STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NANCY ANN SEAMAN,

Defendant-Appellant.

UNPUBLISHED
February 13, 2007

No. 260816
Oakland Circuit Court
LC No. 2004-196916-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NANCY ANN SEAMAN,

Defendant-Appellee.

No. 265572
Oakland Circuit Court
LC No. 2004-196916-FC

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

I. Introduction

We agree with our dissenting colleague's rationale and conclusions with respect to defendant's appeal in docket no. 260816. For those reasons, which we adopt as our own, we affirm the trial court's decisions that were challenged by defendant in docket no. 260816.

In the prosecutor's appeal, docket no. 265572, we respectfully disagree with our dissenting colleague. Instead, we hold that the trial court abused its discretion when it reduced defendant's first-degree premeditated murder conviction to second-degree murder. Accordingly, and for the reasons set forth below, we reverse the trial court's decision and order. Because the trial court stayed it's decision, our opinion leaves intact the judgment confirming the jury's verdict of first degree premeditated murder, and defendant's sentence of life in prison without the possibility of parole. MCL 750.316(1)(a).

II. Analysis

The trial court decision reducing the conviction to second-degree murder came in the context of reviewing defendant's request for a new trial and/or evidentiary hearing. That decision is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). In reviewing for an abuse of discretion, courts must recognize that there will be issues on which there will be no single correct outcome, but rather there can be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Id*.

Defendant's sentencing occurred on January 24, 2005, at which time the trial court indicated that (1) it could not act as a "thirteenth juror", and (2) as a result it could not order a new trial based on it's own assessment of witness credibility:

> Mrs. Seaman, this case is undoubtedly the most tragic, troubling and saddest case I've ever had in twelve years as a Judge.
>
> * * * *
>
> Now the jury who tried your case, they were conscientious and they were attentive. And I don't think that they were swayed in any way by any pretrial publicity because we took careful pains when we interviewed them to make sure that they didn't know much about this case. Or if they did, they would put those things aside. And I honestly believe they did so. *They took their responsibilities and their obligations as jurors very seriously*.
>
> And while many people, including yourself and your family and your friends, they may disagree with the verdict, *the jury did have sufficient evidence presented to them, which would have justified their returning a verdict of guilty in the first degree. Now whether or not I agree or disagree with that verdict, I guess is really irrelevant. I can't be a thirteenth juror. But it makes no sense in attacking the jury, because they were conscientious*.
>
> Now had you only stopped after striking the first blow; because I'm sure that first blow probably rendered your husband unconscious, you could have escaped and we wouldn't be here today. Or had you called the police immediately after the deadly assault, or not tried to cover up the crime scene by destroying evidence in the garage, or had you not attempted to hide your husband's body for two days – *these are all things that the jurors took into consideration when they concluded that you did deliberate and premeditate the killing of your husband*.
>
> If you would have done any one of those things I just suggested, they may have come to a different conclusion.

Now, whatever caused you to continue to strike your husband in the head with the hatchet, whether it was truly fear and I'm sure there was, -- *I can't believe* for instance that you went out to Home Depot to buy and [sic] axe or hatchet to kill your husband. *It just doesn't make any sense*.

But the jury can still find premeditation and deliberation from what you did afterwards. [Emphasis added.]

On August 31, 2005, some seven months after sentencing, the trial court did an about face when it reduced defendant's conviction to second-degree murder when deciding her motion for new trial. Because the colloquy between the trial court and the prosecutor seemed to serve as the basis for the trial court's decision, we quote much of it:

The Court: Your theory of the premeditation is what?

* * *

Prosecutor: All right. Let's – let's talk about the hatchet first. *** And I understand Your Honor, based on the comments that you made at sentencing, may disagree with some of this. *** But here's the evidence that was presented at trial concerning premeditation. First of all, the hatchet, this is a Sunday evening. Most stores are closed. It's Mother's Day. It's raining out. The Defendant decides abruptly that she is going to be doing supposedly yard work sometime during the week.

* * *

The Court: (Interposing) So what you're saying, and I don't mean to cut you off, is what you're saying is she went to that store specifically to buy a hatchet to kill her husband with it.

Prosecutor: Yes. That is our position.

The Court: Now, here's a 140-pound woman at best. What is she – five foot two? And she's going to go get a hatchet. And then she's going to come back and lure her husband into a garage and somehow or other sneak up on him and hit him over the head with a hatchet. The husband is about 180 pounds, 175 pounds.

The record is very, very clear he's a very athletic guy, very strong guy, very physical guy. The record is also clear that he has a reputation for being a brawler. I don't think you doubt that.

Prosecutor: Well, there's – there's – that's disputed.

The Court: That's what the record said. You had three fraternity brothers from college that came in and said he's a brawler, and he has a quick – and he has a hair temper.

Now, here's this little woman and she's going to go out and get a hatchet. And then she's going to kill him in the garage.

Prosecutor: Well, do you know what?

The Court: No, wait. That's your – that's your theory of premeditation. *** Well, let me finish. *** She doesn't wait until he falls asleep and kills him in bed, where it might be a lot easier. She's going to get him somehow – some way or another she's going to get him into the garage. *** Now, here's a woman who has finally decided that she's going to divorce this guy. She has a condo that she's purchased. She's going to be moving into that condo in the fall of that year.

Her youngest son is going to be graduating from Purdue that Friday. She's going to go down and pick him up, and it's Mother's Day. And she has everything to live for, and her life is just about to turn around. And she makes this decision to go to Home Depot to buy this hatchet and kill him. That's the premeditation?

Prosecutor: Well, premeditation doesn't have to be something –

The Court: (Interposing) No, I know. Your other theory of premeditation, I guess, is after she strikes him one time, she has – she has an opportunity to think about it and then keep hitting him.

Prosecutor: Well, not only an opportunity to think about it. But Dr. Drakovic's [sic] testimony was that the killer, the Defendant had to put the hatchet down, pick up a knife and then continue stabbing him; that there had to be –

The Court: (Interposing) And he was already dead by then.

Prosecutor: Well, we don't know that for sure.

The Court: Well, *I'm pretty sure he was*.

Prosecutor: We don't know that for sure. And besides, maybe she didn't know that. In fact, that doesn't matter. I know that brother counsel brings that up several times during the course of his pleading.

The Court: But that's the premeditation. It's one of two theories. *** One is that she went out to get the hatchet, to bring it back, as I said, to lure him into the garage and to kill him. *** If she misses one time with that hatchet, then she's dead.

Prosecutor: Do you know that, Judge? I think – you've been a judge long enough, and I've been a prosecutor long enough to know –

The Court: (Interposing) Yes, and I've watched everybody, and I'm not a thirteenth juror but I – *I think I have an opportunity to observe people and judge their demeanor, and listen to* –

Prosecutor: Defendants don't always think the way you and I and brother counsel and other people would think concerning matters.

The Court: I know that.

Prosecutor: Something obviously happened during that time that Jeff and Rebecca left the marital home.

The Court: There was a fight. There was an argument. That's why they left. *** That's why – what is it, Jeff, the oldest boy? *** That's why he never answered the phone. *** He didn't even – he didn't want to talk to his dad. He left the house because the dad started in again over whether or not she could borrow his –

Prosecutor: (Interposing) And it was also raining very heavily, and he didn't want to fumble with the cell phone in the car.

The Court: Oh come on.

Prosecutor: That was his testimony.

The Court: *Yeah, sure*.

Prosecutor: Well, I mean, that was his testimony.

The Court: I know what his testimony was. His testimony also was that she was [a] klutz, and she had all these black and blue marks all over her body because she was always tripping and falling.

Prosecutor: Well, that was his testimony.

The Court: I know that was his testimony.*** And he didn't know anything about any arguments. And yet, he knew about the condo in Wood Haven and wouldn't tell his dad because, why?

Prosecutor: He was doing that at the request of his mother, the Defendant.

The Court: Why?

Prosecutor: She claimed that he would get angry over that.

The Court: But he wouldn't? *** And then he had the brother coming in from Arizona who says that this – Robert is on a high note. Everything is going well for him. And he's a lot of credibility. He's the guy who is going to buy all

the cars at a discounted rate so that [they] wouldn't be part of the divorce case, and then sell them back to him later on. *Now, he has a lot of credibility*.

Prosecutor: Well, look. I mean, the credibility of all these witnesses –

The Court: (Interposing) I know. I don't want to get into it. I'm just saying. You brought it up a little bit, so I'm just responding. *** But that's your theory of premeditation, that --- *** this woman goes out, buys this – this hatchet to come back for the specific purpose of killing him?

Prosecutor: Yes. That is – that's just the start of it though. *** And the case law in Michigan is very clear. And LaFave can say all he wants in his treatises but what matters ---

The Court: (Interposing) How about People versus Morrin? Did you read that case?

Prosecutor: Yes, I did. In fact, I cite it in my brief.

The Court: Okay.

Prosecutor: And, in fact I was going to quote from it, and I'll quote from it in my brief. *** "While the minimum time necessary to exercise this process, that being premeditation and deliberation, is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable person in this instance time to subject the nature of their response to a – quote/unquote, second look." Basic –

The Court: (Interposing) Okay. Now, look at all the facts in this case. How many times did she strike him with the -- with the hatchet?

Prosecutor: Multiple times, at least sixteen times.

The Court: And how many times did she stab him in the back?

Prosecutor: At least as many, if not more than that.

The Court: In about a circle that big. (Indicating). *** What does that indicate?

Prosecutor: That indicates premeditation. The type –

The Court: (Interposing) Or does it indicate complete out of control rage and/or fear? *** And you're saying that – that amounts to premeditation? *** Deliberation?

Prosecutor: Yes. As well as everything that the Defendant did afterwards. I mean, the case law is clear; that a defendant's attempts to conceal the –

> The Court: (Interposing) I think the – well, I think a jury can consider what she did afterwards. I don't question that at all. *But Morin even talks about the fact that you can't use the actions afterwards to establish premeditation. Premeditation has to be beforehand.*
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> Prosecutor: Well, that's – the more recent case law that has come out, Morin is an older case. The more recent –
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> The Court: (Interposing) Counsel, I've read everything. I wasn't going to rule today, but I think I am.
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> There are two problems that I see with this case. One is the lack of premeditation, and the other one is lack of deliberation.
>
> And I have to sentence a woman to life in prison when I'm not sure that the prosecution has established either one of those.
>
> Now, the jury could disregard the self-defense, and they obviously did. But they can't use that to establish the elements of the offense. *And this Court feels that premeditation and deliberation was not established. And I'm going to reduce the case to second-degree murder*, and I'm going to have her back here for resentencing. [Emphasis added.]

The foundation for the trial court's ruling had two parts: (1) the court found the testimony supporting premeditation and deliberation to be unbelievable, and (2) the trial court concluded that actions taken after the killing could not establish premeditation. The first proposition, even if true, was not a legally sufficient basis upon which to overturn the jury's verdict, and the second proposition was simply incorrect as a matter of law.

We first address the trial court's decision to overturn the verdict because of insufficient credible evidence. *Lemmon, supra,* controls this issue. In that case, the defendant was convicted of five counts of criminal sexual conduct following a jury trial. The trial court granted a new trial, holding that the verdict was against the great weight of the evidence, particularly in light of the contradictory testimony and demeanor of the complainants. *Id*. at 629-631.

This Court remanded the case to the trial court for specific findings of fact and conclusions of law. The trial court held that the witnesses lacked credibility because they had giggled at inappropriate times and were not embarrassed or hesitant despite the sensitive subject matter. The trial court also noted that the only testimony supporting guilt was the complainants' testimony, and there was no supporting medical records, counseling records, or corroborating testimony. This Court denied the application for leave to appeal from the trial court's decision on remand, but expressed its disagreement with the "thirteenth juror" principle cited by the trial court from *People v Herbert*, 444 Mich 466, 476; 511 NW2d 654 (1993). *Lemmon, supra* at 632-633.

On subsequent appeal, the Supreme Court examined the validity of the "thirteenth juror" principle set forth in *Herbert*. The *Herbert* decision held that, when reviewing a motion for new trial, the judge acts as the thirteenth juror. That is, the trial judge is entitled to evaluate the

credibility and demeanor of the witnesses in determining whether a new trial is warranted. However, the *Lemmon* Court overruled that standard and stated that "we clarify that a judge may not repudiate a jury verdict on the ground that 'he disbelieves the testimony of witnesses for the prevailing party.'" *Id*. at 636.

After examining the history of the thirteenth juror rule and the holding that it should be applied only in exceptional cases, the Supreme Court articulated a new standard when examining a motion for new trial:

> Thus, 'a new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.'
>
> We align ourselves with those appellate courts holding that, absent exceptional circumstances, *issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof*.' We reiterate the observation … that, when testimony is in direct conflict and testimony supporting the verdict has been impeached, if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it," *the credibility of witnesses is for the jury*.
>
> Adding flesh to what is a more refined articulation of the formula that '[I]n general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial, 'federal circuit courts have carved out a very narrow exception to the rule that the trial court may not take the testimony away from the jury. Defining the exception, the federal courts have developed several tests that would allow application of the exception; for example, if the 'testimony contradicts indisputable physical facts or laws,' … '[w]here testimony is patently incredible or defies physical realities,' '[w]here a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror,' or where the witness' testimony has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies.'
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> This does not mean that '[a] judge's disagreement with the jury's verdict,' or a 'trial judge's rejection of all or part of the testimony of a witness or witnesses' entitles a defendant to a new trial. Rather, a trial judge must determine if one of the tests applies so that it would seriously undermine the credibility of a witness' testimony and, if so, is there 'a real concern that an innocent person may have been convicted' or that 'it would be a manifest injustice' to allow the guilty verdict to stand. If the 'evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions,' the judge may not disturb the jury findings although his judgment might incline him the other way. Any 'real concern' that an innocent person has been convicted would arise 'only if the credible trial evidence weighs more heavily in [the defendant's] favor than against it.' [(Citations omitted. Emphasis added.)]

Against this factual and legal background, the trial court's decision was outside the range of principled outcomes, and was therefore an abuse of discretion. *Babcock, supra*. [1]

Contrary to the trial court, we conclude that there was more than ample evidence supporting the jury's finding of first-degree, premeditated murder. Case law provides that premeditation may be established by the time frame that it takes for a "second look." *People v Gonzales*, 468 Mich 636, 641; 664 NW2d 159 (2003). There is no magic minimum time period for reflection or a "second look", and depending on the circumstances, only a few seconds can be sufficient time. *People v Glover*, 154 Mich App 22, 29; 397 NW2d 1999 (1986) overruled on other grounds *People v Hawthorne*, 474 Mich 174 (2006); *People v Meier*, 47 Mich App 179, 191; 209 NW2d 311 (1973). Here, evidence was presented showing that defendant inflicted 16 blows with a hatchet and 22 stab wounds with a knife. The time between defendant dropping the hatchet, and then picking up the knife and repeatedly stabbing her husband, was more than sufficient time for defendant to have taken a "second look."

An additional valid legal theory of premeditation was that there was marital discord, that defendant went to the store and bought the hatchet (at a strange day and time), came home and killed Mr. Seaman. *People v Fisher*, 449 Mich 441, 452-453; 537 NW2d 577 (1995). This was certainly a plausible theory, as that is in fact what occurred. The only dispute was whether defendant purchased the hatchet for landscaping or to murder her husband. The jury believed it was for the latter, which had support in the evidence.

Michigan law also establishes that subsequent evidence of concealment may be used as a factor when determining premeditation and deliberation. *Gonzales, supra* at 641. Here, there was ample evidence presented to the jury to conclude defendant covered up the crime by hiding the body, cleaning up the murder scene, and lying about his whereabouts. Hence, there were at least three legal grounds supported by evidence that justified the jury's finding of first-degree premeditated murder.

The trial court impermissibly acted as a thirteenth juror when it vacated the first degree murder conviction based on it's assessment of the reasonableness of the prosecution's theories. Unless the evidence supporting premeditation and deliberation "contradicts indisputable physical facts or laws", or is "patently incredible or defies physical realities", or is otherwise "so inherently implausible that it could not be believed by a reasonable juror", *Lemmon*, *supra*, the verdict must stand. There was no such finding here, and nor could there have been given the overwhelming evidence of premeditation and deliberation, as noted above. The trial court was

[1] Although we recognize that at the sentencing stage the trial court expressly stated that, despite its misgivings about some of the testimony, there was sufficient evidence to support the verdict. Moreover, the trial court noted the factors that support premeditation and deliberation, including the law indicating that subsequent acts can prove premeditation, and the evidence supporting these elements. Specifically, the trial court stated that if defendant had stopped after the first blow, if she had immediately called police to the scene, if she had not destroyed evidence in the garage, and if she had not attempted to hide her husband's body in the garage, a different conclusion may have been reached. We do not rely upon these conclusions, however, because the decision at issue is the order granting the motion for new trial.

simply not empowered to overturn the jury's finding of guilt based on its own assessment of the reasonableness of the theories presented. *Lemmon, supra*. As we quoted in great length above, the trial court's decision was chock-full of impermissible findings and conclusions[2], and was legally erroneous under *Lemmon*. Consequently, the new trial standard was not met[3] as the evidence did not preponderate so heavily against the verdict that a serious miscarriage of justice would otherwise result. The trial court's order is reversed.

Affirmed in part and reversed in part.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio

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[2] For example, the trial court stated that it had "an opportunity to observe people and judge their demeanor", that defendant's son Jeff had no "credibility," and that it simply did not believe the theories presented by the prosecution.

[3] We also note that the remedy for a new trial is, well, a new trial, not the reduction of a conviction.

STATE OF MICHIGAN

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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 13, 2007
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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v NANCY ANN SEAMAN, Defendant-Appellee.	No. 265572 Oakland Circuit Court LC No. 2004-196916-FC

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

FORT HOOD, P.J. (*dissenting in part*).

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316, and was sentenced to life imprisonment. Defendant filed a motion for new trial, and the trial court implicitly denied the motion, but reduced her conviction to second-degree murder, MCL 750.317.[1] In Docket No. 260816, defendant appeals her conviction as of right, and we affirm. In Docket No. 265572, the prosecutor appeals as of right from the trial court's decision to reduce the conviction to second-degree murder, and the majority reverses and remands for reinstatement of the first-degree murder conviction. I respectfully dissent from the majority's decision to reinstate the first-degree murder conviction and would conclude that the trial court's reduction decision was not an abuse of discretion.

[1] The trial court held resentencing in abeyance in light of the prosecutor's representation that an appeal would occur.

I. Background Facts

Defendant's conviction arises from the hatchet killing of her husband. Although the couple had been married for years and had two grown sons, the marriage had been deteriorating for some time, and defendant was preparing to leave the marriage by purchasing a condominium. On May 10, 2004, defendant, a schoolteacher, was preparing to leave for work when her husband wanted to have a discussion. Defendant testified that she had been the victim of domestic violence by her husband for many years, but did not let others know of the extent of the abuse that she had suffered. That day, she stated that defendant prevented her from leaving through the front door, and he pursued her into the garage where she grabbed a hatchet from the top of a generator and began flinging it at her husband to stop his attack with a small kitchen knife. Defendant could not recall specifics of how she handled the hatchet or the amount of times that she swung at her husband. When defendant could still feel her husband on her leg, she found the kitchen knife on the floor of the garage and began to stab at her husband with the knife. Defendant did not telephone the authorities or family members, but proceeded to work, then purchased cleaning materials, wrapped her husband's body, and cleaned the garage. Police ultimately found the husband's body in the back of defendant's car. She testified that she was leaving to turn herself into police when the body was found.

The prosecutor's theory of the case was that defendant planned the killing beforehand. The married couple was having a dispute about the performance of chores around the home. Despite the fact that no one was maintaining the lawn, defendant went to a local hardware store and purchased a hatchet. The prosecutor's theory was that the hatchet was not purchased to perform yard work, but reflected defendant's plan to kill her husband. Following the husband's disappearance for a couple of days, defendant made various misrepresentations. When family, friends, and the police inquired about the victim's whereabouts, defendant asserted that he had taken off to live a life with a new family. The prosecutor's theory prevailed upon the jury, and defendant was convicted of first-degree murder.

II. Docket No. 260816

A. Great Weight of the Evidence Challenge

Defendant first alleges that the verdict was against the great weight of the evidence. We disagree. The lower court's ruling on a motion for a new trial based on the allegation that the verdict is against the great weight of the evidence is reviewed for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). When addressing a claim challenging the great weight of the evidence, a judge may not repudiate the jury verdict because he disbelieves the testimony of witnesses for the prevailing party. *People v Lemmon*, 456 Mich 625, 636; 576 NW2d 129 (1998).

To convict a defendant of first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*. at 370-371.

Proof of the elements may be satisfied by circumstantial evidence and reasonable inferences drawn from the evidence. *Id*. at 371. "Premeditation is an essential element of first-degree, premeditated murder." *People v Plummer*, 229 Mich App 293, 299-300; 581 NW2d 753 (1998). A specific time requirement is not imposed, but rather a sufficient time must elapse to allow the defendant to take a "second look." *Id*. at 300. In *Plummer*, this Court extensively discussed the premeditation requirement:

> 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. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991). 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. *People v Conklin*, 118 Mich App 90, 94; 324 NW2d 537 (1982).
>
> A pause between the initial homicidal intent and the ultimate act may, in the appropriate circumstances, be sufficient for premeditation and deliberation. See *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). However, the Legislature's use of the words "willful," "deliberate," and "premeditated" in the first-degree murder statute indicates its intent to require as an element of that offense substantially more reflection on and comprehension of the nature of the act than the mere amount of thought necessary to form the intent to kill. As the Supreme Court has stated, "when a homicide occurs during a sudden affray … it would be 'a perversion of terms to apply the term deliberate to any act which is done on a sudden impulse.'" *Tilley, supra* at 44-45, quoting *Nye v People*, 35 Mich 16, 18 (1876). To speak of premeditation and deliberation being instantaneous, or taking no appreciable time, destroys the statutory distinction between first- and second-degree murder. See *Morrin, supra* [*People v Morrin*, 31 Mich App 301; 187 NW2d 434 (1971)] at 329; Lafave & Scott, Criminal Law (2d ed), § 7.7, p 643.
>
> When the evidence establishes a fight and then a killing, there must be a showing of "a thought process undisturbed by hot blood" in order to establish first-degree, premeditated murder. *Morrin, supra* at 329-330. The critical inquiry is not only whether the defendant had the time to premeditate, but also whether he had the *capacity* to do so. "Without such evidence, the sequence of events is as consistent with an unpremeditated killing – following hard on the outset of the argument – as it is with a premeditated killing after an interval during which there was an opportunity for cool-headed reflection." *People v Gill*, 43 Mich App 598, 606-607; 204 NW2d 669 (1972). [*Plummer, supra* at 300-302 (emphasis in original).]

Some time span between the initial homicidal intent and the ultimate action is necessary to establish the premeditation and deliberation requirement of first-degree murder. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). "[A] defendant's attempt to conceal the killing can be used as evidence of premeditation." *Id*.

Lawful self-defense, founded upon necessity, will excuse a defendant from an otherwise intentional homicide. *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002). The killing of another in self-defense constitutes justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that deadly force is necessary to prevent such harm to himself. *Id*. at 127. To establish lawful self-defense, the circumstances, as they appeared to the defendant, must result in the reasonable belief that the defendant was in danger of death or serious bodily harm. *People v Green*, 113 Mich App 699, 704-705; 318 NW2d 547 (1982). The test to determine whether a defendant acted in lawful self-defense involves three elements: (1) the defendant had an honest and reasonable belief that he was in danger; (2) the degree of danger that was feared was serious bodily harm or death; and (3) the action was taken was immediately necessary and involved only the amount of force necessary to defend one's self. CJI2d 7.15; *People v Heflin*, 434 Mich 482, 502-503, 508-509; 456 NW2d 10 (1990). The defendant need not testify to warrant an instruction for self-defense provided there is other evidence in the case to support the theory. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978).

To determine whether the defendant feared for her safety, the jury must consider the circumstances as they appeared to the defendant at the time, not as they actually existed. *People v Perez*, 66 Mich App 685, 692; 239 NW2d 432 (1976). A defendant is not entitled to use any more force than is necessary to defend herself. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). When the defendant is the aggressor, the defense is unavailable unless the defendant withdraws from any further encounter with the victim. *Id*. at 323. The killing must be the only escape from death or great bodily harm under the circumstances. *People v Godsey*, 54 Mich App 316, 318; 220 NW2d 801 (1974). Generally, a person must retreat if it is safely possible to do so before he may utilize deadly force to repel the attack. *People v Mroue*, 111 Mich App 759, 765; 315 NW2d 192 (1981). However, there is no duty to retreat from a sudden, violent attack, no duty to retreat from a sudden affray or chance medley, and no duty to retreat from one's own dwelling. *Riddle, supra* at 128-134. The duty to retreat does not apply when both person's have a right to be in the dwelling house. *Mroue, supra*. Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993); *People v Bell*, 155 Mich App 408, 414; 399 NW2d 542 (1986).

First, defendant submits that the jury verdict was against the great weight of the evidence when it was established that the hatchet was purchased for the sole purpose of performing yard work and was not purchased with the intent to kill as reflected by the open purchase with a credit card. Defendant further posits that a hatchet was unnecessary because there were knives in the marital home, and defendant could have killed her husband in his sleep if she had, in fact, premeditated the killing. The testimony presented by defendant at trial revealed that she was an organized planner and began to gather materials to perform yard work. She testified that the marital home needed to be sold prior to foreclosure and yard work needed to be completed. When she found the hatchet in the garage was dull, she proceeded to a hardware store to purchase a new one at approximately 7:30 p.m. on a Sunday evening. Defendant testified that she placed the hatchet in the garage on top of the generator where she had gathered her other gardening tools.

However, in contradiction of the testimony presented by defendant, her son Jeff Seaman testified that his parents were in a dispute regarding the performance of chores at home. Consequently, no one was maintaining the upkeep on the marital home. He testified that yard work had not been performed for a long period of time, estimating up to a year and a half. The yard had not been maintained, and garbage was piling up in the garage because defendant and her husband refused to take out the trash. The credibility of the testimony by the witnesses presented an issue for the trier of fact, and this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. See *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). All conflicts in the evidence are resolved in favor of the prosecution. *Id*. The credibility of defendant's assertion for her night purchase and the placement of the hatchet were submitted to the jury, and the jury nonetheless convicted defendant. Additionally, the fact that there were other means or simpler ways of killing another human being does not absolve defendant of criminal liability. The prosecutor is not required to disprove all theories of a defendant's innocence. *People v Gravedoni*, 172 Mich App 195, 197; 431 NW2d 221 (1988). Accordingly, the prosecutor was not required to address whether there were other, more convenient methods or times available to defendant.

Defendant next alleges that the jury verdict was against the great weight of the evidence because post homicide actions do not constitute evidence of premeditation and deliberation. Specifically, defendant submits that the purchase of cleaning materials and the return of the hatchet do not constitute evidence of premeditation. However, Michigan case law provides that the facts and circumstances surrounding the crime, including actions before and after the crime, can demonstrate evidence of premeditation. *Plummer, supra*. Attempts to conceal the crime afterward may also be considered as evidence of premeditation. *Gonzalez, supra*. While it could be argued that the return of the hatchet and the purchase of the cleaning materials were consistent with defendant's belief that she could return everything to "normal," one could also argue that those efforts were designed to conceal the crime. The defense presents the argument in isolation and ignores other evidence such as defendant's representation to family members, friends, and the police that her husband had run off to start a new life with a new family, although his body was in the garage. The jury was presented with two diametrically opposed versions of events, *Lemmon, supra*, and all conflicts in the evidence are resolved in favor of the prosecution. *Terry, supra*. Based on the laws of this state, the jury was permitted to utilize post homicidal actions in determining the propriety of the criminal charge and any subsequent conviction.

Defendant next submits that the verdict was against the great weight of the evidence because the testimony by the husband's friends and defendant's impartial co-workers indicated that she was a battered woman and that her husband was becoming more volatile. Defendant cites to the objective testimony from five of the husband's friends and six co-workers that corroborated defendant's battered spouse theory. However, the number of witnesses presented in favor of a particular position is not dispositive. The number of witnesses presented does not signify that the verdict is against the great weight of the evidence, rather the credibility and the quality of the testimony presents an issue for the jury. *People v Morlock*, 233 Mich 284, 287; 206 NW 538 (1925). Furthermore, defense expert, Dr. Lenore Walker, testified that battered woman syndrome alone did not excuse murder. Rather, she opined that a victim of spousal

abuse needed to fiend off a legitimate attack to invoke self-defense. Accordingly, defendant's reliance on the number of witnesses that testified on her behalf does not establish that the verdict was against the great weight of the evidence. *Morlock, supra*.[2]

Lastly, with regard to the challenge based on the great weight of the evidence, defendant asserts that the pathology report was "consistent with factual innocence." In discussing this issue, defendant alleges that no examination of credibility is required to review this issue and that the jury was given incomplete information. However, defendant fails to delineate the deficiencies that make the report incomplete. It is not for this Court to discover and rationalize the basis for one's claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Accordingly, this claim of error does not provide defendant with relief.

B. Claims of Prosecutorial Misconduct

Defendant next alleges that the prosecution engaged in multiple acts of misconduct such that a new trial is required. We disagree. The duty of the prosecutor is to seek justice and not merely convict a defendant. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Watson, supra* at 586. A claim of prosecutorial misconduct is reviewed on a case by case basis, with the remarks examined in context to assess whether the defendant was denied a fair and impartial trial. *Id*. If a defendant fails to object to a claim of prosecutorial misconduct, the claim is reviewed for plain error that was outcome determinative. *Id*. Error requiring reversal will not be found where the prejudicial effect of the prosecutor's comments could have been remedied by a timely instruction. *Id*. The prosecutor's 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 Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Watson, supra* at 588.

The first claim of prosecutorial misconduct involves the prosecutor's presentation of the hatchet with a cover on it before the jury during rebuttal argument. At that time, the prosecutor stated:

> One last thought for you before I ask you to convict her of what she deserves. This is the hatchet that she stole, People's Exhibit 31. Notice something on it? A blade cover, a blade cover. You have to take the blade cover off to cause the injury that she did. Please don't give her any breaks. Convict her of one count of first-degree murder.

[2] Within the discussion section of this issue, defense counsel asserts that the extensive bruising on defendant's body at the police station also indicated that she was a battered spouse. Although the examining nurse did record various bruises on the arms and legs of defendant at various ages and stages, she could not definitively opine that the bruising was the result of an assault. The nurse testified that she did not know if the bruising was from an assault, did not know if defendant tended to bruise easily, and did not know if the bruising was the result of cleaning a garage or moving a body.

Although the prosecutor is entitled to argue the evidence and reasonable inferences from the evidence, *Brown, supra*, there was never any evidence that the hatchet purchased by defendant had a cover. There was no testimony from the hardware store employees that the hatchet at issue was purchased with a cover despite the fact that defendant's movements throughout the store and purchase were captured on videotape. Further, the prosecutor also concluded that the hatchet with a cover could not have caused the injuries inflicted. However, there is no record that the prosecutor ever inquired of the medical examiner whether the same degree of physical injury could have been imposed with or without a hatchet cover. Therefore, the prosecutor made a statement of fact that was not supported by the evidence.[3] *Watson, supra*.

The question becomes whether defendant was denied a fair and impartial trial as a result of the prosecutorial statement. *Watson, supra*. At the trial court level, the defense raised the question of the propriety of the statement in light of the evidence presented at trial. The trial court acknowledged that there was no evidence presented during trial to reflect the purchase and use of the hatchet with a blade cover and provided a curative instruction to the jury as follows:

> If you remember yesterday during the closing arguments there was a reference made in rebuttal argument by the assistant prosecutor – she showed you a hatchet with a cover on it.
>
> There was no evidence in this case at all that any hatchet had any covers on them. And I told you before you're only to consider the evidence that was introduced in this trial and nothing else.
>
> So you're only to consider the Exhibits that were introduced.

Jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and instructions are presumed to cure most errors, *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, the trial court provided the jury with the standard instruction that statements of counsel are not evidence, but also provided an additional supplemental instruction expressly directed to the hatchet cover statement made in rebuttal argument by the prosecutor. In light of the trial court's instructions to the jury and the rules governing instructional error, a new trial is not required. *Graves, supra*.

Next, defendant challenges the prosecutor's questioning and argument regarding defendant's expert witnesses and their testimony. Specifically, when the prosecutor began her

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[3] On appeal, the prosecution alleges that the argument was reasonable because the parties stipulated to admission of the hatchet, and the hatchet that was admitted had a cover on it. However, the hatchet was admitted as an exhibit, and the blade cover would have acted to prevent injury to anyone handling the exhibit. The hardware store employees, the medical examiner, and defendant testified in this case, and no one was questioned regarding any cover that may or may not have been on the hatchet. The purchase of the hatchet and defendant's movement throughout the store were recorded on video, and there was no corroboration that the hatchet purchased by defendant had a cover. Appellate counsel's explanation is not supported by the record.

cross-examination of Dr. Walker, the trial prosecutor stated, "As head of the Domestic Violence Section of the Oakland County Prosecutor's Office, I've heard a lot about you." Defendant asserts that this comment by the prosecutor imparted herself as an expert in the proceedings and placed the prestige of the prosecutor's office in issue. We disagree. The propriety of a prosecutor's remark is contingent on all of the facts of the case. *People v Rodriquez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A prosecutor may not impart special knowledge of the veracity of witnesses and may not improperly invoke the prestige of the office. *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004).

Review of the record reveals that the defense placed into evidence the qualifications of Dr. Walker and her extensive body of work. Dr. Walker's educational background included both a master's degree and a doctorate. She was credited with coining the phrase "battered woman syndrome." Her published books were deemed the authority on battered woman syndrome. Dr. Walker explained that it was initially believed that women involved in abusive relationships were masochistic or provoked the abuse and did not want to leave the situation. She explained that the contrary was true, and the syndrome was based on the theory of learned helplessness. Dr. Walker testified that she had appeared before Congress, worked with the United Nations to create domestic violence institutes at affiliates around the world, and had received the most coveted award in psychology as the Distinguished Psychologist of the Year. She also explained that while she was licensed to practice in three states, she held "diplomat" status in clinical and family psychology, which was the equivalent of being board certified as a doctor. Dr. Walker explained that licensing boards recognize the status of "diplomat," and she could move to almost every state and practice. Finally, Dr. Walker testified that she was a frequent presence in the media, appearing on both talk and news related television shows.

In light of this expansive delineation of Dr. Walker's qualifications and experience, it is logical that the head of the prosecutor's domestic violence unit would be familiar with Dr. Walker and her work.[4] It is implausible that the statement "head of the domestic violence unit" would cause the jury to disregard the extensive training and qualifications of Dr. Walker. The statement alone did not impart that the prosecutor herself was an expert. Prosecutorial comments must be read as a whole and evaluated in light of the defense arguments and the relationship they bear to the evidence at trial. *Brown*, *supra*. The statement made by the trial prosecutor did not divulge any special knowledge or off the record experience that would have caused the jury to disregard the qualifications of Dr. Walker and the high regard in which she was held by various entities. In light of the facts of the case, the remarks were not improper and did not impart special knowledge or invoke the prestige of the office. *Matuszak, supra*; *Rodriquez, supra*.

With regard to Dr. Abramsky, the defense submits that the prosecutor injected herself as an expert and erroneously questioned him regarding his treatment before a different judge.

[4] Dr. Walker testified that most abused wives try to hide the abuse from family and friends and will recant allegations of abuse. Under the circumstances, it seems logical that the prosecutor would be familiar with battered woman syndrome, and knowledge of the syndrome would be necessary for prosecutors to understand victims who are reluctant to press charges against the abuser.

There is no record evidence that the prosecutor injected herself or the prestige of the office into evidence while questioning Dr. Abramsky. The record does reveal that the prosecutor questioned Dr. Abramsky regarding a case in which he testified before a different judge and was banned from the courtroom. The prosecutor did not challenge Dr. Abramsky's qualifications and expertise during voir dire, and this line of questioning would have been more appropriate as such a challenge. However, Dr. Abramsky explained that the incident arose from his preparation of an interim report. There was no indication that the other case had any bearing on his qualifications as an expert or had any bearing on his ability to render an opinion about battered woman syndrome. Under the circumstances, the questioning may have been more appropriate for voir dire, but did not impart special knowledge or expertise on the part of the prosecution. Therefore, this claim of error does not provide defendant with any relief. *Brown, supra*.[5]

Next, defendant alleges that the prosecutor improperly shifted the burden of proof when it questioned why defense witnesses had not come forward or did not respond to inquiries from the prosecutor's investigator. We disagree. "Arguments regarding the weight and credibility of the witnesses and evidence presented by defendant do not shift the burden to the defendant to prove his innocence, but rather question the reliability of the testimony and evidence presented." *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995). A prosecutor may comment on a defendant's failure to report a crime under circumstances when it would have been natural to do so. *People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005).

Under the circumstances of this case, we cannot conclude that this issue has any merit. *Rodriquez, supra*. The prosecutor inquired why witnesses did not return telephone calls from the prosecutor's investigator. The responses provided by the witnesses varied. It was reported that some never received a message to return a call. To some witnesses, it was unclear if the caller was an investigator or a member of the press seeking information. Some witnesses indicated that they had previously spoken to police. On cross-examination, the defense established that they never prevented their witnesses from speaking to police and never asked the witnesses to ignore calls from the prosecutor's office. Perhaps of greater importance, there was never any indication that these witnesses had information, i.e., were res gestae witnesses, such that they should come forward. These witnesses merely provided underlying foundation testimony regarding the marital couple's relationship. This testimony had no direct bearing on the charged crime itself because the only surviving person who was aware of the circumstances that transpired in the garage was defendant. The prosecutor did not improperly shift the burden of proof with this line of questioning, but was exploring whether the witnesses were biased in favor of defendant. *Fields, supra*.

[5] Defendant also alleged that the trial prosecutor improperly questioned her about conversations with her attorney. The brief in support of the issue only addresses the concern in three sentences. Review of the record reveals that the allegations are not substantiated by the page references. Further, authority in support of the issue is not provided. A party may not merely announce an issue and expect this Court to rationalize the basis for the claim, but instead may consider the issue abandoned. *Watson, supra*.

Next, defendant alleges that the prosecutor improperly questioned her about her religious beliefs. We disagree. MCL 600.1436 provides that no witness may be questioned regarding her opinion on religion. The statute's underlying purpose is to prevent prejudice by jurors against a witness because of personal disagreement with the religious views of that witness. *People v Umerska*, 94 Mich App 799, 806; 289 NW2d 858 (1980). However, a violation of the statute will not be found when the subject of the defendant's religious beliefs is first introduced by defense counsel. *Id*. When a defendant introduces the matter of her religious beliefs into evidence, the prosecutor's questioning is proper. *Id*. at 807. "Counsel may not have the benefit of responses to questions asked by him which are designed to show the favorable side of defendant's beliefs but deny the people the right to ask any questions at all on the testimony introduced." *Id*. at 808. In light of defendant's initial introduction of her religion into evidence at trial, the prosecutor was entitled to explore the area and such action does not constitute misconduct. *Id*.[6]

C. Claims of Ineffective Assistance of Counsel

Defendant raises various claims of error with regard to the representation by trial counsel. To establish a claim of ineffective assistance of counsel, defendant bears the burden of establishing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To demonstrate prejudice, defendant must establish a reasonable probability that the outcome of the trial would have been different but for trial counsel's error. *Id*. at 6. A reviewing court does not assess competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

The first challenge to trial counsel's performance asserts that it was erroneous to fail to admit evidence that an assistant medical examiner had performed the autopsy and discovered post mortem stab wounds. We note that this claimed error is based on an attachment to the brief on appeal that is not contained within the lower court record, and the evidence is not authenticated. That is, there is no accompanying affidavit from an assistant medical examiner to indicate that he had performed the autopsy and reached the conclusion contained within the document. In contradiction of appellate counsel's assertion, the prosecution contends that the document was prepared by a police officer who observed the autopsy.

Irrespective of the factual dispute presented by the parties surrounding this document, our review is limited to the record established in the trial court, and a party may not expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

[6] Defendant challenged additional statements during closing argument by the prosecutor as improper. However, in light of the trial court's instruction to the jury that statements made in closing are not evidence and the presumption that jurors follow their instructions, this claim does not provide defendant with entitlement to relief.

Moreover, the medical examiner testified at trial that he could reach generalities surrounding the manner of death, but he could not definitively state when death occurred. He testified that the blows with the hatchet occurred first to overpower the victim, the side blows may not have rendered the victim unconscious, but the blows to the center of the head would have rendered the victim unconscious. After these incapacitating injuries were inflicted, a knife was used to stab the victim. Even if the victim was not dead when the knife was used, he was unconscious. On this record, the results of the autopsy do not provide a basis to conclude that trial counsel was ineffective.[7]

Defendant next alleges that trial counsel was ineffective for failing to introduce the drugs that the victim ingested and the interaction between the drugs. It was alleged that a pharmacy expert should have been retained. This issue does not have merit. Although the victim may have been prescribed multiple medications, there is no indication that he had indeed taken them at the time of his death. Without evidence that the victim took medication as prescribed, a pharmacy expert would have shed little light on the victim's condition and the drug interactions. Although defendant asserts that an evidentiary hearing is required to evaluate this issue, without a basic foundation to indicate that the drugs were ingested, a hearing is unnecessary.

Next, defendant alleges that defense trial witness Richard Cox contacted appellate counsel and stated that the prosecutor's witnesses lied about the victim's financial condition. Specifically, it was alleged that the victim's business was failing, and the victim had lost most of his fortune in bad investments. It was also asserted that the victim's large medical bills were covered by defendant's medical insurance. Therefore, a new trial is warranted.

Review of the record reveals that this contention is without merit. The prosecution witnesses did not testify that defendant had a successful business or testify regarding his investments. Rather, Jeff Seaman testified that there were substantial marital assets, but conceded that the assets were not liquid. He testified that the marital home was sold for a substantial amount and only had an outstanding mortgage of $60,000. He further testified that the victim had a retirement account containing $100,000 and other investments. Jeff Seaman also testified that the victim owned at least ten cars with some valued at over $100,000. The prosecution's witnesses did not comment regarding the success of the business or stock losses.[8] The challenge raised by the defense is not substantiated by the record.

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[7] It was also asserted that trial counsel was ineffective for failing to introduce a picture of a kitchen knife. However, there is no authentication that this photograph was available during trial. *Powell, supra*. Moreover, there is no affidavit from defendant to authenticate the knife as part of the set that was used in the killing and later discarded. In any event, the failure to admit the evidence may have been a matter of trial strategy. The medical examiner may have examined the knife and concluded that they did not cause the puncture wounds, providing a basis to impeach defendant's testimony or statements to police. Therefore, this claim fails.

[8] We also note that Greg Seaman testified that the victim was running out of money and had made poor investments. In light of the above, the purported testimony by Richard Cox would have been cumulative to information presented to the jury by another witness.

Next, defendant alleges that trial counsel was ineffective for failing to properly handle the expert witnesses. Specifically, defendant alleges that the preliminary testing of defendant for battered woman syndrome should have been conducted by Dr. Walker instead of Dr. Abramsky, counsel did not make defendant available to Dr. Walker, and counsel failed to have Dr. Walker testify regarding post homicidal behavior. We note that, prior to trial, defendant was housed in the Oakland County jail. Arguably, defendant was available during permissible jail hours to meet with Dr. Walker. Moreover, trial counsel's performance is not to be examined through hindsight. *Rice, supra.*

With regard to trial counsel's questioning of the experts, Michigan case law limits expert testimony on battered woman syndrome. In *People v Christel*, 449 Mich 578, 580; 537 NW2d 194 (1994), the Supreme Court held:

> Generally, battered woman syndrome is relevant and helpful when needed to explain a complainant's actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse. If relevant and helpful, testimony regarding specific behavior is helpful. However, the expert may not opine whether the complainant is a battered woman, may not testify that defendant was a batterer or guilty of the instant charge, and may not comment on the complainant's truthfulness. Moreover, the trial court, when appropriate, may preclude expert testimony when the probative value of such testimony is substantially outweighed by the danger of unfair prejudice.

In light of the restrictions placed on expert testimony regarding battered woman syndrome, defendant's allegations are insufficient to overcome the presumption that trial counsel was effective.[9] *Tommolino, supra*. Decisions regarding the type of evidence to present and the decision to call and question witnesses are matters of trial strategy that will not be second guessed by this Court. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). In the present case, it was irrelevant who conducted the testing because the experts were not permitted to testify regarding the specifics of the testing and that as a result of the testing that it was concluded that defendant was a battered woman.[10]

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[9] In support of this claim of error, appellate counsel submitted a letter from Dr. Walker. Therein, the expert set forth what testimony she would have liked to present at trial. However, defense counsel fails to delineate what portions of letter would have been admissible at trial in light of the restrictions imposed by *Christel, supra*. It is not the function of this Court to discover and rationalize the basis for a claim. *Watson, supra*.

[10] The last claim involving ineffective assistance of counsel alleges that defense counsel failed to object to prosecutorial misconduct. However, we concluded that there was only one instance of prosecutorial misconduct in the present case that did not warrant reversal. With regard to the hatchet cover comment, defense counsel strenuously objected on the record and obtained a curative instruction. However, defense counsel further opined on the record that he did not believe that the instruction would sufficiently cure any error. Defendant failed to overcome the heavy burden of establishing that counsel's performance fell below an objective standard of

(continued…)

D. Claims of Instructional Error

Defendant alleges that the jury instructions were incomplete, confusing, and misleading. We disagree. A party must object or request a given jury instruction to preserve the issue for review. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defense counsel's express approval of a given jury instruction constitutes a waiver that extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Even if somewhat imperfect, instructional error will not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*.

Defendant alleges that the trial court failed to read the first degree murder instruction, CJI 2d 16.1, in its entirety to the jury because paragraph six was omitted.[11] We disagree. As an initial matter, we note that this issue was waived because of the failure to object to the instructions as read. *Carter, supra*. Moreover, the instructions are not to be examined piecemeal but as a whole. *Kurr, supra*. Review of the instructions as a whole reveals that the jury was well aware that defendant alleged that the killing was justified, excused, or occurred under circumstances that reduce the act to a lesser crime. There was no dispute that defendant had caused the death of her husband. The entire crux of the defense of the case involved defendant's assertion that she had acted in response to a threat posed by her husband and extensive injuries inflicted upon him were the product of being subjected to years of spousal abuse. Under the circumstances of this case, the claim of instructional error is without merit.[12]

E. Motion for Mistrial

The defense requested a mistrial after the prosecutor asserted that the cover from the hatchet was removed before the infliction of any injury. The trial court denied the request for a mistrial, but provided a supplemental curative instruction. On appeal, defendant opines that the trial court erred by failing to grant the motion. A trial court's decision on a motion for a mistrial is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). The motion for a mistrial should only be granted "for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. at 195. Under the circumstances, we cannot conclude that the trial court's denial of the motion constituted an abuse of discretion. The trial court crafted an instruction that addressed the

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reasonableness and that the outcome would have been different. *Hoag, supra*.

[11] Specifically, paragraph 6 of the instructions is bracketed to reflect that it is not a mandatory provision and provides: "Fifth, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime."

[12] Although we need not address the claim of error, we note that the use notes and commentary accompanying the portion of the instruction at issue indicate that it is bracketed to reflect that it is not mandatory. Additionally, while the language may become mandatory based on the type of defense raised, the appropriate language need not be given at that time. Review of the record reveals that the entire self defense instruction was read to the jury. Reviewing the instructions in their entirety, this challenge does not entitle defendant to relief. *Kurr, supra*.

prosecutor's statement and noted that there was no evidence introduced at trial. The jury was told to disregard the argument. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *Bauder, supra*.

F. Cumulative Effect of Errors

The cumulative effect of a number of errors may amount to error requiring reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). The cumulative effect of errors can create sufficient prejudice such that reversal is warranted where the prejudice of any one error would not. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). Where multiple errors are not present, reversal is unwarranted. *Id*. Because multiple errors were not present, we cannot conclude that the issues raised in defendant's appeal as of right provide her with any form of relief.

III. Docket No. 265572

In Docket No. 265572, I respectfully dissent. I would affirm the trial court's reduction of defendant's conviction to second-degree murder, MCL 750.316, because I cannot conclude that the trial court's decision fell outside the range of principled outcomes.

In *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998), the Supreme Court noted that a trial court's decision to grant or deny a motion for a new trial was entrusted to the discretion of the trial court, and the decision would not be disturbed on appeal absent an abuse of that discretion. An abuse of discretion occurs when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003). Recent case law concludes that at the core of the abuse of discretion standard is the acknowledgment that there will be circumstances in which there will be no single correct outcome, but rather there can be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion, and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Id*.

The prosecutor contends that the trial court violated the dictates of *Lemmon* by overstepping the boundaries separating the roles of judge and jury and improvidently acting as the thirteenth juror. The trial court engaged in an extensive colloquy with the prosecutor when entertaining oral argument regarding defendant's motion for a new trial. During that exchange, the trial court commented on the credibility of various witnesses. However, the trial court acknowledged that its commentary regarding credibility was merely responsive to the statements made by the prosecutor. The trial court clearly knew that its role was limited. Ultimately, the trial court concluded that premeditation and deliberation had not been established by stating:

> Counsel, I've read everything. I wasn't going to rule today, but I think I am.
>
> There are two problems that I see with this case. One is the lack of premeditation, and the other one is lack of deliberation.

> And I have to sentence a woman to life in prison when I'm not sure that the prosecution has established either one of those.
>
> Now, the jury could disregard the self defense, and they obviously did. But they can't use that to establish the elements of the offense. And this Court feels that premeditation and deliberation was not established. And I'm going to reduce the case to second degree murder, and I'm going to have her back here for resentencing.

Even if the trial court referenced credibility of the witnesses in discussing the merits of the motion for a new trial with the prosecutor, the final holding did not incorporate the discussion with the prosecutor or reference credibility. An abuse of discretion standard is a high standard that is difficult to overcome. See *People v Ackerman*, 257 Mich App 434, 437-438; 669 NW2d 818 (2003). This Court must find more than a difference of opinion with the trial court before we may conclude that the trial court abused its discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Under these circumstances, I do not conclude that the trial court's decision constituted an abuse of discretion when it fell within the range of principled outcomes.

I also cannot conclude that an abuse of discretion occurred for reasons not raised by the parties. I recognize that limitations are placed on the presentation of evidence regarding battered woman or spouse syndrome. *Christel, supra*. Experts may present information regarding the nature of the syndrome itself. *Id*. Although testing is performed to determine whether there is a legitimate reason for raising the syndrome as a defense at trial, it is not presented to the jury.[13] Thus, the information regarding battered woman syndrome is presented to the jury in a vacuum. That is, jurors are not provided with any instructions with regard to how to incorporate the syndrome into the deliberation process.

More importantly, the nature of the syndrome itself seemingly conflicts with legal principles addressing self-defense. Although lawful self-defense will operate to excuse an otherwise unjustifiable homicide, the trier of fact is instructed that the force utilized may not exceed the force necessary to fiend off a legitimate attack. CJI 2d 16.1. This instruction does not address and even ignores a trait typically associated with battered woman syndrome. Specifically, a battered spouse may have lived with the abuser for such an extensive period of time that when action is taken to leave the abusive situation, the rebellion leads to "overkill" or the unnecessary use of excessive force or violence.

In the present case, the injuries inflicted upon the victim husband far exceeded what was required to escape from any alleged violence purportedly initiated by the victim. The large number of hatchet injuries would have incapacitated the alleged aggressor. Nonetheless, defendant picked up a kitchen knife and inflicted approximately twenty more stab wounds. The application of the standard self-defense instruction, without more elaboration or incorporation of battered woman syndrome, does not address this "overkill" characteristic associated with abused women. Therefore, it is questionable whether the presentation of expert testimony in an overkill

[13] I recognize that it is the province of the Legislature to make any such change.

situation can be taken into consideration when the self-defense instruction is to the contrary. Based on the above, I cannot conclude that the trial court abused its discretion by reducing the conviction to second-degree murder when the decision was within the range of principled outcomes. *Babcock, supra*. In Docket No. 265572, I would affirm.

/s/ Karen M. Fort Hood