STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2008
v	No. 279827 Cass Circuit Court
MICHAEL DALE WALL, Defendant-Appellant.	LC No. 07-010030-FH

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant on August 3, 2007, to 2 to 20 years' imprisonment for the home invasion conviction. Because, there was sufficient evidence to enable a rational trier of fact to conclude, beyond a reasonable doubt, that defendant committed first-degree home invasion, the trial court did not abuse its discretion or violate defendant's constitutional rights, there was no prosecutorial misconduct, defendant was properly sentenced, and defense counsel was not ineffective, we affirm.

On January 2, 2007, between 10:00 p.m. and 11:00 p.m., defendant and two other men attacked the residence of Joshua Eutsey, located in a mobile home park in Edwardsburg. Joshua was at home, in bed, and his sister Amanda and his two young children were also home. The assailants broke the driver's side window of Joshua's vehicle, and then began kicking and beating on the exterior of his trailer. Amanda ran into Joshua's room and woke him. Joshua instructed her to call the police. Joshua heard defendant state repeatedly that he was going to come into Joshua's trailer and "kick his ass." Defendant beat on Joshua's screen door, which broke, and subsequently, he beat on the front door. When the door burst open, Joshua saw defendant standing in the threshold. Defendant took one step into the home, but Joshua's Rottweiler lunged at him, so defendant quickly reached in and grabbed the door and pulled it closed. Joshua held the door shut, but someone continued to push on the other side. The living room window of Joshua's trailer was then shattered. Joshua and Amanda saw defendant on the other side of the window. Joshua's children started crying, and Amanda went through the living room to their room. Joshua grabbed a baseball bat out of fear and in order to protect himself and his family. Defendant stood on Joshua's air conditioning unit, stuck his head through the broken window, and taunted Joshua. When Officer Brian Robinson appeared from around the corner, defendant and the other men ran away, in the direction of defendant's trailer.

Robinson went to defendant's trailer and knocked on the door several times, but no one answered. Robinson could hear whispered voices and the sound of footsteps inside the trailer. He returned to the trailer three times that January, but the same behavior occurred each time. At trial, defendant claimed misidentification. Defendant admitted, however, that he did not like Joshua and had been feuding with him for approximately four years. One week before the incident, defendant chased Joshua through the neighborhood in his vehicle and engaged Joshua in a yelling match. During the altercation, Joshua allegedly pushed defendant.

Defendant first argues that his conviction was supported by insufficient evidence. We review the evidence de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). It is the jury's function alone to determine what weight and credibility to give the evidence. *Id.* This Court is "required to draw all reasonable inferences and make credibility choices in support of the jury verdict" when reviewing the sufficiency of the evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

For first-degree home invasion, the prosecution is required to show that (1) defendant broke and entered the dwelling; (2) while breaking into and entering the dwelling, defendant intended to commit a felony, larceny or assault in the dwelling; (3) another person was lawfully present in the dwelling at the time. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2).

Defendant first challenges the witnesses' identification of him as the perpetrator, claiming that they confused defendant with his brother, Herbert Jerraid. There was sufficient evidence to support a finding that defendant committed the home invasion, viewing the identification testimony in the light most favorable to the prosecution, and deferring to the jury's credibility determinations. *Wolfe, supra* at 514-516. This Court does not decide anew whether a witness's identification of a defendant is credible, because it is a question of fact for the jury. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "Moreover, this Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime." *Id.*, citing *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992). The record reflects that both Joshua and Amanda knew defendant, had adequate lighting and opportunity to view defendant, identified him by his coat, his voice, and the lack of tattoos on his neck (unlike Jerraid), and were positive of their identifications of him. *Davis, supra* at 702-703. Although there may have been some impeachment of their testimony, we defer to the jury's determination of weight and credibility issues and view the evidence in a light most favorable to the prosecution. *Wolfe, supra* at 514-516. Although defendant challenged the witnesses' testimony, claiming that they confused him with his cousin or brother, and that he was not present at the trailer that night, it cannot be said that this deprived their testimony of all probative value or that jury could not have nonetheless believed their testimony. *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003). Thus, defendant's argument that the verdict was against the great weight of the evidence fails.

Defendant also challenges the sufficiency of the evidence regarding the entry element of first-degree home invasion. There was sufficient record evidence to enable a rational trier of fact to conclude that defendant entered Joshua's trailer beyond a reasonable doubt. To constitute an

"entry," this Court has stated that, "[i]t is a well established doctrine that '(w)here an entering is a necessary element of the offense, it is sufficient if any part of defendant's body is introduced within the house'." *People v Gillman*, 66 Mich App 419, 429-430; 239 NW2d 396 (1976). Sticking an arm through a window constitutes an entry. *Id.* The evidence indicated that defendant entered Joshua's trailer by stepping at least one foot inside before the dog attacked, then reaching in to pull the door shut, and later sticking his head through the broken living room window. Thus, there was sufficient evidence that an "entry" occurred. *Id.*

We also reject defendant's claim that there was insufficient evidence of his intent to commit an assault in the dwelling. An assault under MCL 750.110a(2) includes misdemeanor and felony assaults, and can be committed either by an attempted battery or the commission of an unlawful act that places the victim in reasonable apprehension of receiving a battery. *Sands, supra* at 163; *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Circumstantial evidence and reasonable inferences drawn from the evidence may satisfactorily prove the elements of the offense. *Marsack, supra* at 371, citing *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). Only minimal circumstantial evidence of defendant's intent is required in order to constitute sufficient evidence. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Circumstantial evidence of a defendant's intent includes a defendant's words during the commission of the offense, and his manner of committing the offense. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). The evidence indicated that immediately before defendant broke and entered Joshua's home by breaking and forcing the door open, he threatened Joshua that, "I'm coming in, I'm kicking your ass." Defendant stated this several times during the ensuing events. Defendant's words indicate that he intended to enter Joshua's home and assault him, and his words and actions caused Joshua to fear for his safety and the safety of the other occupants of his home, prompting him to grab a baseball bat for protection and instruct Amanda to call 911. Viewed favorably to the prosecution, the evidence that defendant intended to commit an assault in the dwelling was sufficient.

Defendant next asserts on appeal that the trial court abused its discretion and violated his constitutional rights in excluding Jerraid as a witness. Defendant attempted to present Jerraid as a witness in the middle of the one-day trial without having disclosed him as a witness before trial pursuant to the discovery rules, thus, this error is partially preserved. *People v Pipes*, 475 Mich 267, 277-278; 715 NW2d 290 (2006). Defendant did not raise a constitutional objection in the trial court. "[A]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Bulmer (After Remand)*, 256 Mich App 33, 35; 662 NW2d 117 (2003). That portion of defendant's challenge to this issue is unpreserved.

The trial court's decision regarding a discovery violation is discretionary, and is therefore reviewed by this Court for an abuse of discretion. *People v Lemcool (After Remand)*, 445 Mich 491, 497; 518 NW2d 437 (1994); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997); MCR 6.201(J). The trial court abuses its discretion where it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). A preserved nonconstitutional error, such as an

evidentiary error,[1] warrants reversal only where it overcomes the presumption that it was harmless, i.e., it is more probable than not that the error affected the outcome and defendant bears the burden of persuasion. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant's unpreserved constitutional error is reviewed for plain error. *Pipes*, *supra* at 278. Defendant must demonstrate the existence of an actual error, that was clear or obvious, and that affected his substantial rights, i.e., prejudiced him by affecting the outcome of the trial. *Id.* at 279. Reversal is ultimately warranted only if defendant also shows that the error resulted in his conviction although he was actually innocent, or the error seriously impacted the fairness, integrity, or public reputation of the proceedings. *Id.*

When deciding whether to exclude evidence because of a discovery violation, the trial court "must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). In addition, the party complaining of the violation must show actual prejudice. *People v Greenfield*, 271 Mich App 442, 456 n 10; 722 NW2d 254 (2006), citing *Davie (After Remand)*, *supra* at 598. Pursuant to MCR 6.201(A)(1), a party is required to provide the names and addresses of all witnesses who may be called at trial. The record reflects that the prosecution requested this information pursuant to MCR 6.201 before trial, but defendant failed to provide it. Defendant acknowledges that he failed to comply. MCR 6.201(J) provides that the penalty for failing to comply, at the trial court's discretion, may include continuation, preclusion of the evidence, or another appropriate remedy.

The record reflects that defendant requested that Jerraid testify after the prosecution had presented two of its four witnesses. Defendant claimed that Jerraid would testify that he was among the three men who attacked Joshua's residence, that he was the one who confronted Joshua, and that defendant was not present. The prosecution opposed the request, arguing that it had no opportunity to interview Jerraid, and it appeared that defendant was attempting to manipulate the court system because he knew Jerraid could be a potential witness all along but failed to inform the prosecution. Defendant told the trial court that he attempted to convince Jerraid to come to court before but Jerraid did not feel like going to jail, "and I was already doing (sic), I'm already facing seventy-five years as it is, so I was just like--." The trial court held that defendant violated MCR 6.201, and that the witness was known to be available to defendant but was not disclosed. Allowing the testimony would therefore unfairly prejudice the prosecution in the middle of the trial with no prior opportunity to investigate or prepare its case.

We conclude based on the record that the trial court did not abuse its discretion in holding defendant violated MCR 6.201(A)(1) in failing to timely provide the prosecution with Jerraid's name as a witness. Further, in balancing the interests of the parties and the trial court as required by *Banks*, *supra* at 252, the trial court had an interest in ensuring the "fairness of the adversary system," that encompasses avoiding the presentation of speculative facts, and in ensuring that there is a complete and truthful disclosure of the significant facts. *People v Burwick*, 450 Mich 281, 297; 537 NW2d 813 (1995). The trial court also had an interest in the efficient

[1] Evidentiary error constitutes nonconstitutional error. *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001).

administration of its docket, while the prosecution had an interest that included "the means to better prepare the party's own case, and the opportunity to assay the opponent's evidence to minimize the opportunities for falsification of evidence." *People v Taylor*, 159 Mich App 468, 484-485; 406 NW2d 859 (1987) (internal quotations and citations omitted).

The record reflects defendant's failure to timely disclose Jerraid as a witness was not the result of recently discovered evidence of which defendant was previously unaware. Defendant knew of this witness, his brother, all along and failed to bring the information to the prosecution and the trial court's attention sooner. Defendant also knew Jerraid would testify that defendant did not commit the crime. Defendant even attempted to convince Jerraid to come to court on an earlier occasion. Defendant apparently chose not to pursue the issue, despite his alleged innocence, until trial was well under way. These facts support that the proffered evidence was not trustworthy and was the result of game playing. In fact, defendant made no effort to inform the prosecution of the possibility of calling Jerraid as a witness at trial, and also failed to avail himself of the opportunity to compel Jerraid's attendance, if he was reluctant to testify, by subpoena. MCL 775.15; MCL 767.40a(5). Moreover, after presenting half of its proofs, the prosecution was surprised by defendant's request and would have suffered actual prejudice because it had no opportunity to interview Jerraid, or prepare the strategy of its case knowing that Jerraid would testify. *Greenfield, supra* at 456 n 10. On the record before this Court, it cannot be said that the trial court's decision to exclude the evidence was an abuse of discretion.

In addition, given the strong and confident identification evidence presented by Joshua and Amanda, and defendant's dislike of, and tumultuous history with Joshua, defendant cannot demonstrate that it is more probable than not that this error affected the outcome. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). Defendant's due process challenge is also unavailing because he has not shown plain error that affected his substantial rights. *Pipes, supra* at 278. "It 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), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Defendant is restrained by the rules of procedure and evidence, and failed to comply with the discovery rules despite the fact that he knew all along that Jerraid could be a witness. *Toma, supra* at 294. Moreover, defendant nonetheless was able to present his misidentification defense to the jury through his own testimony and by attacking the credibility of Joshua and Amanda's testimony.

Defendant next complains on appeal that the trial court's flight instruction to the jury was unsupported by the evidence. Defendant waived this issue because his trial counsel twice indicated that he did not have any objections to the trial court's instructions. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Nevertheless, we conclude that the flight instruction was supported by the record evidence. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). Evidence of flight can include that the defendant fled the scene of the crime, ran from the police, resisted arrest or tried to escape custody, or left the state or jurisdiction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Joshua testified that defendant ran away in the direction of defendant's own trailer when the police arrived. Robinson testified that no one answered when he knocked on the trailer's front door, although he heard footsteps and

voices coming from inside of the residence. The flight instruction was proper and defendant has failed to demonstrate the existence of a plain error that affected his substantial rights.

Defendant next alleges that several incidents of prosecutorial misconduct occurred. As defendant concedes, he did not preserve his claims because he failed to raise any objections during trial. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). Defendant's alleged instances of prosecutorial misconduct are reviewed for plain error that affected defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

"The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *Goodin, supra* at 432. Prosecutorial misconduct claims are examined on a case-by-case basis, viewing the prosecution's statements in the context of defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Generally, prosecutors have great latitude in their arguments and conduct during trial. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). "They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id.* Prosecutors are not required to "state inferences and conclusions in the blandest possible terms." *Id.* at 239.

Defendant first claims that the prosecution introduced irrelevant and prejudicial evidence and made arguments to the jury based on that evidence. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Defendant specifically claims error regarding the evidence and statements pertaining to defendant's alleged flight. However, evidence of flight is admissible and relevant to show consciousness of guilt. *Coleman*, *supra* at 4. The prosecution was therefore permitted to comment on flight evidence and the reasonable inferences drawn therefrom. *People v Dixon*, 84 Mich App 675, 682; 270 NW2d 488 (1978); *Unger, supra* at 236. The prosecutor's conduct was permissible.

Defendant next asserts error because the prosecution presented and commented on testimony that Joshua and his family were scared. In opening statements, the prosecution stated, "it was a frightening and terrorizing instance for both Mr. Eutsey, his sister, and the kids and other people in the neighborhood." The prosecution's comment related to the evidence introduced at trial that Joshua was scared because defendant threatened to "kick his ass," and Joshua was worried about his family's safety. Robinson testified that Joshua ran up to his police vehicle yelling that his children were in the house. Amanda testified that she was scared and that the children were crying during the incident. This testimony was relevant because the prosecution had to prove that defendant intended to commit an assault when he entered the residence. *Sands, supra* at 163; *Grant, supra* at 202; MCL 750.110a(2). Placing "the victim in reasonable fear or apprehension of an immediate battery" is relevant to an assault conviction. *People v Norwood*, 123 Mich App 287, 295; 333 NW2d 255 (1983). Thus, evidence that defendant's actions placed Joshua and Amanda in fear was relevant to the case and was not elicited merely for sympathy. The prosecution's comments were appropriate.

Defendant next argues that the prosecution's opening statement remarks about a potential witness, Justin Erdos, were improper. During his opening statement, the prosecution referred to Erdos' expected testimony, stating that Erdos, who lived across the street from Joshua, would

testify that he heard voices that night and recognized defendant's voice, and he saw defendant and his cousin. It is appropriate to state the facts that the prosecution intends to prove at trial during opening statements. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Where the prosecution indicates that he intends to prove a particular fact during his opening statement, but fails to do so during the trial, reversal is not warranted unless defendant shows the existence of bad faith or prejudice. *People v Wolverton*, 227 Mich App 72, 75-76; 574 NW2d 703 (1997).

Defendant has failed to show bad faith by the prosecution in making his opening statement. *Wolverton, supra* at 75-76. There is no indication that Erdos's failure to appear was a result of bad faith by the prosecution, even if service of his subpoena was arguably deficient. Erdos acknowledged that he knew he was required to appear for trial and the date because he had been in contact with the prosecution's office and indicated that he would appear. And his mother also reminded him of the trial date the night before trial. The trial court held that Erdos intentionally failed to appear and issued a bench warrant for his arrest. The prosecution was justifiably under the impression that Erdos would appear. Although Erdos was not present when the trial began that morning, he could have appeared later that day while the trial was in progress, and no one knew that Erdos had allegedly overslept that day.[2]

Defendant next asserts that the following questions by the prosecution were irrelevant and prejudicial:

> *Q*. You know that there's consequences to this case if you're found guilty, don't you?
>
> *A*. Yes, sir, I do.
>
> *Q*. And you're worried about those, aren't you?
>
> *A*. No, sir, I'm not, not even sweating it.
>
> *Q*. Because you think you're going to beat this case, isn't that right?
>
> *A*. Do you want me to actually—
>
> *Q*. Yes or no. Do you think you're going to beat this case?
>
> *A*. Yes, sir, I am.
>
> *Q*. Because you think you can outsmart the jury and officer, isn't that what you're thinking?
>
> *A*. No, sir, I'm not, because my brother is standing right outside--

[2] Erdos later pleaded guilty to the contempt citation and claimed that, although he knew he was required to appear in court, he overslept.

We conclude that these questions were relevant to the issue of defendant's credibility -- whether his claim that he was not present during the incident was true. The questions related to whether defendant had a motivation to lie, i.e., in order to escape the consequences of a guilty verdict and because defendant was out on bond concerning an unrelated incident. The questions were also asked in response to defendant's direct examination testimony, wherein he attempted to implicate both his brother and his cousin in the crime and claim that he was not involved. Defendant has failed to show that the prosecution's questions were improper or irrelevant, and we conclude that any prejudice could have been cured by a timely objection and cautionary instruction. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

Defendant next claims that the prosecutor argued facts not in evidence when he referred to the FBI crime lab costs, defendant's fight with Joshua, the fact that defendant fled the scene and hid in his trailer, defendant being a bully or a tough guy, and two witnesses' testimony that defendant committed the crime and those witnesses did not want to convict the wrong person. The prosecution may not argue facts that are not supported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the prosecution may make arguments regarding the evidence admitted and all the reasonable inferences that relate to its case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

The record reflects that all of the prosecution's arguments were supported by the facts submitted at trial. Robinson testified that sending fingerprint evidence to the FBI crime lab "costs hundreds of thousands of dollars sometimes to do that," and would likely entail a delay of three or four years before the results were returned. The prosecution's assertion that defendant ran and hid from police was supported by Joshua's testimony that defendant ran away when the police arrived, and Robinson's testimony that he later heard voices and footsteps when he knocked on the door of the trailer where defendant allegedly headed, shortly after the incident. The prosecution's argument that defendant and Joshua fought the week before the incident was supported by defendant's own testimony that, "like a week before this happened I was at home and we was having a party at Edwardsburg in the trailer park, and he was driving around and kept calling, so I was kind of drunk so I decided to get in my car, then I chased him down while he was at his friend's house, so I stopped my car and I got out, and we just talked and talked and talked and started yelling at each other, and he shoved me." This testimony also supported the prosecution's argument that defendant wanted to be the boss of the neighborhood. *Bahoda, supra* at 282; *Unger, supra* at 239. The prosecution also argued that two witnesses identified defendant and that neither of them "wanted to see the wrong guy convicted." This argument was permissible because the prosecution did not assert that he possessed special knowledge regarding the witnesses' truthfulness, and the argument was supported by the evidence. Both Joshua and Amanda testified that defendant was the individual who invaded their home and threatened Joshua. Although the prosecution may not vouch for the credibility of a witness by claiming he possesses special knowledge that the jury does not have, the prosecution is free to argue that a witness is worthy or unworthy of belief based on the evidence. *Bahoda, supra* at 276; *Thomas, supra* at 455.

Defendant next complains that the prosecutor made an impermissible civic duty argument when he stated: "We ask, ladies and gentlemen, on behalf of the victims in this case, those two young kids, and on behalf of the people of this county that you hold Michael Wall accountable for his terrible and terroristic actions on that night in question. It was pure and simple

barbarism." The prosecution may not argue that the jury should convict the defendant out of civic duty. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). A civic duty argument appeals to the jurors' fears and prejudices or urges the jury to convict the defendant for the good of the community. *Bahoda, supra* at 282-283. However, we conclude that the challenged argument did not ask the jury to suspend its powers of reason and convict defendant because it was their civic duty to do so. Moreover, the trial court instructed the jury that it must decide the case based on the evidence, and that the attorneys' statements are not evidence. The instructions were sufficient to cure any prejudice. *Thomas, supra* at 456.

Defendant next asserts that the prosecutor impermissibly appealed to the jury's sympathy in opening statement. He informed the jury that Joshua lived with his sister and two young children, and had been laid off from work but was starting work the next day making horse trailers. The prosecutor also stated that the jury would hear Amanda's telephone call to 911 and should listen for the fear in her voice. The prosecution may not appeal to the jury's sense of sympathy for the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, these comments were not impermissible appeals to sympathy. The comments were merely background information to assist the jury in placing the events in context. -- Joshua had gone to bed early that night because he had to awake the next morning for his first day of work. And, the fear in Amanda's voice was relevant to proving that defendant intended to commit an assault during the home invasion. Further, an element of home invasion entails proving that the breaking and entering occurred while another was lawfully present. Thus, the fact that not only Joshua, but also his family, were present was relevant. The prosecution's brief statements were not so inflammatory as to result in prejudice to defendant. *Callon, supra* at 329.

Lastly with respect to prosecutorial misconduct, defendant argues that the sum total of the prosecution's instances of misconduct denied him a fair trial. Although the cumulative effect of minor instances of prosecutorial misconduct may result in reversal, there were no errors in this case to accumulate. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

Defendant next raises several sentencing issues. He claims his due process rights were violated because the trial court made findings of fact and used them in scoring several offense variables (OVs). He argues that he was therefore sentenced based on facts not found by the jury beyond a reasonable doubt. *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000); *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant also maintains that the facts used in scoring the offense variables were not proven by a preponderance of the evidence. Defendant preserved these issues by moving for resentencing in the trial court. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10).

With respect to defendant's due process challenge based on judicially-determined facts in scoring several OVs, our Supreme Court has determined that a defendant's due process rights are not violated where "the trial court [] utilize[s] judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict," as long as the sentence stays within the statutory maximum. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, defendant's due process challenge fails. First-degree home invasion, MCL 750.110a(2), is a Class B felony carrying a maximum sentence of 20 years. MCL 777.16f. Defendant's sentence of 2 to 20 years' imprisonment was within the maximum range.

Defendant next challenges the trial court's scoring of the specific OVs.[3] The trial court has discretion to determine the number of points to be scored, although this determination must be supported by adequate evidence on the record. *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002). The trial court may use all of the record evidence, including the presentence investigation report (PSIR), preliminary examination testimony, and any admissions by defendant. *People v Ratkov (After Remand),* 201 Mich App 123, 125; 505 NW2d 886 (1993). The proper construction of the sentencing guidelines and the legal questions involved in their applicability present issues of law reviewed de novo. *People v Underwood,* 278 Mich App 334, 337; 750 NW2d 612 (2008). When the sentence is within the appropriate guidelines range, we must affirm unless there was an error in scoring the guidelines or the trial court relied on erroneous information in making its sentencing determination. *People v Babcock,* 469 Mich 247, 261; 666 NW2d 231 (2003); MCL 769.34(10).

The trial court's scoring of OV 1, MCL 777.31, at five points because "[a] weapon was displayed or implied," was supported by the record evidence. MCL 777.31(1)(e). The evidence at trial and the PSIR showed that defendant used and displayed a shovel in committing the home invasion when he used it to break into Joshua's home. Robinson testified that Joshua told him a snow shovel was used to break into the home. The PSIR also contains this information. Because there was record evidence to support the trial court's discretionary scoring decision, we affirm that decision. *Hornsby, supra* at 468.

The trial court scored ten points for OV 9, MCL 777.39, finding that there were "2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). "[E]ach person who was placed in danger of physical injury or loss of life or property" is counted as a victim. MCL 777.39(2)(a); *Kimble, supra* at 274. The record reflects that Joshua testified that his two children and Amanda were in the trailer during the incident. Joshua and Amanda were in the living room and kitchen area when the attack occurred. Joshua was holding the front door closed after defendant attempted to break it down. The PSIR also indicates that Joshua's two children were placed in danger of physical injury given the violent attack that employed a shovel to break the door, a baseball to break the window, the flying glass, and the kicking and denting of the exterior of the trailer. Moreover, Amanda was also placed in danger of physical injury during the attack. She ran through the living room past the window, right past defendant, after the window was shattered in order to tend to the children, who had started crying. Even if the possibility of injury to the children was remote, the immediate danger of physical injury to Amanda and Joshua, as two "victims," supported the trial court's determination to score ten points for OV 9 was supported by the record evidence and the PSIR. *Hornsby, supra* at 468.

[3] According to defendant's Presentence Investigation Report, Defendant was assessed a Prior Record Variable Score of 2, placing him at PRV Level B. Defendant was assessed a total Offense Variable score of 27, placing him in OV Level III (25 to 34 points, MCL 777.63). According to defendant's version of what the proper scoring should have been, his OV score would be 0, placing him in OV Level I, with a minimum sentencing range of 12 to 20 months. MCL 777.63.

The trial court assessed OV 12, MCL 777.42, at one point because it found that the evidence established that defendant worked in concert with "two co-defendants, Herbert [Jerraid] and Corey Parsons [defendant's cousin]. This conduct of the three co-defendants working together to commit a crime could have resulted in the defendant receiving a criminal conviction for conspiracy but it did not and will not." MCL 777.42(1)(f) scores one point where a contemporaneous felonious criminal act is committed. It is contemporaneous if it "occurred within 24 hours of the sentencing offense" and "has not and will not result in a separate conviction." MCL 777.42(2)(a). The crime of conspiracy involves an agreement, express or implied, that is formed between two or more people in order to accomplish an unlawful or criminal act. *People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988). Evidence of the conspiracy may include the circumstances and conduct of the defendants. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). In addition, what the alleged conspirators actually did can be evidence that they had an agreement to do it. *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002).

The trial court's scoring determination was supported by the evidence. *Hornsby, supra* at 468. The evidence at trial and in the PSIR showed that defendant and the other two men decided to go to Joshua's house together, and worked together in carrying out the attack on his trailer. *Bettistea, supra* at 117. Defendant described his involvement in the attack on Joshua's home, including the assistance of Jerraid and his cousin. *Id.* The trial court did not independently convict defendant of conspiracy and sentence him as a conspirator. In fact, the trial court indicated that defendant was not and would not be charged with conspiracy.

The trial court scored OV 14, MCL 777.44, at ten points, finding that defendant was a "leader in a multiple offender situation." MCL 777.44(1)(a). The evidence supported this finding based on the testimony that defendant was the perpetrator who actually smashed the screen door and front door with a shovel until they gave way, yelled that he was coming in to "kick [Joshua's] ass" several times, and then stood on the air conditioning unit, stuck his head through a shattered window, and taunted Joshua. Defendant's testimony indicating his dislike for Joshua and the past altercation with him also support a conclusion that he led the attack. Moreover, defendant's contention that another person could have been a leader "behind the scenes" is unavailing, because more than one offender may be a leader in a three-offender situation, MCL 777.44(2)(b).

Defendant also contests the scoring of one point for OV 16, MCL 777.46, based on the monetary amount of damage caused by the home invasion. One point is scored for damage totaling between $200 and $1,000. MCL 777.46(1)(d). Ten points is scored where the damage totals $1,000 or more but less than $20,000. MCL 777.46(1)(c). In ruling on defendant's motion for resentencing, the trial court noted that it erroneously scored OV 16 at one point instead of ten, because the PSIR actually indicated that restitution in the amount of $1,747 was requested, but this amounted to a harmless error in defendant's favor and did not change his sentencing guidelines range. The trial court's ruling scoring one point was supported by the evidence because the PSIR indicated $1,747 in damages, and the evidence at trial demonstrated that Joshua's trailer was dented, the living room window was shattered, the doors were broken, and his car window was shattered.

In sum, the trial court properly scored the offense variables and its scoring determinations were supported by adequate evidence on the record. *Babcock, supra* at 261; *Hornsby, supra* at 468. We affirm those decisions.

In his final claim of error on appeal, defendant asserts that his trial counsel was ineffective for failing to object to the prosecution's statements regarding Erdos's proposed testimony, failing to object to the allegedly deficient service of process on Erdos, failing to request an instruction that the jury disregard the prosecution's statements in his opening regarding Erdos, and failing to object to the flight instruction. Because defendant did not raise this claim in the trial court by moving for a new trial or an evidentiary hearing, this issue is unpreserved. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Review is limited to errors that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant must demonstrate that his defense counsel's performance fell below an objective standard of reasonableness and denied him a fair trial, and that, but for the alleged error, it is reasonably likely that the outcome of the trial would have been different. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Defendant must overcome the presumption that counsel's performance was effective and constituted sound trial strategy. *Id.* at 146.

With respect to defendant's claim that defense counsel should have objected to and requested a limiting instruction regarding the prosecution's opening statements about Erdos's testimony, defendant has failed to demonstrate that defense counsel's actions fell below an objective standard of reasonableness, or that, in light of the substantial evidence against defendant, the outcome of the trial would have been different if an objection and instruction had been made. *Henry*, *supra* at 145-146. When the prosecution gave the opening statement, it was still possible that Erdos would appear. Defense counsel had no way of knowing that Erdos would ultimately fail to appear. Again, the prosecution attempted to procure Erdos's testimony in good faith and defendant failed to show bad faith or prejudice. *Wolverton, supra* at 75-78. Moreover, the trial court also instructed the jury that the attorneys' statements were not evidence; thus, a limiting instruction was given, although it was not specifically directed to the prosecution's comments about Erdos. And, more importantly, at trial, defendant argued that further statements or testimony to the jury regarding Erdos's absence would be improper because it would "emphasize possibly some untorrid (sic) influence by Mr. Wall, and I don't want either that argued or the impression that Mr. Wall somehow committed or interfered with justice." Defense counsel therefore purposely requested that the trial court not make further mention of Erdos in order to avoid the appearance that defendant was responsible for Erdos's absence. Defendant has failed to overcome the strong presumption that defense counsel's "action constituted sound trial strategy under the circumstances." *Toma, supra* at 302.

Additionally, although defense counsel did not object to the form of service of process on Erdos, any objection would have been meritless because Erdos actually acknowledged that he received the service, knew about the trial and knew he was compelled to appear, but failed to appear because he overslept. A different service of process would not have changed this outcome because Erdos knew that he needed to appear. Defense counsel is not ineffective for failing to raise a meritless objection. *Snider, supra* at 425.

Defendant also argues that defense counsel was ineffective for failing to object to the flight instruction. The trial court did not abuse its discretion in giving the flight instruction

because it was supported by the evidence introduced at trial. *Johnson*, *supra* at 804. Defense counsel is not ineffective for failing to raise an objection that would have been futile. *Snider*, *supra* at 425.

Finally, defendant complains that defense counsel was deficient with respect to all of the other issues he raises in his brief. Other than this brief, conclusory statement, defendant fails to provide further explanation, citation to authority, or analysis of the alleged deficiencies. Defendant has abandoned this claim on appeal because a party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio