

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 23, 2012

v

RICCARDO ALCAPON PRYOR,
Defendant-Appellant.

No. 302264
Jackson Circuit Court
LC No. 10-005402-FC

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree home invasion, MCL 750.110a(2), assault with intent to rob while armed, MCL 750.89, and felony firearm, MCL 750.227b. We affirm.

Defendant first argues that the trial court abused its discretion in scoring offense variable (OV) 4 at ten points. At sentencing, defendant stated that he would “leave [the scoring of OV 4] at the [c]ourt’s discretion.” A defendant may not acquiesce in a ruling by the trial court and then raise the ruling as an issue on appeal. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). This issue is waived and waiver of an issue extinguishes all error for appellate review. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Nevertheless, defendant has failed to establish plain error affecting substantial rights with regard to this unpreserved issue. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Kimble*, 252 Mich App 269, 275; 651 NW2d 798 (2002). The trial court may score OV 4 at ten points where “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). A victim’s expression of fear, *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), or a victim’s anxiety and changed demeanor are sufficient to score OV 4 at ten points. *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005). Here, the record evidence included that the victim was afraid that he would be shot, he was extremely upset after the incident, and he stated that he sought counseling. The scoring of ten points for OV 4 did not constitute plain error. See *Carines*, 460 Mich at 763; *Wilkens*, 267 Mich App at 740-741; *Apgar*, 264 Mich App at 329.

Defendant also argues there was insufficient evidence of his identity to support his three convictions. “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and

determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). The element of identity is always an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Circumstantial evidence may be used to prove identity. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

Here, Syniva Ryan positively identified defendant as the perpetrator. Ryan had known defendant for some time and recognized the teardrop tattoo on his face, as well as the tattoo on his hand. The stolen cellular telephone’s global positioning system (GPS) signal led the police to the address where defendant was found. And a car located outside of the apartment contained a white dust mask that matched the description of the mask defendant wore during the incident. Considering the evidence in a light most favorable to the prosecution, a rational finder of fact could conclude that defendant was the perpetrator of the charged crimes. See *Wolfe*, 440 Mich at 515-516.

In his Standard 4 brief, defendant argues that his counsel was ineffective because he failed to object to alleged perjured and prejudicial testimony given by Ryan, the victim, and Darlene Lasky. Defendant abandoned this issue with regard to the victim’s testimony and Lasky’s testimony by failing to brief the merits of his claims of error concerning their testimony. See *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Thus, our review is limited to Ryan’s testimony; specifically, defendant argues that she offered perjured testimony that defendant was her cousin.

To establish ineffective assistance of counsel, a defendant must show that: (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 proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

To establish a claim of perjury, it must be proven that willfully false statements were made. MCL 750.423; *People v Kozyra*, 219 Mich App 422, 428-429; 556 NW2d 512 (1996). Here, nothing in the trial record proves that defendant is or is not Ryan’s cousin. Defendant merely claims that he is not Ryan’s cousin on appeal. Defendant has not established the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Moreover, it was clear from the record that Ryan was not sure whether defendant was her cousin; thus, her statements cannot be considered willfully false. See *Kozyra*, 219 Mich App at 428-429. Counsel is not required to make frivolous objections. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Accordingly, defendant has not demonstrated that counsel was ineffective in failing to object to Ryan’s testimony on the ground that it was perjured. And defendant’s related claim that the prosecutor erred in failing to correct Ryan’s alleged perjured testimony is likewise without merit.

In his Standard 4 brief, defendant also claims that his counsel was ineffective for failing to object to Ryan’s testimony because it was prejudicial. MRE 403 provides that relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice” Unfair prejudice exists when there is a tendency that the evidence will be

given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Here, there is no record support for defendant's claim that Ryan's statements regarding her relationship with defendant were given undue or preemptive weight by the jury. Counsel is not required to make frivolous objections. *Gist*, 188 Mich App at 613. And we reject defendant's claim that he is entitled to remand for a *Ginther*¹ hearing regarding defense counsel's alleged failure to object because he has not met the requirements of MCR 7.211(C).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).