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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2026 9:40 AM
v	No. 373362 Iosco Circuit Court
TIMOTHY DANIEL GIFFIN, Defendant-Appellant.	LC No. 23-003631-FH

Before: O'BRIEN, P.J., and CAMERON and MALDONADO, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of first-degree home invasion, MCL 750.110a(2). The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to 120 to 480 months' imprisonment. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The three complainants in this case lived together in a house in Oscoda. They alleged that, in March 2023, defendant repeatedly came to their house looking for one of the complainants' coworkers about damage to a truck. During these visits, defendant threatened violence, waited outside the home, demanded that the complainants come outside, and refused to leave when asked. It is undisputed that, on the day this case arose, defendant called his brother for "backup," approached the house, and opened at least the screen door of the home. One of the complainants began recording the interaction, although the door was not visible in the video. Another complainant had a gun and ultimately shot defendant in the leg.

All three complainants testified at defendant's trial. One complainant testified that he heard the door open and what he believed were sounds of someone entering through the doorway, although he did not actually see defendant enter. The other two complainants, however, testified unequivocally that defendant entered their home. The complainant who recorded the encounter explained that, although the door was not visible in the video, a swooshing sound could be heard when the interior door opened. She further explained that defendant's voice became clearer after that sound because he had entered the house. The complainant who shot defendant also testified that defendant entered the house.

Two of the complainants' neighbors testified that they were inside their home and could not see the door but saw defendant step forward toward the door to where they could no longer see him. Approximately 30 seconds later, they heard a gunshot.

Detective Sergeant Erik McNichol testified that he responded to the scene to process the evidence. He photographed the bullet hole, fibrous material powder residue, and blood spatter on the inside of the complainants' screen door. Based on this evidence, he opined that defendant had to have been in front of the interior side of the screen door when he was shot. He further theorized that, because snow on the porch prevented the screen door from fully opening, making it unlikely that a person defendant's size could fit between the screen and front doors. He explained that there was no other explanation for the blood spatter on the inside of the screen door. But he also acknowledged that he could not say "for sure" that defendant was inside the house.

The prosecutor made multiple references to defendant being inside the home during closing argument and rebuttal. The trial court instructed the jury on the elements of first-degree home invasion and warned them that the "lawyers' statements and arguments [were] not evidence," and were "only meant to help [the jury] understand the evidence and each side's legal theories." The jury found defendant guilty as noted.

Defendant's sentencing guidelines range was calculated to be 78 to 260 months. At sentencing, defense counsel argued that a 78-month minimum sentence "would be sufficient and appropriate" in this case but "certainly . . . wouldn't disagree that the recommendation of 120 months is probably also a reasonable sentence." The trial court sentenced defendant as noted, and defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to sustain his conviction because the prosecution failed to prove that he actually entered the complainants' home beyond a reasonable doubt. We disagree.

A. STANDARD OF REVIEW

We review challenges to the sufficiency of evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In so doing, "[w]e view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Id*. "The standard of review is deferential: 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).

B. ANALYSIS

Defendant's only challenge to the sufficiency of the evidence is that there was no evidence he entered the house. He argues that "none of the witnesses could be sure whether [defendant] entered the home." The record belies this assertion.

Two of the complainants explicitly testified that defendant entered their home. One explained that the increased clarity of defendant's voice in the video was "because he [was] now inside of our home[,]" and later noted: "I knew that he was going to be very violent . . . as soon as he stepped inside of our home." The complainant who shot defendant testified that he grabbed his gun after hearing defendant approach the door, explaining that he "was watching the door and [defendant] came in and said are you ready[.]" The complainant further testified that he warned defendant not to come any closer, but defendant took a step toward him, prompting the complainant to shoot. This complainant also identified in a photograph where everyone was positioned inside the house, including defendant, and similarly identified the swooshing noise in the video as the sound of defendant opening the front door to the house.[1]

Defendant does not argue that either of these witnesses were inherently incredible, nor does he argue that any evidence undermines their accounts. Consequently, we see no exceptional circumstances that would excuse us from deferring to the jury's credibility and weight determinations. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Accordingly, the uncontested eyewitness testimony was sufficient for the jury to find that defendant entered the complainants' home beyond a reasonable doubt.

III. PROSECUTORIAL ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL[2]

Defendant next argues the prosecutor committed error by arguing facts not in evidence and eliciting expert testimony from a witness who was not qualified as an expert. He also argues that his trial counsel was ineffective for failing to object to the prosecutor's errors. We disagree.

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[1] Defendant proposes hypothetical alternative explanations for the swooshing noise including that the door could have already been open, that he only pushed on the doorknob to see the complainants, or that there was another unidentified individual at the house. But the prosecutor was "not obligated to disprove every reasonable theory consistent with innocence[,]" he only had to "convince the jury in the face of whatever contradictory evidence the defendant may provide." *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015) (quotation marks and citations omitted).

[2] Defendant refers to the prosecutor's actions as "misconduct," but they are more accurately categorized as prosecutorial error:

> Although we recognize that the phrase "prosecutorial misconduct" has become a term of art in criminal appeals, we agree that the term "misconduct" is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct. See, e.g., MRPC 8.4. In the vast majority of cases, the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial—which is not the kind of conduct that would warrant discipline under our code of professional conduct. Therefore, we agree that these claims of error might be better and more fairly presented as claims of "prosecutorial error," with only the most extreme cases rising to the level of

A. PRESERVATION AND STANDARDS OF REVIEW

Defendant acknowledges that, because he did not object contemporaneously to the prosecutor's alleged erroneous statements and request a curative instruction, this issue is unpreserved. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). We review unpreserved claims of prosecutorial error for plain error. *People v Cooper*, 309 Mich App 74, 88; 867 NW2d 452 (2015). "A plain error is one that is clear or obvious, and the error must affect the defendant's substantial rights." *Id*. (quotation marks and citation omitted). "That is, the defendant must have been prejudiced by the plain error." *Id*. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *Id*. (quotation marks, brackets, and citation omitted).

Defendant's evidentiary challenge is also unpreserved, because he did not object to Detective McNichol's testimony at trial. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Thus, our review of this issue is also limited to plain error affecting substantial rights. See *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014).

Finally, although defendant preserved his ineffective-assistance-of-counsel claims by moving this Court to remand for a *Ginther*[3] hearing, because we denied the motion, *People v Giffin*, unpublished order of the Court of Appeals, entered April 30, 2026 (Docket No. 373362), our review is limited to errors apparent on the record. *People v Abcumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id*. (quotation marks and citation omitted). "Findings of fact are reviewed for clear error while constitutional determinations are reviewed de novo." *Id*. (quotation marks and citation omitted). "A finding is clearly erroneous if this Court is left with a definite and firm conviction that the trial court made a mistake." *Id*. at 227-228 (quotation marks and citation omitted).

B. ANALYSIS

Defendant argues that the prosecutor erred by arguing facts not in evidence and by eliciting impermissible expert testimony from Detective McNichol. Neither argument warrants relief.

First, a prosecutor "may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008). But as explained, defendant's argument that there was no evidence he entered the house lacks merit. Two complainants expressly testified that defendant entered their home. Therefore, the prosecutor's

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> "prosecutorial misconduct." [*People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015).]

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

arguments that defendant entered the house were supported by the record and did not constitute prosecutorial error.

Second, although defendant argues that the prosecutor "resorted to a line of questioning that implied that [Detective] McNichol, an evidence technician, was actually a crime scene reconstructionist expert[,]" he does not specify what this alleged problematic line of questioning was. More importantly, defendant's argument again relies on the alleged weakness of the prosecutor's case and his claim that there was insufficient evidence to prove that he was in the complainants' house. He fails to explain on appeal how, even if Detective McNichol did provide inadmissible expert testimony, the outcome of his trial would have been different had he not testified or how Detective McNichol's testimony undermined the integrity of the judicial proceedings in light of the uncontroverted testimonies of two of the three complainants that defendant did, in fact, enter their home. *Cooper*, 309 Mich App at 88.

Defendant's ineffective-assistance-of-counsel claims also fail.[4] To establish ineffective assistance of counsel, a defendant "must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Abcumby-Blair*, 335 Mich App at 228. With respect to the prosecutor's allegedly improper comments, because those comments were supported by the evidence, any objection would have been futile, and "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). As for Detective McNichol's testimony, even if defense counsel had objected, defendant has not established that he was prejudiced by counsel's failure to object. Defendant fails to explain how any such objection would change the outcome of the case when two eyewitnesses explicitly testified that defendant entered the house. By failing to satisfy the prejudice prong of the ineffective-assistance-of-counsel test, *Abcumby-Blair*, 335 Mich App at 228, defendant has failed to show that his counsel was ineffective for failing to object to Detective McNichol's testimony.[5]

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[4] Defendant also claims trial counsel was ineffective for failing to properly investigate and discuss his case with him and failing to hire a crime scene reconstructionist. But defendant bears the burden of establishing the factual predicate of his ineffective-assistance claims. *People v White*, 331 Mich App 144, 148; 951 NW2d 106 (2020). Defendant does not explain what evidence a reconstructionist could provide that would change the outcome of his case. He merely claims that, because the evidence introduced at trial was insufficient to convict him, counsel's apparent failure to investigate and procure a reconstructionist prejudiced his defense. Thus, defendant has failed to establish the factual basis for this claim.

[5] Defendant also challenges his within-guidelines sentence as being unreasonable and disproportionate. Because defense counsel explicitly conceded at sentencing that 120 months was a reasonable sentence, defendant's challenge is waived. See, e.g., *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003) ("[W]hen a party invites the error, he waives his right to seek appellate review, and any error is extinguished.").

Affirmed.

/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron
/s/ Allie Greenleaf Maldonado

But even if this issue were not waived, defendant has not overcome the presumption that his within-guidelines sentence is proportionate. *People v Ventour*, 349 Mich App 417, 430; 27 NW3d 660 (2023). "A defendant may overcome the presumptive proportionality of a within-guidelines sentence by presenting unusual circumstances that would render the presumptively proportionate sentence disproportionate." *Id*. (quotation marks, brackets, and citation omitted). Defendant does not identify any unusual circumstances in this case. Instead, he argues that his guidelines range was too broad and did not consider pertinent mitigating factors such as his difficult childhood or mental-health and substance-abuse problems. A criminal defendant with a difficult childhood or who struggles with mental health and substance abuse is far from unusual. Nor does defendant's analysis of the sentencing goals under *People v Snow*, 386 Mich 586; 194 NW2d 314 (1972), provide any unusual circumstance unique to defendant that would render his presumptively proportionate sentence disproportionate, *Ventour*, 349 Mich App at 430.