challenge the transcript's inaccuracy in this Court, which he did not do. *Id.* Second, defendant must assert the alleged inaccuracy with specificity. *Id.* We find that defendant has satisfied this element because he identifies the portion of testimony he claims is missing with specificity. Nevertheless, defendant must provide independent corroboration of the asserted inaccuracy. *Id.* In a footnote, the *Abdella* Court listed examples of what could qualify as independent corroboration:

Examples, by no means exhaustive, of means to satisfy the independent-corroboration requirement include affidavits of witnesses, trial spectators, police officers, court personnel, or attorneys; references to police reports or preliminary examination transcripts, or perhaps to trial circumstances that demonstrate the position of the petitioner, such as noting that if the witness whose testimony is claimed to have been transcribed inaccurately had actually testified as transcribed, then the final arguments would have been different. [*Id.* at 476 n 2.]

Here, defendant has only provided his own, unsworn statement to document the transcript inaccuracy. Although plaintiff discusses the inaccuracies in its brief, the discussion is unsworn and insufficient to document the inaccuracies under *Abdella*. See *id.*

Lastly, even if an inaccuracy were corroborated, defendant must show the inaccurate transcription has adversely affected his ability to secure postconviction relief. See *id.* at 475-476. Defendant has failed to meet this burden. Although defendant argues that the omitted testimony proved that the police destroyed exculpatory evidence, in bad faith, it is unlikely that the allegedly omitted testimony shows the bad faith destruction of evidence. Defendant admitted to police that the evidence in question, a key, was a key to the victim's house before the officer threw it away. By defendant's own admission to the officer, the key was not exculpatory evidence. Consequently, the omitted testimony has not adversely affected defendant's ability to secure postconviction relief from this Court. Even if this Court reviewed the omitted testimony, it would not improve defendant's chances for reversal or other postconviction relief.

Defendant's final argument on appeal is that he is entitled to resentencing because the trial court improperly scored offense variable (OV) 9, MCL 777.39. We agree.

At the time defendant was sentenced, MCL 777.39 required a trial court to score a defendant ten points for OV 9, if there were two to nine victims, and zero points if there were fewer than two victims. The sentencing court had to count "each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a); *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004).² In *People v Melton*, 271 Mich App 590, 594-596; 722 NW2d 698 (2006), a special panel of this Court overruled *People v Knowles*, 256 Mich App 53; 662 NW2d 824 (2003), and held that OV 9 cannot be scored for a financial injury. In this case, the victim and her daughter were not home when defendant committed the offenses. There is no evidence in the record that they were placed in danger of injury or loss of life. Therefore, the only injuries the victims sustained or could have sustained were financial in nature related to the destruction of property. Under these circumstances, OV 9 cannot be scored. *Melton*, *supra*. Defendant's score for OV 9 should have been zero.

Because the scoring error affected defendant's minimum sentencing range under the legislative guidelines, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82,

² 2006 PA 548, effective March 30, 2007, amended MCL 777.39(2)(a) to provide that "each person who was placed in danger of physical injury or loss of life or property" was to be counted as a victim. This amendment became effective after defendant was sentenced in this matter, and nothing in the statutory language indicates that the amendment was meant to apply retroactively; thus, it does not apply to this appeal. See, e.g., *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004).

91-92; 711 NW2d 44 (2006). On remand, we instruct the trial court to correct the scoring of OV 9 for each of defendant's sentences and adjust the ranges accordingly.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter