

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAIN LEE PEARSON,

Defendant-Appellant.

UNPUBLISHED

May 24, 2011

No. 296252

Kent Circuit Court

LC No. 09-001904-FC

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Defendant Jermain Lee Pearson appeals as of right his jury convictions for armed robbery, MCL 750.529, unlawful imprisonment, MCL 750.349b, carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, carrying a concealed weapon, MCL 750.227, possessing a firearm while being ineligible to do so (felon-in-possession), MCL 750.224f, and conspiracy to commit armed robbery, 750.157a. The trial court sentenced defendant as a second habitual offender, see MCL 769.10, to serve 40 to 45 years in prison each for his convictions for armed robbery and conspiracy, to serve 180 to 270 months in prison for his unlawful imprisonment conviction, and to serve 60 to 90 months in prison each for his convictions for carrying a concealed weapon and being a felon-in-possession. Finally, the trial court sentenced defendant to serve two years in prison for his felony-firearm conviction, which defendant had to serve prior to serving his sentences for armed robbery, conspiracy, unlawful imprisonment, and being a felon-in-possession. On appeal, defendant argues that the trial court erred when it precluded him from offering his own alibi testimony. He also argues that his trial counsel was ineffective and that the prosecutor engaged in misconduct that deprived him of a fair trial. Finally, he argues that the trial court erred when it scored certain offense variables affecting his sentencing. These errors, defendant maintains, deprived him of a fair trial. For these reasons, defendant asks this Court to reverse his convictions and order a new trial or, at the least, remand this case for resentencing. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

This case has its origins in the robbery of a cash advance store in September 2008.

Willie Tolliver, who was 21 at the time of the events at issue, testified that he knew defendant through his sister, Kimika, who was dating defendant. Willie described defendant as an “associate” with whom he would occasionally hang out.

On the day at issue, defendant called, said that he “needed” Tolliver, and asked his location. Tolliver said he told defendant where he was and defendant arrived a few minutes later. He said that Latisha Arroyo drove defendant in her Blue Neon. Arroyo’s sister testified that defendant was dating Arroyo at the time. Tolliver said defendant was lying low in the back of the Neon and was wearing a hat, wig, cap, sweatshirt, padded bra, and shades. Defendant also had a purse. He agreed that that was kind of odd.

After defendant and Arroyo picked up Tolliver, Arroyo drove to a house on Cass Street. Defendant then left the car and retrieved a “hoody” and a baseball cap that he gave to Tolliver. Tolliver said he put the clothing on and they then drove over to 28th Street. On the way, defendant told him that he “scoped” the “cash advance” store and that it was a “good idea to hit the store.” Defendant opened his purse and showed him a handgun.

They soon arrived at an apartment complex behind the cash advance store’s location. Tolliver stated that Arroyo backed the Neon into a carport and, after that, he and defendant got out and began to walk to the cash advance store. While walking, defendant told Tolliver what he needed to do: “go in the back behind the counter and there’s going to be two little trees to my right, just go in the back, unlock the door, and let me out the door.”

Linda Remington testified that she was working alone at the Check Into Cash store on 28th Street in Wyoming, Michigan, on the day at issue. She said she saw two men coming around the side of the building. One had on a wig and glasses and she got a “bad feeling” because it was “a little early for Halloween.” For that reason, she hit the store’s “panic button” as the men came into the store.

Tolliver testified that he opened the door to the store and let defendant in. Defendant then approached the counter as Tolliver moved over by the “little plants” and pretended to read some magazines. Remington stated that the man with the wig demanded money from her and told her that he would “cap” her if she hit the button. The man in the wig told Tolliver—who Remington knew by the time of the trial—“Go for it, man.” And Tolliver proceeded to round the counter.

Tolliver said that, after defendant demanded money from the clerk, he moved around the counter and unlocked the back door, knocked down a security camera, and checked the drawers for cash. Remington said that she moved from behind the counter to try and leave the store. The man in the wig slammed her against the wall and demanded that she go to the back room. He also showed her a black gun in a purse on his hip. Remington said she began to cry and refused to go to the back room. The man in the wig then forced her into a chair. At this point, Remington saw police officers approaching the store. Tolliver said “police” and both men took off through the back door. Remington said she then went through the front entrance and began

to point out which way the men had run to the officers when she collapsed. Evidence showed that defendant shattered Remington's hip when he slammed her against the wall.

David Thompson testified that he was an officer with the Wyoming Police Department and that he responded to the cash advance store on the day at issue. He said the clerk came out of the store after he pulled up and she pointed; he looked in that direction and saw a man in a hoodie running from the area. The man had a wig and a bag in his hand.

Tolliver said he saw police officers arrive at the store, yelled "police", and started to run. He ran toward the Blue Neon, jumped the fence and landed on the carport, but Arroyo drove off. After that, he ran, jumped a couple fences, and hid behind a house.

Dwayne Holmberg testified that he was an officer with the Wyoming Police Department and that he responded to the scene of the robbery. He said that he learned that the suspects had fled and began to search the area when a passerby pointed out Tolliver's location. Holmberg said that Tolliver was "hunched over with his hands on his knees, sweating profusely" and appeared exhausted. Holmberg took Tolliver into custody without incident and discovered that he had \$431 in cash.

Officer Thompson said he pursued the suspect with the wig in his police cruiser. The suspect was running toward an apartment complex and he drove up to him and tried to pin him against a fence with his car to prevent him from getting to a gate. The suspect dropped the wig and purse next to the fence and rolled off the hood of Thompson's car. Thompson said that, when the suspect was on the hood of his car, he looked right at him and his eyes "were wide open." The suspect ran past after he rolled off the hood and Thompson tried to slam his door into him, but he got past. The suspect ran for a bit and then began to climb a fence. Thompson said he drew his weapon and ordered the suspect to stop, but decided not to shoot. The suspect made it over the fence and scurried away. He then secured the evidence and discovered that the purse had a loaded .40 caliber semi-automatic handgun. The next day, Thompson saw two photos at the station near the copier and recognized the man in the photos as the suspect he chased. The photos were of defendant. Thompson also identified defendant in the courtroom as the man he chased.

Eric Wiler testified that he was an officer with the Wyoming Police Department and that, on the same day as the robbery, he checked the registration of the firearm found at the scene. He discovered that two people lived at the address registered for the handgun: Danisha Reed and defendant. He went to that address and spoke with Reed.

Danisha Reed testified that she was defendant's girlfriend at the time and that she owned the handgun discovered at the scene of the robbery. She said that defendant could come and go as he pleased and that he knew about her gun, but that she did not tell anyone else about it. She said that some officers came to her apartment, which was right behind the cash advance store, and asked her about defendant. She told them that he "had just left." The officers also asked about her gun and she went to retrieve it for them. She was surprised to see that the gun was not there. Wiler also stated that Reed seemed "shocked" when she discovered that the gun was missing.

Kim Deleeuw testified that she worked at the Michigan State Police's forensic lab and that she tested swabs taken from the sunglasses found at the scene. She stated that the swab had two donors: one male and one female. She said she could not exclude defendant as a possible match for the swab and that there was a 1 in 115,000 chance that any given person would match the sample. Brian McMahon testified that he was a latent print examiner and that he found matches for Arroyo, Tolliver and defendant on the Blue Neon used in the robbery.

Defendant was eventually captured in Atlanta, Georgia. At trial, his lawyer argued that defendant had been wrongfully identified as Tolliver's accomplice. Specifically, he noted that some of the witnesses had good reason to implicate defendant and that the officers were rushing to judgment. He ended by arguing that there was reasonable doubt as to whether defendant committed the robbery.

The jury rejected that argument and convicted defendant on all counts.

This appeal followed.

II. ALIBI DEFENSE

A. STANDARD OF REVIEW

Defendant first argues that the trial court erred when it precluded him from offering alibi evidence through his own testimony. The right to testify on one's own behalf, defendant maintains, is so fundamental that—even though the United States Supreme Court has recognized that the States may impose limitations on the right to present evidence or defenses—the States may not establish a rule that categorically prohibits a defendant from testifying on his own behalf. Thus, the trial court could not bar him from testifying as to his alibi defense under MCL 768.21 for failing to give the notice required under MCL 768.20. Instead, he concludes, the trial court had to fashion a remedy for the failure that was less than a complete bar. This Court reviews de novo the proper application and interpretation of statutes. *People v Bemer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). Likewise, this Court reviews de novo questions of constitutional law. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

B. PRESERVATION AND ERROR

We shall first address defendant's implicit argument that precluding a defendant from testifying is structural error mandating a new trial. Defendant's claim of error clearly implicates his constitutional right to testify on his own behalf. See *Rock v Arkansas*, 483 US 44, 51-53; 107 S Ct 2704; 97 L Ed 2d 37 (1987). Nevertheless, not every violation of a constitutional right warrants reversal. Indeed, "most constitutional errors" are "amenable to harmless-error analysis." *Sullivan v Louisiana*, 508 US 275, 279; 113 S Ct 2078; 124 L Ed 2d 182 (1993). The common thread connecting those cases where courts have applied harmless error to a constitutional violation is that the errors were trial errors "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v Fulminante*, 499 US 279, 307-308; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

In contrast, structural errors are those errors that “deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.” *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000), citing *Rose v Clark*, 478 US 570, 577-578; 106 S Ct 3101; 92 L Ed 2d 460 (1986). Structural errors are rare and apply only to a very limited class of cases. *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999). “Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.” *Rose v Clark*, 478 US 570, 579; 106 S Ct 3101; 92 L Ed 2d 460 (1986).

Where a trial court allegedly wrongfully deprived a defendant of his or her opportunity to testify at trial, the defendant can establish a record of his or her proposed testimony. The proposed testimony can then be evaluated in light of the evidence actually adduced at trial to determine whether the error was harmless beyond a reasonable doubt. See *Palmer v Hendricks*, 592 F3d 386, 398-399 (CA 3, 2010) (noting that “such testimony can be evaluated in the context of the remainder of the evidence” and that “this is precisely the type of constitutional error that is amenable to conventional review in the context of the trial and evidence as a whole.”); *Ortega v O’Leary*, 843 F2d 258, 262 (CA 7, 1988) (applying harmless error test to the deprivation of a defendant’s right to testify). Further, although defendant correctly notes that this Court has stated that it “would not hesitate” to reverse where a defendant was deprived of his or her right to testify, the Court nevertheless applied the prejudice test stated for claims of ineffective assistance of counsel to that defendant’s claim that he had been deprived of his right to testify through his counsel’s failure to inform him of the right. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985). Because this type of error is clearly amenable to harmless-error analysis, it does not warrant automatic reversal. *Fulminante*, 499 US at 307-308.

Defendant also argues that the prosecution bears the burden of proving that any error in the trial court’s decision to preclude defendant from offering his own alibi testimony was harmless beyond a reasonable doubt. Had defendant properly preserved this issue for appeal by raising it before the trial court, the prosecution would bear the burden of proving that the constitutional error was harmless beyond a reasonable doubt. See *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). However, it is well-settled that, where a defendant fails to properly preserve a claim of error—even error of constitutional magnitude—in order to obtain any relief, he must show that the error was plain and affected his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

On the first day of trial, the prosecution moved in limine to preclude defendant from offering testimony—even his own testimony—to show that he had an alibi for the time at issue. The prosecution stated that it was its “understanding that the defense was looking into the possibility of an alibi defense” on the basis of the defendant’s request for a private investigator back in May 2009. The prosecution noted that it was unclear “what was discovered” or whether the defense “intended to introduce an alibi defense.” However, because defendant failed to give the notice of alibi defense required under MCL 768.20, the trial court had to bar the admission of any alibi evidence under MCL 768.21.

The trial court addressed the motion on the same day. Defendant's trial lawyer noted that his investigator had not found the witnesses that he wanted to find in Atlanta. He also conceded that the time limit for an alibi defense had passed. He nevertheless argued that the prosecution had notice of the defense because defendant told an officer that he was in Atlanta at the time of the robbery. Defendant's attorney also explained that, whether defendant would take the stand depended in part on the trial court's ruling:

Now, [defendant] may or may not take the stand. I'm not sure at this time. I guess it's going to be determined on whether the Court rules that he can stick with his story which he originally gave or if the Court is going to preclude him taking the stand and presenting his defense because there's nothing new that . . . the People are not already aware of. I don't have any witnesses that would testify that he was down there. I don't have any other statements . . . that he was in Georgia, just [defendant's] own statement.

The court determined that it did not have discretion under the statute—it had to preclude defendant from offering any *alibi* evidence. The trial court did not, however, explicitly state that defendant could not testify on his own behalf.

At no point in the discussion of this motion did defendant's trial lawyer argue that the statute could not constitutionally be applied to categorically preclude a defendant from offering his own alibi testimony. He also did not argue that, given defendant's constitutional right to testify, the trial court had to try to fashion a remedy short of preclusion. On this record, we must conclude that defendant did not properly preserve this issue for appeal. Therefore, we shall review this claim of error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

C. NOTICE OF ALIBI

Several Michigan statutes and court rules require a defendant to give notice of his or her intent to use certain evidence to the prosecution. See MCL 767.94a(1) (requiring a defendant to provide the prosecution with certain types of discovery); MCL 768.20a (requiring a defendant to give notice of his or her intent to present an insanity defense) MCL 750.145c(7) (requiring a defendant to give notice of his or her intent to offer evidence that a sexually explicit image appearing to include a child was not created using any part of an actual child); MCL 768.21b (requiring a defendant who intends to offer duress as a defense to breaking prison to provide notice of that defense to the prosecution); MCR 6.201(A) (providing for mandatory disclosure of discovery materials). Further, in some cases, the statutes and court rules provide that the failure to comply with the notice and disclosure requirements may result in the defendant being precluded from offering the evidence. MCL 767.94a(3) (precluding a defendant from offering evidence at trial that was not properly disclosed); MCL 768.21 (precluding a defendant from offering evidence in support of an insanity defense if the defendant failed to give the required notice of that defense); MCL 750.145c(7) (precluding a defendant from offering evidence that a sexually explicit image of a child was not made using any part of an actual child's body if the defendant failed to give the required notice); MCR 6.201(J) (providing that a trial court may prohibit a party from introducing evidence that it did not properly disclose). Similar notice and preclusion statutes apply to a defendant's proposed alibi defense.

If a defendant in a felony case proposes to offer an alibi defense, the defendant must “file and serve upon the prosecuting attorney” notice of his or her “intention to claim that defense.” MCL 768.20(1). The notice must contain “the names of witnesses to be called in behalf of the defendant” and must include “specific information as to the place at which the accused claims to have been at the time of the alleged offense.” *Id.* If the defendant does not comply with the notice requirement, the trial court must “exclude evidence offered by the defendant for the purpose of establishing an alibi” MCL 768.21(1). Moreover, if the notice did not identify the names of witnesses to be called in behalf of the defendant with sufficient particularity, the trial court must “exclude the testimony of a witness which is offered by the defendant for the purpose of establishing that defense.” *Id.*

Here, it was undisputed that defendant’s trial counsel did not comply with the notice requirements stated under MCL 768.20(1). Defendant’s trial counsel also did not ask the trial court for permission to file late notice, as permitted under MCL 768.20(1). See *People v Travis*, 443 Mich 668, 679; 505 NW2d 563 (1993) (holding that trial court’s have the discretion to “fix the timeliness of notice in view of the circumstances.”). For that reason, the trial court determined that, pursuant to MCL 768.21(1), defendant could not offer any testimony—even his own—to establish that he was in Atlanta at the time of the robbery.

Under MCL 768.21(1), a trial court must preclude a defendant from offering “evidence” or “testimony of a witness” to establish an alibi defense, if the defendant fails to give the notice required under MCL 768.20. On the surface, a defendant’s own testimony as to alibi would appear to be “evidence” or “testimony of a witness” offered to establish an alibi. However, a plurality of our Supreme Court has determined that the exclusion requirement found in a prior version of the notice of alibi statute must be understood in light of the statute’s primary purpose. See *People v Merritt*, 396 Mich 67; 238 NW2d 31 (1976) (opinion by WILLIAMS, J.).

In *Merritt*, the trial court precluded the defendant from offering any evidence—including his own testimony—tending to suggest an alibi, because the defendant failed to comply with the notice provisions of a prior version of MCL 768.20 and MCL 768.21. *Merritt*, 396 Mich at 73-74. Justice Williams, writing for a plurality of our Supreme Court,¹ concluded that the scope of the reference to “evidence” within the notice statute was unclear and should be understood in light of the notice statute’s purpose: “because the word ‘evidence’ in the notice statute may be interpreted to include all evidence, not just that of witnesses for [the] defendant, but even, perhaps, the testimony of [the] defendant, we should examine the purpose of the alibi notice statute itself.” *Id.* at 84-85. Justice Williams noted that the purpose of the notice statute was to protect the public by providing the prosecution time to “investigate proposed witnesses” and avoid undue delays caused by late notification. *Id.* at 85. It also created conditions where, after a proper investigation, a “prosecution may even be dropped.” *Id.* Thus, the notice statute serves “the interests of both parties and the public by facilitating orderly, uninterrupted trials.” *Id.*

¹ Two justices concurred with Justice Williams and two justices did not participate in the decision. See *Merritt*, 396 Mich at 89, 96.

However, Justice Williams determined that, when applied to a defendant's own testimony, the same considerations were not well-served:

[The d]efendant is already in custody or, at least, available to the prosecutor. While there may be a necessity to learn something about other witnesses who have not hitherto been available, that necessity is not present where the defendant is concerned. Should [the] defendant suddenly develop an alibi after having told a different story, he or she may be impeached by the prosecutor. Further, the chance that the finder of fact may not choose to believe [the] defendant's unsubstantiated testimony is itself sufficient motivation to promote timely filing. In any event, whether [the] defendant was at the scene of the alleged crime would seem to be a fundamental question, and the information should reasonably be developed early in the investigative process. [*Id.* at 88.]

Given that there was no evidence of "egregious fault" or "prejudice to the people's case", Justice Williams concluded that the trial court abused its discretion when it excluded the defendant's evidence of alibi. *Id.* at 88-89. Further, Justice Williams concluded that, even had the statute been properly applied to exclude other witnesses, it could not be used to prevent the defendant from testifying on his own behalf about the existence of an alibi defense. *Id.* at 89.

Although the plurality in *Merritt* construed an earlier version of the notice of alibi statute, it essentially determined that a notice statute, while serving a legitimate and salutary purpose, could not be applied to preclude a defendant from exercising his or her right to testify on his or her own behalf—even when that testimony included alibi evidence. This Court has since recognized that *Merritt* stands for that proposition. See *People v Mendoza*, 108 Mich App 733, 743-744; 310 NW2d 860 (1981). Moreover, even if the exclusion mandated under MCL 768.21(1) were properly to apply to a defendant's own testimony, there are strong constitutional arguments for rejecting that application.

A criminal defendant has a constitutional right to present a defense, but does not have an absolute right to present evidence in support of his or her chosen defense. *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984) (noting that there is no constitutional right to assert an insanity defense). Rather, "an accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.* at 279, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Further, courts have upheld preclusion as a sanction for a defendant's failure to comply with notice and discovery requirements even though the sanction implicated a defendant's right to present a defense. See *Hayes*, 421 Mich at 283 (stating that the Legislature could constitutionally preclude a defendant from presenting evidence of insanity where the defendant failed to comply with the notice requirements); *Taylor v Illinois*, 484 US 400; 108 S Ct 646; 98 L Ed 2d 798 (1988) (upholding the use of preclusion as a sanction for a defendant's failure to disclose the identity of a witness); *United States v Nobles*, 422 US 225; 95 S Ct 2160; 45 L Ed 2d 141 (1975) (upholding use of preclusion as a sanction against a defendant who offered the testimony of a witness while refusing to disclose the witness' prior statements and reports); see also *Bowling v Vose*, 3 F3d 559, 561-562 (CA 1, 1993) (noting that preclusion may be an appropriate sanction for the failure to give notice of alibi, but concluding that the trial court should not have resorted to such an extreme sanction when less prejudicial remedies were

available). Nevertheless, the right to testify on one's own behalf is a fundamental right. *Rock*, 483 US at 49 (“At this point in the development of our adversarial system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.”). And the United States Supreme Court has cautioned that restrictions on that right “may not be arbitrary or disproportionate to the purposes they are designed to serve.” *Id.* at 55-56.

In *Rock*, the Court examined whether a state rule could constitutionally preclude a defendant from testifying about matters that the defendant remembered after undergoing hypnosis. *Id.* at 56. The Court noted that the rule was a “*per se* rule prohibiting . . . hypnotically refreshed testimony” that “operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced.” *Id.* Further, as applied to the case before the Court, it “had a significant adverse effect” on the defendant’s ability to testify. *Id.* at 57. The Court determined that, although there might be extreme cases that warranted preclusion, for the majority of cases there were adequate safeguards in the normal adversarial system with which to test the reliability of the testimony. See *id.* at 58-62. As such, the Court concluded that the rule at issue went too far: “Arkansas’ *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his own behalf.” *Id.* at 62. Other courts have similarly concluded that, because the right to testify on one’s own behalf is so fundamental, a defendant may not be categorically barred from testifying for failing to comply with a procedural rule. See *New Jersey v Bradshaw*, 195 NJ 493; 950 A2d 889 (2008); *Alicea v Gagnon*, 675 F2d 913 (CA 7, 1982).

MCL 768.21(1) does not *per se* bar a defendant from testifying as to alibi. Instead, it is a defendant’s failure to give timely notice under MCL 768.20(1) that triggers the mandatory preclusion sanction provided under MCL 768.21(1). Nevertheless, as Justice Williams explained in *Merritt*, the state’s interest in punishing discovery violations must be weighed against a defendant’s fundamental right to testify on his or her own behalf. We agree that the harms occasioned by an untimely notice of alibi are largely absent in cases involving a defendant’s own testimony. As such, we agree with Justice Williams’ analysis in *Merritt* and conclude that, as used under MCL 768.21(1), “evidence” and “testimony of a witness” cannot be understood to encompass a defendant’s own testimony. Therefore, the trial court erred when it determined that it was required to preclude defendant from offering his own alibi testimony.

D. HARMLESS ERROR

Because defendant’s trial counsel forfeited this claim of error by not properly raising it before the trial court, defendant must show that the error was “plain, i.e., clear or obvious” and that the “error affected the outcome of the lower court proceedings.” *Carines*, 460 Mich at 763. Although we agree that defendant should have been allowed to testify that he was in Atlanta at the time of the robbery, we cannot agree with defendant’s contention that, under any standard of review, “the error was not harmless.”

The prosecutor presented overwhelming evidence that defendant was not only in Wyoming, Michigan at the time of the robbery, but also that he was the man in the wig who robbed the cash advance store, injured the clerk, and ran from the scene. Setting aside the

evidence that tended to show that defendant was the common thread connecting the people and items involved in the robbery—the gun, the getaway car, the wig, the sunglasses, and the clothing—there were *three* witnesses who *unequivocally* placed defendant in Wyoming on the day at issue. Tolliver testified that he robbed the store with defendant and identified the items worn by defendant as his disguise, which items were visible in video taken at the scene of the robbery and later recovered by police. Likewise, officer Thompson testified that defendant was the man in the wig that he chased from the scene of the robbery and nearly pinned to a fence with his car. Finally, Reed testified that she was dating defendant at the time and that, when police arrived at her apartment on the day of the robbery and asked about defendant, she told them that he had *just* left. In addition to these witnesses' testimony, the prosecution presented testimony and telephone records that tended to show that defendant made calls in the greater Grand Rapids area at the time of the robbery. In addition, there was DNA and fingerprint evidence that associated defendant with the robbery. Finally, we note that, had defendant testified on his own behalf, the prosecutor could have impeached defendant's credibility with his prior conviction for armed robbery. See MRE 609.

Considering the evidence as a whole, we have no doubt that the jury would have summarily rejected defendant's uncorroborated alibi testimony. Indeed, even if defendant had preserved this claim of error, we believe that the error would have been harmless beyond a reasonable doubt. Therefore, even if we were to conclude that the trial court's error was plain, it would not warrant relief. *Carines*, 460 Mich at 763.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARDS OF REVIEW

Defendant next argues that his trial did not provide effective assistance. Specifically, defendant argues that his trial court failed to consult with him before trial and failed to file a timely notice of alibi. These errors were so egregious, defendant maintains, that he is entitled to a new trial. A claim of ineffective assistance of counsel generally presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, because the trial court did not conduct a hearing or make findings of fact, this Court's review is limited to examining the lower court record to determine—as a matter of law—whether the defendant was deprived of the effective assistance of counsel. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). This Court reviews de novo questions of constitutional law. *LeBlanc*, 465 Mich at 479.

B. ANALYSIS

In order to establish his claim of ineffective assistance of counsel, defendant must show that his trial counsel's actions fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the error, the outcome of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). As already noted above, the evidence that placed defendant in Wyoming, Michigan at the time of the robbery was so overwhelming that any testimony to the contrary that defendant might have offered would have been completely

unavailing. As such, defendant cannot show that, but for his trial counsel's failure to file a notice of alibi, the outcome of the proceedings might have been different. *Id.*

Defendant also argues that his trial counsel's failure to meet with him prejudiced his defense. However, defendant utterly failed to offer any meaningful discussion of this claim of error. Therefore, he abandoned this claim of error. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). In any event, having reviewed the transcripts, we conclude that defendant's trial counsel was clearly prepared for trial and offered defendant effective assistance. See *People v Payne*, 285 Mich App 181, 189; 774 NW2d 714 (2009). Defendant failed to establish that his trial counsel was ineffective.

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Defendant next argues that the prosecutor committed misconduct when he improperly vouched for Tolliver by emphasizing that Tolliver had promised to testify truthfully in exchange for his plea deal. This Court reviews de novo claims of prosecutorial misconduct to determine whether the prosecutor's conduct deprived the defendant of a fair trial. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). However, because defendant's trial counsel did not object to the comments at issue, our review is for plain error affecting defendant's substantial rights. *Id.* at 460-461.

B. ANALYSIS

In his opening statement, the prosecutor noted that Tolliver had confessed to having participated in the robbery at issue and that he would identify defendant as the man that he helped rob the cash advance store. The prosecutor further acknowledged that Tolliver was testifying according to a plea deal. Nevertheless, he argued that the existence of this deal should not lead the jury to disbelieve Tolliver:

Mr. Tolliver testifie[d] at a preliminary examination with absolutely no offer, nothing. We told him, "You tell the truth. We'll weigh your testimony if you're honest and if it's true, you'll get a deal. But it has to be truthful. You lie, no deal." Self-serving what Willie Tolliver did? Absolutely. But he has to tell the truth. Mr. Tolliver has a deal. He's pled. He's been sentenced. Except that there is an allowance. If he lies, we can withdraw that deal, he can go to prison, and he can have perjury charges. So there's a lot at stake for Mr. Tolliver, but what's at stake is telling the truth, not lying.

It is well-settled that a prosecutor may not vouch for the credibility of a witness by claiming some special knowledge with respect to the witness' truthfulness. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). But noting that a witness will testify pursuant to an agreement requiring the witness to testify truthfully does not insinuate that the prosecutor has special knowledge of the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Although the prosecutor's reference to the weighing of Tolliver's testimony at the preliminary examination was unfortunate, after examining the prosecutor's statements and actions in context, see *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003), we

conclude that the prosecutor was not improperly vouching for Tolliver. Rather, the prosecutor's remarks were clearly an attempt to mitigate any adverse inferences that the jury might draw from the generous plea deal given to Tolliver in exchange for his testimony.

In any event, to the extent that the remarks were in error, any prejudice was minimal and could readily have been rectified with a curative instruction. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (“Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.”). Thus, the comment would not warrant relief. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (noting that this Court will not find prejudicial error if the comments could have been cured by a timely instruction). Likewise, given the overwhelming evidence of guilt, even if this error could not have been cured with a timely instruction, it was nevertheless harmless. *Carines*, 460 Mich at 763.

There was no prosecutorial misconduct warranting relief.

V. SENTENCING

A. STANDARD OF REVIEW

Finally, defendant argues that the trial court erred when it scored Offense Variables (OV) 10 and 13. Because these scoring errors altered his sentencing grid, defendant maintains that he is entitled to be resentenced. This Court reviews de novo, as a question of law, whether the trial court properly interpreted and applied the sentencing guidelines. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). The trial court must apply the sentencing guidelines and must score them as provided by statute; it does not have the discretion to decline to score a particular variable or to score it differently than provided by statute. See *Bemer*, 286 Mich App at 31-32. Nevertheless, this Court gives substantial deference to a trial court's factual findings at sentencing and will affirm the scoring of a particular variable as long as there is any evidence to support that score. See *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006); MCL 769.34(10) (requiring this Court to affirm a sentence that is within the appropriate guidelines range unless the trial court committed an error in the scoring or relied on inaccurate information).

B. OV 13

Defendant argues that the trial court erred when it scored OV 13 at 25 points. A trial court must score points under OV 13 if the offender has engaged in a continuing pattern of criminal behavior. See MCL 777.43(1). A trial court must score OV 13 at 25 points if the offender engaged in a pattern of felonious criminal activity “involving 3 or more crimes against a person.” MCL 777.43(1)(c). Further, the Legislature provided that the offense categories for specific crimes are stated under part 2 of the sentencing guidelines, which is codified at MCL 777.11 *et seq.* See MCL 777.5. And, the Legislature provided that “[c]rimes against a person are designated ‘person’” under part 2 of the sentencing guidelines. MCL 777.5(a). As such, the reference to “crimes against a person” under MCL 777.43(1)(c) necessarily refers to the classification applicable to the crimes as enumerated under MCL 777.11 *et seq.*

Here, the trial court scored OV 13 on the basis of three of defendant's convictions from the trial at issue: armed robbery, unlawful imprisonment, and conspiracy to commit armed robbery. After defendant objected to the scoring of OV 13 using his conspiracy conviction, the prosecutor argued that OV 13 could be scored using defendant's conspiracy conviction because the sentencing manual instructed that a conspiracy conviction had the same category as the crime that the offender conspired to commit. Because defendant conspired to commit armed robbery, which is a crime against a person, see MCL 777.16y, the prosecutor maintained that the trial court could rely on that conviction in scoring OV 13. The trial court adopted the prosecution's response and declined to change the score.

The Legislature did not classify conspiracy as a crime against a person; it classified it as a crime against public safety. See MCL 777.18. Thus, it appears that, on a plain reading of the statutory language, a conviction for conspiracy cannot serve as the basis for scoring OV 13 at 25 points. See MCL 777.43(1)(c). However, MCL 777.21(4) provides special rules for determining the appropriate guidelines range for any offense described under MCL 777.18. The trial court must determine the "offense variable level" by scoring the OVs for both the category of the offense stated under MCL 777.18 and the category applicable to the underlying offense. MCL 777.21(4)(a). The trial court must also determine the "offense class" based on the underlying offense. MCL 777.21(4)(b) (emphasis added). Although neither provision modifies the offense category applicable to offenses described under MCL 777.18, this Court has held that the references to the variables and offense class stated under MCL 777.21(4) are "sufficiently sweeping in scope to have required the trial court to look to the nature of the conspiracy for which [the] defendant was convicted . . . when scoring OV 13." *People v Jackson*, ___ Mich App ___, slip op at 3; ___ NW2d ___ (2011) (Docket No.294964). Accordingly, the trial court did not err when it disregarded the class assigned to the crime of conspiracy under MCL 777.18 and instead scored OV 13 on the basis of the class assigned to the underlying offense to which defendant conspired.

C. OV 10

Under the sentencing guidelines, the trial court had to score OV 10. See MCL 777.22(1). This variable must be scored on the basis of the defendant's exploitation of a vulnerable victim. See MCL 777.40(1). Vulnerability is defined to be a "readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). Further, to exploit means to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

On appeal, defendant argues that the trial court erred when it scored OV 10 at 5 points. Specifically, defendant contends that the trial court could not score this variable at 5 points unless the clerk had an "apparent vulnerability" that he "exploited." Because there was no record evidence that the victim had such a vulnerability or that he exploited it, defendant argues that the trial court had to score OV 10 at zero. See MCL 777.40(1)(d) (stating that the trial court must score this variable at zero if the offender "did not exploit a victim's vulnerability.>").

Our Supreme Court has explained that points may only be assessed under OV 10 when "it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *Cannon*, 481 Mich at 158. Further, the Court stated that an offender must exploit the victim's vulnerability in committing the crime before it may assess 5 or

10 points. *Id.* at 159. As such, in order to score 5 points here, the trial court had to find that the store clerk had a readily apparent vulnerability and that defendant exploited that vulnerability.

There was clear record evidence that defendant readily and violently manhandled the store clerk. Indeed, he threw her into the wall with such force that it shattered her hip and knocked plaques off the wall in the store that shared a common wall with the cash advance store. Likewise, defendant forced the clerk into a chair where he trapped her while Tolliver searched for cash. This evidence could support a finding that defendant exploited the clerk and, on the basis of her appearance at trial, the trial court could have found that the clerk had a readily susceptible vulnerability to such physical restraint. Further, we do not agree with defendant's contention that he had to engage in preoffense conduct directed at exploiting the clerk's vulnerability; that requirement applies only to the scoring of OV 10 for predatory conduct. See *Cannon*, 481 Mich at 160-162. Thus, the trial court could have properly scored this variable at 5 points. However, although defendant objected to the scoring of this variable, the trial court did not address defendant's objections on the record. Therefore, we do not know whether the trial court would have found—on the basis of record evidence or observations—that the store clerk had a readily apparent vulnerability and that defendant exploited that vulnerability. Nevertheless, because it would not alter the recommended sentencing range, see MCL 777.62, even if the trial court erred when it scored OV 10 at 5 points, any error would not warrant relief. See *People v Francisco*, 474 Mich 82, 89-90 n 8; 711 NW2d 44 (2006).

There were no errors warranting relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly