

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LEE MURRAY,

Defendant-Appellant.

UNPUBLISHED

March 3, 2009

No. 281767

Jackson Circuit Court

LC No. 07-003587-FH

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of breaking and entering, MCL 750.110. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 46 to 180 months' imprisonment for the conviction. We affirm.

Defendant's conviction arises out of a late night entry into RJ's Party Store in Jackson County. The party store's owner's son, Ryan, received a call from an alarm company at 1:30 a.m. advising that someone was inside the party store. Ryan immediately went to the store and saw a red car parked on the side of the store and a man exiting the closed store carrying liquor and cigarettes. The man, later identified by Ryan as defendant, got into the car and drove away at a high rate of speed, with Ryan following and attempting to contact the police at the same time. The red vehicle eventually pulled over to the side of the road and defendant began pulling sheets of lottery tickets out of the car and putting them into a ditch. The police arrived and defendant ran into a field, leaving the car at the side of the road. The police were unable to locate defendant but, through vehicle records, were able to trace the vehicle to defendant's mother. Defendant was later arrested and charged with breaking and entering.

On appeal, defendant first argues he was denied a fair and impartial trial because of two instances of prosecutorial misconduct. Because defendant failed to object to the two alleged instances of prosecutorial misconduct, this Court's review is limited to plain error affecting a defendant's substantial rights. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005); *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). To avoid forfeiture under the plain error rule, three requirements must be met: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. . . , i.e., the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial.” *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). A defendant’s claim of prosecutorial misconduct is reviewed on a case-by-case basis. *People v Tommy Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

In the present case, defendant asserted at trial that he had fought earlier in the evening with the main prosecutorial witness, and that he was home at the time of the commission of the crime. The prosecution inquired as to why defendant did not contact the police after he learned he was implicated in the crime at issue. While defendant asserts that the prosecutor committed misconduct in this line of questioning “[a] defendant’s prearrest silence is admissible for impeachment purposes.” *People v Hackett*, 460 Mich 202, 213; 596 NW2d 107 (1999). Therefore, “a prosecutor may comment on a defendant’s failure to report a crime when reporting the crime would have been natural if the defendant’s version of the events were true.” *Goodin, supra* at 432. The challenged questioning was not inappropriate because the prosecution was properly inquiring into why defendant did not contact police when it “would have been natural [to do so] if the defendant’s version of the events were true.” *Goodin, supra* at 432.

Defendant next maintains that the prosecutor engaged in misconduct in that the prosecution’s questions improperly required defendant to comment on another witness’s, specifically his mother’s, credibility. A defendant may not be asked “to comment on the credibility of the prosecution witnesses” because it is not probative. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, a prosecutor may “ascertain which facts are in dispute.” *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

In the present case, the prosecution’s questions merely attempted to highlight the differences in the testimony between defendant and defendant’s mother. Defendant testified that the car he was driving ran out of gas, so he left it on the side of the road, whereas defendant’s mother testified that defendant had told her to report the car as stolen. The record indicates the prosecution never asked defendant about Brady’s credibility; rather, the prosecution gave defendant an opportunity to explain why Brady would testify that defendant told her to report that the car was stolen. The prosecution’s actions were not improper.

Defendant additionally argues the cumulative effect of the various instances of prosecutorial misconduct denied him a fair and impartial trial. “The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not.” *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Therefore, “this Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial.” *Id.* As previously discussed, neither of the two instances cited by defendant were improper and, therefore, he was not denied a fair trial.

Next, defendant contends defense counsel was ineffective for failing to object to the prosecutor's questions as challenged on appeal. Because defendant did not request a *Ginther*¹ hearing or a new trial, this Court's review of defendant's claim of ineffective counsel is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). This Court has noted, "it is well established that defense counsel is not ineffective for failing to pursue a futile motion." *People v Craig Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008). As noted above, the prosecutor's questioning was proper. Therefore, an objection in either instance would have been futile. *Id.* In reaching our conclusion, we note that in defendant's standard 4 brief, he argues that he is entitled to a *Ginther* hearing. Defendant did not properly move this Court for such a hearing, MCR 7.211(C)(1), and, because of our resolution of the issues, a hearing would serve no purpose.

In his standard 4 brief, defendant also argues that his conviction and sentence require reversal for several other reasons. All of these claims are abandoned on appeal because defendant does not explain or rationalize them or cite relevant authority to support them. Therefore, defendant has abandoned all of these claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce a 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.")

Nevertheless, we have briefly reviewed each of defendant's claims and find no error requiring reversal. First, the record does not support that the prosecution committed misconduct with respect to defendant's mother. A review of the record reveals no evidence to support the claim that either the prosecution or the trial court badgered her. And, the prosecutor was entitled to present an argument concerning her testimony and the reasonable inferences drawn therefrom during closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Second, defendant was not entitled to a separate hearing regarding his habitual offender status. "The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing . . ." MCL 769.13(5). Because the trial court appropriately and explicitly listed defendant's prior offenses on the record at sentencing and they were not contested by defendant, a separate hearing is unnecessary. MCL 769.13(5); *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998).

Third, defendant alleges four instances of ineffective assistance of counsel, which he claims denied him a fair trial. Defendant failed to preserve any of these claims for appeal; thus, this Court's review is limited to errors apparent on the record. *Knapp, supra* at 385. To prevail on a claim of ineffective counsel, defendant must prove two components: 1) deficient performance, and 2) prejudice. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

In the present case, defendant failed to establish a factual predicate for any of his four claims. First, defendant fails to identify by name the witness he claims was a convicted felon and who should therefore have been precluded from testifying against him. And, there is no evidence in the record to substantiate that any of the prosecutor's witnesses could have been impeached with evidence of prior convictions. Next, defendant cannot establish a factual predicate for his claim that a juror's relationship with defense counsel was inappropriate. Third, nothing in the record supports that defense counsel did not communicate with defendant. Fourth, the record is silent regarding defendant's claim that a juror was sleeping during the trial. Because our review is limited to errors apparent on the record and because defendant was required to establish the factual predicate of his claims, a new trial is unwarranted. *Carbin, supra* at 600; *Knapp, supra* at 385.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly