STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
V JIMMIE LEE MORRIS, Defendant-Appellant.	No. 308221 Macomb Circuit Court LC No. 2011-001462-FC

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, carrying a weapon with unlawful intent, MCL 750.226, and felonious assault, MCL 750.82. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 31 to 51 years for the armed robbery conviction, three to five years for the carrying a dangerous weapon conviction, and two to four years for the felonious assault conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the robbery of a Sunoco gas station in Warren, Michigan, on the afternoon of January 5, 2011. The prosecution presented evidence that defendant approached gas station clerk Mohammed Islam, brandished a gun, and demanded money and cartons of cigarettes. As Islam complied with defendant's directions, defendant struck Islam in the face with the gun two separate times before taking the bag of money and cigarettes, and then fleeing. Surveillance video from an adjacent restaurant depicted a person matching the robber's general description arrive and leave the area in a distinctive red car with a white front quarter panel at the approximate time of the robbery. The police received a tip that ultimately led to defendant's photograph being included in a photographic array. Islam selected defendant as the person who robbed the gas station. The police also located the distinctive red car, a Mazda, and discovered that it was registered to defendant. In addition to the charged armed robbery, the prosecution presented evidence that defendant committed another robbery at a BP gas station in Dearborn, Michigan, less than two weeks before the charged robbery. The defense theory at trial was that defendant was misidentified as the robber.

I. OTHER ACTS EVIDENCE

Defendant first argues that the trial court abused its discretion when it allowed the prosecution to introduce under MRE 404(b)(1) evidence that defendant robbed the Dearborn BP

gas station on December 25, 2010. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *Id*. (citation omitted).

"At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity." *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002); see also *People v Mardlin*, 487 Mich 609, 616; 790 NW2d 607 (2010) ("the rule is not exclusionary, but is inclusionary"). Although MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime, it permits such evidence for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." See *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Other acts evidence is admissible under MRE 404(b)(1) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

We agree that the evidence was relevant to disputed factual issues in this case and was not offered to show defendant's bad character. "A trial court admits relevant evidence to provide the trier of fact with as much useful information as possible." *People v Cameron*, 291 Mich App 599, 612; 806 NW2d 371 (2011). In *People v Golochowicz*, 413 Mich 298, 309, 311-312; 319 NW2d 518 (1982), our Supreme Court explained that when specifically determining whether other acts evidence is admissible to establish identity through modus operandi, the trial court must find that: (1) there is substantial evidence that the defendant committed the similar act, (2) there is some special quality of the act that tends to prove the defendant's identity, (3) the evidence is material to the defendant's guilt; and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice.

Here, the evidence was probative of defendant's identity as the person who robbed the Warren Sunoco gas station. First, there was substantial evidence that defendant committed the Dearborn BP robbery because the victim in that robbery, Mohammed Harajli, testified at defendant's trial in this case and identified defendant as the person who robbed him on December 25. There were also similarities between both robberies, including how defendant carried out the robbery and his conduct of striking each victim with his weapon when they did not move quickly enough. In the Dearborn BP robbery, defendant entered a gas station wearing a long coat and one glove, approached Harajli, appearing as a regular customer. Defendant produced a black handgun, pointed it Harajli, and demanded that he "give him all the money." Defendant directed Harajli to put the money in a plastic bag. When Harajli did not move quickly enough, defendant used the gun to strike Harajli in the face. In this case, Islam identified defendant as the person who robbed him at the Warren Sunoco station on January 5, 2011, 11 days after the Dearborn BP robbery. Islam testified that defendant entered the gas station wearing a winter coat and one glove. Defendant approached Islam, and Islam assumed he was a customer. Defendant pulled a black handgun, pointed it at Islam, and told him to put the money from the cash drawer in a plastic bag. Defendant directed Islam to hurry up and, when Islam did

not move fast enough, defendant hit him in the face with the gun. As Islam was following defendant's directions, defendant struck Islam in the face a second time. In both the BP robbery and the charged crime, there were special qualities that tended to prove defendant's identity, and there was substantial evidence that defendant committed the prior similar act.

Further, we are not persuaded that the evidence should have been excluded because it was unduly prejudicial. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Cameron*, 291 Mich App at 610. MRE 403 is not intended to exclude "damaging" evidence, because any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Instead, under the balancing test of MRE 403, this Court must first decide if the prior bad-acts evidence was unfairly prejudicial, and then "'weigh the probativeness or relevance of the evidence' against the unfair prejudice" to determine whether any prejudicial effect substantially outweighed the probative value of the evidence. *Cameron*, 291 Mich App 611. Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury" or "it would be inequitable to allow the proponent of the evidence to use it." *Mills*, 450 Mich at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). In the second situation, the unfair prejudice language "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Cameron*, 291 Mich App 611 (citation omitted).

Although defendant asserted that the evidence was inherently prejudicial, we are not convinced that the jury was dissuaded from rationally weighing the evidence. Moreover, before Harajli's testimony, before the testimony of the detective in charge of investigating the Dearborn BP robbery, and again in its final instructions, the trial court gave a cautionary instruction advising the jury on the limited permissible use of the evidence. The court's instructions limited the potential for any prejudice. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Under the circumstances, the trial court's decision to allow the evidence did not fall outside the range of principled outcomes. *Feezel*, 486 Mich at 192. Thus, the court did not abuse its discretion by permitting the evidence.

II. SUGGESTIVE PRETRIAL IDENTIFICATION

Defendant argues that Islam's identification testimony was tainted by an impermissibly suggestive photographic lineup in which defendant's photo appeared in the first position and consisted of individuals that "looked nothing like" him. Defendant raised these arguments below in a pretrial motion to suppress Islam's identification testimony, which the trial court denied. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

Photographic identification procedures can violate a defendant's due process rights if they are so impermissibly suggestive as to give rise to a substantial likelihood that there will be a misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). A photographic array is not deemed

to be suggestive if "it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification." *People v Kurylczyk*, 443 Mich 289, 304; 505 NW2d 528 (1993) (quotations omitted). "[D]ifferences in the composition of photographs, in the physical characteristics of the individuals photographed, or in the clothing worn by a defendant and the others pictured in a photographic lineup have been found not to render a lineup impermissibly suggestive." *Id.* at 304-305. Such differences relate only to the weight of the identification and are "significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

Here, there is no evidence that the photographic identification procedure was unduly suggestive or improper. Although the police are not required to make endless efforts to attempt to arrange a lineup, *People v Melvin Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985), the detective testified at a *Wade*[1] hearing regarding his efforts to ensure that the photographic lineup was not suggestive. He explained that he used the CLEMIS[2] photo database system, matched photographs according to similarities in defendant's age, height, and weight, and built the lineup from a large group of similar-looking suspects. In addition, because the background in defendant's photograph varied from the other five photographs, he presented the array in black and white to prevent defendant's photograph from standing out. The photographic array contained six photographs, with defendant's photograph appearing in position one of the array, and sequential numbering of the photographs for the witness to indicate which photograph was selected. Defendant has not demonstrated anything about the procedure used that rendered it unduly suggestive. Although defendant complains that the detective placed his photograph in a particular position, the detective testified that the computer-based system used to create the photographic lineup randomly placed each photograph.

Furthermore, our review of the photographic array reveals that the other individuals depicted in the photographs were fairly representative of defendant's physical features. There was nothing about the other five participants that would have rendered defendant substantially distinguishable. The photographic lineup contained six black and white photographs of similarly-looking, similarly-aged, African-American males. All six participants appeared to have very short hair or be nearly bald with hints of facial hair similar in amount and style. In fact, Islam testified at trial that, in addition to defendant, two other participants had the same facial hair as defendant, and at least four participants had facial hair. Although participant number six appeared slightly younger than defendant, participant numbers two through five easily appeared to be the same age as defendant. On appeal, defendant claims that his face is rounder than the other participants and that he has smile lines and deeper cheekbones, but those differences are not obvious from our review of the array. Moreover, there was nothing significant about the variations in the participants' faces. Rather, those types of minor physical differences in the participants relate to the weight of Islam's identification, not its admissibility,

[1] *United States v Wade*, 388 US 218, 223-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[2] The Court and Law Enforcement Management Information System.

Hornsby, 251 Mich App at 466. We note that defense counsel appropriately raised those differences during his cross-examination of Islam.

In sum, the evidence indicates that efforts were made to ensure that the lineup was fair and comprised of individuals with similar characteristics. The trial court did not clearly err in rejecting defendant's claim that the pretrial identification procedure was unduly suggestive. Because the lineup procedure was not unduly suggestive, it was not necessary to determine if an independent basis existed for Islam's identification. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

III. MOTIONS TO SUPPRESS EVIDENCE

Defendant next argues that the trial court erred by denying his motions to suppress the evidence seized from his car and from his girlfriend's house. Defendant claims that the search warrants were invalid because they were based on affidavits that were fraudulent and did not advise the court that the police had already engaged in two "full" warrantless searches of his car. We disagree. When reviewing a motion to suppress evidence, we review the trial court's findings of fact for clear error and review its ultimate decision whether to suppress the evidence de novo. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009). We also review de novo the question whether a Fourth Amendment violation occurred. *Id.*

A. THE SEARCH OF DEFENDANT'S VEHICLE

The United States and the Michigan Constitutions prohibit unreasonable searches and seizures. US Const Am IV; Const 1963, art 1, § 11. The basic rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009) (citations, internal quotations, and emphasis omitted). In other words, warrantless searches and seizures are presumptively unreasonable unless an exception to the warrant requirement applies. Impoundment of motor vehicles and inventory searches in accordance with departmental regulations are recognized exceptions to the warrant requirement, falling under the community caretaking exception. *People v Slaughter*, 489 Mich 302, 311-312; 803 NW2d 171 (2011); *People v Toohey*, 438 Mich 265, 271, 277-280, 284-285; 475 NW2d 16 (1991). A search conducted pursuant to the community caretaking exception must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Slaughter*, 489 Mich at 313 (citations omitted).

The record does not support defendant's claim that the police engaged in a "full blown" search at the scene of his arrest, as opposed to a valid inventory search. The record discloses that defendant parked his car in a fire lane and was arrested after reentering his car. According to the police testimony, the officers impounded the vehicle and performed only a "cursory inventory search" at the scene. An officer testified that the car was not searched thoroughly and nothing was removed from the car at that time. In fact, defense counsel acknowledged during the hearing that the police report identified the search at the scene as "a cursory search." The Dearborn Police arrest report indicates that no items were removed from the car and that "[p]roper impound procedures were completed." At trial, an officer explained the reason for the search,

indicating that defendant had been arrested and that his car was blocking a fire lane and would be towed, so the car was impounded. The car was towed directly to and secured in the police garage overnight, and thereafter searched only after a search warrant was obtained. There is nothing in the record to support defendant's claim that the police engaged in two "full" searches of the vehicle before obtaining a warrant. Likewise, there is nothing in the record, and defendant has not presented anything on appeal, showing that the inventory search was contrary to standardized police procedure. The trial court did not err in concluding that the limited warrantless search of defendant's car at the scene constituted a valid inventory search.

We also reject defendant's claim that he is entitled to an evidentiary hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), to determine the validity of the search warrant affidavit. There is a presumption of validity with respect to the affidavit supporting a search warrant. *People v Turner*, 155 Mich App 222, 226; 399 NW2d 477 (1986). In *Franks*, 438 US at 171-172, the United States Supreme Court delineated the standard for holding an evidentiary hearing:

> To mandate an evidentiary hearing, the challenger's attack *must be more than conclusory* and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and *those allegations must be accompanied by an offer of proof.* They should point out specifically the portion of the warrant affidavit that is claimed to be false; *and they should be accompanied by a statement of supporting reasons* . . . . Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. [Emphasis added.]

"The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001).

Defendant failed to make a substantial preliminary showing that the affiant intentionally, or with reckless disregard for the truth, made a false statement or material omission in the affidavit in support of the search warrant. In the affidavit, Det. Sgt. Thomas Lance averred that "[w]hile conducting impounding procedures, officers observed what appeared to be luggage and a handgun stored in the vehicle." Thus, the magistrate was advised that an initial search was performed. Simply put, defendant's conclusory attacks do not overcome the presumption of validity with respect to the affidavit supporting the search warrant. Therefore, remand for a *Franks* hearing is not warranted.

B. THE SEARCH OF DEFENDANT'S GIRLFRIEND'S HOUSE

To attack the propriety of a search and seizure, a defendant must first establish that he has standing to challenge the search. *People v Brown*, 279 Mich App 116, 130; 755 NW2d 664 (2008); *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999) (the defendant has the burden of establishing standing). Standing exists if, considering the totality of the circumstances,

the defendant had a legitimate expectation of privacy in the object of the search and seizure and that expectation is one that society is prepared to recognize as reasonable. *People v Parker*, 230 Mich App 337, 340; 584 NW2d 336 (1998). A mere visitor does not have an expectation of privacy sufficient to support standing to challenge the entry of a residence by the police. *Id.* at 340-341.

The trial court did not err in finding that defendant failed to carry his burden of demonstrating that he had a legitimate privacy interest in his girlfriend's home. The residence belonged to defendant's girlfriend, not defendant. Although defendant claimed that he lived there temporarily and paid rent in cash, he admitted that he had no receipts for any rent that he allegedly paid. In addition, defendant had no other types of receipts or bills bearing his name that showed that he actually resided at the residence. The trial court noted other items that showed that defendant resided at a different address, including defendant's driver's license, a pay stub, and a LIEN information report associated with the license plate on defendant's car. The mere fact that defendant visited the residence did not automatically entitle him to a reasonable expectation of privacy in the house. The trial court did not err in finding that defendant lacked standing to challenge the search of his girlfriend's home. Therefore, the trial court did not err by refusing to suppress evidence of the black jacket found in defendant's girlfriend's house.

IV. DOUBLE JEOPARDY

Defendant was convicted at a second trial. Defendant's first trial ended when the trial court granted defendant's motion for a mistrial. Defendant now argues that his retrial was barred by double jeopardy because the prosecutor goaded him into moving for a mistrial by deliberately injecting prejudicial other acts evidence that he had committed other armed robberies. We disagree. Because defendant did not raise this double jeopardy claim below, we review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

A. UNDERLYING FACTS

Before defendant's first trial, the prosecution moved to admit under MRE 404(b)(1) evidence of two Dearborn gas station robberies, two Centerline gas station robberies, and one Clinton Township gas station robbery. The trial court ruled that it would allow evidence of these other acts if the victims in the other robberies testified at trial and identified defendant as the perpetrator. On the third day of defendant's trial, the prosecution proceeded to introduce evidence of a robbery at a Centerline BP gas station. The victim of that robbery testified that defendant followed her into the back room of the station, pressed an unidentifiable object against her back, and demanded money. Defense counsel objected to the admission of this act because the lack of a weapon meant there was no common scheme linking it to the instant case. The trial court agreed and also noted that the victim was not struck or ordered to go to another part of the store. The court instructed the jury to disregard all evidence of the Centerline BP robbery.

The next day, the prosecution called the victim in a January 7, 2011, robbery of a Clinton Township gas station. This victim had previously identified defendant in a photographic lineup, but she could not identify him as the perpetrator in open court. Although she had a clear description of the robber on the day of the robbery, her testimony disclosed that a police

detective first showed her a single photograph of defendant, before she later viewed the photographic lineup. That single photograph was included in the photographic lineup that she later viewed, and she selected defendant's photograph. Defendant later argued that the identification procedure in the Clinton Township robbery was tainted and moved for a mistrial, which the trial court granted. Defendant did not argue that the prosecutor intentionally engaged in improper conduct or goaded defendant into moving for a mistrial.

B. ANALYSIS

The United States and Michigan Constitutions both protect against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Double jeopardy protection attaches when a jury is selected and sworn and is thus applicable before the conclusion of a trial. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). If a trial ends before a verdict is rendered, such as where a mistrial is declared, the Double Jeopardy Clause may bar a retrial. *Id.* If a defendant moves for or consents to a mistrial "and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself," a retrial is permitted. *Id.* at 253. But even where a defendant consents to a mistrial, retrial is not permitted "where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial." *Id.*, citing *Oregon v Kennedy*, 456 US 667; 102 S Ct 2083; 72 L Ed 2d 416 (1982). Thus, retrial is barred if the court finds that the objective facts and circumstances of the case indicate that the prosecutor's intentional misconduct goaded the defendant into moving for or consenting to a mistrial. *Dawson*, 431 Mich at 257; *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997).

Here, the objective facts and circumstances do not support a finding that the prosecutor's conduct was intended to goad defendant into moving for a mistrial. The trial court's decision to declare a mistrial was based on the prosecutor's introduction of other acts evidence of two gas station robberies. As noted, the court had ruled before trial that the other acts evidence was admissible, as long as the victims of the robberies testified at trial and identified defendant. In accordance with the trial court's ruling, the prosecutor presented the victims of the other robberies. Although the two witnesses' testimony did not proceed as expected, defendant has not demonstrated that the prosecutor presented the other acts evidence to incite defendant into moving for a mistrial. *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007) ("a prosecutor's good-faith effort to admit evidence does not constitute misconduct").

Moreover, the objective circumstances do not show that the prosecution gained any advantage by having a second trial, and defendant has failed to provide any reason why the prosecutor would have been motivated to obtain a mistrial. To the contrary, defendant moved for the mistrial on the fourth day of trial, after the prosecution had presented the bulk of its case, with defendant identified as the robber and correlated to the distinctive vehicle. The prosecutor vehemently argued against the mistrial, and argued that defendant was adequately identified as the perpetrator in the other acts. The record does not support defendant's claim that the prosecutor intentionally engaged in conduct to provoke defendant into moving for a mistrial. Accordingly, defendant's double jeopardy rights were not violated as a result of the retrial.

V. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his convictions must be vacated because the evidence was insufficient to establish his identity as the person who committed the robbery. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness may be sufficient to support a conviction for a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Id.*

Defendant asserts that there was no credible evidence that he was the person who committed the robbery. The evidence disclosed that Islam selected defendant from a photographic lineup and identified him as the robber at trial. Islam viewed two different photographic lineups and never identified anyone other than defendant as the perpetrator. Islam explained that he "looked at" defendant when defendant initially entered the store because he assumed that defendant was a customer. Defendant walked close to the counter and directed Islam to open the cashier drawer. From his observation, Islam described defendant as a tall black man with not a lot of facial hair, wearing a black winter jacket with a hood, and a black glove on his right hand. Although defendant was wearing a hood, "[o]nly his head" was covered and Islam could see defendant's face. Islam's testimony, if believed, was sufficient to establish defendant's identity as the shooter. *Davis*, 241 Mich App at 700. In addition to Islam's positive and unequivocal identification of defendant, the prosecution presented evidence that a car linked to defendant was observed in a parking lot adjacent to the gas station at the time of the robbery, and that a coat matching the description of the one that the robber was wearing was found in defendant's girlfriend's house.

This evidence, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to identify defendant as the perpetrator beyond a reasonable doubt. Defendant's challenges to the weight and credibility of Islam's identification testimony were matters for the jury to decide and do not affect the sufficiency of the evidence. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). The same challenges to the identification testimony that defendant raises on appeal were presented to the jury during trial. This Court will not interfere with the jury's role of determining issues of weight and credibility. *Wolfe*, 440 Mich at 514. Rather, this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *Nowack*, 462 Mich at 400. There was sufficient evidence of defendant's identity.

VI. COMPOSITION OF THE JURY

Defendant, who is African-American, argues that the racial composition of his jury did not represent a fair cross section of the community and that the prosecutor improperly used a peremptory challenge to excuse a black juror on the basis of the juror's race, contrary to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Because defendant did not argue a violation of the fair cross-section requirement in the trial court, this issue is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. We review a trial court's ruling regarding a *Batson* challenge for an abuse of discretion. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 320; 553 NW2d 377 (1996). We give great deference to the trial court's findings "because they turn in large part on credibility." *Id*. at 319-320; see also *People v Knight*, 473 Mich 324, 344; 701 NW2d 715 (2005).

A. FAIR CROSS-SECTION

A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community. *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975). To establish a prima facie violation of the fair cross-section requirement, a defendant has the burden of proving the following:

> "(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process." [*People v Bryant*, 491 Mich 575, 581-582; 822 NW2d 124 (2012), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

As an African-American, defendant is a member of a "distinct group" for purposes of the fair cross-section requirement. Defendant has failed, however, to demonstrate a systematic exclusion of African-Americans in Macomb County's jury-selection process. Defendant has not presented any data showing the proportion of African-Americans within the community or on jury venires in general. Defendant has also failed to adequately demonstrate a reason for the alleged underrepresentation beyond forces outside the criminal justice system. Consequently, defendant has failed to establish a prima facie violation of the fair cross-section requirement.

B. *BATSON* CHALLENGE

Defendant also argues that the prosecutor impermissibly used a preemptory challenge to excuse the only African-American jury venire member. Under the Equal Protection Clause of the Fourteenth Amendment, a prosecutor may not exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race. *Batson*, 476 US at 89; *Knight*, 473 Mich at 335. The burden initially is on the defendant to make out a prima facie case of purposeful discrimination. *Batson*, 476 US at 93-94. In deciding whether the defendant has made a requisite showing of purposeful discrimination, a court must consider all relevant circumstances, including whether there is a pattern of strikes against African-American jurors, and the questions and statements made by the prosecutor during voir dire and in exercising his challenges. *Id*. at 96-97. If a defendant makes such a prima facie showing of a discriminatory

purpose, the burden shifts to the prosecutor, who must articulate a racially neutral explanation for challenging African-American jurors. *Id.* at 97-98.

Here, defendant has failed to establish purposeful discrimination. The record of voir dire does not demonstrate a pattern of the prosecutor challenging jurors of a certain racial group on the basis of race. Even assuming that defendant established a prima facie case of purposeful discrimination, the trial court found that the prosecutor provided a race-neutral reason for excusing the venire person. The first reason was the juror's occupation as a minister. The prosecutor explained that he did not want a minister on the jury because "there is a tendency [for ministers] to lend [sic] toward forgiveness and rehabilitation in a situation." The prosecutor noted that he often considered a juror's occupation and also frequently "struck engineers because they wanted a hundred percent rather than 95 or 90 percent." Secondly, a "minor" issue was that the juror had "an issue with a water pill and he had several bathroom breaks that he needed to have." The third issue, which the prosecutor explained was "the biggest," was that the juror's brother had been tried and convicted of a crime, and although the juror had not observed any of the witnesses at his brother's trial, he stated that they all were lying. Finally, the prosecutor noted that an African-American juror was empanelled at defendant's first trial and he did not challenge her.

Because the prosecutor's explanation for excusing the juror was based on factors other than the juror's race, the explanation was race neutral. "[U]nless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral." *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995) (citation omitted). It was not unreasonable for the prosecutor to attempt to achieve a jury that did not have preconceived negative notions about prosecution witnesses, as well as one that would not appear sympathetic to defendant. Giving deference to the trial court's decision to credit the prosecutor's race-neutral reasons for excusing the juror, we find no *Batson* violation. Thus, we reject defendant's claims relating to the composition of the jury.

VII. THE PROSECUTOR'S CONDUCT

Defendant argues that the prosecutor improperly questioned Dearborn Police Corporal Brian Kapanowski in an attempt to create "a false impression of defendant as a criminal who was trying to avoid apprehension." We disagree. We review preserved claims of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). We will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Corporal Kapanowski was part of a special operations plain clothes unit who had defendant under surveillance on the day of his arrest. As the prosecutor questioned the officer about his observations of defendant, the following exchanges occurred:

> *Q.* Where did you follow him to?
>
> *A.* He went to an O'Reilly's auto parts store . . .

Q. Did he go inside?

A. He was paying really close attention to everybody in the parking lot, motorists as well as pedestrians—

Defense counsel: Objection, your Honor. That's not responsive to the question.

The court: It's not. Sustained.

* * *

Q. How was his driving?

Defense counsel: Objection, your Honor. That's not relevant.

The court: It's not relevant. Sustained.

* * *

Q. What did he do at the gas station?

A. He entered the store, and he exited the store, popped the trunk to the Mazda, placed something inside, closed the trunk, and he pumped a minimal amount of gasoline into the vehicle. And then when he placed the pump back on onto the—I'm sorry, when he placed the handle back onto the pump—

Defense counsel: Your Honor, I'll object to the continuing narrative of this. If this is somehow relevant to these facts, and specifically Dearborn incidents, then have the witness focus on that part. Pumping gas is not relevant to the purpose for which this witness is here.

The prosecutor: The next part will be extremely relevant.

The court: I really don't see how this is relevant. Sustained. Well, in the sequence of events—

* * *

Q. What did he do when he put the pump back?

A. Appeared to be wiping his fingerprints off the pump with his jacket sleeve.

The court: That is not relevant. Sustained and it's stricken. The jury is to disregard it.

Q. What happened next?

> *A.* He left the gas station and continued about the behavior that we observed prior, where he was traveling around, circling around businesses. At times he was stopping in the middle of roadways on green lights, seems to be paying attention to—
>
> *Defense counsel*: Objection, your Honor.
>
> *The court*: Sustained as to what he seemed to be doing. Sustained. [Emphasis added.]

As previously noted, "a prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek*, 274 Mich App at 72. Here, defendant has not demonstrated that the prosecutor acted in bad faith. Viewed in context, the challenged questions were not intended to inject improper character evidence, but sought information regarding the officer's own observations of defendant during the surveillance. Regardless, even if defendant could demonstrate any impropriety, defense counsel adequately addressed the matter during cross-examination. Corporal Kapanowski testified that, during their surveillance, defendant did not engage in any criminal activity. When specifically asked if he wanted the jury to infer that there was some criminal activity afoot, the officer testified that he "wasn't trying to infer anything. I was just stating my observations." The officer further testified that the police later ascertained that defendant had gone into the auto parts store to return an item, an innocent reason.

Moreover, the trial court sustained defendant's objections and, in at least one instance, specifically directed the jury to disregard the testimony. Although the trial court sustained all of defendant's objections, defendant did not request curative instructions for the prosecutor's questions, which is an appropriate response for a prosecutor's improper conduct, see *People v Mann*, 288 Mich App 114, 121-122; 792 NW2d 53 (2010). In its final instructions, however, the trial court instructed the jury that it was to decide the case based only on the properly admitted evidence, that it was not to consider any excluded evidence or stricken testimony, and that it was to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Defendant has failed to establish that the prosecution's conduct denied him a fair trial.

VIII. EFFECTIVE ASSISTANCE OF COUNSEL

In a claim primarily focused on other issues raised on appeal, defendant argues that defense counsel was ineffective for failing to move for dismissal on double jeopardy grounds after defendant's first trial ended in a mistrial, for failing to object to an "all-white jury," for failing to move for a speedy trial, and for failing to object to the trial court not reconsidering the prosecution's MRE 404(b) motion on retrial. Defendant also argues that defense counsel was ineffective for expressing his personal belief that defendant was guilty. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 330-331; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of

counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Defendant has the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

As previously discussed, there was no evidence that the prosecutor intentionally goaded defendant into moving for a mistrial. Accordingly, because there was no viable basis to support a motion for dismissal on double jeopardy grounds, defendant cannot be deemed ineffective for failing "to advocate a meritless position." See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Contrary to what defendant argues, defense counsel did object to the prosecutor's use of a peremptory challenge to excuse an African-American juror, and the prosecutor provided a race-neutral explanation that the trial court accepted. Defendant does not indicate what further action defense counsel could have taken to further challenge the matter. Although defense counsel did not specifically object to the jury panel composition, defendant has failed to present any evidence to support a prima facie violation of the fair cross-section requirement. *Hoag*, 460 Mich at 6; *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Therefore, defendant has not shown that, but for counsel's failure to pursue such a claim, it is reasonably probable that the result of the proceeding would have been different. *Armstrong*, 490 Mich at 289-290. As discussed in sections X and XI, *infra*, the record does not support defendant's claims that his right to a speedy trial was violated, or that the trial court was obligated to rehear and issue new rulings on evidentiary motions decided before or during the first trial. *Snider*, 239 Mich App at 425. Accordingly, defendant's ineffective assistance of counsel claims related to those issues cannot succeed.

Defendant lastly argues that defense counsel was ineffective because he twice referred to "my client" when describing what occurred in the gas station, and thereby asserted his personal belief that defendant was guilty. Defendant relies on the following remarks by defense counsel, which were made during arguments when defendant requested to recall Islam as a witness:

> Well, the first purpose [for recalling Islam] is how did those cartons that I brought, and they are not Reds, get put into that and *how did my client leave* strike that—how did that individual who he saw that day leave the store.
>
> * * *
>
> What I wanted to show the jury with the testimony of this witness was specifically to direct attention to this—the contents of this bag and to show that *my client grabbed this bag* by the handles of it and that when he grabbed it, it hung by his side and not— [Emphasis added.]

Viewed in context, it is clear that counsel simply misspoke during the two cited instances. The apparent misstatements did not indicate a belief in defendant's guilt. More importantly, both misstatements were made outside the presence of the jury. Therefore, defendant cannot establish that he was prejudiced by the remarks. *Armstrong*, 490 Mich at 289-290.

IX. RIGHT TO PRESENT A DEFENSE

We reject defendant's claim that the trial court violated his constitutional right to present a defense by precluding defendant from presenting certain evidence. Defendant complains that the trial court refused to allow him to (1) introduce Douglas Ferich's forensic report showing that defendant's fingerprints were not found at the Sunoco crime scene, (2) call Dearborn Police evidence technician Eric Fieber and present his report showing that defendant's fingerprints were not found at the scene of the Dearborn BP robbery, and (3) recall Islam for further questioning during the defense's case. Because defendant did not argue below that admission of this evidence was necessary to preserve his constitutional right to present a defense, this issue is unpreserved. Therefore, we review this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

A defendant has a constitutional right to present a defense and to confront his accusers. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 137-138; 497 NW2d 546 (1993). However, he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Here, defendant was not precluded from presenting evidence to support his defense. The additional evidence that defendant sought to present would have been cumulative to testimony that had already been presented.

First, as part of his defense, defendant called Ferich, who testified that he examined the fingerprints from the Warren Sunoco robbery and determined that none of the recovered prints matched defendant's prints. Defendant has not identified where in the record he was prohibited from introducing Ferich's report, or explain why it was supposedly excluded. Nonetheless, we have reviewed this report, and it adds no new information to Ferich's testimony. With regard to recalling Islam, the trial court noted that Islam was unavailable and, after allowing defense counsel the opportunity to explain what questions he sought to ask Islam, the court concluded that "all areas that you're . . . asking to explore again were the same issues that have already been directed to this witness[.]" Defense counsel had previously extensively cross-examined Islam. On appeal, defendant has not demonstrated any new helpful information that could have been gained by recalling him. Finally, proposed witness Fieber was not listed as a defense witness, and defendant has not identified where in the record he sought to call the witness and present his report. However, the defense did call Cindy Maxwell, a fingerprint expert for the Dearborn Police Department, who testified that she examined the fingerprints lifted from the scene of the Dearborn BP robbery and determined that the recovered prints did not match defendant's prints. Accordingly, with regard to each of these evidentiary matters, defendant was allowed to present evidence to support his defense. Defendant's contention that he was deprived of the opportunity to present a defense is without merit.

X. RIGHT TO A SPEEDY TRIAL

Defendant next argues that he was denied his right to a speedy trial. We disagree. The United States and Michigan Constitutions guarantee criminal defendants the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Patton*, 285 Mich App 229, 235 n 4; 775 NW2d 610 (2009). "In determining whether a defendant has been denied a speedy trial, four

factors must be balanced: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay." *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000) (citations omitted).

Defendant did not formally assert his right to a speedy trial in the trial court. Further, the length of delay does not favor a finding of a speedy trial violation. The delay period commences at the arrest of the defendant. *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Defendant was arrested in this case on January 11, 2011. His first trial began on September 20, 2011, and his second trial began seven days later on September 27, 2011. Thus, the length of the delay was less than nine months. Because the total time between defendant's arrest and trial was less than 18 months, defendant must establish that he was prejudiced by the delay. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999).

There are two types of prejudice: prejudice to the person and prejudice to the defense. *People v Gilmore*, 222 Mich App 442, 461-462; 564 NW2d 158 (1997). The latter prejudice is more crucial in assessing a speedy trial claim. *Williams*, 475 Mich at 264. Defendant does not sufficiently argue that his incarceration during the delay prejudiced his person. *Gilmore*, 222 Mich App at 462. Although defendant asserts that he suffered from "anxiety, depression, stress and mental anguish" because of his confinement in jail, anxiety alone is insufficient to establish a violation of the right to a speedy trial. *Id.*

Prejudice to the defense must meaningfully impair a defendant's ability to defend against the charges against him in such a manner that the outcome of the proceeding will likely be affected. *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). Here, there is no indication that the delay adversely affected defendant's ability to defend the charges. Defendant asserts that he "suffered the natural loss of the recollection of events as a result of the lengthy delay," and lost "valuable witnesses." But general allegations of prejudice caused by delay, such as the unspecified loss of evidence or memory, are insufficient to show that his defense was affected. *Gilmore*, 222 Mich App at 462; *People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987). Furthermore, defendant has not identified any witnesses who were lost, or what specific beneficial testimony they could have provided.

In sum, considering that defendant never asserted his right to a speedy trial, that the length of the delay was less than nine months, and that defendant has not established any prejudice caused by the delay, we find no merit to defendant's claim that his right to a speedy trial was violated.

XI. TRIAL COURT ERROR ON RETRIAL

We also reject defendant's claim that the trial court was "obligated" to rehear the parties' evidentiary motions before proceeding with defendant's retrial. Defendant did not argue below that the trial court was required to rehear any previously decided evidentiary motions before proceeding with the second trial. Therefore, this claim is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

As defendant correctly notes, "[o]n retrial a case stands procedurally as if there had been no prior trial" and a "trial court is not required to follow another trial court's previous evidentiary

rulings. *People v Daniels*, 192 Mich App 658, 670; 482 NW2d 176 (1991). However, that does not mean that the trial court was "obligated" to hold another *Wade* hearing, or to rehear either defendant's motions to suppress or the prosecutor's MRE 404(b) motion. While defendant "renewed" his motions "to make a record" for retrial, he never requested that the court hold new hearings. Further, defendant does not identify any changed circumstances that would have possibly caused the trial court to change its prior rulings. The case was retried less than a week after the first trial ended in a mistrial, and was held before the same judge. By the commencement of the retrial, the court had already limited its prior ruling concerning the admission of other acts evidence, which was the basis for the mistrial. As the trial court noted, the record from the first trial shows that the court thoroughly addressed the evidentiary motions. Thus, defendant has not demonstrated that the trial court plainly erred by preserving its prior evidentiary rulings, or shown that his substantial rights were thereby affected.

XII. RESENTENCING

Defendant argues that he is entitled to resentencing because the trial court improperly sentenced him as an habitual offender, and erroneously scored offense variables 1, 2, 3, and 7 of the sentencing guidelines.[3]

A. HABITUAL OFFENDER STATUS

MCL 769.12 provides that a person who has been previously convicted of three or more felonies shall be subject to an enhanced sentence if convicted of a subsequent felony. Defendant argues that his habitual offender notice must be dismissed because there was no separate hearing before the jury to establish his prior convictions. Contrary to what defendant argues, however, there is no right to a jury trial in an habitual offender proceeding. *People v Zinn*, 217 Mich App 340, 347; 551 NW2d 704 (1996). Rather, the existence of a defendant's prior convictions is determined by the court either at sentencing or at a pre-sentencing hearing. MCL 769.13(5); *People v Marshall*, 298 Mich App 607, 628; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013). The existence of prior convictions can be established by information contained in the presentence investigation report (PSIR) under MCL 769.13(5)(c), and this Court has held that MCL 769.13 sufficiently protects a defendant's "due process rights to be sentenced on the basis of accurate information." *Zinn*, 217 Mich App at 348.

At sentencing, the prosecutor noted that defendant's PSIR contained information establishing defendant's prior felony convictions. Defense counsel conceded that "my client calculates the felonies to be seven." The PSIR "is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant has presented nothing to show that his unchallenged prior seven convictions are erroneous. At sentencing, defendant and defense

[3] Despite his statement of the issue, defendant does not argue in his brief that the trial court erred in scoring 25 points for OV 13, which is appropriate where the offense was part of a pattern of criminal activity involving three or more crimes against a person committed within a five-year period. MCL 777.43(1)(c) and (2)(a).

counsel failed to "deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions[.]" MCL 769.13(6). Defendant failed to carry his burden of showing that the prior conviction information was inaccurate. MCL 769.13(6).

B. THE SCORING OF OFFENSE VARIABLES

When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

1. OV 1 AND OV 2

OV 1 considers the aggravated use of a weapon, and directs a score of 10 points if "[t]he victim was touched by any other type of weapon" besides a firearm. MCL 777.31(1)(d). Under OV 2, which addresses the lethal potential of a weapon, the trial court must assess one point if "[t]he offender possessed or used any other potentially lethal weapon." MCL 777.32(1)(e). At sentencing, the parties agreed for purposes of scoring the offense variables that the object possessed by defendant during the robbery was a BB gun, as opposed to an actual firearm, but defendant still argued that the offense variables should be scored at zero because a BB gun is neither a weapon nor lethal.

At trial, Islam unequivocally testified that defendant struck him twice in the face with what he believed was a real gun. Islam described the gun as metal, and explained that when defendant hit him with it, he was injured and hurting badly. The first responding patrol officer testified that when he arrived, Islam appeared injured and "had several marks of his face." The trial court opined that Islam's description of the weapon as a gun, without any qualification, was sufficient circumstantial evidence to support a 15-point score for OV 1 and a five-point score for OV 2,[4] but nevertheless agreed to use the reduced scores of 10 points for OV 1 and one point for OV 2 in light of the parties' agreement that the object was a BB gun. We find no error. Islam's testimony that he was struck in the head with the BB gun supports the trial court's 10-point score. And although the weapon was a BB gun, Islam's testimony regarding the injuries he received as a result of being struck with the BB gun provides sufficient support for the trial court's one-point score for OV 2.

2. OV 3

Ten points should be scored for OV 3 if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). A "bodily injury" encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging

[4] As it relates to this case, 15 points should be scored for OV 1 if "a firearm was pointed at or toward a victim[.]" MCL 777.31(1)(c). For OV 2, the trial court should score five points if the "offender possessed or used a pistol[.]" MCL 777.32(1)(d).

consequence. *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). The statute mandates assessment of "the highest number of points possible." *People v Houston*, 473 Mich 399, 402; 702 NW2d 530 (2005). At sentencing, defendant acknowledged that Islam was injured, but noted that Islam refused an ambulance transport at the scene and there was no medical testimony about what transpired after Islam went to a clinic.

The evidence at trial showed that defendant struck Islam twice in the face with an object that Islam believed was a metal gun, causing injuries to Islam's face. Islam and an officer testified regarding Islam's injuries, and photographs of Islam's injuries were admitted at trial. Islam received medical treatment at the scene by the fire department. Islam explained at trial that he refused to take an ambulance to a hospital because he did not have medical insurance. Instead, he had his brother drive him to a clinic where he received medical attention. He was off work for one week. This evidence supports the trial court's 10-point score for OV 3.

3. OV 7

OV 7 considers aggravated physical abuse, and 50 points should be scored if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). "Conduct designed to substantially increase the fear and anxiety a victim" can include "circumstances inherently present in the crime[,]" and does not have to be "similarly egregious" to "sadism, torture, or excessive brutality" for OV 7 to be scored at 50 points. *Hardy*, 494 Mich at 443-444. The relevant inquiries are (1) whether the offender engaged in conduct beyond the minimum required to commit the offense; and if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount. *Id*.

The record supports that defendant went beyond the minimum conduct necessary to commit an armed robbery. The elements of armed robbery are (1) the defendant was engaged in the course of committing a larceny of any money or other property, (2) the defendant used force or violence against a person who was present or assaulted or put the person in fear, and (3) the defendant, in the course of committing the larceny, possessed a real or feigned dangerous weapon or orally or otherwise represented that he possessed a dangerous weapon. See *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007), and *Hardy*, 494 Mich at 446. Thus, to rob the gas station, defendant could have simply put Islam in fear by orally representing that he had a weapon. Instead, defendant chose to threaten Islam with what appeared to be a firearm, and then use it to strike Islam in the face two separate times while yelling and admonishing him to move quicker. Defendant stuck Islam with the weapon even though Islam was following defendant's directions to bag up money and cartons of cigarettes. Defendant's conduct exceeded what was necessary to commit an armed robbery. Further, by striking Islam in the head on two different occasions, defendant demonstrated to Islam that he was not only robbing him, but willing to harm him. From the evidence, it can be inferred that defendant's conduct was designed to elevate Islam's fear by a considerable amount. Because defendant's conduct went beyond that necessary to effectuate an armed robbery, and because he intended for his conduct to increase the fear of Islam by a considerable amount, the trial court did not err by scoring 50 points for OV 7. See *Hardy*, 494 Mich at 446-447. Defendant is not entitled to resentencing.

XIII. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Specifically, defendant argues that the prosecution failed to exercise due diligence to produce an endorsed witness, that the search warrant affidavits supporting the search of his car and his girlfriend's house were fraudulent and lacked probable cause, and that the prosecutor's remarks during closing and rebuttal arguments denied him a fair trial.[5] We disagree with each of defendant's claims.

A. NON-PRODUCTION OF AN ENDORSED WITNESS

At trial, defendant challenged whether the prosecution exercised due diligence to produce an endorsed witness, Warren Police Officer Ronald Visbara. After a hearing, the trial court ruled that the prosecution had not exercise due diligence. Therefore, the court instructed the jury in accordance with CJI2d 5.12 that it may infer that the officer's testimony would have been unfavorable to the prosecution's case. On appeal, defendant appears to argue that something more should have been done because Officer Visbara was a "key eyewitness." Although defendant asserts that Officer Visbara told defense counsel that he had captured the robber's face on his patrol car's camera, and that the person was not defendant, nothing in the record supports this claim nor has defendant presented anything on appeal in support of this claim. To the contrary, police witnesses at trial testified that Officer Visbara was an evidence technician, who took photographs and lifted fingerprints from the scene after the robbery. This fact was recognized in discussions during the due diligence hearing that the print lifted by Officer Visbara did not match defendant and was cumulative to other testimony. In sum, the trial court appropriately responded to the prosecution's failure to exercise due diligence to produce Officer Visbara for trial by instructing the jury that it could infer that the officer's testimony would have been unfavorable to the prosecution's case. Defendant has not identified any support for his claim that Officer Visbara possessed direct knowledge that the robber was not defendant. For these reasons, defendant has not demonstrated that any further relief is warranted.

B. THE SEARCH WARRANT AFFIDAVITS

As an initial matter, defendant's challenge to the search of his girlfriend's house is misplaced. As previously discussed in section III(B), *supra*, defendant failed to carry his burden of establishing that he had standing to contest the search of his girlfriend's home. Accordingly, our review is limited to the affidavit supporting the search warrant for the car.

A search warrant may only be issued upon a showing of probable cause. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). The magistrate's findings of probable cause must be based on the facts

[5] In his Standard 4 brief, defendant also challenges the trial court's ruling allowing the prosecution to introduce under MRE 404(b)(1) evidence that defendant robbed a Dearborn BP gas station on December 25, 2010. As explained in section I, *supra*, the trial court did not abuse its discretion by admitting this evidence.

related within the affidavit. MCL 780.653; *Ulman*, 244 Mich App at 509. When an informant is unnamed within an affidavit, MCL 780.653(b) provides that the affidavit must contain "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." However, a "warrant may issue on probable cause if the police have conducted an independent investigation to confirm the accuracy and reliability of the information regardless of the knowledge and reliability of the source." *People v Waclawski*, 286 Mich App 634, 699; 780 NW2d 321 (2009) (citation omitted). The affiant "must state the matters that justify the drawing of inferences," and "the affiant's experience is relevant to the establishment of probable cause." *Id.* at 698.

Here, defendant's challenge to the validity of the affidavit is largely based on the fact that the police received an anonymous tip that led them to defendant's location at his girlfriend's house. A review of the affidavit, however, shows that the facts contained therein established probable cause, particularly considering the extent of the independent investigation by the police. The affidavit was authored by Dearborn Police Det. Sgt. Lance, a 21-year police veteran, who averred that he had investigated many crimes, including robberies. The affiant detailed two armed robberies that occurred at Dearborn BP gas stations on December 19 and 25, 2010, and that the Dearborn Police had broadcasted surveillance video and photos of the suspect. As a result, the police received a tip from "an unidentified female caller" that the suspect captured on the broadcasted video resembled a man who was recently released from prison and staying with a woman on Mansfield Street in Detroit. The affiant and another officer went to the Mansfield house. Although no one was home, the police observed a car parked in the driveway. Based on the car's license plate number, the police determined that the car was registered to defendant, and that defendant had been imprisoned for armed robbery and had been released on October 5, 2010. The affiant detailed the car's uniqueness, noting that it was red with a white front quarter panel. He averred that the car matched the description of the car used in the robbery of a Warren gas station. The affiant also averred that he obtained photographs of defendant from the Secretary of State, compared them to the surveillance video from a Dearborn BP gas station robbery, and observed that the suspect "strongly resembled" defendant. The affiant further averred that he created a photographic lineup, and that the victims from each of the Dearborn BP robberies identified defendant as the robber. The affiant averred that defendant was driving the car when he was arrested and, while performing "impounding procedures," arresting officers observed what appeared to be luggage and a handgun.

Regardless of the initial anonymous tip, the information regarding the affiant's independent investigation was sufficient to allow a reasonable person to believe that evidence of the robberies would be found in defendant's car. *Waclawski*, 286 Mich App at 698-699. Further, contrary to what defendant asserts, each page of the affidavit was signed by both the affiant and the trial court. Finally, as previously discussed, defendant failed to show that the affidavit was fraudulent because it contained false information. The search warrant was supported by probable cause, and the trial court did not err by denying defendant's motion to suppress.

C. THE PROSECUTOR REMARKS

Because defendant did not object to the prosecutor's remarks at trial, his claims of prosecutorial misconduct are unpreserved, and our review is therefore limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

A prosecutor may not express a personal opinion about a defendant's guilt, *Bahoda*, 448 Mich at 282-283, inject himself into trial as a witness, *Rodriguez*, 251 Mich App at 35, or make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, prosecutors are afforded great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence as it relates to their theory of the case, and they need not state their inferences in the blandest possible language. *Bahoda*, 448 Mich at 282; *Dobek*, 274 Mich App at 66. Further, an otherwise improper remark might not warrant reversal if the prosecutor is responding to the defense counsel's argument. *Id.* at 64.

Our review of the record discloses that the prosecutor did not "testify" or improperly express his personal opinion of defendant's guilt. Rather, the prosecutor permissibly contended that the evidence proved defendant's guilt beyond a reasonable doubt. Viewed in context, the challenged remarks were based on the evidence and reasonable inferences arising from the evidence as they related to the prosecutor's theory of the case. *Bahoda*, 448 Mich at 282. Contrary to defendant's claim, the prosecutor did not state that "when removing the beard and moustache from defendant's face, he c[ould] see the defendant in the robbery video." Rather, the prosecutor commented that Islam "is still" identifying defendant even though defendant had grown out his hair and had a beard by the time of trial. That comment was supported by Islam's in-court identification of defendant and the testimony that defendant looked different because of the additional hair at the time of trial. The prosecutor's comment was not clearly improper.

The prosecutor's argument that defendant sold the stolen cigarettes was responsive to defense counsel's assertions in closing argument that the lack of cigarette cartons or the smell of cigarettes in the car established reasonable doubt. Although the prosecutor was speculating, defense counsel had done the same during closing argument by suggesting that defendant would have smoked in his car, would have kept the cigarettes close by, and would not have smoked four cartons during a particular time period. The prosecutor responded to this argument by explaining that another explanation for not finding any cigarettes or detecting any cigarette smoke was that defendant could have sold them. Considering the responsive nature of the remark, there was no plain error.

Lastly, the prosecutor's argument that there were too many coincidences was also responsive to defense counsel's argument that there was no direct evidence of defendant's guilt. When making the challenged remarks, the prosecutor urged the jury to evaluate the evidence, discussed the reliability and consistency of Islam's identification of defendant, and argued that there were reasons from the evidence to conclude that defendant was guilty of the charged crimes. The prosecutor's arguments were not clearly improper.

Further, a timely objection to the challenged remarks and arguments could have cured any perceived prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. And even though defendant did not object, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that it was to decide the case based

only on the properly admitted evidence, and that it was to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *Long*, 246 Mich App at 588.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Karen M. Fort Hood