STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2012
v DONALD SCOTT KNOWLES, Defendant-Appellant.	No. 306558 Mason Circuit Court LC No. 10-002349-FC

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

A jury convicted defendant of second-degree home invasion, MCL 750.110a(3), and the trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to a prison term of nine to 75 years. We affirm.

Defendant's convictions stem from the October 2011 break-in of the home of Martin and Cheryl Schilling. Items were taken from the home, some of which were never recovered.[1]

Defendant first asserts that he was denied the effective assistance of counsel when counsel failed to request that the jury be instructed on the lesser-included offense of entering without permission. Because no evidentiary hearing was held, our de novo review is limited to the existing record. *People v Wilson*, 242 Mich App 350, 354; 619 NW2d 413 (2000).

Defendant bears the heavy burden of showing that counsel's performance was deficient and that he was prejudiced by the deficiency. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), defendant must show that counsel's "representation fell below an objective standard of reasonableness," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. The relevant inquiry "is not whether a defendant's case might conceivably have been advanced by

[1] The underlying facts of the case are set forth in *People v Rivnack*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2012 (Docket No 304705). Aaron Rivnack and defendant were tried separately for their involvement in the same breaking and entering.

alternate means," but whether defense counsel's errors were so serious that they deprived the defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 582; 640 NW2d 246 (2002). Counsel is afforded broad discretion in the handling of cases. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

A jury can be instructed on a lesser-included offense "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). To convict a defendant of second-degree home invasion, the prosecution must prove that the defendant "(1) entered a dwelling, either by a breaking or without permission, (2) with the intent to commit a felony or a larceny in the dwelling." *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). A defendant can be found guilty of breaking and entering without permission, MCL 750.115(1), for "(1) breaking and entering or (2) entering the building (3) without the owner's permission." *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). Thus, the distinguishing element between the two crimes is the intent to commit a felony or larceny in the dwelling. Cf. *Id.* (breaking and entering without permission is a necessarily lesser-included offense of first-degree home invasion).

Defendant's theory of the case was that he drove Aaron Rivnack to the Schillings' residence, but that he believed Rivnack was trying to collect on a debt. Defendant argued he did not enter the home and did not have the intent to commit a larceny, nor was he aware that Rivnack intended to commit a larceny. Consistent with defendant's trial strategy, defense counsel could have determined that if the jury was instructed on an alternative crime that did not include the intent element, it would have increased the likelihood of conviction. A photograph of defendant peering in through the open front door of the residence was in the record, as well as testimony that he admitted opening the door. Only circumstantial evidence of his intent was admitted. It is not objectively unreasonable for counsel to pursue an "all-or-nothing strategy." *People v Armstrong*, 124 Mich App 766. 769; 335 NW2d 687 (1983). Moreover, "[a] failed strategy does not constitute deficient performance." *People v Petri*, 279 Mich App 407. 412; 760 NW2d 882 (2008). Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel.

Next, defendant challenges the admission under MRE 404(b) of testimony by Nicholas Helfrich that described defendant's involvement in a break-in of the same residence in September 2011. Defendant objected to admission of the evidence at trial on the ground that it could not be admitted because there was no substantial evidence corroborating the proffered testimony. Defendant did not raise the arguments he advances on appeal. Because an objection to evidence on one ground does not preserve the issue for appellate review on a different ground, this issue has not been preserved. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Consequently, we will review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Helfrich testified to a conversation he had with defendant in August or September 2010, where the issue of the Schilling residence came up in the context of how Helfrich and defendant could get some money. Helfrich told defendant about silver coins that were in the residence. "A few days later," Helfrich testified, the two drove to the residence and defendant took a box from the home that defendant said held silver coins. Defendant argues that Helfrich's testimony about the prior robbery was inadmissible under MRE 404(b). MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For evidence to be admissible under this court rule, the proponent must show: "(1) that the other acts evidence is for a proper purpose . . . , (2) that the evidence is relevant to an issue of fact that is of consequence at trial, and (3) that, under MRE 403, the danger of unfair prejudice does not substantially outweigh the probative value of the evidence." *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). "MRE 404(b) requires the exclusion of other acts evidence if its only relevance is to show the defendant's character or propensity to commit the charged offense." *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012).

Within his MRE 404(b) challenge, defendant interweaves his contention that Helfrich's testimony was uncorroborated. However, defendant has not fully developed this argument or provided authority to support his position. A party cannot simply assert that an error occurred and then leave it to this Court to "'discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments.'" *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (citations omitted). In any event, this argument is without merit. Nothing in the language of MRE 404(b) requires such corroboration.

Defendant contends that Helfrich's testimony was only admitted for the improper purpose of showing defendant's character and propensity to commit the crime. During the hearing on defendant's objection to the prosecutor's notice of intent to use MRE 404(b) evidence, the prosecutor argued that Helfrich's testimony about the prior break-in was admissible to show a similar scheme or plan, and an absence of mistake or accident. The jury was instructed to consider the evidence only to the extent that it might show that "Defendant used a plan, scheme, or characteristic scheme that he has used before or since." The tendency of the evidence to show such a plan or scheme was relevant to the issue of defendant's involvement in the crime charged. Defendant argued he did not enter the house, that he did not act with the requisite intent, and that he was unaware of Rivnack's intent. Helfrich's testimony about the prior break-in undercut these arguments and tended to show that this was not a situation where defendant was in the wrong place at the wrong time. Thus, the evidence was being used for a proper purpose and was relevant to a fact of consequence.

Similarly, defendant is unable to show that the probative value of Helfrich's testimony was substantially outweighed by the danger of unfair prejudice. Even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. However, all evidence, by its very nature, is prejudicial to some extent. *People v*

Fisher, 449 Mich 441, 451; 537 NW2d 577 (1995). The prejudice is only unfair if "there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

Defendant's alleged participation in the first break-in the month before made it less likely that when defendant returned to the Schillings' residence a month later he was not involved in a planned robbery, either as a principal or as an aider and abettor. Evidence that defendant had robbed the Schillings on a prior occasion in circumstances similar to the charged robbery was highly relevant to his intent and knowledge, which was at the heart of the explanation advanced by defendant regarding his presence at the time of the second break-in. Although this evidence was prejudicial to defendant, this stems from its relevance; the probative value of this testimony was not substantially outweighed by any danger of unfair prejudice. Furthermore, the jury was instructed on how it was allowed to consider the evidence of prior bad acts, and the jury is presumed to have followed the instruction. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also raises a number of arguments in a supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6. He first challenges the instructions that were given to the jury. However, defense counsel indicated that he did not have any objections to the jury instructions, which constitutes a waiver and extinguished any error. *People v Kowalski*, 489 Mich 488, 503-504; 803 NW2d 200 (2011). This precludes our review of the jury instructions. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

In any event, we see no merit to the challenges raised to the instructions. The standard jury instruction on reasonable doubt was given, and this Court has previously determined that this instruction adequately coveys the concept of reasonable doubt. *People v Hubbard* (*After Remand*), 217 Mich App 459, 487; 552 NW2d 493 (1996), overruled on other grounds in *People v Bryant*, 491 Mich 575, 586; ___ NW2d ___ (2012). The trial court also cannot be faulted for failing to sua sponte instruct on a lesser-included offense when defendant had not requested the instruction. To do so would be to interject the court into the adversarial process, a role at odds with the court's duties and responsibilities. Defendant also argues that the court should have instructed consistent with CJI2d 5.4 (witness an undisputed accomplice) instead of CJI2d 5.5 (witness a disputed accomplice). The court did not instruct pursuant to CJI2d 5.5. Rather, the court instructed consistent with CJI2d 5.13 (agreement for testimony/possible penalty), which was proper under the circumstances. Moreover, because Helfrich was not implicated in the crime charged, neither CJI2d 5.4 nor 5.5 was appropriate. Defendant also argues that the court should have given CJI2d 5.7 (addict-informer as a witness). While Helfrich did admit to using the proceeds of the September 2010 robbery to buy drugs, there was no evidence that he was an addict.

Next, defendant raises issues relating to the prosecutor's conduct during the trial. A defendant must object to the prosecutor's comments and request a curative instruction in order to preserve this issue for appellate review. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501. Because defendant did not object, our review is limited to plain error that affected defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant contends that the prosecutor vouched for Helfrich's credibility. A prosecutor's role within our judicial system is to seek justice and not merely to convict. *People v Erb*, 48 Mich App 622, 631; 211 NW2d 51 (1973). While a prosecutor cannot "vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness," *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009), a prosecutor is allowed to argue from the facts in evidence that a witness is worthy of belief, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Defendant's argument centers on how the prosecutor addressed a plea agreement that required Helfrich to testify truthfully in the present case. The issue of Helfrich's plea agreement was brought up by defendant during opening statements, presumably as a way of discrediting his testimony. The prosecutor responded by disclosing the agreement during direct examination and then commenting on it during closing argument. The prosecutor's conduct was directly responsive to the defense argument. Further, the prosecutor's statement that Helfrich's "testimony was believable" was not predicated on any implication that he had any special knowledge that was not part of the record. Rather, it was a statement that the prosecutor believed the testimony based on its consistency and coherence, and the fact that, to the prosecutor, it made sense. Further, the jury was instructed that counsels' arguments are not evidence and that it was the jury's responsibility to "decide which witness [to] believe." There is nothing of record to suggest that the jurors disregarded these instructions. *Graves*, 458 Mich at 486. Accordingly, defendant is unable to show plain error.

Defendant also appears to contend that the prosecutor misstated facts. There is "a long-standing rule of law that an attorney may not argue or refer to facts not of the record." *People v Knolton*, 86 Mich App 424, 428; 272 NW2d 669 (1978). It is also improper for a prosecutor to mischaracterize the evidence presented. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). The passage challenged by defendant is the following:

> We know that Aaron, Aaron Rivnack, went into the house to commit the Home Invasion while Don Knowles sat in the car at the Schilling house. We know that the car right here (indicating) where Don was in had a clear view of the front door of the Schilling house unobstructed. And he was able to see Aaron coming and going, going and coming, coming and going. He was parked in clear view.
>
> And we know that Aaron Rivnack went in and out of that house as shown on this trail camera I would say a minimum of three times in and out. One time he had the pistol in open view. We know that. And once Aaron had a latex glove on his right hand on Exhibit 1-I as he's stepping into the house. Right there is the latex glove on his hand (indicating). Right there is a latex glove on his hand. We know that.
>
> We know that after Aaron had initially gone into that house at, went to the door at 12:06, that 14 minutes after his arrival at that door and six minutes and 30 seconds after Aaron's last sighting, which is here at 12:13:34 on 1-E, on 1-F we have the Defendant standing there on the door. And the door is open. And he's sticking his head in the door. His toes aren't in the house. But he's clearly opened the door. 12:20:01, 12:13:34, six and a half minutes.

* * *

> Did he say something? Did he yell something in? Did he go to the door, open it up and say, "Hey, Aaron, hurry up"? Did he say, "Somebody's coming, you better get out"? Did he say, "You've been in too long, we're gonna get caught"? We don't know.
>
> But we know that he comes out right after that. And he goes back in after that, Aaron Rivnack does, this time with the latex glove on his hand.
>
> We also know, we also know that when Martin Schilling arrived at the house Don Knowles, who was seated in the front seat of this car, our Defendant, turned to him and engaged Mr. Schilling in conversation.
>
> Why did he do that? Was he trying to give Aaron time to get out of the house? Time for him to make it, to bolt out the back slider door, which we know was left open? Those are things we know.

The prosecutor's interpretation of the evidence is reasonable. Although defendant may have been 30 to 40 feet away from the front door as he sat in the car, it does not automatically follow that he could not see the front door from that distance, especially when other testimony established that there were no obstructions between where defendant was sitting and the front door. Similarly, the prosecutor's statement that the picture of defendant at the residence doorway shows him "sticking his head in the door" was based on the evidence, although it was the prosecutor's interpretation of what was depicted in one of the trail camera photos. Further, the jurors, who were instructed that they "should only accept things the attorneys say that are supported by the evidence or by your own common sense and general knowledge," were given the opportunity to determine what the picture showed.

Additionally, the speculative questions posed in the quoted passage are not "conjectures and presumptions" as defendant argues. The prosecutor provided no answers, and indeed he specifically stated that "[w]e don't know" the answers to the first group quoted. The prosecutor does say "Those are things we know" following the second group of speculative questions, but it is not clear what was meant by this. In any event, the prosecutor does not provide any answers (i.e., what "we know").

Defendant also argues that he was severely prejudiced by what he calls "stop-watch jurisprudence." This argument boils down to the contention that the jury must have violated the trial court's instruction not to talk at lunch because it returned a verdict only eight minutes after returning from lunch. This is an entirely speculative argument that does not support the finding of any error.

Defendant also argues that there is insufficient evidence to support his conviction. Defendant contends that his presence at the Schillings' residence was insufficient to convict him of second-degree home invasion as an aider and abettor. Because the jury was given the option of convicting defendant as a principal, and the verdict form did not differentiate between being convicted as a principal or under and aiding and abetting theory, defendant's failure to challenge both possible bases for conviction means that the conviction must stand regardless of the merit of the challenge.

Next, defendant contends that the trial court abused its discretion when it denied his motion for a change of venue. However, defendant has waived this issue because he did not use all of his preemptory challenges and expressed satisfaction with the jury selected. *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Carter*, 462 Mich at 215 (2000) (internal quotation marks and citation omitted).

Defendant next argues that his right to a fair trial was violated because the investigating detectives sought to convict defendant by any means possible after he was acquitted for alleging making a bomb threat to avoid taking a drug test. There is simply no evidence supporting the assertion that the police have a personal vendetta against him. The record also fails to support defendant's contention that Helfrich was coerced into testifying. The fact that he was given consideration in sentencing does not amount to coercion. Further, Helfrich stated that his testimony was truthful.

Next, defendant asserts that the trial court abused its discretion when it denied his motion to suppress a watch that was found during the search of his car. On a motion to suppress, factual findings are reviewed for clear error, and the ultimate decision on the motion is reviewed de novo. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

Defendant contends that the search warrant was invalid because the affiant-officer intentionally or recklessly disregarded the truth when he submitted the affidavit for the search warrant. The United States Supreme Court determined in *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), that a criminal defendant can challenge the truthfulness of the statements made in an affidavit supporting a warrant. To do so, a defendant must make,

> a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. [*Id*. at 155-156.]

Put another way, a defendant is not entitled to suppression simply because a false statement was included in the affidavit. *Id*. The search warrant is only void if the remaining statements in the affidavit fail to establish probable cause. *Id*. See also *People v Mullen*, 282 Mich App 14, 22-25; 762 NW2d 170 (2008).

Probable cause for the issuance of a search warrant exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the location to be searched. *People v Unger*, 278 Mich App 210, 244; 749 NW2d 272 (2008). When reviewing the magistrate's decision to issue a search warrant, this Court must examine the search warrant and affidavit in a common sense and realistic manner. *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). Under the totality of the circumstances, this Court must determine whether a reasonably cautious person could have concluded that there was a substantial basis for the magistrate's finding of probable cause. *Id*. at 603. When a person of reasonable caution would conclude that contraband or evidence of criminal conduct will be found in the place to be searched, probable cause exists. *Id*.

In this case, on the second day of trial defense counsel brought to the court's attention the fact that Cheryl Schilling's testimony about how she discovered the watch was missing was inconsistent with the affidavit for the search warrant. According to defense counsel, Schilling testified at Rivnack's trial that she did not discover the watch was missing until after the vehicle was searched and she was shown a picture of the watch. Yet, the affidavit indicated that "Affiant received a phone call from Martin Schilling indicating his wife discovered she was missing a $300 white gold ring with diamonds and a watch with a black braded strap."

Because of this discrepancy, an evidentiary hearing was held before the trial proceeded. The affiant testified that he received a phone call from Martin Schilling while he was preparing the affidavit. He testified that what he had been told by Martin was included in the paragraph of the affidavit under scrutiny. He said that he had a good faith to include the challenge statement based on what he had been told by Martin Schilling. As the trial court alluded to in denying the motion to suppress, Cheryl Schilling's memory of how she discovered the watch was missing does not mean that the statement in the affidavit was false. The court implicitly found the affiant's testimony that he had a good faith belief to include the disputed information to be credible. We will not disturb this credibility determination on appeal.

Further, the remaining portions of the affidavit were sufficient to establish probable cause. The affidavit describes how Martin Schilling discovered defendant and Rivnack at his residence and followed their vehicle until a traffic stop was conducted. It explains that the affiant was notified that a jewelry box had been disturbed and a revolver was missing, and describes how pictures taken by a trail camera directed at the front door of the Schillings' residence captured images of Rivnack entering and exiting the residence and defendant with the door open. There was no argument raised that these declarations were erroneous.

Defendant also asserts that trial counsel was ineffective because he did not call Rivnack to testify. "Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A defendant must establish the underlying factual predicate to support a claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In support of his argument, defendant has provided, among other things, a handwritten letter from Rivnack to defense counsel. Rivnack's letter to defense counsel is not notarized. The substance of Rivnack's letter is that Helfrich falsely accused defendant of the first home invasion in order to secure a deal for himself, that Kyle Schilling, Martin and Cheryl's son, lied when he testified that he had never shared a jail cell with Rivnack, and that the prosecution planted evidence. Assuming that Rivnack would have testified consistently with his letter, defendant has not shown he was denied a substantial defense. Defendant argued at trial that he did not know what Rivnack was planning on doing when defendant took him to the Schilling residence. Defendant was able to pursue this theory at trial. The proffered testimony would only have supported this theory of defense by attacking the credibility of Helfrich and Kyle Schilling. But defense counsel was able to do that without Rivnack's testimony. Defense counsel could have reasonably concluded that it was better to pursue the theory of defense though other avenues than having Rivnack testify, because using Rivnack to attack the credibility of Helfrich and Kyle Schilling carried with it unreasonable risks that Rivnack might give evidence damaging to defendant's theory of the case.

Next, defendant raises various challenges to the sentence that was imposed by the trial court. A defendant must raise a sentencing issue before the trial court in order to preserve it for appellate review. *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). At the sentencing hearing, defendant only requested that he be given credit for serving seven days that were not taken into account because the initial sentencing hearing was postponed. He did not raise any of the issues that he now challenges on appeal. He has also failed to bring a proper motion for resentencing with the trial court or a proper motion to remand with this Court. MCL 769.34(10); MCR 6.429(C). Consequently, his challenges to his sentence have not been preserved and will be reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

Defendant asserts that the trial court improperly scored prior record variables (PRVs) 1 through 5. "Under the statutory sentencing guidelines, the trial court must score the applicable offense and prior record variables to determine the appropriate range for the minimum sentence." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). When scoring PRV 1 to PRV 5, a trial court cannot consider "any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication." MCL 777.50(1). Although defendant argues to the contrary, there is nothing in the language of MCL 777.50(1) that limits a court's use to offenses where the defendant was represented by counsel. Instead, MCL 777.50(1) allows for older offenses not to be considered if the defendant was able to successfully abide by the law for a period of ten years or more following discharge of the prior offense.

The majority of the offenses set forth in the presentence investigation report were committed before defendant was discharged from a prior offense. The two exceptions were the assault and battery conviction in 1989 and the second-degree home invasion in 2010. However, defendant had only been discharged for 26 days when the assault and battery offence occurred and approximately a year and a half when the second-degree home invasion occurred. Neither of these gaps was long enough to satisfy the 10-year requirement in MCL 777.50(1). Accordingly, it was proper for the trial court to consider the entirety of defendant's prior record when it scored PRV 1 through PRV 5.

PRV 2 addresses prior low severity felony convictions. MCL 777.52(1). Under PRV 2, a court must assess 20 points if a defendant has three prior low severity felony convictions and

30 points if the defendant has four or more prior low severity felony convictions. MCL 777.52(1). Convictions for crimes listed in offense classes E, F, G, and H are among those considered a "prior low severity felony conviction." MCL 777.52(2)(a). Forgery, MCL 750.248, and uttering and publishing, MCL 750.249, are both class E offenses. MCL 777.16n. Larceny in a building, MCL 750.360, is a class G offense. MCL 777.16r. The prosecutor argues that defendant's fourth prior low severity felony conviction is receiving and concealing stolen property valued between $1,000 and $20,000, MCL 750.535(3). While defendant was initially charged with this, it appears that he pleaded guilty to receiving and concealing stolen property valued between $200 and $1,000, MCL 750.535(4)(a). This is a misdemeanor, MCL 750.535(4).

However, two convictions could be classified as either a felony or a misdemeanor. In 1990, defendant pleaded guilty to two counts of breaking and entering a motor vehicle, MCL 750.356a. Defendant does not have any prior convictions for breaking and entering a motor vehicle, so the classification would depend on the property's value that was stolen. MCL 750.356a. While the offense is a misdemeanor if the property was worth more than $200 but less than $1,000, MCL 750.356a(2)(b)(*i*), it is a felony if the property is worth $1,000 or more, MCL 750.356a(2)(c)-(d). Based on how the trial court scored defendant, it appears that the property was most likely valued at more than $1,000 but less than $20,000 , MCL 750.356a(2)(c), which is a class E felony, MCL 777.16r.

PRV 3 considers prior high severity juvenile adjudications. MCL 777.53(1). A trial court must assess 50 points if the defendant has three or more prior high severity juvenile adjudications. MCL 777.53(1)(a). A "prior high severity juvenile adjudication" includes any crime listed in offense classes M2, A, B, C, or D. MCL 777.53(2)(a). Defendant has two juvenile adjudications for second-degree criminal sexual conduct (CSC II), MCL 750.520c, and a juvenile adjudication for breaking and entering, MCL 750.110. CSC II is a class C offense, MCL 777.16y, while breaking and entering is a class D offense, MCL 777.16f. Accordingly, the trial court properly scored defendant 50 points for PRV 3.

PRV 4 addresses prior low severity juvenile adjudications. MCL 777.54(1). If a defendant has three or four prior low severity juvenile adjudications, the court must assess 10 points. MCL 777.54(1)(c). A "prior low severity juvenile adjudication" can be any crime listed in offense classes E, F, G, or H. MCL 777.54(2)(a). Defendant has two juvenile adjudications for unlawfully driving away an automobile (UDAA), MCL 750.413, and a juvenile adjudication for larceny in a building, MCL 750.360. UDAA is a class E offense, MCL 777.16u, and larceny in a building is a class G offense, MCL 777.16r. Because defendant has three prior low severity juvenile adjudications, the trial court properly assessed 10 points for PRV 4.

PRV 5 addresses defendant's prior misdemeanor convictions and misdemeanor juvenile adjudications. MCL 777.55(1). Under PRV 5, a court must assess 15 points if the defendant has five or six prior misdemeanor convictions or misdemeanor juvenile adjudications. MCL 777.55(1)(b). A court must assess 20 points if the defendant has seven or more prior misdemeanor convictions or misdemeanor juvenile adjudications. MCL 777.55(1)(a). Defendant has two misdemeanor convictions for second-degree retail fraud, MCL 750.356d, a misdemeanor conviction for receiving and concealing stolen property worth less than $100, MCL 750.535, a misdemeanor conviction for assault and battery, MCL 750.81, a misdemeanor conviction for receiving and concealing stolen property valued between $200 and $1,000, MCL

750.535(4)(a), and a misdemeanor conviction for possessing marijuana, MCL 333.7403(2)(d). If these were defendant's only prior misdemeanor convictions, the trial court properly assessed 15 points for PRV 5.

Defendant also challenges the scoring of offense variable (OV) 2. OV 2 assesses points if a potentially lethal weapon is possessed or used during the commission of the offense. MCL 777.32(1); *People v Harverson*, 291 Mich App 171, 181-182; 804 NW2d 757 (2010). A court must assess five points if a pistol was possessed or used during the commission of the offense. MCL 77.32(1)(d). In multiple offender cases, if one offender is assessed points for possessing a weapon, all offenders must be assessed the same number of points. MCL 777.32(2).

Although defendant was not charged with first-degree home invasion, which would have required the jury to consider if a gun was present, Rivnack was convicted of first-degree home invasion, felon in possession of a firearm, and possessing a firearm during the commission of a felony for his role the incident. *Rivnack*, unpublished opinion per curiam of the Court of Appeals (Docket No. 304705). The firearm charges stem from Martin Schilling's testimony that a pistol was taken from his residence during the home invasion. While Rivnack's PSIR is not available in the current record, it was filed in Docket No. 304705, and it shows that he was scored 5 points for OV 2. Accordingly, the trial court was required to assess defendant the same number of points regardless of whether defendant possessed or was aware that the firearm was taken.

Next, defendant challenges the award of restitution. "A sentencing court is authorized to order a defendant convicted of a felony to make full or partial restitution to the victim of the defendant's conduct." *People v Griffis*, 218 Mich App 95, 103; 553 NW2d 642 (1996), citing MCL 769.1a(2). This includes the value of the property the victim lost because of the defendant's conduct. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). However, it "encompasses only those losses that are easily ascertained and a direct result of a defendant's criminal conduct." *Id*. "A restitution amount, if contested, must be proven by a preponderance of the evidence." *People v Byard*, 265 Mich App 510, 513; 696 NW2d 783 (2005), citing MCL 780.767(4).

In this case, defendant did not contest the amount of restitution he was ordered to pay before the trial court. He now contends on appeal that the prosecution did not prove the amount of loss suffered by a preponderance of the evidence. Defendant argues that there is no evidence establishing that the jewelry was taken during the October 2010 home invasion. The record belies this argument. Accordingly, defendant has not shown that it was plain error for the trial court to order him to pay restitution for the property the Schillings indicated was lost during the October 2010 home invasion.

Defendant contends that serving a term of 9 to 75 years' imprisonment for second-degree home invasion is a cruel and unusual punishment. "The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963 art1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const, Am VIII." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011) (emphasis in original). Because of this, a punishment valid under the state constitution will also be valid under the federal constitution. *Id*. A three-pronged test is used in Michigan to determine whether a punishment is cruel or unusual. The prongs of this test are: "(1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty to penalties imposed for the same offense in other states." *Id*. However, it is presumed that a sentence within the guidelines is proportionate and is not cruel or unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Defendant's minimum does fall within the guidelines. To overcome this presumption, a defendant must show that there are "unusual circumstances that would render his presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Defendant has failed to make such a showing.

Finally, defendant asserts that the effect of cumulative errors in this case denied him the right to a fair trial. *People v Knapp*, 244 Mich App 361, 624 NW2d 227 (2001). However, because defendant has not shown that any of the allegations has any merit, his cumulative error argument is without merit.

Affirmed.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens