

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 17, 2013

v

CHRISTOPHER JOHN GILES,

Defendant-Appellant.

No. 309338
Oakland Circuit Court
LC No. 10-233863-FH

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

PER CURIAM.

The jury convicted defendant of second-degree home invasion, and the trial court denied his claim of ineffective assistance of counsel and his request for a new trial. For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL ISSUES

Jennifer Wilcox, the victim of defendant's second-degree home invasion, owned a two-story house in Hazel Park, and rented the top story to defendant. Each floor had separate entry and there was no way to enter one floor from the other. Defendant stopped paying his rent in January 2010, and, despite Wilcox's attempts to evict him, refused to move out. He also changed the locks to his section of the house (barring Wilcox from entry, as she did not have a new key), and avoided contact with her. By June 2010, it was unclear to Wilcox whether defendant still lived on the top floor. Nonetheless, Wilcox called defendant and knocked on the top-floor door to inform him that she would be out of town that month, but she could not reach defendant. She assumed he had finally moved out, and left town on or about June 2, 2010 to go on her trip.

However, defendant had not vacated the house, but within a few days after Wilcox departed, neighbors saw defendant and his friends load a number of items from the house into their vehicles, including: a television, desk, stereo, dresser, two mattresses, and white wicker furniture. In addition, one of defendant's friends removed two stained-glass light catchers from the house garage, and carried them across the street to defendant's mother's home. A neighbor also saw an unidentified woman dig up a hydrangea from Wilcox's front yard and load it into defendant's car.

On June 8, 2010, Wilcox returned from her trip to find her house ransacked and burglarized. The backdoor was ajar and a window was open. Many items were missing, including: white wicker furniture, a desk, a stereo, two televisions, two computers, and two stained-glass light catchers. Wilcox also discovered a glass full of Newport menthol cigarette butts on her counter—the brand of cigarettes smoked by defendant.

After deliberating for less than an hour, the jury found defendant guilty of second-degree home invasion. The trial court sentenced him as a fourth habitual offender to four to forty years in prison. Defendant moved for a new trial, on the grounds that: (1) his trial attorney provided him ineffective assistance; (2) the trial court engaged in judicial misconduct; (3) the evidence was insufficient to support his conviction; (4) he was entitled to a hearing regarding the prior convictions supporting his habitual offender sentence; and (5) that the restitution amount was not reasonably related to Wilcox’s damages. The trial court properly rejected all of defendant’s claims and denied his motion for a new trial.

Defendant makes the same arguments on appeal, and adds some additional claims, including that: (1) the jury instructions were invalid; (2) his sentencing hearing was improper; (3) he was entitled to an instruction on a lesser included offense; (4) the prosecution failed to preserve evidence and thus violated his constitutional rights. We review the trial court’s decision to deny a new trial for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

II. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL¹

Ineffective assistance of counsel claims are usually analyzed “under the test developed in *Strickland [v Washington]*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984).” *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Under *Strickland*, “counsel is presumed effective, and the defendant has the burden to show both that counsel’s performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel’s error.” *Id.* In other words, defendant must show (1) his counsel performed deficiently, and (2) counsel’s deficient performance caused him prejudice. See *Harrington v Richter*, 562 US __; 131 S Ct 770, 787–788; 178 L Ed 2d 624 (2011). Thus, if the deficiencies of counsel are harmless, it is unnecessary for a court to address whether counsel’s performance was deficient. *People v Reed*, 449 Mich 375, 400–401; 535 NW2d 496 (1995), quoting *Strickland*, 104 S Ct at 2069 (“a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered

¹ Whether a defendant has been deprived of his Sixth Amendment right to effective assistance of counsel is a constitutional question that is reviewed de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). “Because no *Ginther* hearing was held, review is limited to errors apparent on the record.” *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007), citing *People v Ginther*, 390 Mich 436, 442–443; 212 NW2d 922 (1973) (internal citations omitted).

by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed”).

Here, defendant fails to meet the burden imposed on him by *Strickland*. His brief is essentially a recitation of supposed errors made by his trial attorney. Yet defendant fails to demonstrate that he would have been acquitted “but for counsel’s [alleged] unprofessional errors.” *Harrington*, 131 S Ct at 787 (internal quotation marks omitted). The prosecution introduced very strong and persuasive evidence that proved defendant’s guilt, and defendant does not explain how his counsel’s supposed misconduct could have overcome such evidence. Because of defendant’s failure to do so, we need not address whether counsel’s performance was actually deficient. See *Reed*, 449 Mich at 400–401. Accordingly, the trial court properly dismissed defendant’s claim for ineffective assistance of counsel.

B. ALLEGED JUDICIAL MISCONDUCT

“The test for whether a new trial should be ordered [on the basis of judicial misconduct] 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 the defendant’s case.” *People v Ross*, 181 Mich App 89, 91–92; 449 NW2d 107 (1989). Defendants who claim judicial bias must overcome “a heavy presumption of judicial impartiality.” *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Defendant’s claim that he is entitled to a new trial “because of the continued and excessive interference by the court” is unconvincing. The trial court made no statements about defense counsel that could have unfairly influenced the jury to the detriment of defendant’s case. The court occasionally expressed frustration with defense counsel, but this is not enough to warrant a new trial.² In addition, the trial judge’s neutral questioning of a defense witness did not deprive defendant of a fair trial—the trial court is permitted to question witnesses to clarify statements and elicit additional relevant information. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). See also MRE 614(b) (“[t]he court may interrogate witnesses, whether called by itself or by a party”). Defendant is thus not entitled to a new trial on account of the conduct of the trial court.

² *Cain v Dep’t of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996) (“judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. Further not establishing bias or partiality are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display”) (internal quotation and punctuation marks omitted).

C. ALLEGED INSUFFICIENCY OF EVIDENCE³

Defendant makes an unsupported and cursory argument that the evidence is insufficient to sustain his conviction, and it accordingly is abandoned and fails. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), aff'd 482 Mich 851; 752 NW2d 457 (2008) (“[b]ecause defendant failed to adequately brief the issue . . . he has abandoned this issue on appeal”).⁴ He makes an equally unsupported claim that his conviction was against the great weight of the evidence, citing Michigan cases, but fails to apply that law to the facts of his case. Accordingly, this claim is also abandoned and fails. *Id.*

Had defendant not abandoned these arguments he nonetheless would be unable to demonstrate that the evidence was insufficient to sustain his conviction, or that his conviction was against the great weight of the evidence. Viewed in the light most favorable to the prosecution⁵, there is more than enough evidence to support defendant’s conviction. The elements of second-degree home invasion are that the defendant “(1) entered a dwelling, either by a breaking or without permission, (2) with the intent to commit a felony or a larceny in the dwelling.” *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). Identity is also an element of every offense, *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), and can be shown by either direct or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409–410; 149 NW2d 216 (1967).

Clearly, defendant did not have permission to enter Wilcox’s home, and three different witnesses saw defendant (and his friends) load Wilcox’s possessions into his truck, and drive away with her possessions. Some of the possessions (e.g., the stained-glass light catchers) were distinctive and could not have been mistaken for defendant’s property.

In light of this evidence, a jury could find beyond a reasonable doubt that defendant entered Wilcox’s home, either by a breaking or without permission, with the intent to commit a larceny. In light of this substantial evidence of defendant’s guilt, it is not surprising that he fails to explain why the jury verdict was against the great weight of the evidence—i.e. that evidence “preponderates heavily against the verdict [so] that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). The trial court thus correctly held that the evidence was overwhelming that defendant was guilty of the crime charged, and properly denied his directed verdict on the issue of insufficient evidence, and his claim that the verdict was against the great weight of the evidence.

³ Challenges to the sufficiency of the evidence are reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010).

⁴ See also *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (“[i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow”).

⁵ *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

D. JURY INSTRUCTIONS

Though defendant objects to the aiding-and-abetting jury instruction on appeal, he did not do so at trial. In fact, after the trial judge read the instructions, defense counsel stated that he was satisfied with the instructions. Defendants waive alleged jury-instruction errors on appeal when they express satisfaction with the instructions or affirmatively approve the instructions at trial. *People v Carter*, 462 Mich 206, 214–216; 612 NW2d 144 (2000). “A defendant may not waive objection to an issue before the trial court and then raise it as an error’ on appeal.” *Id.* at 214, quoting *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Defense counsel’s express approval of the jury instructions read by the trial court constitutes a waiver of the issue, *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), citing *Carter*, 462 Mich at 215, and waiver extinguishes any error. *Carter*, 462 Mich at 215.

Were we to assume that defendant did not waive his claim of error about the jury instruction, this argument was obviously not preserved, and it is accordingly reviewed for plain error that affects substantial rights. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005). Substantial rights are affected when the error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, defendant fails to show that the trial court: (1) made an error, and (2) that error affected the outcome of the lower court proceedings. MCL 767.39, which governs aiding and abetting, does not create a distinct crime. *People v Greaux*, 461 Mich 339, 344; 604 NW2d 327 (2000). It creates a theory of prosecution, and does not constitute a separate substantive offense. *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999). Therefore, the prosecution was not required to separately charge defendant as an aider and abettor, or list the names of the people who he aided and abetted. Stated simply, “including a charge to the jury of aiding and abetting when the information did not include this charge [i.e., that defendant was an aider and abettor] was not erroneous and did not result in a denial of due process.” *People v Alexander*, 72 Mich App 91, 99–100; 249 NW2d 307 (1976). Therefore, the trial court did not err in making the instructions, and if its conduct was in error, defendant offers no argument that the outcome of the trial would have been different absent the jury instruction.

E. THE SENTENCING HEARING

“A defendant has a right to be present during the imposition of sentence, and at any stage of trial where substantial rights of the defendant might be adversely affected.” *People v Palmerton*, 200 Mich App 302, 303; 503 NW2d 663 (1993). The trial court must allow the defendant to review the PSIR at sentencing, and allow him to challenge the information it contains. MCR 6.425(E)(1)(a) and (b). The defendant must also be permitted to speak to the court about any circumstances he believes it should consider when imposing the sentence. MCR 6.425(E)(1)(c).

Defendant claims that his sentencing hearing was improper because he was not present during the sentencing.⁶ This claim is without merit and a distortion of the record. Defendant was present at sentencing, he and his attorney were given the opportunity to review the PSIR, and speak on factors they believed should be considered in imposing the sentence. Defendant also challenged the scoring of several prior record variables, an offense variable, and other information in the PSIR. Further, defendant was present when the trial court sentenced him as a fourth habitual offender to 4 to 40 years in prison, and he had been put on notice before sentencing that his maximum potential sentence was life in prison. Accordingly, the sentencing hearing was not improper and defendant's claim has no merit.

F. LESSER INCLUDED OFFENSE INSTRUCTION⁷

MCL 768.32 only permits a jury to consider necessarily included lesser offenses, not cognate lesser offenses. *People v Cornell*, 466 Mich 335, 353–359; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003). An instruction on a requested lesser included offense is proper only if the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense. *Id.* at 357.

Here, defendant asserts that the trial court erred in denying his request for a jury instruction on larceny as a lesser included offense. Yet he cites no authority to support his contention that larceny is a lesser included offense of second-degree home invasion, most likely because larceny is plainly not a lesser included offense of second-degree home invasion.

As noted, the elements of second-degree home invasion are that defendant: “(1) entered a dwelling, either by a breaking or without permission, (2) with the *intent* to commit a felony or a larceny in the dwelling.” *Nutt*, 469 Mich at 593 (emphasis added). In other words, the second-degree home invasion statute, MCL 750.110a(3), only requires intent to commit a larceny—not the occurrence of an actual larceny, which requires an actual taking of property. See *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999); and MCL 750.356.

It is thus possible to commit a second-degree home invasion without first committing a larceny. Someone who enters a dwelling with the intent to steal but does not steal anything may be guilty of second-degree home invasion, but not larceny. Necessarily included lesser offenses

⁶ Again, defendant failed to raise this issue on remand, so it is unpreserved. As noted, “[a]n unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights.” *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007), citing *Carines*, 460 Mich at 763–764.

⁷ Claims of instructional error involving a question of law are reviewed de novo, but the trial court's determination that a jury instruction applies to the facts of the case are reviewed for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). The Court of Appeals reviews de novo whether an offense is a necessarily included lesser offense. *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004).

“must be such that it is impossible to commit the greater without first having committed the lesser.” *Cornell*, 466 Mich at 345 (internal quotation marks omitted). Accordingly, the trial court did not err when it did not give an instruction on larceny as a lesser included offense.

G. DEFENDANT’S HABITUAL OFFENDER SENTENCE⁸

MCL 769.12(1) states that “[i]f a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies . . . and that person commits a subsequent felony within this state,” the person will be sentenced under the habitual offender laws. Our Supreme Court has held that the habitual offender statute:

clearly contemplates the *number* of times a person has been “convicted” of “felonies or attempts to commit felonies.” Nothing in the statutory text suggests that the felony convictions must have arisen from separate incidents. To the contrary, the statutory language defies the importation of a same-incident test because it states that *any combination* of convictions must be counted. [*Gardner*, 482 Mich at 50–51 (emphasis in original).]

As such, Michigan’s habitual offender laws seek to count “*each* prior felony conviction separately. The text of those laws does not include a same-incident test.” *Id.* at 68 (emphasis in original).

Defendant is a habitual offender and was convicted of three felonies before he committed the home invasion at issue in this case. Under MCL 769.12, it is irrelevant that two of his prior convictions supposedly arose out of the same incident. The trial court properly sentenced defendant as a fourth habitual offender.

H. THE PROSECUTION AND PRESERVING EVIDENCE

On appeal, defendant raises an unpreserved claim that he was deprived of his right to due process and fair trial because the prosecution did not preserve the cigarette butts found on Wilcox’s counter after the home invasion. Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764.

In his brief, defendant misstates the law on preservation of evidence and due process. The U.S. Supreme Court has held that the *Brady*⁹ framework, which governs the government’s failure to *disclose* evidence, does not apply to the government’s failure to *preserve* evidence. It stated:

The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose

⁸ The trial court’s decision to apply habitual offender enhancements is reviewed for an abuse of discretion. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

⁹ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 215 (1963).

to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. [*Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988).]

Accordingly, “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Id.* at 58.

Defendant has not demonstrated—indeed, he does not even assert—that the police acted in bad faith to not preserve the cigarette butts. In fact, the contention defendant makes—that the butts could have been tested for DNA to exonerate him—is exactly the type of claim disfavored by *Youngblood*. *Id.* at 57. He accordingly has failed to show a due process violation. Even if the government had destroyed the cigarette butts in bad faith, defendant has not shown how his substantial rights would have been affected by such prosecutorial misconduct. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Nothing in the record suggests that a DNA test on the cigarette butts would have proven that defendant had not smoked them—in fact, a test likely would have confirmed that defendant *did* smoke the cigarettes. Accordingly, defendant’s claim that the prosecution’s failure to preserve the cigarette butts violated his due process and fair trial rights is without merit.

I. RESTITUTION¹⁰

MCL 780.767 governs restitution to crime victims. A trial court is required to conduct an evidentiary hearing on restitution only if the defendant disputes the restitution amount at sentencing. *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997), citing MCL 780.767(4) (“[o]nly an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution, triggers the need to resolve the dispute by a preponderance of the evidence”). Defendant’s failure to do so amounts to a waiver of his opportunity for an evidentiary hearing on restitution. *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997) (“at sentencing defendant did not request an evidentiary hearing regarding the amount of restitution that was properly due. This was a waiver of his opportunity for an evidentiary hearing and he cannot now argue that he was denied due process”).

Here, defendant did not dispute the amount of restitution at sentencing, despite the fact that his attorney cross-examined Wilcox on the monetary value of her stolen property. He thus

¹⁰ An unpreserved nonconstitutional issue is reviewed for plain error affecting defendant’s substantial rights. *People v Newton*, 257 Mich App 61, 68; 65 NW2d 504 (2003), citing *Carines*, 460 Mich at 763, 773.

waived his opportunity for an evidentiary hearing on the issue.¹¹ Accordingly, the trial court correctly dismissed his claim for an evidentiary hearing on restitution.¹²

III. CONCLUSION

For the reasons stated above, we affirm the trial court's denial of defendant's motion for a new trial, and its dismissal of defendant's other claims. We also reject as meritless all of defendant's additional claims on appeal.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad

¹¹ Defendant's decision to raise the issue in his post-conviction motion for a new trial does not cure his waiver of the restitution evidentiary hearing at sentencing. We note that another panel of this court held the same in an unpublished, per curiam opinion. *People v Plevinski*, entered January 27, 2009 (Docket No. 281237), slip op at 2. Though unpublished opinions are not binding precedent, MCR 7.215(C)(1), they may be considered persuasive. *People v Jamison*, 292 Mich App 440, 445; 807 NW2d 427 (2011).

¹² Defendant's argument that the restitution order is improper because he is unable to pay it is equally meritless. Ability to pay is not a factor in determining the amount of restitution. MCL 780.767(1); *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001) (“[s]ince June 1, 1997, MCL 780.767 . . . no longer includes the defendant's ability to pay among the factors to be considered when determining the amount of restitution”).