STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2014
v	No. 314607 Saginaw Circuit Court
WILLIAM MAXIE JR, Defendant-Appellant.	LC No. 11-036678-FH

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of first-degree home invasion, MCL 750.110a(2), and possession of burglary tools, MCL 750.116. The trial court sentenced defendant as a habitual offender, fourth-offense, MCL 769.12, to serve concurrent prison sentences of 150 months to 30 years for the home invasion, and 10 to 20 years for possession of burglary tools. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

Defendant's convictions stem from the breaking and entering of Sullivan Fence company, located in Saginaw County, on November 3, 2011, at approximately 3:00 a.m. An employee of the business, Darren Grandmaison, was in the building at the time of the break-in. He resided there during the week because he lived out of town. Grandmaison testified that he was almost asleep when the cable television picture went out, and shortly thereafter the power went out. Grandmaison testified that he heard someone entering the business office through a window that was secured with an aluminum bar. He slept in the shop area of the building, which was adjacent to the office. Police officers responding to the scene encountered defendant in front of the building. When stopped by police, they recovered a hammer, two screwdrivers, four wrenches, a folding knife, a calculator, and a rotary from defendant's pants pockets. Upon searching the area, the police discovered that one of the business's utility boxes had been pried open and the wires appeared to be loose. A part of an electric meter was on the ground.

I. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant argues that plaintiff failed to come forth with sufficient evidence to prove his guilt of first-degree home invasion. We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an

appellate court is required to take the evidence in the light most favorable to the prosecutor to ascertain whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). Direct and circumstantial evidence, as well as all reasonable inferences that may be drawn therefrom, when viewed in a light most favorable to the prosecution, are considered to determine whether the evidence was sufficient to support defendant's conviction. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

MCL 750.110a(2) sets forth the elements of the crime of first-degree home invasion:

> 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.

Defendant argues that the evidence contradicts the testimony of plaintiff's primary witness, Grandmaison. Grandmaison stated that defendant entered the building through the office window because he heard the metal bar that was locking the window hit the floor before he heard someone in the office. Grandmaison explained that an aluminum bar was in the bottom window track of the office window so that it could only be opened from the outside by maneuvering an object through the window case and lifting the aluminum bar. Defendant argues that Grandmaison's account was proved impossible because the police found no evidence of forced entry, and an office worker did not notice anything unusual with the widow at 8:30 a.m. the morning following the robbery.

Unless "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." *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003) (citation and internal quotation marks omitted). That the office window did not show evidence of any force applied to it does not directly conflict with Grandmaison's testimony that defendant entered after dislodging the metal bar from outside the window. Grandmaison explained that the aluminum bar could be dislodged by inserting a rod between the windows from the outside. Hence, there was testimony that a means existed whereby someone could gain access to the inside of the building without damaging the exterior in the process.

Defendant also argues that although it was raining that night, no wet or muddy footprints were seen in the office. This argument fails to take into consideration defendant's own statement that he was in the office prior to leaving the building. If there were no wet or muddy footprints

in the office even though defendant was admittedly in the office, then the lack of footprints did not contradict the theory that defendant entered the office from outside through a window.

Defendant also argues that Grandmaison's testimony that the power to the building went out before he heard movement and saw a silhouette in the office was contradicted because the police saw light in the building when they arrived. However, defendant himself stated that the lights were out when he was in the building. And there was also evidence that a utility box was pried open and part of an electric meter was on the ground. Further, Saginaw Police Department Officer Matthew Ward stated that Grandmaison turned on some lights before Ward entered the building. This evidence tends to show that some, but maybe not all, of the building's lights were not working, which in turn supports the conclusion that the power (or at least some of it) went out.

Defendant also argues that although Grandmaison's 911 call identified the intruder as a black male, his trial testimony was that he only saw a silhouette, and that Grandmaison waited 10 to 15 minutes after the break-in before calling 911, while defendant was arrested immediately upon leaving the building. However, Grandmaison's testimony was that he waited from a few minutes to 10 minutes before calling 911, and there is nothing inherently inconsistent about testifying to seeing a silhouette and reporting an African-American intruder. He may not have been able to see the feature of the intruder's face but still believed that he could identify the intruder's race.

Defendant further argues that the evidence did not show he was intending to break into a building because he did not have a flashlight, a bag to carry stolen items, and he arrived on a bike. While these circumstances could be evaluated by the trier of fact with respect to how they impact the question of intent, they do not negate any finding of intent. Defendant also stated that the police did not search the building for evidence of drug use, which would support his report that he was invited into the building to use drugs. However, the police determined that defendant had no evidence of drug use in his possession, nor did he display any signs of drug use or intoxication. In essence, defendant is challenging the jury's credibility determinations and weighing of the evidence, matters the Court will not second-guess an appeal. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendant also argues that he could not be convicted of first-degree home invasion because he did not enter a "dwelling." Conviction for first-degree home invasion requires that defendant first break and enter a dwelling, or enter a dwelling without permission. MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010). MCL 750.110a(1)(a) defines a dwelling as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." *People v Crews*, 299 Mich App 381, 393; 829 NW2d 898 (2013). Grandmaison testified that he stayed "at the shop" during the week. He explained that the shop was separated from the office by a wall, and that when Grandmaison stood up in his area of the shop he could see the office through a window. The evidence established that the office was linked to the area of the building that served as Grandmaison's abode during the work week.

In sum, the evidence established that Grandmaison was almost asleep in the shop when his television went out and, shortly later, the power went out. The evidence revealed that

someone had tampered with the building's utility boxes. While lying in the bed, Grandmaison heard the aluminum bar that was in the office window hit the ground. Grandmaison heard items on desks moved around and desk drawers opening and closing. He saw someone inside the building. Grandmaison noticed that the safe was pulled out of its location in the corner of the office and turned. Grandmaison stated that items on the secretary and salesperson desks were moved and papers from a drawer were placed on a desk. Police approaching the building encountered defendant walking away from it. Defendant had a hammer, two screwdrivers, four wrenches, a folding knife, calculator, and a notary stamp in his pants pockets. The office manager identified the rotary stamp as hers and explained the papers she found on her seat were taken out of her desk drawers. The office manager said that the safe, a deck sample, and blueprints were moved from their usual locations. When viewed in a light most favorable to the prosecution, the direct and circumstantial evidence and reasonable inferences that may be drawn from the evidence were sufficient to support defendant's conviction for first-degree home invasion. *Hardiman*, 466 Mich at 429.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that his trial counsel was ineffective in presenting his defense. Defendant brought a motion for a new trial raising this issue and it was denied by the trial court. A trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion. *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B); *Terrell*, 289 Mich App at 559.

Because an evidentiary hearing was not conducted, review of defendant's challenge to the effectiveness of trial counsel is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). The constitutional question of whether an attorney's ineffective assistance deprived a defendant of his Sixth Amendment[1] right to counsel is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This right to counsel encompasses the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). Defendant must also show that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). An objectively ineffective performance prejudices the defense if it is

[1] US Const, Am VI.

reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Id.*

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). The effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Defense counsel's decisions are presumed sound trial strategy, *Taylor*, 275 Mich App at 186, and a reviewing court is not to substitute its judgment of trial strategy with the benefit of hindsight, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Rather, the court must ensure that counsel's actions provided the modicum of representation for the defendant that is his constitutional right. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004).

Here, defendant argues that his trial counsel was ineffective for failing to prepare for trial and present witnesses identified by defendant. Defendant argues that he was thus deprived of his right to present a defense. We agree with defendant that defense counsel has a duty to prepare, investigate, and present all possible defenses. *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007), rev'd on other grounds 482 Mich 1156 (2008). Additionally, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Grant*, 470 Mich at 485, citing *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The reasonableness of an attorney's investigation is determined by considering whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins v Smith*, 539 US 510, 527; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is defined as one that might have made a difference in the outcome of the trial. *Id*.

Defendant argues that he identified eight witnesses for his trial counsel to utilize, but that trial counsel informed him after jury selection, without explanation, that the witnesses were not necessary. Defendant reports that six of the witnesses would testify about his tendency to have tools in his pocket because he frequently worked on cars, including the evening before the home invasion, and one witness would testify about defendant's character. Another potential witness was defendant's mother, who reportedly would have testified that a police officer told her that defendant was intoxicated on drugs and alcohol at the time of his arrest.

In the absence of any record evidence of defendant's assertions on this issues, we find that even if the witnesses that defendant wished to call did testify to his tendency to carry tools, he was not denied a substantial defense. Defendant testified that the wrenches, pliers, and knife he had were from working on cars. But he also testified that he had tools on his person that were not used for automobile repair, explaining that he took screwdrivers, a hammer, and a black pouch from the building. However, there was also testimony that no tools were missing from the building. The witnesses testifying about defendant frequently carrying tools to repair cars at most could bolster the credibility of defendant's statement that he had the wrenches from repairing a vehicle earlier that day. However, there was still the issue of the origin or purpose of

the other tools found with defendant around 3:30 a.m. outside of a building with damaged utility equipment and a window that had been opened by apparently moving an aluminum rod. Further, none of the witnesses had knowledge of defendant's activity on the night of the crime.

Additionally, defense counsel's decision not to utilize a character witness that defendant wished to testify was presumed sound trial strategy. By not calling a character witness, defendant's trial counsel protected defendant from cross-examination regarding his character, including past convictions and drug use.

Defendant also argues that his trial counsel should have called police officer Ryan Patterson, who reportedly transported defendant to jail and to whom defendant reportedly told a similar version of events as those described in defendant's trial testimony, i.e., he was in the building to sell cocaine. Before Patterson was dismissed as a possible defense witness, defendant's trial counsel discussed with the trial court the possibility of Patterson testifying, and the trial court indicated that she did not "think the defendant gets to bring in that self serving statement." Defendant's trial counsel informed the trial court he had made the strategic decision that Patterson's testimony would not benefit defendant and declined to call him. The trial court concluded that counsel had articulated a reasonable strategic reason for not calling Patterson, and we concur.

Defendant argues that his trial counsel should have listened to or objected to the admission of the recorded original 911 call from Grandmaison that was not previously provided to defendant. However, defendant states that his defense counsel explained that he had heard the recording. Accordingly, we assign no error.

Defendant argues that he is entitled to an evidentiary hearing and funds to investigate his defense due to the ineffective assistance of his trial counsel. However, defendant has not demonstrated that he was deprived of a defense that could have made a difference in the outcome of the trial, nor has defendant overcome the presumption that not calling defendant's suggested possible witnesses was sound trial strategy, which we will not second-guess with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

III. PROSECUTORIAL MISCONDUCT.

Defendant next argues that the prosecutor's misconduct during closing argument deprived him of a fair trial. Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objected below, or unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Here, defendant did not object to the prosecutors closing remarks. Thus, this issue is not preserved for appeal.

The responsibility of a prosecutor is to seek justice, rather than merely to convict. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id*. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Id.* at 63-64. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, in the context of the issues raised at trial, to determine whether a defendant

was denied a fair and impartial trial resulting in prejudice to defendant. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). Prosecutors are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Unger*, 278 Mich App at 236. Moreover, prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

However, a prosecutor may not argue the effect of testimony that was not entered into evidence at trial. *People v Stanaway*, 446 Mich 643, 686-687; 521 NW2d 557 (1994). Similarly, a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Ericksen*, 288 Mich App at 199. A prosecutor may also not vouch for the credibility of a witness by implying that the prosecution has some special knowledge that the witness is testifying truthfully. *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). A prosecutor may not interject personal beliefs regarding a defendant's guilt. *People v Montevecchio*, 32 Mich App 163, 165-166; 188 NW2d 186 (1971).

Defendant argues that five of the prosecutor's[2] remarks during closing argument were improper because they were irrelevant, prejudicial, constituted argument about facts not in evidence, and interjected the prosecutor's personal beliefs.

The prosecutor commented that he tends to fall asleep while watching television and wake up to louder sounds. Defendant argues that this statement was improper as irrelevant, a fact not in evidence, and the prosecutor impermissibly interjecting his opinion regarding defendant's guilt. Grandmaison stated that he was falling asleep with the television on when he was aroused by the television signal and power failing. The prosecutor's statement that he experienced a similar circumstance was a permissible comment. Accordingly, we assign no error.

Defendant next argues that the prosecutor improperly commented that Grandmaison would not buy crack cocaine from a person he did not know because the comment was irrelevant, concerned a fact not in evidence, and interjected personal beliefs. However, the prosecutor actually stated that Grandmaison "didn't know the defendant, he hadn't seen the defendant before, so he certainly didn't but any crack cocaine from him," which was consistent with Grandmaison's testimony. Again, we cannot find any error.

Defendant next argues that the prosecutor's comment that he did not think the hammer and screwdrivers found in defendant's possession would be found in a professional shop because the hammer was rusty and the screwdrivers did not match was improper. Defendant argues that this was improper comment because it was irrelevant, concerned a fact not in evidence, and constituted an impermissible interjection of personal opinion regarding defendant's guilt. However, defendant stated he took these tools from the shop, implying that he did not use them

[2] The record reveals that the trial was not conducted by *the* prosecutor, but rather by an assistant in the Saginaw County Prosecutor's office. Therefore, all references to "the prosecutor" are to the assistant prosecutor who argued the case at trial.

to break into the building. The prosecutor's comment was responsive to this explanation of why defendant had the tools in his pocket. Accordingly, we assign no error.

Defendant also argues that the prosecutor's comment that office manager Robin Byers "kind of struck me as the type of person who would keep a neat desk and would kind of know where everything is" was improper. However, Byers stated papers were moved from her desk and items were not in their usual places. Although the prosecutor's opinion on Byers's personality was arguably improper, defendant cannot demonstrate any prejudice arising from this errant remark. Accordingly, we conclude that defendant is not entitled to a new trial based on this arguably impermissible statement.

Defendant next argues that the prosecutor's statement that he could not get food delivered to him from across the street in 30 minutes, so how could defendant run a crack delivery service for strangers in the night was improper. While certainly colorful, the prosecutor was only calling into question the credibility of defendant's explanation that he was bringing Grandmaison cocaine at this request. The prosecutor was arguing an interpretation of the evidence, rather than offering fact, and did not assert any special personal knowledge regarding defendant's guilt. Accordingly, we assign no error.

Defendant further argues that the prosecutor's comment that defendant "had the opportunity to call the friend as a witness or tell us who his friend was, but he didn't," improperly placed the burden of proof on defendant to demonstrate his innocence. A prosecutor may not suggest in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), disapproved on other grounds in *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995). However, attacking the credibility of a theory advanced by a defendant does not shift the burden of proof. *McGhee*, 268 Mich App at 635. Here, reviewing the comment in the context in which it was offered, we find that the prosecutor was responding to defendant's explanation that he had been helping a friend repair the friend's truck. We cannot find that the prosecutor attempted to shift the burden of proof, hence we assign no error.

Defendant argues that the sum of the prosecutor's comments deprived him of a fair trial. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal." *Dobek*, 274 Mich App at 106. The cumulative effect of several errors must have denied the defendant a fair trial. *Id.* Here, as discussed, other than the brief and non-prejudicial comment on Byers's personality, defendant has not demonstrated that errors were made at trial or that he was denied a fair trial. In an event, instructions from the trial court to the jury may be sufficient to eliminate any prejudice that might result from a prosecutor's remarks. *Thomas*, 260 Mich App at 454. Here, the trial court instructed the jury that the arguments of the attorneys were not evidence. Jurors are presumed to follow these instructions and this instruction may have alleviated any prejudice as a result of the prosecutor's statements. *Unger*, 278 Mich App at 237. Accordingly, defendant is not entitled to relief on this issue.

IV. STANDARD 4 BRIEF

Defendant filed a Standard 4 brief that raises several similar arguments, which we conclude lack merit.

Defendant contends that defense counsel was ineffective because he failed to adequately consult with defendant before trial, because he failed to investigate the case properly, because he failed to use defendant's witnesses at trial, because he failed to prevent Grandmaison from testifying, because he failed to object to the prosecutor's disclosure of a "been verified" report, because he failed to impeach Grandmaison and one of the police officers, and because he failed to request a new trial upon learning that one of the juror's had been fired from his job as a result of his jury service.

Again, because there was no *Ginther*[3] hearing, our review is limited to the lower court record, which does not contain any evidence in support of defendant's contention that defense counsel failed to consult with him before trial. However, even if we assumed that defendant could establish the facts as asserted in his brief,[4] we would nevertheless conclude that defendant is not entitled to relief. Although defense counsel is required to consult with a criminal defendant about important decisions such as general defense strategy, defense counsel is not required to consult with defendant about every tactical decision. *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004). Nor is counsel required to meet with a defendant for a certain amount of time before trial.

Furthermore, even assuming that defense counsel was ineffective for failing to meet with defendant, defendant has also failed to establish that he was prejudiced by defense counsel's performance. Defendant claims that the following information would have been presented if defense counsel had done a better job consulting with him: (1) medical staff at the jail would have corroborated defendant's testimony that he was drunk and high at the time of his arrest, which would have served to impeach police testimony that he did not appear to be intoxicated; (2) defendant's proposed witnesses would have been able to offer testimony that he had been drinking the night of the break-in, that he had been fixing a vehicle that night, and that he usually carried tools on him; and (3) the witnesses would have also testified that defendant did not have a reputation of breaking into buildings. Even if all of this is true, none of that proposed testimony has a reasonable probability of being outcome determinative. Defendant presented a defense that Grandmaison requested he retrieve crack cocaine and after doing so, Grandmaison told him that he could take whatever he wanted from the building. Grandmaison testified that he had never seen the defendant before that evening and that defendant broke into the dwelling. Even assuming that all of defendant's witnesses would have testified in a manner consistent with

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

[4] Based on defendant's assertions, it appears that he met with defendant for two face-to-face meetings before trial, each lasting about five minutes. During the meetings, defendant gave the prosecution a list of witnesses he wanted for trial and defense counsel gave defendant a copy of the police report and the preliminary examination transcript in addition to relaying plea offers from the prosecution. Additionally, per defendant's assertions, he also had phone contact with defense counsel before trial.

his assertions, defendant cannot show that the proposed additional evidence would have been outcome determinative. *Jordan*, 275 Mich App at 667.

Defendant also alleges that defense counsel failed to investigate the following: (1) the medical staff at the jail; (2) Grandmaison's criminal background and history of alcohol and substance abuse; (3) proposed testimony from the list of witnesses defendant gave him during their pretrial consultation; and (4) whether Grandmaison had permission from the owner or owners of the business to stay in the shop at night. A criminal defendant must establish a factual predicate for his claims of ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Our review of the record shows that there is no support for defendant's allegations that defense counsel did not investigate the stated areas. In fact, for a few of the areas, defense counsel expressly indicated on the record that he had conducted an investigation.[5] Because defendant has not established a factual predicate for his claims, *id*., defendant cannot show that defense counsel's performance was deficient.

Defendant next argues that defense counsel was ineffective for failing to object to Grandmaison testifying and to the "Been Verified" report disclosed by the prosecution. Defendant argues that defense counsel should have moved the trial court to exclude Grandmaison's testimony in its entirety as sanctions for the prosecution's failure to comply with mandatory discovery pursuant to MCR 6.201(A), i.e., the prosecution allegedly failed to disclose Grandmaison's criminal record. However, defense counsel informed the trial court that he had conducted a LEIN check of Grandmaison as well as a search with an online PI firm and that both had indicated Grandmaison had no criminal history. Because there was no criminal background to turn over, any motion to preclude Grandmaison's testimony would have been without merit. Defense counsel is not required to raise meritless objections. *Ericksen*, 288 Mich App at 201. Further, counsel cannot be deemed ineffective, as defendant urges, for failing to impeach Grandmaison with his criminal record and substance abuse history, as there is no evidence in the record supporting defendant's assertions that Grandmaison had either a criminal history or a substance abuse history.

Similarly, defendant's argument that defense counsel should have objected to the "Been Verified" report (apparently printout from an online PI firm and was not guaranteed to be 100 percent accurate) the prosecution gave him during the trial because he was unable to impeach Grandmaison with it is without merit. The report could not be used to impeach Grandmaison because it showed Grandmaison had no criminal background, which was consistent with defense counsel's own investigation. Accordingly, defense counsel cannot be held ineffective for failing to object because any objection would have been without merit. *Id*.

Defendant next argues that defense counsel failed to impeach witnesses with prior inconsistent statements. Defendant directs this Court to a number of supposed inconsistencies

[5] For example, defense counsel stated that he had contacted defendant's witnesses and concluded that their testimony would not be relevant and that he had examined Grandmaison's LEIN records with another assistant prosecuting attorney and concluded that Grandmaison did not have a criminal background.

between a police report, the preliminary examination testimony, and the trial testimony. Our review of the record shows that, overall, the inconsistencies with Grandmaison's testimony, if they can indeed be called inconsistencies, address fairly minor issues, and in one instance, defense counsel actually addressed the inconsistency during cross-examination. In short, defense counsel could have decided that impeaching on these matters would not help his case. Defendant has not overcome the presumption that defense counsel's lack of questioning about minor inconsistencies was a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant also argues that defense counsel was ineffective for failing to cross-examine or impeach Ward's testimony. Ward testified that the window defendant allegedly entered through was "out or missing or broke out" and that he "believed it was removed, and part of it was laying in the shrubs." Defendant asserts that his testimony was contradicted by the photographs of the window, which apparently did not show that the window was out, missing, broken, or partially lying in the shrubs. Assuming that there was a contradiction between the photographs and Ward's testimony, the jury had possession of both and were capable of making their own determinations. Indeed, it is possible that defense counsel did not want to draw attention to Ward's brief comments in light of the fact that the jury would have the photographs of the windows in the jury room. See *id*.

Defendant also argues that defense counsel was ineffective for failing to request a new trial based on the probability that a juror was biased because he got fired from work for being on the jury. Although the juror asserted he was fired because of the jury service, there is no indication on this record that the juror's decision was influenced in any way by his personal circumstances. Further, defendant had not provided any authority in support of his position. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant next argues that there was insufficient evidence to sustain his first-degree home invasion conviction because the prosecutor could not establish that Grandmaison was "lawfully" present on the premises within the meaning of MCL 750.110a(2).[6] Grandmaison testified that he was an employee of the business. He explained that during the week he stayed at the shop and that, the night of the break-in, he had been sleeping in the shop. In light of Grandmaison's testimony it was reasonable to infer that Grandmaison was lawfully in the building when the break-in occurred.

Next, defendant argues that there was insufficient credible evidence to support a finding that planned to use or actually used the tools found on him to break into the building. MCL 750.116 provides that a person is guilty of possession of burglary tools if he or she

[6] Defendant also argues that there was insufficient evidence that the building was a "dwelling" within the meaning MCL 750.110a(2), which we have already considered and rejected.

> shall knowingly have in his possession any . . . tool or implement . . . adapted and designed for . . . breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose aforesaid[.]

Defendant had possession of a hammer, two screwdrivers, four wrenches, and a folding knife when he was searched by the police. Further, one of the officer's testified that based on his experience and training, he would classify the items as burglary tools because people breaking into buildings use similar instruments to break or pry open windows or doors. He added that although the tools had other uses, the fact that they were on the defendant on scene also led him to conclude they may be burglary tools. Defendant asserts that the prosecutor cannot show intent to use the tools to break in or that he actually used the tools. Also, defendant points out that he admitted to taking the hammer and screwdrivers from the building. However, a police officer testified that no tools were reported missing from the building. Thus, viewing the evidence in the light most favorable to the prosecution, because defendant did not take the tools from the building, it is reasonable to infer that he had them before entering the building. See *Tennyson*, 487 Mich at 735. And because the window could only be opened by prying it open or breaking it, and the evidence established that defendant had items been inside the building without permission, there was sufficient credible evidence to support a finding that planned to use or actually used the tools found on him to break into the building.

Lastly, defendant argues that the prosecutor committed misconduct by suppressing favorable testimony in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by making improper comments during closing argument, and by failing to correct perjured testimony. Because the issues are unpreserved, we review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

In order to establish a *Brady* violation, a defendant must prove that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2013). "Evidence is favorable to the defense when it is exculpatory or impeaching." *Id*. Further, "[t]o establish materiality, a defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.'" *Id*., quoting *Napure v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959).

Defendant argues that the favorable evidence was Grandmaison's LEIN records. However, defendant's trial attorney explained to the court that he had viewed the LEIN records and that they did not show any "hits for a criminal record." Thus, there is no evidence that Grandmaison's LEIN record was favorable to defendant. Additionally, because defense counsel reviewed the LEIN records with an assistant prosecuting attorney, defendant cannot establish that the prosecution suppressed the evidence. Further, there is no reasonable probability that the outcome of the proceedings would have been different because the LEIN record showed that there was no criminal record. Thus, defendant has failed to establish the elements of a *Brady* violation. There was no plain error. *Carines*, 460 Mich at 763.

Defendant also argues that the prosecutor committed misconduct by not correcting false testimony. In *People v Gratsch*, 299 Mich App 604, 619-620; 831 NW2d 462 (2013), vacated in part on other grounds 495 Mich 876 (2013), this Court set forth the legal principles for reviewing a claim that a conviction was obtained using perjured testimony:

> A defendant's right to due process guaranteed by the Fourteenth Amendment is violated when there is any reasonable likelihood that a conviction was obtained by the knowing use of perjured testimony. Accordingly, a prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility. When a conviction is obtained through the knowing use of perjured testimony, a new trial is required only if the tainted evidence is material to the defendant's guilt or punishment. So whether a new trial is warranted depends on the effect the misconduct had on the trial. The entire focus of the analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability. [Internal citations, quotations, and alterations omitted.]

Defendant asserts that Ward's testimony that the window was "out or missing or broke out" and that he "believed it was removed, and part of it was laying in the shrubs" was perjury because the photographs of the window did not show a window out, missing, broke out, removed, or partially lying in the shrubs. However, Ward's testimony is not clearly perjury. In regard to his comments about the window being removed and lying in the shrubs, he stated that he "*believed* it was removed, and part of it was laying in the shrubs" but added that he "*can't remember exactly*, but it was open."

Finally, defendant also argues that seven of the prosecutor's remarks during closing argument were improper because they mischaracterized the facts in evidence, improperly bolstered the prosecutor's evidence and witness testimony, and interjected his personal beliefs about the ridiculousness of defendant's theory.

First, the prosecutor argued that "[a]t three o'clock in the morning, in the rain, [Grandmaison] is probably not out on Cronk Street or [sic] Michigan, hailing someone down to buy crack cocaine in the rain, barefoot." The testimony showed that it was raining around 3 a.m. Further, according to defendant's testimony, Grandmaison flagged him down on Cronk Street and asked him about obtaining crack cocaine. Thus, the prosecutor's comment was reasonable commentary on an inference supported by the evidence. *Unger*, 278 Mich App at 236, 241.

During closing argument the prosecutor also said, "I would submit to you that if you kick a 75-pound safe it is not going to move at all, much—let alone that far." The prosecutor's comment came after he explained that testimony had established the heavy, steel safe was out of place, and that defendant had testified he kicked it when he ran past. The prosecutor's comment was a reasonable inference supported by the evidence, especially in light of defendant's admission that the safe was unlikely to move when kicked. See *Unger*, 278 Mich App at 236, 241.

The prosecutor also commented that "[i]t was clear there was movement [of the notary stamp], because it was in a desk drawer, and that it was found on defendant outside of the building." At trial, Ward testified that he found a notary stamp in a soft black case in

defendant's back pocket. Defendant admitted that he grabbed a black case that had been sitting on the desk and put it in his pocket before leaving the building. Thus, the prosecutor's comment was supported by the evidence, so it was not improper. See *Ericksen*, 288 Mich App at 199.

The prosecutor also commented that "Grandmaison was an employee of Sullivan Fence, he stayed in the shop, he was allowed to be there. He was lawfully present in the building when all of this took place." Grandmaison testified that he stayed at the shop during the week and was sleeping before he heard and saw someone in the building. Thus, the prosecutor's comment was a reasonable inference supported by the evidence. *Unger*, 278 Mich App at 236, 241.

The prosecutor also commented that "what is likely to have happened in this case is, [defendant] used the screwdriver and the knife to kind of jimmie open the window, flip that bar off, and open it." Again, the testimony showed that defendant was apprehended with a screwdriver and a knife in his possession, that the window could only be opened from the outside by prying it or breaking it, that Grandmaison heard the aluminum bar in the window hit the floor before he heard sounds of an intruder, and that defendant was not invited into the building. Thus, the prosecutor's comment was a reasonable inference supported by the evidence, *id.*, which was related to the prosecutor's theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Next, the prosecutor commented that "having [defendant] use [the tools] to open up that window and get into that room, in my mind, qualifies for that third element" of possession of burglary tools. Again, the evidence indicated that defendant was found with tools on his person. Further, the prosecutor's theory of the case was that defendant used the tools to pry open the window and that his actions showed his intent to use the tools to break and enter a building. Thus, the prosecutor's comment was a reasonable inference supported by the evidence, *Unger*, 278 Mich App at 236, 241, and it was related to the prosecutor's theory of the case, *Bahoda*, 448 Mich at 282.

Additionally, none of the comments injected any derisive personal opinion about defendant's defense theory because the comments were based on the evidence. Further, the comments did not bolster the evidence and testimony submitted at trial because the comments did not imply that the prosecutor had some special knowledge concerning Grandmaison's truthfulness. *Bahoda*, 448 Mich at 279 (holding that "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness").

Finally, the prosecutor also commented that "defendant is putting forward a story that he runs this crack delivery service for strangers in the night." Strictly speaking, the evidence does not support a reasonable inference that defendant's story was that he ran a crack delivery service for strangers in the night. Defendant's testimony at trial was that he was flagged down by Grandmaison, who allegedly asked him where he could purchase cocaine. Defendant said that he told Grandmaison he could obtain the cocaine and then left to purchase it for him. He added that he is not in the business of selling cocaine and that the only reason he was willing to go and get it for Grandmaison was that he would also be able to use get some for himself. However, it seems unlikely that the jury understood the prosecutor's comment as an assertion that defendant ran such an enterprise. It is more likely that the jury understood the comment to be a colorful

way to attack the reasonableness of defendant's explanation for his presence in the building. See *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (explaining that a prosecutor "is not required to state inferences and conclusions in the blandest possible terms"). In any event, any possible prejudice was cured when the court instructed the jury that the arguments of the attorneys were not evidence. See *Thomas*, 260 Mich App at 454.

Defendant argues that defense counsel was ineffective for failing to object to the above comments. However, because the prosecutor did not engage in any misconduct, defense counsel cannot be faulted for failing to object. *Erickson*, 288 Mich App at 201.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Stephen L. Borrello