

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE MARTIN FARLEY,

Defendant-Appellant.

UNPUBLISHED
November 19, 2013

No. 310254
Macomb Circuit Court
LC No. 2011-002012-FH

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

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). He was sentenced, as a fourth-offense habitual offender, MCL 769.12, to a term of 150 to 300 months' imprisonment. We affirm defendant's conviction and sentence, but remand with instructions to amend the judgment of sentence to reflect defendant's status as a habitual offender.

As an initial matter, we note that for every claim of error raised, defendant states in his questions presented that his equal-protection rights were violated. However, defendant fails to address the merits of these arguments. The only constitutional arguments raised in defendant's appellate brief address his due-process rights and do not cite any authority supporting his argument that his equal-protection rights were violated. Thus, to the extent that defendant argues that his equal-protection rights were violated by the claimed errors, these issues are abandoned. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue."). Additionally, defendant notes that every unpreserved issue may be reviewed on ineffective assistance of counsel grounds, but fails to address the merits of these arguments. Accordingly, these issues are also abandoned.

I. MOTION FOR DIRECTED VERDICT

Defendant first argues that the trial court erred when it denied his motion for a directed verdict because the description of the intruder the homeowner provided to police did not match defendant's height and weight, making the homeowner "not credible."¹ We disagree.

We review a trial court's denial of a motion for a directed verdict de novo, viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Passage*, 277 Mich App 175, 176-177; 743 NW2d 746 (2007). The alternative elements of first-degree home invasion are (1) that the defendant either breaks and enters a dwelling or enters a dwelling without permission; (2) that the defendant either intends when entering to commit a felony, larceny, or assault in the dwelling, or at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault; and (3) while the defendant is entering, present in, or exiting the dwelling, either the defendant is armed with a dangerous weapon or another person is lawfully present in the dwelling. MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 42-43; 780 NW2d 265 (2010). "[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

The homeowner testified that she found defendant in her house, without her permission, after she came back inside after dropping a trash bag in a trash can and picking up trash that had been strewn on the side of her house. After struggling with defendant, he fled. A short while later, her neighbor called to inform her that he found her purse thrown on the deck in his yard. This evidence was sufficient for a rational trier of fact to conclude that the three alternative elements of first-degree home invasion were proven beyond a reasonable doubt.

With regard to the element of identity, defendant argued in his motion for a directed verdict that the description the homeowner gave to the police immediately after the intrusion was so different from defendant's actual height and age that the homeowner lacked credibility. However, trial courts are not permitted to evaluate witnesses' credibility in ruling on motions for a directed verdict. *People v Lemmon*, 456 Mich 625, 649 n 3; 576 NW2d 129 (1998). Further, the homeowner provided a sensible reason for each disparity. The homeowner testified that defendant seemed taller than he is because she attempted to deduce defendant's height based on her own when he had her pushed up against a door and they were face-to-face. The homeowner also testified that defendant looked younger than he is because, on the night of the intrusion, he was clean-shaven, "[h]is face was kind of gaunt," and she "saw no markings of an older person," such as wrinkles. In addition, there was expert testimony that defendant was a major contributor

¹ Defendant briefly states that the trial court's decision deprived him of his due-process rights, but fails to address the merits of this argument. Thus, this issue is abandoned. See *Harris*, 261 Mich App at 50.

to DNA recovered from a button found in the house, which had contained green and white fibers that matched the homeowner's description of the intruder's shirt. Although defendant's expert challenged this evidence, that testimony was heard after defendant's motion for a directed verdict. Thus, given the deference afforded to the prosecution, there was sufficient evidence for a rational trier of fact to conclude that the element of identity was proven beyond a reasonable doubt. See *Passage*, 277 Mich App at 176-77.

II. IN-COURT IDENTIFICATION

Defendant next argues that his due-process rights were violated when the trial court failed to suppress the homeowner's in-court identification of defendant because he was subjected to an improperly suggestive in-person lineup. We disagree.

Not only did defendant not object to the homeowner's in-court identification, but also he failed to gather evidence to support his allegations after the trial court instructed him to do so. Thus, this issue is unpreserved, and we will review it for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must prove that the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity[,] or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, 460 Mich at 763-764.

For an identification procedure to violate a defendant's due-process rights, the suggestiveness of the procedure must create a "substantial likelihood of misidentification." *Neil v Biggers*, 409 US 188, 199-201; 93 S Ct 375; 34 L Ed 2d 401 (1972). According to defendant, he was subjected to a suggestive lineup because he was taken to the district court in Warren, with no charge pending against him there, and was left in the jury box when he saw the homeowner in the audience. As such, defendant claims that the homeowner committed perjury when she testified at trial that she had never previously seen him. However, defendant offers no evidence to support his claim. A review of the record reveals that no proceedings in this case took place at the district court in Warren. Additionally, the homeowner and the lead detective each denied defendant's allegations. Thus, without any supporting evidence, defendant has failed to show plain error warranting relief.

III. DISCOVERY DEMAND

Defendant next argues that the prosecution violated his due-process rights when it did not give defense counsel information relating to the second photographic lineup that occurred at the district court in Sterling Heights. We disagree.

We review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

At trial, the lead detective testified that the homeowner made a positive identification of defendant during a second photo array that he showed her at the district court. However, defendant argues that defense counsel was not provided with the report the detective had written. Defendant argues the prosecutor was required to provide defendant with the reports and

witness's statements regarding this matter, which were mandatory pursuant to MCR 6.201(A) and (B).

MCR 6.201(A)(2), makes it mandatory for the prosecutor, upon request, to disclose to the defendant "any written or recorded statement . . . pertaining to the case by a lay witness whom the party may call at trial." In addition, upon request, the prosecuting attorney must provide the defendant with "any exculpatory information or evidence known to the prosecuting attorney" and "any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation." MCR 6.201(B)(1) and (2). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Here, the first photo array was shown to the homeowner on March 31, 2011, and she was unable to identify the intruder, but she believed it was either number four or number two. Because she was distraught, the detective testified that he put the matter on hold. On June 8, 2011, the detective met the homeowner at the district court, where upon first contact the homeowner immediately told the detective that she knew 100 percent who the intruder was. Because the detective had the file with him, he let her look at the photo array again, where she positively identify the intruder as number four, which was defendant. It appears that the detective included this information in a follow-up report made in October 2011. The record indicates that defense counsel made his demands for discovery on August 29, 2011. Although MCR 6.201(A) and (B) makes it mandatory to disclose written statements of witnesses and police reports, there can be no discovery violation when the report does not exist at the time of the request. Further, the detective testified that he informed the prosecutor and the defense counsel, at the district court, of the homeowner's positive identification. Thus, defendant knew that the homeowner had made a positive identification, which eliminated any surprise at trial. See *People v Johnson*, 356 Mich 619, 621; 97 NW2d 739 (1959) (quotation marks and citations omitted) ("The purpose of broad discovery is to promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate the vestiges of trial by combat."); *People v Taylor*, 159 Mich App 468, 406 NW2d 859 (1987) (finding "that defendant was entitled to no remedy for the prosecutor's nondisclosure of the letter in question since the defendant, having written it himself, had knowledge of it independent of discovery."). Additionally, there is no due-process violation because the report contained the homeowner's positive identification of defendant, which is not favorable to the accused. There is no indication that the detective's report contained any other statements made by the homeowner that would have been favorable to the accused. Accordingly, defendant has failed to show plain error warranting relief.

IV. ADMISSION OF LABORATORY REPORTS

Defendant next argues the prosecution's DNA evidence lacked a proper foundation and the trial court erred when it admitted a laboratory report authored by Jennifer Morgan, a forensic scientist at the Michigan State Police crime laboratory, because the report was hearsay and violated the Confrontation Clause. We disagree.

First, defendant argues that the DNA evidence was admitted “without a proper foundation,” and thus, unreliable, because “[t]here was no proof that the statistical probabilities used were in compliance with stated, approved[,] and recognized industry and/or governmental standards.” We disagree. Defendant did not challenge the admission of the DNA evidence on this ground, so we review this unpreserved issue for plain error affecting the defendant’s substantial rights. *Carines*, 460 Mich at 763-765.

There was ample proof that the laboratory procedures and statistics used were generally accepted in the scientific community and were of “reliable principles and methods.” MRE 702; see also *People v Coy*, 258 Mich App 1, 10; 669 NW2d 831 (2003). Morgan testified that the laboratory was accredited, and she was required to complete two rounds of proficiency tests every year. She also testified that before releasing a final report, all work performed undergoes a peer review. Further, Morgan testified that the statistics used in her report have been endorsed by the National Research Council, which is subjected to peer review within the scientific community. In addition, Jeffrey Nye, the prosecution’s rebuttal expert witness and a Michigan State Police forensic analyst, testified on direct examination that there were “several organizations” that “evaluate the methodologies” the crime laboratory uses “and how [they] apply them,” including the American Society of Crime Lab Directors, which conferred upon the laboratory “an accreditation certificate that’s the hallmark of forensic programs in the United States.” Nye also said that the laboratory follows “the FBI’s quality assurance standards for forensic DNA testing laboratories.” Other than mere assertions regarding unreliability of the laboratory’s methodologies, defendant fails to explain how the procedures and statistical probabilities used by the laboratory were actually unreliable or failed to comply with generally accepted laboratory procedures.

Second, defendant argues that the laboratory report and related testimony that linked defendant’s DNA to the DNA found on a button at the crime scene was inadmissible hearsay. We disagree. Defendant objected to Morgan’s testimony regarding the report, preserving this issue for appeal. However, defendant failed to object to the admission of the laboratory report. We review preserved, evidentiary errors for an abuse of discretion, and unpreserved, constitutional errors for plain error affecting substantial rights. *Carines*, 460 Mich at 763; *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” US Const, Am VI; Const 1963, art 1, § 20. “The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination.” *People v Payne*, 285 Mich App 181, 196; 774 NW2d 714 (2009), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Here, it is clear that the laboratory report was prepared in anticipation of litigation and to establish defendant’s presence at the crime scene, and thus, it is testimonial hearsay. See *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003); *Payne*, 285 Mich App at 197. As such, defendant was “entitled to ‘be confronted with’ the analysts at trial.” *Melendez-Diaz v Massachusetts*, 557 US 305, 311; 129 S Ct 2527; 174 L Ed 2d 314 (2009), quoting *Crawford*, 541 US at 54. Defendant argues that because another analyst, Brandon Good, performed some of the data-collection functions for Morgan’s report, but did not testify, his constitutional right to confront the witnesses against him was violated when the trial court admitted the report and permitted Morgan to testify regarding it.

There was no dispute that Morgan both prepared the report and testified regarding its contents. Concerning Good's role, Morgan stated that

he obtained the buccal sample and did the processing steps which would be the extraction, the quantitation, the amplification, and then the instrumentation. [He ran] it through the genetic analyzer where the DNA profile is generated. At that point then he handed all of the information and data to me, where I added it to my case record and made the interpretations from that.

Morgan described the DNA-processing steps as follows:

The first part of the analysis requires an extraction step. So as I mentioned DNA is contained in cells. So the extraction step involves breaking open the cell structure and releasing the DNA that might be contained in or on the item. The second step is a quantitation step, which is where we would analyze how much DNA is actually obtained from that item. And then the third step would be an amplification process. And this is where we would take a targeted DNA amount and amplify it or make millions of copies so that we can interpret it or have a DNA profile that we can read. And then the final step is to process it and generate that DNA profile.

Good primarily executed data collection on defendant's buccal swab sample and did not write the report, instead giving the information and data to Morgan, who made her own conclusions after comparing defendant's buccal sample to the DNA recovered from the button. Good did not formulate his own opinions or conclusions from the data, see *People v Dinardo*, 290 Mich App 280, 290; 801 NW2d 73 (2010) (noting that the documents at issue in *Melendez-Diaz* and *Payne* contained the analysts' own written conclusions on the data); *People v Dendel*, 289 Mich App 445, 445; 797 NW2d 645 (2010) (finding that a nontestifying analyst's conclusion that an individual's glucose level was zero at the time of his death was testimonial hearsay); he simply extracted the data and ran it through the genetic analyzer to obtain a DNA profile. The fact that Good processed the evidence relates more to the chain of custody, which goes to the weight of the evidence and not its admissibility, see *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994), and the Confrontation Clause does not require the prosecution to call as a witness "anyone whose testimony may be relevant in establishing the chain of custody." *Melendez-Diaz*, 557 US at 311 n 1. Comparing the respective responsibilities of Good and Morgan, the laboratory report in this case was not prepared by a nontestifying analyst. It was Morgan's analysis and report that linked defendant's DNA to the DNA found on a button at the crime scene, and she testified at trial and was amply cross-examined, affording defendant the right to "be confronted with the analyst[] at trial." *Id.* at 311 (quotation marks and citation omitted). Accordingly, the admission of the laboratory report and Morgan's testimony did not violate the Confrontation Clause.

V. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed misconduct when he stated, during closing argument, that defendant did not appear for a police interview. We disagree.

Because defendant did not object to the comments he argues were improper, this issue is not preserved for appellate review, and we review it for plain error affecting substantial rights. *Brown*, 294 Mich App at 382. Reversal is not required “where a curative instruction could have alleviated any prejudicial effect. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements.” *People v Unger (On Remand)*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

The prosecution violates a defendant’s due-process rights when it comments on a defendant’s postarrest, post-*Miranda*² silence. *Doyle v Ohio*, 426 US 610, 611; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Borgne*, 483 Mich 178, 186-187; 768 NW2d 290 (2009). However, because “under the United States Constitution, use of a defendant’s silence only deprives a defendant of due process when the government has given the defendant a reason to believe both that he has a right to remain silent and that his invocation of that right will not be used against him,” a defendant’s prearrest silence, as well as his postarrest but pre-*Miranda* silence, may be used against him. *Borgne*, 483 Mich at 187-188, citing *Fletcher v Weir*, 455 US 603, 605-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Jenkins v Anderson*, 447 US 231, 239-240; 100 S Ct 2124; 65 L Ed 2d 86 (1980).

Here, because the prosecution’s comments during closing argument concerned defendant’s consent to and subsequent nonappearance at an interview that was to occur before his arrest, the commentary did not violate defendant’s due-process rights. See *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996) (noting that the prosecution’s introduction of testimony that the defendant canceled a scheduled police interview did not violate the defendant’s due-process rights because he was not in custody and had not invoked his right to remain silent).

Defendant also contends that the prosecution’s reference to his nonappearance at the police interview before his arrest violated MRE 401, MRE 402, and MRE 403 “by injecting irrelevant and unfairly prejudicial matters into the trial.” However, these rules deal with the admission of evidence and not closing arguments. In addition, prosecutors may “argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case,” *Unger (On Remand)*, 278 Mich App at 236. And the portion of the prosecution’s closing argument with which defendant takes issue was a restatement of Hill’s testimony concerning his attempts to contact defendant for an interview, and do not amount to misconduct. Finally, any perceived error would have been cured by the trial court’s instruction that closing arguments were not evidence. See *id.* at 235.

VI. SENTENCING

Defendant next argues that because the sentencing information report and the judgment of sentence do not indicate that defendant was sentenced as a habitual offender, his sentence of 150 to 300 months’ imprisonment violates MCL 750.110a(5), which limits the maximum sentence for first-degree home invasion to 240 months’ imprisonment. Defendant also argues

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

that because his maximum sentence could not be more than 240 months' imprisonment, his minimum sentence of 150 months' imprisonment would violate the two-thirds rule articulated in *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). We disagree.

We review this unpreserved issue for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-765.

There are several indications that the omission of defendant's status as a habitual offender from the judgment of sentence was a clerical error. The trial court sentenced defendant to 150 to 300 months' imprisonment, and this sentence could only result if the trial court concluded that defendant was a fourth habitual offender.³ The prosecutor also filed a notice before trial of an intent to seek an enhanced sentence, and this fact was brought to the trial court's attention at sentencing. The prosecutor also noted at sentencing that defendant's maximum sentence would be increased to life because of the habitual-offender classification. The prosecutor further noted at sentencing that the parties discussed dismissing the habitual-offender status during plea discussions, but an agreement was never reached. Further, defendant stated that he had no objections to the presentence investigation report (PSIR), which classified defendant as a fourth habitual offender and provided that the minimum sentencing range was 72 to 240 months. The trial court acknowledged on the record that this was the correct minimum sentencing range. Additionally, the PSIR recommended that defendant be sentenced to 120 to 240 months' imprisonment, which defendant agreed to. The facts indicate that the trial court and defendant were well informed of defendant's habitual-offender status. Accordingly, defendant's sentence was proper as a fourth habitual offender. The omission of defendant's habitual-offender status was mere clerical error, and pursuant to MCR 7.208(A)(1), we remand for the trial court to correct this clerical error.

Defendant also argues that the trial court sentenced him on the basis of incomplete and inaccurate information because it did not consider departing downward from the guidelines based on several mitigating factors. We disagree.

We review this unpreserved issue for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-765. If a minimum sentence is within the appropriate guidelines, this Court must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining

³ First-degree home invasion, MCL 750.110a(2), is a class B offense. MCL 777.16f. Defendant's prior-record variable level is F, and his offense variable level is I, which corresponds to a minimum sentence range of 72 to 120 months. MCL 777.63. As a fourth habitual offender, MCL 769.12, the upper limit is to be increased by 100 percent, MCL 777.21(3)(c), yielding a minimum sentence range of 72 to 240 months. With regard to defendant's maximum punishment, although first-degree home invasion is punishable by up to 20 years' (240 months') imprisonment, see MCL 750.110a(5), the habitual-offender statute provides that the trial court "may sentence the person to imprisonment for life or for a lesser term." MCL 769.12(1)(b).

the sentence. MCL 769.34(10); *People v Gibbs*, 299 Mich App 473, 485; 830 NW2d 821 (2013).

Defendant claims that the trial court did not rely on accurate information in sentencing defendant because it failed to consider his strong family support, his substance-abuse history, and the fact that he was subjected to physical abuse by his step-father. However, there is no requirement that the trial court consider mitigating factors when imposing a sentence. See *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011). Defendant also argues that based on his history there is an inference that he suffers from a “serious mental disease,” and the trial court was required by *People v Triplett*, 407 Mich 510; 287 NW2d 165 (1980), to conduct an assessment of his rehabilitative potential. However, no such requirement exists. Further, the trial court did consider defendant’s rehabilitative potential, noting that defendant has been a “career criminal” and implying that prison is best for defendant to achieve rehabilitation.

Finally, defendant claims that the trial court erred when it did not state any reasons on the record why both the minimum and maximum sentences were proportionate. However, the trial stated that defendant had been involved in criminal activity for 37 years, committing 6 felonies and 12 misdemeanors. The trial court also stated that the sentence must be tailored to fit the particular defendant and case, and stated that defendant was “done as a career criminal.” Further, the trial court relied on the information contained in the PSIR, which defendant did not object to, and sentenced defendant within the sentencing guidelines.

Accordingly, defendant has failed to show plain error. Absent a showing that the trial court relied on inaccurate information, we must affirm defendant’s sentence, as it is within the appropriate guidelines.

VII. CONCLUSION

We affirm defendant’s conviction and sentence. We remand for the trial court to amend the judgment of sentence to reflect defendant’s status as a fourth habitual offender. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra