

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLATUNJI KEAN,

Defendant-Appellant.

UNPUBLISHED

April 26, 2007

No. 264236

Saginaw Circuit Court

LC No. 04-025108-FC

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant Olatunji Kean appeals as of right his conviction and sentence for bank robbery, MCL 750.531(a), and third-degree fleeing and eluding a police officer, MCL 750.479(a)(3). He was sentenced as a habitual offender, third offense, MCL 769.11, to serve concurrent terms of 8½ to 20 years' imprisonment for his bank robbery conviction and 3 to 10 years' imprisonment for his fleeing and eluding conviction. We affirm defendant's bank robbery conviction, vacate his fleeing and eluding conviction and remand for resentencing.

Defendant argues that the trial court violated his right to due process by ordering duct tape to be placed around his mouth in front of the jury.¹ Further, defendant argues that his trial counsel was ineffective for failing to object before, during or after defendant was gagged. We disagree. Defendant did not object to being gagged at trial. Therefore, this issue is unpreserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing on the issue. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Defendant raised his claims of ineffective assistance of counsel and requested an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), in his motions to the trial court for a new trial and for reconsideration of the denial of that motion. Therefore, this issue is preserved.

This Court reviews an unpreserved assertion of constitutional error for plain error. *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004), citing *People v Carines*, 460

¹ Defendant's brief on appeal also notes that he was shackled. However, there is no indication in the record that he was shackled. In any event, our analysis of defendant's argument would not be different if the record showed that he was shackled as well as gagged.

Mich 750; 597 NW2d 130 (1999). A criminal defendant may obtain relief based on an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003). This Court reviews a trial court's decision to restrain a defendant during trial for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or motion for new trial before the trial court, or will be considered by this Court only to the extent that claimed counsel mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. Ordinarily, a trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In the instant matter, however, the trial court did not render factual findings on defendant's claim. Therefore, this Court is left to its own review of the facts contained in the record in evaluating defendant's assertions. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

A trial court has broad discretion to control court proceedings. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). That authority includes restraining a defendant where necessary to prevent escape, or injury to persons in the courtroom or to maintain order. *People v Dunn*, 446 Mich 409, 411, 425; 521 NW2d 255 (1994).

In *People v Conley*, 270 Mich App 301, 307-309; 715 NW2d 377 (2006), this Court determined that a trial court's warning to defendant that if he continued to interrupt proceedings his mouth would be taped shut did not deprive the defendant of a right to a fair trial, where the defendant had interrupted proceedings "several times" before the trial court issued the warning. The Court explained:

In *Illinois v Allen*, [397 US 337, 343-344; 90 S Ct 1057; 25 L Ed 2d 353 (1970),] the United States Supreme Court set forth a number of permissible ways courts can handle an obstreperous defendant. In that case, the defendant continually interrupted court proceedings and responded to the trial court's questions with vulgar language. [*Id.* at 339-341.] Although the trial court continually asked the defendant to behave himself and threatened to remove him from the courtroom, the defendant continued to be disruptive. [*Id.*] In holding that the trial court was within its authority to remove the defendant from the courtroom, the Court noted, "We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant . . . : (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." [*Id.* at 343-344.] Although the Court noted that the first method could affect the jury's feelings about a defendant and should be used as a last resort, the Court noted that "[I]n some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as [the defendant] did here." [*Id.* at 344.]

Similarly, this Court in *People v Kerridge*, [20 Mich App 184, 186-188; 173 NW2d 789 (1969),] addressed whether a trial court abused its authority in gagging an unruly defendant. Although the Court noted that gagging should only be considered as a last resort, the Court said that such a measure was appropriate when the defendant used vulgar language, repeatedly stated that he was not going to stand trial, attempted to leave the courtroom, and undressed himself in his cell. [*Id.* at 188.] *Clearly, if a defendant is unruly, disruptive, rude, and obstreperous, a trial court is within its discretion to gag a defendant when repeated warnings have been ineffective.* [Emphasis added.]

The *Conley* Court concluded that “the trial court did not deny [the defendant’s] right to a fair trial when it properly warned him of what actions it could take if he continued to disrupt the trial proceedings.” *Conley, supra* at 309. Similarly, in *Kerridge supra* at 186-188, this Court recognized that gagging a defendant should be a “last resort,” but found that the trial court acted properly by gagging the defendant during a “short period [in which] he insisted upon shouting obscenities.” *Id.*

Here, the trial court had removed defendant from the courtroom on two occasions and had advised defendant that he was in contempt of court. Only after defendant continued his outbursts despite these actions, did the trial court first warn him that it would place duct tape over his mouth if he persisted in his comments in the presence of the jury. Defendant acknowledged the warning and actually invited the trial court to tape his mouth before the jury entered the courtroom. The trial court declined, indicating that it did not want to have to tape defendant’s mouth at all, and again instructed defendant to maintain proper decorum in front of the jury. Defendant was aware of the consequences of his continued refusal to comply with the trial court’s instructions that he remain quiet. Yet, despite being advised by the court of those consequences, defendant addressed the jury directly and inappropriately until he was rendered incapable of doing so by duct tape. As a panel of this Court observed in *People v Martin*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2005 (Docket No. 255869), “[g]iven defendant’s complete lack of cooperation, it was appropriate for the court to take some sort of action to maintain control of the proceedings.” Having already advised defendant that he was in contempt, and having already removed him from the proceedings on two separate occasions, the trial court finally resorted to taping defendant’s mouth to prevent further outbursts in order to allow defendant’s trial to conclude. Considering defendant’s awareness of the consequences of his continued outbursts and in light of his persistent and deliberate conduct thereafter, we do not conclude that the trial court abused its discretion in ordering duct tape placed over defendant’s mouth.

Further, even were we inclined to conclude that the trial court abused its discretion in ordering defendant gagged, reversal is only required where defendant establishes that the trial court’s actions prejudiced the proceedings. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988). Given the evidence presented against defendant, including his admissions to police, the eyewitness testimony and the physical evidence against him, defendant cannot establish that he was prejudiced by the trial court’s decision to gag him to prevent further outbursts in front of the jury. Therefore, defendant is not entitled to a new trial.

Finally, defendant asserts that his trial counsel was ineffective for failing to object to the trial court’s conduct in gagging him. To establish a claim of ineffective assistance of counsel,

defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel's errors there is a reasonable probability that the results of his trial would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Again, given the evidence against him, defendant cannot establish that he was prejudiced in any way by counsel's alleged error in failing to object to the trial court's decision to restrain him. Additionally, because the trial court's actions were within its discretion, any objection to them would have been futile. Counsel is not required to assert meritless objections or positions. *Matuszak, supra* at 58; *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant argues that he was denied the effective assistance of trial counsel by his counsel's decision to concede defendant's guilt to the bank robbery charge without defendant's consent. We disagree.

A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing on the issue. *Rodriguez, supra* at 29-30. Defendant raised his claims of ineffective assistance of counsel and requested an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973) in his motions to the trial court for a new trial and for reconsideration of the denial of that motion. Therefore, this issue is preserved.

A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or motion for new trial before the trial court, or will be considered by this Court only to the extent that claimed counsel mistakes are apparent on the record. *Johnson, supra* at 129-130. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. Ordinarily, a trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *LeBlanc, supra* at 579. In the instant matter, however, the trial court was not presented with and did not rule on defendant's claim. Therefore, this Court is left to its own review of the facts contained in the record in evaluating defendant's assertions. *Rodriguez, supra* at 38.

This Court has explained that a complete concession of a defendant's guilt without the defendant's consent renders counsel ineffective. *People v Kryztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). However, it is acceptable trial strategy to admit to offenses where the evidence strongly establishes guilt, while at the same time denying other elements or other crimes. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Defendant was charged with armed robbery in violation of MCL 750.529. Armed robbery is a class A felony. MCL 777.62. Defendant was also charged with bank robbery in violation of MCL 750.531. Bank robbery is a class C felony. While both offenses provide for a statutory maximum term of imprisonment of life, the sentencing guidelines provide a lesser recommended minimum term of imprisonment at every point in the sentencing grid for class C felonies than for class A felonies. MCL 777.62; MCL 777.64; *People v Ford*, 262 Mich App 443, 456-457; 687 NW2d 119 (2004). Indeed, defendant's minimum sentence, enhanced for his habitual offender status, of 102 months for bank robbery is a full two years less than the guidelines recommended

minimum sentence for an offender convicted of armed robbery having defendant's total guidelines score² before any enhancement for habitual offender status. MCL 777.64.

Thus, contrary to defendant's assertion, defense counsel did not concede defendant's guilt to the most serious or "highest" charge against him. Rather, defense counsel conceded that which defendant himself had already admitted to police – that he robbed the bank and then attempted to flee and elude police – while challenging the prosecution's allegation that defendant was armed during the robbery. As this Court has explained, "[w]here the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others." *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988), overruled in part on other grounds by *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998). Simply stated, it is not ineffective assistance of counsel for defense counsel to concede lesser crimes in hopes of avoiding a finding of guilt on greater ones. *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984).

Defendant argues that his counsel's tactic cannot be explained as legitimate trial strategy. However, defense counsel's concession that defendant robbed the bank, in light of the overwhelming evidence including defendant's own statement that he did so and pictures showing him doing so, merely confirmed the inescapable conclusion that he did so. Defense counsel's strategy was to attempt to steer the jury away from the most serious of possible verdicts against defendant: guilty of armed robbery. This Court has consistently held that counsel's strategy of admitting defendant's guilt on some elements or crimes that the evidence strongly supports, while denying others, does not necessarily render ineffective assistance. *Walker, supra* at 382; *Wise, supra* at 98-99. As this Court explained in *Wise*:

Legitimate trial strategy will not be second-guessed. Accordingly, arguing that the defendant is merely guilty of the lesser offense is not ineffective assistance of counsel. Where defense counsel in opening statement recognizes and candidly asserts the inevitable, he is often serving his client's interests best by bringing out the damaging information and thus lessening the impact. In light of defendant's confession to the police that he had committed [certain of the charged offenses] defendant's credibility would have been lost if he had testified denying any involvement at all. . . . In fact, [counsel's strategy] was somewhat successful. Defendant was acquitted of four of the seven charges. [*Id.* at 98 (citations omitted).]

Here, counsel's strategy likewise was successful: defendant was acquitted of armed robbery and thus avoided a longer sentence than that imposed for his bank robbery conviction. This Court should not second-guess trial counsel's tactic of admitting guilt to a lesser offense. *Emerson, supra* at 349.

² According to his PSIR, defendant was scored at 65 points for prior record variables (PRV) and 45 points for offense variables (OV). This would place him at PRV level E and OV level III for purposes of sentencing a class A felony. The recommended minimum for the resulting grid cell is 126-210 months. MCL 777.62.

Further, even were this Court to disapprove of defense counsel's strategy of essentially admitting that defendant committed the bank robbery, given the overwhelming evidence against him, defendant cannot establish that but for counsel's mistake there is a reasonable probability that the results of his trial would have been different, and that the proceedings were fundamentally unfair or unreliable. *Toma, supra* at 302-303; *Rodgers, supra* at 714. Therefore, defendant's claim lacks merit.

Defendant argues that a person cannot flee and elude a police officer in violation of MCL 750.479a until a uniformed officer directs the person to stop their motor vehicle. Testimony at trial was unequivocal that defendant was not given an order to stop until after he entered Genesee County and that no portion of the police pursuit of defendant occurred in Saginaw County. Thus, defendant argues that no part of the crime of fleeing and eluding occurred in Saginaw County, and as a result, venue regarding that offense was not proper there. We agree.

This issue was raised before, and decided by the trial court on defendant's motion for a directed verdict. Therefore it is preserved for appellate review. *People v Cain*, 238 Mich 95, 129; 605 NW2d 28 (1999).

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). This Court reviews a trial court's determination regarding the existence of venue de novo. *People v Huffman*, 266 Mich App 354, 362; 702 NW2d 621 (2005); *People v Webb*, 263 Mich App 531, 533; 689 NW2d 163 (2004).

Venue is an element of every criminal prosecution and must be proven by the prosecution beyond a reasonable doubt. *Webb, supra* at 533. "Due process requires that the trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature." *Id.*, quoting *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996).

MCL 750.479a provides in pertinent part:

(1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the vehicle driven by the police or conservation officer is identified as an official police or department of natural resources vehicle.

* * *

(3) Except as provided in subsection (4) or (5), an individual who violates subsection (1) is guilty of third-degree fleeing and eluding, a felony ... if 1 or more of the following circumstances apply:

(a) The violation results in a collision or accident.

(b) A portion of the violation occurred in an area where the speed limit is 35 miles an hour or less, whether that speed limit is posted or imposed as a matter of law.

(c) The individual has a prior conviction for fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

Thus, as this Court explained in *People v Grayer*, 235 Mich App 737, 741-742; 599 NW2d 527 (1999):

On the basis of a plain reading of the statute, there are six elements necessary to establish third-degree fleeing and eluding: (1) the law enforcement officer must have been in uniform and performing his lawful duties and his vehicle must have been adequately identified as a law enforcement vehicle, (2) the defendant must have been driving a motor vehicle, (3) *the officer, with his hand, voice, siren, or emergency lights must have ordered the defendant to stop*, (4) the defendant must have been aware that he had been ordered to stop, (5) *the defendant must have refused to obey the order by trying to flee from the officer or avoid being caught*, which conduct could be evidenced by speeding up his vehicle or turning off the vehicle's lights among other things, and (6) some portion of the violation must have taken place in an area where the speed limit was thirty-five miles an hour or less, or the defendant's conduct must have resulted in an accident or collision, or the defendant must have been previously convicted of certain prior violations of the law as listed in MCL § 750.479a(3)(c). [Emphasis added.]

Testimony at trial was unequivocal that defendant was first directed to stop his vehicle by Genesee County Sheriff's Deputy Peter Stoochi in Genesee County and that no portion of the police pursuit of defendant occurred in Saginaw County. As noted in the statement of facts, defendant moved for a directed verdict on that basis at the close of the prosecution's proofs. The trial court denied defendant's motion, explaining that

under MCL 762.9 . . . as long as any part of the crime was committed in any county, and it talks about railroad cars, it talks about vessels, and it talks about automobiles. And the [c]ourt believes that part of the fleeing and eluding started in Saginaw County with defendant fleeing from the bank robbery. It ended in Genesee County. I believe that venue was proper in Saginaw County.

This Court reviews a trial court's determination regarding the existence of venue de novo. *Huffman, supra* at 362; *Webb, supra* at 533. MCL 762.9, relied on by the trial court in denying defendant's motion, provides:

Whenever a felony has been committed on a railroad train, automobile, aircraft, vessel or other moving vehicle, said offense may be prosecuted in any county, city or jurisdiction in which such conveyance was during the journey in the course of which said offense was committed.

As this Court explained in *People v Slifco*, 162 Mich App 758; 413 NW2d 102 (1987), MCL 762.9 “is intended to apply to felonies committed in a moving vehicle in situations where it is difficult to determine the county in which the criminal acts occurred.” *Id.* at 762. Such is not the case here. Clearly and unequivocally, all criminal acts constituting the separate offense of fleeing and eluding in violation of MCL750.479a occurred wholly within Genesee County. Thus, MCL 769.2 does not apply to the present case and the trial court erred in concluding otherwise.

At trial, the prosecution argued that defendant’s fleeing and eluding was part of the same criminal transaction as the bank robbery, which occurred in Saginaw County, and therefore, that venue was proper in Saginaw County on that basis, citing CJI2d 4.13. CJI2d 4.13 provides:

The alleged crime in this case is made up of several acts. The prosecutor only has to prove that one of these acts took place in [_____ County / the city of Detroit]; [he / she] does not have to prove that all of them took place there.

The commentary to this instruction notes that it is based on MCL 762.8, which provides:

Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any 1 of said acts was committed.

MCL 762.8 is concerned with “acts” that culminate in the felony, and not with elements of the felony. *People v Jones*, 159 Mich App 758, 761; 406 NW2d 843 (1987). “This statute merely requires that a defendant commit at least one act of a multiple act felony in the prosecuting jurisdiction. In order to establish proper venue, it is not necessary that the act constitute an essential element of an offense.” *People v Meredith*, 209 Mich App 403, 409; 531 NW2d 749 (1995).

For MCL 762.8 to apply to allow for venue to lie in Saginaw County, defendant would have had to undertake some act in Saginaw County in perpetration of or in preparation for the felony of third-degree fleeing and eluding. Certainly, testimony was unequivocal that no police officers identified, pursued or directed defendant to stop in Saginaw County. Thus, for venue to lie in Saginaw County pursuant to MCL 762.8, this Court would need to conclude that the bank robbery and/or defendant’s driving away, unpursued, from the bank robbery in Saginaw County and into Genesee County were preparation for, part of, or culminated in, defendant’s fleeing and eluding offense in Genesee County.

We see no basis for concluding that defendant robbed the bank in preparation for or as part of the felony of later fleeing and eluding a police officer. We do not conclude that the offense of fleeing and eluding a police officer within the meaning of MCL 750.479a was, in any way, the “culmination” of the “acts” of his bank robbery. Thus, we conclude that venue for this

offense was proper only in Genesee County, and not in Saginaw County. Therefore, defendant's fleeing and eluding conviction must be vacated.

Defendant argues that the trial court impermissibly assessed 25 sentencing points under Offense Variable (OV)13, for three crimes committed against a person in the past 5 years. Again, we agree.

Defendant objected to the trial court's scoring of OV 13 at sentencing. Therefore, defendant's challenge to the scoring of OV 13 is preserved. *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). A sentencing court has discretion to determine the scoring of offense variables, provided that there is evidence on the record to support a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews a sentencing court's scoring to determine whether that court properly exercised its discretion and whether the evidence adequately supports the score given. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004); *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The sentencing court's findings of fact are reviewed for clear error. *Houston, supra* at 471. The sentencing court's scoring should be upheld if there is any support in the record for it. *Id.*

OV 13 is for a continuing pattern of criminal behavior, and is to be scored at 25 points if the sentencing offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person" within a five-year period including the sentencing offense. MCL 777.43(1)(b); MCL 777.43(2)(a). When scoring OV 13, a court is to consider all crimes committed within the applicable period of time, regardless whether those crimes resulted in a conviction. MCL 777.43(2)(a). Thus, a trial court is permitted to consider pending charges against a defendant, as well as allegations of uncharged offenses for which there is evidence in the record. *Id.*; *People v Wilkens*, 267 Mich App 728, 744; 705 NW2d 728 (2005).

The trial court scored OV 13 at 25 points based on the instant bank robbery conviction and the prosecutor's representation at sentencing that, "[t]here are other bank robberies. He's confessed to one. I have a photograph of him in another." Defendant objected to the trial court's consideration of these alleged other offenses, asserting that the trial court should not rely "on offenses that are pending or may be charged in other counties" and that before considering them the trial court was required to hold a hearing and make "at least a probable cause, if not a reasonable doubt determination that those offenses happened."

As this Court explained in *People v Golba*, ___ Mich ___; ___ NW2d ___; 2007 WL 102508 (2007), slip op, p 6, "A trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided the defendant is afforded the opportunity to challenge the information and if challenged, it is substantiated by the preponderance of the evidence." As this Court explained in *People v Callon*, 256 Mich App 312, 333-334; 662 NW2d 501 (2003):

Our Supreme Court in *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987), established the preponderance-of-evidence standard to determine *contested factual matters* at sentencing proceedings by adopting Standard 18-6.4(c) of the American Bar Association Standards for Criminal Justice (2d ed.). However, it is incumbent on a defendant to first mount an effective challenge to invoke his right to a hearing on a contested fact at

sentencing and, thus, the need for an evidentiary hearing with a finding by the trial court based upon the preponderance of evidence. *People v Ewing (After Remand)*, 435 Mich 443, 472; 458 NW2d 880 (1990) (Boyle, J.); *Walker, supra* at 268. “Whether that requirement is satisfied with a flat denial of an adverse factual assertion, or whether an affirmative factual showing is required, will depend upon the nature of the disputed matter.” *Walker, supra* at 268.

“Once a defendant has ‘effectively challenged’ an adverse factual assertion, the prosecution must prove by a preponderance of the evidence that the facts are as the prosecution asserts.” *Walker, supra*, 428 Mich 268.

Even were this Court to determine that the prosecutor’s statements,³ without introduction of the confession or photograph into the record at sentencing, constitute sufficient “evidence in the record” to support the trial court’s conclusion that defendant committed two additional bank robberies, the prosecutor did not identify the date of the alleged robberies or in any way indicate when they transpired. Thus, regardless whether defendant’s request for a hearing constituted an “effective challenge” to the prosecutor’s assertion that defendant committed these additional offenses so as to require the prosecutor to prove by a preponderance of the evidence that defendant committed them, there simply was no evidence whatsoever in the record to allow the trial court to conclude that they occurred within a five-year period including the instant offenses.

Accordingly, we remand this matter to the trial court for a determination as to when these offenses occurred for purposes of scoring OV 13. Further, we instruct that, if defendant continues to challenge the prosecution’s assertions regarding these offenses, the prosecution is required to prove that defendant committed them by a preponderance of the evidence.

Defendant argues that, pursuant to MCL 769.11b, defendant is entitled to credit for time served for the three days he spent in police custody while in the hospital. We disagree.

Defendant failed to object at sentencing to the omission of three days jail credit for time served while in police custody at the hospital. Therefore this issue is unpreserved. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). Whether defendant is entitled to credit for time served is a question of statutory interpretation reviewed de novo. *People v Seiders*, 262 Mich App 702, 705; 405; 686 NW2d 821 (2004). However, we review unpreserved sentencing errors for plain error affecting defendant’s substantial rights. *Meshell, supra*.

MCL 769.11b, provides:

Whenever any person is hereafter convicted of any crime within this state and has served any time *in jail* prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in

³ While information relied on at sentencing may include that contained in the presentence investigation report, *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985), there is no mention in defendant’s PSIR of any pending or uncharged criminal activity. Thus, the only basis for the trial court’s scoring was the prosecutor’s statements, quoted above.

imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing. [Emphasis added.]

By its plain language, this statute does not authorize a sentencing credit unless the defendant served time “in jail” before sentencing because of being denied or unable to furnish a bond for the offense of which the defendant was convicted. MCL 769.11b; *People v Whiteside*, 437 Mich 188, 196; 468 NW2d 504 (1991); *People v Seiders*, 262 Mich App 702, 707; 686 NW2d 821 (2004); *People v Scott*, 216 Mich App 196, 199-200; 548 NW2d 678 (1996). “[T]he primary purpose of the sentencing credit statute is to equalize, as far as possible, the status of the indigent or lower-income accused with the status of the accused who can afford to post bail.” *People v Givans*, 227 Mich App 113, 125; 575 NW2d 84 (1997). Here, defendant was not “in jail,” but rather was in the hospital receiving medical treatment for the three days at issue.

Defendant argues that the record viewed in its entirety reveals that the actions and inactions of the trial judge, the actions and comments of the prosecutor and the actions of defense counsel considered together evidence willful and intentional calculated efforts to deny defendant a fair trial. We disagree.

Defendant did not raise this issue below. Therefore, it is unpreserved. *Cain, supra*. This Court reviews unpreserved assertions of error for plain error affecting substantial rights. *Jones, supra* at 355-356.

Defendant asserts without more that the trial judge, prosecutor and defense counsel conspired to deprive him of a fair trial. However, he points to no specific conduct and offers this court no legal authority or record citations to support his assertion. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998) [citing *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984)]. “An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue.” *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Thus, defendant has abandoned this claim.

Further, even if defendant’s argument were not abandoned, as discussed above defendant was not deprived of a fair trial, and given his confession to the crimes of which he was convicted, cannot establish prejudice arising from any alleged errors in his trial. Moreover, even if defendant were able to establish that he was deprived of a fair trial, there is nothing in the record to establish any conspiracy between the trial judge, the prosecutor and the defense counsel to produce this result. Defendant’s claim thus lacks merit.

In a number of related arguments, defendant contends that the prosecutor abused his discretion by charging defendant with both armed robbery and bank robbery, that the trial court denied defendant due process by refusing to rule on defendant’s motion to quash the armed robbery charges and forcing him to renew the motion as a motion for a directed verdict, that the trial court denied him due process by denying the motion for a directed verdict on the armed robbery charge, and that defendant was denied the effective assistance of counsel by counsel’s delay in filing the motion to quash until a few days before trial. None of these claims have merit.

These issues were raised below in defendant's motion for a new trial or resentencing. Therefore they are preserved for appellate review. *Cain, supra*. This Court reviews a prosecutor's decision to charge a defendant under an "abuse of power" standard to determine if the prosecutor acted contrary to the Constitution or law. *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005). This Court reviews a circuit court's decision to grant or deny a motion to quash charges de novo to determine if the district court abused its discretion in binding over defendant for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). This Court reviews a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

A prosecutor has broad discretion in bringing charges against a defendant. *People v Venticinque*, 459 Mich 90, 100-101; 586 NW2d 732 (1998). A prosecutor may proceed under any applicable statute as long as the charge is warranted by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004); *People v Yeoman*, 218 Mich App 406, 414; 554 NW2d 577 (1996). This Court has determined that a defendant may be charged with, convicted of and sentenced for both armed robbery and bank robbery arising from the same criminal transaction, "because the armed robbery statute and the bank, safe, or vault robbery statute are intended to protect different social norms." *Ford, supra* at 456. Thus, the prosecution did not abuse its discretion in charging defendant with both armed robbery and bank robbery, so long as both charges were warranted by the evidence presented.

Defendant argues that there was no evidence that defendant was armed or indicated that he was armed so as to justify the armed robbery charge. However, bank teller Bauer indicated at all points in the investigation, including when she first spoke to police, at the preliminary examination and at trial, that she believed defendant had a gun during the robbery, based on his conduct, his demeanor and the presence of a bulge in his shirt. This was sufficient to permit the prosecution to charge defendant with armed robbery.

Defendant moved to quash the armed robbery charges against him. At the beginning of trial, defense counsel reminded the trial court that the motion was pending, and the trial court advised that it was going to "wait and see what happens with the testimony" and that defendant could "raise the issue . . . at the end of the People's proofs, if [it] wished to do so by motion for a directed verdict." Defendant argues that the trial court thus denied him due process by declining to decide his motion to quash the armed robbery charges before trial.

A defendant must be bound over for trial if, at the conclusion of the preliminary examination, probable cause exists to believe that the defendant committed the crime of which he is charged. *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997). "Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged." *Id.*, citing MCL 766.13; MCR 6.110(E). While a defendant's guilt need not be established beyond a reasonable doubt, there must be evidence of each element of the crime charged, or evidence from which the elements may be inferred. *People v Flowers*, 191 Mich App 169, 179; 477 NW2d 473 (1991).

Bauer testified at the preliminary examination that she believed defendant possessed a gun because, rather than leave her window after she gave him an initial amount of money, he “started to get nervous, and he also was shaking,” she “sensed he was getting uneasy” and she observed him reach toward a bulge in the left side of his shirt. This testimony was sufficient to support the charges of armed robbery. Therefore, there was no abuse of discretion in binding defendant over for trial on those charges and the trial court did not err in denying defendant’s motion to quash.

Defendant next argues that the trial court erred in denying his motion for a directed verdict on the armed robbery charge because there was no evidence to permit the jury to conclude that he possessed or indicated that he possess a weapon. In denying this motion, the trial court explained that Bauer’s testimony and the pictures submitted constituted sufficient evidence when viewed in the light most favorable to the prosecution, to allow a reasonable jury to conclude that a reasonable person in Bauer’s position would have concluded that defendant possessed a weapon.

At trial, Bauer testified that she believed that defendant possessed a weapon because of his mannerisms and conduct, because she observed a bulge in the left side of his shirt which she believed to be a gun, because when she gave defendant the initial amount of money he did not leave her window whereas “most people would run away,” and because defendant was uneasy and shaking and appeared to be reaching for something in the vicinity of the bulge in his shirt when indicating that he wanted more money from her. This testimony, viewed in the light most favorable to the prosecution was sufficient, if believed, to allow the jury to conclude that defendant possessed a weapon or indicated by his gestures and conduct that he possessed a weapon. Thus, the trial court did not err in denying defendant’s motion for a directed verdict.

Further, even if submission of the armed robbery charge to the jury was unwarranted, any error was cured when the jury acquitted defendant of that charge. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (“[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury.”); *People v Moorner*, 246 Mich App 680, 682-683; 635 NW2d 47 (2001) (“Defendant also contends that reversal is warranted because the trial court erred in denying his motion for a directed verdict of acquittal of the first-degree murder charge. Defendant does not dispute that the charge of second-degree murder was properly submitted to the jury. Accordingly, any error arising from the submission of the first-degree murder charge to the jury was rendered harmless when the jury acquitted defendant of that charge”).

Finally, defendant argues that he received ineffective assistance of counsel because counsel filed the motion to quash the armed robbery charges only a few days before trial. To establish a claim of ineffective assistance of counsel, defendant must show that his attorney’s representation fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel’s errors, there is a reasonable probability that the results of his trial would have been different, and that the proceedings were fundamentally unfair or unreliable. *Toma, supra* at 302-303; *Rodgers, supra* at 714. Given Bauer’s testimony at the preliminary examination, defendant cannot establish that he was prejudiced in any way by counsel’s alleged error in not filing the motion sooner. As discussed above, the trial court did not err in denying defendant’s motion to quash and there is no indication that the trial court

would have reached a different result had the motion been filed some amount of time earlier. Therefore, defendant has not established that he was denied effective assistance of counsel.

Defendant complains of a number of instances of allegedly wrongful conduct by the prosecutor. However, the instances of alleged prosecutorial misconduct neither deprived defendant of substantial rights, nor affected the outcome of his trial, and therefore, reversal is not warranted.

Defendant did not object to the alleged instances of prosecutorial misconduct at trial. Therefore, they are unpreserved for review. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the proceedings. *Id.* at 448-449.

The test for prosecutorial misconduct is whether, examining the prosecutor's statements in context, they deprived defendant of a fair and impartial trial. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis and the comments of the prosecutor are to be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Because the claimed instances of prosecutorial misconduct are unpreserved, reversal of defendant's conviction is warranted only if it constitutes plain error resulting in the conviction of an innocent defendant or seriously affecting the fairness, integrity or public reputation of the proceedings. *Ackerman, supra* at 448-449.

Defendant asserts that the prosecutor committed misconduct necessitating a new trial by prosecuting him for both armed robbery and bank robbery, by inquiring whether the trial court would tape defendant's mouth if he persisted in his outbursts, by calling the defendant a "conartist and liar" who would say anything he believed to be in his best interests, and by suggesting that defendant was lying when he told police officers that his sunglasses were prescription glasses.

As discussed above, a prosecutor is permitted to charge a defendant with both bank robbery and armed robbery. *Ford, supra* at 456. Indeed, defendant acknowledges that a prosecutor may charge a defendant with multiple offenses arising from the same transaction. Thus, in the absence of an improper motive, which defendant has not established, the prosecutor did not commit misconduct by charging defendant as such in this case.

Similarly, given that the trial court did not abuse its discretion in restraining defendant by placing tape over his mouth, we see no basis to conclude that the prosecutor committed misconduct by inquiring, outside the presence of the jury, whether the trial court would be taking such action if defendant persisted in his outbursts.

Next, during his closing argument, the prosecutor addressed the jury regarding defendant's strategy of admitting the obvious - that he robbed the bank and fled from police officers - while denying that he was armed. The prosecutor explained that, "[t]he theme of this whole trial from the defense standpoint has been that defendant is guilty of bank robbery, and

he's guilty of fleeing and eluding, and he admitted those crimes to Detective Ruth, but he denied that he ever possessed a pistol. Therefore, he must be telling the truth because he admitted everything else." The prosecutor then examined the "logic of that argument" by addressing the evidence the prosecutor believed indicated that defendant was armed during the robbery and by asserting that defendant was "not telling the truth to Detective Ruth and [they] caught him in two lies" in his statement, relating to whether his sunglasses were prescription glasses and whether he was injured by police officers while being apprehended. The prosecutor concluded this line of argument by asserting that defendant was "lying about that. The defendant is a con artist. He's a liar. He will say or do anything he believes is in his best interests."

A prosecutor is permitted to challenge the credibility of witnesses, including the defendant, and may argue from the facts presented at trial that the defendant is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). A prosecutor is also free to argue "the evidence and all inferences relating to his theory of the case" and respond to defense counsel's theory of the case. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). A prosecutor is not required to phrase arguments in the blandest possible terms; emotional language may be used during closing argument. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). The prosecutor's remarks, quoted above, were responsive to the defense's assertion that defendant told the truth in his interview with Ruth and therefore the jury should believe that he did not have or intimate that he had any weapon during the robbery. Considered in context, the prosecutor's comments were not improper.

Further, any possible prejudice was cured by the trial court's instruction to the jury that the statements and arguments of the lawyers are not evidence and that the jury was required to make its own assessment of the evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Further, given the evidence presented against defendant at trial, including his own admissions together with the eyewitness testimony and physical evidence against him, even if this instruction was insufficient to cure any prejudice resulting from the prosecutor's comments, defendant cannot establish that those comments affected the outcome of his trial. Therefore, reversal of defendant's conviction is not warranted. *Ackerman, supra; Launsbury, supra*.

Defendant argues that the trial court erred in concluding that there was more than a single victim of defendant's bank robbery, for purposes of scoring OV 9. We disagree.

Defendant objected to the trial court's scoring of OV 9 at sentencing. Therefore, defendant's challenge to the scoring of OV 9 is preserved. *Cain, supra* at 129. A sentencing court has discretion to determine the scoring of offense variables, provided that there is evidence on the record to support a particular score. *Hornsby, supra* at 468. This Court reviews a sentencing court's scoring to determine whether that court properly exercised its discretion and whether the evidence adequately supports the score given. *Houston, supra* at 471; *McLaughlin, supra* at 671. The sentencing court's findings of fact are reviewed for clear error. *Houston, supra*. The sentencing court's scoring should be upheld if there is any support in the record for it. *Id.*

OV 9 takes into account the number of victims of a crime and may be scored at ten points if there were two to nine victims. MCL 777.39(1)(c). When scoring OV 9 the court must "[c]ount each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a); *People v Melton*, 271 Mich App 590, 595; 722 NW2d 698 (2006). In scoring OV

9 at ten points, the trial court explained that it considered “the victims in a bank robbery [to be] anybody that happened to be in the bank, because they are all potential victims” in danger of being injured.

This Court has concluded that only those persons involved in the criminal transaction itself may be counted as victims. *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994). However, victims need not be the complainant. Bystanders and persons who intervene after the fact may be considered victims if placed in danger of injury. See, e.g., *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004); *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002); *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988).

Defendant argues that only Bauer was a victim of his bank robbery, because only she was aware of any unusual circumstances and because he did not use any weapon or make any threats during the robbery. Defendant does not contest that there were more than two people present inside the bank at the time of the robbery. We conclude that defendant’s conduct in robbing the bank thus placed more than two persons in danger of injury. As this Court explained in *Day*, *supra*, when considering a similar issue under the prior judicial sentencing guidelines, “in the event of police or other third party apprehension intervention, each individual in the bank at the time of the robbery was a victim subject to possible injury or death.” Therefore, there was sufficient record evidence to support the trial court’s conclusion that there were between two and nine persons placed in danger of injury by defendant’s conduct. Thus, the trial court did not abuse its discretion in scoring OV 9 at ten points.

Finally, defendant argues that he is entitled to correction of his presentence investigation report because it contains factual errors, which defendant was prevented from raising at sentencing due to ineffective assistance of trial.

Defendant contested the accuracy of his presentence investigation report pertaining to his prior convictions at sentencing. Therefore, this issue is preserved for appeal. MCR 6.429(C). We review the trial court’s response to a claim of inaccuracies in the defendant’s presentence investigation report for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

At sentencing, defense counsel objected to information in the presentence investigation report that defendant had two prior felony convictions and three prior misdemeanors, asserting that defendant had two prior felony convictions and two prior misdemeanor convictions. The trial court accepted that correction. Despite this, defendant raised this same concern again in his motion for resentencing. On appeal, defendant asserts that he was prevented from raising objections to inaccurate information about his prior criminal history at sentencing, but he does not specify what he believes to be inaccurate. To the extent that defendant asserts the same issue as raised below, he prevailed on that issue and there is no need to grant him any relief on appeal. To the extent that defendant is attempting to assert new alleged inaccuracies, his failure to object to them below prevents this Court from affording him any relief. *People v Bailey*, 218 Mich App 645, 647; 554 NW2d 391 (1996).

Defendant also asserts that his counsel was ineffective by failing to provide him with ample time to review the presentence investigation report. However, the record indicates that defense counsel received the presentence report and reviewed it with defendant before

sentencing. Based on his conversations with defendant, defense counsel raised an issue with regard to defendant's prior convictions. Defendant was afforded an opportunity to speak to the court. During that time, defendant did not indicate in any way that he was otherwise dissatisfied with the information contained in the presentence report.

Finally, in his brief in support of his motion for resentencing, defendant objected to the statement in his presentence investigation report that, "[d]uring a search of the area, one of the deputies located a small stainless steel handgun lying in the ditch where defendant had run through." Testimony at trial established that this gun belonged to a Mt. Morris Township police officer, and was in no way connected to defendant. While we agree with defendant that this statement implies that defendant possessed the gun during the robbery, the statement itself is actually not inaccurate. Therefore, strictly speaking, the trial court did not abuse its discretion in declining to strike the sentence in response to defendant's motion for resentencing. Still, as we are remanding for resentencing, we instruct the trial court to strike or clarify the sentence in the presentence investigation report referring to the gun found at the scene.

We affirm defendant's bank robbery conviction, vacate his fleeing and eluding conviction and remand for resentencing and amendment of the presentence investigation report consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens