

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL EARL BAKER,

Defendant-Appellant.

UNPUBLISHED

May 20, 2010

No. 289844

Wayne Circuit Court

LC No. 08-004441-FH

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), carjacking, MCL 750.529a, unlawfully driving away an automobile (UDAA), MCL 750.413, felonious assault, MCL 750.82, resisting and obstructing a police officer, MCL 750.81d(1), carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 5 to 20 years' imprisonment for the first-degree home invasion conviction, 16 to 30 years' imprisonment for the carjacking conviction, one to five years' imprisonment for the UDAA conviction, one to four years' imprisonment for the felonious assault conviction, one to two years' imprisonment for the resisting and obstructing a police officer conviction, one to five years' imprisonment for the CCW conviction, one to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We vacate defendant's conviction and sentence for UDAA, but affirm defendant's remaining convictions and sentences, and remand for correction of the judgment of sentence.

Defendant first argues, and the prosecution agrees, that his conviction and sentence for UDAA violates the double jeopardy clause because it constitutes a second punishment for the same offense. Defendant contends that all of the essential elements of UDAA are included in the crime of carjacking, which defendant was also convicted. We agree.

"This case involves multiple punishments for the same offense, where defendant was convicted and sentenced for both carjacking and UDAA. Whether two offenses are the same for purposes of the "multiple punishments" strand of double jeopardy analysis is determined by

using the *Blockburger*¹ “same elements” test. *People v Ream*, 481 Mich 223, 228; 750 NW2d 536 (2008). “[M]ultiple punishments are authorized if each statute requires proof of an additional fact which the other does not...” *Id.* (citations and internal quotation marks omitted). The focus is on the statutory elements, not the particular facts of the case. *Id.* at 238. Even if two offenses share the same elements, imposition of multiple punishments does not violate the Constitution “if the legislature expressed a clear intention that multiple punishments be imposed.” *Id.* at 228 n 3 (citations and internal quotation marks omitted). We conclude that a review of the elements for UDAA shows that UDAA does not require proof of an additional fact that carjacking does not. The possession and driving away without permission, which are required for UDAA, are subsumed into the elements of carjacking. Therefore, all of the elements of UDAA are a part of carjacking.

Moreover, there is no language in the UDAA statute, MCL 750.413, that indicates the Legislature specifically authorized two separate convictions arising out of the same transaction. Therefore, it is not clear that the Legislature intended to separately punish a defendant convicted of both UDAA and carjacking. Consequently, defendant’s conviction and sentence for UDAA is a double jeopardy violation, which constitutes plain error affecting his substantial rights, and must be vacated.

Next, defendant argues that the trial court abused its discretion in denying his motion for a mistrial. Defendant contends that a portion of the prosecutor’s closing argument, in which he improperly vouched for the testimony of Officer Christopher Staton, had a prejudicial effect that impaired defendant’s ability to receive a fair trial. We disagree.

A trial court’s decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). An abuse of discretion exists when the trial court’s decision is not within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

“A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant’s ability to get a fair trial.” *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). In the absence of consent to a mistrial, a court may declare a mistrial only if justified by manifest necessity, i.e., the prejudicial effect could be removed in no other way. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Manifest necessity generally exists when there are sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial, make its completion impossible, or amount to a miscarriage of justice. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999); *People v Tracey*, 221 Mich App 321; 561 NW2d 133 (1997).

In this case the prosecutor, during the rebuttal portion of his closing argument, stated:

Counsel didn’t really stress that, that [defendant] was dealing not just with another armed man, but a person [Staton] that has taken an oath to serve and

¹ *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

protect, a person that is not the neighbors that [the victim] called, but a person that is there as a person that society pays to serve and protect.

In denying defendant's motion for a mistrial, the trial court stated:

The comments that the Assistant Prosecuting Attorney made in his rebuttal argument relative to the oath that Officer Staton took to serve and protect . . . came in my opinion dangerously close to vouching for that witness's credibility. . . . I do not believe that the Defendant's rights in regard to this case have been thwarted; that due process is still taking place and he has not been prejudiced by the comments that the Assistant Prosecuting Attorney made.

While it is improper for a prosecutor to vouch for the credibility of his witnesses by implying some specialized knowledge of their truthfulness, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004), he may argue that a witness is credible on the basis of facts presented at trial, *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). A prosecutor is "given great latitude to argue the evidence and all inferences relating to his theory of the case," *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004), but a prosecutor may not appeal to the jury's civic duty by injecting issues broader than guilt and innocence or encouraging jurors to suspend their powers of judgment, *Id.* at 455-456. Further, a prosecutor's comments are not reviewed in isolation. Rather, the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Viewing the prosecutor's comments in context, the trial court did not abuse its discretion in concluding that he was not improperly vouching for Staton's credibility. The context in which the prosecutor's made the statements was in rebuttal to defendant's arguments in his closing argument regarding how Staton had fabricated defendant's possession of a gun in order to justify his own actions in firing at defendant after defendant drove off in Staton's vehicle. Therefore, the prosecutor was responding to defendant's attack on Staton's credibility. Although addressing Staton's oath to protect and serve comes close, the record does not establish that the prosecutor, in fact, vouched for Staton's truthfulness. In addition, otherwise improper prosecutorial remarks generally do not require reversal when they are responsive to issues raised by defense counsel. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). "The doctrine of invited response is used as an aid in determining whether a prosecutor's improper remarks require the reversal of a defendant's conviction. It is used not to excuse improper comments, but to determine their effect on the trial as a whole." *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). Under this doctrine, "the proportionality of the response, as well as the invitation, must be considered to determine whether the error, which might otherwise require reversal, is shielded from appellate relief." *Id.* In this case, even if the prosecutor's statements are viewed as improper, the statements were invited and proportional when considering defendant's closing argument, and did not unfairly prejudice defendant. Therefore, the trial court did not err in denying defendant's motion for a mistrial.

Defendant also argues that there is insufficient evidence that he possessed a firearm. Defendant contends that because there is no evidence to corroborate Staton's testimony that he possessed a firearm, his firearm related convictions should be vacated. We disagree.

A challenge to the sufficiency of evidence is reviewed by this Court de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must “view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *Id.*, quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

When reviewing a sufficiency of evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). It is solely the trier of fact’s role to weigh the evidence and judge the credibility of witnesses. *Wolfe*, 440 Mich at 514. Therefore, “[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Staton testified that, while in pursuit of defendant, he observed defendant holding a small black handgun. Staton acknowledged that he mistakenly described the gun in his report as a blue steel automatic and Staton could not recall whether defendant fired at him. Defendant vigorously attacks Staton’s credibility and argues that there is no evidence or testimony to corroborate Staton’s testimony. As an initial matter, defendant’s attacks on Staton’s credibility are unavailing because it is solely the trier of fact’s role to judge the credibility of witnesses. *Wolfe*, 440 Mich at 514. Further, the prosecutor is not required to introduce physical evidence to corroborate a complainant’s eyewitness testimony, *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976), and we will not interfere with how a jury decides to weigh the evidence presented, *Wolfe*, 440 Mich at 514. Nevertheless, although there was no physical evidence establishing that defendant possessed a gun, several witnesses testified that they heard what sounded like two different guns firing. Regardless, even without this additional evidence, Staton’s testimony, when viewed in the light most favorable to the prosecution, is sufficient to establish that defendant possessed a firearm.

Next, defendant argues that his consecutive sentences, in the aggregate, constitute cruel and unusual punishment. We disagree. An unpreserved claim of cruel and unusual punishment based upon proportionality is reviewed for plain error affecting defendant’s substantial rights. *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003).

At sentencing, the trial court ordered defendant’s sentences for first-degree home invasion, carjacking, and felony-firearm to be served consecutively to one another, while the remaining sentences are to be served concurrently with defendant’s sentence for first-degree home invasion. As defendant acknowledges, the consecutive sentencing ordered was permissible pursuant to MCL 750.11a(8), 750.529a(3), and MCL 750.227b(2).

“[A] sentence that is proportionate is not cruel or unusual punishment.” *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Although defendant argues that his sentences in the aggregate constitute cruel and unusual punishment, the cumulative length of consecutive sentences is not considered when determining whether the individual sentences are proportionate, rather, each sentence is examined individually. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). Moreover, a minimum sentence that is within the sentencing guidelines range is presumptively proportionate. *Powell*, 278 Mich App at 323. In order to overcome the presumption of proportionality, “a defendant must present unusual circumstances that would

render the presumptively proportionate sentence disproportionate.” *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

The trial court, which sentenced defendant as a fourth habitual offender, calculated a minimum sentencing guidelines range of 171 to 570 months for the carjacking offense. Defendant’s minimum sentence for his carjacking conviction is 192 months, and thus, is presumptively proportionate because it falls within the minimum sentencing guidelines range.

Regarding defendant’s sentence for first-degree home invasion, the record does not reflect that the trial court separately calculated the minimum guidelines range for defendant’s first-degree home invasion conviction, which is in violation of MCL 777.21(2). Michigan Sentencing Guidelines Manual (2009 edition), p 2. However, defendant does not raise the trial court’s failure to calculate the guidelines for first-degree home invasion as an issue on appeal. Further, we conclude that defendant was not prejudiced by this unpreserved error. The Sentencing Information Report (SIR) for defendant’s carjacking offense reflects that he was scored at a Prior Record Variable (PRV) score of 85 points, placing him in PRV Level F. Because all seven PRVs should be scored for all offenses, *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004); MCL 777.21(1)(b), defendant would have received the same PRV score for his first-degree home invasion offense. Even assuming the lowest possible Offense Variable (OV) score, placing defendant in OV Level I, his minimum sentencing guidelines range for first-degree home invasion, as a fourth habitual offender, would be 72 to 240 months. MCL 777.63. However, the trial court sentenced defendant to a minimum of 60 months for his first-degree home invasion conviction, and thus, defendant’s argument is without merit.

Lastly, defendant’s two-year felony-firearm sentence is statutorily mandated, and as such, is presumptively proportionate. MCL 750.227b(1); *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002). Therefore, because defendant’s sentences are each presumptively proportionate and defendant has not identified any unusual circumstances that would render them disproportionate, his consecutive sentences do not constitute cruel and unusual punishment.

Defendant also raises additional issues in his Standard 4 brief. First, defendant argues that because the victim’s identification of him at the preliminary examination was improper and suggestive, her in-court identification during trial violated his right to due process. We disagree. Because this issue is unpreserved, we review for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process.” *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To show a due-process violation, “[the] defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.” *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

In-court identifications at the preliminary examination can be an impermissively suggestive under certain circumstances. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). However, because this issue was never properly raised below, the record does not provide a basis for concluding that the circumstances of the preliminary examination were unduly suggestive. In addition, even if an unduly suggestive identification procedure in

fact took place at the preliminary examination, it is not apparent that the victim lacked an independent basis for her in-court identification. *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).

The record shows that the victim observed defendant from a close distance while in her driveway as defendant climbed out of the window in the back of her house. There was nothing obscuring defendant's face and the encounter took place in broad daylight in the middle of the afternoon. The victim later viewed defendant again around the block, while she was in her car and he was fleeing on foot. Although the victim did not partake in a lineup prior to identifying defendant at the preliminary examination, she had a good opportunity to view defendant and was sure of her identification. In addition, the time between the incident and the preliminary examination was only about three weeks. Therefore, viewed in light of the totality of the circumstances, it is not apparent that the victim lacked an independent basis for her in-court identification, and thus, defendant has not shown that the victim's identification testimony at trial constituted plain error.

Defendant also raises several grounds under which he contends that his counsel was ineffective. First, defendant argues that his trial counsel was deficient for failing to investigate the possible eyewitness testimony from an individual named Marvin and another individual named Allister. We disagree. Because there was no hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish the ineffective assistance of counsel, a defendant must show: "(1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 543; 775 NW2d 857 (2009).

The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *Payne*, 285 Mich App at 190. A substantial defense is one that might have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Marvin and Allister were mentioned as a part of the victim's testimony because she called them to help catch the fleeing perpetrators. However, a review of the victim's testimony does not make it apparent that either Marvin or Allister actually saw the perpetrators. Thus, it is not apparent from the record that their testimony would have had any value. Further, defendant does not explain how their testimony would have aided his case. Therefore, defendant has failed to establish that he was denied a substantial defense by his counsel's decision not to call Allister and Marvin as witnesses.

Second, defendant argues that his counsel was ineffective for failing to file a pretrial motion to suppress or object to the in-court identification of defendant by the victim. We disagree. As discussed above, the in-court identification of defendant by the victim was proper.

Therefore, defense counsel's decision not to file a pretrial motion to suppress or to object to this identification was not unreasonable and counsel is not ineffective for failing to advocate meritless or futile positions. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Lastly, defendant argues that he was denied the effective assistance of counsel by his trial counsels' failure to raise any defense. We disagree. Defendant has provided no explanation of what defense counsel did not raise, and thus, failed to establish the factual predicate for his ineffective assistance of counsel claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Therefore, defendant's argument must fail.

Defendant also requests the alternative relief of remand for further fact-finding on these issues. A defendant is not entitled to a *Ginther* hearing as a matter of right. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). A defendant must demonstrate that there are factual issues regarding his or her counsel's performance that require further inquiry. *Id.* However, defendant has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim. See MCR 7.211(C)(1)(a)(ii). Therefore, we decline to remand on this basis.

We vacate defendant's conviction and sentence for UDAA, but affirm defendant's remaining convictions and sentences, and remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens