

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 16, 2014

v

DONOVAN DWAYNE WESSON,

Defendant-Appellant.

No. 318746
Lenawee Circuit Court
LC No. 13-016268-FH

Before: JANSEN, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of second-degree home invasion, MCL 750.110a(3), and larceny in a building, MCL 750.360. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 180 to 360 months for the home-invasion conviction and 46 to 72 months for the larceny conviction. We affirm.

This case arises out defendant's conviction of kicking in the victim's door, gaining entrance to his home, and stealing a television. The evidence submitted against defendant consisted of (1) police testimony about distinct footprints in the snow leading from the victim's home to a house on East Church Street where the mother of defendant's child lived and back to the victim's home; (2) the fact that defendant occasionally stayed at the house on East Church Street and was there on the day in question; (3) a pair of wet men's shoes found at the house on East Church Street that matched the footprints in the snow and were defendant's size; (4) police officers finding defendant outside the house on East Church Street moving the stolen television; and (5) the testimony of defendant's brother that defendant told him while they were both in the county jail that he had taken the television.

Defendant first argues that the prosecution committed misconduct and introduced improper character evidence in violation of the MRE 403 and MRE 404(b)(1) when it elicited statements from Officer Lindsay that, in his capacity as a law enforcement officer, he had previously encountered defendant. Defendant asserts that the prosecution did this intentionally and that the statements made were prejudicial such that a curative instruction given to the jury could not have cured the prejudice and, therefore, due process requires a new trial. Although defense counsel timely objected to the admission of the evidence, there was no objection on the ground of prosecutorial misconduct.

“Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Because defendant did not object, we review the issue of prosecutorial misconduct for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). When an issue is reviewed for plain error reversal is warranted only when the error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). The court’s decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant argues that the prosecution offered this evidence for the improper purpose of showing his propensity to be involved in crime. However, a review of the record shows that the only evidence presented was that the officer had previously encountered defendant in an official capacity. The nature of the interaction was never discussed. Furthermore, the record is clear that the evidence was offered for the proper purpose of demonstrating the identity of defendant. The rules of evidence expressly allow for this use. MRE 404(b)(1). Furthermore, there is nothing to show that this use should have been excluded because, under MRE 403, the probative value of this identity evidence substantially outweighed the danger of unfair prejudice. The evidence was used for a narrow purpose and the nature of the interaction was never discussed, nor was defendant’s criminal history presented. In addition, defense counsel also separately raised defendant’s prior interaction with law enforcement. Therefore, defendant could not have been prejudiced.

Since the evidence was properly admitted, defendant cannot show prosecutorial misconduct. A claim of prosecutorial misconduct cannot be predicated on good-faith efforts to introduce admissible evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). As such, defendant’s claim is without merit.

Defendant next asserts that the prosecution committed misconduct and denied him a fair trial by shifting the burden of proof during its cross-examination of defendant. Defendant claims that the prosecution spent half of its cross-examination asking him to provide explanations for the evidence presented. Because defendant failed to object to this issue of prosecutorial misconduct, the issue is reviewed only for plain error. *Carines*, 460 Mich at 763-764. Defendant also argues that if this Court fails to review this issue or fails to find plain error, it should find that defense counsel was ineffective in violation of the Sixth Amendment by failing to object to this line of questioning.

This allegation of prosecutorial misconduct is also without merit. Contrary to defendant’s assertion, the relevant cross-examination was not an attempt to shift the burden to defendant or undermine the presumption of innocence. Defendant chose to testify after having been warned by counsel on the record of the dangers. When a defendant chooses to be a witness on his own behalf he is subject to the same inquiries on cross-examination as any other witness. *People v Howard*, 73 Mich 10, 13; 40 NW 789 (1888). “A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” MRE 611(c).

Defendant misconstrues the prosecutor's attack on the credibility and veracity of his defense as an attempt to shift the burden of proof and presumption of innocence. "[A]ttacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). While a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory of defense, argument on the inferences created does not shift the burden of proof. See *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Further, the court properly instructed the jury on the burden of proof and presumption of innocence. Jurors are presumed to follow their instructions and any error was cured by the court's instructions. *Unger*, 278 Mich App at 235.

Defendant failed to preserve his secondary argument that trial counsel was ineffective because he failed to move for a new trial or an evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Therefore, this Court's review of this issue is limited to the existing appellate record. *Id.* To establish a claim of ineffective assistance of counsel a defendant must establish that counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). As previously discussed, the prosecutor's cross-examination of defendant was not improper and therefore any objection by defense counsel would have been futile. Trial counsel is not deficient for failing to raise a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant raises additional issues in a supplemental brief filed *in propria persona*. He first argues that the prosecution committed misconduct when it failed to turn over video from the Lenawee County Jail showing that he was not with his brother Woodard at the jail and, therefore, could not have told Woodard that he stole the television. Defendant alleges a *Brady*¹ violation by the prosecution.

A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor when it would raise a reasonable doubt about the defendant's guilt. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). In order to demonstrate a *Brady* violation a defendant must demonstrate (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence nor could the defendant have obtained it with reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.*

Defendant made a general demand for discovery of any audio or video recordings of his arrest or booking. There is nothing on the record to show further attempts to procure the supposed video. Defendant has failed to establish that the evidence even exists or that the

¹ See *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution").

prosecution had this evidence in its possession. Defendant merely states that the evidence exists and that the prosecution possesses it. Further, defendant has not shown that he could not have obtained the video, if it existed, from the county jail himself. Finally, there is nothing to demonstrate that this evidence would have changed the outcome of the proceedings. Defendant was convicted based on substantial evidence. Even without defendant's confession to Woodard, the outcome of the trial would not have changed. Other evidence presented at trial independently established that the wet shoes found at the home of the mother of defendant's child, where defendant occasionally stayed and was present on the day in question, matched a trail of footprints in the snow that led from the mother's home to the victim's home and back. Defendant was caught by police in possession of the stolen television and lied, stating to police that the television belonged to Woodard. Thus, there was sufficient independent evidence to establish defendant's guilt.

Lastly, defendant raises two additional claims of ineffective assistance of counsel in his supplemental brief. First, defendant argues that trial counsel was ineffective for failing to investigate Woodard's statements that defendant told him he committed the crime. "Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *McGhee*, 268 Mich App at 626. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defense counsel is afforded wide latitude on matters of trial strategy. *Unger*, 278 Mich App at 242-243.

Defendant fails to show that trial counsel was deficient on this basis or that he was prejudiced. Defendant has not shown that a video exists that would have been favorable to his case. Additionally, trial counsel did address the issue and raised the veracity of the confession multiple times at trial during cross-examination of Woodard's testimony, during defendant's own testimony, and by presenting Officer Craig's testimony that codefendants would not be allowed to be together at the jail. Even if defendant had shown that counsel's performance was deficient, he failed to show that he suffered any prejudice because of the alleged deficiency. As previously noted, even in the absence of Woodard's testimony regarding defendant's confession, there was still ample evidence showing that defendant committed the offenses. While defendant claims that Woodard stole the television, defendant was found moving the television at the home of the mother of his child.

Defendant also argues that trial counsel was ineffective for failing to present an expert witness in shoe print identification. The presentation of witnesses is presumed to be trial strategy and reasonable. In this case, while no expert was presented, trial counsel attacked the evidence and the weight of the evidence on a variety of occasions throughout the trial by his cross-examination of police witnesses. Defendant fails to show that the failure to produce an expert was unreasonable under the circumstances. Defendant also fails to show that an expert would have aided in and refuted the claims against him. Finally, as previously explained there was substantial evidence of defendant's guilt in this case and defendant could not have suffered any prejudice in this regard. We perceive no ineffective assistance of counsel with respect to these matters.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Talbot
/s/ Deborah A. Servitto