

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER EARNEST RIEPEN,

Defendant-Appellant.

UNPUBLISHED
September 27, 2011

No. 297316
Oakland Circuit Court
LC No. 2008-223574-FH

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of resisting and obstructing a police officer, MCL 750.81d(1), and reckless use of a firearm, MCL 752.863a. Defendant was sentenced to two years of probation and 30 days of jail for his resisting and obstructing a police officer and reckless use of a firearm convictions. This case arises out of a three-hour armed standoff with police, which in turn arose out of defendant's wife's report that defendant had committed domestic violence against her. We affirm.

Defendant first argues that the prosecutor engaged in misconduct that deprived him of a fair trial. Claims of prosecutorial misconduct are reviewed case by case, and alleged improprieties are evaluated in context. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Because defendant did not preserve this claim, we only review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Defendant claims that the prosecutor presented false testimony, presented an improper personal opinion, improperly vouched for a witness's credibility, and mischaracterized testimony. We disagree.

Defendant contends that the prosecutor introduced false testimony regarding the meaning of the phrase "stand down," the significance of which is that a police lieutenant shouted this phrase while defendant was being subdued and taken into custody. Defendant contends that the phrase is an instruction to relax and cease offensive actions, in contrast to officers' testimony explaining that it was an instruction to avoid overzealousness or to take a suspect down and into custody. Defendant fails to provide any citation or authority for his definition. We are therefore unable to conclude that the testimony was false. Defendant also contends that another officer lied about having entered defendant's house at any time and observing defendant with a gun while inside, largely because defendant's wife testified that the officer never entered the house.

Inconsistent testimony is not enough to establish perjury or that a prosecutor should disbelieve his or her own witness. *People v Kozyra*, 219 Mich App 422, 429; 556 NW2d 512 (1996); *People v Bright*, 50 Mich App 401, 407; 213 NW2d 279 (1973). These are simply matters of witness credibility for the jury to decide. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

Defendant argues that the prosecutor inappropriately told the jury during closing argument that “I personally don’t have guns but I have not heard of guns just discharging accidentally all the time.” During the standoff, defendant’s gun discharged, and defendant and his wife both asserted that it was an accident when defendant lost his balance and bumped the gun against a stairway handrail. A prosecutor may argue from the facts that a witness, including the defendant, is not credible and should not be believed, so long as the prosecutor does not claim some special knowledge of the witness’s truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Had the prosecutor claimed to be a gun expert, the prosecutor’s remark might have been improper. However, the prosecutor explicitly disclaimed any personal knowledge and, in context, merely urged the jury to apply common sense and general knowledge. This was proper argument that the jury should find defendant guilty of recklessly using the firearm, rather than an assertion of personal knowledge that defendant was untruthful. Likewise, the prosecutor directly argued to the jury that it should find defendant and his wife unbelievable, but it is not improper for the prosecutor to comment on the credibility of witnesses during closing argument. *People v McGhee*, 268 Mich App 600, 630-633; 709 NW2d 595 (2005). Finally, defendant’s argument that the prosecutor mischaracterized a witness’s testimony simply fails to recognize that the witness in question contradicted her own testimony several times; prosecutors are free to argue all reasonable inferences from the evidence, and the prosecutor’s argument was a reasonable interpretation of the witness’s testimony. See *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). In any event, the trial court also properly instructed the jury that only witnesses’ answers were evidence.¹

Defendant next argues that he received ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Although defendant requested an evidentiary hearing in the trial court, the trial court denied the motion,² so our

¹ Because we find no misconduct, we need not address defendant’s claim that he was denied a fair trial by the cumulative effect of multiple instances of misconduct. Likewise, the trial court did not abuse its discretion when it concluded that the prosecutor engaged in no misconduct.

² Defendant contends that the trial court abused its discretion and asks us to remand for an evidentiary hearing. Because, as we discuss *infra*, defendant has not set forth “facts that would require development of a record to determine if defense counsel was ineffective,” and indeed the

review is limited to the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). This Court will not substitute its judgment for that of counsel regarding matters of strategy, and there is a presumption that defense counsel's actions were based on reasonable trial strategy. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). We find that defendant received effective assistance of counsel.

Defendant argues that counsel failed to investigate the facts and failed to interview witnesses. The record does not support either assertion. To the contrary, counsel engaged in vigorous cross-examination of the prosecution's witnesses and presented several defense witnesses. Counsel pursued defendant's theory that the gunfire was accidental, that he refused to come out of his house because he feared for his safety, that he surrendered after he was promised that he would not be harmed, and that any apparent resistance was involuntary muscle contractions because he had been tasered. Defendant has not shown that there were any potential witnesses in existence who could have provided exculpatory evidence or any testimony that was not cumulative to what counsel had already presented. We find that the record shows that counsel was prepared, and defendant has not shown that any of his proposed additional testimony would have likely changed the outcome of the proceedings.

Defendant argues that counsel was ineffective for failing to investigate a duress defense and failing to request a jury instruction on that defense. We disagree. Duress is an affirmative defense available to a defendant who can show that, in the face of an imminent greater danger, he was forced to choose the lesser evil of violating the law to avoid that greater harm. See *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997); *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). There is no evidence here that defendant was placed in such a situation. More significantly, the affirmative defense of duress will, if successful, excuse otherwise-prohibited under the circumstances. Because the gravamen of defendant's defense here and below is that he did not actually engage in any prohibited conduct in the first place, the defense of duress is simply inapplicable.

Defendant argues that counsel should also have requested a jury instruction using accident as a defense against his charge of reckless discharge of a firearm. However, a claim of accident is a defense to specific intent crimes only. *People v Hess*, 214 Mich App 33, 38-39; 543 NW2d 332 (1995). Reckless discharge of a firearm is a general intent crime, not a specific intent crime. See MCL 752.863a. In *Hess*, this Court explained that an "'accident' is subsumed within the charge of involuntary manslaughter because the jury must consider whether the defendant's conduct was negligent, careless, reckless, wilful and wanton, or grossly negligent." *Hess*, 214 Mich App at 39. It is likewise subsumed within a charge of recklessly discharging a firearm, because the jury must consider whether the defendant's conduct was reckless, or heedless, or willful and wanton. Consequently, a jury instruction on accident would have been inappropriate.

Defendant argues that counsel was ineffective for failing to object to misconduct committed by the prosecutor. Because we find that the prosecutor did not engage in any

record shows that counsel *was* prepared, we decline. See *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). We also decline defendant's request to remand for a *Ginther* hearing. The record is more than sufficient to review defendant's ineffective assistance claim.

misconduct, counsel could not have been ineffective for failing to object. Defendant finally argues substantively that he was denied a fair trial because of the cumulative effect of all of the above claimed errors. Because we find no errors, “a cumulative effect of errors is incapable of being found.” *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

In the alternative, defendant next argues that he is entitled to resentencing. We disagree. This Court reviews factual findings at sentencing for clear error and reviews the trial court’s decision to score an offense variable for an abuse of discretion. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). Moreover, scoring decisions for which there is evidence in support will be upheld. *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Defendant challenges his score of 5 points for offense variable (OV) 1. OV 1 should be scored at 5 points if “[a] weapon was displayed or implied.” MCL 777.31(1)(e). One officer heard defendant state that “if anybody comes [here] with guns, they’re done,” and that officer subsequently saw defendant with a gun. Another officer heard defendant state that if the police had guns, he wanted to have guns as well. We find that the trial court scored OV 1 correctly because a weapon was displayed or implied during the commission of the crime.

Defendant challenges his score of 10 points for OV 4. OV 4 should be scored at 10 points if “serious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). The scoring of OV 4 does not depend on whether the victim sought or received any psychological treatment, and evidence of fear may be sufficient. MCL 777.34(2); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). There was ample evidence that defendant’s wife, who was with defendant for much of the standoff, was fearful. The trial court had a sufficient basis to score OV 4 at 10 points.

Defendant finally challenges his score of 15 points for OV 19. OV 19 should be scored at 15 points if defendant “used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services.” MCL 777.49(b). “The investigation of crime is critical to the administration of justice.” *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Defendant used at least an implied threat of force with guns against the police and barricaded himself into his house with his wife for a considerable length of time, interfering with the officers’ duties to investigate defendant’s wife’s allegation of domestic violence. There was also evidence that defendant used force to resist the officers when he was arrested. OV 19 was properly scored at 15 points.

Defendant next argues that his right to keep and bear arms, protected by the Second Amendment to the United States Constitution and by Michigan Const 1963, Art 1, § 6 was violated. Defendant has not articulated any argument in support of his Second Amendment claim beyond the bare conjecture that his ownership of guns was used to portray him as a “bad person.” We do not find that the lawfulness or propriety of defendant’s possession of his guns was ever put at issue, but rather only the legality of his use of one in a particular manner and under particular circumstances. Defendant presents no additional argument or authority pertaining to the Second Amendment. We will not attempt to devise an argument on his behalf or search for authority that might support whatever potential argument might conceivably exist.

See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Consequently, we decline to speculate, and we take no position regarding, whether the Second Amendment has any applicability to this specific armed standoff in a residential area with police officers who were present because they were responding to and attempting to investigate a report of domestic violence.

Defendant finally argues that his rights under the Fourth Amendment to the United States Constitution were violated, arguing that he was forced to surrender to the police despite having allegedly broken no law. Defendant asserts a general “right to be secure in his home.” The Fourth Amendment “reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference” and protects “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.” *Oliver v US*, 466 US 170, 178; 104 S Ct 1735; 80 L Ed 2d 214 (1984) (citations omitted). However, along with Const 1963, Art 1, § 11, the protections are against *arbitrary* interference, not *any* interference. The right against “unreasonable” searches and seizures means state conduct restricting a person’s freedoms must be based on probable cause. See *People v Bolduc*, 263 Mich App 430, 437; 688 NW2d 316 (2004); *People v Lewis*, 251 Mich App 58, 68-69; 649 NW2d 792 (2002). “Probable cause is found when the facts and circumstances within an officer’s knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed.” *Chapo*, 283 Mich App at 367.

Here, the police arrived at defendant’s residence in response to a domestic violence report placed by the claimed victim of that domestic violence. The police received reports that defendant had already committed physical violence against her and that defendant was presently threatening to shoot people. One officer heard defendant state that “if anybody comes [here] with guns, they’re done,” and shortly thereafter, an officer saw defendant holding a gun and heard a gunshot. Defendant’s wife was still inside the house at that time. Irrespective of whether defendant believed he had committed no crime, and indeed irrespective of whether defendant actually had committed no crime, probable cause is an objective standard. *Chapo*, 283 Mich App at 367. Based on the information the officers had available to them at the time, they objectively had probable cause to believe that a crime had been committed, so their alleged seizure of defendant was reasonable under the Fourth Amendment.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen