

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 8, 2011

V

No. 298259
Monroe Circuit Court
LC No. 09-038063-FH

DELFINO MARGITO MOYA,
Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V

No. 300868
Monroe Circuit Court
LC No. 09-037901-FH

DELFINO M. MOYA,
Defendant-Appellant.

Before: **SERVITTO, P.J.**, and **CAVANAGH** and **STEPHENS, JJ.**

PER CURIAM.

Defendant was tried simultaneously in two separate cases, both of which involved home invasions in Monroe County on November 5, 2008. Following a bench trial, he was convicted of one count of first-degree home invasion, MCL 750.110a(2), in LC No. 09-038063-FH, and he was convicted of three counts of first-degree home invasion and one count of possession of a firearm during the commission of a felony, MCL 750.227b, in LC No. 09-037901-FH. He was sentenced to concurrent prison terms of 94 to 240 months for each home invasion conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right in each case. We affirm.

Defendant's convictions arise from a series of home invasions that were committed on November 5, 2008, in the same vicinity in Ida Township in Monroe County. Defendant presented an alibi defense.

Each home was broken into sometime after the homeowner left the house in the morning. One homeowner in the area obtained a license plate number of a vehicle that the police determined was registered to the mother of Alexander Weiner. Weiner admitted his involvement in the offenses along with defendant and two other men. Weiner cooperated with the police and showed them the location of the home where he and the other men brought the stolen property. The police executed a search warrant at that home and recovered some of the stolen property. Defendant was present in the home at the time of the police raid.

At trial, Weiner explained that the group targeted the homes they broke into by knocking on the front door to determine if anyone was at home. If a homeowner answered, they would just tell the homeowner that they were looking for someone and then they would leave.

Thomas Czapinski, who lived in the vicinity of the break-ins, testified that he was present in his home on the morning of the offenses and observed a vehicle back up in his driveway. A man from the vehicle walked up to the house and Czapinski spoke to him. The man was wearing a hooded sweatshirt and had a tattoo on his neck. Czapinski identified the man as defendant. Defendant told Czapinski that he was looking for Andy Simms, whom defendant was supposed to pick up for a roofing job. Czapinski told defendant he did not know anyone by that name, so defendant left.

In his sole issue on appeal, defendant argues that the trial court erred in admitting Czapinski's testimony. Emphasizing that he was not charged with any offense involving Czapinski, defendant argues on appeal that Czapinski's testimony was irrelevant and unfairly prejudicial under MRE 403. Although defendant objected to the relevancy of Czapinski's testimony at trial, thereby preserving that issue, he did not argue that Czapinski's testimony should be excluded under MRE 403. An objection on one ground is insufficient to preserve an appellate attack on a different ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Accordingly, defendant's latter argument is not preserved.

"The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). This Court reviews an unpreserved claim of evidentiary error for plain error that affects the defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

In *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004), this Court explained:

Relevant evidence is evidence "having any tendency 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." MRE 401; *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. MRE 402; *Aldrich, supra* at 113. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403; *Aldrich, supra* at 113.

Unfair prejudice does not mean any prejudice, but refers to “the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994).

Although Czapinski may not have been able to recall all details of defendant’s appearance or his vehicle, and defendant was not charged with any offense involving Czapinski, Czapinski’s testimony was relevant to link defendant to the charged offenses because (1) it placed defendant in the vicinity of the crimes during the relevant time period, and (2) it corroborated Weiner’s testimony describing how the men targeted certain homes and how they planned to respond if a homeowner was present.

Defendant appears to argue that Czapinski’s testimony should have been excluded under MRE 403 because his identification of defendant was questionable. We disagree. Czapinski testified that the person he spoke to had a tattoo on his neck, and the evidence established that defendant had a tattoo on his neck. Czapinski also identified defendant in a photographic array. He further described defendant as wearing a hooded sweatshirt, which was consistent with another description of a suspect who broke into a home. Czapinski also described the vehicle he saw as an Explorer, which was consistent with Weiner’s testimony.

Although defendant correctly observes that there were some discrepancies between Czapinski’s testimony and some of the other evidence, those discrepancies did not render his testimony inadmissible or unduly prejudicial. Although Czapinski thought that the Explorer was green and Weiner’s vehicle was a red color, Czapinski also admitted that he was not sure about the color of the vehicle. Czapinski also described defendant’s neck tattoo as being the size of a half-dollar. Considering that the person Czapinski spoke to was wearing a hooded sweatshirt with the hood down, it was the existence of the tattoo on the suspect’s neck that was probative of defendant’s identity. Any discrepancy between Czapinski’s description of the tattoo and defendant’s actual tattoo affected only the weight of Czapinski’s testimony, not its admissibility.

Defendant also argues that it was unfair for the trial court to use Czapinski’s testimony to conclude that Weiner’s account was credible because Czapinski did not actually witness defendant committing a crime. However, the trial court merely used the circumstances under which Czapinski encountered defendant, along with Weiner’s testimony and the other evidence of the actual break-ins, to find that the evidence supported defendant’s identification as one of the participants in the charged offenses.

In sum, the trial court did not abuse its discretion in admitting Czapinski’s testimony at trial.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens