STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2012
v MARLON TREMAYNE DAVIS Defendant-Appellant	No. 305054 Oakland Circuit Court LC No. 2011-235605-FH

Before: JANSEN, PJ., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant, Marlon Tremayne Davis, appeals as of right. On May 10, 2011, following a jury trial, he was convicted of manufacture of marijuana 20 to 200 plants, MCL 333.7401(2)(d)(ii), and possession of a firearm during the commission of a felony, MCL 750.227b ("felony-firearm"). Defendant's convictions arose from his residency in and operation of a marijuana grow house. Defendant was sentenced on May 27, 2011 to two years' imprisonment for the felony-firearm conviction and eleven months imprisonment for the manufacture of marijuana conviction. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

First, defendant argues there was insufficient evidence of his identity to support the manufacture of marijuana and felony-firearm convictions. We disagree. A criminal defendant is not required to take any additional steps to preserve an appeal based on the sufficiency of the evidence. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). This Court reviews a sufficiency of the evidence challenge de novo. *People v Jackson,* 292 Mich App 583, 587-88; 808 NW2d 541 (2011).

Defendant's challenge to the sufficiency of the evidence is based solely on his assertion that there was insufficient evidence to establish his identity as the perpetrator of the grow operation. We disagree. The evidence presented at trial was sufficient to support defendant's conviction for manufacture of marijuana and felony-firearm. Defendant argues that he was not present when the grow operation was discovered, his fingerprints were not recovered on any of the evidence, and he cannot be placed in the home within two months preceding the discovery of the grow operation. He argues also that the proof of his residency at the home was based upon hearsay and circumstantial evidence, which was insufficient to identify him as the perpetrator.

Identity of the perpetrator is an essential element for all charged crimes, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and "[c]ircumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime." *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999). A review of the record indicates sufficient evidence was presented to support a finding that defendant was the individual who committed the charged offenses. The evidence found at the grow site when it was discovered by officers responding to a burglary report included: defendant's driver's license; mail addressed to him; and his CCW registration. Months later he made statements to the police claiming sole possession of the home and his life-long residency. Additionally, defendant's cousin, Michelle Cunningham, testified that defendant lived in the home for the last 30 years and that she had met defendant at the home in August 2010 to deliver car registration documentation. Despite his speculation on appeal that someone else might have lived in the home or was otherwise responsible for running the grow operation, there is no record evidence of another person's residency.

II. AGAINST THE GREAT WEIGHT OF THE EVIDENCE

Defendant next asserts an alternative argument that the verdict was against the great weight of evidence based on insufficient evidence of defendant's possession of the firearm and presumably the home. We disagree. In order to preserve an issue regarding the great weight of evidence based on a jury verdict, the defendant must move for a new trial in the trial court. *People v Cameron*, 291 Mich App 599, 617-618; 806 NW2d 371 (2011); MCR 2.611(A)(1)(e). Because defendant failed to preserve this issue by moving for a new trial it is reviewed for plain error. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

We find that the trial court did not commit a plain error that affected defendant's substantial rights because the verdict was not against the great weight of the evidence. In discussing a challenge based on the great weight of the evidence, this Court has stated:

> The test to determine whether a verdict is against the great weight of the evidence 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 McCray,* 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon,* 456 Mich 625, 647; 576 NW2d 129 (1998). "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* at 645-646; 576 NW2d 129 (citation omitted). [*Musser*, 259 Mich App at 218-219.]

Here, defendant contests the verdict on the grounds that the evidence offered to prove his residency and possession of the home during the time of the break-in was insufficient to identify him as the perpetrator; thereby establishing his guilt. Defendant's argument regarding the great weight of the evidence is nothing more than a reiteration of his argument regarding the sufficiency of the evidence. Defendant incorrectly argues that a claim against the great weight of the evidence is a standard less than a sufficiency of the evidence challenge. Rather, this is

merely an alternative argument challenging the jury verdict based on proof of residency evidence. As discussed above, there was a significant amount of circumstantial evidence establishing defendant's connection to the grow house. Therefore, the verdict was not against the great weight of the evidence identifying defendant as the resident of the grow house.

III. CLAIMS RELATED TO THE ALLEGED EVIDENTIARY ERROR

Defendant next argues that the trial court violated defendant's due process rights because it admitted two inadmissible hearsay statements. Defendant further asserts the elucidation and use of those statements constituted prosecutorial misconduct and defense counsel's failure to object to the statements amounted to ineffective assistance of counsel. We disagree.

In support of these three claims of error, defendant cites two portions of trial testimony. The first statement was offered by Officer Jachym,[1] who testified that at approximately 3:00 a.m. on October 27, 2010, he spoke with an unidentified neighbor who was walking his dog. This neighbor stated that defendant lived in the home. The second statement was offered by Detective Paul Kinal who testified that he learned from colleagues that approximately one percent (1%) of fingerprints on firearms are recoverable.

We agree that both statements were inadmissible hearsay. However, defendant fails to persuade this Court that his substantial rights were affected. We review an evidentiary issue that was not preserved by raising an objection, *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010), for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is required only if the error was prejudicial. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). Generally, hearsay evidence is inadmissible as substantive evidence at trial, *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993), unless it is shown to fall within a recognized exception, *People v Burton*, 177 Mich App 358, 362; 441 NW2d 87 (1989) (citation omitted). Statements of identification made by an out-of-court declarant are not hearsay when the identifier is subject to cross examination and such nonhearsay may be used as substantive evidence. *People v Malone*, 445 Mich 369, 371, 377-78; 518 NW2d 418 (1994); MRE 801(d)(1)(C). Both statements challenged as hearsay related to defendant's identification and were inadmissible as substantive evidence. As established in *Malone*, the unidentified neighbor and the lab personnel were not testifying witnesses and defendant was not afforded any opportunity to cross-examine them. The prosecution offered no exceptions that would provide for the admission of either statement. Consequently, the admission of these hearsay statements constituted plain error.

It cannot, however, be shown that the admission of these statements were outcome determinative because defendant's substantial rights were not affected. Defendant argues that the neighbor's identification was the sole piece of direct evidence connecting him to the residence at the time the grow operation was discovered ignoring the other evidence establishing his residency. He further asserts that the detective's statement regarding fingerprints was offered to prove defendant possessed the gun recovered in the grow house, despite the absence of

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[1] The record does not contain a first name for this officer.

fingerprint evidence. However, there was ample evidence that the defendant was the sole occupant of the home at the time of the discovery of the weapon and had been the sole occupant for several months prior, to support the conviction on the weapons charge. Even if these hearsay statements were excluded, the properly admitted evidence was sufficient to support the convictions. Admission of the statements did not prejudice defendant.

We also, reject the defendant's arguments regarding prosecutorial misconduct. Absent a timely and specific objection, review of alleged prosecutorial misconduct is precluded unless an objection could not have cured the error or where failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272. Where a contemporaneous objection was not made and a curative instruction was not requested, claims of prosecutorial misconduct are limited to ascertain whether there was plain error that affected a substantial right. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). An unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. *People v Haywood*, 209 Mich App 217, 228-29; 530 NW2d 497 (1995). The test of prosecutorial misconduct is whether the defendant was denied a fair and partial trial. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

In this case the record shows that the prosecutor did not elicit either of the hearsay statements, rather Officer Jachym and Detective Kinal volunteered the information. As Officer Jachym detailed his investigation, the prosecutor asked him if he had contact with anyone else, and he responded that he had. Without any encouragement by the prosecutor or objection by defense counsel Officer Jachym then continued to explain that the neighbor told him defendant resided in the grow house. Thus the prosecutor did not commit any misconduct. Moreover, this statement albeit inadmissible was not outcome determinative and did not deny the defendant a fair trial. Just as the initial introduction of this statement did not prejudice defendant, the prosecutor's reference to this statement in closing arguments did not prejudice him. Finally, the prosecution's questioning of Detective Kinal, did not invite or encourage his hearsay answer, was not outcome determinative, nor denied the defendant a fair trial. Therefore, this claim of prosecutorial misconduct fails also.

Defendant's argument that counsel rendered ineffective assistance fails because he has not demonstrated that counsel's representation was objectively deficient or that counsel's performance prejudiced him. Since defendant failed to preserve his claim of ineffective assistance of counsel by moving for a new trial or for a *Ginther* hearing in the trial court, this issue is unpreserved and our review is limited to errors that are apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under professional norms, and (2) there was a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Wash* 466 US 668, 687-690; 104 S Ct 2052, 2064-2065; 80 L Ed2d 674, 693-694, 698 (1984). Defense counsel has a wide discretion regarding trial strategy. *People v Odom,* 276 Mich App 407, 415; 740 NW2d 557 (2007). Declining to raise objections to procedures, evidence, or argument can be sound trial strategy. *Unger*, 278 Mich App at 242, 253.

Defendant first asserts that his counsel was ineffective for failing to object to the hearsay statements. Although the hearsay statements were inadmissible, defendant cannot establish that the preclusion of those statements would have changed the outcome of the trial and prejudiced him. As discussed above, the properly admitted evidence overwhelmingly supported the jury's verdict. Additionally, counsel may have decided to forgo objection rather than highlight the inadmissible testimony. Defendant cannot establish that his attorney, in failing to object to the hearsay statements, performed below an objective level of reasonableness or negatively impacted the outcome of the proceedings.

Similarly, defendant asserts that his counsel failed to object to the prosecution's improper use of Officer Jachym's testimony during its closing argument. Defendant has not shown that the failure to object was not a sound strategic decision. Further, as discussed above, there was significant, and properly admitted, evidence of defendant's residency, which supported his convictions. Consequently, defendant cannot establish that counsel's performance was objectively unreasonable or outcome determinative.

Affirmed.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan