

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 20, 2014

V
WAYNE CHRISTOPHER MCKINNON, JR.,
Defendant-Appellant.

No. 314347
Wayne Circuit Court
LC No. 12-007137-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V
BENJAMIN MATHES,
Defendant-Appellant.

No. 314675
Wayne Circuit Court
LC No. 12-007137-FC

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 314347, defendant, Wayne Christopher McKinnon, Jr., appeals as of right his jury trial¹ convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

In Docket No. 314675, defendant, Benjamin Mathes, appeals as of right his jury trial convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, and third-degree fleeing and eluding a police officer, MCL 257.602a(3)(a). We affirm.

¹ Defendants McKinnon and Mathes were tried together but had separate juries.

I. DOCKET NO. 314347

McKinnon argues that there was no probable cause to arrest him and that his trial counsel was ineffective for failing to move to dismiss on this ground. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must move in the trial court for a new trial or a *Ginther*² hearing with the trial court. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). McKinnon did not file a motion for a new trial or an evidentiary hearing in the trial court. He filed a motion to remand for a *Ginther* hearing in this Court, but it was denied. *People v McKinnon*, unpublished order of the Court of Appeals, entered August 15, 2013 (Docket No. 314347). Therefore, this issue is unpreserved. As a result, our review is limited to mistakes apparent from the record. *Heft*, 299 Mich App at 80.

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *Id.*

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To obtain a new trial, a defendant must show that “(1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012); see also *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). There is a strong presumption that “counsel’s performance was born from a sound trial strategy.” *Trakhtenberg*, 493 Mich at 52; see also *Strickland*, 466 US at 689. This Court “will not substitute [its own] judgment for that of counsel on matters of trial strategy,” nor will it “use the benefit of hindsight when assessing counsel’s competence.” *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). In addition, “[t]rial counsel is not ineffective for failing to advocate a meritless position.” *People v Payne*, 285 Mich App 181, 191; 774 NW2d 714 (2009).

McKinnon claims that he was illegally arrested and that his trial counsel was ineffective for not moving to dismiss on that basis. The United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Steele*, 292 Mich App 308, 314; 806 NW2d 753 (2011). However, a police officer may conduct an investigative stop, or *Terry*³ stop, “if the officer has a reasonable, articulable suspicion that criminal activity is afoot.” *People v Collins*, 298 Mich App 458, 467; 828 NW2d 392 (2012), quoting *Steele*, 292 Mich App at 314. “Reasonableness is determined on a case-by-case basis, based on a totality of the facts and circumstances.” *Collins*, 298 Mich App

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

at 467. Additionally, the *Terry* stop must be limited in scope “to that which is necessary to quickly confirm or dispel the officer’s suspicion.” *People v Barbarich*, 291 Mich App 468, 473; 807 NW2d 56 (2011).

In this case, Corporal Jake Hatten initially stopped McKinnon because he had a “reasonable, articulable suspicion that criminal activity [was] afoot.” See *Collins*, 298 Mich App at 467. Corporal Hatten originally saw McKinnon, who was a black male wearing a plain, white t-shirt, walking down Lafayette Street. Corporal Hatten continued driving for several minutes, when he heard over his radio that two suspects from the armed robbery were still at large. Both were black males who were seen running through backyards near Lafayette – notably, one of the men was wearing a plain, white t-shirt. Corporal Hatten then turned around, relocated McKinnon, and conducted the *Terry* stop. While the above facts were insufficient to establish probable cause that McKinnon committed the armed robbery, they were sufficient for Corporal Hatten to conduct an investigative stop because McKinnon matched the general description of one of the suspects and he was in the area where the suspects were last seen. See *id.* (stating that amount of suspicion to conduct *Terry* stop is less than probable cause).

However, the events that transpired *after* Corporal Hatten stopped to ask McKinnon some questions established probable cause to arrest him. “A police officer may arrest a person without a warrant if he or she has reasonable cause to believe that a felony has been committed and the particular person committed it.” *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011); see also MCL 764.15(1)(d). When Corporal Hatten asked McKinnon if he knew anyone in the neighborhood, McKinnon said that he did not. Also, when Corporal Hatten asked what McKinnon was doing in that area, McKinnon initially admitted that he had no reason to be there but then added something about selling marijuana in the area. Selling marijuana is a felony, regardless of the amount. See MCL 333.7401. Thus, Corporal Hatten had probable cause to arrest McKinnon on that ground alone.

Furthermore, before transporting McKinnon to the police station, Corporal Hatten heard Officer Timothy Ciochon run a suspect’s name, address, and date of birth over the radio. The name was similar to McKinnon’s and the address and date of birth were identical to those that McKinnon provided to Corporal Hatten. This later information gave Corporal Hatten probable cause to believe that McKinnon had committed the robbery. See *Cohen*, 294 Mich App at 74.

Therefore, because Corporal Hatten had probable cause to arrest McKinnon, McKinnon’s trial counsel was not ineffective for failing to move for a dismissal on that basis. “[T]rial counsel is not ineffective for failing to advocate a meritless position.” See *Trakhtenberg*, 493 Mich at 191.

Moreover, McKinnon cannot meet the prejudicial prong of the *Strickland* test. See *Strickland*, 466 US at 692-696; *Trakhtenberg*, 493 Mich at 51. Contrary to McKinnon’s position, the remedy for an illegal arrest is not dismissal. *United States v Crews*, 445 US 463, 474; 100 S Ct 1244; 63 L Ed 2d 537 (1980); see also *In re Forfeiture of \$180,975*, 478 Mich 444, 459-460; 734 NW2d 489 (2007). Rather, a defendant who is illegally arrested may be entitled to the suppression of evidence stemming from that arrest. Even then, “[i]t is only when an unlawful detention has been employed as a tool to directly procure *any* type of evidence from a detainee that the evidence is suppressed under the exclusionary rule.” *People v Corr*, 287 Mich

App 499, 508-509; 788 NW2d 860 (2010) (emphasis in original, internal citations and quotation marks omitted).

Assuming arguendo that McKinnon's arrest was illegal, there was no evidence to speak of that arose from the arrest.⁴ Thus, the exclusion of that evidence would have had no effect on the outcome of the trial. The primary evidence against McKinnon was that his identification card was found on the floor of the silver Chevrolet Malibu and that the vehicle was registered to McKinnon's wife. Further, there was ample evidence that the silver Chevrolet was the getaway car used in the liquor store robbery. Walter Solovey saw a silver Chevrolet outside the Dearborn Heights Liquor Store. Michael Dalou saw the two robbers jump into the backseat of a silver car at the liquor store and speed away. Solovey also saw the car run a stop sign. He said the driver was "driving like a maniac." Officer John Burdick recovered \$1,218, a shotgun, and two bandanas from the car. Mazin said the two robbers were wearing bandanas and had shotguns. Given this evidence, McKinnon cannot show that "there is a reasonable probability that the outcome [of the trial] would have been different" if his trial counsel had objected to his allegedly illegal arrest. See *Trakhtenberg*, 493 Mich at 51.

II. DOCKET NO. 314675

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Mathes argues on appeal that his trial counsel was ineffective. We disagree. Because Mathes did not move for a new trial or a *Ginther* hearing in the trial court, our review is limited to mistakes apparent from the record. See *Heft*, 299 Mich App at 80.

Counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Trakhtenberg*, 493 Mich at 52. While the decision to call or question a witness is presumed to be a matter of trial strategy, the failure to do so constitutes ineffective assistance of counsel if it deprives a defendant of a substantial defense. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). A substantial defense is one that would have affected the trial's outcome. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Mathes is not entitled to relief on this issue because he has not established the factual predicate for his claim that his trial counsel should have called his fiancée, Teresa Verge, as an alibi witness. "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). There is nothing on the record to suggest what Verge's testimony would have been, let alone if it would have been helpful to Mathes. Accordingly, defendant cannot establish that counsel's performance fell below an objective level of reasonableness by failing to call her, and defendant cannot establish that if Verge had testified, that the trial outcome would have been different.

⁴ Upon McKinnon's arrest, only a water bottle was found on him.

In his Standard 4 brief, Mathes claims that the prosecution's witnesses were not properly placed under oath, and he asserts that his trial counsel was ineffective for failing to object to their testimony. However, such an objection would have been futile. As discussed further below, the trial court asked each witness if he or she promised to be truthful, or some variation of that question. Each witness answered affirmatively. This "impress[ed] upon the oath taker the importance of providing accurate information," which is the requirement for sworn testimony. *People v Ramos*, 430 Mich 544, 548; 424 NW2d 509 (1988); see also MRE 603. An oath need not be in any particular form. *Donkers v Kovach*, 277 Mich App 366, 373; 745 NW2d 154 (2007). Thus, Mathes's trial counsel was not ineffective on this ground because he was not required to make a meritless argument. *Payne*, 285 Mich App at 191.

Mathes also argues in his Standard 4 brief that his trial counsel was ineffective for failing to move for a mistrial, file pretrial motions in limine, adequately cross-examine the prosecution's witnesses, and subject the prosecution's case to adversarial testing. Mathes's cursory treatment of these issues results in the issues being abandoned on appeal. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). "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 [of an issue]" *Id.*, quoting *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). For example, Mathes does not identify what evidence his counsel should have moved to exclude or how his attorney should have cross-examined witnesses better. He does not say why certain evidence was inadmissible, or why his trial counsel should have moved for a mistrial. Accordingly, the issue is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Finally, Mathes's Standard 4 brief references Solovey's statement to police and asserts that his trial counsel was ineffective for failing to investigate why counsel's copy of the statement was only two pages long, when the statement was actually three pages long. The testimony on this issue is less than clear. During cross-examination, defense counsel asked Solovey to identify where in his statement he said that the individual sitting in the driver's seat of the silver Chevrolet was covering his face with his hand and talking on his cell phone. Solovey responded:

A. From what I'm looking at right now, it appears that the page with that description is not in this information right now.

Q. Okay. Well, maybe I'll hand you mine. But, but if there was a three-page statement – Is that what you're saying? There was a three-page statement?

A. Yes.

Q. Okay.

A. I have two pages here that say the same thing at the beginning of them.

Q. I see.

A. And that picks up from the first page.

Q. Okay. I think in a moment I'm going to hand you what I have here and see –

A. (Interposing) Okay.

Q. So, you know I was asking whether or not there was anything said in your memorandum about being on a cell phone, holding their hand to cover their face or what they were wearing on the top part of their body. Okay? I'm going to hand this to you and see if ---

* * *

A. Okay. I did not mention that in my statement.

In our opinion, this testimony indicates that Solovey had a copy of his statement with him, and it was missing a page. It was Mathes's trial counsel who then provided his copy to Solovey. Presumably, the only reason for counsel to provide his copy is because that copy was, in fact, complete. Thus, defendant failed to establish the necessary factual predicate for his ineffective assistance of counsel claim. See *Carbin*, 463 Mich at 600.

B. EVIDENCE OF EARLIER ROBBERY

Next, Mathes claims that the trial court abused its discretion in allowing Solovey to testify that the Dearborn Heights Liquor Store had been robbed a week earlier and the same car and driver were involved. We disagree.

Although Mathes did not object to Solovey's testimony on this subject, McKinnon's counsel did object. Therefore, this issue is preserved.⁵

This Court reviews a preserved evidentiary issue for an abuse of discretion. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* "A preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (internal citations omitted).

At the outset, we note that Mathes mischaracterizes Solovey's testimony. Solovey did not testify that the same car and driver were involved in a robbery of the liquor store a week

⁵ When a codefendant raises an objection and the trial court's decision affects both defendants, this Court may "decline to regard the technicality of a defendant's lawyer failing to join in the objection as failing to preserve the issue." *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007); see also *People v Brown*, 38 Mich App 69, 75; 195 NW2d 806 (1972).

earlier. Rather, Solovey mentioned that he initially took note of the silver car because it was parked on the wrong side of the street, with its hazard lights flashing, and the driver appeared to be trying to cover his face. When Solovey saw someone run out of the liquor store, yelling that there was a robbery, he thought about the silver car he had just passed. He was suspicious because of his earlier observations and because the liquor store had been robbed a week before. Solovey only mentioned the previous robbery to explain why he went back to the area where he initially saw the silver car. Knowledge of that earlier robbery made him think that the *current* car might be linked to the *current* robbery. Solovey never testified that the same car or driver was involved in the earlier robbery. In fact, he explicitly stated that he had never seen the silver car before.

Because Solovey's testimony did not link the silver vehicle or any defendant to the earlier robbery, there was no undue prejudice. MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." "Undue prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). As discussed above, because neither defendant was implicated in the earlier robbery, there was no danger that the jury would give the fact that this same store was robbed a week earlier "too much weight." Further, because neither defendant was connected to the prior robbery, Mathes's reliance on MRE 404(b), which governs the admissibility of a defendant's prior crimes is misplaced.

C. WITNESS OATH

In his Standard 4 brief, Mathes next argues that he was denied his rights to due process and a fair trial because the witnesses were not properly placed under oath. We disagree.

Mathes did not object to this issue at trial, so it is unpreserved. See *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007). This Court reviews unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v King*, 297 Mich App 465, 472-473; 824 NW2d 258 (2012). To demonstrate plain error, "a defendant must establish (1) that the error occurred, (2) that the error was plain, (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Gibbs*, 299 Mich App 473, 480; 830 NW2d 821 (2013).

MRE 603 provides:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

"[I]t is not necessary for a witness to raise his or her right hand or to engage in any special formalities when swearing or affirming to testify truthfully pursuant to MRE 603." *Donkers*, 277 Mich App at 373.

However, in addition to the above rule of evidence, “Chapter 14 of the Revised Judicature Act mandates that witnesses in judicial proceedings swear or affirm that their testimony will be true.” *Id.* at 369. MCL 600.1432(1) provides as follows:

The usual mode of administering oaths now practiced in this state, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law except as otherwise provided by law. The oath shall commence, “You do solemnly swear or affirm.”

The *Donkers* Court noted the conflict between these two provisions and held that MRE 603 controls over MCL 600.1432. The Court noted that “[t]he authority to promulgate rules and governing practice and procedure in Michigan courts rests exclusively with our Supreme Court,” which means that the rule promulgated by the Supreme Court prevails over the legislative statute that governs purely procedural matters. *Donkers*, 277 Mich App at 373. Consequently, witnesses need not raise their right hands when affirming to testify truthfully pursuant to MRE 603 and those oaths do not have to be prefaced with the words, “You do solemnly swear or affirm.” See *id.* Instead, “no particular ceremonies, observances, or formalities are required of a testifying witness so long as the oath or affirmation awakens the witness’s conscience and impresses his or her mind with the duty to testify truthfully.” *Id.* (quotation marks and brackets omitted).

At trial, the trial court asked each witness if he or she promised to be truthful, or some variation of that question. Each witness answered affirmatively. While the court did not preface any oath with “You do solemnly swear or affirm,” the questions nonetheless “impress[ed] upon the oath taker the importance of providing accurate information.” See *Ramos*, 430 Mich at 548. Accordingly, Mathes failed to establish any plain error that affected his substantial rights.

D. PEREMPTORY CHALLENGES

Mathes next asserts in his Standard 4 brief that he was denied his rights to due process and a fair trial where the prosecution used its peremptory challenges to exclude potential jurors who had prior bad experiences with police. We disagree.

Mathes did not raise this issue below and it was not decided by the trial court. Therefore, it is unpreserved. See *Metamora Water Serv*, 276 Mich App at 382. We review unpreserved claims of error for plain error affecting the defendant’s substantial rights. *King*, 297 Mich App at 472-473.

A defendant is entitled to a certain number of preemptory challenges – generally five, unless he could be punished by life imprisonment for an offense charged, in which cause he is entitled to 12 preemptory challenges. MCL 768.12(1); MRE 6.412(E)(1). However, a preemptory challenge may not be used to strike a juror on the basis of his or her race, ethnicity, or sex. See *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005); see also *Batson v Kentucky*, 476 US 79, 89, 96-98; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Mathes does not allege that the prosecution used its peremptory challenges to discriminate on any of those bases. Generally, a party does not need to provide a reason for its use of a preemptory challenge. See *Black’s Law Dictionary* 9th ed (defining a preemptory challenge as “[o]ne of a party’s limited

number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex”); see also MCL 768.12(1); *Bell*, 473 Mich at 282. Thus, the prosecution’s use of its peremptory challenges was not improper.

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood