STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WILLIAM FAULK,

Defendant-Appellant.

UNPUBLISHED
March 20, 2008

No. 273688
Oakland Circuit Court
LC No. 2006-206926-FH

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2), larceny of a firearm, MCL 750.357b, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced as a fourth-felony habitual offender, MCL 769.12, to concurrent prison terms of 10 to 25 years for the home invasion conviction, 58 months to 25 years for the larceny of a firearm conviction, and 4 to 25 years for the felon in possession conviction, to be served consecutive to three concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant's convictions arise from his involvement in leading a group of four juveniles in an activity known as "garage hopping," i.e., stealing items out of open garages. Each of the four juveniles testified against defendant at trial. According to their testimony, defendant entered one garage and stole three hunting rifles from a vehicle parked in the garage.

I. Cautionary Instruction

Defendant first argues that the trial court erred by failing to provide a cautionary instruction regarding accomplice testimony. See, CJI2d 5.6. Defendant did not request this instruction at trial and expressed satisfaction with the court's jury instructions. Accordingly, any error was affirmatively waived and may not be reviewed on appeal. *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Even if this issue is considered, it is apparent that defendant's substantial rights were not affected because issues concerning

the juveniles' credibility were thoroughly exposed during cross-examination and presented to the jury. *People v Young*, 472 Mich 130, 132-133, 140-143; 693 NW2d 801 (2005).

II. Prosecutorial Misconduct

Defendant next argues, both through appellate counsel and in propria persona, that misconduct by the prosecutor denied him a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995). Here, however, defendant did not object to the prosecutor's conduct. Therefore, defendant must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Appellate review of allegedly improper remarks is precluded unless a curative instruction could not have eliminated any possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Schutte*, 240 Mich App 713, 721-722; 613 NW2d 370 (2000), abrogated on other grounds *Crawford v Washington*, 541 US 36; 124 SCt 1354 (2004).

Defendant argues through appellate counsel that the prosecutor improperly asked him to comment on the credibility of the juvenile witnesses. We disagree.

It is improper for the prosecutor to ask one witness to comment on the credibility of another witness. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Here, however, the prosecutor did not directly ask defendant to comment on the credibility of the juvenile witnesses' testimony, but only asked defendant if he knew of any reason why the juveniles would be biased against him or would want to frame him for a crime he did not commit. Defendant had previously testified that, contrary to the juveniles' testimony, he was not involved in the offense. The prosecutor was entitled to explore this defense theory on cross-examination. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Considered in the context of defendant's direct examination testimony, the prosecutor's line of questioning did not constitute plain error. *Id.*; *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant, acting in propria persona, raises several additional claims of misconduct, none of which have merit.

The prosecutor's comment concerning the possible involvement of defendant's girlfriend was supported by the juveniles' testimony that defendant was present in the neighborhood during the offense and his girlfriend was in the neighborhood at the same time or shortly thereafter. A prosecutor is free to comment on the evidence and draw reasonable inferences from the evidence. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). There was no plain error.

There is also no evidence to support defendant's argument that the prosecutor knowingly allowed the juveniles to present perjured testimony. The fact that there were some inconsistencies in the juveniles' testimony presented a credibility dispute, but did not establish that their testimony was perjured. The prosecutor remained free to believe his witnesses rather than defendant. *People v Lester*, 232 Mich App 262, 278-279; 591 NW2d 267 (1998). Defendant has failed to show any plain error.

Defendant also argues that the prosecutor committed misconduct by interrupting witnesses who were favorable to defendant, by withholding evidence, by arguing that the timelines of various events proved defendant's guilt, by charging defendant with ten felony offenses arising from a single criminal episode, and by referring to defendant's felony record. We find no merit to these claims.

Defendant's sister was not prevented from testifying that she was not afraid of him. As discussed in section IV, *infra*, there is no merit to defendant's argument that the prosecutor improperly withheld evidence. The prosecutor's arguments regarding the timeline of events were properly based on the evidence and reasonable inferences drawn from the evidence. The prosecutor permissibly referred to defendant's felony record in the context of the felon in possession charge, and defendant's stipulation that he had previously been convicted of a felony offense.

The prosecutor had the sole discretion to determine which charges to bring. *People v Jones*, 252 Mich App 1, 6-8; 650 NW2d 717 (2002). Defendant has not presented any reason to conclude that the prosecutor's charging decision was unconstitutional, illegal, ultra vires, or vindictive. *Id.*

The prosecutor properly could refer to Detective Buffa's laid-back demeanor as a reason for the jury to find that his testimony was credible. The prosecutor did not suggest that he had some special knowledge, unknown to the jury, that Detective Buffa was testifying truthfully. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Further, Detective Buffa had denied making any statement suggesting that incarcerating four juveniles was more costly than incarcerating one adult. Therefore, the prosecutor's comment regarding this statement was based on the evidence. The prosecutor also properly responded to defendant's testimony that Detective Buffa had threatened him. Lastly, the prosecutor's rebuttal comments were a proper response to defense counsel's attacks on Detective Buffa's credibility. Accordingly, there was no misconduct.

We also reject defendant's argument that the prosecutor falsely stated that defendant's sister was afraid of defendant. The transcript discloses that the prosecutor did not argue that defendant's sister was afraid of defendant, but rather argued, on the basis of the evidence, that defendant's sister was "hiding" and urged the jurors to rely on their collective memories for the rest of her testimony. The prosecutor's questions to defendant and his sister, and the prosecutor's closing argument, were based on the evidence and reasonable inferences arising therefrom. There was no plain error.

III. Pre-arrest Delay and Probable Cause for Arrest

Acting in propria persona, defendant argues that he was prejudiced by the 78-day pre-arrest delay, and that he was arrested without probable cause. These issues were not raised below and, therefore, are not preserved. Accordingly, we review the issues for plain error affecting defendant's substantial rights. *People v Walker*, 276 Mich App 528, 545; 741 NW2d 843 (2007); see also *Carines*, *supra* at 763-764.

To warrant dismissal due to pre-arrest delay, "there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000); see also *Walker*, *supra* at 546. "To be substantial, the prejudice to the defendant must meaningfully impair his ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected." *Crear*, *supra* at 166. "An unsupported statement of prejudice . . . is not enough, nor are undetailed claims of loss of physical evidence, witness memory loss, or witness death." *Walker*, *supra* at 546; see also *Crear*, *supra* at 166.

There is no indication in the record that the prosecution intentionally delayed charging defendant in order to gain a tactical advantage. Further, defendant has failed to allege any cognizable form of prejudice that meaningfully and substantially impaired his ability to defend against the charges because of the delay.

Regarding the question of probable cause for arrest, the lower court file shows that a warrant was issued for defendant's second arrest on January 30, 2006, on a complaint sworn to by Detective Buffa. Defendant does not challenge the warrant. Thus, there is no merit to defendant's argument that he was illegally arrested without a warrant. Additionally, by the time the warrant was issued, the juveniles had provided statements to the police indicating that they saw defendant enter the victim's garage and take three rifles and a briefcase. All the juveniles admitted their involvement in the offense. This was reasonably trustworthy information sufficient to justify a reasonable person in believing that defendant had committed a felony. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Thus, there was probable cause to support defendant's second arrest.

IV. Withholding Evidence

Defendant, acting in propria persona, next argues that the prosecutor deprived him of a fair trial by withholding material evidence. We again disagree.

Constitutional claims of due process violations are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), "[a] criminal defendant has a due process right of access to certain information possessed by the prosecution." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). "This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt." *Id.* at 281. "Impeachment evidence as well as exculpatory evidence

falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Id*. (citation omitted).

"In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Id*. at 281-282. "The failure to disclose impeachment evidence does *not* require automatic reversal even where . . . the prosecution's case depends largely on the credibility of a particular witness." *Id*. at 282 (emphasis added). Rather, "[t]he court must still find the evidence material," i.e., a reasonable probability that, if disclosed, the evidence might have affected the outcome. *Id*.

"In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecution's case." *Id*. at 282-283. "In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Id*. at 283.

In this case, defendant complains that he did not receive the juveniles' police statements until three days before trial. It is undisputed, however, that the statements were disclosed, were introduced into evidence, and were used for impeachment. Defendant does not allege any prejudice resulting from any delay in providing the statements. Because the statements were disclosed, there was no *Brady* violation.

Defendant also alleges that he was prejudiced by the prosecutor's failure to turn over the juveniles' probate court testimony. However, there has been no showing that such testimony existed, let alone that it would have been useful for impeachment. Defendant similarly alleges that he was prejudiced by the prosecutor's failure to turn over the juvenile's criminal and probate court records. Again, however, there has been no showing, nor is there any indication in the record, that any of the juveniles had a prior criminal record, let alone a criminal record that could have been used for impeachment under MRE 609(a).

Defendant also alleges that the prosecutor failed to provide his sister's consent to search her mother's home, but there is no evidence that she signed a formal consent form, and no evidence that may have been collected from inside the home was used at trial. Defendant similarly alleges that the prosecutor failed to provide the juveniles' waiver of rights forms. Regardless of the validity of the waivers, however, defendant has no standing to raise any alleged violation of the juveniles' constitutional rights. Although defendant also alleges that the prosecutor failed to provide him with a copy of his arrest warrant, a copy of the warrant appears in the lower court file, so defendant cannot show

that he would not have been able to obtain it with reasonable diligence. In sum, there is no merit to defendant's arguments that the prosecutor's failure to produce various documents and materials requires a new trial.

V. Sufficiency of the Evidence

Next, acting in propria persona, defendant argues that there was insufficient evidence to support his convictions. We disagree.

Defendant does not argue that the juveniles' testimony was insufficient to establish the elements of each of offenses of which he was convicted. Instead, he argues that the juveniles were not credible because they had a motive to blame him and there were inconsistencies in their testimony. When reviewing a challenge to the sufficiency of the evidence, however, we are required to view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Viewed in this manner, the juveniles' testimony was sufficient to convict defendant of each of the crimes charged beyond a reasonable doubt.

VI. Effective Assistance of Counsel

Acting in propria persona, defendant argues that defense counsel was ineffective. We disagree. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Pickens*, *supra*, 446 Mich at 312, 314. To establish prejudice, defendant must show a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314.

Although an attorney's failure to make a reasonable investigation can constitute ineffective assistance of counsel, *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), there is no record support for defendant's claims regarding the existence of

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

photographs, a list of items that defendant allegedly wanted counsel to investigate, or the juveniles' alleged probate court records. Even if these items existed, defendant has failed to show how they would have been useful, or demonstrated that counsel's alleged failure to investigate these matters deprived him of a substantial defense.

Next, the record does not support defendant's claim that defense counsel failed to present a reasonable trial strategy. On the contrary, the record discloses that defense counsel pursued a strategy that was consistent with the theory that defendant continues to pursue on appeal, namely, that defendant did not commit the charged crimes and was falsely accused by the four juveniles. Defendant does not identify what other strategies were available, if any. The fact that a particular strategy does not work does not establish that counsel was ineffective, *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004), and "this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant also argues that defense counsel was ineffective because he failed to file various motions, including a motion to compel disclosure of the juveniles' probate court records, criminal histories, and plea agreements, and a motion to compel production of physical evidence such as the unusable fingerprints. However, there is no indication that any of the juveniles had a prior record, and the testimony at trial disclosed that no useable fingerprints were collected, nor was such evidence used against defendant at trial. Defendant also argues that counsel was ineffective for not moving to suppress defendant's arrest, or to dismiss the case. As discussed previously, there is no merit to defendant's argument that his arrest was illegal, or that the prosecutor improperly charged him with multiple offenses. Without any basis for concluding that a motion might have led to either the production of evidence or an outcome favorable to defendant, we cannot conclude that counsel was ineffective for failing to file a motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Additionally, there was no double jeopardy violation arising from defendant's convictions for multiple offenses in this case. See *People v Calloway*, 469 Mich 448, 450-452; 671 NW2d 733 (2003); *People v Whiteside*, 437 Mich 188, 200; 468 NW2d 504 (1991).

Defendant also asserts that defense counsel was difficult to contact and did not spend enough time with defendant. The record does not disclose the frequency or duration of defendant's meetings with defense counsel. More significantly, defendant does not explain what more would have been accomplished by having more or lengthier meetings. Thus, this allegation does not support defendant's claim that counsel was ineffective.

Defendant also alleges that defense counsel was ineffective by moving for adjournments, thereby denying him the benefit of the 180-day rule. Because defendant was not incarcerated when these charges were filed, he has not shown that the 180-day rule even applies. See MCL 780.131(1). Furthermore, defendant was tried within 129 days after his second arrest, and within 115 days after his preliminary examination. Thus, there is no merit to this claim.

Although defendant also argues that defense counsel was ineffective for failing to interview witnesses, he does not identify any specific witness who counsel failed to interview, or explain how counsel's failure to interview witnesses deprived him of a substantial defense. Defendant additionally argues that defense counsel was ineffective for failing to call defense witnesses at trial, such as his girlfriend and his brother, and for failing to properly cross-examine the prosecution's witnesses. According to defendant's own version of events, however, neither his girlfriend nor his brother were with him at the time of the offense and could not have supported his alibi. Moreover, testimony disclosed that defendant's girlfriend was present in the neighborhood where the offenses were committed and was arrested because of her suspected connection to the offenses. Defendant has not overcome the presumption that the decision not to call defendant's girlfriend as a witness was reasonable trial strategy. *Davis*, *supra* at 368. Additionally, the record does not disclose, nor does defendant explain, what testimony his brother could have provided.

Regarding defense counsel's examination of witnesses, defendant's sister testified on direct examination that she was not afraid of defendant, so questioning her about that again would have been cumulative. Lastly, defendant has failed to explain how impeaching Deputy Zoedak concerning the timeline preceding defendant's arrest might have affected the outcome.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's conduct. As discussed in section II, *supra*, there is no merit to defendant's claims of prosecutorial misconduct. Therefore, counsel was not ineffective for failing to object. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Next, defendant argues that defense counsel was ineffective in failing to challenge any of the information in the presentence investigation report ("PSIR"). However, the record discloses that defense counsel reviewed the PSIR before sentencing and defendant fails to identify any inaccuracy that defense counsel failed to challenge. Defendant also argues that defense counsel failed to provide any positive input at sentencing, such as emphasizing defendant's allegedly negative drug screen and breathalyzer test results for the previous two years. However, there is no record evidence supporting defendant's claim that his drug and breathalyzer tests were negative for two years preceding this offense. Moreover, the PSIR indicates that defendant reported having used alcohol on the date of the offense, after allegedly being clean and sober for six months, because he had a fight with his girlfriend.

In sum, defendant has failed to establish that he was denied the effective assistance of counsel.

VII. Cumulative Error

Defendant, acting in propria persona, lastly argues that the cumulative effect of the many errors committed below deprived him of a fair trial. Because defendant has failed to establish a single claim of error, he cannot show that the cumulative effect of

several errors deprived him of a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); see also *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

Affirmed.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey