

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN LLOYD HEMINGWAY,

Defendant-Appellant.

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UNPUBLISHED

March 12, 2013

No. 308775

Tuscola Circuit Court

LC No. 11-012121-FH

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of one count of possession of burglary tools, MCL 750.116, one count of conspiracy to possess burglar tools, MCL 750.157a, one count of malicious destruction of property greater than \$1,000 but less than \$20,000, MCL 750.377a(1)(b)(i), and one count of conspiracy to commit malicious destruction of property greater than \$1,000 but less than \$20,000. We affirm.

**I. FACTS**

In 2011, Tri-City Aggregate's Sheridan Road work site had been broken into repeatedly to remove copper wiring. On the night of October 11, 2011, Tri-City Aggregate employee Garnet Mochty parked his Jeep on a hill overlooking the work site and maintained surveillance of the site using binoculars. Sometime after midnight, Mochty observed two men enter the site and begin banging and sawing at the site's panel boxes. Mochty called 911 to report the incident and, while he was on the line, a third man appeared and joined the initial two.

Shortly after the arrival of the third man, police officers arrived at the work site, causing the three men to flee directly in Mochty's direction. Mochty, who was armed with a baseball bat, told the men to "get down or he'd shoot," and the three men, including defendant, complied and were subsequently apprehended.

At trial, witnesses testified that defendant's shoes matched tracks left following earlier break-ins at the work site, and Scott Gronau, one of the other men apprehended along with defendant, testified that defendant had planned the scrapping operation and had previously hidden saws and a dolly in the woods near the site. Defendant, however, maintained that the plan was Gronau's idea and that Gronau had fooled defendant into believing they were going to

the site to pick marijuana plants. Defendant denied damaging any equipment or attempting to steal any wiring.

Following the trial, the jury found defendant guilty on all charges. This appeal followed.

## II. ANALYSIS

Defendant first argues that there was insufficient evidence to support his convictions. We disagree.

“In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were prove[n] beyond a reasonable doubt.” *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

Defendant’s argument has two prongs. First, defendant asserts that there was insufficient evidence presented at trial to rebut his version of events—that he merely went to the crime scene with the intention of stealing marijuana plants and chose to leave the scene once he realized the actual plan to steal the copper wiring. The record contradicts this argument.

Witness testimony placed defendant at the scene of the crime directly before his apprehension. Further, one of defendant’s codefendants explicitly testified that defendant had planned and organized the entire criminal enterprise in question. Finally, after defendant and the codefendants fled the scene, saws and bolt cutters were found left behind, and numerous panel boxes had been damaged. Given the record, there was clearly sufficient evidence for a reasonable jury to conclude that defendant was guilty of possession of burglary tools, malicious destruction of personal property, attempted larceny, and conspiracy to possess burglary tools. The fact that much of the evidence was circumstantial is immaterial; circumstantial evidence is capable of establishing guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, an accomplice’s testimony alone is sufficient to establish a conviction if believed by a jury. *People v Zesk*, 309 Mich 129, 132; 14 NW2d 808 (1944).

Defendant argues, however, that even if plaintiff’s version of events is accurate, the panel boxes broken into at the crime scene were not a “building, room, vault, safe, or other depository” as required under MCL 750.116. This argument is also without merit. The statute does not define the term “depository.” But in *People v Osby*, 291 Mich App 412, 415; 804 NW2d 903 (2011), this Court found “depository” to be a “catchall phrase” that applies to places “the average person locks . . . and assumes that the contents will be relatively safe.” Here, the panel boxes were locked to protect the contents inside the boxes. We therefore conclude that the panel boxes were depositories under the language of MCL 750.116, and defendant’s argument must fail.

Therefore, considering the evidence in the light most favorable to the prosecutor, it was sufficient evidence to support the jury’s verdicts.

Second, defendant argues that testimony concerning footprints found near the scene of the crime denied him his right to a fair trial. We disagree.

An unpreserved claim of non-constitutional error is reviewed for plain error affecting the defendant's substantial rights. Defendant bears the burden of demonstrating that it is more probable than not that the error affected the outcome of the trial, and even on such a showing, reversal is only warranted if the error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At trial, several witnesses testified that the shoes defendant was wearing at the time of his apprehension matched shoe prints found at and around the crime scene. Defendant first asserts that the testimony was improper opinion testimony from lay witnesses. Second, defendant argues that the footprint testimony was used as improper propensity evidence attempting to show that defendant had a history of being near the crime scene. Each of these arguments will be considered in turn.

MRE 702 provides that the court may allow expert testimony if it determines that scientific, technical, or specialized knowledge will assist the trier of facts to understand evidence, finds that a witness is qualified, that the testimony is based on sufficient facts and data and that the testimony is a product of reliably principled methods; and that the witness has applied the principles and methods reliably to the facts of the case. Here, there is no question that the three witnesses who testified concerning the footprints at and around the scene of the crime were not experts in footprint analysis, nor did they apply any principled scientific methods to their analysis of the footprints in question. As such, defendant is correct that the witnesses were not qualified to provide expert testimony.

But under MRE 701 a lay witness may testify in the form of opinions or inferences when those opinions or inferences are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Here, the witnesses testifying concerning footprints had directly observed the footprints and compared them to the shoes defendant was wearing on the night of his arrest. Further, the footprint testimony was relevant to determining a fact in issue at trial: the footprints supported the prosecution's theory that defendant had masterminded the criminal enterprise and had previously gone to the crime scene to plant tools to use on the night of the scrapping mission. By extension, the footprint evidence also directly contradicted defendant's theory of the case, which posited that defendant had never been to the crime scene before and that he was tricked into coming along on the scrapping mission. Therefore, the testimony in question was rationally based on the witnesses' perception and was helpful to the determination of a fact in issue. The evidence was, thus, proper lay opinion testimony. MRE 701.

Defendant's second argument, that the footprint evidence was improper propensity testimony, is similarly without merit. Other acts evidence is admissible if it is relevant to an issue other than propensity, is relevant to an issue of fact or consequence at trial, and the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). Here, the footprint evidence complained of was not introduced to show propensity, but rather to show that defendant had been to the crime scene before, which was directly relevant to the prosecution's theory of the case and correspondingly weakened defendant's theory of the case. Consequently, the testimony was relevant to a fact at issue, other than propensity, and its probative value was not substantially

outweighed by the danger of unfair prejudice. Consequently, we conclude the evidence was properly admitted. *Id.*<sup>1</sup>

Defendant next argues that the prosecution engaged in misconduct that denied him a fair trial. We disagree.

We review allegations of prosecutorial misconduct on a case-by-case basis, examining the record and evaluating a prosecutor's remarks in context to determine if defendant received a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). In reviewing a claim of prosecutorial misconduct under the plain error standard, reversal is warranted only when the error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Callon*, 256 Mich App 312, 329; 597 NW2d 501 (2003).

Defendant complains of the following comments the prosecutor made during closing arguments:

I mean this is what—this is what Mr. Gronau does, this is what [defendant] does. . . . [W]hat you have here is a subculture of folks who are addicted to controlled substances, and the way they get their money is they bottom feed off the rest of us. They go off and steal everything that isn't nailed down or screwed to the wall, and even then sometimes it doesn't stop them as you can see from the use of these—these tools. And then they trade that in for money to buy drugs. And that's—that's what Mr. Gronau more or less alluded to, this is what he does, and that [defendant] has given statements to Sergeant Jones that he's familiar with Mr. Gronau and his operation and that he's indicated he also does a number of controlled substances. And so, you know, you see really the forest for the trees of what's happening here.

On appeal, defendant asserts that the above statements amounted to an appeal to the jurors' "civic duty" and improperly denigrated him. A prosecutor may not argue that jurors should convict a defendant as part of their civic duty. *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). Taken in context, however, the statement is not an appeal to the jurors' "civic duty" to convict bad individuals generally; it is an explanation of the prosecution's theory of defendant's motive for committing the charged offenses. As such, the above statement is not an improper appeal to the jury's civic duty.<sup>2</sup>

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<sup>1</sup> Defendant also argues that he was prejudiced by "bad acts" testimony concerning his drug use on the night of the incident in question. This argument is also without merit. Defendant's own theory of the case was that he had been using drugs with friends on the night of his arrest and had gone to the crime scene in order to steal more drugs.

<sup>2</sup> Defendant also alleges misconduct because the prosecution invited the jury to consider who would be more familiar with the work site, defendant, who lived a few minutes away, or Gronau, who lives in Flint. There is nothing improper about this statement, however, as defendant's and

On the other hand, the prosecution's portrayal of defendant and his co defendants as bottom feeders who "steal everything that isn't nailed down" is somewhat more problematic, as it is evocative and denigrating language. But a prosecutor is not obligated to argue his or her case in the "blandest possible terms." *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). Moreover, even if the comments were improper, plain error cannot be established unless the error is outcome determinative. *Callon*, 256 Mich App at 329. Given that defendant was apprehended fleeing from the crime scene, and testimony was offered that identified defendant as the organizer of the scrapping operation on the night of his arrest, any prejudice stemming from the prosecution's harsh language was outweighed by the evidence of defendant's guilt.

Therefore, because the comments the prosecution made during closing arguments were either proper or non-outcome determinative, defendant cannot establish plain error affecting substantial rights.

Next, defendant argues that the sentencing court erred when scoring offense variables (OV) 13, 14, and 19. We disagree.

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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews the interpretation and application of the sentencing guidelines de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

Defendant raises two arguments regarding the guidelines scoring. First, defendant asserts that many of the facts the sentencing court used were not proven beyond a reasonable doubt at trial, and so the use of such facts is unconstitutional. In *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), our Supreme Court rejected this claim, holding that judicial fact-finding in applying the sentencing guidelines under Michigan's indeterminate sentencing scheme is not unconstitutional. As such, defendant's first argument fails. Next, defendant argues that the sentencing court's scoring of OV 13, 14, and 19 were not justified, even under a preponderance of the evidence standard. As we discuss below, this argument is also without merit.

Under OV 13, five points are to be scored if the offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against property." MCL 777.43(1)(f). For OV 13 purposes, "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). In the instant case, defendant committed and was convicted of multiple crimes against property as part of a scrapping operation. Although some of these crimes were contemporaneous and were part of the sentencing offense, they are to be included for purposes of scoring OV 13 by the plain and unambiguous terms of MCL 777.43(2)(a). Thus, the sentencing court properly scored five points for OV 13.

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Gronau's addresses were facts in evidence. "A prosecutor may argue the evidence and all reasonable inferences arising from the evidence." *Ackerman*, 257 Mich App at 453.

Under OV 14, 10 points are to be scored if the offender “was a leader in a multiple offender situation.” MCL 777.44(1)(a). The offense at issue was a “multiple offender situation.” Moreover, there was ample evidence in the form of codefendant Gronau’s testimony and the corroborating footprint evidence to support a judicial finding that defendant was a leader of the scrapping operation. Thus, the sentencing court properly scored 10 points for OV 14.

Finally, under OV 19, 10 points are to be scored if the offender “interfered with or attempted to interfere with the administration of justice.” MCL 777.49(c). In *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004), our Supreme Court held that “the investigation of a crime is critical to the administration of justice” and that “[p]roviding a false name to the police constitutes interference with the administration of justice,” which may be scored under OV 19. Here, the record shows that defendant lied to police officers during the investigation of the criminal enterprise in question. Thus, the sentencing court properly scored 10 points for OV 19.<sup>3</sup>

Therefore, because the sentencing court properly scored OV 13, 14, and 19, defendant is not entitled to resentencing.

Finally, defendant argues that he received ineffective assistance of counsel at trial. We disagree.

The deprivation of effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). The trial court’s factual findings are reviewed for clear error; its constitutional determinations are reviewed de novo. *Id.*

Under both federal and state constitutional law, a defendant in a criminal case has a right to the assistance of adequate and effective counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to prevail under a claim of ineffective assistance of counsel, a defendant must show that counsel’s representation fell below professional norms, that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would be different, and that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

In the instant case, defendant argues that his trial counsel was deficient in three ways. First, defendant argues that trial counsel was deficient for failing to object to the footprint testimony admitted at trial. As noted above, however, that testimony was not improper, and any objection would have been meritless. Trial counsel is not required to raise meritless objections. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Next, defendant argues that his trial counsel was deficient for failing to object to the allegedly improper statements made by the prosecution. As discussed already, those statements were either proper or were not prejudicial.

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<sup>3</sup> Defendant alternatively argues that OV 19 is unconstitutionally vague; however, our Supreme Court has specifically found OV 19 to be “plain and unambiguous.” *Barbee*, 470 Mich at 286. Accordingly, defendant’s alternative argument is without merit.

It follows that counsel's failure to object was either reasonable or was not outcome determinative. Accordingly, defendant is not entitled to a new trial.

Finally, defendant argues that his trial counsel was deficient for failing to ensure that defendant was properly sentenced following trial. Defendant, however, was resentenced on motion of appellate counsel. Therefore, defendant cannot show any prejudice stemming from errors trial counsel made during his initial sentencing. Because defendant cannot show that trial counsel's performance with respect to any claimed deficiency was both unreasonable and prejudicial, defendant cannot establish ineffective assistance of counsel. *Odom*, 276 Mich App at 415.

We affirm.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ William C. Whitbeck