STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 27, 2018
v	No. 336412 Oakland Circuit Court
JALEN ZAMAR LYONS, Defendant-Appellant.	LC No. 2015-256599-FC

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529; first-degree home invasion, MCL 750.110a(2); and assault with intent to do great bodily harm less than murder, MCL 750.84.[1] The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 126 months to 50 years in prison for the armed robbery and assault convictions, to be served concurrently, and to a consecutive prison term of 5 to 30 years for the home invasion conviction. We affirm.

Michael Leach was at his mobile home on the morning of October 26, 2015, when he discovered defendant climbing through an unlocked window in the home. As defendant entered the home, Leach saw that he was armed with a gun. Leach ran to the front door, but was unable to open it. According to Leach, defendant followed him and said, "Get back here, you ain't going nowhere." He pointed the gun at Leach from less than two feet away and then repeatedly said, "Get me everything or I'm going to kill you, get me everything. I want everything or I'm going to kill you."

As Leach gave defendant some money, Leach noticed a second, unidentified man in the home. Leach believed defendant intended to kill him, so Leach jumped on defendant and tried to take the gun. While Leach struggled with defendant, the unidentified man punched Leach. During the struggle for possession of the gun, Leach bit defendant's hand and continued biting

[1] Defendant was originally charged with assault with intent to commit murder, MCL750.83, but the jury convicted him of the lesser offense of assault with intent to do great bodily harm less than murder.

until defendant dropped the gun. Leach picked it up, but then the unidentified man repeatedly hit Leach in the head with a sledge hammer, causing Leach to drop the gun. The men thereafter placed Leach in the bathroom, closed the door, and instructed him to count to 200. Eventually, Leach did not hear any more movement outside the bathroom, so he left the room, went to a neighbor's home, and the neighbor called the police.

The police contacted local hospitals and learned that defendant had sought treatment at a local hospital emergency room for a bite wound to his hand. The police interviewed defendant and he stated that he received the hand bite while "playfighting" with some cousins at his uncle's house. Defendant was unable to provide the name of the person who allegedly bit him or an address of his uncle's house. Defendant also refused to participate in a corporeal lineup. Therefore, the police instead conducted a photographic lineup and Leach identified defendant as his attacker without hesitation.

At trial, defendant testified that he went to Leach's home intending to purchase a pound of marijuana, but they disagreed over the price. Defendant claimed that he then tried to leave and Leach attacked him. They wrestled and Leach bit defendant. Defendant denied that a third person was present, denied hitting Leach with a sledgehammer, and denied being armed with a gun or taking any items from Leach's home.

The jury convicted defendant of the charged offenses of first-degree home invasion and armed robbery, and of assault with intent to do great bodily harm less than murder as a lesser offense to an original charge of assault with intent to commit murder.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his conviction of assault with intent to do great bodily harm less than murder. We disagree.

A challenge to the sufficiency of the evidence in a jury trial is reviewed de novo, by reviewing the evidence in the light most favorable to the prosecution to determine whether the trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). "All conflicts with regard to the evidence must be resolved in favor of the prosecution." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

The elements of the crime of assault with intent to do great bodily harm less than murder 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. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). No actual physical injury need be shown. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992).

Defendant was tried under an aiding or abetting theory. In accordance with MCL 767.39, "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." According to this statute, a defendant is criminally liable for both offenses that he intends to aid or abet, and any crimes that are the natural and probable consequences of the

intended offense. *People v Robinson*, 475 Mich 1, 14-15; 715 NW2d 44 (2006). Under the natural and probable consequences theory, "[t]here can be no criminal responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if the occasion should arise for any one to do it." *Id.* at 9. "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). Defendant only argues on appeal that he lacked the requisite intent to be convicted of assault with intent to do great bodily harm less than murder.

In *Robinson,* the defendant and his coconspirator went to another man's home to assault him. The Supreme Court held that a natural and probable consequence of the plan to assault was that one of the actors would escalate the assault into murder. *Robinson*, 475 Mich at 11. The Court in *Robinson* cited another case involving a defendant who hired a coconspirator to commit adultery with the defendant's wife so that he could divorce her. The Court in that case ruled that the subsequent sexual assault of the wife by the coconspirator was a natural and probable consequence of the plan. *Id.*, citing *People v Chapman*, 62 Mich 280, 286; 28 NW 896 (1886). The sexual assault directly flowed from the common enterprise of adultery.

Here too, sufficient evidence showed that defendant possessed the requisite intent to harm the victim. The evidence showed that defendant and another unidentified man entered Leach's home in the middle of the night to commit an armed robbery. Defendant carried a gun and pointed it at Leach while repeatedly threatening to kill him unless he gave defendant his valuables. Defendant's possession of a gun and threats to kill Leach if he did not cooperate supported an inference that defendant was prepared to kill or harm Leach if he would not surrender his valuables. See *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995), disapproved of in part on other grounds *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001) (the intent to kill can be inferred from the use of a deadly weapon). When Leach told defendant to take the few possessions that he had, defendant was dissatisfied and Leach feared for his life. Defendant argues that he did not intend to harm Leach and the injuries only occurred because of Leach's attempts to disarm defendant.[2] But just as the sexual assault was a natural and probable consequence of hiring a coconspirator to commit adultery in *Chapman*, a victim attempting to save his own life when it has been threatened during an armed robbery is a natural and probable consequence of an armed robbery.

Moreover, defendant and the unidentified assailant did not retreat after Leach attempted to disarm defendant. Instead, to continue the common enterprise — the robbery — they struggled with Leach and the unidentified assailant bit Leach, and hit him with a sledge hammer until he was subdued. Defendant then held Leach at gunpoint in the bathroom, where he could not escape, while the unidentified man searched for valuables to steal. The jury could infer that defendant then left with the sledge hammer, which Leach had seen in defendant's pocket, and that this effort to conceal that weapon demonstrated defendant's cooperation in the other assailant's assault with the sledge hammer. Viewed in a light most favorable to the prosecution,

[2] "[A]n aggressor has no right of self-defense." *People v Maclin*, 101 Mich App 593, 594-596; 300 NW2d 642 (1980).

the evidence was sufficient for the trier of fact to conclude beyond a reasonable doubt that defendant had the requisite intent to commit assault with intent to do great bodily harm less than murder.

II. PROSECUTORIAL MISCONDUCT

Next on appeal, defendant raises three claims of prosecutorial misconduct, arguing: (1) the prosecutor improperly questioned a police witness about defendant's credibility, (2) the prosecutor improperly cross-examined defendant about being a drug dealer, and (3) the prosecutor argued facts not in evidence during closing argument. Defendant concedes that there was no objection to the prosecutor's conduct at trial and further argues that defense counsel was ineffective for failing to object to the alleged misconduct. None of defendant's claims require reversal.

Defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). An error is plain if it is clear or obvious, and an error affects substantial rights if it is prejudicial, i.e., if it affects the outcome of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Ackerman,* 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Reversal is not required if a jury instruction could have cured any error. *Id.* at 449.

The United States and Michigan Constitutions guarantee a defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 US at 694.

A. QUESTIONS REGARDING DEFENDANT'S CREDIBILITY

First, defendant argues that the prosecutor improperly questioned Sergeant John Jacobson about whether he felt defendant was being honest during Sergeant Jacobson's interview of him. We disagree.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). It is "generally improper for a witness to comment or provide an opinion on the credibility of another witness,

since matters of credibility are to be determined by the trier of fact." *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987).

The prosecutor elicited testimony about what Sergeant Jacobson looks for during an interview to determine if a suspect is telling the truth. Sergeant Jacobson testified that he observes body language and evasiveness; he ultimately opined that defendant was being evasive and indicated his reasoning for that finding. Sergeant Jacobson also testified that he found suspicious defendant's statements during the interview that he was bitten while playfighting with a "kid" at his uncle's house, given the seriousness of the injury and defendant's inability to provide the address of his uncle's house or the identity of the "kid." He testified that he found most of what defendant said to be not truthful. The prosecutor questioned Sergeant Jacobson and Detective Scott Erikson about how they pursued the investigation after the interview.

The prosecutor did not ask the police to provide an opinion whether defendant is credible, generally, nor was the questioning directed at the credibility of any trial testimony. Rather, the prosecutor's questioning elicited the details of the interview and the justification for the continued investigation of defendant as a suspect, despite his alternative explanation for his injury. Considering the context of the questioning, defendant has not demonstrated a plain error.

Furthermore, to the extent that the prosecutor's questioning could be considered improper, defendant has not demonstrated that it affected his substantial rights. The trial court cautioned the jury to make its own determination as the trier of fact and advised that police officers' testimony was to be judged by the same standards used to evaluate other witnesses' testimony. *People v Pinkney*, 316 Mich App 450, 476; 891 NW2d 891 (2016) (" 'Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.' " (citation omitted)). Moreover, Sergeant Jacobson's opinion — that defendant's explanation for his injury was not credible — was cumulative of defendant's own admission at trial that he lied to the police about the injury because he was trying to conceal the drug deal. In light of defendant's admission that his explanation was not true, any concern that the police testimony regarding the credibility of defendant's explanation might invade the jury's province to determine matters of credibility cannot be considered outcome determinative.

B. CROSS-EXAMNATION OF DEFENDANT

Next, defendant argues that the prosecutor improperly cross-examined him in detail about whether he was a drug dealer who supplied drugs to people in the jury's community. We disagree.

Defendant "opened the door" to the prosecutor's questions when he testified on direct examination that he went to Leach's trailer to buy a pound of marijuana for $1,000. *Jones*, 468 Mich at 352-353 n 6 ("[u]nder the doctrine of fair response, there is no error because a party is entitled to fairly respond to issues raised by the other party"); *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994) (prejudicial testimony does not warrant reversal when the defendant "opened the door" to the testimony); *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003) (otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense). The prosecutor was free to explore the credibility of defendant's claim by questioning why he would need such a large amount of marijuana.

Moreover, the record does not support defendant's argument that the prosecutor invited the jury to convict defendant because he admittedly sold drugs in the community. The prosecutor never argued that the jury should go outside the evidence and decide the case to solve any civic problem in the community. Rather, the prosecutor argued that the jury should convict defendant of the charged offenses because he had proved each of the requisite elements. Therefore, we reject this claim of misconduct.

C. PROSECUTOR'S CLOSING ARGUMENT

Lastly, defendant argues that the prosecutor improperly relied on facts not in evidence when he argued that DNA evidence supported Leach's testimony that there were two perpetrators present, not just defendant, as defendant testified. We disagree.

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinion of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal. [*People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995) (citations omitted).]

In this case, the prosecutor argued that Leach's testimony was supported by the physical evidence, whereas defendant's testimony was not. The prosecutor argued:

> But there's more. We remember that the Defendant testified today that he was there by himself. The victim from the start said not one, but two guys, two guys came in to try to pull this off. You heard the testimony of the forensic scientist today, not one, not two, but three DNA profiles were found on the evidence. The Defendant's was found there. We heard about that, on the plywood and on his shoes. The victim's was found there on the -- in the house from the carpet swab as well as from on the bottom left part of the Defendant's shoe. And we also heard that on the Defendant's socks a third unidentified profile, definitely not the Defendant, definitely not [the victim] that was found as well. Shows you that three people were involved here. Whose story, whose version of events does that match up better with?

The prosecutor's argument was based on a reasonable inference from the evidence. Although no DNA match was made to a third profile recovered by the police during the investigation, it was reasonable for the prosecutor to infer that the profile belonged to the other perpetrator. In closing, defense counsel was free to argue an alternative inference, as she did, stating:

> Defendant's socks were tested, and that there was -- there was another sample of DNA that wasn't able to be matched to [the victim] or to my client. If you walk around without your shoes on in your house and you live in a house with multiple

people, there's going to be other people's DNA on your socks. Does that fact alone prove any of the elements? It doesn't.

The trial court entrusted the jurors as the triers of the facts. The jury was free to believe either theory. The prosecutor's argument was not improper.

D. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's conduct. Because defendant has not shown error with regard to his claims of prosecutorial misconduct, he cannot demonstrate that defense counsel was ineffective for failing to object. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

III. SENTENCING

Defendant argues that the trial court erred by relying on a sentencing guidelines range for assault with intent to commit murder to sentence him for the assault with intent to do great bodily harm less than murder conviction. Defendant's argument is inconsistent with the record.

The probation department initially calculated the guidelines for "assault with intent to commit murder," which is a class A offense against a person. At sentencing, defense counsel noted that defendant was convicted of the lesser offense of assault with intent to do great bodily harm less than murder, not assault with intent to commit murder, which was listed in the original presentence investigation report (PSIR). The probation department corrected the PSIR and defendant's conviction is correctly listed as assault with intent to do great bodily harm on those documents. The probation department also changed the SIR from "assault with intent to commit murder" to "armed robbery," which is also a class A offense against a person. MCL 777.16y. On the corrected SIR, defendant's scores resulted in a sentencing guidelines range of 126 to 420 months under the sentencing grid applicable to armed robbery, MCL 777.62. The trial court sentenced at the low end of that range, imposing sentences of 126 months to 50 years in prison for the armed robbery and assault with intent to do great bodily harm less than murder convictions, and 5 to 30 years in prison for the home invasion conviction.

Armed robbery is a class A offense under the guidelines, MCL 777.16y, whereas assault with intent to do great bodily harm less than murder is a class D offense, MCL 777.16d. Because defendant's sentences for armed robbery and assault with intent to do great bodily harm less than murder were required to be served concurrently, and armed robbery is in a higher crime class than assault with intent to do great bodily harm less than murder, the trial court was only required to score the guidelines for armed robbery, the conviction with the highest crime classification. *People v Lopez*, 305 Mich App 686, 690-692; 854 NW2d 205 (2014); *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005). The record reveals that the trial court followed the correct procedure.

Defendant further argues that the trial court abused its discretion in imposing consecutive sentences and in failing to articulate its rationale for imposing consecutive sentences. When "a statute grants a trial court discretion to impose a consecutive sentence, the trial court's decision to

do so is reviewed for an abuse of discretion." *People v Norfleet*, 317 Mich App 649, 654; 897 NW2d 195 (2016). Thus, when a trial court imposes a discretionary consecutive sentence, it is required to articulate on the record the reasons for each consecutive sentence imposed. *Id*.

The home invasion statute under which defendant was convicted, MCL 750.110a(8), permits a term of imprisonment for that offense to be served consecutive to "any term of imprisonment imposed for any other criminal offense arising from the same transaction." Thus, the trial court was permitted to impose consecutive sentencing in this case, and it articulated specific reasons for doing so. The trial court noted that defendant testified at trial and that his version of the events that transpired was not credible. It further noted that defendant was a fourth habitual offender at 23 years old and, that unless it sentenced defendant at the absolute highest end, he would see his freedom again. The trial court found the sentence reasonable and appropriate because it protected the public, because defendant deserved to go to prison for a substantial period of time, it would serve as a deterrent to others, and it would hopefully rehabilitate defendant. The trial court thus articulated its reasons for consecutive sentencing on the record. Defendant has not established any grounds for resentencing.

Affirmed.

/s/ Kathleen Jansen
/s/ Deborah A. Servitto