

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD JAMES CARGILL,

Defendant-Appellant.

UNPUBLISHED

December 15, 2009

No. 284893

Jackson Circuit Court

LC No. 07-004510-FC

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was convicted following a bench trial and was acquitted of one count of false imprisonment, MCL 750.349b, and one count of felony-firearm, MCL 750.227b.¹ Defendant was sentenced to 15 to 40 years' imprisonment for each of the armed robbery convictions, and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but remand for correction of the judgment of sentence and sentencing information report.

Defendant argues that the trial court erred when it admitted the recording of a post-arrest police interview of defendant. During the interview, police asked defendant several questions but defendant did not make any incriminating statements. At one point defendant stated that he did not want to talk "at this time." All of the questions were asked before defendant was advised of and waived his *Miranda*² rights. Defendant claims that the trial court erred in ruling that the evidence was admissible on relevance grounds and also contends that admission of the evidence violated his constitutional rights. Defendant preserved this issue for review with respect to his relevance argument by objecting on that same ground in the trial court; however, defendant failed to preserve the constitutional aspect of this issue for review because he did not object in the trial court on the same grounds. See *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994).

¹ The judgment of sentence does not reflect this.

² *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

This Court reviews a trial court's decision to admit evidence for an abuse of discretion; however, preliminary questions of law related to that decision are reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Unpreserved constitutional errors are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant bears the burden of showing: 1) an error occurred, 2) the error was plain, i.e. clear or obvious, and 3) the plain error affected defendant's substantial rights in that it affected the outcome of the lower court proceedings. *Id.* at 764.

The trial court did not abuse its discretion in determining the evidence was relevant pursuant to MRE 401; however, MRE 402 provides in part that relevant evidence is admissible "except as otherwise provided" by the state and federal constitutions. Pursuant to the Fifth Amendment, statements of an accused made during "custodial interrogation" are not admissible unless the prosecution shows that before any questioning, the accused was advised of his constitutional rights and he voluntarily, knowingly, and intelligently waived those rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). For purposes of *Miranda*, an accused is in "custody" if he has a reasonable belief, based on the objective circumstances, that he is not free to leave police presence. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). "Interrogation" occurs, in part, whenever police conduct "express questioning." *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

Here, defendant was in custody and police interrogated him for purposes of the Fifth Amendment. Defendant was at the police department, was not free to leave police presence during the interview, and the detective subjected him to direct questioning. Because the detective did not apprise defendant of his constitutional rights and obtain his waiver of those rights, the recording was inadmissible on constitutional grounds. See *Miranda*, *supra*. In addition, defendant indicated that he did not wish to speak with police at the time and this amounted to an invocation of his right to remain silent. See *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984) (an accused invokes his Fifth Amendment rights when he "unequivocally" indicates that he wishes to remain silent). Furthermore, during her rebuttal argument the prosecutor improperly referenced defendant's silence during the interrogation. See *People v Shafier*, 483 Mich 205, 212-213; 768 NW2d 305 (2009). However, we conclude that the constitutional error in this case did not affect defendant's substantial rights because it did not affect the outcome of the trial. See *Carines*, *supra*.

The recording was brief, defendant did not make incriminating statements, and the prosecutor's improper comment regarding the evidence was limited to the end of her rebuttal argument. The prosecutor did not reference defendant's silence in her opening statement, or during closing argument. See *Shafier*, *supra* at 221. More importantly, the case against defendant was extremely strong even when considered in light of the prosecutor's improper argument. See *id.* The prosecutor introduced a substantial amount of other evidence against defendant including testimony of four witnesses—and two were co-conspirators—who implicated defendant in the robbery. The primary victim in this case testified that he was "certain" and "100 percent certain" that defendant was one of the three men who broke into his home and robbed him. One of the witnesses testified that defendant admitted to her after the offense that he participated in the robbery. All of the witnesses' testimonies were strong and

consistent. On this record, defendant cannot show plain error affecting his substantial rights. See *Carines*, *supra*.

Next, defendant contends that defense counsel rendered deficient performance on five separate occasions at trial and during sentencing. In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, *supra* at 600.

First, defendant contends that trial counsel acted deficiently when he failed to object to the admission of the recording on constitutional grounds and then failed to object to the prosecutor's improper rebuttal argument. Regardless of whether trial counsel was deficient in these respects, for the same reasons discussed above, defendant cannot show that, but for counsel's failure to raise these objections, the result of the proceeding would have been different. See *id.*

Second, defendant contends that trial counsel rendered deficient performance when he failed to impeach a co-conspirator, Keenan King, who testified on behalf of the prosecution and implicated defendant in the instant case.³ "The questioning of witnesses is presumed to be a matter of trial strategy." *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). This Court does not second-guess trial counsel on matters of trial strategy with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We conclude trial counsel's strategic decision not to impeach King with his prior testimony did not fall below an objective standard of reasonableness. See *Toma*, *supra*. King's prior inconsistent statement was not of significant value for impeachment purposes because it lacked credibility where King had motive to make a false statement at the time in order to avoid a felony conviction. In addition, had defense counsel impeached King, the prosecutor could have used prior consistent statements King offered during the sentencing phase of his proceeding. Moreover, King's testimony in this case was consistent with the testimony of three other prosecution witnesses.

Third, defendant asserts that defense counsel rendered deficient performance during the sentencing phase of the proceeding when he failed to object to the scoring of the legislative sentencing guidelines prior record variable (PRV) 7, (subsequent and concurrent felony convictions). As discussed *infra*, the trial court did not abuse its discretion in assessing 20 points for PRV 7. Therefore, defense counsel was not deficient for failing to raise a futile objection. See *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

³ We note that defendant also raises this issue in a separate question presented in his supplemental brief on appeal, but he merely advances an ineffective assistance claim in that brief and we address it as such.

Fourth, defendant argues that defense counsel rendered deficient performance during sentencing when he argued, in contrast to recommendation of the probation department, that the trial court assess points for offense variables (OVs) OV 8, asportation of a victim, and OV 16, destruction of property. Following his conviction and sentencing, defendant moved this Court for a *Ginther*⁴ hearing and to allow defendant to move for resentencing. We granted the motion to remand and the trial court ultimately rescored OV 16 at zero points; however, the sentencing information report was not revised to reflect the change. Because OV 16 was rescored at zero, defendant's ineffective assistance claim in relation to that variable is moot.

With respect to OV 8, we conclude defense counsel's performance did not fall below an objective standard of reasonableness. See *Toma, supra*. Here, both defense counsel and the prosecutor questioned the scoring of OV 8, and, as discussed *infra*, there is evidence on the record to support scoring the variable at 15 points. Additionally, pursuant to MRPC Rule 3.3 an attorney has a "duty of candor" toward the tribunal. Specifically, the rule provides that an attorney must not "knowingly ... fail to disclose to a tribunal controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel...." MRPC 3.3(a)(3). In any case, even if defense counsel's performance in this regard could be considered deficient, defendant cannot show that resentencing would provide any relief. See *Carbin, supra*.

Fifth, defendant argues in a Standard 4 brief that defense counsel was deficient when he failed to move to suppress the testimony of the homeowner victim in this case. Defendant failed to preserve this aspect of his appeal for review because he did not move for a *Ginther* hearing on the same basis. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Thus, review of defendant's argument in his Standard 4 brief is limited to errors apparent on the record. See *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). Defendant fails to advance any legal authority to support the contention that the victim's testimony was inadmissible and nothing in the record suggests that counsel would have been successful in moving to suppress his testimony. Defense counsel is not deficient for failing to make a meritless motion to suppress evidence or in failing to raise a futile objection. See *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Next, defendant contends that he was denied his due process right to a fair trial when the prosecutor engaged in several instances of misconduct. Defendant argues that the errors individually or when combined with other errors at trial denied him his right to a fair trial. Defendant failed to preserve any of his allegations of misconduct for review because he did not object on the same basis in the trial court. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). This Court reviews unpreserved challenges to alleged instances of prosecutorial misconduct for outcome-determinative, plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor jeopardizes the defendant's right to a fair trial when he or she interjects issues broader than guilt or innocence of the accused. *Id.* at 63-64. This Court reviews a cumulative error claim to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

First, defendant argues that the prosecutor improperly referenced his post-arrest silence during her rebuttal argument. In this case, the prosecutor's improper statement was limited and there was a substantial amount of other evidence introduced against defendant. Defendant fails to show the rebuttal argument amounted to outcome-determinative plain error. See *Callon, supra*.

Second, defendant argues that the prosecutor committed misconduct when she failed to "correct" King when he testified that he always maintained to police that defendant was involved in the charged offense. A prosecutor's knowledge that a witness offers perjured testimony can amount to misconduct warranting a new trial. *People v Lester*, 232 Mich App 262, 279-280; 591 NW2d 267 (1998). Here, defendant fails to show that King offered perjured testimony at trial or that the prosecutor was aware King was offering false testimony. There was no misconduct.

Third, defendant argues that the prosecutor committed misconduct at sentencing when she misrepresented the evidence and stated defendant acted as a "leader" for purposes of OV 14 (offender's role) by contacting the man who organized the robbery. A prosecutor may not argue facts that were not introduced as evidence at trial. *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008). Here, the prosecutor's assertion was not a comment concerning facts outside the evidence introduced at trial. A prosecution witness testified that he and defendant leapt from an upper window at the victim's residence and then made contact with the organizer at his residence for a ride back to Detroit. This evidence supports the assertion that defendant "contacted the planner" and acted as a leader in the offense.

In sum, we conclude defendant failed to show that any of the prosecutor's alleged misconduct denied him his right to a fair trial. Because there were no errors of consequence at trial, defendant's cumulative affect argument lacks merit. See *Knapp, supra* at 388.

Next, defendant argues that the trial court erred in scoring OV 7, aggravated physical abuse; OV 8, asportation or captivity of a victim; OV 14, offender's role; OV 16, property obtained, damaged, lost or destroyed; OV 17, degree of negligence; and, PRV 7, subsequent or concurrent felony convictions. Defendant's argument regarding OV 16 and OV 17 is moot because the trial court rescored these variables at zero on remand. With respect to the other variables, "[t]his Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

MCL 777.37 governs the scoring of OV 7 and provides, in part, that a trial court assess 50 points when, "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."

MCL 777.37(1)(a). Actual physical abuse is not necessary to assess points under this variable. *People v Mattoon*, 271 Mich App 275, 277; 721 NW2d 269 (2006). In this case, evidence on the record indicates that this variable was properly scored because defendant engaged in conduct “designed to substantially increase the fear and anxiety of a victim during the offense.”

Here, while another co-defendant held the homeowner on the ground and pointed a gun at him, defendant pointed a gun at the homeowner’s girlfriend and two young children. While defendant and King continually demanded money and pointed guns, the homeowner was unsure if his children were going to be hurt. He repeatedly asked defendant and the other two perpetrators not to harm the children. At one point during the robbery, defendant and one of the other co-defendants brought the homeowner to the lower level of the residence while the children were left on the upper level with the third robber. The homeowner was unaware of what was happening to his children at that point. We conclude that this evidence supports the trial court’s assessment of 50 points for OV 7. See *Endres, supra*.

MCL 777.38 governs the scoring of OV 8 and provides that a trial court assess 15 points where “a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). “Asportation,” in terms of OV 8, involves movement in furtherance of the crime that is not incidental. *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003). This Court has held that movement of a victim away from the observation of others supports a finding of “asportation.” *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996).

In this case, evidence shows that defendant participated in moving one or more of the victims “in furtherance of the offense” and that the movement was not incidental. See *Spanke, supra*. The homeowner-victim testified that defendant and King pulled him away from the front door and onto the floor to prevent his escape. This movement of the homeowner allowed defendant and the others to commit the offense of armed robbery. After, King pulled the homeowner into the dining room and police began knocking, according to the homeowner, the robbers, instructed that everyone move upstairs. The homeowner testified that defendant pointed his gun at his girlfriend and the boys “while we were moving upstairs.” King and defendant then went back downstairs with the homeowner and searched him and took items out of his pockets. While they were back downstairs, the police continued knocking and defendant and King brought the homeowner back upstairs. Finally, defendant assisted King in moving the homeowner to the lower level to open the door for police when he took King’s gun and held it for him. In sum, the evidence supports that defendant either moved or helped move the homeowner and the other victims in this case in furtherance of the offense. See *Endres, supra*.

MCL 777.44 governs the scoring of OV 14 and provides, in part, that the trial court assess ten points for this variable when “the offender was a leader in a multiple offender situation.” MCL 744.44(1)(a). Pursuant to this statute, “the entire criminal transaction should be considered....” *People v McGraw*, 484 Mich 120, 125; 771 NW2d 655 (2009), quoting MCL 744.44(2)(a). In this case, the homeowner testified that defendant helped pull him away from a door and onto the ground when he was trying to escape from his residence where the robbery took place. Defendant then paced back and forth with a gun and shouted instructions while another robber held the victim on the ground. Defendant took the girlfriend’s jewelry and her cellular telephone and pointed his gun at her. Defendant also pointed his gun at the victims when they were ordered to move to the upper level of the residence and defendant and another robber

brought the homeowner back downstairs and searched his pockets. This evidence supports the trial court's assessment of ten points for OV 14. See *Endres, supra*.

MCL 777.57 governs the scoring of PRV 7 and provides that the trial court assess 20 points when "the offender has 2 or more subsequent or concurrent convictions." The statute provides that this variable be scored "if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed." MCL 777.57(2)(a). A felony-firearm conviction is not considered for purposes of this variable. MCL 777.57(2)(b).

In this case, evidence shows that the trial court properly assessed 20 points for PRV 7. In addition to the sentencing offense (armed robbery), defendant was convicted of another armed robbery offense, giving him one "concurrent" felony conviction for purposes of PRV 7. In addition, defendant's presentence investigation report (PSIR) indicates that he was convicted by plea of carrying a concealed weapon (CCW), a felony pursuant to MCL 750.227, on October 5, 2007, in Detroit, which was after the armed robbery occurred in March 2007. At the time defendant was sentenced in this case, sentencing for his CCW conviction was still pending. However, that fact is irrelevant for purposes of scoring PRV 7. The statute provides that subsequent felony "convictions" be considered when scoring this variable and does not reference sentencing. MCL 777.57(2)(a). See *People v Reyna*, 184 Mich App 626, 633; 459 NW2d 75 (1990). The trial court did not abuse its discretion in assessing 20 points for PRV 7. See *Endres, supra*.

Finally, defendant contends that the trial court erred in denying his request for additional sentencing credit for time served. On remand, the parties stipulated that defendant's credit would be adjusted to 161 days served. Therefore, defendant's argument is moot. However, on remand, we instruct that the trial court revise the judgment of sentence to reflect its modification of the sentencing credit.

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence and sentencing information report. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Mark J. Cavanagh

/s/ Michael J. Kelly