STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 2013
v	No. 304160 Wayne Circuit Court
ARTHUR VERNELL THOMPSON, Defendant-Appellant.	LC No. 10-012383-FH

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12,[1] to 18 to 36 years in prison. For the reasons set forth below, we affirm.

I. ADMISSION OF PRIOR CONVICTION

Defendant argues that the trial court erred in allowing the prosecutor to cross-examine him about his prior burglary conviction. Defendant waived this issue because he testified about the conviction during direct examination. "Where a prosecutor would have the option of impeaching the defendant with a prior conviction, the defendant may not mitigate the damage by fronting the conviction and then argue on appeal that admission of the testimony was error." *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001). Waiver extinguishes any error for review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Were we to find that defendant did not waive this issue, it is nonetheless unpreserved, and without merit. We review unpreserved issues for plain error affecting defendant's substantial rights. *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012).

"A witness's credibility may be impeached with prior convictions if the requirements of MRE 609 are satisfied." *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005). Although not his primary argument, defendant points out that he was never convicted of aggravated burglary. Defendant's presentence investigation report states that defendant was

[1] MCL 769.12 was amended, effective October 1, 2012. 2012 PA 319.

initially charged with aggravated burglary and kidnapping, but the final charge was for attempted kidnapping. If defendant was not convicted of burglary, it was error to allow impeachment by evidence of this offense because it was not a prior conviction. MRE 609(a). Nonetheless, during direct examination by his attorney, defendant testified that he was convicted of burglary in Ohio eight years earlier. Defendant similarly testified on cross-examination that he was convicted of burglary. "Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this issue." *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (citation omitted).

Defendant also asserts that the trial court erred because it did not rule that the probative value of the evidence was outweighed by its prejudicial effect. MRE 609(b) states, in relevant part:

> For purposes of the probative value determination . . . the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

A trial court's failure to articulate its analysis pursuant to MRE 609(b) may be deemed harmless if this Court finds that, had the trial court articulated its analysis on the record, there would be no abuse of discretion. *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1991), amended 440 Mich 882 (1992). "[T]he trial court's failure to articulate on the record its analysis of these factors does not require reversal if the trial court was aware of the pertinent factors and of its discretion." *Meshell*, 265 Mich App at 638.

Although the trial court did not articulate its analysis on the record, its refusal to admit defendant's *other* prior convictions shows the court was aware of the relevant factors as well as its discretion in deciding whether to admit the evidence. We also hold, contrary to defendant's claim, that the probative value of the evidence was not outweighed by its prejudicial effect. MRE 609(a)(2)(B). The conviction was eight years old and "indicative of veracity." See *People v Lester*, 172 Mich App 769, 773; 432 NW2d 433 (1988); *People v Johnson*, 170 Mich App 808, 810; 429 NW2d 237 (1988). In assessing the prejudicial effect of the prior offense, we note that the only details known regarding the earlier crime are that it was a burglary and that a person was present in the home. While the similarity between the charged offense and the prior conviction might enhance the prejudicial effect, admission of the evidence did not negatively impact defendant's election to testify at trial. Further, the trial court instructed the jury that defendant's prior conviction could only be considered with regard to his credibility. Admission of the prior conviction was not an abuse of discretion and permitting defendant's impeachment with this prior conviction did not constitute plain error.

II. SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence on the element of intent. In *People v Portellos*, 298 Mich App 431, 732-733; 827 NW2d 725 (2012), this Court stated:

> This Court reviews de novo the sufficiency of the evidence on appeal. When reviewing a challenge to the sufficiency of the evidence, we review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. [Footnoted citations omitted.]

Further, "as our Supreme Court recently noted in *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010), MCL 750.110a identifies several ways in which first-degree home invasion can be committed by providing 'alternative elements' that must be established, i.e., each element of first-degree home invasion can be established by satisfying one of two alternatives set forth in the statute." *People v Baker*, 288 Mich App 378, 384; 792 NW2d 420 (2010). According to the Court in *Wilder*, the "alternative elements" are:

> Element One: The defendant either:
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> 1. breaks and enters a dwelling or
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> 2. enters a dwelling without permission.
>
> Element Two: The defendant either:
>
> 1. intends when entering to commit a felony, larceny, or assault in the dwelling or
>
> 2. at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault.
>
> Element Three: While the defendant is entering, present in, or exiting the dwelling, either:
>
> 1. the defendant is armed with a dangerous weapon or
>
> 2. another person is lawfully present in the dwelling. [*Wilder*, 485 Mich at 43.]

Defendant challenges the second element by arguing that no evidence showed that he intended to commit an assault. "Michigan generally defines an assault as 'either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.'" *People v Meissner*, 294 Mich App 438, 453-454; 812 NW2d 37 (2011) (citation omitted). "A battery is an intentional, unconsented and harmful or offensive touching of the person of another. . . ." *Id.* (citation omitted). Even if there was no evidence that defendant intended to assault the victim, the second element was established by testimony elicited from the victim that defendant committed an assault while in the dwelling. *Baker*, 288 Mich App at 384.

The victim testified that defendant held her by her hands, closed the door, put his hand over her mouth, and pushed her to the ground. "These acts constituted an offensive touching, from which a reasonable jury could find that defendant assaulted [the victim.]" *Meissner*, 294 Mich App at 454. While defendant's version of how the events transpired differed from the victim's testimony, credibility determinations are left to the trier of fact. *People v Eisen*, 296

Mich App 326, 331; 820 NW2d 229 (2012) (citation omitted). Defendant's argument that there was no medical evidence that the victim sustained an injury is also unavailing, because the presence of an injury is not required. *People v Terry*, 217 Mich App 660, 662-663; 553 NW2d 23 (1996). Because the victim testified that she sustained injuries to her finger and wrists, the prosecution presented sufficient evidence to sustain defendant's conviction.

III. CRUEL AND UNUSUAL PUNISHMENT

Defendant argues this his sentence amounts to cruel or unusual punishment. This issue is unpreserved because defendant did not object at sentencing. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). This Court reviews unpreserved claims of constitutional error for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763–764; 597 NW2d 130 (1999).

Defendant concedes that his sentence was within the guidelines range. "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (citations omitted). "In order to overcome the presumption that [a] sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Defendant suggests that his age renders his sentence disproportionate but, contrary to defendant's contention, a court is not required to consider a defendant's age in determining whether a sentence is disproportionate. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). Defendant also asserts that his conviction was based on improperly admitted and incorrect evidence. However, as discussed, the trial court did not err in the admission of evidence and sufficient evidence supported his conviction. Accordingly, defendant has failed to demonstrate plain error affecting his substantial rights.

IV. ALTERNATIVE COUNSEL

Defendant challenges the trial court's denial of his request for alternative counsel. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

In *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (citation omitted), this Court stated:

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.

"When a defendant asserts that the defendant's assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record." *Id.* (citation omitted). "A

mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason, does not amount to adequate cause. Likewise, a defendant's general unhappiness with counsel's representation is insufficient." *Id.* at 398 (citations omitted).

At the beginning of defendant's trial, the court provided defendant with an opportunity to speak. Defendant stated:

> Today is the day that I, you know, have to pick a jury to determine whether or not I'm guilty of these charges. And I just got the feeling just before I came in here, with talking to my attorney briefly that I do not feel that I will be represented to the fullest that, you know, allows me to actually be able to clear myself of these charges and therefore I would like to release him from my case and to retain another attorney if I'm able to, by the Court's permission.
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> * * *
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> It's nothing personal to my attorney, Mr. Harris, but I just didn't get the feeling that we were going in the right direction as my defense. And, you know, it just doesn't seem like I'm being fairly represented to the fullest, some conflicts with us on some of the avenues that I wanted to go into and, you know, just -- just not seem like he's going to work out here for me.

The trial court denied defendant's request for alternative counsel, without taking testimony, and without making specific findings.

In *Strickland*, 293 Mich App at 397, this Court ruled that the trial court adequately inquired into the nature of the breakdown of the attorney-client relationship when the court accepted a copy of the defendant's grievance and allowed the defendant to articulate his concerns on the record. Similarly, here, the trial court permitted defendant to speak on the record. Defendant failed to establish good cause. He merely asserted that he was not satisfied with his trial counsel and failed to identify the alleged conflicts. See *id.* at 398.

Even if we ruled that the trial court should have elicited further information, "[a] judge's failure to explore a defendant's claim that his assigned lawyer should be replaced does not necessarily require that a conviction following such error be set aside." *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973). To justify the appointment of new counsel, the appointment must not unreasonably disrupt the judicial process. *Strickland*, 293 Mich App at 397. Because defendant did not request new counsel until the day of trial, a substitution would have unreasonably delayed the judicial process. Therefore, the trial court did not abuse its discretion when it denied of defendant's request.

V. JUROR VOIR DIRE

Defendant claims the trial court erred in empaneling a juror without obtaining an assurance regarding her ability to fairly decide the facts of the case. This Court reviews the trial court's conduction of voir dire for an abuse of discretion. *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003) (citation omitted).

"[W]here the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause can be intelligently exercised." *Washington*, 468 Mich at 674. The potential juror stated that she did not want to sit on the jury and asserted that she lacked the mindset to focus. The trial court instructed her to do her job and to apply herself. The trial court did not further question the juror regarding her statements and whether she could be fair and impartial.

Defendant has not established the existence of any potential bias that would have required the trial court to "adequately question" the juror. *Washington*, 468 Mich at 674. "Jurors are presumptively competent and impartial, and the party alleging the disqualification bears the burden of proving its existence." *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). This Court has found that "the fact that the jurors would rather not serve on the jury did not establish a ground for their dismissal." *People v Vaughn*, 291 Mich App 183, 193; 804 NW2d 764 (2010), vacated in part on other grounds 491 Mich 642 (2012). The juror's assertion that she did not wish to sit on the jury did not establish grounds for her dismissal or the existence of any actual bias against defendant.

Further, defendant has failed to demonstrate that he was denied the right to an impartial jury. This Court has ruled:

> [D]efense counsel did not use his peremptory challenges to excuse those jurors who defendant now claims denied him a fair trial. Moreover, at the conclusion of jury selection, defense counsel expressly stated that he was satisfied with the jury as empaneled. Under these circumstances, defendant has failed to show that he was denied his right to an impartial jury. [*People v DePlanche*, 183 Mich App 685, 691; 455 NW2d 395 (1990).]

Although defendant never expressed satisfaction with jury, defendant did not challenge the juror at issue. Accordingly, the trial court's conduct did not constitute an abuse of discretion.

VI. QUESTION POSED BY TRIAL COURT

Defendant asserts that a question posed by the trial judge was prejudicial and deprived the jury of the opportunity to decide the facts of the case. Because defendant failed to object to the trial judge's conduct, the issue is unpreserved, see *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996), and this Court must determine whether the trial court's questioning deprived defendant of a fair trial, *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996). "When questions cross the line of judicial impartiality, this Court applies the harmless-error test." *Id.* at 51. Unpreserved issues are reviewed for plain error affecting defendant's substantial rights. *Earl*, 297 Mich App at 111.

"MRE 614(b) provides that a court 'may interrogate witnesses, whether called by itself or by a party.'" *Davis*, 216 Mich App at 49. Citing *United States v Dandy*, 998 F2d 1344, 1354 (CA 6, 1993), the *Davis* Court identified situations in which a trial court has good reason to interject:

> (1) when the trial is lengthy and complex, (2) when attorneys are unprepared or obstreperous, or if the facts become confused and neither side is able to resolve

> the confusion, and (3) when a witness is difficult or is not credible and the attorney fails to adequately probe the witness, or if a witness becomes confused. In addition, we note that there might be situations in which attorneys for both sides avoid asking a witness a material question on the (traditional in some quarters) ground that counsel never ask a question without first knowing the answer. In these and other appropriate instances, the court may have good reason to question a witness in order to enhance the role of the criminal trial as a search for substantive truth. [*Id.* at 49-50 (citation omitted).]

"The principal limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality." *Id.* at 50. "The test is whether the judge's questions and comments *may* well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility . . . and whether partiality quite *possibly could* have influenced the jury to the detriment of defendant's case." *Id.* at 50-51 (citation omitted, emphasis in original). In *Davis*, the Court ruled as follows:

> [T]he questions . . . were relevant to issues in dispute and were intended to clarify those issues. There is no indication that the court's questions were intimidating or argumentative or that the court assumed the prosecutor's role in its questioning. While the answers to these questions may have contradicted defendant's claims, the questions themselves did not unjustifiably arouse jury suspicions regarding a witness' credibility. Nor is there any indication that the questions demonstrated prejudice, unfairness, or partiality on the court's part that might have influenced the jury. Further, the court specifically instructed the jury that its questions were not evidence. Under these circumstances, we find that the court's questioning of the witnesses was appropriate. The court's questions assisted the factfinder in getting to the truth about relevant issues. As long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality, we believe that a trial court is free to ask questions of witnesses that assist in the search for truth. Here, the court's questions were relevant and appropriate and did not abandon its mantle of impartiality. Accordingly, the court's questioning did not deprive defendant of a fair trial. [*Id.* at 51-52.]

Here, the trial court asked defendant whether the victim asked him to grab her wrists. The trial court's question was not intimidating or argumentative, and the court did not assume the role of the prosecutor. The answer to the question did not contradict defendant's claim that he grabbed the victim accidentally or unintentionally. Further, the question did not "unjustifiably arouse jury suspicions regarding a witness' credibility," and did not demonstrate prejudice, unfairness, or partiality by the trial court. *Id.* at 50-51. The trial court's question could have been posed by either party and it assisted the jury in reaching the truth regarding the relevant issue of whether defendant assaulted the victim. *Id.* at 51-52. Moreover, the trial judge instructed the jury that his questions were not evidence. See *id.* Because the trial court's question did not invade the province of the jury as the finders of fact, defendant was not deprived of a fair trial and there was no plain error affecting defendant's substantial rights.

VII. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor engaged in misconduct. "In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Because defendant did not object to any of the instances of alleged misconduct, the claim is unpreserved and is "reviewed for plain error affecting substantial rights." *Brown*, 294 Mich App at 382. To the extent that defendant's claim involves constitutional issues, this Court also reviews unpreserved issues of constitutional error for plain error affecting substantial rights. *Carines*, 460 Mich at 763–764.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context." *Brown*, 294 Mich App at 382-383.

Defendant contends that the prosecution's failure to turn over his cellular telephone deprived him of a fair trial. Specifically, defendant argues that the phone was favorable to the defense and that, if it had been disclosed, there is a reasonable probability that the result of his trial would have been different because it would have corroborated defendant's testimony regarding his intent. Defendant also asserts misconduct because the prosecution failed to disclose Officer Brian Kapanowski's police notes or report.

"Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). The elements necessary to prove a *Brady*[2] violation are:

> (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Schumacher*, 276 Mich App at 177 (citation and internal quotation marks omitted).

Defendant has failed to establish a *Brady* violation with regard to his cellular telephone. Although the police did recover a cellular telephone, defendant has not established that the phone constituted evidence that would have been favorable to him, *Schumacher*, 276 Mich App at 177, because he presented nothing to show it would have been possible to determine at the time of trial whether the phone was operable on the day of the offense. Further, while defendant was not provided the cellular telephone, he has not shown that he was unable to obtain it or that the state suppressed the evidence. As a result, defendant has failed to demonstrate that if the phone had been disclosed that there existed a reasonable probability that the outcome of the trial would have been different. Finally, even if defendant were able to corroborate his testimony by

[2] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

establishing that the cellular telephone was not operable on the day of the offense, the testimony of the other witnesses was sufficient to support his conviction.

Defendant has also failed to establish a *Brady* violation with regard to Officer Kapanowski's report or notes. At the outset, the record does not establish that a report or notes existed or that they were favorable to defendant. See *Schumacher*, 276 Mich App at 177. Although at one point Officer Kapanowski referred to "my report," he later testified that Corporal Michael McNamara of the Dearborn Police Department actually prepared the report and Officer Kapanowski did not prepare a report. Because it appears Officer Kapanowski did not prepare a report or notes, defendant has not established that the alleged documents were suppressed. Defendant has also failed to demonstrate that, if a report or notes existed and had been disclosed, that there is a reasonable probability that the outcome of the trial would have been different. See *id.*

Defendant claims that the testimony of Officer Kapanowski and Corporal Michael McNamara were inconsistent and misled the jury. He further contends that their testimony was not sufficient or reliable enough to support his conviction and that the prosecutor improperly commented on Officer Kapanowski's testimony.

Defendant's assertions regarding the testimony of Officer Kapanowski and Corporal McNamara is not a claim of prosecutorial misconduct, but rather a challenge to the sufficiency of the evidence. It is true that Corporal McNamara and Officer Kapanowski's testimony was inconsistent regarding some details. Corporal McNamara said defendant pushed the door open with his hands while Officer Kapanowski testified that defendant may have used his shoulder to force open the victim's door. "In general, conflicting testimony or questions concerning the credibility of the witnesses are not sufficient grounds for granting a new trial." *People v Brantley*, 296 Mich App 546, 553; 823 NW2d 290 (2012), amended 296 Mich App 801 (2012). Because it is the trier of fact's role to determine the weight of the evidence and the credibility of witnesses, *Eisen*, 296 Mich App at 331 (citations omitted), there was no basis to strike the testimony of Officer Kapanowski or Corporal McNamara.

Moreover, it was not improper for the prosecutor to refer to Officer Kapanowski's testimony. "[A] prosecutor is entitled to argue the evidence and reasonable inferences from the evidence." *People v Comella*, 296 Mich App 643, 654; 823 NW2d 138 (2012). The prosecutor stated that Officer Kapanowski testified that he saw defendant "shoulder his way in," which is consistent with his testimony that defendant may have used his shoulder to gain entry to the home. Because the prosecutor properly argued from the evidence, no error occurred.

Defendant also claims the prosecutor engaged in misconduct when he: (1) asserted that defendant was lying, (2) stated that it was not the prosecution's burden to prove motive, and (3) commented on the absence of defendant's cellular telephone. A prosecutor is free to argue "that a witness is not worthy of belief." *People v Caldwell*, 78 Mich App 690, 692; 261 NW2d 1 (1977). When a defendant testifies, "his credibility may be impeached and his testimony assailed like that of any other witness." *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995) (citation and internal quotation marks omitted). This Court has ruled that a prosecutor may argue that the defendant is lying if such remarks are related to and supported by the evidence. *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973).

During closing argument, the prosecutor stated that defendant was "trying to hoodwink" and "mislead" the jury. In rebuttal, he also stated that defendant was lying, defendant's testimony was "not true," and stated, "[d]amn lies." Based on the testimony elicited from other witnesses, the prosecutor's argument that defendant was lying was not improper.

Contrary to defendant's assertion of error, it is not necessary to prove motive as an element of the offense of first-degree home invasion. See *Baker*, 288 Mich App at 384. Defendant appears to confuse the concepts of motive and intent. "A motive is an inducement for doing some act; it gives birth to a purpose. The resolve to commit an act constitutes the intent." *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925). Specifically, "[t]he motive inducing the resolve, while illuminative of the intent, is necessarily merged therein, and is not an essential element in proving commission of crime. The essential element of intent is not at all dependent upon motive." *Id.* During closing argument, the prosecutor stated that he did not have to prove motive, but explained what he believed to be defendant's motive. The prosecutor's comment that it was unnecessary to prove defendant's motive for the charged offense did not constitute error.

Defendant also argues that it constituted misconduct for the prosecutor to comment on the absence of defendant's cellular telephone. "[A] prosecutor is entitled to argue the evidence and reasonable inferences from the evidence." *Comella*, 296 Mich App at 654. During his closing argument, the prosecutor stated that defendant claimed his cellular telephone was dead, but he did not mention this to the police when interviewed. The prosecutor further noted that the cellular telephone was absent and that Officer McNamara testified that it was recovered. Although he did not explain why the telephone was not introduced, the prosecutor's comments accurately referred to the facts and testimony of the witnesses and, thus, were not improper.

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant alleges his counsel provided ineffective assistance at trial. Because defendant did not move for a new trial or *Ginther* hearing, the issue is unpreserved and this Court's review "is limited to mistakes apparent on the record." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

Defendant contends that trial counsel was ineffective in failing to: (1) investigate four potential witnesses, (2) attempt to locate defendant's cellular telephone, and (3) strike a biased juror.

> In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. [*People v Crews*, __ Mich App __; __ NW2d __ (Docket No. 305830, issued February 5, 2013) (slip op at 10) (citations omitted).]

"Effective assistance of counsel is presumed and defendant must overcome the presumption that counsel's performance constituted sound trial strategy. 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." *Marshall*, 298 Mich App at 612.

Defendant argues that trial counsel was ineffective for his failure to investigate four potential witnesses—the police sergeant with whom defendant first spoke, defendant's sister, a man who lived in a house where defendant first knocked, and the friend defendant was going to visit. Defendant also asserts that trial counsel was ineffective for failing to obtain his cellular telephone. "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight. Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (citations omitted). Defendant has failed to overcome the presumption that the decision of trial counsel to not present any of the referenced witnesses or the cellular telephone constituted sound trial strategy. Because defendant was able to present his defense through his own testimony, he was not deprived of a substantial defense. *Id.*

Defendant has also failed to demonstrate prejudice because he has not established a reasonable probability that the testimony of any of the potential witnesses would have affected the outcome of the case. See *Crews*, __ Mich App at __ (slip op at 10). Similarly, defendant has failed to demonstrate that it would have been possible to determine whether the phone was operable at the time of the offense and that admission of the cellular telephone into evidence would have been favorable to him.

Defendant further argues that trial counsel failed to object to or strike a biased juror. This Court has recognized that "an attorney's decisions relating to the selection of jurors generally involve matters of trial strategy." *Johnson*, 245 Mich App at 259. Defense counsel's failure to challenge the juror for cause did not constitute ineffective assistance because the juror's statements did not establish a ground for her dismissal, and "counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant suggests that the cumulative effect of the alleged errors constituted ineffective assistance of counsel. This Court has stated:

> "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal. . . ." A new trial is warranted if the combination of errors denied the defendant a fair trial. "[T]he cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." [*People v Douglas*, 296 Mich App 186, 202-203; 817 NW2d 640 (2012), lv gtd 493 Mich 876 (2012) (citations omitted).]

Because none of the alleged instances of ineffective assistance of counsel constituted error, no cumulative effect warrants reversal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan