STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2011
v	No. 292041 Kent Circuit Court
MICHAEL LAVAIL WALKER, Defendant-Appellant.	LC No. 08-003025-FC

Before: MARKEY, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him, as a fourth habitual offender, MCL 769.12, to 28 to 50 years' imprisonment for the armed robbery, assault, and felon in possession convictions, all to be served concurrently, but consecutive a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

Defendant's convictions arise from the robbery of Tillie's Market in Grand Rapids on February 18, 2008. The store clerk identified defendant as the robber. The clerk testified that he followed defendant outside the store and chased him as defendant fled on foot, and that during the chase defendant fired a gun at him. In addition to the clerk's testimony, defendant was connected to the robbery by eyewitness testimony and other evidence tracking his route from Tillie's to the nearby house where he was living. Specifically, police, with canine assistance, followed footprints in snow leading from Tilly's toward defendant's home, and along the way, discovered assorted monies and a pack of cigarettes which was the same brand and bore the same tax code as those taken in the robbery. A search of defendant's residence uncovered clothing similar to that of the robber, more of the same incriminating cigarette packages and monies, and an operable handgun with four live rounds and one spent casing. Also, after defendant was arrested, he made several incriminating statements in a recorded telephone call to his mother from the jail in which he stated that he had "f***ed up big time," "I'm cooked," that he "didn't know they had all that other sh*t" and "he should have shot it out with them." The prosecutor

also presented evidence of defendant's involvement in two other robberies at a nearby North End Liquor store, both of which were committed less than a month before the charged offense.

I. SPEEDY TRIAL

We first address defendant's claim that his constitutional right to a speedy trial was violated. The determination whether a defendant was denied a speedy trial is a mixed question of fact and law. *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). We review the trial court's factual findings for clear error and review constitutional questions de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute and court rule. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MCR 6.004(A); *Williams*, 475 Mich at 261. The delay period commences at the arrest of the defendant. *Id.* "In contrast to the 180-day rule, a defendant's right to a speedy trial is not violated after a fixed number of days."[1] *Id.* In determining whether a defendant has been denied a speedy trial, a court must weigh the following relevant factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Id*. at 261-262.

> In assessing the reasons for delay, this Court must examine whether each period of delay is attributable to the defendant or the prosecution. "Unexplained delays are charged against the prosecution. Scheduling delays and docket congestion are also charged against the prosecution." However, "although delays inherent in the court system, e.g., docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." [*Waclawski*, 286 Mich App at 666 (citations omitted).]

Delays sought by defense counsel, whether counsel is retained or assigned, are ordinarily attributable to the defendant. *Vermont v Brillon*, ___ US ___; 129 S Ct 1283, 1290-1291; 173 L Ed 2d 231 (2009).

In this case, the delay between defendant's arrest and trial was approximately ten months. The reasons for the delay varied. Defendant was responsible for at least 49 days of the 291-day period because of requests from his attorneys for more time to prepare for trial. Of the 242 days attributable to the prosecution, approximately 160 days were due to the trial court's schedule, which is given very little weight. Although defendant asserted his right to a speedy trial, he did not do so until October 31, just after he retained new counsel. Trial began approximately six weeks later. Regarding prejudice, because the delay was less than 18 months, the burden was on defendant to prove prejudice. *Williams*, 475 Mich at 262. A defendant can experience two types

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[1] Defendant raised a separate claim below based on the statutory 180-day rule, MCL 768.1. The trial court rejected that claim and defendant does not challenge that decision on appeal.

of prejudice while awaiting trial, prejudice to his person and prejudice to the defense. *Id*. at 264. The first type results when pretrial incarceration deprives an accused of civil liberties. The second type, which is more crucial, occurs when the delay affects a defendant's ability to adequately prepare for trial and defend his case. *Id*.

Defendant asserts that he suffered anxiety, depression, stress, and mental anguish, which resulted in prejudice to his person. He also asserts prejudice to his defense, claiming generally that the delay affected witnesses' memories and resulted in a loss of witnesses. The only allegedly lost witness that defendant identifies is his brother, but defendant does not explain why his brother was unable to testify because of the delay. General allegations of prejudice such as the unspecified loss of evidence or memories as a result of the delay is insufficient to establish that a defendant was denied his right to a speedy trial. *People v Walker*, 276 Mich App 528, 544-545; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008); *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Defendant's unsupported assertions of prejudice fail to establish that his ability to prepare or defend was prejudiced by the delay. Considering the relevant factors as a whole, the trial court did not err in finding that defendant's constitutional right to a speedy trial was not violated. Therefore, the trial court did not err in denying defendant's motion to dismiss.

II. JURY SELECTION

A. JURY ARRAY

Defendant argues for the first time on appeal that his jury array was not proportionally representative of the African-American population in Kent County because of systematic exclusion in the jury allocation process. We conclude that defendant waived review of this issue by expressing his satisfaction with the jury without having challenged the jury array in the trial court.

"A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003) (citations omitted). But a challenge to the composition of a jury array must be made before the jury has been impaneled and sworn. *Id*. "An expression of satisfaction with a jury made at the close of voir dire examination waives a party's ability to challenge the composition of the jury thereafter impaneled and sworn." *People v Hubbard (After Remand)*, 217 Mich App 459, 466; 552 NW2d 493 (1996). In this case, defense counsel never challenged the jury array at trial and, at the end of the voir dire examination, expressed his satisfaction with the jury that was seated. Accordingly, defense counsel knowingly abandoned any challenge to the jury array. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (waiver is the intentional relinquishment of a known right).

We disagree with defendant's claim that defense counsel could not waive this issue because it involves a significant right. While there are certain fundamental rights that trial counsel cannot waive without a defendant's formal consent, matters that pertain to the conduct of the trial and trial strategy are within trial counsel's authority to waive. *Id*. at 217-218. Decisions regarding the selection of jurors involve matters of trial strategy. *People v Johnson*, 245 Mich

App 243, 259; 631 NW2d 1 (2001); *Hubbard*, 217 Mich App at 467. Accordingly, defendant is bound by defense counsel's waiver, which was within his authority to effectuate.

B. *BATSON*[2] CHALLENGE

Defendant additionally argues that his Fourteenth Amendment equal protection rights were violated because the prosecutor purposefully used her peremptory challenges to ensure that African-Americans did not sit on his jury. The record indicates that defendant made one *Batson* challenge at trial with regard to the prosecutor's use of a single peremptory challenge. The trial court found that defendant established a prima facie case of discrimination, but that the prosecutor provided race-neutral reasons for dismissing the juror that were not a pretext for discrimination. See *People v Bell*, 473 Mich 275; 702 NW2d 128 (2005) (explaining the three-step process for analyzing a *Batson* challenge). Defendant does not address the trial court's decision or explain how the trial court erred in its *Batson* analysis, but rather merely relies on the ultimate composition of the jury to argue that a violation occurred. A defendant may not merely assert a claim of error and then leave it to the appellate court to search for factual or legal support for the claim. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Accordingly, this issue could be considered abandoned. Nevertheless, having reviewed the challenged juror's responses to the voir dire questioning and the trial court's comments concerning the juror, we find no clear err in the trial court's determination that the prosecutor's race-neutral reasons for exercising a peremptory challenge were not a pretext for discrimination.

III. OTHER ACTS EVIDENCE

We next address defendant's argument that the trial court erred in allowing the prosecutor to present evidence of the two North End robberies pursuant to MRE 404(b)(1). We review the trial court's decision for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 84-85; 732 NW2d 546 (2007). A trial court abuses its discretion when it chooses an outcome that is outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

The prosecutor sought to admit evidence of robberies at the North End Liquor store on January 27 and February 5, 2008, to show that defendant was the person who robbed Tillie's on February 18, 2008. "Use of other acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of a conviction based on a defendant's history of misconduct." *Id*. For evidence to be admissible under MRE 404(b), it (1) must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). MRE 404(b)(1) expressly allows other acts evidence to be introduced for the purpose of proving identity. In this case, identity was the principal issue at trial.

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[2] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

In his discussion of relevancy, defendant focuses solely on identity proven through modus operandi, as delineated in the four-part test in *People v Golochowicz*, 413 Mich 298, 307-309; 319 NW2d 518 (1982). "The *Golochowicz* test requires that "(1) there is substantial evidence that the defendant committed the similar act, (2) there is some special quality of the act that tends to prove the defendant's identity, (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice." *Waclawski*, 286 Mich App at 673 (citations and quotations omitted). We agree that the commonality of circumstances between the North End robberies and the charged offense are insufficient to satisfy the second prong of this test. The most that can be said in regard to the evidence is that the perpetrator wore similar, unremarkable clothing, committed the robberies within a relatively short period of time, and demanded cash while pointing a similar looking gun at the clerk. These commonalities are not "so unusual and distinctive as to be like a signature." *Golochowicz*, 413 Mich at 311.

However, the trial court did not abuse its discretion in admitting the evidence for the purpose of proving identity alone, and the admissibility of the evidence for that purpose is not dependent upon the *Golochowicz* test. As our Supreme Court explained in *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998):

> Pursuant to MRE 401, evidence is relevant if two components are present, materiality and probative value. Materiality is the requirement that the proffered evidence be related to "any fact that is of consequence" to the action. "In other words, is the fact to be proven truly in issue?" A fact that is "of consequence" to the action is a material fact. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial."
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> It is well established in Michigan that all elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. Because the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements, the elements of the offense are always "in issue" and, thus, material. [Citations omitted.]

Here, defendant's identity as the person who committed the charged offenses was the principal issue in the case. Thus, the evidence was offered for a material purpose. In regard to the probative value of the evidence, the Court in *Crawford* stated:

> The probative force inquiry asks whether the proffered evidence tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The threshold is minimal: "any" tendency is sufficient probative force. In the context of prior acts evidence, however, MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be

excluded, notwithstanding its logical relevance to character. [*Id*. at 389-390 (citations omitted; emphasis in original).]

The North End store clerk, Cary Waters, testified that the February robbery was committed by a person who wore a tan coat, grey sweatshirt, black hat, and blue bandana similar to what was found at 10 Travis Street, where defendant was apprehended the night of the charged robbery. Further, Waters and the clerk at Tillie's, Michael Siwek, both testified that the perpetrator used a gun that looked like the gun recovered from 10 Travis. Defendant admitted that the clothing and gun recovered from that location belonged to him. The surveillance tapes from the February North End robbery and the robbery of the Tillie's store also show that the perpetrator's stature, race, gun, and clothing were similar. Further, ballistics testing connected a bullet cartridge that was recovered from the February North End robbery to the gun that was recovered from 10 Travis, which defendant admitted was his.[3]

There was no witness testimony regarding the January North End robbery. Rather, the prosecution relied on the surveillance videotape of the incident, which shows that the perpetrator of both North End robberies wore similar if not identical clothing, and Waters's testimony supported an inference that that clothing was the same as that recovered from 10 Travis. Therefore, the evidence of the North End robberies made it more probable that defendant committed the instant robbery.

Relying on MRE 609, defendant contends that the other acts evidence was unfairly prejudicial because it involved the same type of crime, a robbery, that was charged in this case. Defendant's reliance on MRE 609 is misplaced, however, because the evidence was offered as substantive evidence of defendant's identity, not as impeachment evidence. For evidence to be unfairly prejudicial under MRE 403, there must be a tendency that the evidence would be given undue or preemptive weight by the jury, or it must be inequitable to allow use of the evidence. *Blackston*, 481 Mich at 462. In this case, identity was the principal issue at trial. The North End robberies connected the perpetrator to defendant's clothing and gun found in the basement of 10 Travis, which was probative of defendant's identity, particularly given the slight differences in clothing worn by the perpetrator of the Tillie's robbery and the Tillie's clerk's limited basis for his identification. Given all the circumstances, we find no reason to disturb the trial court's finding that the probative value of the North End robberies was not substantially outweighed by the danger of unfair prejudice. *Waclawski*, 286 Mich App at 670.

Accordingly, we conclude that the trial court did not abuse its discretion in allowing the other acts evidence.

IV. SUFFICIENCY OF THE EVIDENCE

[3] Contrary to what defendant asserts, the forensic examiner was "absolutely certain" that the cartridge found at North End was fired from defendant's gun, which was operable.

Defendant argues that there was insufficient evidence to support his convictions of armed robbery and assault with intent to do great bodily harm. We disagree.

We review a challenge to the sufficiency of the evidence de novo by viewing 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 a reasonable doubt. *People v Harrison*, 283 Mich App 374, 377-378; 768 NW2d 98 (2009). It is for the trier of fact rather than this Court to determine questions of credibility and the weight to be accorded the evidence. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *Id*. All conflicts in the evidence must be resolved in favor of the prosecution. *Id*.; see also *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

To establish armed robbery, the prosecution must prove that

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

The elements of assault with intent to do great bodily harm, which is a specific intent crime, are: (1) an attempt or threat with force or violence to do corporal harm to another, and (2) an intent to do great bodily harm less than murder. MCL 750.84; *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005).

We disagree with defendant's argument that there was insufficient evidence to establish his identity as the person who robbed Tillie's and fired a gunshot at the store clerk. The store clerk identified defendant, a person he recognized as a prior customer, as the person who robbed the store. The clerk testified that he followed the perpetrator outside the store as the perpetrator fled on foot, heading east on Travis, and that the perpetrator fired a gun at him during the chase. Shortly after hearing gunfire, two witnesses saw a man travel east on Travis and enter the house at 10 Travis. One of the witnesses, Timothy Ketchpaw, also identified that man as defendant. Clothing similar to that worn by the robbery perpetrator was found in the basement of 10 Travis. This evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant was the person who robbed Tillie's and assaulted the store clerk.

There is no merit to defendant's argument that his armed robbery conviction cannot stand because there was insufficient evidence that a real gun was used during the robbery. It was not necessary to establish that a real gun was used because a conviction of armed robbery only requires evidence that the robber was armed with "an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon." MCL 750.529. Nonetheless, Siwek testified that defendant was armed with a gun that was similar to

the gun recovered from 10 Travis, and a police examiner determined that that gun was operable. Thus, there was sufficient evidence to prove the "dangerous weapon" element of armed robbery.

Defendant also argues that there was insufficient evidence of intent to support his conviction of assault with intent to do great bodily harm less than murder. We disagree. Because of the difficulty of proving an actor's state of mind on an issue such as intent, minimal circumstantial evidence is sufficient. *Id*. at 622. Intent may be inferred from all the facts and circumstances. *Id.* Siwek testified that after the robber fled and saw him on the street, the robber stopped, turned, and fired his gun. This evidence was sufficient to enable the jury to infer defendant's intent to cause great bodily harm.

V. PROSECUTORIAL MISCONDUCT

Defendant raises several claims of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *Dobek*, 274 Mich App at 63. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Defendant did not preserve most of his claims with an appropriate objection at trial. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007).

A. DEFENDANT'S SILENCE

Defendant argues that the prosecutor impermissibly used defendant's post-arrest, post-*Miranda*[4] silence against him. "As a general rule, if a person remains silent after being arrested and given *Miranda* warnings, that silence may not be used as evidence against that person." *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). Thus, generally, prosecutorial references to a defendant's post-arrest, post-*Miranda* silence violate the defendant's right to remain silent and due process rights. *Id*. at 212-213, citing *Doyle v Ohio*, 426 US 610, 618-620; 96 S Ct 2240; 49 L Ed 2d 91 (1976). The only exception is where it is used for impeachment purposes, such as when a defendant tells an exculpatory story at trial and claims to have told the police the same version upon arrest. *People v Borgne*, 483 Mich 178, 192; 768 NW2d 290 (2009). Thus, when a defendant testifies on his own behalf, he "may be impeached with both prearrest silence and postarrest pre-*Miranda* silence without violating the Fifth Amendment." *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990), amended 437 Mich 1208 (1990).

In this case, the prosecutor's questions on cross-examination in regard to whether defendant ever told anyone in law enforcement his version of events did not violate *Doyle*. Immediately before the questions, the prosecutor had elicited evidence that defendant had sent

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

case materials to a fellow jail inmate asking him to propose several scenarios of what happened, and then defendant would tell him if he got it right. Viewed in context, it appears that the prosecutor's questions immediately before and after defendant's objection were intended to clarify whether defendant told the inmate his exculpatory story. The questions did not suggest that the jury infer guilt from defendant's post-arrest, post-*Miranda* silence. Thus, no *Doyle* violation occurred. Also, the questions were isolated and a cautionary instruction was immediately given. See *Shafier*, 483 Mich at 214-215 (no *Doyle* violation where an immediate objection concerning post-arrest, post-*Miranda* silence was made and a curative instruction was given); *People v Dennis*, 464 Mich 567, 576-580; 628 NW2d 502 (2001) (brief and oblique reference to the defendant's post-arrest, post-*Miranda* silence did not violate *Doyle* where there was no attempt to "use" the defendant's silence against him).

Further, the prosecutor's second question referred to the time at which defendant was removed from the house. This period, though brief, was pre-*Miranda*, so use of defendant's silence at that time was not impermissible. A defendant may be impeached by his prior failure to state a fact in circumstances in which that fact naturally would have been asserted. *People v Alexander*, 188 Mich App 96, 103; 469 NW2d 10 (1991) (applies to pre-arrest and/or pre-*Miranda* silence). It would have been natural for an innocent person to denounce the charges for which he was arrested.

Lastly, to the extent that the prosecutor's remark during closing argument could be considered a *Doyle* violation,[5] it was harmless beyond a reasonable doubt. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008). The remark was brief and the trial court gave an immediate cautionary instruction. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham*, 256 Mich App at 279. In addition, given the overwhelming evidence against defendant independent of this remark, there is no reasonable possibility that it contributed to the jury's decision to convict. *People v Hyde*, 285 Mich App 428; 775 NW2d 833 (2009).

B. DEFENDANT'S UNPRESERVED CLAIMS OF MISCONDUCT

Defendant raises four additional unpreserved claims of prosecutorial misconduct. The first relates to a telephone call that he made from jail on the night he was arrested. Defendant contends that the prosecutor failed to establish a proper foundation for admitting the recording of the call, because he failed to demonstrate that it had not been modified. We conclude that review of this claim is waived because defense counsel expressly consented to the exhibit's admission. *Carter*, 462 Mich at 215.

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[5] The prosecutor stated:

> Think about what Mr. Walker said in the car to Officer Hintz, 'I've got nothing to say to you.' Are the actions of Mr. Walker the actions of someone with a clear conscience, are they actions of someone who is being wrongly accused?

Second, defendant contends that the prosecutor suborned perjury when he questioned Siwek about the tax codes for the store's Newport cigarettes. A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Here, Siwek testified that the store only had two cartons of Newport cigarettes, each with a different and unique tax code. In response to the prosecutor's question, however, Siwek admitted that he was repeating what a cigarette representative told him. Later, the prosecutor stipulated that 3,000 cartons of Newport cigarettes had the same tax code. Because the record shows that the prosecutor did not support or rely on Siwek's testimony regarding unique tax codes, this allegation of error lacks merit.

Third, defendant asserts that it was improper for the prosecutor to call Ketchpaw as a witness because he had no notice that Ketchpaw witnessed a crime. Ketchpaw was listed as a witness on defendant's felony information. This notification satisfied the prosecutor's duty of notifying defendant of known witnesses. MCL 767.40a; *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005). The prosecutor was not required to provide defendant with the details of Ketchpaw's proposed trial testimony. Accordingly, there was no plain error.

Fourth, defendant asserts that the prosecutor committed misconduct when he held private sidebar conferences with the trial court. Defendant concedes that he does not know the content of these exchanges. Therefore, he cannot establish any clear or obvious error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Additionally, defendant has not demonstrated that a remand for an evidentiary hearing on this issue is warranted. See MCR 7.211(C)(1).

VI. SENTENCING

Defendant also challenges his sentences of 28 to 50 years, arguing that the trial court erred in scoring 25 points for offense variable (OV) 13 of the sentencing guidelines. Because defendant did not object to the scoring of OV 13 at sentencing or in a post-sentencing motion, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Kimble*, 470 Mich at 312.

At the time the offense was committed, MCL 777.43(l)(b) provided that 25 points are to be scored for OV 13 when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."[6] MCL 777.43(2)(a) provided that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." In this case, the evidence of the two North End robberies, together with the sentencing offense, were sufficient to establish a pattern of felonious criminal activity involving three or more crimes against a person, thereby supporting the trial court's 25-point score. We disagree with defendant's argument that no points should have been scored for OV 13 because the evidence did not prove that he committed the North End robberies. The evidence of the similar clothing and similar weapon used by the perpetrator of the North End robberies, which resembled the clothing and gun found in the basement at 10 Travis where

[6] The statute was amended by 2008 PA 562, effective April 1, 2009.

defendant was living, the stores' proximity to 10 Travis, and the ballistics evidence linking defendant's gun to one of the North End robberies made it more probable than not that defendant committed the North End robberies. Accordingly, there was no plain err in scoring 25 points for OV 13.

Defendant also appears to challenge the scoring of OV 13 on the basis that it violated the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296, 305; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. However, our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Lastly, defendant asserts that his sentences of 28 to 50 years are disproportionately high. But because defendant's sentences are within the sentencing guidelines range of 135 to 450 months and defendant has not established a scoring error or shown that the trial court relied on inaccurate information in determining his sentences, this Court is required to affirm his sentences. MCL 769.34(10).

VII. CUMULATIVE ERROR

Defendant argues that the cumulative effect of several errors in this case denied him a fair trial. Because we have determined that there are no errors to cumulate, defendant is not entitled to any relief on the basis of cumulative error. *Dobek*, 274 Mich App at 106.

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Pat M. Donofrio