STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2009
v	No. 285640 Macomb Circuit Court
WILLIAM AERRON BRADY, Defendant-Appellant.	LC No. 2007-003158-FC

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, unlawful imprisonment, MCL 750.349b, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and two counts of resisting or obstructing a police officer, MCL 750.81d(1). He was acquitted of three additional counts of felonious assault. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 19 to 60 years each for the assault with intent to do great bodily harm, unlawful imprisonment, and felon in possession convictions, and 5 to 15 years each for the felonious assault and resisting or obstructing convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We now affirm.

Defendant was convicted of physically assaulting and confining a 77-year-old woman who had befriended him and allowed him to stay in her home. The evidence indicated that during an approximate 12-hour period beginning on June 6, 2007, and continuing until the early morning hours of June 7, 2007, defendant assaulted and forcibly confined the woman inside her own home, except for a brief period when he forcibly took her to a party store. On the morning of June 7, after defendant left for work, the police were contacted and later arrested defendant at his worksite.

I. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to support his convictions for assault with intent to do great bodily harm less than murder, unlawful imprisonment, and

resisting or obstructing a police officer and, accordingly, the trial court erred in denying his motion for a directed verdict on those charges.[1] An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We must review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the elements of the charged crime were proven beyond a reasonable doubt. *Id*. at 514-515.

To prove the crime of assault with intent to do great bodily harm, the prosecution was required to prove (1) an assault with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). Defendant concedes that there was sufficient evidence of an assault, but argues that there was insufficient evidence of his intent to do great bodily harm. We disagree.

Assault with intent to do great bodily harm is a specific intent crime. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). As plaintiff correctly argues, the offense depends on the defendant's intent, not any actual harm to the victim. See *People v Harrington*, 194 Mich App 424, 429-430; 487 NW2d 479 (1992). In this case, testimony that defendant attempted to smother the victim several times with a pillow, and that he loaded a gun, pointed it at the victim, and pulled the trigger, was sufficient to enable the jury to find beyond a reasonable doubt that defendant assaulted the victim with the intent to do great bodily harm. The facts that the victim was able to resist defendant's attempts to smother her, and that the gun did not fire when defendant pointed it and pulled the trigger, does not negate defendant's intent. Accordingly, the evidence was sufficient to support defendant's conviction of assault with intent to do great bodily less than murder.

The unlawful imprisonment statute, MCL 750.349b, provides, in relevant part:

> (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
>
> (a) The person is restrained by means of a weapon or dangerous instrument.
>
> (b) The restrained person was secretly confined.

[1] Defendant was convicted of assault with intent to do great bodily harm less than murder as a lesser offense to an original charge of assault with intent to commit murder, MCL 750.83. At trial, defendant moved for a directed verdict of the assault with intent to commit murder count, arguing that, at most, the evidence only supported a finding of assault with intent to do great bodily harm less than murder. The trial court denied defendant's motion. Despite defendant's apparent concession at trial that the evidence supported a finding of assault with intent to do great bodily harm less than murder, defendant properly may challenge the sufficiency of the evidence for that offense on appeal. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

(c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

* * *

(3) As used in this section:

(a) "Restrain" means to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.

(b) "Secretly confined" means either of the following:

(*i*) To keep the confinement of the restrained person a secret.

(*ii*) To keep the location of the restrained person a secret.

Although defendant argues that unlawful imprisonment was not proven because the victim was allowed to move around her house during the 12-hour period defendant was present, MCL 750.349b(3)(a) specifically provides that a defendant need not restrain the victim for any particular length of time. The testimony indicated that defendant restrained the victim in her home by taking her from room to room with him several times, and by disabling the telephones, during which time he threatened her with a gun. Also, he forced her to accompany him to the store by not letting go of her arm while they went there. Although defendant contends that the victim was not secretly confined because one of the telephones was not immediately disabled, thereby enabling the victim to call her employer, defendant was not charged with secret confinement imprisonment, but rather with knowingly restraining the victim through the use of a weapon under MCL 750.349b(1)(a). Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant was guilty of unlawful imprisonment for restraining the victim under circumstances involving the use of a weapon.

The evidence was also sufficient to support defendant's two convictions of resisting or obstructing a police officer, MCL 750.81d(1). A person is guilty of this crime if he knowingly resists or obstructs a police officer in the performance of his duties. *People v Ventura*, 262 Mich App 370, 375-376; 686 NW2d 748 (2004). For purposes of the statute, "obstruct" includes "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7); *People v Chapo*, 283 Mich App 360, 367; ___ NW2d ___ (2009). The evidence that two officers repeatedly ordered defendant to get down on the ground, and that defendant ignored those commands, stood up, and continued standing until the officers physically placed him on the ground, and that defendant thereafter refused to comply with the officers' commands to place his arms at his side, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find that the essential elements of this offense were proven beyond a reasonable doubt.

II. Failure to Produce a Witness

Next, defendant argues that the prosecution failed to provide reasonable assistance in attempting to locate a res gestae witness, David Wilson, and that defense counsel was ineffective for not attempting to secure Wilson's appearance at trial, and for not requesting either a hearing on the matter or an instruction that would have allowed the jury to infer that Wilson's testimony would not have been favorable to the prosecution.

Although defendant requested assistance in locating Wilson before trial, he did not object when Wilson was not produced at trial, or protest that the prosecution failed to provide reasonable assistance in attempting to locate Wilson and secure his appearance at trial. Therefore, this issue is not preserved and defendant must demonstrate a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Under MCL 767.40a, the prosecution is not required to produce all known res gestae witnesses for trial, but rather is only required to identify those witnesses and produce them for trial if they are included on the prosecution's witness list. See *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003). Wilson was not named on the prosecution's witness list. Therefore, the prosecutor did not have a duty to produce him at trial.

Upon request by a defendant, the prosecution must also provide reasonable assistance in attempting to locate and serve process upon a witness. MCL 767.40a(5); see also *People v Lawton*, 196 Mich App 341, 347-348; 492 NW2d 810 (1992). If a defendant requests assistance in locating a witness and that witness is not produced, a hearing may be appropriate to determine whether the prosecution provided reasonable assistance in attempting to locate and secure that witness's appearance at trial. *People v Cook*, 266 Mich App 290, 295-296 n 7; 702 NW2d 613 (2005). If it is determined that the prosecutor failed to provide reasonable assistance in attempting to locate a witness, an instruction informing the jury that it may infer that the missing witness's testimony would have been favorable to the defendant may be appropriate. See CJI2d 5.12; *Perez, supra* at 420. Whether such an instruction is appropriate depends on the facts of each particular case. *Id.* at 420-421.

In this case, defendant never requested a hearing to determine what efforts were made to attempt to locate Wilson and secure his appearance at trial. Thus, there is no basis for concluding that reasonable assistance was not provided, or that a missing witness instruction would have been appropriate. Furthermore, it is apparent that Wilson's nonappearance did not affect defendant's substantial rights. Where a witness has not been produced despite a duty to do so, a defendant must demonstrate that he was prejudiced by the failure to produce the witness. *People v Bonita Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989). It follows that a showing of prejudice is likewise necessary when the prosecution fails to provide reasonable assistance in attempting to locate a witness.

The record discloses that Wilson's only connection to this case was that he was present at the house where defendant was later arrested. Thus, the only charges to which his testimony possibly could have been relevant are the two charges of resisting or obstructing a police officer. Even then, however, the evidence indicated that Wilson was in the basement of the house when defendant was arrested in the upstairs kitchen. Thus, he was not in a position to observe the circumstances surrounding defendant's arrest. At most, Wilson could have offered testimony

about what he heard, if anything. The principal issue at trial, however, was not whether the officers made a lawful command, but whether defendant failed to comply with the officers' commands. Because Wilson was in the basement, he was not in a position to observe defendant's conduct in reaction to the officers' commands. For these reasons, there is no basis for concluding that defendant was prejudiced by the failure to locate Wilson, or by Wilson's absence at trial. Indeed, defense counsel acknowledged at a pretrial hearing that Wilson was not a necessary witness. Accordingly, defendant is not entitled to relief with respect to this unpreserved issue.

Defendant alternatively argues that defense counsel was ineffective for not securing Wilson's appearance, not requesting a hearing regarding the prosecution's efforts to locate Wilson, and not requesting a missing witness instruction. Because defendant did not raise this ineffective assistance of counsel issue in the trial court, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy and ineffective assistance of counsel will not be found merely because a strategy backfires. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987).

As discussed previously, the record indicates that Wilson was not in a position to observe the circumstances surrounding defendant's arrest, and that Wilson was not present when the remaining charged offenses were committed. Thus, there is no basis for finding that Wilson could have provided a substantial defense to any of the charges. Similarly, there is no reasonable probability that the outcome of the trial would have been different had Wilson been located and testified at trial, or had counsel requested the missing witness instruction, CJI2d 5.12. We therefore reject defendant's claim that defense counsel was ineffective.

III. Prosecutor's Conduct

Defendant next argues that he is entitled to a new trial because of improper comments by the prosecutor during closing and rebuttal arguments. We disagree. Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Where an alleged error is

not preserved with an appropriate objection at trial, our review is limited to plain error affecting the defendant's substantial rights. *Id.* at 274. Further, this Court will not reverse if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction upon request. *People v Joezell Williams II,* 265 Mich App 68, 70-71; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006).

Claims of prosecutorial misconduct are decided case by case and the challenged comments must be considered in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). A prosecutor is afforded great latitude in closing argument. She is permitted to argue the evidence and reasonable inferences that arise from the evidence in support of her theory of the case. *Bahoda, supra* at 282. However, the prosecutor must refrain from making prejudicial remarks. *Id*. at 283. While prosecutors have a duty to see that a defendant receives a fair trial, they may use "hard language" when it is supported by the evidence and they are not required to phrase their arguments in the blandest of terms. *People v Ullah,* 216 Mich App 669, 678; 550 NW2d 568 (1996).

"A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman,* 257 Mich App 434, 450; 669 NW2d 818 (2003). "A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand),* 235 Mich App 429, 438; 597 NW2d 843 (1999).

Defendant first argues that the prosecutor improperly appealed to the jurors' sympathy for the victim by describing the offense in her closing argument as a horror, and asking the jury to "send a message" and find defendant guilty if the jury believed the victim. Because there was no objection to these remarks, defendant must show a plain error that affected his substantial rights, and must also show that a cautionary instruction could not have cured any possible prejudice. *Abraham, supra*; *Williams, supra*.

It is improper for the prosecutor to appeal to the jury to sympathize with the victim. *People v Watson,* 245 Mich App 572, 591; 629 NW2d 411 (2001). It is also generally improper for the prosecutor to ask the jurors to place themselves in the role of the victim when arriving at a verdict. *People v Buckey,* 133 Mich App 158, 167; 348 NW2d 53 (1984), rev'd on other grounds 424 Mich 1 (1985). Here, the prosecutor's comments did not involve an obvious plea to the jury to sympathize with the victim. The prosecutor merely urged the jury to consider all of the circumstances of the case and find defendant guilty. The descriptions of the offense as "torture" and "horror" were supported by the evidence and, therefore, were not improper. Also, the prosecutor did not ask the jurors to place themselves in the victim's shoes, nor were her arguments calculated to ask the jurors to suspend their judgment and decide the case based on sympathy for the victim. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Accordingly, no plain error has been shown.

Defendant next argues that the prosecutor improperly denigrated defense counsel through the following remarks during her rebuttal argument:

> Talked about this burden, and I welcome this burden, and this burden is used to convict people everyday across America. He says it is our burden to take

> finger prints [sic]. No, it is not. That's -- it's not a legal burden. Testimony is evidence and he wants you to forget that. He wants you to forget about Chris Genna's testimony, just forget about that testimony. He wants you to forget about the gun that he says the officers planted on him.
>
> Ladies and Gentlemen, did the officers appear to be evading the questions or lying? Are they going to risk their jobs for him? This isn't TV, this is – I said, well, you heard her, you heard the testimony that she said there's guns I didn't hear that testimony there was guns in the house, I heard there was weapons in the house, and yeah, there was a gun in the house, really break it down semantics? He got caught, and that's a very nice story Mr. Dennis told, and we got to listen to all the evidence before, he gets to see all the police reports, this was now say June, a lot of time to come up with that story, you got to do something, we have got pictures, we have got bullet holes, we have got testimony, we have got the neighbor that saw him out there yelling at him, smelled like alcohol, said he was off, wasn't right. He was off, wasn't right.

Defendant moved for a mistrial, arguing that these comments were improper because the defense was not required to prove anything. Trial defense counsel did not argue below that the prosecutor's comments denigrated defense counsel. Therefore, this particular claim is unpreserved, and we review for plain error affecting substantial rights. *Abraham, supra* at 274. The trial court accepted the prosecutor's argument that she was merely responding to defense counsel's closing argument in which counsel claimed that the victim fabricated the incident.

A prosecutor must refrain from denigrating the defendant or defense counsel with intemperate and prejudicial comments. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). While prosecutors are free to argue the evidence,

> "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); see also *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988).
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> "The prosecutor may not question defense counsel's veracity. When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality." [*People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008) (citation omitted).]

When the defense raises an issue, it is generally not improper for the prosecutor to comment on the improbability of the defense theory or evidence. *People v Jones*, 468 Mich 345, 352-353 n 6; 662 NW2d 376 (2003). Here, the prosecutor's comments were made during rebuttal argument and were a fair response to defense counsel's closing argument. The prosecutor was not commenting on defense counsel's veracity, but rather on the credibility of the theories espoused by the defense. Defendant has failed to show that the comments were improper.

Defendant next argues that the prosecutor improperly vouched for the credibility of her witnesses through the following portion of her closing argument:

> Count 1 is assault with intent to murder. And he's right, this is a very serious charge. You better believe the police took it seriously. An old woman got beat up and tortured for ten hours. They take it so seriously, wanted to get him in custody right away, that's how serious they took it. That is how serious they took her statement and her word. And to prove this, I have to prove the elements that I went through in opening statement.
>
> * * *
>
> Ladies and Gentlemen, pictures don't lie. Mrs. Hornberger didn't lie either. . . .

A prosecutor may not vouch for the credibility of her witnesses by suggesting that she has some special knowledge of the witnesses' truthfulness. *Bahoda, supra* at 276. However, she may argue from the facts that a witness should be believed. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Here, the prosecutor's comments were made in reference to the evidence. The prosecutor did not suggest that she had some personal knowledge, unknown to the jury, that the witnesses were truthful. Accordingly, there was no plain error.

Defendant lastly argues that the prosecutor improperly commented on his guilt at the beginning of her rebuttal argument when she stated, in reference to defendant, "He is not sitting there an innocent man, Ladies and Gentlemen." After a defense objection, the trial court instructed the jury to disregard the prosecutor's remark.

A prosecutor is not prohibited from arguing that the defendant is guilty:

> While the prosecutor may not place the prestige of his office behind the assertion that the defendant is guilty, he may argue that the evidence establishes defendant's guilt. Where the prosecutor's argument is based upon the evidence and does not suggest that the jury decide the case on the authority of the prosecutor's office, the words "I believe" or "I want you to convict" are not improper. [*People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988).]

To the extent that the prosecutor's comment was improper because it was not accompanied by a contemporaneous reference to the evidence, the trial court's instruction to the jury to disregard the comment was sufficient to cure any prejudice, since jurors are generally presumed to follow instructions. *Abraham, supra* at 279. Accordingly, defendant is not entitled to a new trial.

IV. Sentencing

A. Scoring of the Sentencing Guidelines

Defendant next argues that the trial court erroneously scored offense variables 1, 7, 8, and 19 of the sentencing guidelines. As defendant acknowledges, however, he received a total offense variable score of 165 points and, even if the challenged variables were scored as he contends they should be, his sentencing guidelines range would not change. Where an alleged scoring error does not affect the appropriate guidelines range, resentencing is not warranted. *People v Francisco*, 474 Mich 82, 89 n 2; 711 NW2d 44 (2006); *People v McGee*, 280 Mich App 680, 685-686; 761 NW2d 743 (2008). Accordingly, because the alleged scoring errors do not affect defendant's guidelines range, we decline to consider this issue further.

B. Felon in Possession Sentence

Defendant argues that the trial court erred by failing to separately score the sentencing guidelines for his conviction of felon in possession of a firearm, and that the trial court's sentence of 19 to 60 years for that conviction exceeds the appropriate guidelines range for that offense. We disagree.

Where a defendant is convicted of multiple offenses, the trial court is only required to score the guidelines for the higher class felony conviction. See MCL 771.14(2)(e); MCL 777.21(2); *People v Mack*, 265 Mich App 122, 126-128; 695 NW2d 342 (2005); see also *People v Johnigan*, 265 Mich App 463, 471; 696 NW2d 724 (2005) (Sawyer, J.). Unlawful imprisonment is a class C felony, MCL 777.16q, whereas felon in possession of a firearm is a class E felony, MCL 777.16m. Therefore, the trial court properly scored the guidelines only for defendant's unlawful imprisonment conviction, and did not err by failing to score the guidelines for the felon in possession offense.

C. Restitution

Defendant also argues that the trial court erred in ordering him to pay $400 in restitution to the victim. "This Court reviews a restitution order for an abuse of discretion." *People v Cross*, 281 Mich App 737, 739; 760 NW2d 314 (2008). "Generally, an appellate court defers to the trial court's judgment, and if the trial court's decision falls within the range of principled outcomes, it has not abused its discretion." *Id*.

Restitution to a crime victim is mandatory unless the victim has already received compensation. *People v Bell*, 276 Mich App 342, 347; 741 NW2d 57 (2007). In *Cross*, *supra* at 739-740, this Court explained:

> Crime victims retain both statutory and constitutional rights to restitution. Const 1963, art 1, § 24; MCL 780.766; *People v Grant*, 455 Mich 221, 229; 565 NW2d 389 (1997). Further, the Crime Victim's Rights Act, MCL 780.766(2), mandates that a defendant "make *full restitution* to any victim of the defendant's course of conduct . . . ." (Emphasis added.) To prove the appropriate amount of restitution, MCL 780.767(4) requires:

> "Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney."
>
> "Preponderance of the evidence" means such evidence, as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. *People v Pugh*, 48 Mich App 242, 245; 210 NW2d 376 (1973).

Information pertaining to restitution may be included in the presentence report ("PSIR"). MCL 780.767(2). Although a court must resolve a dispute regarding the type or amount of restitution by a preponderance of the evidence, a hearing is not always required. MCL 780.767(4).

In this case, testimony below indicated that defendant owed the victim money for rent and other living expenses, and that defendant had given the victim his paycheck for $400. During the offense, defendant demanded the return of that money and the victim gave it to him. At sentencing, defendant did not dispute the amount of restitution, but only argued that he should not be required to pay restitution because he was not convicted of taking any money. Because there is record support that defendant obtained the $400 during his "course of conduct that gives rise to the conviction," MCL 780.766(2), the trial court did not abuse its discretion in determining that the victim was entitled to restitution of $400. Further, because defendant did not dispute the amount of restitution, but rather challenged the victim's entitlement to restitution on a legal ground, he was not entitled to a hearing to resolve the issue.

D. Attorney Fees

Defendant also argues that the trial court erred by requiring him to repay the cost of his court-appointed attorney in the amount of $1,969.45 without inquiring into his ability to pay. We disagree.

In *People v Jackson*, 483 Mich ___; ___ NW2d ___ (Docket No. 135888, decided July 10, 2009), our Supreme Court overruled *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), and held that a trial court is not required to conduct an ability-to-pay analysis before imposing a fee for a court-appointed attorney. Instead, the ability-to-pay analysis is required only when the imposition of the fee is enforced and the defendant contests his ability to pay. *Id.*. Accordingly, the trial court did not err by failing to inquire into defendant's ability to pay before imposing a fee for the cost of defendant's court-appointed attorney.

V. Defendant's Standard 4 Brief.

Defendant raises three issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. Presenting False Evidence

Defendant first argues that the prosecutor improperly presented false or perjured testimony at trial. The Due Process Clause of the Fourteenth Amendment prohibits a prosecutor from knowingly presenting false testimony to obtain a conviction, and a prosecutor is obligated

to report to correct and expose false evidence when it arises. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001).

Contrary to what defendant argues, the testimony did not establish that defendant could not have possessed the gun that allegedly was in his possession at the time of his arrest because it had previously been found in the victim's house. The testimony on which defendant relies only generally addressed the weapons that were taken into custody and secured for safekeeping by the police. However, that testimony did not establish that all of the weapons were found in the victim's home. The victim's home was searched for weapons after she contacted the police, but the officer also testified that he was given information that defendant might be armed with a handgun. The officer did not testify at the preliminary examination that the pistol was found in the home, and not on defendant at the time of his arrest.

Defendant also claims that false testimony was presented regarding the number of bullet holes found in the victim's home, but the testimony merely disclosed that the home was searched at two different times, by different officers, for different reasons. The fact that the officers' testimony differed concerning the number of bullet holes they observed does not mean that either officer's testimony was false. Similarly, the fact that there were some inconsistencies between the victim's preliminary examination testimony, trial testimony, and account of the offense in the police report does not prove that false testimony was knowingly presented at trial. In addition, Officer Sellers's testimony that a firearm was tested for fingerprints at defendant's request is supported by the record of the December 6, 2007, pretrial hearing, which shows that defense counsel requested that the firearm be forensically examined for finger prints.

In sum, the record does not support defendant's claim that the prosecutor knowingly presented false or perjured evidence.

B. Discovery

Defendant argues that he was improperly denied discovery of (1) the victim's criminal history; (2) ownership information about the rifle and pistol used in the offense; (3) the victim's telephone records for the period surrounding the offense; and (4) a list of the victim's medications and prescribing doctors. "A trial court's decision regarding discovery is reviewed for abuse of discretion." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

In criminal matters, discovery is limited to the items expressly set forth in MCR 6.201. Either the subject of the discovery must be set forth in that rule or the party seeking discovery must show good cause why the trial court should order the requested discovery. *People v Greenfield (On Rehearing)*, 271 Mich App 442, 447-448; 722 NW2d 254 (2006). Unless MCR 6.201 requires production of information or the party seeking discovery demonstrates good cause, the trial court is without authority to mandate discovery. *Id*. at 448-449.

The record discloses that the trial court granted defendant the right to obtain information about the victim's criminal history in accordance with MCR 6.201(A)(4) and (5). Defendant has not shown that the victim had any criminal history that was not disclosed.

Testimony regarding ownership of the weapons used during the offense was presented at the preliminary examination, as well as at trial. The victim indicated that the guns were owned

by her late husband, but admitted that one of the guns was not registered to her husband, and that none of the guns were registered to her. Defendant does not specify what other ownership information was not disclosed.

The record discloses that the trial court granted defendant's request for access to the victim's telephone records and provided him with funds to obtain those records from the telephone company. The prosecutor was not obligated to do more to assist defendant in obtaining those records. Thus, defendant has not shown any discovery violation by the prosecutor with regard to that information.

Lastly, although the trial court refused to allow defendant to obtain the victim's medical records regarding her prescription medications and prescribing doctors, defendant admitted that he was aware of her medications. Defendant has not shown that any other undisclosed medical information was necessary for his defense. Thus, he has not shown that the trial court abused its discretion in prohibiting further discovery in this area.

For these reasons, we reject defendant's claim that he was denied his right to discovery.

C. Effective Assistance of Counsel

Defendant lastly argues that trial counsel was ineffective because he did not adequately investigate the case or prepare for trial, or properly present a defense theory. Because defendant did not raise this issue in the trial court, our review is limited to errors apparent from the record. *Matuszak, supra*.

As previously indicated, a defendant is entitled to have his defense attorney prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is one that might have made a difference in the trial's outcome. *Kelly, supra*.

Defendant argues that defense counsel was ineffective for failing to investigate the possibility that he could not have telephoned the victim's residence from the county jail after he was arrested. Although it was reported at defendant's arraignment that the victim had received telephone calls that were identified on her caller ID as originating from the county jail, that information was not presented at trial. Defendant fails to explain how additional information concerning the telephone calls would have been relevant to any issue at trial, or could have provided a substantial defense. Thus, defendant has not shown that counsel was ineffective for failing to investigate this matter.

Defendant next argues that defense counsel was ineffective for failing to request the victim's telephone records for the purpose of investigating whether the telephone at the victim's house was working during the offense. As discussed previously, however, the record discloses that the trial court granted defense counsel's request for access to the victim's telephone records. Further, the victim's own testimony at trial established that she had a working telephone in her home during the offense. Accordingly, the record does not support defendant's claim that counsel was ineffective in this regard.

Defendant also argues that counsel was ineffective for not fully investigating or exploring the issue of the medications that the victim was taking at the time of the offense. We disagree. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy[.]" *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy and ineffective assistance of counsel will not be found merely because a strategy backfires. *Duff, supra*. At trial, defense counsel cross-examined the victim regarding her use of aspirin, which could have made her injuries appear more severe. Although he did not question the victim regarding other medications she was taking, he explored this issue in his examination of the physician who treated the victim at the hospital. This was a matter of trial strategy and defendant has not shown that counsel's strategy was unsound.

Defendant also argues that defense counsel did not adequately investigate the victim's injuries. However, the record discloses that counsel obtained the victim's medical records and photographs of her injuries. Defendant does not explain what additional evidence of the victim's injuries counsel should have obtained. Thus, the record does not support this claim.

Defendant also argues that defense counsel was ineffective for not properly challenging the police discovery of additional bullets after the victim's home was searched a second time. We disagree. The record reveals that this issue was explored at trial. The testimony indicated that bullet holes and additional casings were discovered when a second, more thorough search was conducted after defendant was taken into custody. The first search was primarily focused on securing the house and collecting weapons until defendant was taken into custody. The victim also explained that she collected some bullets from her home so that they would not be ingested by her cat. Defendant has not shown that defense counsel's questioning on this subject was objectively unreasonable.

Defendant lastly argues his defense counsel was ineffective for requesting that the gun recovered from his possession be checked for fingerprints, and for not objecting when the prosecutor elicited that the gun was tested for fingerprints at defendant's request. The decision whether to have the gun examined for fingerprints was a matter of trial strategy. Because defendant denied possessing the gun, that strategy was not unsound. Further, because the testimony indicated that there were no identifiable fingerprints on the gun, there is no basis for concluding that defendant was prejudiced because of this issue.

In sum, the record does not support defendant's various claims of ineffective assistance of counsel.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens