

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LLOYD ARTZ,

Defendant-Appellant.

UNPUBLISHED

April 24, 2003

No. 233471

Jackson Circuit Court

LC No. 00-000647-FC

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, and was sentenced to life imprisonment without the possibility of parole. He appeals as of right. We affirm.

On July 15, 1999, in response to a 911 telephone call, Deputy Wayne Bisard was dispatched to Kipp's Pizza and Taco restaurant in Jackson. The restaurant had been closed for several days. It belonged to defendant and his wife, the victim, who lived in an apartment attached to the restaurant. The victim's family was worried because defendant was recovering from brain surgery and the victim had not spoken to, or responded to messages from, her family in two days. Before Bisard arrived, several relatives went to the restaurant and knocked on doors and windows. At some point, defendant appeared outside and inquired about what they were doing. In response to questions, he indicated that the victim had taken their car and gone to visit someone. The victim's relatives knew that defendant was lying because the victim sold the car a day or two earlier.

When Bisard arrived, defendant reiterated that he last saw the victim when she left in their car. Defendant reluctantly allowed Bisard to take a quick look inside of the restaurant. After doing so, Bisard was convinced that something was wrong. He left the premises and consulted with both his supervisor and Detective Thomas Fiero. Bisard arranged to return to the restaurant to meet with defendant.

Bisard and Fiero arrived at the restaurant before the time scheduled for the meeting, and they saw defendant outside of the restaurant with a white box. Defendant disappeared around the corner. When Bisard and Fiero caught up to defendant, he no longer had the box. Bisard went through the restaurant a second time. He saw brown drippings, like watered blood from fresh meat, on newspapers by the oven. He also saw a pan of cooked material in the kitchen sink.

Water was running into the pan. Fiero turned off the water. While doing so, he recognized the smell of burnt flesh. The white box was recovered from the porch of a neighboring, vacant home. It contained the victim's severed and charred bones.

The evidence established that defendant killed the victim in the apartment, perhaps by hitting her in the head with a heavy object. He then placed her body inside a sleeping bag and took it from the apartment to the restaurant. Defendant subsequently cleaned the living room area of the apartment, washing the carpets and couch cushions. He also moved the furniture to conceal spots on the carpet. Luminol tests revealed the presence of blood in the apartment. It was heaviest on the carpet near the couch. The victim's DNA was found on the dining room table, on the tile in the apartment, on the restaurant floor, in the restaurant sinks, in the sleeping bag, and in defendant's fingernail scrapings. It was undisputed that defendant dismembered the victim's body and then baked the bones and boiled or cooked the remainder.

At trial, the defense maintained that defendant was mentally insane and not responsible for his actions. He was admitted to the hospital on June 29, 1999, because he was suffering from a brain hemorrhage. He underwent surgery and was released from the hospital on July 2, 1999. After that time, numerous family members and friends saw defendant. Descriptions of defendant's mental health widely varied from dazed, doxy and childlike to communicative and conscious of what was occurring. The victim was last seen on July 13, 1999. Defendant presented two experts who testified that he was legally insane at the time of the murder. Edward Cook, a neuropsychologist, testified that defendant had an organic, psychotic condition and, because of his mental illness, lacked substantial capacity to appreciate the nature, quality or wrongfulness of his conduct. Cook believed that defendant was insane before and after his brain surgery and that he struck the victim, believing she was the devil. Bradley Sewick, a doctor of clinical psychology and a board certified neuropsychologist, testified that defendant's cerebral bleed was a deep, destructive, severe hemorrhagic stroke, which not only affected defendant's speech, but also affected his ability to think in a logical and rational manner. Sewick believed that the stroke and surgery caused a devastating insult to defendant's nervous system and that defendant suffered a great destruction of nerve cells in his brain. Sewick concluded that defendant was in a confused, psychotic state at the time he killed the victim. He suffered from delusions and hallucinations. As a result of the mental illness of delirium, defendant did not appreciate the wrongfulness of his conduct and lacked sufficient capacity to conform his conduct to the requirements of the law.

The prosecution presented evidence to rebut the insanity defense. The neurosurgeon, who performed defendant's surgery, testified that defendant had a cerebral hematoma on the left, temporal lobe of his brain, which controls speech. The clot was present in the brain for one or two days and was not acute. The evacuation of the blood clot was relatively easy, and no abnormality was found in the brain. The cause of the hemorrhage was never determined. After surgery, defendant suffered from aphasia, which is word-finding difficulty. While his process of thinking was not impaired, the conversion of thought to speech was impaired. He needed speech and occupational therapy. The neurosurgeon testified that there was no nerve damage to the brain. He acknowledged the existence of a hospital note reflecting that defendant had a hallucination. He explained that this hallucination occurred within a day or two after surgery when defendant was intensely sick. It was not an uncommon occurrence for a patient recovering from deep anesthesia. Joseph Galdi, a forensic pathologist and neuropsychologist, testified that

there was no basis to conclude that defendant met the criteria for legal insanity. Galdi testified that problem solving and analytical functions are controlled by the front brain, which was not affected in defendant's case. Defendant's residual aphasia would not have caused him to commit illegal activity. Galdi concluded that defendant was not suffering from delirium or a major depressive disorder, even though Prozac was discontinued after surgery.¹ Outside of the possibility that intoxicants were involved, defendant had no mental illness at the time he killed his wife. Manfred Greiffenstein, a psychologist specializing in both neuropsychology and sleep disorders, testified that defendant did not suffer from any type of sleep disorder at the time of the crime. Charles Clark, a forensic psychologist, believed that defendant was not truthful because he told inconsistent stories about the victim's death. Defendant's psychological test results showed mild reactive depression, but no major depressive disorder. Clark noted that defendant had no documented, major depressive condition before the brain injury. He was taking Prozac for anxiety and stress. Clark also concluded that, at the time of the killing, defendant had no substantial disorder of thought or mood, was in touch with reality, was aware that he was in legal jeopardy, and was not operating under the influence of hallucinations or delusions. Finally, Moses Muzquiz, a cardiologist, testified that defendant's cerebral bleed was superficial and did not penetrate the brain. There were no vascular deformities after the surgery. No permanent, ongoing brain damage was physically evident.

The jury rejected defendant's defense that he was mentally insane at the time of the crime and convicted him of first-degree, premeditated murder.

I

Defendant first argues that there was insufficient evidence to support his conviction for first-degree murder. Specifically, he contends that the evidence of premeditation or deliberation was lacking. When reviewing the sufficiency of the evidence in a criminal case, we "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 proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from circumstances surrounding the killing. [*People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998) (citations omitted).]

¹ Defendant treated with a physician's assistant (PA), who prescribed Prozac in 1995. The PA testified that defendant wanted the medication. The PA conceded that a psychological "work up" was not conducted before the Prozac was prescribed.

In *People v Plummer*, 229 Mich App 293, 300-302; 581 NW2d 753 (1998), this Court examined the issue of premeditation and stated:

Though not exclusive, factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation. [Citations omitted.]

The evidence in this case, when viewed in a light most favorable to the prosecution, was sufficient to support a finding of premeditation and deliberation. There was evidence that defendant and the victim had marital difficulties. In 1992, the victim consulted with a divorce lawyer, telling him that there was physical and emotional abuse in the marriage. The marital difficulties continued after that time. Approximately 2-1/2 years before she was killed, the victim told a friend that defendant tried to suffocate her with a pillow. There was also evidence of ongoing marital tension because of defendant's use of marijuana and alcohol. The victim was especially concerned about defendant's continued marijuana use after his surgery. When defendant was released from the hospital and returned home, he immediately went to his marijuana stash and smoked a joint. This angered and concerned the victim. The victim's frequent use of the telephone, especially outside of defendant's hearing, was also a source of tension between the victim and defendant after the surgery. More importantly, however, the parties were at odds over a pig roast that defendant held nine days before his admission to the hospital. The victim was not happy about the party or the expense. The corn that defendant purchased for the pig roast contained bugs that infested the restaurant kitchen. The victim and defendant tried to fumigate the restaurant themselves. Defendant was convinced that his exposure to the bug spray triggered his brain hemorrhage. He informed several people of this belief and indicated that the hemorrhage was the victim's fault because she sprayed him with bug spray. The physician's assistant, who regularly treated defendant, saw defendant a few days before the offense. He testified that defendant was still angry about the bug spray and was blaming the victim.

In addition to evidence of marital discord, the prosecutor presented evidence that, in July, 1998, defendant talked to David Whiting and indicated that he wanted the victim to "come up missing." Defendant asked if Whiting knew anyone who could "do it." In 1998, defendant also complained to Virgil Wirebaugh, the victim's son-in-law, that the victim knew how to push his buttons. Defendant inquired about whether Wirebaugh ever got so mad at his own wife that he felt like killing her or having her killed. Defendant pondered about how much it would cost to find a killer. After his surgery, defendant told Wirebaugh that the victim was treating him like a child, like he was stupid. There was also evidence that, in the early 1980s, defendant had a conversation with Michael Wyllis about the capture of a famous serial killer. During the conversation, defendant indicated, while using a low voice, that he could commit a perfect murder. He would cut the person up and boil the meat so that the corpse would not stink. Then, he could throw the meat in a dumpster, which is something that many restaurants do.

In sum, there was evidence of tension between the victim and defendant. Defendant contemplated killing the victim the year before she was killed, and, at the time of the victim's

death, he blamed her for his health predicament. Defendant's actions after the killing also support a finding of premeditation and deliberation. Defendant told inconsistent stories about what had occurred. He actively lied to both the victim's relatives and the police about her disappearance. He engaged in a great effort to try to cover up his crime and to dispose of the body in the bizarre fashion that he had previously contemplated. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational jury to determine that the essential elements of premeditation and deliberation were established beyond a reasonable doubt.

II

Defendant next argues that the admission of numerous, graphic photographs and a videotape of the crime scene was unfairly prejudicial. We review the admission of photographic evidence for an abuse of discretion. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).²

Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal. However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime. [*Id.* at 188 (citation omitted).]

Even where error is found, reversal is not required unless defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). “[A] preserved, nonconstitutional error is not a ground for reversal unless ‘after an examination of the entire cause, it shall affirmatively appear’ that it is more probable than not that the error was outcome determinative.” *Id.* at 495-496. The necessary inquiry focuses on the type of error and its effect in light of the weight and strength of the untainted evidence. *Id.* at 495.³

The challenged photographs included numerous pictures of the victim's bones and body after being cooked and of the victim's skull both before and after the forensic pathologist reconstructed it. The videotape depicted the outside of, and area surrounding, the apartment and restaurant as well as the interior of the apartment and restaurant kitchen. It further depicted the porch where the box of bones was discovered, and it contained several minutes showing the

² We reject defendant's argument that the de novo standard of review should be applied. While defendant frames his issue in terms of a violation of his due process right to a fair trial, not every evidentiary issue implicates due process. See *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). In *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001), this Court noted that evidentiary errors fall into a nonconstitutional error category.

³ We disagree with the prosecution that defendant failed to preserve his challenge to many of the photographs. Before any evidence was presented at trial, defense counsel objected to the proposed “photographs” and videotape, arguing that the prejudicial effect far outweighed any probative value. While defendant renewed that objection on occasion in response to certain photographs, his failure to renew it with respect to each photograph did not waive any objection to the photographs.

bones both in the box and spread out on a yellow blanket. We agree that the challenged photographs and a portion of the videotape are disturbing and gruesome. Nevertheless, we find that their admission was not an abuse of discretion. The prosecutor was required to prove premeditation and deliberation. *Kelly, supra*. Defendant's plan to secretly dispose of the body after the crime and to hide the bones after the police began investigating was relevant to proving this essential element of the crime. See *Plummer, supra*. The gruesome photographic evidence depicted the extent to which defendant went to destroy the body. The images of the bones in the box were insufficient to give the jury a full picture of the efforts expended to dismember the body. Thus, the photographic evidence of the bones spread on the blanket was necessary. In addition to being relevant to the issues of premeditation and deliberation, we believe that the photographs and videotape assisted the jury in understanding why the cause of the victim's death was not clearly determined. The body was substantially destroyed. The medical examiner reconstructed the victim's skull and theorized that it was struck by a heavy object. The skull photographs showed the reconstruction and supported the medical examiner's theory that the victim was struck on the head. Thus, although gruesome, the challenged evidence clearly had probative value.

The photographs and videotape were not rendered inadmissible solely because of their shocking depictions. *Ho, supra*. MRE 403 provides for the exclusion of otherwise relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. Relevant considerations in determining the existence of unfair prejudice include whether the jury will give the evidence undue or preemptive weight or whether the use of the evidence is inequitable. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), modified 212 (1995). Nothing in the record suggests that the pictures or videotape were given undue weight by the jury. Further, they were not admitted to inflame the passions and sympathies of the jury but were admitted to explain and support other evidence that was presented to the jury. Even if we agreed that there was an abuse of discretion because of the volume of photographic evidence admitted, much of which was duplicative, reversal would not be required. *Lukity, supra*. In light of the strength of the untainted evidence in this case, the admission of the photographs and videotape was not outcome determinative. *Id.*

III

Defendant next argues that the trial court abused its discretion by admitting certain evidence at trial, including statements he made before the killing, evidence of his marijuana use, and evidence that the victim consulted with a divorce attorney. We review these preserved evidentiary issues to determine if the trial court's decision to admit the evidence was an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).⁴

Defendant first challenges the admission of evidence that sixteen or seventeen years before the crime, he described how he would dispose of a body if he committed murder. Defendant argues, without citation to any supporting authority, that the statement was too remote in time to demonstrate premeditation and deliberation. He claims that the statement, along with

⁴ For the reasons previously stated with respect to the photographic evidence, we reject defendant's claim that the evidentiary issues are constitutional and require de novo review.

his other statements about killing or causing the disappearance of the victim, were offered to make him appear depraved. This argument has no merit. Defendant's statements, expressing thoughts of killing the victim and explaining the best way to dispose of a body, were directly relevant to the issues of premeditation and deliberation. MRE 401. Admissions of a party-opponent are admissible evidence. MRE 801(d)(2). The extent to which the passage of time may reduce the probative value of evidence is an issue of weight, not admissibility. See, e.g., *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999).

Defendant additionally claims that, even if his statements were relevant, they should have been excluded under MRE 403. He fails to explain or rationalize this position, and we deem it abandoned. *Kelly, supra* at 640-641. "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 with little or no citation of supporting authority." *Id.*

Defendant next challenges the testimony of a divorce attorney with whom the victim consulted in 1992. This issue is also abandoned. *Id.* While defendant alleges an error in the trial court's decision to admit the evidence, he fails to explain his position that the testimony was irrelevant and inadmissible. His cursory argument also contains no citation to authority.

Finally, defendant challenges the admission of evidence of his marijuana use. He concedes that his post-surgery use of marijuana was relevant. He argues, however, that testimony about his pervasive use of marijuana in the years before the killing was irrelevant and did not support the prosecutor's theory that marijuana use was a source of ongoing marital discord. We disagree. Defendant's long-time marijuana use was relevant to the issue of premeditation. See *Plummer, supra*, wherein this Court found that the state of the relationship between the defendant and the victim was relevant to premeditation or deliberation. In this case, testimony indicated that defendant's marijuana use was the source of marital tension for many years, and, after defendant's surgery, it caused the victim anger and concern. It was clearly an issue of tension near the time of the victim's death. Moreover, we disagree with defendant's argument that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. The record does not indicate that the jury gave the marijuana evidence undue or preemptive weight, that it was used for an improper purpose, or that its use was inequitable. *Mills, supra*.

IV

Defendant next claims that there were numerous instances of prosecutorial misconduct, which deprived him of a fair trial. Defendant failed to object to most of the challenged conduct. "Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Preserved issues of prosecutorial misconduct are reviewed in context to determine whether the defendant received a fair and impartial trial. *Aldrich, supra*.

Generally, “[p]rosecutors are accorded great latitude regarding their arguments and conduct.” They are “free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.” [*People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).]

In addition, a prosecutor is not required to state inferences or conclusions in the blandest possible terms. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In other words,

prosecutors may use “hard language” when it is supported by the evidence and are not required to phrase arguments in the blandest of all possible terms. Emotional language may be used during closing argument and is “an important weapon in counsel’s forensic arsenal.” [*People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).]

We have reviewed all of the unpreserved allegations of prosecutorial misconduct and find that several of these allegations have no merit. First, the record does not support defendant’s claim that the prosecutor mischaracterized the defense “as an excuse for . . . murder.” In rebuttal argument, the prosecutor stated that defendant’s experts wanted the jury to excuse the murder. This was precisely the theory of the defense experts, who opined that defendant was mentally insane when he killed the victim. Thus, the prosecutor’s argument was not objectionable.

Second, defendant claims that the prosecutor improperly argued that the real issue in the case was defendant’s failure to admit that his problems were caused by substance abuse. Again, the record does not support defendant’s claim that the prosecutor made such an argument. The prosecutor argued that defendant blamed the victim for his brain hemorrhage because he did not want to believe that a drug-induced vasculitis may have been the cause. There was evidence to support this argument. Because the argument was based on the evidence and reasonable inferences, it was not improper. *Bahoda, supra*.

Third, defendant accuses the prosecutor of testifying during closing argument. The prosecutor argued, “But I can tell you that there were lots of problems in that marriage. And there were lots of dangerous undercurrents underneath the placid waters of that marriage.” The challenged argument was made immediately after the prosecutor acknowledged that he could not tell the jury what exactly occurred on the night of the killing or what ignited the actual murderous attack. The prosecutor was not testifying. He was trying to convey to the jury that, while there was no direct evidence of what precipitated the crime, there was indirect evidence to support a conviction for first-degree murder, specifically the problems in the marriage. The argument was proper because it was based on the evidence and reasonable inferences drawn from it. *Bahoda, supra*. We further find no impropriety in the prosecutor’s closing remarks, which mentioned domestic abuse, drug and alcohol use, and defendant’s tight rein on the family finances. These arguments were also based on evidence presented at trial. *Id.*

With respect to the remainder of defendant’s unpreserved allegations, a timely curative instruction could have cured any prejudice resulting from the challenged conduct. Thus, even if the allegations of error have merit, reversal is not required. First, defendant argues that the prosecutor repeatedly denigrated the defense experts and mischaracterized their testimony and qualifications. The relative qualifications and conclusions of the expert witnesses were hotly debated at trial. In closing argument, the prosecutor pointed out valid differences in

qualifications between the prosecution experts and the defense experts. While the prosecutor was harsh in his treatment of the qualifications and conclusions of the defense experts, his emotional language was not improper. *Ullah, supra*. In so ruling, we acknowledge defendant's claim that the prosecutor misrepresented the testimony of the defense experts. Defendant fails, however, to cite any portion of his expert's testimony to support his claim that the prosecutor's closing argument contained misrepresentations. Even if we agreed there were some misrepresentations with respect to the testimony, a curative instruction could have cured any prejudice. *Watson, supra*. Moreover, the jury was instructed that it could only consider evidence when deciding the issue of defendant's guilt. The term "evidence" was defined to include only sworn testimony and admitted exhibits. The jury was specifically instructed that the lawyers' statements and arguments were not evidence.

Second, defendant alleges that, during closing argument, the prosecutor misstated the testimony of two witnesses, Dr. Muzquiz and Arthur Benedetto. The prosecutor argued that Muzquiz had testified that drug-induced vasculitis could cause intracerebral bleeding in someone with a long history of drinking and drug use. Muzquiz did not testify to that information. The neurosurgeon, who performed defendant's surgery, however, testified that drug-induced vasculitis could have caused the hemorrhage. Thus, it appears that the prosecutor identified the wrong expert when making his argument. With respect to Benedetto, defendant does not cite to any portion of the record suggesting that the prosecutor's arguments failed to comport with the evidence or reasonable inferences. The prosecutor nevertheless concedes that certain testimony was improperly attributed to Benedetto and was not evidence at trial. We find that any mischaracterization of the witnesses' testimony could have been cured by a curative instruction if a timely objection was made. *Watson, supra*. And, as previously noted, the jury was instructed that it could only consider the evidence when deciding the case. The lawyers' statements and arguments were not evidence.

On appeal, defendant also complains that the prosecutor committed misconduct when he asked his experts to vouch for the expertise of other expert witnesses produced by the prosecution. While defendant identifies this as an issue, he provides no explanation or rationalization to explain his position, and he cites no authority to support his claim that the challenged conduct was improper. The issue is abandoned. *Kelly, supra*.

Finally, defendant challenges the prosecutor's argument that the victim's first husband was abusive and that it was the victim's normal pattern to become involved with another abusive person after her divorce. There was no testimony to support an argument that the victim had a "normal pattern" of becoming involved with abusive men. Defense counsel made a timely objection to the challenged argument, and the trial court immediately cautioned the jury that closing argument had to be based on the evidence or reasonable inferences from the evidence. The court additionally instructed the jury that any of the prosecutor's statements, which did not comport with the evidence or reasonable inferences, should be ignored. This cautionary instruction, along with the final jury instructions informing the jury that the lawyers' statements and arguments were not evidence, adequately cured any prejudice resulting from the prosecutor's improper argument. Thus, defendant was not deprived of a fair trial. *Aldrich, supra*. In so deciding, we note that there was evidence on the record that the victim's first husband was abusive. Thus, the prosecutor's statements in that regard were based on the evidence and were not improper. *Bahoda, supra*.

In sum, there was no prosecutorial misconduct requiring reversal. We reject defendant's alternative argument that there were errors of misconduct, which combined to deprive him of a fair trial. We further reject defendant's claim that his counsel was ineffective for failing to object to many of the instances of alleged misconduct. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 577 (1994). Defendant has not met his burden of proof with respect to this claim, and we note that he concedes that counsel's conduct was not prejudicial unless we treat his unpreserved claims of prosecutorial misconduct as having been being waived. We have not done so.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell