

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MARIO RANGE,

Defendant-Appellant.

UNPUBLISHED

August 21, 2007

No. 270831

Wayne Circuit Court

LC No. 05-010939-01

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

After a jury trial, defendant Thomas Mario Range was convicted of one count of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 15 to 30 years' imprisonment for this conviction. Defendant appeals as of right. We affirm.

I. Facts

On October 7, 2005, at about 8:30 a.m., Gordon Muenchow left his Westland, Michigan, home, locking his house before leaving. Later that morning, Patrick Rokita, a neighbor of Muenchow's, saw defendant walking toward Muenchow's house and called the police. Jonathan Vincent, another neighbor, also saw defendant walking toward Muenchow's house. A short time later, Vincent saw defendant in Muenchow's front yard.

Officer Robert Wysong of the Westland Police Department arrived in the neighborhood soon after Rokita and Vincent made their observations. Wysong saw defendant leave Muenchow's front yard with a bag over his shoulder. Defendant walked down the street and was stopped by Officer Kevin Wojcik in front of a nearby group home that served the mentally and physically disabled. When asked, defendant told Wojcik that he was in the area to visit his girlfriend at the group home.

To test defendant's story, Wojcik told defendant to enter the group home and ask a worker if she knew who he was. Defendant asked Christina Lackley, an employee of the group home working at the front desk, if she knew "Tex" or his girlfriend, who was named either Felicity or Felicia. Lackley told defendant that she did not know these individuals and that they were not on the employee roster. Defendant then told Lackley that the police were harassing him and asked if he could stay at the group home until the police left the area. Lackley denied his

request and asked him to leave. After defendant left the group home, the officers asked for defendant's driver's license and recorded the information. They then allowed defendant to leave.

About the time Wojcik and defendant were interacting, Muenchow returned home. He found wood splinters and paint chips on his kitchen floor and discovered that the door jam to the kitchen door was broken and split apart. A handgun, a watch, jewelry, a Sam's Club membership card, and a blue duffle bag were missing from his house. After allowing defendant to leave, the officers were informed of a reported home invasion at Muenchow's residence. Wysong investigated Muenchow's house and noticed that the back door had been kicked in. Sergeant Stephen Borisch, the officer in charge of the case, investigated Muenchow's house. Borisch noticed that the exterior door leading to the kitchen was damaged and had smudges on it that may have been a footprint.

The next day, Dearborn Police Department officers effected a traffic stop of a vehicle that defendant was driving because the license plates were not properly registered. Muenchow's duffle bag and Sam's Club card were in the backseat of the vehicle. The officers ran a check of defendant's license and discovered that he had an outstanding arrest warrant. Defendant was subsequently arrested.

Borisch interviewed defendant after his arrest. During the interview, he told defendant that the police had confiscated Muenchow's duffle bag. After learning this, defendant promised that he would retrieve the items that were stolen from Muenchow's house if the police released him on bond.

After the interview, Borisch confiscated defendant's shoes and sent them to the Michigan State Police Trace Evidence Unit for testing. Guy Nutter, an expert in trace evidence detection, tested Muenchow's kitchen door using a special lighting technique and discovered footwear impressions. Nutter determined that these impressions were consistent with the treads on defendant's right shoe. The prosecution received these test results on the first day of trial. The trial court permitted Nutter's late endorsement as a witness, and he testified the following day regarding his analysis of the evidence.

II. Late Endorsement of Expert Witness

First, defendant argues that the trial court improperly permitted the late endorsement of Nutter as a witness. We disagree. "A trial court's decision to allow a late endorsement of a witness is reviewed for an abuse of discretion." *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998).

MCL 767.40a(3) states, "Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." MCL 767.40a(4) permits the prosecutor to "add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown . . ." Here, following the lunch recess on the first day of trial, the prosecutor moved to amend her witness list to add Nutter. His testimony would establish that recently completed forensic tests indicated that the footwear impressions were consistent with the treads on defendant's right shoe, which had been confiscated by police. The prosecutor explained that she had not previously endorsed Nutter because she had only learned during the recess that the

forensic tests had been finished that morning. Thus, the prosecutor provided good cause for the late endorsement.

Further, defendant failed to demonstrate prejudice resulting from this late endorsement. A defendant must show prejudice to be entitled to relief where the prosecutor fails to show good cause for the late endorsement of a witness. *People v Burwick*, 450 Mich 281, 295-296; 537 NW2d 813 (1995); *People v Herndon*, 246 Mich App 371, 403; 633 NW2d 376 (2001). Indeed, defense counsel did not request a continuance to prepare for his cross-examination of Nutter (which did not occur until the following day of trial) or request a copy of the results of the forensic tests. In addition, an overwhelming amount of incriminating evidence was presented against defendant in this case. In light of this evidence, defendant failed to establish that it was more probable than not that the introduction of this additional evidence was outcome-determinative. Therefore, any error was harmless. See *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001), quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000) (“In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative.”)

III. Ineffective Assistance of Counsel

Next, defendant argues that his counsel was ineffective for failing to properly cross-examine Wysong. We disagree. “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). Because there was no evidentiary hearing below, we limit our review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The United States and Michigan Constitutions guarantee a defendant the right of effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. “To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

The decision whether to call or question witnesses or to present evidence is a matter of trial strategy and only constitutes ineffective assistance of counsel if defendant is denied a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant claims that his counsel should have questioned Wysong regarding his observation that there was “no visible shoe print” on Muenchow’s door because this statement contradicted other evidence presented at trial. However, Wysong never testified that there was “no visible shoe print” on the door. Rather, this “statement” is found in a police report prepared by another police office after the investigation of Muenchow’s house.

Regardless, this statement does not conflict with the other evidence presented at trial. Although Borisch testified that smudges were visible in the photographs of the door, he only indicated that the smudges could be shoe prints resulting from someone kicking in the door. Similarly, Nutter did not discover the shoe print on the door with the naked eye. Rather, Nutter explained that he found the shoe print only after photographing the door with a special lighting technique and dusting the door with black fingerprint powder. Thus, the statement that there was “no visible shoe print” on the door was consistent with the other testimony offered at trial. In light of this, defense counsel’s decision not to question Wysong or call Officer Price, the author of the police report, about the statement at issue constituted sound trial strategy because it would have had no impact on the outcome of the trial. Therefore, defendant was not denied the effective assistance of counsel.

IV. OV 13

Defendant also argues that the trial court erred in scoring 25 points for Offense Variable (OV) 13. We disagree. We review *de novo* the application of the sentencing guidelines. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003). However, we review a trial court’s scoring of a sentencing variable to determine whether the trial court abused its discretion and whether the evidence of record supports the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). ““Scoring decisions for which there is any evidence in support will be upheld.”” *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

A trial court’s sentence may be invalid if it is based on a “misconception of the law” or “inaccurate information.” MCL 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). OV 13 is scored for a “[c]ontinuing pattern of criminal behavior.” MCL 777.43. In calculating OV 13, a trial court scores 25 points when the defendant engages in “a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b); *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

Here, in addition to the sentencing offense of second-degree home invasion, defendant was charged with two other counts of second-degree home invasion for offenses that occurred in 2003. However, these charges were dropped pursuant to a plea agreement.

A court may consider pending charges against a defendant when scoring OV 13. *People v Wilkens*, 267 Mich App 728, 744; 705 NW2d 728 (2005). Moreover, in scoring OV 13, “all crimes within a 5-year period, including the sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction.*” MCL 777.43(2)(a); *Francisco*, *supra* at 85 (emphasis supplied). In light of this, it follows that a court may consider the charges against a defendant dismissed by a plea agreement in scoring OV 13. Second-degree home invasion is a crime against a person. MCL 777.16f. Therefore, it was proper for the trial court to count those offenses in scoring OV 13. Consequently, the score of 25 points was proper.

V. Upward Departure from Sentencing Guidelines Range

Defendant next argues that the trial court failed to provide substantial and compelling reasons justifying its upward departure from the sentencing range established by the guidelines. We disagree.

We review the trial court's determination of the existence of a factor for departing from the guidelines for clear error, review de novo the determination that a factor is objective and verifiable, and review the determination that objective and verifiable factors justified departure from the guidelines range for an abuse of discretion. [*People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005).]

A trial court may depart from the sentencing range established by the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439-440; 636 NW2d 127 (2001). "In addition, the court's reasons for departing must be objective and verifiable." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Objective and verifiable factors are "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *Id.* An objective and verifiable factor must "keenly" or "irresistibly" grab the court's attention and be of "considerable worth." *People v Hendrick*, 472 Mich 555, 563; 697 NW2d 511 (2005), quoting *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003). Moreover, the court may not depart from the guidelines range based on an offense or offender characteristic already accounted for in determining the appropriate sentence range unless the trial court "concludes that the characteristic was given inadequate or disproportionate weight." *Havens, supra* at 18, citing MCL 769.34(3)(b).

Defendant's sentencing guidelines range was 43 to 86 months' imprisonment. However, the court departed from this range and sentenced defendant to 15 to 30 years' imprisonment (180 to 360 months' imprisonment). In departing from the sentencing range established by the guidelines, the court explained that the guidelines did not adequately account for the number of felonies for which defendant had served time in jail and in prison.

The guidelines provide that 50 points are scored for two prior high-severity felony convictions under prior record variable (PRV) 1 and 30 points are scored for four or more low-severity felony convictions under PRV 2. MCL 777.51(1)(b); MCL 777.52(1)(a). A maximum of 30 points may be scored under PRV 2.

Here, defendant had at least 13 prior felony convictions. For these convictions, the court assessed 50 points for two prior high-severity felony convictions under PRV 1 and 30 points for four or more prior low-severity felony convictions under PRV 2. However, even with these scores, defendant still had seven prior low-severity felony convictions in addition to the four accounted for by PRV 2.

In light of this, PRV 2 was given inadequate weight. See *People v Sarah Stewart*, 442 Mich 937, 937-938; 505 NW2d 576 (1993) (holding that an upward departure was appropriate where the defendant's score for an offense variable vastly exceeded the maximum score permitted under the guidelines for that variable); see also *People v Cain*, 238 Mich App 95, 132; 605 NW2d 28 (1999). Although defendant was sentenced as a fourth habitual offender, this was defendant's eighth felony conviction since he was originally sentenced as a fourth habitual offender. Consequently, the court's upward departure was appropriate.

VI. Defendant's Standard Four Brief

Defendant raises a variety of issues in his Standard 4 brief. First, defendant argues that the court lacked subject-matter jurisdiction because of several jurisdictional defects. We disagree. We review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Circuit courts have original jurisdiction over all criminal cases involving felonies. *People v Bidwell*, 205 Mich App 355, 358; 522 NW2d 138 (1994). Therefore, because second-degree home invasion is a felony, the court had subject-matter jurisdiction to hear this case.

Defendant claims that the complaint against him was invalid because Muenchow failed to personally file a criminal charge against defendant in accordance with MCL 764.1d and MCR 6.101(B). However, neither MCL 764.1d nor MCR 6.101(B) requires a victim to personally file a complaint against the accused. Rather, MCL 764.1d requires that the complaint include the substance of the accusation against the accused and MCR 6.101(B) requires the complaint to be signed or sworn before a judicial officer or court clerk. The complaint in this case satisfied both requirements. Therefore, this claim of error fails.

Defendant next claims that he was improperly charged because the prosecution, rather than Muenchow, pressed charges against him in this case. However, the prosecutor has the discretion to decide whether to initiate criminal charges. *People v Herrick*, 216 Mich App 594, 598; 550 NW2d 541 (1996). Therefore, this claim fails.

Defendant also asserts that his arrest warrant was improperly issued because there was no record of a hearing to establish probable cause and the complaint forming the basis of the warrant was not made under oath. MCR 6.102(A) provides, "A court must issue an arrest warrant . . . if presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense." The arrest warrant in this case was signed by a district judge and indicated that after an examination of the complaining witness who filed a sworn complaint, the judge found probable cause to believe that defendant committed second-degree home invasion. Therefore, the warrant was properly issued.

Defendant next contends that the warrant was invalid because neither the police nor the prosecutor had personal knowledge that he committed the offense for which he was charged. However, defendant cited no authority to support this claim of error. Therefore, he has abandoned this argument. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Defendant also argues that he was denied a fair trial because of prosecutorial misconduct. We disagree. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Prosecutorial misconduct occurs if a defendant is denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant alleges that the prosecutor's opening statement was improper because the evidence presented at trial did not support her assertions that Muenchow's neighbors saw defendant casing the neighborhood and that defendant told Borisch that he could retrieve the

items stolen from Muenchow's house. Defendant is wrong. In evaluating issues of prosecutorial misconduct, "this Court examines the [prosecutor's] remarks in context to determine whether they denied defendant a fair trial." *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), aff'd *People v Tilley*, 405 Mich 38 (1979). Here, Rokita, Vincent, and Borisch provided testimony that was consistent with the prosecutor's comments during opening statement. Therefore, defendant's claim of error fails.

Defendant next contends that the prosecutor made "egregious" statements that denied him a fair trial. However, in making this argument, defendant failed to identify any specific statement that was improper. Therefore, defendant has abandoned this claim of error on appeal. *Kevorkian, supra* at 389.

Defendant also argues that Borisch's testimony concerning statements that defendant made during his interview constituted inadmissible hearsay and was unfairly prejudicial. We disagree. We review unpreserved issues for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. Because a defendant's statements are not hearsay and therefore are admissible as a statement against a party opponent under MRE 801(d)(2), *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996), defendant's argument fails. Further, although MRE 403 bars the admission of relevant evidence when its probative value is substantially outweighed by its prejudicial effect, the mere fact that evidence may be damaging does not make it unfairly prejudicial. *People v Mills*, 450 Mich 61, 74-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Although the evidence was damaging, it did not contain violent or gruesome details that could inflame the passion or prejudice of the jury. Therefore, defendant's argument fails on this ground.

Defendant next argues that Borisch should have been sequestered before he was allowed to testify. We disagree. Again, we review unpreserved issues for plain error affecting substantial rights. *Carines, supra* at 763-764. A trial court may order the sequestration of witnesses so they cannot hear the testimony of other witnesses, unless the presence of a witness is essential to the presentation of the party's case. MRE 615. Defendant has failed to show that the trial court's failure to sequester Borisch constituted plain error because he was the officer in charge of this case and, therefore, his presence at trial was essential. Regardless, even if error occurred, defendant has failed to show how this alleged error would have affected his substantial rights in light of the incriminating evidence presented against him.

Defendant claims that the photo array shown to Vincent was improper. We disagree. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001).

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). We evaluate the fairness of the identification procedure in light of the totality of the circumstances. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993).

“[F]actors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” [*Id.*, quoting *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).]

The display of a single photograph may be unduly suggestive if the witness is led to believe that the person in the photograph is the perpetrator. *Gray, supra* at 111.

During cross-examination, defense counsel asked Vincent if he was shown a photo array. Vincent indicated that within a few days of the incident, the police showed him a photograph of defendant. Vincent did not indicate whether he identified defendant in the photograph at the time.

Regardless, assuming that Vincent identified defendant in the photograph at that time, the identification procedure was not unduly suggestive. Indeed, Vincent testified that he had ample opportunity to observe defendant as defendant cased Muenchow’s house and paid close attention to him. Moreover, there is no indication that the police told Vincent that they were showing him a photograph of defendant because they believed that he was the perpetrator. Accordingly, this identification procedure was proper.

Defendant also claims that the identification procedure was improper because his attorney was not present and because he was in custody when Vincent was shown the photograph. “[T]he right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings.” *People v Hickman*, 470 Mich 602, 609; 684 NW2d 267 (2004). Further, when an accused is in custody, a photographic identification procedure should not be used without a legitimate reason. *Kurylczyk, supra* at 298. Defendant was arrested on October 8, 2005, and the felony warrant was issued on October 11, 2005. Although Vincent indicated that he viewed the photograph within days of the crime, it is unclear from the record when the identification occurred. Thus, defendant has failed to establish plain error. Further, Rokita observed defendant on the day of the home invasion, positively identified defendant, and testified consistently with Vincent. Accordingly, even if the identification constituted plain error, defendant has failed to establish that the error affected his substantial rights.

Defendant claims that the evidence presented at trial was insufficient to support his conviction. We disagree. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992). In determining the sufficiency of the evidence, we review the evidence de novo in the light most favorable to the prosecution. *Id.* at 515. We do not consider whether any evidence existed that could support a conviction; rather, we must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *Id.* at 513-514.

To support a conviction for second-degree home invasion, the prosecutor must prove 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.” *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004); MCL 750.110a(3). “Because it is difficult to prove an actor’s state of mind, only minimal circumstantial evidence is required.” *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

Evidence was presented to establish that, at the time Muenchow was away from his home, defendant was casing the neighborhood and at one point was in Muenchow’s yard and driveway. Shortly thereafter, police officers found defendant in Muenchow’s neighborhood carrying a duffle bag. After returning home on the day in question, Muenchow discovered that his kitchen door was damaged. Forensic test results of the door revealed a shoe print that matched the treads of defendant’s shoes. Muenchow also indicated that his Sam’s Club card and duffle bag, among other items, were missing from his home. After defendant was arrested, officers found the Sam’s Club card and duffle bag in defendant’s vehicle. Later, during a police interview, defendant indicated that he could retrieve items that were stolen from Muenchow’s house if he were released on bond.

Given that “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime,” *Carines, supra* at 757, quoting *People v Allen*, 210 Mich App 98, 100; 505 NW2d 869 (1993), it is reasonable to infer that defendant broke into Muenchow’s home without permission and with the intent to commit a larceny. Therefore, the evidence was sufficient to support defendant’s conviction.

Next, defendant argues that the prosecution suppressed evidence, specifically, Price’s police report, the photographs of Muenchow’s door, and the forensic test results revealing the shoe prints on Muenchow’s door. Again, we review unpreserved issues for plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764.

“[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 to 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).

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).]

Although the police report indicates that there were no visible shoe prints on the door, and even assuming that the photographs do not show a visible shoe print on the door, defendant has failed to show how this evidence would have been exculpatory or outcome-determinative. As noted above, the report and photographs were consistent with the other evidence presented at trial. Thus, defendant has failed to show how this evidence was favorable to him or how its disclosure to him would have affected the outcome of the proceedings.

Defendant has also failed to show that the prosecutor suppressed the forensic test results or that this evidence was exculpatory. The prosecutor informed defendant and the court at the earliest possible opportunity that the forensic test results were available. Moreover, the test results indicated that the shoe print on the door was consistent with the treads of defendant's shoes. Because this evidence was inculpatory rather than exculpatory, defendant's claim of error fails.

Defendant also argues that the prosecution failed to disclose other inculpatory evidence. However, defendant has failed to identify the inculpatory evidence that he claims the prosecution failed to disclose. Regardless, other than his due process right to receive exculpatory evidence, a defendant does not have a general constitutional right of discovery in a criminal case. *Elston, supra* at 765; *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992). Therefore, his claim fails.

Defendant also contends that his counsel was ineffective for the following reasons: (1) his counsel failed to request an evidentiary hearing although the evidence was insufficient to support a charge of second-degree home invasion; (2) his counsel failed to challenge the complaint on the ground that Muenchow did not personally file charges against defendant; (3) his counsel failed to challenge Borisch's testimony although he was not sequestered; (4) his counsel failed to challenge Borisch's testimony regarding defendant's statements during his interview with Borisch; and (5) his counsel failed to challenge the photographic identification procedure employed by police. However, none of these alleged errors amounted to error requiring reversal. Thus, raising an objection or motion regarding these issues would have been futile. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Consequently, defense counsel's performance was neither objectively unreasonable nor outcome-determinative. *Effinger, supra* at 69.

Defendant claims that his original counsel was ineffective because he refused to file defendant's discovery motions.¹ To establish his claim that he was denied the effective assistance of counsel, "defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "[C]ounsel's decision not to file the motions clearly falls within the categories of professional judgment and trial strategy that are matters entrusted to the attorney . . ." *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). At the pretrial conference, defense counsel informed the court that he had reviewed a set of proposed discovery motions that defendant had provided that were inappropriate to file. In light of this, defense counsel's decision not to file these motions constituted sound professional judgment and was a matter of trial strategy.

Next, defendant claims that his counsel was unprepared for trial because he failed to obtain exculpatory and inculpatory evidence during discovery. However, because no evidence

¹ The attorney originally assigned to defendant's case withdrew on January 13, 2006.

was improperly withheld from defendant, he has failed to show that his counsel was unprepared for trial.

Defendant also claims that his counsel failed to remove jurors from the jury venire who had worked for the police or had relatives working in law enforcement. The decision whether to challenge a juror for cause or to exercise a peremptory challenge is a matter of trial strategy that seldom rises to a level of ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). Although two jurors indicated some connection to law enforcement during voir dire, both stated that they could decide the case fairly. In light of this, defendant's counsel apparently concluded that the removal of these jurors would have been futile. Therefore, defense counsel's failure to move to strike these jurors was not objectively unreasonable.

Defendant alleges that his counsel failed to question and remove four jurors from the venire for cause. However, defendant has failed to explain the underlying causes supporting the removal of these jurors. Notwithstanding, these jurors indicated that they could decide the case fairly. In light of this, any further questioning or challenge for cause made by defense counsel would have been futile. Therefore, defense counsel was not required to question or challenge these jurors.

Defendant argues that his counsel failed to challenge the admission of his shoes into evidence. Generally, evidence is admissible if it is relevant. MRE 402. 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." MRE 401. Because forensic test results showed that the treads of defendant's shoes matched the shoe print found on Muenchow's door, the shoes were relevant to the determination whether defendant kicked down Muenchow's door. Thus, the admission of the shoes into evidence was proper, and any objection by defense counsel to the admission of the shoes into evidence would have been futile. *Goodin, supra* at 433.

Defendant next claims that his counsel failed to challenge the prosecutor's "illicit actions." However, defendant has failed to identify any specific "illicit action" to which his counsel failed to object. Therefore, defendant has abandoned this claim on appeal. *Kevorkian, supra* at 389.

Defendant claims that his counsel failed to request the videotape of defendant's interview with Borisch. Given Borisch's live testimony, the videotape would have been merely cumulative. Thus, even if potentially relevant, the videotape could have been excluded under MRE 403. See *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002) (evidence may be excluded if it would be needlessly cumulative). Therefore, defense counsel's failure to request the videotape was objectively reasonable and not outcome-determinative. *Effinger, supra* at 69.

Defendant argues that he was denied his right to confront Price and Sergeant Heater.² We review defendant's unpreserved claim that his Confrontation Clause rights were violated for plain error affecting his substantial rights. *Carines, supra* at 763-764. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" US Const, Am VI. Defendant has failed to establish that his right to confront these witnesses was abridged, especially given that no statements by Price or Heater were introduced at trial. Further, defendant did not attempt to call these witnesses. Therefore, this claim fails.

Finally, defendant argues that his counsel was ineffective for failing to call Price and Heater as witnesses. However, defendant has failed to show how his counsel's failure to call Price or Heater would have affected the outcome of the trial. See *Kelly, supra* at 526. Therefore, the failure of defendant's counsel to call these witnesses did not constitute ineffective assistance of counsel.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray

² The felony complaint issued against defendant lists Heater as the complaining witness. His first name was not provided.