STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 8, 2011
V	No. 299607 Wayne Circuit Court
THOMAS LOUIS WASHINGTON, Defendant-Appellant.	LC No. 09-031281-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), witness intimidation, MCL 750.122(7)(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to prison terms of 30 to 60 years for the assault conviction, 10 to 20 years for the home invasion conviction, 2 to 10 years for the witness intimidation conviction, one to five years for the felon-in-possession conviction, and two years for the felony-firearm conviction. The assault sentence is to be served consecutive to the home invasion sentence, and the home invasion, witness intimidation, and felon-in-possession sentences are to be served concurrent to each other, and all sentences are to be served consecutive to the felony-firearm sentence. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the November 18, 2009, shooting of Art Taylor in a suspected act of retaliation. There was evidence that on November 17, 2009, Charles McCoy shot a woman while at Taylor's house, following which McCoy was arrested because of information that Taylor provided to the police. On November 18, 2009, Lana Turner went to Taylor's house, made statements about Taylor reporting her son McCoy, and threw a brick through Taylor's window. About 30 minutes later, defendant and his girlfriend Joy Head went inside Taylor's house. Head questioned Taylor about reporting her cousin McCoy and defendant ultimately shot Taylor twice. The defense denied that defendant was the shooter, and argued that Taylor's testimony was not credible.

I. HEARSAY EVIDENCE

Defendant first argues that the trial court abused its discretion when it denied his request to admit a statement of an unavailable witness under MRE 804(b)(7). Defendant relied on a

police report in which an officer noted that he had contact with a man who described the shooter as arriving five minutes after Turner and driving a red pickup truck. The officer testified that the man refused to give his name, but was calm when he spoke. The officer could not describe the man, had no way of locating him, and was unable to determine the man's identity or whether he lived in the neighborhood. Defendant argues that the unknown declarant's statement was admissible under the catch-all exception to the hearsay rule. We disagree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, that question is reviewed de novo. *McDaniel*, 469 Mich at 412.

Hearsay is inadmissible at trial unless a specific exception allows its introduction. See MRE 801, MRE 802, and *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). MRE 804(b)(7) provides a residual or "catch-all" exception to the hearsay rule for an unavailable declarant, and allows for the admission of

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

We agree that the unknown man's statement to the police was evidence of a material fact because it would show that a man driving a red truck, and not defendant, shot Taylor. Arguably, it would also be more probative on the point of what occurred than any other evidence that the defense could procure through reasonable efforts. However, "[t]he first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions." *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003). A court "should consider the 'totality of the circumstances' surrounding each statement to determine whether equivalent guarantees of trustworthiness exist." *Id.* at 291. "There is no complete list of factors that establish whether a statement has equivalent guarantees of trustworthiness," *id.*, but relevant factors include:

> (1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal

> knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made, and (8) the time frame within which the statements were made. [*People v Geno*, 261 Mich App 624, 634; 683 NW2d 687 (2004) (citation omitted).]

Without a showing of a particularized guarantee of trustworthiness, a statement will be deemed presumptively unreliable and therefore inadmissible. *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000). Here, the unidentifiable man's statement does not bear sufficient indicia of reliability. There is no evidence that the statement was spontaneous, and the only indication of the man's demeanor was that he was "calm." His statement was completely inconsistent with that of the one other witness who was present to testify at trial. The record is lacking regarding the man's bias and motive to fabricate, whether he spoke from personal knowledge, and other variables relating to his position and ability to have actually observed the shooting. Because the statement lacks any indicia of reliability, the trial court did not abuse its discretion by refusing to admit it under MRE 804(b)(7).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that trial counsel was ineffective for failing to move for a mistrial after the trial court excused a sitting juror who reported being fearful and intimidated by trial spectators. On the third day of trial, after questioning and excusing the juror, the trial court questioned the remaining jurors regarding their knowledge of the excused juror's comments about her departure to determine the impact, if any, that her comments might have on their ability to be impartial. Defendant now argues that trial counsel should have asked additional questions of the jurors, and moved for a mistrial because the excused juror's experience and comments tainted the entire jury. We disagree.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citation omitted). Consistent with the right to a fair trial, a defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). To show the denial of a fair and impartial jury in this context, a defendant must show that the jury was exposed to extraneous influences and that the extraneous influences "created a real and substantial possibility that they could have affected the jury's verdict." *Id*. at 88-89. Due process only demands that jurors act with a "lack of partiality, not an empty mind." *People v Jendrzejewski*, 455 Mich 495, 516-517; 566 NW2d 530 (1997).

In this case, there was a permissible reason to excuse the juror, and proceed with trial. See MCL 768.18. The record does not support defendant's claim that the remaining jurors were exposed to extraneous influences that tainted them. Although the jury heard the juror's comments about her reasons for departing, the trial court immediately addressed the situation. The trial court questioned each juror individually to test their reaction to the excused juror's comments. The remaining jurors explicitly indicated that they could be fair and impartial. The purpose of voir dire is to expose potential juror bias so that a defendant may be tried by a fair and impartial jury. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). Although defendant claims that trial counsel should have also asked the jurors questions, he does not indicate what additional questions should have been asked. Further, counsel's decisions about what questions to ask are matters of trial strategy, which this Court will not evaluate with the benefit of hindsight, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Because the existing record does not provide a basis upon which to move for a mistrial, defendant cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

III. CRUEL AND UNUSUAL PUNISHMENT

Defendant further argues that he is entitled to resentencing because, despite being within the sentencing guidelines range, his 30-year minimum sentence for assault with intent to commit murder when added to his sentences for first-degree home invasion and felony-firearm constitutes cruel and/or unusual punishment, contrary to US Const, Am VIII, and Const 1963, art 1, § 16. Defendant did not advance a claim below that a sentence within the sentencing guidelines range would nonetheless be constitutionally cruel or unusual. Therefore, we review this unpreserved claim of constitutional error for plain error affecting a defendant's substantial rights. We review an unpreserved claim of constitutional error for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant's 30-year minimum sentence for assault with intent to commit murder is within the sentencing guidelines range of 225 to 468 months (SIR).[1] Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence, neither of which is alleged to have occurred here, this limitation on review is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). But a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), and a sentence that is proportionate is not cruel or unusual punishment, *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Here, defendant contends that his sentence is cruel or unusual because of his age (26 years at the time of sentencing). That factor is insufficient to overcome the presumptive proportionality of defendant's sentence, especially considering his criminal record and his parole status when he

[1] Defendant does not challenge the propriety of consecutive sentencing in this case pursuant to MCL 750.110a(8) and MCL 750.227b.

committed the current offenses. Further, the fact that defendant's assault sentence is to be served consecutive to his sentences for home invasion and felony-firearm does not overcome the presumption of proportionality. "In determining the proportionality of an individual sentence, this Court is not required to consider the cumulative length of consecutive sentences." *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998), lv den 459 Mich 968 (1999). Because defendant has not overcome the presumptive proportionality of his sentence, we reject his claim that his sentence is cruel or unusual.

IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises a sufficiency of the evidence issue in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, which has no merit.

In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact's] verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues that first-degree home invasion was not established because there was insufficient evidence that he entered Taylor's house without permission. We disagree. The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2). Taylor's testimony that he did not invite defendant and Head into his home, that they did not knock, ring the doorbell, ask to come inside, or otherwise seek permission to enter, and came through the door uninvited, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant entered the dwelling without permission. Accordingly, the evidence was sufficient to sustain defendant's first-degree home invasion conviction.

Defendant does not challenge any of the individual elements of the other offenses. Rather, he makes a general argument that the evidence was insufficient to support any of his convictions because Taylor's testimony was not credible. This argument requires this Court to ignore Taylor's testimony and resolve credibility issues anew on appeal. It is well established that absent compelling circumstances, which are not present here, the credibility of witnesses is for the jury to determine. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), and *Wolfe*, 440 Mich at 514. Further, when viewed in a light most favorable to the prosecution, Taylor's testimony that defendant was the person who entered his home without permission, attempted to shoot him in the head, and ultimately shot him in the stomach and pelvis with a

handgun as retribution for Taylor reporting a crime, was sufficient to sustain defendant's convictions.

Affirmed.

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