

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTEL RAMONE RILEY,

Defendant-Appellant.

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UNPUBLISHED

June 24, 2021

No. 353360

Calhoun Circuit Court

LC No. 2019-002129-FH

Before: GADOLA, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of third-degree home invasion, MCL 750.110a(4). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 46 to 360 months' imprisonment. We affirm defendant's conviction, but remand to the trial court for resentencing.

I. FACTS

On May 25, 2018, defendant kicked in the front door of the home of his former girlfriend, Shoniqua Williams. Williams testified that she lived with defendant for three years before she sought and was granted a personal protection order against him. On the night in question, Williams was home with her two children when defendant began excessively ringing her doorbell. When Williams refused to open the door, defendant kicked the door until it fell off its hinges and into Williams's living room. Williams testified that defendant entered the home and began to yell and curse at her. Defendant then followed her upstairs while she retrieved her phone, and followed her back downstairs and left the home. A community security guard heard the disturbance and called the police. Defendant was arrested and charged with aggravated stalking, MCL 750.411i, first-degree home invasion, MCL 750.110a(2), and domestic violence, MCL 750.81(2). The jury found defendant guilty of the lesser included offense of third-degree home invasion, MCL 750.110a(4), and acquitted defendant of the other charges. The trial court sentenced defendant as a fourth-offense offender to 46 to 360 months' imprisonment. Defendant now appeals.

## II. DISCUSSION

### A. PROSECUTORIAL MISCONDUCT

Defendant contends that he was denied a fair trial because the prosecution engaged in misconduct by (1) improperly asking him to comment on Williams’s credibility, and by (2) improperly asking him why he failed to produce evidence to support his testimony. We disagree that defendant was denied a fair trial.

We review de novo preserved claims of prosecutorial misconduct to determine whether the defendant received a fair trial. *People v Dunigan*, 299 Mich App 579, 588; 831 NW2d 243 (2013). Claims of prosecutorial misconduct are preserved by a contemporaneous and specific objection. *People v Clark*, 330 Mich App 392, 433; 948 NW2d 604 (2019). However, “a preserved, nonconstitutional error is not a ground for reversal unless ‘after an examination of the entire cause, it shall affirmatively appear’ that it is more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant’s substantial rights. *Clark*, 330 Mich App at 433.

Defendant contends that the prosecutor engaged in misconduct while cross-examining him. During trial, Williams testified that defendant kicked the front door of her home off its hinges, then entered her home without permission. Defendant thereafter testified that although he kicked in the door of Williams’s home, he did not enter her home. When the prosecutor cross-examined defendant, the following exchange occurred:

*PROSECUTOR:* So, you were just standing outside yelling at her?

*DEFENDANT:* Yes.

*PROSECUTOR:* Why would Mrs. Williams lie about [you entering the home]?

*DEFENDANT:* Why wouldn’t she lie about it? She was my ex-girlfriend.

Defendant contends that it was improper for the prosecution to ask him to comment on the credibility of Williams. We note initially that defendant failed to preserve this issue for appeal because he did not contemporaneously object<sup>1</sup> and request a curative instruction. *People v Mullins*, 322 Mich App 151, 172; 911 NW2d 201 (2017). We therefore review this contention of

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<sup>1</sup> Defendant argues that his later objection to the prosecution’s question regarding failure to produce evidence to support his defense also preserved his challenge to the prosecutor’s question about Williams’s credibility. However, a challenge of prosecutorial misconduct must be raised contemporaneously. *Clark*, 330 Mich App at 433; *Mullins*, 322 Mich App at 172.

misconduct for plain error affecting defendant's substantial rights. See *Clark*, 330 Mich App at 433.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). We consider the propriety of a prosecutor's remarks in the context of all the facts of a case. *Id.* at 383. If the prejudicial effect of an improper prosecutorial statement could have been alleviated by a timely objection and curative instruction, reversal is not warranted. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Generally, it is considered improper for a prosecutor to ask the defendant to comment on the credibility of a prosecution witness because the defendant's opinion of the witness's credibility is not probative. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). It is not improper, however, for the prosecutor to question the defendant about how the defendant's version of the facts differs from that of a prosecution witness. See *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). The propriety of the prosecutor's remarks depends upon the facts of the case, and we evaluate the remarks in light of the defense arguments. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). An improper remark by the prosecutor does not necessarily warrant reversal if the remark responded to an issue raised by the defense. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

In this case, defendant presented testimony that contradicted Williams's testimony; Williams testified that after defendant kicked in the door, he entered her home, and defendant testified that he kicked down the door but did not enter Williams's home. The context of the prosecution's cross-examination suggests that the prosecutor was rhetorically asking defendant to explain why his testimony differed from that of Williams, rather than literally to explain why Williams was lying. Given the context of the question, we conclude that it does not rise to the level of prosecutorial misconduct.

Further, it is questionable whether the prosecutor, in asking the defendant if he might know of any motivation Williams might have to lie, was in fact asking defendant to comment on her credibility. The prosecutor asked what might motivate Williams to lie. Defendant answered that question in the vein in which it was asked, by indicating that it was because she was his ex-girlfriend. This was not the same as if the prosecutor had asked defendant whether he was calling Williams a liar, which would clearly have been improper.

Alternatively, defendant asserts that he was denied effective assistance of counsel because defense counsel did not object to the prosecution's alleged improper question. Because we conclude that the prosecution's question regarding Williams's motivation to lie did not rise to the level of prosecutorial misconduct, defense counsel did not provide ineffective assistance by failing to raise a meritless objection. *People v Savage*, 327 Mich App 604, 617; 935 NW2d 69 (2019).

Defendant also argues that the prosecutor improperly questioned him about why he failed to produce evidence to support his testimony. At trial, defendant testified that he shared with a police officer at the jail a voice mail from Williams that allegedly demonstrated an ongoing relationship between Williams and defendant. The prosecutor observed that any conversation between defendant and the officer at the jail would have been recorded by the camera at the jail,

and asked defendant if he had asked his attorney to obtain the recording. Defense counsel objected on the basis that defendant did not have the burden of proof. The trial court ruled that the prosecutor was permitted to ask the question. Defendant argues on appeal that the questioning improperly attempted to shift the burden of proof to him.

Although a prosecutor may not use a defendant's failure to present evidence as substantive evidence of the defendant's guilt, the prosecution is entitled to contest evidence presented by the defendant. *People v Caddell*, 332 Mich App 27, 71; 955 NW2d 488 (2020). In addition, the prosecutor does not err by commenting on the defendant's failure to produce evidence of the defense upon which the defendant is relying. *People v Fields*, 450 Mich 94, 111 n 21; 538 NW2d 356 (1995).

In this case, defendant was charged with aggravated stalking, first-degree home invasion, and domestic violence. Defendant argued that the allegations against him were untrue, as demonstrated by his ongoing personal relationship with Williams. As evidence of that relationship, defendant testified that Williams left him a voice mail wishing him a happy birthday and that he shared this voice mail with the officer at the jail. The prosecutor's question regarding whether defendant had obtained the video from the jail camera that ostensibly would show defendant sharing the voice mail with the officer was an attempt to contest the defense raised by defendant, not an attempt to shift the burden of proof to defendant on the charges.

Additionally, defendant has not demonstrated that this alleged error was outcome determinative. The jury acquitted defendant of aggravated stalking, MCL 750.411i; first-degree home invasion, MCL 750.110a(2); and domestic violence, MCL 750.812. Defendant has not demonstrated how this alleged error affected his conviction of the lesser included offense of third-degree home invasion. The elements of third-degree home invasion are (1) breaking and entering or entering without permission, (2) into a dwelling, (3) with the intent to commit a misdemeanor or the actual commission of a misdemeanor while in the dwelling, or while violating a personal protection order term or condition. MCL 750.110a(4)(b). The defendant's testimony regarding the voice mail, however, was not pertinent to his conviction of third-degree home invasion. Rather, defendant's defense to the charge of home invasion was to deny that he entered Williams's home. Thus, his relationship with Williams was not relevant to this charge. Accordingly, the prosecutor's question regarding the recording did not deny defendant a fair trial.

## B. SCORING OF OFFENSE VARIABLE 13

Defendant also contends that the trial court erred by assessing 25 points for OV 13 without evidentiary support that he committed the prior offenses assessed under that offense variable. When reviewing a trial court's scoring of the sentencing guidelines, we review the trial court's factual determinations for clear error; the factual determinations must be supported by a preponderance of the evidence. *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017). A finding of fact is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). A preponderance of the evidence is evidence that when weighed against the opposing evidence has more convincing force and the greater probability of truth. *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008). Whether the factual findings satisfy the scoring

conditions prescribed by statute is a question of statutory interpretation that we review de novo. *Calloway*, 500 Mich at 184.

OV 13 concerns a continuing pattern of criminal behavior. MCL 777.43(1); *People v Gibbs*, 299 Mich App 473, 488; 830 NW2d 821 (2013). In scoring OV 13, the sentencing court is required to assess 25 points if the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(c); *Gibbs*, 299 Mich App at 488. In scoring OV 13, “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a).

Before the sentencing court may count a crime for purposes of OV 13, the prosecution must prove by a preponderance of the evidence that “the crimes actually took place, that the defendant committed them, that they are properly classified as felony ‘crimes against a person,’ MCL 777.43(1)(c), and that they occurred ‘within a 5-year period’ of the sentencing offense.” *People v Nelson*, 502 Mich 934, 935 (2018). The sentencing court may rely upon the record evidence, information contained in the presentence investigation report (PSIR), plea admissions, and the testimony at the preliminary examination. *McChester*, 310 Mich App at 358. The information in the PSIR is presumed to be accurate unless successfully challenged, and the sentencing court is entitled to rely upon the information. *People v Grant*, 455 Mich 221, 233; 565 NW2d 389 (1997). In scoring an offense variable, the trial court may rely on reasonable inferences arising from the record evidence. *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012).

A sentencing court may not find that a defendant engaged in conduct of which he was acquitted, *People v Beck*, 504 Mich 605, 629; 939 NW2d 213 (2019), but may consider charges that were dismissed if a preponderance of the evidence supports that the offense occurred. *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013). The criminal offenses cannot arise from the same felonious event, however, because a single event does not constitute a pattern. *People v Carll*, 322 Mich App 690, 704-705; 915 NW2d 387 (2018). A sentence based on inaccurate information is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

In this case, the sentencing offense occurred on May 25, 2018. Two additional offenses within five years of the sentencing offense were required to establish a pattern warranting an assessment of 25 points for OV 13. Defendant’s PSIR indicates that in May 2016, defendant was arrested on charges that included assault by strangulation, and in December 2018, while awaiting trial in this case, defendant was arrested on charges of aggravated stalking. The PSIR indicates that the charges were dismissed, however, and the PSIR does not provide underlying facts to support the conclusion that defendant committed the offenses. Moreover, the trial court did not explain the basis for its assessment of 25 points for OV 13 on the record. Without factual support for the additional offenses, we are left with a definite and firm conviction that a mistake has been made with respect to the 25-point assessment of OV 13. Because defendant’s sentence was imposed based upon an inaccurate calculation of the sentencing guideline range, the matter must be remanded for resentencing consistent with defendant’s right to be sentenced on the basis of the law. See *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

Defendant's conviction is affirmed. We remand this matter to the trial court for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola

/s/ David H. Sawyer

/s/ Michael J. Riordan