STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2009
v	No. 281940 St. Clair Circuit Court
AJENE MARK JORDAN, Defendant-Appellant.	LC No. 07-000192-FC

Before: Jansen, P.J., and Borrello and Stephens, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of armed robbery, MCL 750.529, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, receiving and concealing a stolen firearm, MCL 750.535b, third-degree fleeing and eluding a police officer, MCL 257.602a(3), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to prison terms of 25 to 40 years for the armed robbery conviction and 10 to 20 years for the felon-in-possession, receiving-and-concealing, and fleeing-and-eluding convictions. He was also sentenced to a consecutive term of two years in prison for the felony-firearm conviction. We affirm.

I

Defendant first argues that there was insufficient evidence presented at trial to support his convictions other than for fleeing and eluding. He specifically asserts that the circumstantial evidence presented at trial was insufficient to adequately identify him as the robber or to prove that he ever had possession of the firearm in evidence. We disagree. We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). The prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). However, the prosecution is not required disprove all theories of innocence. *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991).

In the instant case, the witnesses who saw the robber at the gas station described him as a stocky to heavyset man wearing dark clothing and a ski mask. When defendant was apprehended he was described as a heavyset male wearing dark clothing; a ski mask was found

in the vehicle he was driving. The robber was observed getting into a dark green vehicle. Defendant borrowed a dark green Oldsmobile Aurora from a friend on the night of the robbery. Two men followed the robber from the gas station, only abandoning the chase when police cars began pursuing the vehicle. Defendant failed to stop when the police activated their sirens and lights. Defendant then ran after he crashed his car and eventually surrendered to police only when ordered to do so at gunpoint. Loose cash was found on the ground where defendant was apprehended. The total amount of cash was within a few dollars of the amount of money taken from the gas station. The clothing recovered from defendant at the hospital appeared to be the same as that worn by the robber on the gas station's surveillance video. We conclude that the evidence was sufficient to establish that it was defendant who robbed the gas station.

There was also sufficient evidence to support the jury's finding that defendant possessed a gun during the robbery. The gun was found along the route of the car chase, less than 36 hours after the robbery. Moreover, the registered owner of the weapon had reported it missing following defendant's visit to her home. During that visit, defendant had access to the closet where the gun was stored. Lastly, the gas station clerk testified that the weapon found was consistent with the weapon used by the robber during the robbery. Taken as a whole, and viewed in a light most favorable to the prosecution, the evidence was more than sufficient to allow the jury to find beyond a reasonable doubt that defendant possessed the firearm during the robbery and only later disposed of it during the police chase. We accordingly conclude that there was sufficient evidence to support defendant's firearm-related convictions in this case.

Defendant takes particular issue with the prosecution's use of circumstantial evidence. But as we have noted on many occasions, "[c]ircumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001); see also *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Indeed, "'circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence.'" *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748, amended 441 Mich 1201 (1992) (citation omitted). We will not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *Id*. at 514-515. It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). We perceive no error in the prosecution's use of circumstantial evidence in this case.

II

Defendant also argues that his convictions were against the great weight of the evidence. Defendant relies on the same reasoning employed for his argument that there was insufficient evidence to sustain his convictions. For the reasons set forth above, these arguments are without merit. See *People v Unger*, 278 Mich App 210, 232-233; 749 NW2d 272 (2008).

III

Defendant next argues that certain evidentiary rulings, one preserved and one forfeited, violated his due process rights and denied him a fair trial. We disagree. A preserved challenge to a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Unpreserved evidentiary issues are

reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant first asserts that the trial court erred by allowing a police officer to testify that the clothing worn by the robber and defendant's clothing recovered from the hospital appeared to be the same. In general, police officers may provide lay opinions under MRE 701 if they are not dependent on scientific, technical, or specialized knowledge. *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988). "MRE 701 provides that opinion testimony by a lay witness is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or a fact in issue." *People v Smith*, 152 Mich App 756, 764; 394 NW2d 94 (1986). The officer's opinion that the clothes recovered from the hospital were consistent with those worn by the robber as seen on the surveillance tape was rationally based on his perception and was helpful to the determination of a fact at issue. Accordingly, it was properly admitted as lay witness testimony, and defendant has failed to establish plain error. MRE 701. In any event, the jury did request the surveillance video and the clothing during deliberations. Because it appears that the jury conducted its own comparison, we conclude that any error in the police officer's testimony would have been harmless.

Defendant also asserts the trial court erred by excluding a statement that he made to the doctor who treated his gunshot wound following the arrest. MRE 803(4) excludes from the hearsay rule "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis or treatment." Defense counsel represented to the court that defendant had told the doctor treating his gunshot wound that he had been shot while struggling with another individual for a gun. The trial court concluded that the statement was not relevant for medical treatment and thus not subject to the hearsay exception. We agree with the trial court's reasoning in this regard. Defendant's statement concerning the manner in which the gunshot wound was inflicted did not fall within the category of statements excluded from the hearsay rule by MRE 803(4) because it was not "reasonably necessary to [defendant's] diagnosis and treatment." MRE 803(4). Thus, the court properly excluded the hearsay testimony.

With respect to the statement to the treating physician, defendant argues on appeal that it would violate the constitutional equal protection guarantee "for the prosecutor to be able to get in exactly the same type of evidence which the defendant in prohibited to get in based on the same rule of evidence." Citing *People v Meeboer* (*After Remand*), 439 Mich 310, 315; 484 NW2 621 (1992), defendant contends that because prosecutors are frequently able to introduce the statements of child sexual abuse victims under MRE 803(4), he should have been permitted to introduce the treating doctor's testimony concerning his gunshot wound in this case. We cannot agree. The equal protection clause "demands only that the government not impose differences in treatment on persons similarly situated except on the basis of some reasonable differentiation fairly related to the object of the law." *People v Darwall*, 82 Mich App 652, 661; 267 NW2d 472 (1978). Defendant has simply not shown that the statement made to the doctor was

necessary for the diagnosis or treatment of his wound. Therefore, he was not similarly situated to the declarants in *Meeboer, supra*.[1]

IV

Defendant next argues that he is entitled to a new trial because of prosecutorial misconduct. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Questions of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Thomas, supra* at 454.

Defendant first asserts that it was misconduct for the prosecutor to elicit testimony that he was given *Miranda* warnings,[2] but not to ask about his response to the *Miranda* warnings. Defendant argues that because the prosecutor did not ask about his response to the *Miranda* warnings, an implication was left in the minds of the jurors that he said nothing in his defense and did not attempt to offer an exculpatory explanation to the police. Defendant is grasping at straws. The prosecutor did not impermissibly introduce evidence of defendant's post-*Miranda* silence. See *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Moreover, defense counsel elicited information that defendant had disavowed any involvement in the robbery. Therefore, defendant is unable to demonstrate that his substantial rights were affected.

Defendant also contends that the prosecutor improperly elicited a comment from a police officer that a woman wanted her Cadillac back. Defendant contends that this evidence improperly suggested the commission of a prior bad act—i.e., that the Cadillac was stolen or improperly kept by defendant—and therefore should have been excluded. But defendant's presentation of this argument does not include the context in which the testimony was elicited. The officer testified that the owner of the Oldsmobile Aurora that defendant had used on the night of the robbery wanted that car back from police impound, and had therefore driven the Cadillac to the police department to swap it for the Aurora. Thereafter, the Cadillac's owner simply indicated a desire to have the Cadillac returned. In context, it is clear that the Cadillac's owner was not indicating that defendant had improperly taken or possessed the Cadillac, but was merely stating that she wanted the vehicle returned to her from police possession. Viewed in context, we cannot conclude that the officer's testimony in this regard raised any improper

[1] Defendant also cursorily suggests that the trial court's exclusion of the treating doctor's testimony was violative of due process. However, this argument has not been properly presented for appellate review. In addition to the fact that this argument was not raised in defendant's statement of the questions presented, MCR 7.212(C)(5); *Unger, supra* at 262, defendant has cited no authority for his contention, merely suggesting that "[d]ue process would also prohibit such a ruling as being unfair." "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

implications before the jury. We perceive no outcome-determinative plain error with respect to this testimony.

Finally, defendant contends that the prosecutor's explanation of reasonable doubt was a misstatement of the law and constituted prosecutorial misconduct. A prosecutor's uncorrected misstatement of the law may deprive a defendant of his right to a fair trial. *People v Abraham*, 256 Mich App 265, 275; 662 NW2d 836 (2003). However, a prosecutor's remarks must be examined in context. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). During jury voir dire, the prosecutor asked a potential juror if he would be able to return a guilty verdict if he believed that the prosecutor had met the burden of proof on all of the elements but still had some minor questions that he would like answered. The prosecutor went on to ask if the juror understood that "beyond reasonable doubt" does not necessarily mean beyond all doubt. When viewed in the context of the entire exchange, the prosecutor's remarks did not misstate the law regarding reasonable doubt. Moreover, the trial court properly instructed the jury regarding the definition of reasonable doubt, and informed the jurors that they were required to take the law as given by the court even if one of the attorneys had said something different. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham*, *supra* at 279.

V

Defendant argues that offense variables (OVs) 1, 8, and 19 were improperly scored and that he is therefore entitled to resentencing. We disagree. We review a sentencing court's decision to determine whether the record evidence adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). A sentencing factor need only be proven by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Questions of statutory interpretation are reviewed de novo. *People v Schaub*, 254 Mich App 110, 114-115; 656 NW2d 824 (2002).

Defendant specifically challenges the assessment of 15 points under OV 1 (aggravated use of weapon), 15 points under OV 8 (asportation of a victim), and 10 points under OV 19 (interference with the administration of justice). As an initial matter, we reject defendant's assertion that his sentence is constitutionally barred by the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and its progeny. Our Supreme Court has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing framework. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007).

Under OV 1, 15 points may be scored if a firearm was pointed at or toward a victim. MCL 777.31(1)(c). At trial, the gas station clerk testified that a gun was pointed in his face during the robbery. This evidence was sufficient to justify the scoring of 15 points for OV 1. Under OV 8, 15 points may be scored if the victim was asported to a place of greater danger. MCL 777.38(1)(a). This Court has previously held that moving a victim away from the observation of others supports a finding that the victim was moved to a place of greater danger. *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003). The gas station clerk testified that the robber ordered him at gunpoint to move into a windowless storage closet. This would have effectively removed him from observation of others. Therefore, the trial court's

decision to score 15 points for OV 8 was adequately supported by the evidence. Under OV 19, 10 points be assessed when an offender interferes or attempts to interfere with the administration of justice. MCL 777.49(c). Running from police in order to escape apprehension has been held to constitute interference with the administration of justice and is a proper basis for scoring 10 points under OV 19. *People v Cook*, 254 Mich App 635, 640-641; 658 NW2d 184 (2003); see also *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Here, defendant fled both in a vehicle and then on foot after the vehicle crashed. This was sufficient evidence to permit a score of 10 points for OV 19.

Defendant's argument that MCL 777.49(c) is unconstitutionally vague is unpersuasive. "[A] presumption exists that a statute is constitutionally sound, and this Court will construe it as such unless its unconstitutionality is 'clearly apparent.'" *People v Newton*, 257 Mich App 61, 65; 665 NW2d 504 (2003), quoting *People v Hubbard* (*After Remand*), 217 Mich App 459, 483-484; 552 NW2d 493 (1996).

MCL 777.49(c) provides that 10 points may be scored if the offender interfered with or otherwise attempted to interfere with the administration of justice. The critical terms of the statute—"interfere," "administration," and "justice"—are neither uncommon, nor are they used in an unusual manner. The commonly accepted meaning of these terms can be easily ascertained from a dictionary. Indeed, the phrase "administration of justice" is itself defined in Black's Law Dictionary (8th ed) as "[t]he maintenance of right within a political community by means of the physical force of the state; the state's application of the sanction of force to the rule of right." While the statute does not set forth a list of the types of behavior that can constitute interference, this does not mean that it vests a trial court with unbridled discretion in scoring OV 19. It is true that a statute "'must provide standards for enforce[ment] and administ[ration] . . . in order to ensure that enforcement is not arbitrary or discriminatory; basic policy decisions should not be delegated to . . . judges . . . for resolution on an ad hoc and subjective basis.'" *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 468; 639 NW2d 332 (2001) (citation omitted). But defendant's anecdotal evidence that some of Michigan's prosecutors have been urging an overly broad interpretation of MCL 777.49(c) does not establish that the actual scoring of OV 19 *in this case* was impermissible or otherwise improper. "When a defendant's vagueness challenge does not implicate First Amendment freedoms, the constitutionality of the statute in question must be examined in light of the particular facts at hand without concern for the hypothetical rights of others." *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). Here, defendant's conduct constituted interference with the state's administration of justice. *Cook*, *supra* at 641; see also *Vronko*, *supra* at 652 (observing that "[t]he proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case"). The trial court relied on accurate information and there was no error in the scoring of the guidelines. See *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

VI

Finally, we reject defendant's assertion that he was denied the effective assistance of trial counsel. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant

proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defense counsel has no obligation to raise a meritless objection or make a futile argument. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant contends that trial counsel should have objected to police testimony regarding the recovery of the firearm because it included hearsay statements of the individual who reported finding the gun. However, defendant cannot show that the outcome of the proceedings would have been different in the absence of this testimony. The police officer still could have properly testified, without including the hearsay statements, that he was dispatched to the area where the gun was found and that he recovered the weapon. Therefore, we reject defendant's suggestion that the testimony was "completely fundamentally unfair." Moreover, even assuming arguendo that defendant is correct that the police testimony in this regard was admitted in violation of his Confrontation Clause rights, we conclude that the error was harmless beyond a reasonable doubt. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). We perceive no ineffective assistance of counsel on this issue.

Defendant also argues that trial counsel should have moved to suppress multiple pieces of evidence including the handgun, photographs of the handgun, and either ammunition or spent casings. Defendant has not adequately briefed this issue and has provided no citation to authority to support this position. A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Kelly*, *supra* at 640-641.

Defendant next asserts that trial counsel was ineffective for failing to object to the police officer's testimony comparing defendant's clothing with that seen on the gas station surveillance video. However, as noted earlier, the police officer's observations were properly admitted as lay testimony. MRE 701; *Oliver*, *supra* at 49-50. Furthermore, the jury requested the surveillance video and apparently conducted its own comparison. Thus, any error in the police officer's testimony would have been harmless. Counsel was not ineffective for failing to make a futile objection. *Kulpinski*, *supra* at 27.

Defendant also contends that he was denied the effective assistance of counsel when counsel failed to stipulate to his prior felony convictions. It is true that if a defendant is willing to stipulate that he may not legally possess a firearm, the trial court is required to accept the stipulation. *People v Swint*, 225 Mich App 353, 377; 572 NW2d 666 (1997). However, if counsel had stipulated that defendant was a felon without any further information, the jury may have speculated as to the nature of the prior conviction, and perhaps believed it was for a violent crime. Here, the prosecution entered into evidence a certified judgment of conviction demonstrating that defendant had been previously convicted of delivery of marijuana. Defense counsel likely considered defendant's previous conviction to be for a non-violent crime and therefore strategically decided not to stipulate to an unidentified prior felony conviction. See *Carbin*, *supra* at 600. Further, given the substantial evidence of defendant's guilt introduced to the jury, there is no reasonable probability that an offer by counsel to enter into a stipulation would have changed the outcome of the trial. *Rodgers*, *supra* at 714.

Lastly, defendant contends that trial counsel was ineffective for failing to put him on the stand to present his side of the story. At the close of the prosecutor's proofs, however, defense

counsel informed the trial court that, after discussing the matter with counsel, defendant had elected not to testify in his own defense. Defendant himself confirmed that he understood his rights in the matter, that he had chosen not to testify, and that the decision was his own. When a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, then the right to testify is waived. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985).

In sum, we find no ineffective assistance of counsel in this case. Accordingly, we reject defendant's argument that the trial court erred by denying his motion for an evidentiary hearing to explore whether he was denied the effective assistance of counsel. See *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995) (observing that remand is unnecessary if a defendant has failed to show a factual dispute or an area in which further elucidation of facts might advance his position).

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens