

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TUNISIA YVETTE PHILLIPS, a/k/a TUNISIA
PHILLIPS-LARK,

Defendant-Appellant.

UNPUBLISHED

June 5, 2012

No. 300497

Muskegon Circuit Court

LC No. 10-058986-FH

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant Tunisia Yvette Phillips of making a false report of a felony, MCL 750.411a(1)(b). The trial court sentenced defendant to 15 months of probation, with three months to be served in jail. Defendant appeals as of right. We affirm.

I. PERTINENT FACTS

Trial testimony revealed that on September 23, 2009, Kameasha Wilson and defendant's brother, Julius Johnson, were visiting a friend. At about 1:00 a.m., Johnson asked Wilson to drive him home. As Wilson drove Johnson home, City of Muskegon Police Officer Adam Dent stopped Wilson for making an illegal left turn. During the traffic stop, Officer Dent smelled marijuana coming from Wilson's vehicle and called for backup. Johnson called defendant on his cellular telephone at 1:25 a.m. but could not reach her.

Within a short time, Officer Charles Anderson arrived. Officer Dent approached the passenger side of Wilson's vehicle where Johnson was sitting and asked him if he had been smoking marijuana. Johnson responded affirmatively. Officer Dent asked Johnson to step out of the vehicle, and Johnson complied. Officer Dent searched Johnson and found money and a blunt wrapper. Johnson then "took off running," and Officer Anderson pursued. Officer Dent noticed crack cocaine on the ground next to Wilson's vehicle, secured Wilson in his police car, and followed Officer Anderson's pursuit of Johnson. At the time, Johnson was a parolee and could be found in violation of his parole and returned to prison for either possessing marijuana or not being at his approved residence.

Officer Anderson was five feet and eight inches tall and weighed between 160 and 165 pounds. Johnson was six feet tall and weighed 240 pounds. Johnson jumped over a four-foot

chain-link fence, stumbled, and fell down. Officer Anderson jumped onto Johnson and attempted to wrap his legs around him so that he could not get away. Johnson then punched Officer Anderson. Officer Anderson got his pepper spray and attempted to spray Johnson but missed. Johnson then grabbed the pepper spray and sprayed Officer Anderson. Officer Anderson's eyes began burning, and he punched Johnson. Officer Anderson grabbed his radio and yelled for help. Johnson grabbed the radio out of Officer Anderson's hand and hit Officer Anderson in the head with the radio several times. Officer Anderson got his baton and tried to hit Johnson, but Johnson grabbed the baton. Dizzy, blinded, and fearing for his life, Officer Anderson warned Johnson that he was going to shoot him. Officer Anderson then felt "a very large blow" toward the center of his forehead. Although he could not see Johnson, Officer Anderson felt Johnson on top of him. Officer Anderson drew his firearm and fired once. After firing, Johnson was no longer on top of Officer Anderson. Johnson told Officer Anderson "you shot me." Officer Anderson radioed that a shot was fired and that he needed help.

Officer Dent heard the gunshot and radioed "shots fired." Officer Dent and Officer Chad Hoop located Officer Anderson and Johnson. The area was completely dark except for the officers' two flashlights. Officer Anderson was lying on his back and pointing his gun at Johnson. Officer Anderson had a very large cut in the middle of his forehead and had pepper spray on him. Blood covered his face and was in his eyes. Johnson was lying on the ground with a gunshot wound to his arm and stated that "he shot me." The Michigan State Police were called in to investigate the shooting.

When Johnson was being treated at the hospital before his death, defendant approached Detective Sergeant Gary Miles of the Michigan State Police and stated that he needed to take a statement from her. Defendant told Detective Miles that she approached the scene of the shooting because she heard a commotion. She walked out her back door and heard "the police" say, "I'm going to shoot you" and that she heard her brother say, "Please don't shoot me," after which she heard a gunshot. Defendant did not mention a telephone call from Wilson.

Later that day, Detective Miles interviewed defendant a second time at the scene of the shooting. During this interview, defendant stated on multiple occasions that she received a telephone call before she went outside. The phone call was from a female who was using Johnson's cell phone, and who indicated that Johnson was "in the back with police... in the alley," which defendant connected to a commotion she heard outside. Defendant went outside, and although it was very dark with no artificial lighting of any kind, she saw her brother down and the police officer over him, at which time the officer said "I'm going to shoot you," and her brother responded, "please, don't shoot me." As soon as her brother finished the sentence the officer shot him.

Using information gleaned from the radio dispatches, cellular phone data, police cruiser video footage, and a neighbor's surveillance camera, the Michigan State Police constructed a timeline of the incident preceding and following the shooting. The evidence reveals that thirty-five seconds after Officer Dent's shots-fired call, Officer Dent's police-car video shows Wilson calling defendant on Johnson's cellular telephone and stating that Johnson ran away from the police. Wilson asks, "Where he at now?" Defendant responded that she did not know. Shortly after, defendant approached the scene of the shooting in her nightgown. Officers Dent and Hoop ordered defendant to stay back, and she complied.

One minute and four seconds after the shots-fired call, a video recording device attached to a private citizen's home depicts a female voice stating, "Oh my God, is that my brother, oh my God, what happened[?]" At one minute and 12 seconds after the shots-fired call, the citizen's video depicts the officers telling defendant to get back. One second later, defendant asks, "What happened to him[?]" At one minute and 16 seconds after the shots-fired call, the citizen's video shows defendant asking, "Who shot [Johnson], oh my God what is wrong[?]" And at two minutes and 24 seconds after the shots-fired call, the citizen's video depicts defendant asking, "Can anyone tell me what is going on, please?" Officer Dent treated Johnson until the paramedics arrived. Johnson did not speak with defendant.

Johnson ultimately died from the contact-range gunshot wound. He had a small scrape on a finger and a blunt-force abrasion on his shoulder. His blood contained THC, and his urine indicated cocaine and opiate use within hours of his death. Officer Anderson's sinus was broken, fractured, and displaced downward. He also suffered an orbital fracture. Officer Anderson's injuries required reconstructive surgery.

Detective Miles interviewed defendant a third time. Detective Miles gave defendant an opportunity to reconsider her statements because they conflicted with the evidence revealed during the investigation. Defendant maintained that she witnessed the shooting and saw the position of her brother and the officer at the time of the shooting. The police arrested defendant for making a false report of a felony.

II. ANALYSIS

On appeal, defendant raises numerous issues for this Court's review, and we address each accordingly.

A. UNAVAILABILITY OF TRANSCRIPT AND CLOSING-ARGUMENT IMPROPRIETIES

Defendant first argues that the unavailability of a transcript of the attorneys' closing arguments violates her right to due process because it impedes her right of appeal. At a post-trial hearing, the trial court admitted that it inadvertently neglected to record a portion of the attorneys' closing arguments, so no transcript could be produced. Whether the unavailability of a transcript denies a defendant the due-process right to proper appellate review is a constitutional issue subject to de novo review on appeal. See *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011).

"[T]he inability to obtain the transcripts of criminal proceedings may so impede a defendant's right of appeal that a new trial must be ordered." *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981). However, "[t]he unavailability of transcripts does not . . . automatically require that the case be started all over again." *People v Jackson*, 95 Mich App 565, 568; 291 NW2d 123 (1980). The Michigan Court Rules address what an appellant must do when a transcript cannot be obtained. See MCR 7.210(B)(2). "When a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant shall file a settled statement of facts to serve as a substitute for the transcript." MCR 7.210(B)(2). The proposed statement of facts must be filed in the trial court within 14 days after filing the claim of appeal and must concisely set forth the substance of

the oral proceedings before the trial court. MCR 7.210(B)(2)(a). The appellee may file an amendment or objection to the proposed statement of facts before the time set for settlement. MCR 7.210(B)(2)(b). The trial court will then “settle any controversy and certify a statement of facts as an accurate, fair, and complete statement of the proceedings before it.” MCR 7.210(B)(2)(c).

Aside from the requirements of MCR 7.210(B)(2), this Court has stated that a defendant’s constitutional right to an appeal is satisfied if the surviving record is sufficient to allow evaluation of the issues on appeal. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983); see also Const 1963, art 1, § 20. “Where only a portion of the trial transcript is missing, the surviving record must be reviewed in terms of whether it is sufficient to allow evaluation of defendant’s claim on appeal.” *People v Federico*, 146 Mich App 776, 799; 381 NW2d 819 (1985). In order to demonstrate denial of a fair appeal, defendant must show prejudice resulting from the missing transcripts, and she must provide something more than gross speculation to support her claim. *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986); see also *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993) (holding that a defendant must provide independent corroboration and explain how the error adversely affected the ability to secure appellate relief).

Here, defendant failed to comply with MCR 7.210(B)(2). She has not filed a settled statement of facts to serve as a substitute for the missing portion of the transcript. Instead, defendant moved the trial court for an evidentiary hearing and, alternatively, to vacate her conviction. Defendant insisted that “it would be impossible to recreate or ‘settle’ the record in a fair way that protects her constitutional right to appeal” given the imperfect memories of defendant, defense counsel, and the prosecutor. This argument is speculative and does not excuse noncompliance with the court rule. See *Jackson*, 95 Mich App at 569 (defendant’s failure to attempt to settle the record not excused by contention that settlement would be impossible and inadequate to preserve constitutional guarantees). “There is seemingly no physical problem with settling the record, as trial counsel and the trial judge are all apparently still alive and available.” *Id.* And, as this Court noted in *Abdella*, claims of transcript inadequacies can be addressed with the assistance of trial spectators, police officers, court personnel, and attorneys. See *Abdella*, 200 Mich App at 476 n 2. Furthermore, defendant has not provided this Court with independent corroboration that the missing portion of the trial transcripts would raise an issue for review, let alone that reversible error occurred. See *id.* at 476 (holding that an alleged inaccuracy in a transcript must be supported by independent corroboration); *Audison*, 126 Mich App at 834-835 (constitutional right to an appeal is satisfied if the surviving record is sufficient to allow evaluation of the issues on appeal). Indeed, the trial court specifically noted that it made notes of the parties’ closing arguments and that those notes indicated that defense counsel did not raise any objections during the prosecutor’s closing argument. Finally, defendant vaguely claims that the prosecutor committed misconduct during closing arguments and that the trial court interfered with defense counsel’s closing argument.¹

¹ More specifically, defendant only generally refers to the prosecutorial misconduct as “character arguments, vouching for the credibility of prosecution witnesses including Off. Anderson, shifting the burden of proof, placing matters not in evidence before the jury, presenting known

Defendant does not provide even a general factual basis for a specific error. Thus, defendant has failed to “provide something more than gross speculation to support her claim.” See *Bransford*, 806 F2d at 86. Without a settled statement of facts required by MCR 7.210(B)(2), independent corroboration of what occurred during closing arguments, or a factual basis for a specific error during closing arguments, we cannot conclude that the surviving record is insufficient to allow review of defendant’s claim of appeal. See *Federico*, 146 Mich App at 799. Defendant has not established that her right to due process has been impeded by the unavailability of a transcript of closing arguments. See *id.* at 799-800.

Defendant relatedly argues that the circuit judge’s failure to disclose until after trial that he neglected to record a portion of the closing arguments deprived her of the opportunity to reconstruct the record on the same day, thereby violating her right to due process. At a post-trial hearing after defendant filed her claim of appeal, the circuit judge assumed responsibility for neglecting to turn on the device. The record, however, does not demonstrate that the circuit judge—on the date of closing arguments—knew of the failure to timely turn on the recording device. And, although some of the prosecutor’s rebuttal argument was transcribed, indicating that the recording device may have been finally turned on, the record does not establish that the circuit judge turned the device on and then intentionally failed to tell the parties of the mistake. Moreover, as previously discussed, defendant has not made the necessary showing of a due-process violation for the reasons discussed above.

Lastly, defendant’s contentions that the prosecutor “committed various improprieties” during closing argument and that the trial court improperly interfered with defense counsel’s closing argument fail. Defendant acknowledges that “there is no record to support or refute these claims” and, thus, requests an evidentiary hearing. But, as previously indicated, defendant has neither obtained a settled statement of facts required by MCR 7.210(B)(2) nor provided independent corroboration of what occurred during closing arguments. Therefore, we decline to remand for an evidentiary hearing. Furthermore, defendant’s claims of prosecutorial misconduct and trial-court error during closing arguments are vague as previously discussed. Defendant has not even attempted to articulate a factual basis to support her prosecutorial-misconduct claims. And defendant has not stated what trial court rulings were made, how they were improper, or explained how any rulings prevented defense counsel from “making the arguments he wanted to make.” Defendant’s mere announcement of errors without explaining or providing a factual basis for her claims constitutes abandonment of the issues. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Finally, we emphasize that, in the absence of evidence to the contrary, there is a presumption of regularity, and “[d]oubts should be resolved in favor of the integrity, competence and proper performance of . . . official duties by the judge and the State’s attorney.” *People v Iacopelli*, 141 Mich App 566, 568; 367 NW2d 837 (1985).

false information to the jury, denigrating defense counsel, and other misconduct.” And, defendant merely describes the alleged improprieties by the trial court as “rulings that improperly prevented defense counsel from making the arguments he wanted to make.”

B. FIRST AMENDMENT

Defendant argues that her conviction violates her First Amendment right to freedom of speech because she was prosecuted on the basis of the content of her speech. Defendant did not raise this issue in the trial court; therefore, we review this unpreserved issue for plain error affecting her substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 118; 631 NW2d 67 (2001).

MCL 750.411a(1) prohibits a person from “intentionally mak[ing] a false report of the commission of a crime” or “intentionally caus[ing] a false report of the commission of a crime to be made” to a police officer or police agency, “knowing the report is false.” It is well established that false statements of fact are not constitutionally protected. See, e.g., *Herbert v Lando*, 441 US 153, 171; 99 S Ct 1635; 60 L Ed 2d 115 (1979); *Gertz v Robert Welch, Inc*, 418 US 323, 339-340; 94 S Ct 2997; 41 L Ed 2d 789 (1974). Thus, neither MCL 750.411a(1) nor defendant’s prosecution for violating MCL 750.411a(1) violated defendant’s First Amendment right to freedom of speech because the First Amendment does not protect false statements of fact and MCL 750.411a(1) only prohibits a person from knowingly making a false report of the commission of a crime.

Defendant, relying on the United States Supreme Court’s decision in *New York Times Co v Sullivan*, 376 US 254, 291-292; 84 S Ct 710; 11 L Ed 2d 686 (1964), insists that she was unconstitutionally prosecuted for criticism of government conduct. Defendant’s argument lacks merit. Defendant was not prosecuted for criticizing the government; rather, she was prosecuted for making false statements of fact regarding the details of a felony. Accordingly, there is no plain error.

C. PROSECUTOR’S QUESTIONING REGARDING POLICE-CAR VIDEOS

Defendant argues that the prosecutor engaged in misconduct during his questioning of witnesses by stating that police-car videos are encrypted and inquiring whether it would surprise a police officer to learn that his police-car video did not record or could not be found. We review this unpreserved issue for plain error affecting defendant’s substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

“A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence” *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). However, a finding of prosecutorial misconduct cannot be based on a prosecutor’s good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The record reveals that the prosecutor’s comments and questions during direct examination of Officer Hoop and Detective Curtis Schram were made when technical difficulties were occurring with the police-car videos. Because of these technical difficulties, it was not improper for the prosecutor to attempt to elicit testimony describing the operation of the police videos and how the videos are downloaded. Moreover, the prosecutor had a good-faith reason for showing that the absence of a video from Officer Bahorsky’s police car was not his fault, and Officer Bahorsky was subject to cross-examination on the matter. Therefore, defendant has not demonstrated a plain error. To the extent that some of the prosecutor’s questions referred to facts not in evidence, it is well-settled that the lawyers’ statements and arguments are not evidence; the trial court so instructed

the jury, and jurors are presumed to follow their instructions. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant has failed to demonstrate that the prosecutor's statements affected her substantial rights, i.e., affected the outcome of her trial. See *Carines*, 460 Mich at 763.

D. LABORATORY REPORTS AND HEARSAY TESTIMONY

Defendant argues that the admission of various laboratory reports² violated her constitutional rights of confrontation because the persons who prepared the reports did not appear as witnesses at trial. The record reflects that defendant stipulated to the admission of these reports without the need for the prosecutor to call their authors to testify; therefore, defendant waived any claim of error on this basis. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant also argues that the following hearsay testimony was improperly allowed at trial: (1) Wilson's testimony that Johnson told her that he called defendant; (2) Detective Schram's testimony regarding the place that defendant identified as her location; and (3) Detective Schram's testimony regarding a statement made by Officer Anderson during an interview. We review these unpreserved evidentiary issues for plain error affecting defendant's substantial rights. See *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). First, Wilson's testimony that Johnson told her that he had dialed defendant's number was not introduced for the truth of the matter asserted but, rather, to show the basis for Wilson's knowledge. Accordingly, it was not hearsay. See MRE 801(c). Second, although Detective Schram's testimony that defendant pointed out her location refers to an out-of-court statement by defendant, a statement is not hearsay if it "is offered against a party and is . . . the party's own statement[.]" MRE 801(d)(2). Thus, there was no plain error in the admission of these statements. Lastly, although we agree that Detective Schram's testimony describing a statement by Officer Anderson during an interview was hearsay, the testimony did not affect defendant's substantial rights. See *Carines*, 460 Mich at 763. The same evidence was presented through the declarant, Officer Anderson, who testified at trial and was subject to cross-examination. See *People v Gursky*, 486 Mich 596, 620; 786 NW2d 579 (2010). Moreover, the testimony concerned the proximity of Johnson to Officer Anderson during the altercation; although this evidence was helpful for the jury to understand the fatal altercation between Johnson and Officer Anderson, it was not significant to the ultimate issue in the present case: whether defendant provided false details to Detective Miles about the shooting. See *id.* (the prejudice from an error is assessed given its nature and effect). Therefore, defendant is not entitled to appellate relief on the basis of these evidentiary issues.

² The laboratory reports established the following: (1) the drugs in Johnson's possession were cocaine and marijuana; (2) no latent fingerprints could be developed from the items collected; (3) there was human blood on Officer Anderson's radio, baton, and pistol; (4) Officer Anderson's DNA was on the grip of the baton, the gun slide, and the gun swab of the hammer; and (5) Johnson's DNA was on the grip and shaft of the baton.

E. PROSECUTOR'S USE OF LEADING QUESTIONS

Defendant contends that the prosecutor engaged in misconduct by asking leading questions concerning the contents of the laboratory reports during his direct examination of Detective Schram. Again, defendant's failure to object to the prosecutor's questions leaves this issue unpreserved and limits review to plain error affecting her substantial rights. See *Brown*, 279 Mich App at 134.

MRE 611(d)(1) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." Having reviewed the record, we agree with defendant's contention that the prosecutor improperly asked leading questions concerning the contents of the laboratory reports during his direct examination of Detective Schram. However, defendant has not demonstrated that the prosecutor's use of leading questions affected her substantial rights for three significant reasons. See *Carines*, 460 Mich at 763; see also *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) ("Where the defendant was not prejudiced by the leading questions, reversal is not required."). First, defendant stipulated to the admission of the laboratory reports; the testimony that the prosecutor elicited from Detective Schram through leading questions simply reiterated the reports' content. See *People v Fortson*, 202 Mich App 13, 18; 507 NW2d 763 (1993) (no prejudice where challenged testimony is cumulative). Second, the content of the laboratory reports concerned the drugs in Johnson's possession and the presence of fingerprints and DNA on Officer Anderson's radio, baton, and firearm. Although this evidence was helpful for the jury to understand the fatal altercation between Johnson and Officer Anderson, it was not significant to determining whether defendant provided false details to Detective Miles about the shooting. And, third, there was significant evidence that defendant provided false details to Detective Miles about the shooting. Accordingly, defendant's claim of error on this basis fails.

F. "BAD ACTS" EVIDENCE

Defendant next argues that evidence of drugs in Johnson's system was improper "bad acts" evidence of Johnson's criminal propensity and bad character. Again, defendant's failure to object to this evidence limits our review to plain error affecting her substantial rights. See *Coy*, 258 Mich App at 12. At trial, defendant stipulated to the admission of the pathology report that served as the basis for Dr. Joyce DeJong's testimony regarding the drugs in Johnson's system. Thus, even assuming that the admission of Dr. DeJong's testimony was plain error, defendant's claim fails because she has not established that the admission of this evidence affected her substantial rights.³ See *Carines*, 460 Mich at 763. Dr. DeJong's testimony was cumulative of the pathology report that was admitted into evidence through defendant's stipulation. See *Fortson*, 202 Mich App at 18 (no prejudice where challenged testimony is cumulative).

³ We note that during oral arguments before this Court defendant conceded that she waived this issue during trial.

G. IMPROPER OPINION TESTIMONY

Defendant also argues that Officer Anderson and Detective Schram both gave improper opinion testimony. Again, there was no objection to this testimony at trial, so our review is for plain error. See *Coy*, 258 Mich App at 12. Although defendant correctly asserts that Officer Anderson was not qualified as an expert witness, Officer Anderson's testimony that Johnson was "definitely out to kill [him]" was both rationally based on his perception of Johnson's conduct during their encounter and helpful to a determination of the circumstances surrounding Johnson's death. As such, the testimony was admissible as a lay opinion under MRE 701. See *People v Grisham*, 125 Mich App 280, 286; 335 NW2d 680 (1983).

Detective Schram's testimony that the absence of fingerprints on the radio and baton did not mean that no one touched those items was not rationally based on his perception of the evidence but, rather, involved a conclusion concerning the meaning or effect of the fingerprint evidence. Thus, the testimony did not qualify for admission under MRE 701. But contrary to defendant's argument, this does not mean that the testimony was expert testimony admissible only under MRE 702. The testimony merely indicated that an item can be handled without leaving a fingerprint. It did not rise to the level of "scientific, technical, or other specialized knowledge" requiring expert testimony under MRE 702. Thus, there is no plain error. Further, even if the testimony fell within the scope of MRE 702, whose fingerprints were on Officer Anderson's radio and baton was not significant to a determination of defendant's guilt or innocence for providing false details about the shooting to Detective Miles. Thus, any error did not affect defendant's substantial rights. See *Carines*, 460 Mich at 763.

H. EXCLUSION OF DEFENSE WITNESSES

Defendant next argues that the trial court abused its discretion when it prohibited Reverend William Anderson and attorney James Waters from testifying. Initially, we conclude that defendant waived any error related to Waters because, when Waters's identity as a potential witness was disclosed at trial, defense counsel expressly informed the trial court that he was not asking to add Waters as a witness. See *Aldrich*, 246 Mich App at 111 ("A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal").

With respect to the trial court's refusal to allow defendant to call Reverend Anderson, "[a] trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id.* "A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses." *Id.*, citing US Const, Am VI; Const 1963, art 1, § 20. However, the right is not absolute, and the accused must still comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Yost*, 278 Mich App at 379.

We conclude that the trial court made a reasoned and principled decision not to allow Reverend Anderson to be called as a witness. The court determined that defendant violated the mandatory discovery rule by failing to identify Reverend Anderson as a witness until trial. See MCR 6.201(A)(1). The court also determined that, although Reverend Anderson did not

technically violate the sequestration order because he was not named as a witness, his presence throughout the trial weighed against allowing him to testify because he might “adjust” his testimony to comport with what he observed while attending the trial. “The purposes of sequestering a witness are to ‘prevent him from “coloring” his testimony to conform with the testimony of another,’ *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976), and to aid ‘in detecting testimony that is less than candid.’ *Geders v United States*, 425 US 80, 87; 96 S Ct 1330; 47 L Ed 2d 592 (1976).” *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008). Finally, the trial court determined that any probative value of Reverend Anderson’s testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, considerations of waste of time, and the needless presentation of cumulative evidence. See MRE 403. Specifically, the prosecution was surprised by the request for Reverend Anderson’s testimony. Indeed, the prosecutor indicated that he would have approached his examination of witness Jennifer Stoel differently had he known that defendant was going to call Reverend Anderson as a witness. Moreover, the trial court determined that Reverend Anderson’s testimony would have been duplicative of Stoel’s testimony and also would have injected issues of race and witness tampering into the proceedings. Lastly, defendant requested Reverend Anderson to testify at a time when the trial was winding down and the testimony would potentially necessitate calling several additional witnesses. Accordingly, the trial court’s decision to prohibit Reverend Anderson from testifying was based on appropriate considerations and fell within the range of reasonable and principled outcomes. It did not abuse its discretion.

I. VIDEO EVIDENCE

Defendant next argues that the trial court abused its discretion by admitting a video of the scene of the shooting because the video was taken under conditions different from those on the night of the incident. We review this preserved evidentiary issue for an abuse of discretion. See *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). The prosecution offered the video as demonstrative evidence. “Demonstrative evidence . . . is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case.” *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). “In considering the admissibility of test results, it is not necessary that the conditions should be exactly identical, but a reasonable or substantial similarity is sufficient.” *People v England*, 176 Mich App 334, 341; 438 NW2d 908 (1989) (internal quotation marks and citation omitted); see also *Lopez v Gen Motors Corp*, 224 Mich App 618, 628; 569 NW2d 861 (1997) (“[D]emonstrative evidence is admissible if it bears ‘substantial similarity’ to an issue of fact involved in a trial.”).

Here, although defendant complains that the lighting and weather conditions at the time the video was made were different than the conditions on the night of the incident, the conditions did not have to be exactly identical. See *England*, 176 Mich App at 341; *Lopez*, 224 Mich App at 628. Indeed, “the atmospheric conditions on no two nights are exactly similar.” *Smith v Grange Mut Fire Ins Co of Mich*, 234 Mich 119, 126; 208 NW 145 (1926). We conclude that the conditions were substantially similar to support the admission of the video into evidence. See *id.*; *England*, 176 Mich App at 341; *Lopez*, 224 Mich App at 628. The state police made the video eight days after the incident, at night and in the dark, in the same location as the incident, and with flashlights turned both on and off. The differences from the video and the night of the incident affect only the weight of the evidence and not its admissibility as demonstrative evidence. See *People v Ng*, 156 Mich App 779, 788; 402 NW2d 500 (1986). Furthermore, the

probative value of the demonstrative video was not substantially outweighed by the danger of misleading the jury because it was made clear, through questioning by both the prosecutor and defense counsel, that the video was not filmed at the same time of night or under the same lighting or weather conditions as those on the night of the incident.⁴ See MRE 403. Therefore, the trial court did not abuse its discretion in admitting this evidence.

J. CONFLICT OF INTEREST

Defendant next argues that both the police investigation and her prosecution were improper because the Muskegon Police Department and the prosecutor's office had a severe conflict of interest as Officer Anderson was a member of the Muskegon Police Department, had "buddies" in the prosecutor's office, and testified for the prosecution in other criminal cases. Defendant did not raise this conflict-of-interest issue below. Therefore, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. We find no merit to this issue. The investigation was principally conducted by the Michigan State Police, not the Muskegon Police Department. Further, Officer Anderson's association with the Muskegon Police Department did not create a conflict of interest with the prosecutor's office. "Although . . . police officers may and do cooperate with the prosecutor, they are not part of the prosecutor's office." *People v Williams*, 475 Mich 245, 256; 716 NW2d 208 (2006). Defendant has failed to demonstrate a plain error affecting her substantial rights.

K. WITNESS INTIMIDATION

Defendant next argues that she was denied due process by the prosecution's intimidation of witness Jennifer Stoel. We review this unpreserved issue for plain error affecting defendant's substantial rights because it was not raised in the trial court. *Carines*, 460 Mich at 763-764; *Brown*, 279 Mich App at 134.

Defendant correctly observes that attempts by the prosecution to intimidate witnesses into changing their testimony amount to a denial of a defendant's constitutional right to due process of law. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). In this case, however, there is no factual support for defendant's claim that the prosecutor intimidated Stoel into testifying as she did. Additionally, the discrepancies in Stoel's testimony were fully brought out at trial. Stoel's various versions of the events presented a matter of witness credibility, which was for the jury to decide. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). There is simply no indication that Stoel's testimony was the product of intimidation by the prosecution. Accordingly, defendant has failed to establish a plain error.

⁴ We note that defendant's assertion that the prosecution failed to follow through on its statement that it would introduce evidence about "the stages of the moon" is meritless. The record clearly establishes that the prosecution admitted "a two page exhibit from the US Naval Observatory about moon rise and moon set" for both the date of the incident and the day the video was filmed. Defendant stated on the record that she had no objection to its admission.

L. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the prosecution failed to present sufficient evidence to sustain her conviction because she did not tell the police that a felony had been committed. We review de novo a challenge on appeal to the sufficiency of the evidence, viewing the evidence in a light most favorable to the prosecution and resolving all evidentiary conflicts in its favor, to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). A person is guilty of falsely reporting a felony if he or she intentionally makes a false report of a felony knowing the report is false. MCL 750.411a(1)(b). Furthermore, our Supreme Court has held that a person can be convicted under MCL 750.411a for providing “false details” about a crime. *People v Chavis*, 468 Mich 84, 94; 658 NW2d 469 (2003).

Here, the record evidence demonstrates that defendant told Detective Miles that she went outside after hearing a commotion and she heard the officer say he was going to shoot, at which point Johnson said, “Please don’t shoot me,” and she heard a shot. She later stated that she was able to see the police officer standing over her brother when the officer stated that he was going to shoot, her brother asked him to please not shoot, and the officer shot her brother. The officers who were at the scene provided testimony that refuted defendant’s statements to Detective Miles. And both the police-car and citizen videos clearly refuted defendant’s statements concerning her alleged presence at the time of the shooting. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that defendant violated MCL 750.411a(1)(b).

M. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant argues that her trial counsel was ineffective. Our review is limited to errors apparent on the record because defendant did not raise this issue in a motion for a new trial or a request for an evidentiary hearing. See *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must demonstrate (1) that counsel’s performance fell below an objective standard of professional reasonableness and (2) a reasonable probability that, but for counsel’s ineffective assistance, the result of the proceeding would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Defendant argues that defense counsel was ineffective for failing to make appropriate objections to the various unpreserved matters raised on appeal. However, as set out in our discussion above, either no error occurred, in which case defense counsel was not ineffective for failing to raise a futile objection, *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005), or any error that did occur did not prejudice defendant to the extent that it would create a reasonable probability that she would have been acquitted. See *Jordan*, 275 Mich App at 667.

Defendant also argues that defense counsel was ineffective for failing to make a pretrial motion to disqualify the Muskegon County Prosecutor’s Office on the basis of a conflict of interest and for failing to move to dismiss on the basis of the prosecutor’s intimidation of Stoel. As previously discussed, however, there is no basis for finding an actual conflict of interest, and the record does not factually support defendant’s claim of witness intimidation. Therefore, any

motion on those grounds would have been futile. Defense counsel is not ineffective for failing to make a meritless motion. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Finally, defendant argues that defense counsel was ineffective for failing to discover and retrieve Stoel's written statement and for failing to warn Reverend Anderson to stay out of the courtroom. According to the record, defense counsel did not become aware of Stoel's written statement until trial. Although the failure to reasonably investigate a case can constitute ineffective assistance of counsel, *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), there is no indication that counsel's investigation was inadequate or that any further investigation would have prompted the revelation of the written statement. Further, when claiming ineffective assistance due to defense counsel's inadequate preparation, a defendant must show that counsel's lack of preparation resulted in "counsel's ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). According to counsel's representations at trial, the content of Stoel's statement was "consistent with what she testified to." Therefore, defendant has not shown that Stoel's written statement constituted "valuable evidence which would have substantially benefited" defendant. See *id.*

With respect to defendant's claim involving Reverend Anderson, the record reveals that the sequestration order was one of several reasons for prohibiting defendant from calling him as a witness. Given that the trial court's decision was also on the basis of MCR 6.201(A)(1) and MRE 403, there is no reasonable probability that the trial court's decision would have been different had defense counsel advised Reverend Anderson not to be present in the courtroom. Therefore, this ineffective-assistance-of-counsel claim cannot succeed.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause