

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 16, 2012

v

NATHAN CORNELIUS READOUS,
Defendant-Appellant.

No. 304765
Wayne Circuit Court
LC No. 10-009913-FC

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), unlawful imprisonment, MCL 750.349b, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felon in possession of a firearm, MCL 750.224f, unlawfully driving away a motor vehicle, MCL 750.413, and felonious assault, MCL 750.82(1). He was sentenced as a third habitual offender, MCL 769.11, to 18 to 40 years' imprisonment for armed robbery, 5 to 20 years' imprisonment for first-degree home invasion, 5 to 15 years' imprisonment for unlawful imprisonment, one to five years' imprisonment for being a felon in possession, one to five years' imprisonment for unlawfully driving away a motor vehicle, and one to four years' imprisonment for felonious assault, to be served concurrently and consecutively to five years' imprisonment for his second offense felony-firearm conviction. We affirm.

Defendant argues that his trial counsel was ineffective. We disagree.

Because this Court denied defendant's motion to remand for a *Ginther* hearing,¹ our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish his claim of ineffective assistance of counsel, defendant must demonstrate that counsel's performance fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* Defendant must overcome the strong presumption that the challenged actions of counsel constituted reasonable trial strategy. *People v*

¹ *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

LeBlanc, 465 Mich 575, 578; 640 NW2d 246 (2002). Further, we will not substitute our judgment for that of counsel on matters of trial strategy, or evaluate counsel's performance from the perspective of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). We review for clear error any factual findings of the trial court but review de novo the ultimate constitutional question. *LeBlanc*, 465 Mich at 579.

First, defendant argues that his trial counsel was ineffective for failing to challenge the in-court identification of defendant by the victim, Sharon Hans. A pretrial identification procedure that is unduly suggestive requires any subsequent in-court identifications be suppressed unless there is an independent basis for them. *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998). An identification procedure is unduly suggestive when it creates "a substantial likelihood of misidentification," which often occurs when one suspect is singled out in some way during the identification. *Id.* at 111. But an on-scene identification that occurs shortly after a crime "to obtain reliability in the apprehension of suspects" is not necessarily improper. *People v Libbett*, 251 Mich App 353, 362; 650 NW2d 407 (2002).

In this case, Hans did not identify defendant in-person, but she was presented with a picture of him. She then confirmed that he was the perpetrator. But the police obtained the picture based on information Hans provided, including defendant's first name and where he lived. In essence, Hans had already identified defendant, and the photo was used merely to confirm his identity. Regardless, there are multiple independent bases supporting Hans's in-court identification of defendant.

The following factors indicate an independent basis supports the in-court identification:

(1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup [sic] of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).]

Here, Hans had lived next to or across the street from defendant for at least two years; she exchanged greetings with him on multiple occasions. Hans had ample opportunity to see defendant during the robbery, which lasted approximately 30 minutes. Defendant was not wearing any mask or disguise, and Hans had multiple face-to-face interactions with him during the robbery. Hans identified defendant almost immediately after the robbery was over and the police arrived. She knew his first name and where he lived. Hans also consistently identified defendant as the perpetrator, to her neighbor right after she escaped, to the police, and in court. Because of these numerous independent bases for Hans's identification of defendant, any challenge to it by counsel would have been futile. See *Jordan*, 275 Mich App at 668.

Second, defendant alleges that his trial counsel was ineffective for failing to call a cell tower expert to testify. Defendant suggests that an expert *could have* determined his location

during the crime, and thus proved his alibi defense. Defendant cannot establish his claim of ineffective assistance of counsel with speculation that an expert would have testified in his favor. *Payne*, 285 Mich App at 190. Further, defendant must demonstrate that calling the expert would have changed the trial's outcome. *Id.* Based on the facts in the record, there is no reason to believe that a cell tower expert would have testified that defendant was not in Detroit when he called his sister or Jeffrey Monaghan.

Third, defendant contends that his trial counsel was ineffective for failing to seek DNA testing of the extension cords recovered from Hans's home, which were used to tie her up during the robbery. Again, defendant merely speculates that DNA would have been recovered, and that this DNA would exonerate him; therefore, defendant has not shown that his trial counsel's failure to request DNA testing was outcome determinative.

Fourth, defendant argues that his trial counsel was ineffective for failing to object to Officer Robert Kane's testimony. Kane was asked about the search for fingerprints in Hans's home and car. He responded that there were no fingerprints found. First, this is not hearsay. Second, most of this testimony was actually elicited by defense counsel. An attorney has wide discretion regarding matters of trial strategy. *LeBlanc*, 465 Mich at 578. Moreover, Officer Kane's testimony was helpful to defendant because it established that his fingerprints were not found at the crime scene or in the stolen car. Consequently, defendant did not suffer any prejudice.

Finally, defendant claims his trial counsel was ineffective for failing to challenge the accuracy of the prosecution's notice of sentence enhancement under MCL 769.11. The information and amended information alleged that defendant was convicted in July 2000 of delivery of marijuana and in October 1998 of attempted delivery of marijuana. Defendant argues these allegations reflected only one conviction and that he was prejudiced because he was sentenced based on inaccurate information. The record does not support defendant's claim. The presentence information report (PSIR) confirms defendant's two prior convictions as the prosecutor alleged.² MCL 769.13(5)(d). Any error in the information as to the dates of the convictions is a technical defect subject to corrective amendment at any time. *People v Hornsby*, 251 Mich App 462, 472; 650 NW2d 700 (2002); MCL 767.76; MCR 6.112(H).

Defendant also contends that the trial court abused its discretion in scoring OV 8 at 15 points because there is no evidence that he asported Hans to a place of greater danger. We disagree.

We review a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether evidence in the record adequately supports a particular score. *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010). Generally, if there is any evidence to support a scoring decision, it will be upheld. *Id.*; *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). Disputed facts at sentencing are subject to the trial court's

² The prosecutor has also attached court register of actions to its brief confirming two separate prior convictions as alleged in the information and amended information. MCL 769.13(5)(c).

determination using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

MCL 777.38 provides that the sentencing court is to score OV 8 at 15 points when, “[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.” The statute does not define “asported.” *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). The asportation element of forcible kidnapping requires some movement of the victim in furtherance of the kidnapping that is not merely incidental to the commission of an underlying lesser or coequal crime. *Id.* Victims are “asported” when they are moved “to another place or situation of greater danger” or “they [are] secreted from observation by others.” *Id.* at 648.

This Court has upheld a 15-point score for OV 8 in criminal sexual conduct cases when a defendant moves a victim to a more secluded, and thus a more dangerous, location. See *Spanke*, 254 Mich App at 648 (the victims were moved to the defendant’s home before he sexually assaulted them); *Steele*, 283 Mich App at 490-491 (the defendant took the victims to a trailer, a tree stand, and to a remote area on a dirt bike, where he sexually assaulted them); *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002) (the defendant took the victim in a car to an isolated area away from the road to sexually assault her). On the other hand, our Supreme Court has concluded that moving a victim within a house to a bedroom to rape her was incidental to the commission of the crime, and so did not constitute asportation. *People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010).

Here, evidence supported the trial court’s decision to score OV 8 at 15 points because defendant moved Hans to places of greater danger. Defendant forced Hans to walk with him throughout the house while he looked for money or a safe. By moving Hans from room to room with a gun pointed at her, defendant increased the possibility that Hans would be harmed and decreased Hans’s chances of escaping. Hans had no opportunity to get away from defendant or call someone for help when defendant was right behind her, pointing a gun at her back. Furthermore, defendant forced Hans into the basement, where her chances of escape were even less likely. By moving Hans to the basement, a more secluded location, defendant also significantly reduced the possibility that someone would interrupt him during the commission of the crime. Because the evidence supports the conclusion that defendant asported Hans to a place of greater danger, the trial court did not abuse its discretion in scoring OV 8 at 15 points.

Defendant next argues that his due process rights were violated when he was sentenced as a habitual offender using inaccurate information. We disagree. This Court reviews unpreserved sentencing errors for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). As noted already, the PSIR confirmed the two prior convictions that supported sentence enhancement under MCL 769.13. If the dates of these convictions were inaccurately stated in the information and amended information, this technical defect may be corrected at any time. *Hornsby*, 251 Mich App at 472; MCL 767.76; MCR 6.112(H). Defendant has not established that plain error affected his substantial rights. *Kimble*, 470 Mich at 312.

Finally, defendant argues that his due process rights were violated because his convictions were obtained through perjured testimony. We disagree.

Generally, this Court reviews unpreserved claims of prosecutorial misconduct for plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). “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.* A conviction obtained with the knowing use of perjured testimony must be set aside when there is any reasonable likelihood that the perjured testimony affected the defendant’s conviction. See *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009).

Some older Michigan case law suggests that a defendant’s conviction must be set aside if it is based on perjured testimony even if the prosecution was not aware the testimony was false. *People v Cassell*, 63 Mich App 226, 228-229; 234 NW2d 460 (1975) (concluding that the chief investigative officer’s knowledge of perjured testimony could be imputed to the prosecutor); *People v Anderson*, 44 Mich App 222, 229; 205 NW2d 81 (1972) (holding that the defendant was entitled to a new trial even though the prosecution and the witness did not know the testimony was untrue). But it is unnecessary in this case to determine if the prosecution must have knowledge of the perjured testimony to grant defendant a new trial because defendant has failed to show that Officer Kane testified untruthfully.

On appeal, defendant contends Officer Kane testified falsely regarding receiving reports that defendant’s fingerprints were not connected to the crimes. Defendant submits Kane’s testimony was false because “[t]here are no reports pertaining to the fingerprints.” Defendant provides no facts in support of this assertion. As the prosecution argues, it is possible that Officer Kane received the news that no fingerprints were recovered from Hans’s home orally. With respect to Officer Kane’s statement that “no reports came back on any fingerprints” for Hans’s car, that testimony indicates the absence of a report, not the existence of one. More importantly, defendant does not explain what incentive Officer Kane had to lie about the existence of reports or how this allegedly perjured testimony affected his conviction. Indeed, Officer Kane’s testimony benefitted defendant in that it did not implicate him in the crimes.

We affirm.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Deborah A. Servitto