S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TOMMIE LEE WATKINS, JR., Defendant-Appellant.	UNPUBLISHED July 29, 2014 No. 313390 Oakland Circuit Court LC No. 2011-239274-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TOMMIE LEE WATKINS, JR., Defendant-Appellant.	 No. 313391 Oakland Circuit Court LC No. 2012-240720-FH

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of three total charges, arising from two cases that were consolidated for trial. In LC No. 2011-239274-FH, the jury convicted defendant of second-degree home invasion, MCL 750.110a(3), for which the trial court sentenced him as an habitual offender, third offense, MCL 769.11, to 30 months to 30 years' imprisonment. In LC No. 2012-240720-FH, the jury convicted defendant of fourth-degree fleeing or eluding a police officer, MCL 257.602a(2), and driving with a suspended or revoked license (DWSL), MCL 257.904, for which the court sentenced him to concurrent terms of 152 days for the fleeing or eluding conviction, and 93 days for the DWSL conviction. Defendant appeals as of right in each case, and we affirm in both cases.

Defendant's convictions arise from his role as the getaway driver for a home invasion in Orchard Lake, which ultimately led to defendant leading police officers from at least two different jurisdictions on a high-speed chase on June 16, 2011. The prosecution presented evidence that as the homeowner approached his residence, he observed a white van with its

engine running in the driveway and two men, later identified as Marquese Jackson and Adrian Johnson, emerging from the house carrying jewelry boxes. Upon seeing the homeowner, Jackson and Johnson dropped the boxes, ran, and entered the already moving van. The homeowner contacted law enforcement, who quickly located the van on a main thoroughfare. The van thereafter led the police on a high-speed chase, reaching speeds of up to 100 miles an hour. The pursuit was ultimately terminated by the police, but not before an officer obtained the van's license plate number. Also before the pursuit ended, Farmington Hills Police Officer Brian Kersanty managed to drive alongside the van and get a good look at the driver. He provided a description of the driver, selected defendant from a photographic array, and identified defendant at a preliminary examination and at trial. In addition, the police investigation of the van's license plate number revealed that the van belonged to defendant's sister. The police also learned that Jackson is defendant's cousin and Johnson is from defendant's neighborhood. At trial, the defense presented an alibi defense and asserted that defendant was misidentified as the driver of the van.

I. DESTRUCTION OF EVIDENCE

Defendant argues that he is entitled to dismissal of the charges because the Farmington Hills Police Department destroyed an in-car dash video recording of the pursuit, and that the destruction amounted to a violation of due process and prevented him from effectively cross-examining Officer Kersanty, the only person who identified him as the driver. We disagree. Generally, we review due process claims de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). A trial court's ruling on a motion for a mistrial is reviewed for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* (citation omitted). The trial court's decision regarding whether a case should be dismissed due to the destruction of evidence is also reviewed for an abuse of discretion. *People v Jones*, 301 Mich App 566, 581; 837 NW2d 7 (2013). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012).

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). However, "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial" is insufficient. *United States v Agurs*, 427 US 97, 109-110; 96 S Ct 2392; 49 L Ed 2d 342 (1976). "In order to warrant reversal on the claimed due process violation, a defendant must prove that the missing evidence was exculpatory or that law enforcement acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). A claim that the police deliberately destroyed evidence must be supported by evidence, and a defendant's blanket assertion is insufficient to substantiate the claim. *People v Johnson*, 197 Mich App 362, 365-366; 494 NW2d 873 (1992). The defendant bears the burden of showing that the evidence was exculpatory or, in the case of a failure to preserve evidence, that the police acted in bad faith. *Jones*, 301 Mich App at 581; *Hanks*, 276 Mich App 95.

Defendant failed to show that the evidence was exculpatory, or that the police acted in bad faith. Defendant sought the video recording from Officer Kersanty's dash camera for the purpose of proving that defendant was not the driver of the fleeing van. Officer Kersanty testified, however, that the camera recorded straight in front of his vehicle, not what transpired to the side of or behind the vehicle. Officer Kersanty observed defendant only when he was driving along the side of the van, when defendant turned toward him. A video recording from a West Bloomfield police officer's video camera depicted Officer Kersanty's car on the side of the van and briefly in front of the van. As that video recording was played for the jury, Officer Kersanty pointed out when he was able to observe defendant's face, i.e., while his police vehicle was on the side of the van. Because the video recording from Officer Kersanty's car only recorded what was in front of the car, it would not have recorded from a vantage point that captured the driver. Accordingly, there is no support for defendant's claim that the evidence, had it been preserved and produced, would have assisted defendant's defense.

Moreover, because the record establishes that the recording was recycled pursuant to a routine police procedure, there is no evidence of bad faith. This Court has held that "the routine destruction of taped [material], when the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal." *Johnson*, 197 Mich App at 365; see also *People v Albert*, 89 Mich App 350, 353; 280 NW2d 523 (1979). Here, Officer Kersanty had assisted several police cars from neighboring police departments in the pursuit. The video recording was recycled in 30 days pursuant to routine police procedure because no crimes originated or would be prosecuted in Farmington Hills. It was not unreasonable for Officer Kersanty to presume that his in-car camera would not have captured any needed information. In addition, the video was recycled before the defense made any request for its production. The recording was made on June 16, 2011, defendant was arrested on July 29, 2011, and defense counsel requested the evidence on October 11, 2011, nearly four months later. Under these circumstances, there is no basis for concluding that the police acted in bad faith in employing their routine practice. See *United States v Garza*, 435 F3d 73, 76 (CA 1, 2006). Consequently, this claim of error does not entitle defendant to appellate relief.

Defendant alternatively argues that the trial court erred in failing to give an adverse inference instruction. "A trial court shall instruct the jury that if it determines that the prosecutor acted in bad faith it may infer that the destroyed, potentially exculpatory evidence would have been favorable to defendant." *People v Cress*, 250 Mich App 110, 157-158; 645 NW2d 669 (2002), rev'd on other grounds 468 Mich 678 (2003). In light of the complete absence of any evidence of bad faith, defendant was not entitled to an adverse inference instruction.

II. PROSECUTOR'S CONDUCT

Next, defendant argues that the prosecutor improperly impeached three of his alibi witnesses when she questioned his mother and sister Latasha Watkins about their failure to previously testify on his behalf and questioned his sister Lanesia Watkins about her prior conviction. Defendant objected to the prosecutor's questioning of his mother, thereby preserving that issue. Defendant failed, however, to object to (1) the prosecutor's questioning of Latasha, (2) the impeachment of Lanesia with a prior conviction on the ground he now raises, and (3) the prosecutor's questioning of Lanesia regarding the details of the prior conviction. An objection on one ground is insufficient to preserve an appellate challenge based on a different ground.

People v Bulmer, 256 Mich App 33, 35; 662 NW2d 117 (2003). Therefore, those claims are not preserved. We review preserved claims of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

A. QUESTIONING OF DEFENDANT'S MOTHER AND LATASHA

"[A] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007). Defendant has made no showing that the prosecutor acted in bad faith in questioning his mother and Latasha. The defense presented an alibi defense at trial and both defendant's mother and Latasha claimed that defendant was with them when the crimes occurred. As defendant correctly observes, when a defendant puts forth an alibi defense, that defense can be challenged by cross-examination concerning unexplained delays in its assertion or untruths in its substance. *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002). While defendant specifically challenges the prosecutor's isolated questions regarding each witness's failure to *testify* previously, as opposed to simply failing to come forward, he has not cited any applicable supporting legal authority for his position that such questions are improper. Indeed, a defendant is not prohibited from calling witnesses to testify at a preliminary examination. See MCR 6.110(C). Moreover, viewing the questions in context, the prosecutor simply sought to highlight the witnesses' delay in telling *anyone* about defendant's alibi. The fact that the prosecutor also asked about previously testifying does not support that there was any bad faith or misconduct. Regardless, even if defendant could demonstrate any impropriety, defendant was not prejudiced where his counsel addressed the witnesses' tardiness in coming forward, including not previously testifying, on redirect examination and in closing argument. *Gray*, 466 Mich at 47. Therefore, defendant has not established that he was denied a fair trial.

B. QUESTIONING OF LANESIA

On cross-examination, Lanesia indicated that she was not lying under oath. Outside the presence of the jury, the prosecutor expressed her intention to impeach Lanesia under MRE 609 with a prior welfare fraud conviction. Defense counsel objected, arguing only that the issue was not brought up during cross-examination. The court found that the conviction was pertinent to the witness's truth and veracity. Because the trial court ruled that impeachment with the prior conviction was permissible, the prosecution did not commit misconduct by relying on the court's ruling and asking Lanesia if she had a conviction involving theft or dishonesty. *Dobek*, 274 Mich App 72. Further, defendant has not shown that the trial court's ruling, on which the prosecutor relied, was plain error. A prior conviction may be used to impeach a witness's credibility if the conviction satisfies the criteria set forth in MRE 609. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). As applicable here, MRE 609(a)(1) permits introduction of prior convictions to impeach a witness's credibility where "the crime contained an element of dishonesty or false statement." The offense of welfare fraud, MCL 400.60, is a crime that contains an element of dishonesty or false statement because it involves some element of deceit, untruthfulness, misrepresentation, or falsification. *People v Allen*, 429 Mich 558, 586, 593 n 15;

420 NW2d 499 (1988). Defendant nonetheless asserts that evidence of Lanesia's prior conviction was inadmissible because it was a misdemeanor. MRE 609(a)(2)'s penalty requirement, however, only applies to crimes that contain an element of theft; no such condition is required if the crime contains an element of dishonesty or false statement, which falls solely under MRE 609(a)(1).

In a related claim, defendant argues that after introducing Lanesia's prior conviction, the prosecutor improperly inquired into the factual basis of that conviction, even commenting about Lanesia's intent, although the prosecutor had indicated to the court that she was only going to ask about the existence of the conviction. Defendant relies on *People v Johnson*, 54 Mich App 678, 680; 221 NW2d 452 (1974), in which this Court held that a prosecutor may not interrogate a defendant about the collateral facts comprising a prior conviction that the defendant has acknowledged on direct examination, and similar cases. In presenting this claim, however, defendant has mischaracterized the record. During the prosecutor's redirect examination, she asked Lanesia only if she had a prior conviction. During recross-examination, *defense counsel* questioned Lanesia about the details of the prior conviction. Thereafter, on redirect examination, the prosecutor asked Lanesia the following questions, which defendant claims were improper:

> *Q*. But you've lied to authorities before back in 2005?
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> * * *
>
> *A*. No, I never lied to—
>
> *Q*. You lied to an agency about your—the amount of welfare?
>
> *A*. No, I didn't to them about that. It was hours that was off. I never lied to an agency or authorities.
>
> *Q*. But it was dishonest, correct?
>
> *A*. No.
>
> *Q*. How many hours you were getting was—
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> *A*. No.
>
> *Q*. It wasn't. Okay. So it was an accident?
>
> *A*. Yes, I would say it was.
>
> *Q*. But you pled to it, so that means there's some intent.
>
> *A*. Hours was there. I was off for hours of calling in and you can't be off hours. You have to be accurate, and I was just learning the system and everything and that's when they just charged me. So I was receiving the hours, so it happened.

It is not apparent that the prosecutor violated the rule set forth in *Johnson*, 54 Mich App at 680, or acted in bad faith by asking Lanesia the follow-up questions. *Dobek*, 274 Mich App 72. Again, defense counsel was responsible for soliciting the facts of Lanesia's prior welfare fraud conviction. Through questioning Lanesia in that manner, the defense was able to suggest to the jury that, although Lanesia was convicted of welfare fraud, her actions were not intentional. In doing so, however, defense counsel also "opened the door" to further questioning by the prosecutor regarding Lanesia's intent, or lack thereof. See *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). Consequently, defendant is not entitled to appellate relief.

III. IMPROPER REBUTTAL TESTIMONY

Defendant argues that he was denied a fair trial by the admission of improper rebuttal testimony. Because defendant did not object below to West Bloomfield Police Sergeant Eric Gruenwald being called as a rebuttal witness or challenge his testimony on the ground now argued on appeal, this issue is unpreserved. *Bulmer*, 256 Mich App at 35. Thus, we review the issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

"Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). "[A] party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness' statements." *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003).

Arguably, the sergeant's testimony regarding Lanesia's account of what she reported about the location of the van directly contradicted Lanesia's testimony on cross-examination and was proper rebuttal evidence. Although the sergeant's testimony also directly contradicted the testimony of John Hall, to the extent that Hall denied that he told the officers that defendant fit the description of the driver, the rebuttal testimony was improper because it did not contradict evidence developed by the defense or answers elicited during cross-examination. Nonetheless, even if admission of the rebuttal evidence was plain error, defendant must also establish that his substantial rights were affected. *Carines*, 460 Mich at 763-764. Defendant bears the burden of showing actual prejudice, and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

There is no reasonable likelihood that the sergeant's rebuttal testimony caused the jury to convict defendant, and the testimony did not seriously affect the fairness, integrity, or public reputation of the proceedings. The substance of the sergeant's testimony was that Hall told the police that defendant was a man of larger stature and that Lanesia was less than forthcoming about the location of the van. This evidence was of comparatively minor importance considering the totality of the admissible evidence against defendant. Officer Kersanty unequivocally identified defendant as the person who was driving the van. Defendant had unique features, which Officer Kersanty recalled, including that he was a very obese man with "bug" eyes. When the van was initially spotted, Sergeant Gruenwald also observed that the driver was a very large male. Officer Kersanty identified defendant from a photographic array without hesitation, at the

preliminary examination, and at trial. He testified that he was 100 percent certain that defendant was the person he observed driving the van. Strong circumstantial evidence also supported the officer's identification and linked defendant to the crimes. The van used during the home invasion and used in eluding the police belonged to defendant's sister Lanesia. While they claimed it was an uncommon occurrence for defendant to drive the van, both defendant and Lanesia admitted at trial that defendant had driven the van in the past. Defendant's two accomplices, who were positively identified by the homeowner, were connected to defendant; one assailant was defendant's cousin and defendant knew the second assailant from his neighborhood. While defendant makes much of his alibi defense, it is noteworthy that it was comprised primarily of his immediate family members and the mother of his child. Given the evidence regarding defendant's identity and his familial connection to the van's proprietor, the rebuttal testimony was of little consequence. Consequently, defendant is not entitled to new trial on this basis.

IV. REMOVAL OF A JUROR

Before deliberations began, the trial court announced its intention to randomly select the two alternate jurors to be dismissed and a juror remarked, "Could you volunteer to leave I mean?" Relying on that question, defendant requested that the juror be removed, and also claimed that the same juror had not been paying attention during trial. On appeal, defendant argues that the juror was incompetent and failed to "disclose[] his state of mind during voir dire" that he did not want to deliberate or make a decision, and, therefore, the trial court erred by failing to remove the juror and by denying his related motion for a mistrial. We disagree. We review a trial court's decision whether to remove a juror for an abuse of discretion. *People v Mahone*, 294 Mich App 208, 215; 816 NW2d 436 (2011). The trial court's factual findings regarding juror misconduct or a juror's qualifications to serve are reviewed for clear error. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). Clear error occurs when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

A criminal defendant has a constitutional right to a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Miller* 482 Mich at 547. Jurors are presumed to be impartial until the contrary is shown. *Miller*, 482 Mich at 550. The defendant bears the burden of establishing "that the juror was not impartial or at least that the juror's impartiality was in reasonable doubt." *Id.* "A juror's failure to disclose information that the juror should have disclosed is only prejudicial if it denied the defendant an impartial jury." *Id.* at 548.

In this case, defendant's jury, including the challenged juror, was sworn in without objection. Although defendant asserts that the juror failed to disclose his "state of mind" during voir dire, no new information about the juror was disclosed before deliberations. Rather, during voir dire, the juror expressed the same preference that he later expressed that, if given the option, he would rather not serve on the jury. More importantly, however, defendant has not met his burden of establishing that the juror's impartiality was reasonably in doubt. The fact that the juror sought to volunteer to be dismissed in place of one of the alternates did not establish that he was incompetent, or otherwise not qualified to serve; instead, it merely was consistent with his preference not to serve. The court specifically questioned the juror about his question and his attentiveness, and the juror indicated that he had been attentive during trial and would keep his oath to be fair and impartial. The trial court found nothing "to outweigh th[e] presumption of

sincerity with respect to the oath," and we cannot conclude that this factual finding is clearly erroneous. *Miller*, 482 Mich at 544. Because defendant introduced no evidence that suggested impartiality on the part of the juror, the trial court's denial of defendant's motion for a mistrial was a principled decision, and, therefore, was not an abuse of discretion.

V. SCORING OF THE SENTENCING GUIDELINES

In his last issue, defendant argues that he must be resentenced because the trial court improperly scored offense variable (OV) 4 and prior record variable (PRV) 7 of the sentencing guidelines. Again, we disagree. When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

A. OFFENSE VARIABLE 4

OV 4 addresses psychological injury to a victim. MCL 777.34(1). The trial court is required to score 10 points for OV 4 if a "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Contrary to what defendant suggests, the homeowner's daughter can be considered a victim of defendant and his associates' crime of breaking into the family's home for purposes of scoring OV 4.[1] Although the homeowner's 15-year-old daughter was not in the house when the actual invasion occurred, evidence was introduced that she is a resident of her father's home, even if only part time.[2] Notably, the homeowner also was not in the house at the time, but arrived as two assailants were leaving the house, and defendant does not challenge the homeowner's position as a victim of the crime. In addition, like the homeowner, his daughter was also exposed to the potential loss of property. Further, a preponderance of evidence supports the trial court's finding that the victim suffered a

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[1] Although the statute does not define "victim," "[a]ny term not defined by the statute 'should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.'" *People v Davis*, 300 Mich App 502, 511; 834 NW2d 897 (2013) (citations omitted). "[I]t is permissible for this Court to consult dictionary definitions in order to aid in construing the term 'in accordance with [its] ordinary and generally accepted meaning.'" *Id.* (quotation marks omitted). "Victim" has been defined as "a person who suffers from a destructive or injurious action or agency." *Random House Webster's College Dictionary* (1997), p 1430.

[2] Our view is further supported by the fact that the Legislature categorized second-degree home invasion as a "crime against a person," MCL 777.16f, even though the crime itself does not require anyone to be home at the time, MCL 750.110a(3). Thus, the Legislature clearly envisioned that victims of the second-degree home invasion need only reside at the home and not be present at the time of the crime. To the extent that defendant suggest that only title owners are capable of being victims, that suggestion is not supported by any legal or rationale foundation.

serious psychological injury. The homeowner submitted a letter to the court in which he recounted his daughter's constant fear when she is at his house because of the home invasion. Her fear is heightened because she is wheel-chair bound and her limited mobility makes it impossible for her to flee from an intruder. She also has nightmares and will no longer sleep in her own bedroom, but now sleeps in her father's bedroom. This evidence adequately supports the trial court's score 10-point score for OV 4.

B. PRIOR RECORD VARIABLE 7

PRV 7 addresses subsequent or concurrent felony convictions. MCL 777.57(1). Under PRV 7, the trial court must assess the highest number of pertinent points applicable to the offense. Ten points must be scored when "the offender has 1 subsequent or concurrent conviction." MCL 777.57(1)(b). In scoring PRV 7, the appropriate points must be assessed 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); *People v Williams*, 294 Mich App 461, 479; 811 NW2d 88 (2011).

In this case, because defendant was convicted of both home invasion and fleeing or eluding at trial, PRV 7 was properly scored at 10 points. Defendant nevertheless argues that his convictions should not be considered as concurrent because each offense was charged in a separate case file. Defendant's argument is meritless because it ignores the plain language of the statute, as well as the purpose of PRV 7, which considers a defendant's relationship with the criminal system. In specific, PRV 7 "is concerned with the commission of a number of felonies at the same time." *People v Jarvi*, 216 Mich App 161, 163-164; 548 NW2d 676 (1996). Here, two cases were filed simply because defendant and his associates committed a home invasion in Orchard Lake immediately before leading the police on a high-speed chase primarily through West Bloomfield, resulting in the two associated felonies being committed in two different cities. Defendant's convictions were concurrent for purposes of scoring PRV 7, and the trial court did not err in scoring 10 points for that variable.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio