STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 298656 Kent Circuit Court
ANDRE CORTEZ BROWN, Defendant-Appellant.	LC No. 08-005181-FH

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant, Andre Cortez Brown, appeals as of right his conviction for unarmed robbery, MCL 750.530. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 19 to 40 years' imprisonment. We affirm.

Defendant first argues the evidence was insufficient to support his conviction. We disagree. We review de novo a claim that evidence was insufficient to sustain a conviction. *People v Phelps*, 288 Mich App 123, 131; 791 NW2d 732 (2010). We must determine whether the evidence would, when viewed in a light most favorable to the prosecution, "justify a rational trier of fact in finding that all the elements of the crime were proved beyond a reasonable doubt." *Id*. at 131-132. In doing so, we "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The crime of unarmed robbery is established by proving: "(1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). It is a specific intent crime that requires proof that the defendant intended to permanently deprive the owner of property. *People v Harverson*, 291 Mich App 171, 177; ___ NW2d ___ (2010).

Defendant he argues that the evidence only showed he intended to prevent the victim from calling 911, not that he intended to permanently deprive her of her cellular telephone. This Court has explained that in the context of unarmed robbery, the intent element "'does not require, in a literal sense that a thief [intend] to permanently deprive the owner of the property.'" *Id*. at 178, quoting *People v Jones*, 98 Mich App 421, 425-426; 296 NW2d 268 (1980). "Rather,

the intent to permanently deprive includes the retention of property without the purpose to return it within a reasonable time . . . ." *Harverson*, 291 Mich App at 178.

The victim testified that defendant forcefully took her cellular telephone and exited the vehicle with it. The telephone was found, broken in two pieces, a block away. We note that circumstantial evidence and reasonable inferences that may arise from it can constitute satisfactory proof of the elements of the crime. *Kanaan*, 278 Mich App at 619. And, because of the difficulty of proving a state of mind, "only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent" for unarmed robbery. *Harverson*, 291 Mich App at 178. When viewed in a light most favorable to the prosecution, the forceful method by which defendant acquired the victim's cellular telephone, the subsequent location of the telephone, and the condition of the telephone is circumstantial evidence that would permit a rational jury to find that the requisite intent was proved beyond a reasonable doubt. *Phelps*, 288 Mich App at 131-132. There was sufficient evidence to convict defendant of unarmed robbery.

Defendant next argues that the trial court erred by denying his motion for new trial because the verdict was against the great weight of the evidence. We review for an abuse of discretion the trial court's decision on a motion for a new trial based on a claim that the verdict was against the great weight. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). "An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes." *Id.* A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.*

Defendant's argument is largely predicated on his claim that the trial court should have reweighed the credibility of witnesses. Generally, when considering an argument that the verdict is against the great weight of the evidence, a judge may not repudiate a jury verdict on the basis of disbelieving the testimony of the prevailing party's witnesses. *People v Lemmon*, 456 Mich 625, 636; 576 NW2d 129 (1998). The mere fact that a witness has been impeached, or there is conflicting testimony, is not sufficient to warrant a new trial on the basis that the verdict is against the great weight of the evidence. *Id.* at 642-643. Only under "exceptional circumstances" should a trial court intrude on the jury's role in determining credibility of witnesses. *Id.*, n 22. While there are some circumstances where a court may assess a witness's credibility, this is limited to situations where the testimony was "'patently incredible or defies physical realities'" or "'is so inherently implausible that it could not be believed by a reasonable juror.'" *Id.* at 643-644 (citations omitted). Because neither exception has been demonstrated here, the trial court's denial of defendant's motion for a new trial is within the range of reasonable and principled outcomes. *Lacalamita*, 286 Mich App at 469.

Defendant next argues the trial court abused its discretion in failing to exclude certain evidence admitted pursuant to MRE 404(b) because the prosecutor violated a discovery order. We disagree. While defendant's trial attorney, at an earlier hearing, initially argued the timeliness of the 404(b) evidence, when given an opportunity to address the issue the morning of trial he said: "I'm not necessarily bringing up the timeliness aspect of -- of the 404(b) evidence. I have more of an evidentiary or legal objection to any such evidence . . . ." This statement

constituted a waiver of any argument on appeal relating to the alleged violation of the discovery order. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Appellate review is unavailable because defendant's waiver has extinguished any error. *Id*.

Defendant next argues that the evidence admitted under MRE 404(b), which related to his prior use of false names with police, should not have been admitted because it was irrelevant and more prejudicial than probative. Neither argument has merit. Generally, evidence of prior bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). However, evidence of prior bad acts or crimes may be admissible to show "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." MRE 404(b)(2). In order for evidence to be admitted under MRE 404(b), the prosecution must first establish the evidence "is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010). Also, evidence admissible under MRE 404(b) may be excluded if its probative value is substantially outweighed by its prejudicial value. MRE 403; *Mardlin*, 487 Mich at 616. A trial court's decision on whether to admit evidence pursuant to MRE 404(b) is reviewed for an abuse of discretion. *Id* at 614.

In the present case, all three witnesses who testified regarding MRE 404(b) evidence did so regarding defendant falsely identifying himself in the past, just as he did with the victim. Identity is an element of every criminal offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "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. Evidence of defendant's prior use of the same or similar false name was relevant evidence to establish defendant's identity because it tended to show he used the same false name when making contact with the victim. Additionally, defendant has failed to demonstrate that the probative value of the evidence was "*substantially* outweighed by the danger of unfair prejudice." MRE 403 (emphasis added). "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). We defer to the trial court's determination under MRE 403 because of the court's ability to contemporaneously assess "the presentation, credibility, and effect of testimony . . . ." *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); see also MCR 2.613(C). Because the evidence was relevant and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, the trial court did not abuse its discretion in admitting the evidence. *Mardlin*, 487 Mich at 614-616.

Defendant next argues his constitutional right to confront witnesses was violated. We disagree. We review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). To demonstrate plain error, a defendant must show: (1) error occurred; (2) the error was plain; and (3) the plain error affected substantial rights. *Id.* at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court

proceedings." *Id.* The burden is on defendant to demonstrate prejudice. *Id.*

Defendant contends his right to confront witnesses was violated because the trial court limited his cross-examination on the issue of the victim's injuries. Both the Sixth Amendment of the United States Constitution and the Michigan Constitution provide that a criminal defendant has a right to "to be confronted with the witnesses against him." US Const, Am VI; Const 1963, art 1, § 20. But "[t]he right to confront and cross-examine is not without limits. It does not include a right to cross-examine on irrelevant issues. It may bow to accommodate other legitimate interests in the criminal trial process . . . and other social interests." *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982) (citations omitted). Having reviewed the record, we find defendant was not denied his right to confront the victim. Defense counsel was allowed ample opportunity to question the victim regarding her injuries. The trial court's decision to preclude one irrelevant and repetitive question regarding the injuries did not deny defendant his right to confront witnesses. "'[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), quoting *Delaware v Van Arsdall*, 475 US 673, 678; 106 S Ct 1431; 89 L Ed 2d 674 (1986). Consequently, defendant has not demonstrated plain error occurred. *Carines*, 460 Mich at 763.

Defendant next argues the prosecutor committed misconduct during closing arguments. All but one (involving the prosecutor commenting on defendant's intentions to shoot pool) of defendant's claims of prosecutorial misconduct were not preserved because defendant failed to timely object and request for a curative instruction was made. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

We review de novo claims of prosecutorial misconduct to "determine whether defendant was denied a fair and impartial trial," examining "the pertinent portion of the record [to] evaluate a prosecutor's remarks in context." *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). Unpreserved instances of prosecutorial misconduct, however, are reviewed for plain error affecting substantial rights. *Id.* at 451. Error requiring reversal cannot be found where a curative instruction would have "alleviated any prejudicial effect." *Callon*, 256 Mich App at 329-330. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant first claims the prosecutor improperly appealed to the jury's sense of civic duty to convict defendant. "Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Defendant argues that the prosecutor improperly referenced civic duty during closing argument both by suggesting the victim was telling the truth because she had a reason to be embarrassed about how she met defendant and by arguing, "I have never in my life seen a woman hit with a closed fist, nor do I think that's appropriate." We find that neither of the prosecutor's comments suggested that jurors had a civic duty to society to convict defendant.

Defendant also argues the comments noted above improperly appealed to the jury to sympathize with the victim. "Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The first challenged comment, explaining why the victim initially lied about how she met defendant, was an argument based on the prosecutor's theory of the case and prosecutors "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236. The second challenged comment, regarding hitting a woman, was also not an improper attempt to elicit jury sympathy. The prosecutor did not argue that the jury should convict solely because of the nature of the attack, instead it was merely a characterization of the heinous nature of the attack and it is not improper for the prosecutor to characterize a crime as "horrible." *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Nor is it improper for a prosecutor to suggest no one should be subjected to criminal conduct. *Id*. We find no error.

Defendant next argues that the prosecutor improperly expressed a personal belief about the facts of the case and argued facts not in evidence on four occasions. A prosecutor should not express a personal opinion about a defendant's guilt, *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995), or express a personal belief about the facts, *People v Nimeth*, 236 Mich App 616, 626-627; 601 NW2d 393 (1999). Prosecutor may also not argue facts that are not in evidence. *Watson*, 245 Mich App at 588. But prosecutors are accorded great latitude in arguing all reasonable inferences from the evidence. *Id*.; *Bahoda*, 448 Mich at 282. The first statement defendant challenges came when the prosecutor said: "[W]e know the person in her car, the defendant, he doesn't intend to go shoot pool with her. His intentions quite frankly are very suspicious and nefarious." Read in context, however, this was a proper argument based on evidence that supported the prosecutor's theory that defendant never intended to take the victim to a pool hall, and "the prosecutor's use of 'we know' does not show an attempt to place the credibility of his office behind the case or a suggestion that he possessed extrajudicial information on which defendant should be convicted." *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995). We find no error.

The second challenged statement by the prosecutor was that it was a mistake for the police not to photograph the victim's injuries. This argument did not improperly express a personal belief by the prosecutor regarding the facts; rather, it was a proper argument based on reasonable inferences arising from the evidence. *Bahoda*, 448 Mich at 282. The prosecutor could properly argue that the jury should believe the victim's testimony that she was injured. *People v Lodge*, 157 Mich App 544, 550; 403 NW2d 591 (1987). Additionally, the prosecutor's comment was a proper response to defense counsel's ongoing attempt to discredit the victim on the basis that there was no evidence corroborating her testimony that she was injured. See *People v Ackerman*, 257 Mich App 434, 453-454; 669 NW2d 818 (2003).

Defendant next asserts that the prosecutor improperly argued facts that were not in evidence when he stated that had never seen a woman hit in the face with a fist in his life. A prosecutor may not make a statement of fact to the jury that is unsupported by evidence. *Id*. at 450. Here, the prosecutor's comment about his personal experience was not supported by the evidence; therefore, we agree this comment constitutes plain error. Nevertheless, this error does not warrant reversal because any prejudice was cured by the trial court's instruction that the arguments of the attorneys were not evidence. See *Callon*, 256 Mich App at 330-331.

Defendant next challenges the following remarks by the prosecutor on the basis that the comments expressed personal belief and argued facts not in evidence:

> When you go back there and ask yourself, Was [sic] she telling the truth? I think you're going to come to the same conclusion that myself and Detective Recor did and that is, yes, she is and, if you believe that, then he is guilty of the crime of unarmed robbery.

While "[a] prosecutor may comment on the credibility of witnesses during closing arguments," *Lodge*, 157 Mich App at 550, and "may argue from the facts that a witness should be believed," *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005), a prosecutor may not suggest a personal belief in defendant's guilt, *Bahoda*, 448 Mich at 282-283. To the extent the remarks suggested the jury should convict because the prosecutor and the police personally believed the victim, the challenged statement was error. See *People v Swartz*, 171 Mich App 364, 371; 429 NW2d 905 (1988). Nevertheless, the comment also explicitly reminded the jury that it was their prerogative to determine the victim's credibility based on the evidence presented. We conclude that the trial court's instruction that the arguments of the attorneys were not evidence dispelled any prejudice. See *Callon*, 256 Mich App at 330-331. We decline to address defendant's argument that the comment above was an improper comment by one witness on the credibility of another because it was the prosecutor, not Recor, who made the statement at issue.

Defendant next argues that the prosecutor improperly denigrated his defense. A prosecutor must not denigrate a defendant with "intemperate and prejudicial remarks," but has "great latitude" in making his closing arguments and is "free to argue the evidence and all reasonable inferences" arising from that evidence. *Bahoda*, 448 Mich at 282-283 (citations omitted; quotations omitted). The prosecutor's comments in the present case were properly responsive to defendant's questioning of the victim and Detective Recor and were not improper. See *Ackerman*, 257 Mich App at 453-454.

Defendant also argues that even if the individual instances of prosecutorial misconduct do not warrant reversal, the cumulative effect of the errors does. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). While there were some minor errors, any prejudice was cured by the trial court's instruction to the jury that the arguments of the attorneys were not evidence. See *Callon*, 256 Mich App at 330-331. Defendant was not denied a fair trial. *McLaughlin*, 258 Mich App at 649.

Defendant next argues he was denied effective assistance of counsel. Because no *Ginther*[1] hearing was held, "review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law; the trial court's findings of fact are reviewed

[1] See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

for clear error and the ultimate constitutional question is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To prove ineffective assistance of counsel defendant must demonstrate: (1) his counsel's performance fell below an objective standard of reasonableness, and (2) it is reasonably probable that the result of the proceeding would have been different but for counsel's alleged error, rendering the result fundamentally unfair or unreliable. *Id*. at 578; *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Reviewing courts must apply a strong presumption that counsel's performance fell with a wide range of reasonable professional assistance. *LeBlanc*, 465 Mich at 578.

Defendant first argues his trial counsel was ineffective in failing to call a number of witnesses. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). We find defendant's arguments regarding potential witnesses amounts to nothing more than speculation; defendant has failed to establish the "factual predicate" for his various claims of ineffective assistance. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Consequently, defendant has not overcome the strong presumption his trial counsel provided reasonable professional assistance in opting not to call certain witnesses. *LeBlanc*, 465 Mich at 578. We also find without merit defendant's argument that his trial counsel was ineffective in failing to impeach the victim with her prior testimony or with evidence of her lack of memory regarding the defendant's false name. Counsel was not ineffective because there was no basis to impeach the victim on these grounds.

Defendant also contends his trial counsel failed to properly investigate the case. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant's argument is predicated on facts not in the record; as a result, his claim that trial counsel failed to properly investigate must fail. *Hoag*, 460 Mich at 6.

Defendant also alleges his trial counsel should have obtained an expert in eyewitness identification. Again, defendant's argument is nothing more than speculation that an expert would have somehow benefited his defense. Defendant has failed to overcome the strong presumption his trial counsel provided reasonable professional assistance in failing to obtain an expert in eyewitness identification. *LeBlanc*, 465 Mich at 578; *Caballero*, 184 Mich App at 640.

Defendant makes a number of additional arguments regarding: testimony his counsel elicited; certain unidentified photographs; counsel's refusal to challenge two proposed jurors; the prosecutor failing to turn over the 911 tape; the use of a photographic lineup at trial; and counsel's failure to question one unspecified witness testifying with respect to a traffic stop that was admitted under MRE 404(b). We find there is no factual basis provided for any of the above claims and defendant has failed to establish a factual predicate for his argument. See *Hoag*, 460 Mich at 6. Because review of the above claims is limited to mistakes apparent on the record, *Mack*, 265 Mich App at 125, defendant has not met his burden of showing counsel's performance fell below an objective standard of reasonableness, *Odom*, 276 Mich App at 415.

Defendant next raises a number of additional issues in his Standard 4 brief on appeal. Defendant first contends he was denied his right to self-representation. We disagree. A trial court's factual findings regarding a defendant's request to represent himself are reviewed for

clear error. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). A trial court's ultimate decision whether to allow a defendant to represent himself is reviewed for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

The right of self-representation is secured by both the Michigan Constitution, Const 1963, art 1, § 13, and by statute, MCL 763.1. The right of self-representation is also implicitly guaranteed by the Sixth Amendment to the United States Constitution. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). To invoke the right to self-representation: (1) a defendant must make an unequivocal request to self-representation; (2) the trial court must determine the desire to proceed without counsel is knowing, intelligent, and voluntary; and (3) the trial court must "determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Id.* at 367-368. "[C]ourts are to make every reasonable presumption against the waiver of a fundamental constitutional right, including the waiver of the right to the assistance of counsel." *Russell*, 471 Mich at 188. The denial of a defendant's Sixth Amendment right of self-representation constitutes a structural error requiring automatic reversal. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994).

Having reviewed the record, we find the trial court did not clearly err in finding defendant's request to represent himself was equivocal. Defendant, on numerous occasions, insisted he did *not* want to represent himself and defendant's motion in propria persona, filed before the hearing where defendant told the trial court he wanted to represent himself, indicated defendant wanted co-counsel. "[T]he right of self-representation and the right to counsel are mutually exclusive, a defendant must elect to conduct his own defense." *Russell*, 471 Mich at 189. Further, on the first day of trial, defendant was given an opportunity unequivocally state his desire to represent himself. He failed to do so. A trial court "should not allow a defendant to proceed without counsel if any doubt casts a shadow on the waiver's validity." *People v Brooks*, ___ Mich App ___; ___ NW2d ___ (Docket No. 298299, issued August 16, 2011), slip op at 7. Further, the trial court did not clearly err in finding the third prong of the test stated in *Anderson*, 398 Mich at 368, was not met because defendant had a long history of interrupting judicial proceedings. Consequently, we find the trial court did not abuse its discretion by denying defendant's self-representation request.

Defendant next argues the trial court erred in failing to resolve a conflict between defendant and his trial counsel. To establish ineffective assistance on the basis of a conflict of interest, a defendant must demonstrate that an actual conflict of interest adversely affected his attorney's performance. *People v Smith*, 456 Mich 543, 356; 581 NW2d 654 (1998). Defendant has failed to articulate any conflict that affected his counsel's performance. The only "conflict" was one created by defendant with *every* attorney appointed to represent: the filing grievances against them. The filing of a grievance does not automatically create a conflict. See *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). Accordingly, we find no error.

Finally, defendant alleges a variety of sentence guidelines scoring errors. We find defendant waived any claim regarding scoring errors where his attorney, when asked by the trial court, expressly agreed with the scoring calculations at sentencing. See *Carter*, 462 Mich at 214-216. A "[w]aiver is the intentional relinquishment or abandonment of a known right." *Carter*,

462 Mich at 215 (citations and quotation marks omitted). A party who waives a right may not seek appellate review because his waiver has extinguished any error. *Id.* Because defendant, through counsel, waived any scoring errors, there is no error to review.

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello