

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

EVEREGE VERNOR DICKENS,

Defendant-Appellant.

UNPUBLISHED

June 17, 2014

No. 314267

Oakland Circuit Court

LC No. 2012-241989-FC

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

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, third-degree fleeing and eluding a police officer, MCL 257.602a(3), and carrying a concealed weapon (CCW), MCL 750.227. He was sentenced, as a second habitual offender, MCL 769.10, to 20 to 80 years' imprisonment for the armed robbery and carjacking convictions, two years' imprisonment for each felony-firearm conviction, three to seven and one-half years' imprisonment for the felon in possession of a firearm conviction, and two to seven and one-half years' imprisonment for the third-degree fleeing and eluding a police officer and CCW convictions. Defendant appeals by right, and we affirm.

Defendant's convictions arise from the armed robbery of an elderly man at a gas station during the lunch hour. The victim was near his Cadillac when he was approached by defendant. Defendant pointed a gun at the victim and demanded money. The victim handed over money. Defendant took the victim's keys and entered his Cadillac. The victim screamed out for help, and a store clerk came to the victim's aid and called 911.

Two police officers were returning from lunch in an unmarked police car. One of the officers saw defendant approach the victim in a deliberate manner, saw the victim back away with his hands raised, and saw defendant enter the victim's vehicle. The officer driving the unmarked vehicle attempted to block the Cadillac from leaving the gas station, but defendant struck the officers' vehicle and fled. Because the unmarked vehicle did not have appropriate lights and sirens, the officers followed defendant until marked vehicles could pursue him. Once the marked vehicles arrived on the scene, the officers that observed the carjacking returned to the gas station where it was learned that defendant brandished a weapon at the victim. Multiple

officers in vehicles gave chase and performed a maneuver that caused defendant to crash the Cadillac. Defendant ignored officers' requests to raise his hands, and when he tried to flee, he was shot and fell in a grassy area. There, officers arrested him and found a loaded gun on him. Although the victim could not identify defendant at the preliminary examination, multiple officers identified defendant as the perpetrator of the offenses.

I. PROSECUTORIAL MISCONDUCT

Defendant argues that several statements made by the prosecutor during closing arguments amounted to prosecutorial misconduct because the prosecutor improperly appealed to the jury's sympathy and sense of civic duty. Assuming without deciding that the prosecutor's argument was improper, this claim of error does not entitle defendant to appellate relief.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant failed to object to the prosecutor's statements in his closing argument at issue on appeal. Therefore, the issue is unpreserved for appellate review.

This Court reviews defendant's unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Walker (On Remand)*, 273 Mich App 56, 66; 728 NW2d 902 (2006). To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *Id.* The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *Bennett*, 290 Mich App at 475. A prosecutor may not appeal to the jury's sympathy for the victim. *Abraham*, 256 Mich App at 273. In addition, "a prosecutor may not urge the jurors to convict the defendant as part of their civic duty." *Id.* "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citation and quotation omitted).

According to the record, the prosecutor cited to the victim's age and his fragile condition on multiple occasions. Although the defense submits that this argument was designed to appeal to the jury's sympathy, we note that the victim was unavailable to testify, and therefore, his testimony was read at trial by another individual. Arguably, the prosecutor's comments were devised to address the disparity between the individual who read the testimony at trial and the appearance and condition of the actual victim. Nonetheless, if we assume the comments were improper, defendant failed to establish plain error affecting his substantial rights. *Walker*, 273 Mich App at 66. There can be no prejudice to defendant where the evidence of his commission of the crimes was overwhelming. *Id.* Although the victim could not identify defendant, a police officer saw the carjacking in progress, and his vehicle collided with defendant as he fled the gas station. Police officers gave chase and never lost sight of defendant until his arrest. Therefore, this issue does not entitle defendant to appellate relief.

II. CONFRONTATION CLAUSE

Defendant alleges the trial court's admission of the victim's preliminary examination testimony at trial denied him the right of confrontation. We disagree.

Generally, the question whether a defendant was denied his constitutional right to confront witnesses against him is reviewed de novo. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). However, this Court reviews unpreserved claims of error for plain error affecting defendant's substantial rights. *Walker*, 273 Mich App at 66.

In every criminal trial, the federal and state constitutions protect the defendant's right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *Walker*, 273 Mich App at 60-61. "The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witnesses." *Watson*, 245 Mich App at 584 (citation omitted).

"Former testimony is admissible at trial under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009), citing *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Under MRE 804(a)(4), a witness is unavailable if he is "unable to be present or to testify at the hearing because of . . . then existing physical or mental illness or infirmity." MRE 804(b)(1) provides that if a witness is unavailable, prior testimony can be admitted if there was "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

In the present case, defendant contends that the prosecutor failed to make a due diligence showing regarding unavailability. Here, the prosecutor advised the trial court that the victim was hospitalized for a period of days before trial after being taken to the hospital by ambulance. Although at the time of trial the victim had returned home, the prosecutor stated to the court that the victim remained in ill health and that his health would be compromised if he were to leave his home to testify in court. The trial court recognized that the prosecutor is an officer of the court and that it had no reason to disbelieve him. See MRPC 3.3(a)(1) (A lawyer shall not knowingly "make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); see also *People v Dunbar*, 463 Mich 606, 617; 625 NW2d 1 (2001) (There was no reason to assume that the assistant prosecutor, an officer of the court, was not telling the truth). Defense counsel cross-examined the victim at the preliminary examination and conceded that the preliminary examination testimony was admissible if he was unavailable. Moreover, the victim's son testified at trial regarding his father's three recent hospitalizations. Thus, the evidence supported that the victim was unavailable to testify and defendant had an opportunity to cross-examine him. *Garland*, 286 Mich App at 7. Defendant's due diligence challenge is without merit.

III. HABITUAL-OFFENDER NOTICE

Defendant argues the trial court improperly sentenced him as a second habitual offender because the prosecution filed the habitual-offender notice more than 21 days after he was arraigned. We disagree.

Defendant never challenged the habitual-offender notice in the trial court. Therefore, the issue is unpreserved for appellate review. This Court reviews defendant's unpreserved claim of error for plain error affecting defendant's substantial rights. *Walker*, 273 Mich App at 66.

MCL 769.10 provides that a person who has been previously convicted of a felony shall be subject to an enhanced sentence if convicted of a subsequent felony. MCL 769.13(1) provides that the prosecutor may file a written notice within 21 days after the arraignment. Defendant contends that the habitual-offender notice was not timely filed because it was filed on July 5, 2012, more than 21 days after he was arraigned on June 11, 2012. However, the record does not support defendant's contention that he was arraigned on June 11, 2012. Rather, defendant was arraigned in circuit court on July 9, 2012. In addition, defense counsel acknowledged at the arraignment hearing that he had received the habitual-offender notice. Therefore, defendant has failed to show plain error affecting his substantial rights. *Walker*, 273 Mich App at 66.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends he was denied the effective assistance of counsel. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must move in the trial court for a new trial or *Ginther*¹ hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). A *Ginther* hearing was not held below. Therefore, this issue is unpreserved. "Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "This Court reviews for clear error a trial court's findings of fact and de novo its conclusions of law." *People v Douglas*, 296 Mich App 186, 199-200; 817 NW2d 640 (2012). However, when no *Ginther* hearing is held in the trial court, appellate review is limited to mistakes apparent on the record. *Payne*, 285 Mich App at 188.

"To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different." *Douglas*, 296 Mich App at 200. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). "[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight." *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). "Failing to advance a meritless argument or raise a futile objection does not constitute

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

ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). However, counsel may be found ineffective for the strategy employed when it is not a sound or reasonable strategy. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988). The burden of establishing the factual predicate for a claim of ineffective assistance is on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant failed to show that trial counsel’s representation fell below an objective standard of reasonableness. *Douglas*, 296 Mich App at 200. We disagree with defendant’s argument that his trial counsel’s assistance was ineffective for failing to object to the prosecutor’s statements that arguably appealed to the jury’s sympathy and sense of civic duty. It is conceivable that defense counsel thought it was better not to object and draw attention to the prosecutor’s statements. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). This Court will not substitute its 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).

Furthermore, defendant failed to demonstrate prejudice from the prosecutor’s statements. The trial court instructed the jury that it must not let sympathy or prejudice influence their decision and that the lawyers’ statements and arguments are not evidence. Jurors are presumed to follow the trial court’s instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). Therefore, the trial court’s instructions cured any potential prejudicial effect of the prosecutor’s remarks during closing argument.

We further disagree with defendant that his trial counsel’s assistance was ineffective for failing to object to the procedure by which the trial court determined that the victim was unavailable to testify at trial and for failing to object to the trial court’s sentencing of defendant as a second habitual offender. Given the analysis above, we conclude that defense counsel was not ineffective for failing to raise futile or meritless objections. *Ericksen*, 288 Mich App at 201.

Defendant contends that his trial counsel’s assistance was ineffective because he visited with defendant only twice before trial and was not adequately prepared for trial. Although lack of adequate trial preparation can constitute ineffective assistance of counsel, *People v Dixon*, 263 Mich App 393, 396-397; 688 NW2d 308 (2004), it is not apparent from the record that trial counsel was unprepared. Defense counsel argued that the victim could not identify the perpetrator when he testified at the preliminary examination, defendant was not wearing dark clothing, the police cruiser videos were inconsistent, and objected to the admissibility of the handgun admitted at trial. “In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel’s failure to prepare for trial resulted in counsel’s ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant.” *People v Bass*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Here, defendant fails to identify *any* evidence on appeal that would have substantially benefitted him at trial.

Defendant also argues that his trial counsel’s assistance was ineffective for failing to file a pretrial motion to suppress the charges because the victim testified at the preliminary

examination that defendant was not the perpetrator. Decisions on which motions to file are matters of trial strategy. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). Here, defendant's motion to suppress would have been futile because of the identification of defendant by police officers who witnessed the carjacking or pursued defendant.

Defendant argues that his trial counsel failed to challenge during voir dire an allegedly biased potential juror. We disagree. Jurors are presumptively impartial and a party challenging a juror based on impartiality bears the burden of proving its existence. See *People v Johnson*, 245 Mich App 243, 256 n 5; 631 NW2d 1 (2001). "Perhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions." *Unger*, 278 Mich App at 258. "However, as a reviewing court, we cannot see the jurors or listen to their answers to voir dire questions." *Id.* (citation and internal quotation omitted). "For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror." *Id.* "A lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury." *Id.* (citation omitted).

Here, defense counsel cannot overcome the presumption that his trial counsel's failure to challenge the unidentified juror was sound trial strategy. After the unidentified juror expressed his skepticism for a defendant's refusal to testify, defense counsel explained that a defendant has constitutional right not to testify. After further discussion, the unidentified juror stated that he would try to be impartial. In addition, the trial court instructed the jury that defendant is presumed innocent, that every defendant has the absolute right not to testify, and that defendant's decision not to testify must not affect the jury's verdict in any way. This Court will not substitute its judgment for that of defense counsel, nor will it use the benefit of hindsight to assess defense counsel's performance. *Unger*, 278 Mich App at 258.

Although defendant contends that he was denied the effective assistance of counsel as the result of the cumulative effect of trial counsel's errors, we have found no specific errors in trial counsel's performance. See *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003) ("The cumulative effect of several minor errors may warrant reversal where the individual errors would not."). Therefore, there are no individual errors that can be aggregated to form cumulative effect. See *Unger*, 278 Mich App at 258 (where an appellate court finds no individual errors in trial counsel's performance, there are no errors that can be aggregated to form a cumulative effect).

V. SENTENCING

Next, defendant argues the trial court violated his Sixth and Fourteenth Amendment rights by engaging in judicial fact-finding in scoring offense variables. This argument was rejected in *People v Herron*, 303 Mich App 392, 401-405; ___ NW2d ___ (2013), and therefore, he is not entitled to resentencing.

VI. DISCLOSURE OF EXCULPATORY EVIDENCE

Defendant argues that the prosecution's failure to disclose two forensic laboratory reports deprived him of a fair trial. We disagree. Defendant failed to demonstrate plain error with

regard to this unpreserved issue because the record lacks evidence to support his conclusion that the reports were not provided, and further, there is no indication that the reports contained exculpatory evidence. *Walker*, 273 Mich App at 66.

VII. AUTHENTICATION

Defendant argues the trial court abused its discretion in admitting the handgun recovered from defendant's person and admitted at trial as exhibit 24. We disagree.

“A trial court's decision whether to admit or exclude evidence will be affirmed in the absence of a clear abuse of discretion.” *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” MRE 901(a). The proponent does not have to establish a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Rather, it is only required that the proponent establish that the evidence is what the proponent claims it to be with a reasonable degree of certainty. *Id.* at 133. “[A]ny deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims.” *Id.* at 130-131. A break or gap in the chain of custody does not require automatic exclusion of the evidence if a proper foundation has been established. *Id.* at 133.

Here, although the officer who identified the gun did not take it into custody at the time of admission at trial, ultimately, the evidence technician testified regarding his custody of the gun. Accordingly, the trial court did not abuse its discretion.

Affirmed.

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