

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 27, 2012

v

DONTYA SHAMAR JOHNSON,
Defendant-Appellant.

No. 305488
Muskegon Circuit Court
LC No. 11-060097-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

DAMARCUS DANGELO STINSON,
Defendant-Appellant.

No. 305494
Muskegon Circuit Court
LC No. 10-059982-FH

Before: **SERVITTO, P.J.**, and **MARKEY** and **MURRAY, JJ.**

PER CURIAM.

Following a joint trial, defendants Dontya Johnson and Damarcus Stinson were convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84. The circuit court sentenced defendants, each as an habitual offender, fourth offense, MCL 769.12, to 9 to 40 years' imprisonment. In Docket No. 305488, Johnson appeals as of right his conviction. In Docket No. 305494, Stinson appeals as of right his conviction and sentence. We affirm in both cases.

In the early morning hours of July 24, 2010, Roosevelt Gamble was assaulted outside the Carbon Club in Norton Shores. Dashawn Boylan testified that a "whole bunch of guys," including defendants, stomped on, jumped on, and kicked Gamble.

I. DOCKET NO. 305488

Johnson argues that the circuit court erred when it refused his request for an adverse inference instruction regarding the failure by the police and the prosecution to preserve all the

surveillance footage from the Carbon Club's security cameras. We review a trial court's determination whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

A defendant has a due process right to obtain exculpatory evidence that is in the prosecution's possession. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994); see also *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Suppression of exculpatory evidence by the prosecution violates a defendant's due process rights, irrespective of the good faith or bad faith of the prosecution. *Arizona v Youngblood*, 488 US 51, 55; 109 S Ct 333; 102 L Ed 2d 281 (1988). However, the failure to preserve potentially useful evidence does not constitute a denial of due process, unless the defendant can show bad faith on the part of the police. *Id.* at 58.

According to Johnson, the circuit court, when it denied his request for an adverse inference instruction, failed to consider "carelessness or negligence bad faith." However, neither carelessness nor negligence establishes bad faith. To establish bad faith, "a defendant must prove 'official animus' or a 'conscious effort to suppress exculpatory evidence.'" *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996), quoting *California v Trombetta*, 467 US 479, 488; 104 S Ct 2528; 81 L Ed 2d 413 (1984); see also *Youngblood*, 488 US at 58 (stating that, while the failure of the police to refrigerate the victim's clothing and to perform tests on semen samples could be described as negligence, there was no evidence of bad faith). Here, no evidence was presented that the decision, which was made jointly by a police officer and a prosecuting attorney, to only copy surveillance footage from two of the Carbon Club's security cameras was motivated by an official animus against Johnson or a conscious effort to suppress exculpatory evidence. Rather, the evidence showed that the security cameras did not capture the assault and that the surveillance footage deemed relevant by the police officer and prosecuting attorney was copied. Accordingly, because there was no evidence of bad faith, the circuit court's decision not to provide an adverse inference instruction fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Johnson next argues that his conviction is not supported by sufficient evidence. We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*

According to Johnson, there was insufficient evidence to establish that he was one of the persons who assaulted Gamble. Identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Johnson correctly argues that no other witness corroborated Boylan's testimony that he participated in the assault and that Boylan was impeached with prior inconsistent statements that he gave at the preliminary examinations and to Detective Anthony Nanna. However, as defendant recognizes, the credibility of witnesses is a question for the jury. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). The jury, by convicting Johnson, necessarily found Boylan credible in regard to his testimony that Johnson participated in the assault. We must accept the jury's credibility determination. See

People v Williams, 268 Mich App 416, 419; 707 NW2d 624 (2005). Accordingly, when the evidence is viewed in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecution proved beyond a reasonable doubt that Johnson participated in the assault on Gamble. *Cline*, 276 Mich App at 642. Johnson's conviction is supported by sufficient evidence.

II. STANDARD 4 BRIEF IN DOCKET NO. 305488

In a standard 4 brief, Johnson argues that defense counsel was ineffective for failing to object when the prosecutor elicited an opinion from Nanna on his guilt. Because Johnson did not move for a new trial or a *Ginther*¹ hearing, our review is limited to errors apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

A witness may not express an opinion concerning the guilt or innocence of a defendant. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). A defendant's guilt or innocence is a question for jury resolution. *People v Suchy*, 143 Mich App 136, 149; 371 NW2d 502 (1985). A review of Nanna's testimony reveals that the prosecutor did not ask Nanna whether he believed Johnson was guilty and that Nanna never provided his opinion on Johnson's guilt. Accordingly, any objection by defense counsel that the prosecutor improperly elicited Nanna's opinion regarding Johnson's guilt would have been futile, and so defense counsel was not ineffective. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Johnson also argues that the circuit court erred when it failed to direct the prosecution to file a bill of particulars. Because Johnson did not move for a bill of particulars, the issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Pursuant to MCR 6.112(E), a "court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense."² A court rule is construed according to its plain language. *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009). Nothing in the court rule required the circuit court sua sponte to order the prosecution to provide a bill of particulars to Johnson. Accordingly, Johnson fails to establish that the circuit court plainly erred when it failed to order the prosecution to provide a bill of particulars. *Carines*, 460 Mich at 763-764.

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

² See also MCL 767.44, which, in pertinent part, directs, "[t]hat the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged."

Nor do we find no merit to Johnson's claim that defense counsel was ineffective for failing to move for a bill of particulars. Johnson had a preliminary examination, at which Boylan testified. Johnson makes no argument why, despite the preliminary examination, a bill of particulars was still necessary. See *People v Harbour*, 76 Mich App 552, 557; 257 NW2d 165 (1977) (stating that the need for a bill of particulars is obviated when a preliminary examination informs the defendant of the charge against him). Consequently, defense counsel was not ineffective for failing to bring a futile motion. *Fike*, 228 Mich App at 182.

Finally, Johnson argues that the prosecutor committed misconduct when he vouched for the credibility of witnesses, mischaracterized the reasonable doubt standard, repeatedly called attention to Nanna's testimony, asked leading questions, and elicited hearsay. However, Johnson has not supported his argument with any citation to the record. Because a defendant may not leave it to this Court to search for a factual basis to sustain or reject a claim, *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008), Johnson has abandoned his claims of prosecutorial misconduct.

III. DOCKET NO. 305494

Stinson argues that the circuit court erred in denying his motion for a separate trial. We review a trial court's decision whether to hold separate trials for an abuse of discretion. *People v Etheridge*, 196 Mich App 43, 53; 492 NW2d 490 (1992).

In moving for a separate trial, Stinson claimed that he would be asserting defenses of self-defense and defense of others. He claimed that these defenses were the "complete polar opposite" of the defenses of his codefendants, who were denying any contact with Gamble or Timothy Thomas, who was shot outside the Carbon Club shortly before Gamble was assaulted. However, at trial, Stinson did not claim self-defense or defense of others. Rather, while arguing that he acted as a peacemaker both in the Carbon Club and in the club's parking lot, he asserted that he was not present at the assault of Gamble. Accordingly, there is no indication that Stinson suffered any prejudice for being tried with Johnson. We are precluded, therefore, from reversing the circuit court's decision denying Stinson's motion for a separate trial. *People v Hana*, 447 Mich 325, 346-347; 524 NW2d 682 (1994); see also MCR 2.613(A) (stating that an error in a ruling by the trial court is not ground for disturbing a judgment or order unless refusal to take action is inconsistent with substantial justice).³

Stinson next argues that the circuit court erred in denying his motion to dismiss based on a violation of his right to a speedy trial. The determination whether a defendant was denied a speedy trial is a mixed question of law and fact. *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). We review a trial court's conclusions of law de novo and its factual findings for clear error. *Id.* "A finding is clearly erroneous when, although there is evidence to

³ Moreover, because Stinson never provided the circuit court with an affidavit or offer of proof, the circuit court did not abuse its discretion in denying Stinson's motion. *Hana*, 447 Mich at 346, 355. Stinson did not provide the circuit court with any concrete facts on which to base a ruling.

support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

The United States Constitution, US Const, Am VI, and the Michigan Constitution, Const 1963, art 1, § 20, guarantee a defendant the right to a speedy trial. *Waclawski*, 286 Mich App at 665. We apply a four-factor balancing test to determine whether a defendant was denied a speedy trial. *Id.* The four factors are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of the right; and (4) prejudice to the defendant. *Id.* Here, the delay from the date of Stinson’s arrest until the time that trial commenced, see *id.*, was 7-1/2 months. Because the delay was less than 18 months, the burden is on Stinson to show prejudice. *Id.*

We agree with Stinson that neither the second nor the third factor should weigh against him. However, Stinson only makes general allegations of prejudice, arguing that the 7-1/2-month delay increased the recalcitrance of witnesses to come forward and the memory loss of reluctant witnesses. Such general allegations are insufficient to establish prejudice. See *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Accordingly, Stinson has failed to show that the circuit court clearly erred in finding that the delay did not result in prejudice.

Stinson next argues that his conviction is not supported by sufficient evidence. We review de novo a challenge to the sufficiency of the evidence. *Cline*, 276 Mich App at 642. We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*

Although Stinson recognizes that Boylan testified that he saw Stinson, along with Johnson and others, stomp on, jump on, and kick Gamble, Stinson argues that Boylan’s testimony cannot support his conviction because Boylan’s testimony was contradictory, explaining that Boylan also testified that Stinson acted as a peacemaker. However, Boylan’s testimony was not contradictory. Boylan testified that Stinson acted as a peacemaker at a time separate and before Gamble was assaulted. Further, while Boylan’s testimony contradicted the testimony of defense witnesses, the credibility of witnesses is a question for the jury. *Harrison*, 283 Mich App at 378. We must accept the jury’s determination that Boylan was credible in regard to his testimony that Stinson participated in the assault. See *Williams*, 268 Mich App at 419. Accordingly, when the evidence is viewed in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecution proved beyond a reasonable doubt that Stinson participated in the assault on Gamble. *Cline*, 276 Mich App at 642. Under this standard of review, Stinson’s conviction is supported by sufficient evidence.

Stinson next argues that the circuit court erred in scoring 50 points for offense variable (OV) 7. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision for which there is any evidence in support. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The interpretation and application of the sentencing guidelines present legal questions that we review de novo. *People v Huston*, 489 Mich 451, 457; 802 NW2d 261 (2011).

OV 7 addresses aggravated physical abuse. MCL 777.37. A trial court may score 50 points for OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1). Initially, we reject Stinson’s claim that he could not have treated Gamble with excessive brutality or conduct designed to substantially increase Gamble’s fear and anxiety because Gamble was knocked unconscious after the first punch. A victim need not actually be conscious and have experienced the extreme brutality or the conduct designed to substantially increase fear and anxiety for OV 7 to be scored. *People v Kegler*, 268 Mich App 187, 191-192; 706 NW2d 744 (2005).

The Court, in *People v Glenn*, 295 Mich App 529, 533; 814 NW2d 686 (2012) lv gtd 491 Mich 934 (2012),⁴ construed the phrase “excessive brutality”:

“Excessive” and “brutality” are not defined in MCL 777.37. *Random House Webster’s College Dictionary* (2d ed, 1997) defines “excessive” as “going beyond the usual, necessary, or proper limit or degree.” “Brutality” is defined as the “the quality of being brutal.” *Id.* “Brutal,” in turn, is defined as “savage; cruel; inhumane” or “harsh; severe.” *Id.* Thus, excessive brutality means savagery or cruelty beyond even the “usual” brutality of a crime.” [Brackets omitted.]

There is record evidence that Gamble was treated with excessive brutality. Gamble was repeatedly stomped on, his head was jumped on, and he was kicked. All this was done after Gamble was knocked unconscious. As a result of the assault, Gamble lost some teeth and suffered eight blood clots in his brain and broke bones in his face. There was extensive bruising to Gamble’s face and his face swelled to an extent previously unseen by a police officer. This evidence supports a finding that the conduct of those who assaulted Gamble was savage and cruel beyond the usual brutality of the crime charged. *Glenn*, 295 Mich App at 533.

However, for purposes of scoring OV 7, only the defendant’s actual participation in the crime should be scored. *People v Hunt*, 290 Mich App 317, 326; 810 NW2d 588 (2010). Thus, there must be record evidence that Gamble was treated with excessive brutality by Stinson. Boylan did not describe the individual acts of Stinson; he testified that he saw Stinson, Johnson, Jariko Burks, and Jimmy Moore “stomping [Gamble] out.” However, because a reasonable inference from Boylan’s testimony is that each of the four men repeatedly stomped on, jumped on, or kicked Gamble, there is record evidence that Stinson treated Gamble with excessive brutality. Compare *id.* at 324-326 (stating that, although the defendant was present and armed during the kidnapping and felonious assault, there was no evidence that the defendant treated the victim with sadism, torture, or excessive brutality when the defendant never took part in a beating, fired a weapon, or encouraged others to commit those acts). By repeatedly stomping on, jumping on, or kicking Gamble, and doing so while Gamble was unconscious, Stinson treated

⁴ “[A] Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.” MCR 7.215(C)(2).

Gamble with savagery or cruelty beyond the usual brutality of the crime. *Glenn*, 295 Mich App at 533. Accordingly, we affirm the circuit court’s score of 50 points for OV 7.⁵

IV. STANDARD 4 BRIEF IN DOCKET NO. 305494

In a standard 4 brief, Stinson argues that the circuit court did not obtain jurisdiction over him because the district court, following his preliminary examination, did not file a “certified” return with the circuit court. He also claims that the district court and circuit court did not have jurisdiction over him because the complaint did not include factual assertions to support a finding of reasonable cause to believe that he committed the crime. Because Stinson did not object to the complaint or to the courts’ jurisdiction, the issues are unpreserved. *Metamora Water Serv, Inc*, 276 Mich App at 382. We review unpreserved claims of error for plain error affecting the defendant’s substantial rights. *Carines*, 460 Mich at 763-764.

A circuit court has jurisdiction to hear, try, and determine prosecutions upon informations for crimes, misdemeanors, and offenses. MCL 767.1. A criminal prosecution may be initiated in a court having jurisdiction over the charge on the filing of an information. *People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001). When a criminal prosecution is initiated by information, rather than indictment, the defendant has a statutory right to a preliminary examination. *People v McGee*, 258 Mich App 683, 695; 672 NW2d 191 (2003). A magistrate’s bind over to the circuit court, following the preliminary examination or the defendant’s waiver of an examination, authorizes the prosecution to file an information. *Id.* The circuit court is vested with personal jurisdiction over the defendant upon the filing of the magistrate’s return. *People v Goecke*, 457 Mich 442, 459; 579 NW2d 868 (1998); *McGee*, 258 Mich App at 695.

Here, Stinson had a preliminary examination before the district court. At the conclusion of the examination the district court found probable cause to believe that Stinson assaulted Gamble with the intent to commit great bodily harm less than murder. It stated that Stinson would be bound over for further proceedings in the circuit court. Thereafter, the district court filed a return with the circuit court. Accordingly, the circuit court had jurisdiction over Stinson. *Goecke*, 457 Mich at 459; *McGee*, 258 Mich App at 695. We reject Stinson’s contention that the return failed to vest the circuit court with jurisdiction over him because the return was not “certified.” Stinson makes no argument supported by legal authority that the return, which was signed by the district court and dated, failed to meet any certification requirement imposed by MCL 766.15(1).

In addition, assuming that the warrant for Stinson’s arrest was invalid because the complaint failed to provide a factual basis for a finding of reasonable cause to believe that Stinson committed the listed offense, Stinson had only one remedy – the suppression of evidence obtained as a result of the illegal arrest. *People v Burrill*, 391 Mich 124, 132; 214 NW2d 823 (1974); *People v Daniel Rice*, 192 Mich App 240, 244; 481 NW2d 10 (1991). Accordingly, an

⁵ Because we conclude there was record evidence to show that Stinson treated Gamble with excessive brutality, we do not address the parties’ arguments whether Stinson treated Gamble with conduct designed to increase fear and anxiety.

invalid arrest does not entitle Stinson to a holding that either the district court or circuit court lacked jurisdiction over him.

Stinson next argues that the prosecution committed a *Brady* violation when it suppressed, lost, or destroyed all the surveillance footage from the Carbon Club's security cameras. Because Stinson never argued below that the prosecution's failure to preserve all the surveillance footage constituted a *Brady* violation, the issue is unpreserved. *Metamora Water Serv, Inc*, 276 Mich App at 382. We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Under *Brady*, 373 US at 83, a defendant has a due process right to obtain exculpatory evidence that is in the prosecution's possession. *Stanaway*, 446 Mich at 666. *Brady* only applies to evidence that is in the possession of the prosecution. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). It is undisputed that the prosecution turned over to the defense copies of the surveillance footage that it had copied from cameras 3 and 9 at the Carbon Club. The prosecution never had within its possession any other surveillance footage captured by the Carbon Club's security cameras. Accordingly, the prosecution did not suppress any evidence and there was no *Brady* violation.

Finally, Stinson argues that the prosecutor committed misconduct when he vouched for the credibility of Boylan. Because Stinson did not object during trial to the alleged misconduct, Stinson's claims of prosecutorial misconduct are unpreserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, examining the challenged conduct in context. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). A prosecutor may not vouch for the credibility of a witness. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). A prosecutor may not comment on his personal belief regarding the truthfulness of a witness, nor may a prosecutor convey a message that he has some special knowledge or facts of a witness's truthfulness. *Bennett*, 290 Mich App at 478.

Stinson claims that by calling Assistant Prosecutor Raymond Kostrzewa as a rebuttal witness the prosecutor improperly bolstered the credibility of Boylan based on the powers of the prosecutor's office. Kostrzewa was a proper rebuttal witness; his testimony was responsive to the theory introduced by Johnson that the prosecutor's office did not authorize a warrant for Boylan's arrest for a larceny because of his testimony in the present case. See *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996) ("Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending to directly weaken or impeach the same.") (quotation marks and citation omitted). In addition, the prosecutor never elicited Kostrzewa's opinion regarding Boylan's truthfulness, nor did he elicit any testimony from Kostrzewa that would convey a message that the prosecutor's office had some special knowledge or facts of Boylan's truthfulness. Accordingly, the prosecutor did not commit any misconduct in calling Kostrzewa as a witness or in questioning him.

The prosecutor also did not vouch for Boylan's credibility in rebuttal closing argument. Instead, the prosecutor was directly responding to the insinuation raised by Johnson during closing argument that he pressured Boylan to testify. "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In the second challenged remarks, all the prosecutor was arguing was that Boylan was a credible witness, which clearly a prosecutor is entitled to do. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). There was no misconduct during closing rebuttal argument.

Affirmed.

/s/ Deborah A. Servitto

/s/ Jane E. Markey

/s/ Christopher M. Murray