

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REID TALLEY,

Defendant-Appellant.

UNPUBLISHED

February 24, 2005

No. 242215

Wayne Circuit Court

LC No. 01-004435-01

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for first-degree home invasion, MCL 750.110a(2), and aggravated assault, MCL 750.81a. Defendant was sentenced to eighty-four months to twenty years in prison for the first-degree home invasion conviction and one year in prison for the aggravated assault conviction. We affirm.

Defendant first claims on appeal that he received ineffective assistance of trial counsel. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To support his claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance was 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 result of the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *Toma, supra* at 302. This Court will not substitute its judgment for that of counsel when it comes to matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant makes five separate claims of ineffective assistance of counsel. First, defendant alleges a breakdown in the attorney-client relationship occurred because his counsel failed to argue zealously on his behalf throughout trial and lacked interest in defendant's case.

We disagree. At the *Ginther*¹ hearing, trial counsel testified that he understood that defendant wanted to assert the defense that he did not forcefully enter the victim's apartment and that instead her uncle, off-duty Detroit police officer Roscoe Thomas, arrived at the victim's apartment before uniformed officers did in order to break the chain on the victim's door and thereby fabricate an appearance of a forceful entry. The record establishes that counsel's argument and questioning of the witnesses was consistent with the theory that defendant did not enter the apartment by force.

In addition, trial counsel testified that on several occasions he made decisions and proceeded as requested by defendant even though he believed the requested actions would not be helpful to the defense, citing as examples his request for a tape of the 911 call made by the victim as well as the victim's telephone records. Counsel also believed that the three former coworkers whom defendant wanted to testify could not offer relevant testimony as to whether defendant broke into the victim's apartment, and could offer only testimony regarding the victim's credibility, and that to the extent the testimony was relevant, it was cumulative to the testimony of another co-worker, Christopher Parks, who did testify. The trial record also shows that trial counsel held off the record discussions with defendant and made decisions at defendant's behest, both prior to and throughout trial. We, therefore, find no evidence to support defendant's contentions that his trial counsel failed to zealously represent him or that a lack of communication caused a breakdown in the attorney-client relationship. Defendant was not denied the effective assistance of counsel on this basis.

Second, defendant argues that counsel was not prepared for trial because counsel failed to meet with defendant, investigate defendant's claims in support of his defense, contact witnesses material to that defense, and take steps on his own to obtain telephone records. Defendant also argues that defense counsel's reliance on the prosecution to locate Thomas and obtain telephone records created a conflict of interest. We disagree.

When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *Toma, supra* at 302; *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Defense counsel has a constitutionally imposed duty to investigate the case, and the pre-trial stage is a critical period for investigation. *People v Dixon*, 263 Mich App 393, 397; 688 NW2d 308 (2004). The record shows that trial counsel met with defendant at least three times prior to trial, including one visit to interview defendant in jail shortly after he was appointed. At the initial meeting, defendant conveyed his theory of the case, discussed the witnesses and records he wanted presented at trial and admitted assaulting the victim but denied entering the apartment by force. Defendant gave trial counsel copies of lengthy correspondences he had written to the trial court and the prosecutor, among others, and also wrote many lengthy letters to trial counsel. According to the record, trial counsel read most of these communications. The record also establishes that trial counsel understood the details of what had occurred, that the only issue disputed was whether defendant entered the apartment by force, and how defendant wished to be defended. The record indicates that counsel had been apprised of all the relevant facts, firmly understood defendant's

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

defense theory, and was able to advocate defendant's position at trial. Consequently, we conclude that defendant was not prejudiced by any additional investigation or discussion that defendant wishes had occurred. See *Dixon, supra* at 397.

Defendant also claims that his trial counsel was unprepared because he relied on the prosecution to produce police officer Thomas as a witness and to obtain the 911 tape and the victim's phone records, and that this reliance created a conflict of interest. When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). First, defendant cannot show that he was prejudiced by any of these alleged failures because Thomas actually testified at trial and the requested phone records were destroyed in the normal course of business prior to defendant's request. Second, defendant alleges that, in response to his inquiries regarding the telephone records, counsel proclaimed that they were destroyed and that he was "not going to do the work!" Defendant contends that this statement exemplifies his counsel's conflict of interest. Counsel, however, denied making the statement, and testified that he actually wrote a letter to the prosecutor regarding efforts to obtain these records, and that it was appropriate for him to rely on the prosecution when representing an indigent defendant. Even if counsel made the statement as defendant alleges, it does not at all reveal that counsel had an actual conflict of interest which prejudiced defendant.

Lastly, defendant argues that counsel was unprepared for trial because he failed to interview NSO employees Jacqueline Harris, Rosie Nobles and Gloria Bryant. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. The failure to interview witnesses does not alone establish inadequate preparation. *Caballero, supra* at 642. Counsel testified that these witnesses would have commented on the complainant's credibility and the instances in which she called defendant's work. Counsel's investigations brought forth Parks as a witness, who testified to these very facts. Defendant, therefore, was not prejudiced by counsel's failure to interview these witnesses. Defendant also has not overcome the presumption that this decision was sound trial strategy. *Rockey, supra* at 76. In total, defendant alleges no conduct which would lead us to conclude that counsel was unprepared for trial and that defendant was prejudiced as a result. A new trial is not warranted on this basis.

Defendant's third argument is that counsel was ineffective because counsel failed to adequately examine Thomas about his alleged fabrication of the crime scene. We disagree. What questions to ask a witness are presumed to be matters of trial strategy. *Rockey, supra* at 76. Counsel questioned Thomas on the amount of time that he was in the apartment, and he testified that he arrived at the apartment approximately ten minutes before the uniformed officers' arrival. Although counsel did not directly ask Thomas whether he fabricated the crime scene, defendant has not shown why this could not have been a matter of trial strategy given Thomas' testimony that he was only in the apartment for ten minutes. In addition, we also note that defendant, who was very vocal throughout trial, spoke in many instances directly to the court, despite being represented by counsel. Before Thomas left the witness stand, defendant himself indicated that he had no further questions for Thomas.

Fourth, defendant argues that counsel was ineffective because he did not argue that the testimony of complainant's eleven-year-old daughter, Richella, supported defendant's contention

that there had been no forced entry by defendant. Defendant contends that Richella testified that there had been no forced entry into the apartment, that the trial transcript inaccurately reflects that Richella stated instead that she did not *see* defendant force his way into the victim's apartment, and that trial counsel failed to point out and argue that Richella's testimony supported defendant's actual innocence.

Defendant has provided no record support for his argument that the trial transcript, in which Richella admitted that she did not witness defendant enter the apartment, is in error. Further, defendant does not contest Richella's additional testimony, which is supported by the testimony of complainant's other daughter, twelve-year-old Remi, that she heard a loud noise consistent with a forceful entry before she saw defendant in the apartment and that the chain worked before the incident, but was broken after the incident.

Defense counsel questioned both Richella and Remi regarding what they actually witnessed, and successfully established that neither of them actually saw defendant enter the apartment. Counsel garnered testimony from the girls that they were present when the complainant told police what had happened. During closing argument, counsel argued that the only evidence to indicate that defendant forcefully entered the apartment was the complainant's unsubstantiated testimony, and evidence indicated that she was a very angry and vindictive person who did not want defendant to keep his job. Counsel contended that the prosecutor had not proven defendant's guilt regarding any home invasion charge beyond a reasonable doubt. Consequently, we conclude that defendant was not denied effective assistance of counsel on this basis.

Finally, defendant argues that it was ineffective assistance for trial counsel to fail to produce police officer Timaka Jones, and civilian witnesses Nobles and Harris, who were material to defendant's defense. We disagree. Decisions regarding whether to call witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. The failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Dixon, supra* at 398. A substantial defense is one which might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grounds 453 Mich 900 (1996).

Because defendant's only theory was that the apartment was fabricated to appear as if he made a forceful entry, counsel correctly believed that the testimony of Nobles and Harris would not have contributed to proving defendant's innocence. Nobles and Harris would have testified to the complainant's inclination to call defendant's workplace, inquire about his whereabouts, and potentially her desire to get him fired. The testimony of Parks and the complainant herself established these facts. Similarly, Jones would have testified that she arrived at the complainant's apartment at 9:30 p.m., found Thomas present, as well as complainant and her daughters, and complainant refused to be taken to the hospital by EMS. Jones also could have reiterated what the complainant told her regarding defendant's forceful entry. Counsel again correctly believed that Jones and the other officers had nothing material to add to defendant's defense. We cannot say that the failure of these witnesses to testify denied defendant a substantial defense. See *Dixon, supra* at 398; *Hyland, supra* at 710. Defendant was not denied the effective assistance of counsel on this basis, or any other bases, as indicated above.

Defendant's next argument on appeal is that the prosecution failed to present sufficient evidence to support his conviction for first-degree home invasion and that an intent to commit a misdemeanor assault cannot satisfy the requirements of first-degree home invasion. We disagree. The Court reviews the evidence *de novo*, resolving all factual conflicts in the light most favorable to the prosecution, to determine whether a rational trier of fact could have found that all essential elements of the crime were proven beyond a reasonable doubt. *People v Bulls*, 262 Mich App 618, 623; 687 NW2d 159 (2004). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [] verdict." *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003), quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The first-degree home invasion statute, MCL 750.110a(2), provides:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or *assault* in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or *assault* is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling. [Emphasis added.]

The third-degree home invasion statute, MCL 750.110a(4), provides, in pertinent part:

A person is guilty of home invasion in the third degree if the person . . . [b]reaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor. [See also *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004)].

The plain language of the statute indicates that both felony and misdemeanor assaults may properly be charged as crimes underlying a first-degree home invasion charge. *Id.* at 163; *People v Musser*, 259 Mich App 215, 222-223; 673 NW2d 800 (2003). This Court has recently articulated this point in *Sands, supra*, p 163:

[MCL 750.110a] [s]ubsection (2) does not limit the term "assault" to any particular type of assault . . . Further, because felonies are specifically listed as underlying crimes for first-degree home invasion, it would be redundant to list assault and larceny separately if subsection 110a(2) was referring to only felony assaults and larcenies. . . .

MCL 750.110a clearly differentiates when it is appropriate to charge a misdemeanor assault under subsection (2) as opposed to subsection (4). Under subsection (2), the additional element of a dangerous weapon or another person's lawful presence is required for a criminal act to constitute first-degree home invasion. A misdemeanor assault may be prosecuted under subsection (2) *only* if the person is armed with a dangerous weapon or another person is lawfully present in the dwelling. MCL 750.110(2)(a) and (b). Under subsection (4), a misdemeanor assault may be prosecuted in the absence of either of these elements.

Therefore, defendant could be properly convicted of first-degree home invasion with the underlying crime of misdemeanor aggravated assault. *Id.* at 162.

Viewing the evidence in favor of the prosecution, there was sufficient evidence to support defendant's conviction of first-degree home invasion. Defendant never disputed the fact that he committed aggravated assault upon the complainant. The only question at trial was whether defendant entered the apartment by force. The complainant testified that she did not give defendant permission to enter the apartment and that he used his body to force the door open while the security chain was engaged. Complainant and her daughters each testified that complainant had never allowed defendant, or other men they were not related to, in the apartment when she was alone with her daughters. Richella and Remi, neither of whom were facing the door at the time defendant entered the apartment, testified that they heard a loud noise consistent with someone pushing through a locked door, and then subsequently saw defendant assaulting complainant. Complainant and her daughters also testified that prior to the incident with defendant, they had used the chain on the door, but that after the incident with defendant, the chain was broken and could no longer be used. Viewing the evidence in a light most favorable to the prosecution, the evidence is sufficient to support the trial court's conclusion that defendant entered the apartment by force and, accordingly, his conviction for first-degree home invasion.

Defendant contends that complainant is not a credible witness given the animosity and vindictiveness she has demonstrated toward him. Complainant admitted to making malicious phone calls to defendant's work, but she testified that she made these calls after the incident with defendant had occurred. Questions of credibility, however, are left to the trier of fact and will not be judged anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Next, defendant argues on appeal that the verdict was against the great weight of the evidence because complainant, who was the only witness to testify that he forcefully entered the apartment, was not a credible witness and the testimony regarding the broken chain on the door was likewise not credible. We disagree. A trial court's decision to grant or deny a motion for a new trial based on an argument that the verdict was against the great weight of the evidence is reviewed for abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). A trial court's determination that a verdict is not against the great weight of evidence is given substantial deference. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

When reviewing the denial of a motion for a new trial on the basis that the verdict is against the great weight of evidence, the test is “whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). New trial motions that are based solely on the weight of the evidence regarding witness credibility are not favored and should be granted only with great caution and in exceptional circumstances. *Lemmon, supra* at 639 n 17. If the issue involves credibility and there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Id.* at 642-643. Conflicting testimony, even when impeached to some extent, is not a sufficient ground for granting a new trial. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), quoting *Lemmon, supra* at 647. A narrow exception exists when testimony contradicts “indisputable physical facts or laws” or “defies physical realities.” *Lemmon, supra* at 643, 647.

For the same reasons we found that the evidence presented at trial was sufficient to support defendant’s conviction, *supra*, we also conclude that the first-degree home invasion conviction was not against the great weight of the evidence, and that the trial court did not abuse its discretion in denying defendant’s motion for a new trial based on a claim that the verdict was against the great weight of the evidence. See *Lemmon, supra* at 647.

Defendant’s fourth argument on appeal is that his sentence for first-degree home invasion is not proportional to the nature of the crime he committed. We disagree. This Court reviews for clear error the trial court’s factual findings at sentencing. MCR 2.613; *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), lv gtd in part 471 Mich 913 (2004). But this Court reviews de novo the proper construction or application of statutory sentencing guidelines. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). The trial court has discretion in scoring the sentencing guidelines, and its scoring will be upheld if there is any evidence in the record to support it. *Houston, supra* at 471; *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

Defendant was convicted of first-degree home invasion, MCL 750.110a(2). According to the guidelines, first-degree home invasion is a Class B crime against a person with a statutory maximum sentence of twenty years. MCL 777.16f. Defendant received a PRV score of 120, which equates to PRV level F, and an OV score of thirty, which equates to an OV level III. The sentencing guidelines called for a minimum sentencing range of 84 to 140 months. MCL 777.63. Defendant was sentenced as a habitual fourth offender, which increased his minimum sentence to 84 to 280 months. MCL 777.21(3). The trial court sentenced defendant within the guidelines range to eighty-four months to twenty years in prison.

“When a trial court imposes a sentence within the recommended guidelines range of accurately scored sentencing guidelines, this Court must affirm the trial court’s sentence.” *Houston, supra* at 472, citing MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261, 272; 666 NW2d 231 (2003). Remand for resentencing is appropriate only when the guidelines have been misscored or when inaccurate information results in the sentence imposed falling outside the relevant guidelines range and the trial court did not have a substantial and compelling reason for departure. *Id.* at 473, citing MCL 769.34(11). Consequently, we conclude that defendant’s sentence for first-degree home invasion was proportionate.

Defendant next claims that multiple instances of prosecutorial misconduct occurred, involving the prosecution's failure to produce evidence and witnesses, which denied him a fair trial. We disagree. This Court reviews claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *Abraham, supra* at 272. When a claim of prosecutorial misconduct is not properly preserved, our review is limited to whether a plain error affected defendant's substantial rights. *Id.* at 274-275. For a defendant to obtain reversal of a conviction under the plain error standard, (1) the defendant must show that a plain error affecting his substantial rights has occurred, and (2) the appellate court, in its discretion, must find that the plain error either resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceeding. *Abraham, supra* at 263; *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96 (2002). This Court will not find error requiring reversal unless the prejudicial effect of the prosecutor's comments could not have been cured by a timely instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A defendant's due process rights to discovery may be implicated when the prosecution suppresses material evidence favorable to the defendant after the defendant requested discovery. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997), citing *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992). The prosecution's suppression of evidence requested by and favorable to the accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *People v Banks*, 249 Mich App 247, 254-255; 642 NW2d 351 (2002), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). A *Brady* violation is established if the defendant demonstrates: "(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Lester*, 232 Mich App 262, 281- 282; 591 NW2d 267 (1998) (citations omitted). "Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Defendant first argues that the prosecution suppressed the 911 tape and phone records, and should have taken measures to protect these records. However, defendant has not established that the prosecution improperly suppressed evidence. The record shows that prior to trial, defendant requested that the prosecution obtain the 911 tape and phone records. At trial, the prosecutor indicated that she had requested both records, but that they had been destroyed in the normal course of business. Defendant requested a court order compelling the prosecutor to obtain these records, and the trial court denied defendant's request. Defendant's claim fails because the prosecution was not aware of defendant's defense until after the records had been destroyed. The prosecution is under no duty to take measures to preserve these records on its own, and defendant can point to no authority which indicates otherwise. Further, defendant does not know what these records would have revealed, although he argues that they would have indicated that Thomas had at least thirty minutes to fabricate the scene. Even assuming Thomas had an opportunity to fabricate the scene, no evidence supporting defendant's theory was

presented at trial. Moreover, complainant's testimony that defendant forcefully entered the apartment and broke the chain on the door directly contradicts defendant's theory. Because the prosecution did not possess the requested information and there is no evidence that, if preserved and disclosed, these records would have resulted in a different outcome at trial, defendant's claim fails. *Lester, supra* at 282.

Defendant also argues that the prosecutor should have produced Thomas as a witness at trial without defendant's assistance, investigated Thomas regarding defendant's allegations of misconduct, questioned him about his misconduct at trial, and produced a report that Thomas must have made regarding the incident. Because Thomas testified at trial, defendant suffered no prejudice and his argument regarding the prosecution's efforts in this regard has no merit. In addition, even if Thomas was being investigated, the prosecutor has no duty to disclose or question a witness who is under investigation regarding an unrelated matter. See *People v Brownridge (On Remand)*, 237 Mich App 210, 215; 602 NW2d 584 (1999). Further, there is no evidence that Thomas filled out a report regarding the incident and, in fact, Thomas testified that he did not give a statement. Therefore, defendant was not denied a fair trial on this basis.

Defendant next argues that the prosecution should have produced witnesses Nobles, Harris, Bryant, and Silar. Defendant asserts that Nobles, Harris and Bryant would have testified regarding complainant's numerous phone calls to NSO and inquiries regarding defendant's whereabouts. In our judgment, this evidence is not material and would not have made a difference at trial as the evidence is cumulative due to Parks' testimony on this same matter. Defendant alleges only that Silar would have provided positive character evidence. Defendant, however, failed to list Silar on his witness list and never requested that the prosecution produce Silar at trial. More importantly, Silar was not present during the offense and thus could not have testified regarding the pertinent issue of whether defendant entered the complainant's apartment by force. Because Silar's testimony is not likely to have rendered a different outcome at trial, we therefore conclude that no error affecting defendant's substantial rights occurred.

We also reject defendant's argument that the prosecution failed to produce Jones to testify. On the last day of trial, the prosecutor indicated that, although Jones received a subpoena to appear, she was unable to appear due to illness. The trial court offered to adjourn the trial, and even recommended that defendant do so, until Jones could be produced. After consulting with defense counsel and being questioned by the trial court at length regarding his decision, defendant indicated on the record that he had decided to waive Jones' appearance. Accordingly, because defendant waived any objection, we find there is no error to review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *Hall, supra* at 679

Next, defendant argues that the trial court's findings of fact are erroneous. We disagree. A trial court's findings of fact are reviewed for clear error. *People v Green*, 260 Mich App 392, 405; 677 NW2d 363 (2004). A finding is clearly erroneous when it leaves the appellate court with the definite and firm conviction that the trial court has made a mistake. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). In actions tried without a jury, the trial court must find the facts and state separately its conclusions of law as to contested matters. MCR 2.517(A)(1); MCR 6.403; *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994); *People v Feldmann*, 181 Mich App 523, 534; 449 NW2d 692 (1989). The findings and conclusions regarding contested matters are sufficient if brief, definite and pertinent, without over-elaboration of detail or particularization of facts. MCR 2.517(A)(2); *Fletcher, supra* at 883.

A trial court's duty to make specific factual findings is satisfied when it is manifest that the court was aware of the factual issues and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995); *In re Forfeiture \$19,250*, 209 Mich App 20; 530 NW2d 759 (1995).

The trial court's findings are sufficiently specific. The trial court noted that its findings were based on the testimony of the witnesses. The trial court specifically found that defendant and complainant had a relationship, that defendant wanted a more serious commitment than complainant, which caused a fracture in the relationship, and that thereafter, complainant discouraged communication between her and defendant. The trial court further found that on March 28, 2001, when defendant came to complainant's apartment, one of complainant's daughters informed her that defendant was at the door, and that complainant opened the door partially with the door secured by the chain. The trial court ultimately found that defendant entered the apartment by force and inflicted blows upon the complainant, requiring her to seek medical care.

Defendant claims that the trial court's findings are erroneous because the trial court failed to specifically find that Richella testified that defendant did not enter the apartment by force or that she was undressed. We disagree. The trial court is not required to state its findings with such specificity and detail. *Fletcher, supra* at 883. Further, Richella's allegedly exculpatory statement regarding defendant's forced entry does not appear on the record. Defendant has cited no support for his claim that the transcript improperly reflects Richella's testimony. We conclude, therefore, no clear error occurred. The trial court's findings of fact are sufficiently specific and reflect the trial court's understanding of the factual issues. *Smith, supra* at 235.

Finally, we address defendant's two claims raised in his standard 11 brief on appeal. Defendant argues that he received the ineffective assistance of appellate counsel and that the trial court improperly failed to take judicial notice of the interval between the time Thomas arrived at complainant's apartment and the time the other police officers arrived. Defendant failed to include these issues in the statement of questions presented section of defendant's brief. Therefore, pursuant to court rule and case law, these issues are waived and we need not address them. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999) (failure to raise issue in statement of questions presented precludes appellate review).

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder