

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 3, 2012

V

JAYSON JAMAR HOLT,

Defendant-Appellant.

No. 302381
Ingham Circuit Court
LC No. 10-000515-FH

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of second-degree home invasion, MCL 750.110a(3). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 96 to 300 months' imprisonment. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from a Christmas Eve breaking and entering into a fraternity house. Employees of a nearby hotel observed a white vehicle parked illegally near the fraternity, and two men were seen stuffing objects into the trunk of the car. Both men carried the objects because they were large. Police were called to the scene. When the police arrived, there was no apparent evidence of an illegal entry into the fraternity, and no one near the illegally parked vehicle. The vehicle was impounded. Later, a resident of the fraternity returned to the residence to find that several rooms were broken into, and items were stolen, including large televisions, an iPod, video games systems, and video games. The owner of the impounded vehicle identified defendant and another male occupant of his home as individuals who borrowed his vehicle at the time of the offenses. Additionally, a female occupant of the vehicle owner's home observed defendant and the other male occupant with items that were similar to items taken during the home invasions. An iPod stolen from the fraternity house was found on defendant's accomplice. Defendant was convicted as charged.

Defendant alleges that trial counsel was ineffective for: (a) failing to object to the interrogating detective's testimony that defendant's statements to him were lies; (b) calling the owner of the vehicle to testify at trial when he knew the testimony would be damaging; (c) failing to call defendant to testify at trial; and (d) failing to request a complete instruction regarding aiding and abetting. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich

575, 579; 640 NW2d 246 (2002). First, the court must find the facts and then determine whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, and its constitutional determinations are reviewed de novo. *Id.* "[T]he defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The performance of counsel is based on an objective standard of reasonableness and recognizes the strategy of trial counsel without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Decisions regarding the evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *Id.* When a *Ginther*¹ hearing is not held, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Accordingly, unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant has the burden of establishing the factual predicate to support his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). A defendant may not merely announce his claim and expect this Court to discover and rationalize the basis for his assertions. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

First, defendant alleges that trial counsel erred by failing to object to the detective's testimony that defendant lied. We disagree. It is improper for the prosecutor to ask a defendant to comment on the credibility of prosecution witness. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). This opinion testimony by the defendant regarding credibility is not probative of a matter in issue. *Id.* Furthermore, the assessment of credibility by a testifying witness is unnecessary because the resolution of the credibility of witnesses is for the jury. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, any error in admitting this testimony does not result in unfair prejudice to the defense. *Buckley*, 424 Mich at 17.

In the present case, the testimony at issue was not introduced as an improper comment on defendant's credibility. Rather, the evidence was elicited to demonstrate the circumstances that led to defendant's confession. Initially, defendant denied any involvement in the home invasions, claiming that he was with his girlfriend at the time of the crimes. Police told defendant that they did not believe him because of the hotel witnesses. Defendant offered that he was merely the driver of the vehicle, and his friend entered the home. The detective then noted that two men were seen carrying items from the home because of their size, causing defendant to admit his involvement. In light of the fact that this testimony was elicited to show the circumstances that led to defendant's confession, this claim of error does not entitle defendant to appellate relief. *Hoag*, 460 Mich at 6.

¹ *People v Ginther*, 390 Mich 436, 442-443; 212 922 (1973).

Next, defendant asserts that it was erroneous to present the testimony of the vehicle owner because it was damaging to the defense. We disagree. Decisions regarding what evidence to present and what witnesses to call to testify present matters of trial strategy. *Rockey*, 237 Mich App at 76-77. Trial counsel's strategic decisions are reviewed without benefit of hindsight. *Id.* The prosecutor's key witness, the female occupant, presented circumstantial evidence that defendant stole the items from the fraternity house. However, the vehicle owner's equivocal testimony, particularly regarding who borrowed his vehicle and when, to some extent contradicted the testimony offered by the female occupant. Accordingly, the decision to call this witness was a proper matter of trial strategy.

Defendant's claim that trial counsel was ineffective for failing to call him as a witness and for failing to place his waiver of his right to testify on the record is without merit. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d (1985). Furthermore, in light of defendant's criminal history and the possibility of impeachment, the decision may have been a matter of trial strategy. *Rockey*, 237 Mich App at 76-77.

Lastly, defendant's challenge to the instruction is without merit. By expressing approval of the instructions, appellate review was waived. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *Matuszak*, 263 Mich App at 57. Additionally, there was no error with regard to the lack of a mere presence instruction in light of the testimony admitted at trial. *Hoag*, 460 Mich at 6.

Defendant raises numerous issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order 2004-6. However, these issues are not preserved for appellate review, and therefore, our review is limited to plain error affecting substantial rights. *People v Baker*, 288 Mich App 378, 380 n 1; 792 NW2d 420 (2010). Defendant bears the burden of establishing plain error. *Matuszak*, 263 Mich App at 47. Defendant's challenge to the conduct and rulings at the preliminary examination is rendered harmless by the presentation of sufficient evidence to convict at trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). We cannot conclude that defendant was deprived of a fair trial in light of the conduct of the prosecutor. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). A prosecutor is free to argue the evidence and reasonable inferences arising from the evidence and to respond to arguments made by defense counsel. *People v Unger*, 278 Mich App 210, 236-237; 749 NW2d 272 (2008). Defendant failed to support the factual predicate for perjured testimony. *Hoag*, 460 Mich at 6. Finally, defendant did not meet his burden of establishing plain error with regard to the verdict form and the instructions. *Matuszak*, 263 Mich App at 47.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood