STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 21, 2012
v	No. 299867 Wayne Circuit Court
RICHARD HARRISON GOREE, Defendant-Appellant.	LC No. 10-002425-FC

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 81 months to 20 years for the armed robbery and home invasion convictions, and six months to four years for the felonious assault conviction. He was also sentenced to a consecutive prison term of two years for the felony-firearm conviction. We affirm.

Defendant's convictions arise from his participation with two other men in the May 28, 2004, home invasion of a house occupied by Denise Lake, her boyfriend Bruce Parrish, and her daughter Amy Wright in Taylor. According to the testimony of codefendant Floyd Steward, the three codefendants believed they would find marijuana and money at the home. After the men gained entry into the house, they demanded money and marijuana, assaulted Lake and Parish, stole Parrish's watch and cash from his person, and attempted to break into Parrish's truck. A neighbor contacted the police, who arrived at the scene and captured Steward and codefendant Abdulaziz Kabeer. The third participant was able to escape. Wright and Steward identified defendant as the third participant. Defendant was not arrested until January 2010. The defense denied that defendant was involved in the crimes.

I. PROSECUTOR'S REMARK IN OPENING STATEMENT

Defendant first argues that the prosecutor denied him a fair trial by remarking during her opening statement that defendant had "been on the run for six years." Defendant argues that there was no evidentiary support for the prosecutor's statement. Because defendant did not object to the challenged comment below, this issue is unpreserved and we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130

(1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction upon request. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

"The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). When a prosecutor observes during his opening statement that evidence will be presented, but that evidence is not subsequently presented at trial, reversal is not required if the prosecutor acted in good faith and the defendant was not prejudiced by the statement. *People v Wolverton*, 227 Mich App 72, 76; 574 NW2d 703 (1997). Although there was no direct evidence that defendant was aware of the felony warrant or that he was "on the run," the record does not show that the prosecutor acted in bad faith when she made the statement or that defendant was prejudiced. At trial, the prosecutor presented testimony that defendant was identified as the third participant in the crimes shortly after they were committed, that he escaped from the crime scene by jumping over a fence, that a felony warrant was issued for his arrest in October 2004, that several unsuccessful efforts were made to locate him (including speaking with his mother), and that defendant was not arrested until January 2010, nearly six years after he fled the crime scene. Given this evidence, we cannot conclude that the prosecutor acted in bad faith in making the statement. Accordingly, there was no plain error.

Further, a timely objection and request for a curative instruction could have alleviated any prejudice arising from the challenged remark. See *Watson*, 245 Mich App at 586. And even though defendant did not object, the trial court instructed the jury that the lawyers' statements were not evidence and that the jury was to decide the case on the basis of the properly admitted evidence only. These instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

II. RIGHT OF CONFRONTATION

Defendant next argues that a detective's testimony regarding a statement by defendant's mother concerning defendant's presence in town at the time of the crimes was impermissible hearsay, admitted in violation of his Sixth Amendment right of confrontation. See *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We disagree. Defendant objected at trial only on the ground that the testimony was inadmissible hearsay. Therefore, that evidentiary issue is preserved for review. But because defendant did not challenge the testimony on the ground that its admission violated his constitutional right of confrontation, his constitutional argument is not preserved. An objection on one ground is insufficient to preserve an appellate challenge based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

We review defendant's preserved evidentiary issue to determine whether the trial court abused its discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). 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). Defendant's

unpreserved constitutional claim is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. MRE 801; MRE 802. The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007); see also *Crawford*, 541 US at 68. "However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 10-11; see also *Crawford*, 541 US at 59 n 9.

During trial, the challenged statements regarding the detective's contact with defendant's mother were not offered to prove the truth of the matter asserted, i.e., that defendant was in the city on or about June 11, 2004. Rather, the prosecutor's questions and resulting testimony were intended to explain background information regarding the course and propriety of the police investigation that ultimately led to arresting defendant in this six-year-old case. See *People v Lewis*, 168 Mich App 255, 267; 423 NW2d 637 (1988) (observing that statements which are offered "to explain why the police did what they did" do not constitute hearsay). Moreover, during defense counsel's cross-examination of the detective, defense counsel pointed out that although defendant was out on bond, "obviously [he's] here." Defense counsel went on to question the detective about his investigative procedures and the lack of fingerprints and DNA evidence to connect defendant to the crimes. Because the statements were presented for the limited purpose of providing background information, they did not constitute hearsay, or statements of an absent declarant such that defendant's confrontation rights were violated.

To the extent that the challenged testimony went beyond simply explaining the police investigation, defendant has not shown that any error was outcome-determinative. Contrary to what defendant argues, the detective did not indicate that defendant was in town on the date of the crimes. Rather, the detective testified that he spoke with defendant's mother on June 11, 2004, and that defendant was in town during that timeframe—two weeks after the incident. Moreover, two witnesses identified defendant as the third perpetrator who escaped from the crime scene. Wright testified that she observed defendant's face before he pulled down a mask upon entering the house. She was only about five feet away, and the back porch light illuminated his face. Defendant's accomplice, Steward, also identified defendant as the third perpetrator. Given the record evidence before us, we conclude that defendant is entitled to no relief on this issue.

III. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant also raises several additional issues in a supplemental brief filed *in propria persona*, none of which warrants relief.

A. SCORING OF OFFENSE VARIABLE 4

Defendant argues that he is entitled to resentencing because the trial court erroneously assessed ten points for offense variable (OV) 4. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A trial court's scoring decision need only be supported by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Ten points may be assessed for OV 4 when "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). It is not required that the victim actually receive psychological treatment, and testimony that a victim was afraid during the offense may be sufficient to support a score of ten points under OV 4. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Lake testified that after she observed the perpetrators breaking into her house at 3:00 a.m., she fled to a bathroom to hide behind the door because she was scared. One of the masked perpetrators saw her, used the door to slam her against the wall, pulled her out of the bathroom, pointed a handgun at her, and touched the gun to her head as he directed her to a bedroom, pushing her along the way. Once in the bedroom, Lake had to watch as Parrish was assaulted, struck in the face with a shotgun, and robbed by a second masked gunman. As this occurred, Lake, who advised the perpetrators that she had recently suffered a stroke, sat on the edge of her bed, rocking back and forth with her hands clasped together, praying. In response to her actions, one of the intruders stated, "What are you praying for, b*tch?" Lake testified that she "was scared to death." The record evidence amply supported the trial court's decision to assess ten points for OV 4.

B. JURY INSTRUCTIONS

Defendant next argues that the trial court erred when it constructively amended the information during its final jury instructions. He also contends that defense counsel was ineffective for failing to object. Again, we disagree.

The felony information indicated that defendant possessed a shotgun during the commission of the charged crimes. In its final instructions to the jury, the trial court identified the dangerous weapon possessed by defendant as a shotgun, pistol, or handgun. Because defendant assented to the trial court's instructions as given, he has waived appellate review of this substantive claim. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant's waiver has extinguished any error. *Id.* at 216.

Defendant alternatively argues that defense counsel was ineffective for failing to object to this constructive amendment. Because defendant did not raise a claim of ineffective assistance of counsel in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Even if defense counsel had objected, it would have been within the trial court's discretion to grant a motion to amend the information with regard to the type of firearm possessed by defendant. See *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). MCR 6.112(H) provides, in relevant part, that "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." "A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *Unger*, 278 Mich App at 221; see also MCL 767.76 and MCR 6.112(H). Here, the amendment did not involve a new or different act, but rather related to the type of dangerous weapon used to carry out the charged acts as revealed through the trial testimony. The information was sufficient to inform defendant of the nature of the charges against him and the amendment did not alter those charges. Nor did it affect the proffered defense that defendant was not involved in the crimes. Because the existing record reveals no reasonable basis to object to the amendment, defendant cannot establish that he received ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

C. PROSECUTOR'S REMARKS IN CLOSING AND REBUTTAL

Defendant argues that the prosecutor impermissibly argued facts not in evidence and vouched for the testimony of two prosecution witnesses. We disagree. Because defendant did not object to the prosecutor's comments, we review this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). We agree that there was no evidence to support the prosecutor's statement that defendant knew where Parrish lived. Thus, defendant has established a plain error. As previously indicated, however, defendant must also establish that his substantial rights were affected. *Carines*, 460 Mich at 752-753, 763-764. Defendant bears the burden of showing actual prejudice, *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006), and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence, *Carines*, 460 Mich at 752-753, 763-764.

There is no reasonable likelihood that the prosecutor's improper statement caused defendant's conviction. The prosecutor's remark was focused on supporting the identification of defendant as one of the perpetrators and establishing that this was not merely a random home invasion. Both Wright and Steward identified defendant as the third participant. With regard to defendant's connection to Parrish, defendant acknowledges Parrish's testimony that he and Parrish knew each other from their respective employment. In addition, there was evidence that during the crimes, defendant and his associates specifically sought "the" box of money and marijuana. Wright testified that after the men broke into the house, she heard defendant ask Parrish, "Where's the f*cking box?" According to Parrish, the men demanded the box of money and marijuana from him. Lake similarly testified that the men asked for the whereabouts of the money and the keys to their vehicles. Two of the men then attempted to break into the interior of Parrish's truck and a cooler that was in the rear of the truck. Further, the trial court's instruction

that the lawyers' statements and arguments were not evidence was sufficient to dispel any possible prejudice. *Long*, 246 Mich App at 588.

Defendant next argues that the prosecutor improperly vouched for Wright's and Steward's testimony during her rebuttal argument by stating that "it doesn't look like anyone's lying. They're telling the truth, one way or another." A prosecutor may not vouch for the credibility of a witness by suggesting that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). But a prosecutor is free to argue from the facts that a witness is credible. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor's remarks must be considered in light of defense counsel's comments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Viewed in context, the challenged remarks did not suggest that the prosecutor had special knowledge that the witnesses were credible. The prosecutor's argument was made in response to defense counsel's assertions that the witnesses' identifications of defendant were not worthy of belief. The defense challenged Wright's vantage point and ability to identify defendant, and claimed that Steward only identified defendant to gain a favorable plea agreement. During the challenged remarks, the prosecutor urged the jury to evaluate the evidence, discussed the reliability and consistency of the witnesses' testimony, and argued that there were reasons from the evidence to conclude that both witnesses were credible. Because the prosecutor's argument was based on the evidence at trial, there was no plain error. In addition, in its final instructions, the trial court instructed the jurors that they were the sole judges of witness credibility. Consequently, this unpreserved claim does not warrant reversal.

We also reject defendant's related claim that defense counsel was ineffective for failing to object to the prosecutor's remarks. Because the remarks did not deny defendant a fair trial, defense counsel's failure to object was not objectively unreasonable. Further, because the trial court's jury instructions were sufficient to dispel any possible prejudice, defendant cannot demonstrate a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Defendant cannot establish ineffective assistance of counsel in this regard.

D. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant further argues that defense counsel was ineffective for failing to call alibi witness Kevin Cannon after having listed Cannon in the notice of alibi and referencing him during opening statement. Because defendant did not raise this issue in the trial court, our review is limited to mistakes apparent on the record. *Sabin (On Second Remand)*, 242 Mich App at 659.

The record indicates that defense counsel was aware of Cannon and considered calling him as a witness at trial, but does not disclose why counsel ultimately decided not to call him. Defendant has not overcome the strong presumption that counsel chose not to call Cannon as a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*,

235 Mich App 429, 445; 597 NW2d 843 (1999). Further, defendant has not provided a witness affidavit or identified any other evidence of record establishing that Cannon actually could have provided favorable testimony. Absent such a showing, defendant has not established that he was prejudiced by defense counsel's failure to call Cannon at trial.

E. CUMULATIVE EFFECT OF ERRORS

Lastly, we reject defendant's argument that the cumulative effect of several minor errors denied him a fair trial. The only clear error that we have identified is the prosecutor's improper statement that defendant knew where Parrish lived, which standing alone did not affect defendant's substantial rights. Because no other errors have been identified, there can be no cumulative effect of multiple errors in this case. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey