

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 9, 2012

v

MUQARIBU AUNDUNAE MILES,

Defendant-Appellant.

No. 302497
Jackson Circuit Court
LC No. 09-006113-FH

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2); however, the jury could not reach a verdict with respect to felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 18 to 40 years' imprisonment with credit for 262 days served. Following trial, the trial court denied defendant's motion for a new trial or to vacate his conviction based on the presence of extrinsic information that was inadvertently submitted to the jury during deliberations. Defendant appeals as of right both the trial court's order and his conviction and sentence. For the reasons set forth in this opinion, we affirm.

I. FACTS

Sometime in late September 2009, police stopped a vehicle in Canton Township that was driven by a man named Marcel Conner. According to Conner, defendant and Justin Robinson were passengers in the vehicle and when police stopped the vehicle defendant fled on foot. Police discovered stolen catalytic converters in the vehicle. During the traffic stop, Conner implicated defendant in the crime.

A few days later when Conner was released from jail, defendant met Conner at a party store in Jackson where, according to Conner, defendant and another man "jumped" Conner and physically beat, kicked, and "stomped" him. Defendant agreed at trial that he beat Conner "pretty bad" that evening. Conner testified that defendant was upset that Conner implicated him in the theft; Conner did not report the assault to police.

Shortly thereafter, on October 3, 2009, Conner was at the home of Rebecca Robinson visiting his girlfriend Jennifer Snyder, the mother of two of his young children. Conner planned

to take his children to spend the night at his grandmother's house. Later that evening after dark, Conner exited Robinson's home through a door onto a screened-in porch when he was immediately accosted by defendant. Specifically, Conner testified that when he exited the home onto the porch, defendant "jumped" him while he was "brandishing" a silver handgun. Conner testified that defendant stated that he did not like "snitches" and said "I'm here to get you," and threatened to kill Conner. According to Conner, defendant grabbed him and said "come with me" and started pulling him away from the door. Defendant threatened to kill Conner, and Conner resisted and yelled for help.

Snyder testified that when Conner exited the home she heard a loud "bang" and immediately heard a child scream and then heard Conner yelling for her. Snyder rushed to the door and saw that defendant had a hold of Conner and was pulling him away from the door. A struggle ensued where Snyder grabbed hold of both defendant and Conner and tried to pull them apart. According to Snyder, the struggle took place on the enclosed porch and the entryway of the home and both she and Conner testified that defendant stepped over the doorstep into the home. Snyder testified that defendant pulled a gun out of his pocket and told her to "let go." Snyder testified that she released her hold of defendant at that point. According to Snyder, a police car effectuated a traffic stop nearby and defendant walked away.

Eva Harrell, a friend of Rebecca, testified that she was in another room of the Robinson home that evening when she heard a loud commotion near the door. Harrell testified that she heard someone say the word "gun" and heard a child exclaim "don't shoot my daddy!" Harrell stayed in a separate room with her children and did not approach the door.

After defendant left the scene, one of Rebecca's children alerted her to the commotion. Rebecca testified that when she came downstairs to investigate, Conner, Snyder, and one of her sons exclaimed that defendant had a gun. Rebecca called 911 and the telephone call was played for the jury at trial. Rebecca testified that a couple weeks before the incident, she told defendant not to come over to her home. However, Rebecca testified that she left the front door to her porch unlocked on the night of the incident. Defendant denied that Rebecca told him not to return to the home.

Defendant was charged as an habitual offender, fourth offense, MCL 769.12, with first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. On the first day of trial outside the presence of the jurors, the prosecutor informed the trial court that she had certified copies of defendant's prior felony convictions and that the copies were marked as "People's Exhibit 1." At the time of trial, defendant had the following prior felony convictions: 1) malicious destruction of property over \$100; 2) conspiracy to commit false pretenses over \$100; 3) carrying a concealed weapon; 4) fleeing and eluding—third degree; 5) resisting and obstructing a police officer; 6) felon in possession of a firearm; 7) malicious destruction of police property; 8) fleeing and eluding—third degree; and 9) felony-firearm. The prosecutor indicated that she and defense counsel agreed to stipulate to the jury that defendant had a prior felony conviction for the felon in possession charge so that defendant's criminal record would not be published to the jury.

At trial, defendant testified and agreed that he appeared uninvited at Robinson's home after dark on October 3, 2009. Defendant agreed that he did not give anyone advance notice that

he was going to appear at the home that night and he agreed that no one invited him over or gave him permission to approach the home. Defendant agreed that his presence at the home surprised Conner and he stated that Conner probably screamed because he thought he was going to “get beat up again.” However, defendant testified that he went to the Robinson home because he wanted to talk to Justin and he knew that Justin frequented the home. Defendant testified that he wanted to explain that the converter theft was only a misdemeanor. Defendant stated that as he approached the home, Conner happened to be exiting the porch. Defendant testified that he grabbed Conner’s arm and asked him to talk, and he stated that when Conner responded that he did not want to talk, defendant pulled a cellular telephone out of his pocket and handed it to Conner and asked him to call Justin. According to defendant, Conner screamed and he ended up on the porch struggling with Conner, Snyder and their children. Specifically, defendant stated that while he was holding Conner’s arm, when Snyder and the children pulled Conner back toward the entrance to the house, this propelled him onto the enclosed porch. Defendant also testified that Snyder grabbed hold of him. Defendant testified that he wanted to leave but Snyder would not release him so he took his cellular telephone out of his pocket and told her to call police. Defendant denied that he had a gun. During his direct testimony, defendant stated that he had three prior misdemeanor convictions, an “R & O,” and a “couple other thing[s].” On cross-examination, defendant agreed that he was a convicted felon and that a felony charge was not a new experience for him.

At trial, the prosecutor introduced a recorded telephone conversation that defendant placed to his fiancé Sherry Heard while he was incarcerated following his arrest. During the telephone conversation, defendant informed Heard that it would be “horrible” for him if Conner testified at trial and that he would “never, ever see the daylight.” Defendant encouraged Heard to talk to Conner’s brother because he could make Conner “change his mind.” Defendant testified that during the conversation he wanted Heard to try and convince Conner to tell the truth.

After the close of proofs on the morning of June 23, 2010, the jury began deliberations. Shortly thereafter, on the same day, the jury requested all of the items entered into evidence. The jury deliberated for the rest of the day and was excused at about 5:30 p.m. At about noon the next day, June 24, 2010, the jury convicted defendant of first-degree home invasion but could not reach a verdict with respect to the remaining offenses. The trial court accepted the jury’s verdict and declared a hung jury with respect to the other three counts.

On the day after trial, the prosecutor went into the jury room to retrieve the exhibits. The exhibits were in a stack on a table and the prosecutor noticed that defendant’s criminal record was on the top of the stack of exhibits. The prosecutor immediately notified the trial court and defense counsel and defense counsel appeared at court that day. The prosecutor informed the court that the criminal record must have inadvertently been included with all of the other exhibits. She stated that she was surprised to find the criminal record because she and defense counsel and the trial court spoke with the jurors immediately after the trial and none of the jurors indicated that they were aware of defendant’s criminal record. The prosecutor stated that the jurors expressed surprise when she mentioned defendant had a criminal record. The trial court indicated that it would address the issue at another hearing, and on June 30, 2010, the court reconvened with the prosecutor, defense counsel, and defendant present. Defense counsel argued that the criminal record had tainted the jury and prejudiced defendant. The trial court

agreed to consider a motion to vacate defendant's conviction, but indicated that it would proceed with sentencing.

Defendant moved for a new trial or to vacate his conviction, arguing that the presence of his criminal record in the jury room denied him his constitutional right to a fair trial. The prosecutor responded and argued that defendant did not suffer any prejudice where the jurors expressed surprise at defendant's prior record and where the jury failed to reach a verdict on the weapons offenses—the offenses most similar to defendant's prior felony convictions. At a sentencing hearing, the trial court heard oral arguments and then denied defendant's motion. The court found that defendant could not show prejudice where the jurors expressed surprise at defendant's criminal record and where the jury did not convict defendant of the offenses that were most similar to his criminal history. However, after the trial court sentenced defendant and went off the record, the trial court reconvened and indicated that it had received a telephone message from a juror and had held a conference call with the prosecutor, defense counsel, and the juror. The juror indicated that he telephoned the court after having read a newspaper article about how defendant's criminal record had been inadvertently submitted to the jury. The juror stated that the jury wanted the exhibits to determine whether defendant had a prior felony conviction and that the jury must have missed the fact that the parties' stipulated to the prior conviction. The trial court indicated that it would hold an evidentiary hearing so that the jurors could testify.

On February 9, 2011, the trial court held an evidentiary hearing where 11 of the 12 jurors testified. Juror Olson testified that he was unsure as to what order the jury addressed the charges during deliberation. He indicated that the jury reached a consensus on the home invasion charge, then discussed the other charges and could not agree, and then returned to the home invasion charge and took a final vote. Olson testified that the jury requested all of the exhibits to use as a "reference point," but not as a focus, and stated that defendant's criminal record was among the exhibits. Olson testified that he thought the jury was nearing a consensus on the home invasion count when the exhibits were brought into the room and he stated that defendant's criminal record was not a focal point of the jury's discussion of the home invasion charge. He stated that when the jury addressed the other charges they "dug deeper" into the exhibits. Olson stated that he "glanced" at defendant's criminal record.

Juror Adams testified that he thought the jury started with the home invasion charge then went on to discuss the other charges then returned to the home invasion charge for a "final vote." Adams indicated that he did not recall looking at defendant's criminal record, but testified that a couple jurors may have seen the criminal record when they "skimmed through" all the other exhibits. Adams testified that one of the jurors stated that defendant's record was not supposed to be in evidence and then the jurors stopped looking at it. Adams testified that he did not recall the jury discussing defendant's criminal record during deliberation on the home invasion charge.

Juror Dunnick testified and was unclear regarding the order in which the jury addressed the charges. Dunnick testified that the jury did not look at defendant's criminal record in reaching a decision on the home invasion charge. Dunnick testified that she did not recall anyone discussing defendant's criminal history and she stated that, other than a photograph, the jury did not pass exhibits around during deliberations.

Juror White testified that the jurors first skipped around in addressing the counts, but then decided to consider the counts in order. White testified that the jury did not initially review the exhibits, or discuss defendant's criminal record. White testified that one of the jurors picked up defendant's criminal record after the jury decided to convict defendant of home invasion, but she did not recall the document being passed around.

Juror Burns testified that she did not recall the sequence in which the jury discussed the counts. She looked at a photograph exhibit, but did not review any other evidence. Burns testified that when a juror made a comment about defendant's criminal record, another juror stated that defendant's criminal record was not to be considered and the record was set aside at that point.

Juror Miller, the jury foreman, testified that the jury addressed each charge in sequence. Miller testified that the jury did not learn of defendant's criminal record until after it reached a unanimous verdict on the home invasion count. Miller stated that defendant's criminal record had no influence over the home invasion conviction because the jury addressed each element of the offense and reached a unanimous agreement as to all the elements. Miller testified that, at one point during deliberations, one of the jurors mentioned defendant's prior felony convictions but the other jurors did not express any interest in the criminal record. Miller indicated that the other jurors did not think the criminal record was out of place because it was evidence of a prior felony. Miller testified that he suggested that the jury review defendant's criminal record in more detail, but the other jurors rejected that suggestion and indicated that they were supposed to focus on evidence admitted in the courtroom.

Juror Struber testified that the jury decided the home invasion charge before it addressed the other charges. Struber testified that she recalled reviewing testimonies in reaching a conclusion on the home invasion charge. Struber was aware of defendant's criminal record but she did not personally review it. Struber testified that two or three jurors looked at defendant's criminal record, but ultimately set it aside after deciding that it should not be taken into consideration. Struber testified that someone may have said something about a gun charge but she did not recall specifics about defendant's criminal history, other than the fact that it amounted to a "long list."

Juror Davis testified that the jury first considered the home invasion charge and she did not think that any of the jurors looked at defendant's criminal record before deciding to convict him of that charge. Davis testified that defendant's criminal record was not brought into the jury room until the second day of deliberations. Davis stated that she looked through the exhibits and saw defendant's prior criminal record and informed the other jurors that his criminal history was with the other exhibits. Davis testified that she was surprised at how lengthy defendant's criminal history was. Davis testified that one other juror looked at defendant's criminal record but the other jurors stated that they did not care what defendant did before, and that they were not to take defendant's history into consideration. Davis did not think that she looked at the prior history before reaching a result on the home invasion charge. She could not recall what was in defendant's criminal history but thought that there was something about felony assault. Davis testified that, before deliberations began, the jury was aware that defendant had a prior felony for a weapons offense.

Juror Ransom testified that the jury decided the home invasion charge after it could not reach agreement on the other charges. Ransom testified that the jury considered the layout of the house and landscaping when it discussed the home invasion charge. Ransom stated that she looked at defendant's criminal history after reaching a verdict on the home invasion charge. However, Ransom indicated that she did not recall the contents of the record because she merely glanced at it and then glanced at it again when someone else was holding it. She did not know how many people looked at the criminal history. Ransom did not recall discussion about the criminal record because one of the jurors stated that the history should not be considered and the jurors set the document aside at that point.

Juror Carpenter testified that the jury debated several of the charges before arriving at a final decision. Carpenter testified that the jury considered exhibits that pertained to the home invasion charge during discussion of that charge. Carpenter testified that after the jury reached a conclusion on the home invasion charge, she heard discussion about defendant's prior criminal history on the opposite side of the table but she did not look at the document.

Juror Cornwell testified that the jury discussed all of the charges. He stated that he did not look at defendant's criminal record, discuss it with anyone, or hear anyone else discussing it.

After hearing testimony from the jurors and oral arguments from both parties, the trial court again denied defendant's motion for a new trial or to vacate his conviction. The court reasoned that, before deliberation, the jurors were aware that defendant had a felony conviction because the parties stipulated to that fact during trial. The court found that the jurors "all seemed to be in agreement that [defendant's criminal record] was not a factor in their decision, they pushed those facts aside." The court reasoned that the jury was aware that defendant had a prior felony conviction, yet it did not convict on the felony-firearm charge. The court also noted that the jury hung on the weapons charges even though defendant's prior criminal record included weapons offenses. This appeal ensued.

II. ANALYSIS

A. EXTRINSIC EVIDENCE

Defendant contends that the presence of his criminal record in the jury room denied him his constitutional right to a fair trial. Defendant raised this issue at the appropriate time and the trial court addressed and decided the issue; therefore, the issue is preserved for our review. See *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Whether a jury's exposure to extraneous information denied defendant his constitutional rights necessarily involves a question of constitutional law. See *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). We review constitutional issues de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

"A defendant tried by jury has a right to a fair and impartial jury." *Budzyn*, 456 Mich at 77. "During their deliberations, jurors may only consider the evidence that is presented to them in open court." *Id.* (citations omitted). "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Id.* (citations

omitted). In order to prove that extraneous information deprived him of a fair trial, a defendant has the initial burden to prove: (1) the jury was exposed to extraneous influences; and (2) the extraneous influences “created a real and substantial possibility that they could have affected the jury’s verdict.” *Id.* at 89. In order to prove the second prong, a defendant must demonstrate that: (A) the extraneous influence “is substantially related to a material aspect of the case”; and (B) there “is a direct connection between the extrinsic material and the adverse verdict.” *Id.* In determining whether extrinsic information created a “real and substantial” possibility of prejudice, a court may consider the following factors:

(1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. [*Id.* at 89 n 11 (quotation omitted).]

If the defendant meets his initial burden, “the burden shifts to the people to prove that the error was harmless beyond a reasonable doubt” by showing “that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming.” *Id.*, citing *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

In this case, while there is no dispute that the jury was exposed to extraneous information, defendant has failed to show that there is a “real and substantial possibility” that such information could have affected the jury’s verdict because he cannot show that there is a “direct connection between the extrinsic material and the adverse verdict.” *Budzyn*, 456 Mich at 88-89. Here, several jurors testified that they were unaware of the exhibits until sometime after deliberation commenced and after the jury was nearing a consensus on the home invasion charge. While some of the jurors mentioned the presence of defendant’s criminal record, the jury did not discuss or consider the criminal record in any detail during deliberations. See *Budzyn*, 456 Mich at 89 n 11 (noting that a court may consider the “extent to which the juror[s] discussed and considered” the extrinsic information in weighing the prejudicial impact of the information). None of the jurors testified that the jury engaged in detailed discussion or gave consideration to the content of defendant’s criminal record. Instead, the record shows that after a few jurors noted the presence of the criminal record, the jury concluded that it should not consider the information and the document was not discussed or considered during deliberations.

Other factors show that there is no “direct connection between the extrinsic material and the adverse verdict.” See *Budzyn*, 456 Mich at 89 n 11 (indicating that a court may consider “any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict”). Here, the presence of defendant’s criminal record in the jury room did not *create* the risk that the jury would conclude defendant was of bad character and had a propensity to commit crime. That danger was present at the close of proofs. Specifically, the jury was aware that defendant was a convicted felon and that a felony charge was not a new experience for defendant. The jury was aware that defendant had three prior misdemeanor convictions, an “R & O,” and “a few other things,” and that he was on bond at the time of the convertor thefts. The jury was aware that defendant engaged in prior bad acts when he assaulted Conner and beat, kicked, and “stomped” him “pretty bad,” and when he participated

in the converter thefts. Hence, any danger that the jury would conclude that defendant was of bad character and had a propensity to commit crime existed long before the jury was exposed to copies of defendant's criminal record.

In addition, the content of defendant's criminal record created more of a danger that the jury would consider it as evidence that defendant had a propensity to commit weapons offenses—charges on which the jury did not convict defendant. Specifically, defendant's criminal record included three weapons offenses (carrying a concealed weapon, felon in possession of a firearm, and felony-firearm), yet the jury could not reach a unanimous verdict on any of the weapons charges in this case. In contrast, defendant's criminal record did not include any prior convictions of home invasion or breaking and entering. Thus, any danger that the jury considered the record as propensity evidence is minimal. Furthermore, as noted, the jury did not discuss defendant's criminal record and declined to consider the record during deliberations.

Moreover, there was substantial evidence introduced at trial to support the jury's decision to convict defendant of first-degree home invasion such that defendant cannot show there is a direct connection between the extraneous information and the adverse verdict. *Budzyn*, 456 Mich at 88-89. MCL 750.110a(2) proscribes first-degree home invasion and the offense can be broken into the following elements:

Element One: The defendant *either*:

1. breaks and enters a dwelling or
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. [*People v Wilder*, 485 Mich 35, 42-43; 780 NW2d 265 (2010), citing MCL 750.110a(2).]

In this case, there was significant evidence that established these elements beyond a reasonable doubt. Evidence showed that defendant entered a "dwelling" without permission. For purposes of first-degree home invasion, a "dwelling" includes "a structure . . . that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." MCL 750.110a(1)(a); *People v Powell*, 278 Mich App 318, 320-321; 750 NW2d 607 (2008). Here, the front porch that abutted the Robinson home was enclosed with

a door and a person needed to cross through the porch to gain access to the home. Therefore, the enclosed porch was clearly a “dwelling” for purposes of the home invasion statute. Conner testified that defendant was inside the enclosed porch when he exited the Robinson home. Snyder also testified that defendant was on the front porch when she arrived at the doorway to help Conner. Rebecca testified that she left the screen door to the porch unlocked that night. This was significant evidence to show that defendant entered a dwelling without permission. In addition, both Conner and Snyder testified that defendant crossed over the doorstep into the home during the scuffle.

There was also significant evidence to establish the second element of home invasion—that defendant committed an assault when he was entering, present in, or exiting the dwelling. *Wilder*, 485 Mich at 42-43. An assault is “an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Cameron*, 291 Mich App 599, 614; 806 NW2d 371 (2011) (quotation omitted). A battery is “an intentional, unconsented and harmful or offensive touching of the person of another. . .” *Id.* (quotation omitted). For purposes of a battery, “[i]t does not matter whether the touching caused an injury” and every battery “necessarily includes an assault.” *Id.* Here, Conner testified that defendant grabbed him and tried to pull him off the porch. Snyder also testified that she saw defendant holding onto Conner and pulling him. Defendant admitted that he held onto Conner’s arm. A reasonable juror could have concluded that defendant’s conduct clearly amounted to an offensive touching. Conner did not give defendant permission to make contact with him, instead, Conner told defendant he did not want to talk. Thus, because every battery includes an assault, there was substantial evidence in support of the second element of home invasion. *Wilder*, 485 Mich at 42-43.

Other evidence also supported that defendant assaulted Conner when he committed an unlawful act that placed Conner in reasonable apprehension of receiving an immediate battery. *Cameron*, 291 Mich App at 614. Here, evidence showed that defendant entered the enclosed porch to the Robinson home after dark without permission. This incident occurred shortly after defendant beat, kicked, and “stomped” Conner “pretty bad.” Defendant testified that Conner probably screamed because he thought he was going to “get beat up again.” This evidence standing alone was more than sufficient to allow a juror to conclude that defendant committed an unlawful act that placed Conner in reasonable apprehension of receiving an immediate battery. *Id.* Furthermore, Conner testified that defendant grabbed him, pulled him, and threatened to kill him and Snyder testified that she saw defendant pulling Conner. This, when combined with evidence that defendant recently beat Conner, was substantial evidence that would allow a juror to conclude beyond a reasonable doubt that defendant intended to and did assault Conner on the night of the incident.

There was also substantial evidence to support a finding of the third element of home invasion—that another person was lawfully present in the dwelling when defendant was entering, present in, or exiting the dwelling. *Wilder*, 485 Mich at 42-43. Here, there was no dispute that Conner, Snyder, and their children were lawfully present at the Robinson home when defendant was there. Hence, there was substantial evidence to establish the third and final element of home invasion.

In sum, there was substantial evidence to support that defendant committed first-degree home invasion such that defendant cannot show a direct connection between the presence of his criminal record in the jury room and his conviction. *Budzyn*, 456 Mich at 88-89.

Furthermore, the trial court instructed the jury that it could only consider the evidence that was properly admitted at trial and that “evidence” included sworn testimony of the witnesses and exhibits that were admitted into evidence. The trial court instructed the jury that it was not to consider evidence that the court had excluded and that the jury needed to base its decision “only on the evidence that was let in and nothing else.” The court also instructed the jury that evidence that defendant stipulated to a prior felony conviction was only to be considered for purposes of the felon in possession charge. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (“jurors are presumed to follow their instructions”). Here, although defendant’s criminal record was included with the other exhibits it was never admitted into evidence at trial. The jurors’ testimonies showed that the jury followed the trial court’s instruction and declined to discuss and consider defendant’s criminal record during deliberations. Specifically, after jurors noticed the presence of defendant’s criminal history, one of the jurors stated that the document should not be considered and the jury set the record aside and declined to discuss it.

In summary, defendant has failed to show that the presence of his criminal record in the jury room amounted to constitutional error warranting reversal because defendant cannot show that there is a direct connection between his criminal record and his conviction of first-degree home invasion. *Budzyn*, 456 Mich at 88-89. Here, the jury followed the trial court’s instructions and declined to discuss or consider the criminal record in any detail and the criminal record was set aside during deliberation. Defendant’s criminal record did not contain offenses that were similar to home invasion, the jury was aware that defendant was a convicted felon and aware of defendant’s uncharged prior bad acts, and there was significant evidence to support the jury’s verdict. Accordingly, we conclude that the trial court did not err in denying defendant’s motion for a new trial or to vacate his conviction.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

In a Standard 4 brief, defendant contends that trial counsel rendered ineffective assistance on several occasions. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court’s findings of fact, if any, for clear error, while questions of constitutional law are reviewed de novo. *Id.*

In order to show that he was denied the effective assistance of counsel under either the state or federal constitution, a defendant must show that counsel’s performance was deficient and that such deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Carbin*, 463 Mich at 600.

Defendant contends that he was denied the effective assistance of counsel during pretrial plea negotiations with the prosecutor. In order to establish ineffective assistance of counsel in a plea bargain situation, a defendant must show that counsel's deficient performance caused him to reject the plea, and that, but for counsel's deficient performance, "there is a reasonable probability that . . . defendant would have accepted the plea . . . that the court would have accepted its terms, and that the conviction or sentence or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v Cooper*, ___ U.S. ___, 132 S Ct 1376; 182 L Ed 2d 398 (2012), slip op at 5; see also *Hill v Lockhart*, 474 US 52, 58; 106 S Ct 366; 88 L Ed 2d 203 (1985). Counsel must provide advice during plea negotiations that is sufficient to allow the defendant "to make an informed and voluntary choice between trial and a guilty plea." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995).

In this case, on the first day of trial before jury selection, defense counsel informed the court that the prosecution offered defendant a plea bargain where he would face a maximum of 15 years' imprisonment. When defense counsel asked defendant whether it was fair to say that he did not want anything to do with the plea agreement, defendant responded, "[t]he fair statement is, I have a right to a jury trial. That's the fair statement." When asked again whether he wanted anything to do with the plea bargain, defendant responded, "Nothing where there's a fifteen year maximum sentence. That's the controlling sentence. So I'll go to prison and they'll flop me for fifteen years. He's going to sentence me to six and then they'll flop me for the other nine years." Defendant indicated that he informed defense counsel that he was innocent and stated, "I want my day in court in front of a jury trial."

Defendant contends that counsel rendered ineffective assistance because he failed to correct defendant's inaccurate assertion that the Parole Board would make him serve his maximum sentence. Defendant asserts that he would have received credit against his sentence and that the Parole Board no longer has "reluctance" to grant parole. Defendant's argument lacks merit.

First, counsel's performance did not fall below an objective standard of reasonableness. Counsel informed defendant of the terms of the plea offer including the maximum possible sentence defendant could serve. This information was sufficient to allow defendant "to make an informed and voluntary choice between trial and a guilty plea." *Corteway*, 212 Mich App at 446. Defendant vehemently rejected the terms of the agreement and stated that he did not want to enter a plea agreement that included a 15-year maximum sentence. Instead, he insisted on exercising his right to a jury trial. Contrary to defendant's assertion, trial counsel could not offer advice on whether and when the Parole Board would grant defendant parole because such decisions are contingent on numerous factors and remain within the sole discretion of the Parole Board. See *In re Elias*, 294 Mich App 507, 510-521; 811 NW2d 541 (2011).

Second, defendant cannot show that there is a reasonable probability that had counsel acted differently, there is a reasonable probability that he would have accepted the plea. *Lafler*, ___ US ___, slip op at 4-5. Here, defendant adamantly refused to accept any plea that involved a 15-year maximum prison sentence. Defendant maintained that he was innocent and he demanded that he be allowed to exercise his right to a jury trial. In sum, defendant demanded

that he be allowed to exercise his right to a jury trial and he was afforded that right. His contention that such action was based on ineffective assistance of counsel is devoid of all merit.

Next, defendant contends that counsel rendered ineffective assistance because he failed to object to the prosecution's introduction of evidence that defendant was involved in stealing converters with Conner. Defendant fails to articulate on what grounds defense counsel should have objected to the evidence and he fails to cite any law in support of his argument. Therefore, defendant has abandoned this aspect of his appeal for review. See *People v Kelly*, 231 Mich App 627, 640–641; 588 NW2d 480 (1998) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority”). Regardless, the evidence was relevant and admissible to prove motive.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” “A motive is the inducement for doing some act; it gives birth to a purpose.” *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000), quoting *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925). Other acts evidence can be admissible to prove motive. MRE 404(b). In this case, Conner testified that defendant “jumped” him on the front porch and said that he was there to “get” Conner because he did not like “snitches.” Defendant testified that he did not assault Conner and instead was merely trying to talk to Conner about the converter thefts. Thus, evidence that defendant was involved in the thefts was relevant to show why defendant was at the Robinson home and that he had motive to commit the charged offense as retaliation for being implicated in the thefts. *Sabin*, 463 Mich at 68. Furthermore, the evidence was relevant to show why Conner was frightened of defendant. Both Conner and defendant testified that defendant physically assaulted and beat Conner several days before the incident at the Robinson home. Conner indicated that defendant beat him in retaliation for Conner implicating defendant in the thefts. Hence, evidence that defendant participated in the thefts was relevant to show why Conner was afraid of defendant and whether he may have had an apprehension that defendant was going to commit another battery. Therefore, because the evidence was relevant and admissible, any objection would have been futile and counsel was not ineffective for failing to raise a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (“Counsel is not ineffective for failing to make a futile objection”).

Next, defendant contends that defense counsel was ineffective for failing to raise objections to Rebecca's testimony that a couple weeks before the incident, defendant was at her home and told her young son to “get the fuck out of my face” when the child asked defendant to take him to the store. Defendant again fails to cite relevant legal authority in support of his argument and he has therefore abandoned this aspect of his appeal for review. See *Kelly*, 231 Mich App at 640–641. Nevertheless, defendant has not shown that counsel was deficient in failing to object to Rebecca's testimony.

Defendant contends that defense counsel should have objected because the testimony amounted to evidence that he committed child abuse. This argument lacks merit. The testimony did not amount to evidence of child abuse, but rather showed defendant made a rude comment to a child. The evidence was admissible to show why Rebecca told defendant to leave her home

and why she told him not to return to her home, which in turn was relevant to prove that defendant entered Robinson's home uninvited on the night of the incident. See MRE 401. Therefore, because the testimony was relevant and admissible, and because defendant has failed to articulate grounds on which it should have been excluded, he cannot show that counsel acted deficiently in failing to object. See *Thomas*, 260 Mich App at 457.

Defendant contends that the testimony amounted to improper hearsay. This argument also lacks merit because the child's statement was not offered to prove the truth of the matter asserted—i.e. it was not offered to prove that the child asked defendant to take him to the store. See MRE 801(c) (hearsay is an out of court statement offered “to prove the truth of the matter asserted”). Instead, the child's statement was offered to show defendant's reaction, which was admissible as an admission by a party-opponent under MRE 801(d)(2), and was relevant to show why Rebecca told defendant to leave and not return to her home. With respect to Rebecca's testimony that her son said that defendant was rude, this aspect of the child's statement was also not offered to prove the truth of the matter asserted, i.e. to prove that defendant was in fact rude. Instead, the remark tended to show how Rebecca and her son reacted to defendant's comment, which in turn was relevant to show why Rebecca asked defendant to leave and told him he was not welcome at the house. See MRE 401. In sum, defense counsel was not deficient in failing to object to Rebecca's testimony on grounds that it amounted to inadmissible hearsay. See *Thomas*, 260 Mich App at 457.

Defendant also contends that defense counsel was deficient in failing to “insist on the child's production.” Defendant fails to provide any reasoning to support why counsel should have called the child to testify and there is no evidence to support that the child would have testified in favor of the defense. Defendant's argument is wholly without merit and he cannot show that counsel acted deficiently in failing to call the child to testify or that but for counsel's failure to call the child to testify, the result of the proceeding would have been different. *Thomas*, 260 Mich App at 457; *Carbin*, 463 Mich at 600.

Defendant also contends that introduction of the child's out of court statements deprived him of his rights under the Confrontation Clause. Defendant failed to raise this issue in his statement of questions presented; he has therefore abandoned the issue for review. *People v McMiller*, 202 Mich App 82, 83 n 1; 507 NW2d 812 (1993). Nevertheless, defendant's argument is devoid of merit.

“The United States Supreme Court has held that the introduction of out-of-court testimonial statements violates the Confrontation Clause; thus, out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant.” *People v Nunley*, ___ Mich ___; ___ NW2d ___ (2012) (Docket No. 144036, Issued July 12, 2012), slip op at 11, citing *Crawford v Washington*, 541 US 36, 51-53; 124 S Ct 1354; 158 L Ed 2d 177 (2004). With respect to what constitutes a testimonial statement, the Supreme Court in *Crawford* explained that “testimony” is “a ‘solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Nunley*, ___ Mich at ___, slip op at 11, quoting *Crawford*, 541 US at 51 (citations omitted).

In this case, the child's out of court statements were not made for purposes of "establishing or proving some fact." The statements were not offered to prove that the child asked defendant to take him to the store and they were not offered to prove that defendant was rude to the child. Rather, as noted, the statements were offered to show defendant's reaction and to show why Rebecca asked defendant to leave the home and was not welcome to return to the home. Thus, the statements were not testimonial in nature and admission of the statements did not violate the Confrontation Clause. *Nunley*, ___ Mich at ___, slip op at 10-11; *Crawford*, 541 US at 50-53. Accordingly, defense counsel was not deficient in failing to object to the evidence on this basis. *Thomas*, 260 Mich App at 457.

Next, defendant contends that defense counsel was ineffective with respect to the prosecution's introduction of a recorded telephone call between defendant and his fiancé Heard. Defendant contends that the jury only heard three of 1,000 tape recordings and that the other telephone calls would have provided "clarification" and "refuted" the prosecutor's evidence. At trial, Captain David Luce of the Jackson County Sheriff's Department testified that he reviewed a recorded telephone call defendant placed from jail to a cellular telephone number on October 25, 2009. A police detective testified that the recording was a conversation between defendant and Heard. The recording was introduced at trial. Luce testified that defendant made 1,199 attempts to call that same number and that 168 of the calls were actually completed. Defendant fails to indicate how any of the other 168 telephone calls that he placed would have "clarified" or "refuted" the content on the telephone call that was played to the jury. Furthermore, defendant testified at trial and agreed he asked Heard to talk to Conner's brother in an attempt to convince Conner to change his testimony; defendant does not contend that he asked Heard not to talk to Conner's brother in any of the subsequent telephone conversations. Moreover, the other telephone calls would not have affected the outcome of the trial where, as noted above, there was significant evidence to establish all of the elements of first-degree home invasion. Hence, defendant cannot show that, but for counsel's failure to introduce other telephone calls, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

Next, defendant alleges that counsel was ineffective for calling Heard as a witness; defendant states that counsel knew Heard would assert her Fifth Amendment right to remain silent regarding questions about witness tampering. At trial, Heard testified as a defense witness. At one point during cross-examination, the prosecutor asked Heard if she had acted on defendant's advice and feigned defendant's identity to try and obtain food stamps. Heard refused to answer the question and asserted her Fifth Amendment right to remain silent. The trial court allowed Heard to assert her right and the prosecutor dropped the line of questioning. Defendant argues that the prosecutor was able to use Heard to insert "powerful and prejudicial innuendo into the trial" to attack defendant's reputation.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Here, counsel made a strategic decision to call Heard to testify for the defense. Heard offered testimony regarding defendant's whereabouts on the day of the offense and she denied offering a bribe to one of the witnesses. Heard's testimony countered the prosecution's evidence that defendant solicited Heard to tamper with witnesses. The mere fact that counsel's strategy was unsuccessful does not constitute ineffective assistance of counsel.

People v Matuszak, 263 Mich App 42, 61; 687 NW2d 342 (2004). Moreover, defendant cannot show that, but for counsel's decision to call Heard, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600. Here, the jury already knew that defendant asked Heard to engage in criminal activity. The prosecution introduced a recorded telephone call where defendant asked Heard to tamper with a witness. Hence, the fact that defendant suggested Heard obtain food stamps by using his identity was not highly prejudicial. Furthermore, Heard testified that she had power of attorney. In sum, defendant cannot show that absent Heard's testimony, the result of the proceeding would have been different. *Id.*

Defendant contends that the cumulative effect of the instances of deficiency resulted in prejudice warranting reversal. However, as discussed above, defendant has not articulated any instances where counsel rendered deficient performance. Accordingly, there are no errors that combined to warrant reversal. See *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995) ("only actual errors are aggregated to determine their cumulative effect").

C. SUFFICIENCY OF THE EVIDENCE

Defendant contends that there was insufficient evidence to support his conviction of first-degree home invasion. We review a challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "When reviewing a claim that the evidence presented was insufficient to support defendant's conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime." *People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011).

Defendant contends that there was insufficient evidence that he entered a "dwelling" because the enclosed porch did not constitute a "dwelling." As noted above, one of the elements of first-degree home invasion requires proof that the defendant either broke and entered a dwelling or entered a dwelling without permission. *Wilder*, 485 Mich at 42-43. For purposes of the statute, a "dwelling" includes an "appurtenant structure" that is attached to a "structure that is used permanently or temporarily as a place of abode." MCL 750.110a(1)(a). In this case, defendant entered an enclosed porch that was attached to the Robinson home. The porch was enclosed and had a door and a person had to walk through the porch to access the front door to the home. Hence, the porch clearly fell within the definition of "dwelling" under MCL 750.110a(1)(a). As discussed above, there was sufficient evidence that would have allowed a reasonable juror to conclude beyond a reasonable doubt that defendant entered the porch without permission. Further, both Conner and Snyder testified that defendant crossed over the doorway and into the Robinson home. This testimony would have also allowed a rational juror to conclude beyond a reasonable doubt that defendant entered a dwelling without permission. Additionally, with respect to the remaining elements of first-degree home invasion, as discussed in detail above, there was sufficient evidence to allow a rational jury to conclude that the prosecutor proved all of the elements of the crime beyond a reasonable doubt.

D. SENTENCING

Defendant contends that he was deprived due process of law during sentencing because the trial court refused to remove information from his presentencing investigation report (PSIR)

that indicated defendant's father was serving a prison sentence for criminal sexual conduct. At sentencing, defendant objected to the information; the prosecutor agreed that the trial court should not use the information in determining defendant's sentence, but maintained that the information should remain in the report for the benefit of the Michigan Department of Corrections (MDOC). The trial court overruled defendant's objection. Defendant contends that the court denied him his due process rights by refusing to strike the information. Defendant fails to cite any legal authority in support of his argument; therefore, he has waived the issue for review. See *Kelly*, 231 Mich App at 640–641. Regardless, defendant cannot show that the information is prejudicial where the information was included in a section of the PSIR that concerned defendant's family history, where the trial court did not consider the information for purposes of sentencing, and where the MDOC already had the information about defendant's father on record. See *People v Pierce*, 158 Mich App 113, 118; 404 NW2d 230 (1987) (“[e]nsuring that accurate and relevant information be transmitted to the Department of Corrections does not require deletion of every challenged statement in the report which is not considered by the sentencing court”).

Next, defendant challenges the trial court's scoring of several offense variables (OVs). “This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). To the extent we must construe or apply the statutory sentencing guidelines, such issues present questions of law that we review de novo. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Defendant contends that the trial court erred in scoring OV 1 (aggravated use of a weapon), at 15 points. MCL 777.31 governs the scoring of OV 1 and directs a trial court to score 15 points in relevant part where “[a] firearm was pointed at or toward a victim” In this case, Conner testified that defendant was “brandishing” a gun when he confronted Conner on the porch. Snyder also testified that defendant pulled a gun from his pocket and pointed it and Harrell testified that she heard a child say “don't shoot my daddy.” This was sufficient evidence to support the trial court's scoring of OV 1 at 15 points. See *Endres*, 269 Mich App at 417. And, although the jury could not reach a verdict on the weapons offenses, a trial court's scoring of the offense variables need not be consistent with the jury verdict. See *People v Perez*, 255 Mich App 703, 713; 662 NW2d 446 (2003), vacated in part on other grounds, *People v Perez*, 469 Mich 415; 670 NW2d 655 (2003); see also, *People v Drohan*, 475 Mich 140, 159-162, 164; 715 NW2d 778 (2006).

Defendant contends the trial court erred in scoring OV 2, (lethal potential of the weapon used or possessed), at five points. MCL 777.32 governs the scoring of OV 2 and in relevant part directs a trial court to score five points where the offender used or possessed a rifle, shotgun, or pistol. MCL 777.32(1)(d). As noted above, both Conner and Snyder testified that defendant possessed a pistol. This was sufficient evidence to allow the trial court to score OV 2 at five points. *Endres*, 269 Mich App at 417; *Perez*, 255 Mich App at 713.

Next, defendant contends that the trial court erred in scoring OV 4, (psychological injury), at 10 points. MCL 777.34 governs the scoring of OV 4, and provides that a trial court

must score 10 points when “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). “[T]he fact that treatment is not sought is not conclusive when scoring the variable.” *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005). A victim’s expression of fearfulness can be sufficient to satisfy the statute. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009).

In this case, Conner indicated in a victim impact statement that he was “scare[d] for my life, went blank, numb.” Snyder stated that she could not sleep, that her children could not sleep, and stated that her five-year-old daughter does not want to leave the house because she is afraid that someone is “out there and is going to kill us.” Harrell stated that she was “very scared” for a few days and that she and her children could not sleep at night. In addition, Rebecca testified that Snyder and Conner were visibly upset and shaken following the incident. On this record, the evidence was sufficient to support the trial court’s scoring of OV 4 at ten points. *Endres*, 269 Mich App at 417.

Next, defendant contends the trial court erred in scoring OV 13, (continuing pattern of criminal behavior), at 10 points. Defendant failed to preserve this issue for review because he did not raise the issue in the trial court or in a motion for resentencing.¹ *People v Wilson*, 252 Mich App 390, 392-393; 652 NW2d 488 (2002). Nevertheless, defendant’s argument lacks merit.

MCL 777.43 governs the scoring of OV 13 and directs a trial court to score 10 points where the sentencing offense “was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a [major controlled substance offense].” MCL 777.43(1)(d) (e). In scoring OV 13, “all crimes within a 5–year period shall be counted *regardless of whether the offense resulted in a conviction.*” MCL 777.43(2)(a) (emphasis added). In this case, in addition to first-degree home invasion,² evidence at trial showed that defendant engaged in two additional instances of felonious criminal activity against a person or property within a five-year time span. Specifically, evidence showed that defendant committed or aided and abetted the commission of larceny from a motor vehicle when he participated in the theft of catalytic converters. See MCL 750.356a(1). Larceny from a motor vehicle is a property offense. MCL 777.16r. In addition, evidence at trial showed that defendant committed the crime of assault with intent to do great bodily harm less than murder when he beat, kicked, and “stomped” Conner. See MCL 750.84; *People v Brown*, 267 Mich App 148-149; 703 NW2d 230 (2005). Assault with intent to do great bodily harm less than murder is an offense against a person. MCL 777.16d. Therefore, because the record supports that the home

¹ Defendant contends that trial counsel’s failure to object to the scoring of OV 13 amounted to ineffective assistance of counsel; however, he provides no meaningful analysis with respect to his argument and he has therefore abandoned it for review. See *Kelly*, 231 Mich App at 640–641. Moreover, as articulated above, the trial court did not err in scoring OV 13; thus, counsel was not deficient in failing to raise an objection. *Thomas*, 260 Mich App at 457.

² First-degree home invasion is a crime against a person. MCL 777.16f.

invasion was part of a pattern of criminal activity against a person or property, the trial court did not err in scoring OV 13 at 10 points. *Endres*, 269 Mich App at 417.

Defendant also contends that his sentence was based on inaccurate information and violated his constitutional rights as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant's argument lacks merit; the trial court scoring was supported by evidence as set forth above and *Blakely* does not affect Michigan's sentencing scheme. See *Drohan*, 475 Mich at 159-162.

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael J. Talbot