

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
July 14, 2011

v

JAMES LEONARD LANIER,  
  
Defendant-Appellant.

No. 295314  
Kalamazoo Circuit Court  
LC No. 2009-000194-FC

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Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant James Lanier appeals as of right his jury conviction of first-degree premeditated murder<sup>1</sup> and possession of a firearm during the commission of a felony (felony firearm).<sup>2</sup> The trial court sentenced Lanier to life in prison for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm.

**I. FACTS**

Lanier's convictions arise from the January 15, 2009 shooting death of Bob Atkinson, the president of Precision Windows in Portage, Michigan. There were no eyewitnesses to the shooting and no physical evidence directly linking Lanier to the offense. However, the evidence showed that Atkinson frequently hired Lanier to install windows for Precision Windows on a subcontractor basis, but that Atkinson had become dissatisfied with Lanier's work performance because of customer complaints and Lanier's moodiness and unreliability, which Atkinson believed was attributable to Lanier's drug use. The prosecutor also presented evidence that Lanier had converted a customer check for \$771 approximately ten days before Atkinson was killed and that Atkinson intended to report Lanier to the police. The evidence also showed that Atkinson had planned on meeting with Lanier on the morning of January 15, to confront him about the converted check and to terminate his services.

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<sup>1</sup> MCL 750.316(1)(a).

<sup>2</sup> MCL 750.227b.

The prosecution's theory at trial was that Atkinson was shot at his office sometime between 10:32 a.m., when he spoke to a delivery person on the telephone, and approximately 10:45 a.m., when his body was discovered in the office. There were no signs of a disturbance or struggle in the office, and Atkinson's wallet was in his jacket pocket. The prosecution presented evidence of Lanier's cellphone records, gas station surveillance videos, and credit union transactions to show that Lanier was in the vicinity of the crime scene during the relevant timeframe. The prosecution also presented evidence that a member of the Outriders Motorcycle Club, of which Lanier was a member, owned the gun that was used to kill Atkinson and that Lanier knew where the gun was stored in the Outriders' clubhouse.

After police arrested Lanier, Michael Ketcham, an inmate at the Kalamazoo County Jail where Lanier was incarcerated, confessed to killing Atkinson. However, the prosecutor presented evidence to show that Ketcham had agreed to falsely confess to the crime in exchange for favors from Lanier. The evidence also showed that, before Ketcham actually confessed, Lanier informed a friend that he had heard that someone else confessed to the crime. Despite the evidence that Ketcham's confession was false, Ketcham testified at trial that he killed Atkinson. The parties later stipulated that Ketcham's trial confession was false.

The prosecution also presented evidence that Lanier told another jail inmate, John Devould-Cohn, that he shot his boss "execution-style" because his boss owed him money and "had it coming."

Lanier relied on an alibi defense at trial and claimed that he was with another Outriders member, Jesse Staley, at the Outriders' clubhouse in Kalamazoo on the morning of Atkinson's death. The jury found him guilty of first-degree premeditated murder and possession of a firearm during the commission of a felony. Lanier now appeals.

## II. DIRECTED VERDICT

### A. STANDARD OF REVIEW

Lanier argues that the trial court erred in denying his motion for a directed verdict at trial. This Court reviews *de novo* a trial court's decision on a motion for a directed verdict.<sup>3</sup> On appeal, this Court should determine whether the evidence that the prosecution presented, viewed in a light most favorable to the prosecution, could persuade a rational fact-finder that the essential elements of the offense were proven beyond a reasonable doubt.<sup>4</sup>

### B. ANALYSIS

To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally and willfully killed the victim with premeditation and deliberation.<sup>5</sup>

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<sup>3</sup> *People v Evans*, 288 Mich App 410, 415; 794 NW2d 848 (2010).

<sup>4</sup> *Id.* at 415-416.

<sup>5</sup> *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002).

Lanier does not dispute that the prosecution presented sufficient evidence to enable the jury to find that someone killed Atkinson with premeditation and deliberation, but he contends that the evidence was insufficient to prove his identity as the killer. Identity is an essential element of every offense that may be shown by circumstantial evidence.<sup>6</sup>

Although there was no physical evidence directly linking Lanier to the killing and there were no eyewitnesses to the shooting, there was sufficient circumstantial evidence of Lanier's identity as the perpetrator. Atkinson told Larry Stinson, a Precision Windows employee, that he had planned to meet with Lanier at the Precision Windows office on the morning of January 15, 2009. Atkinson was prepared to confront Lanier over his conversion of a customer's check. The evidence showed that someone killed Atkinson between 10:32 a.m. and approximately 10:45 a.m. Cellphone records showed that Lanier's cellphone was used in the vicinity of the Precision Windows office during this timeframe. Surveillance videos from nearby gas stations also showed a vehicle matching the description of Lanier's pickup truck in the vicinity of the Precision Windows office at approximately 10:40 a.m. Additionally, Lanier initially tried to conceal from Portage Police Department Detective Matthew Wolfe that he had been at the Precision Windows office on January 15.

The police determined that Karl Baragar, a member of the Outriders Motorcycle Club, owned the gun that was used to kill Atkinson. The prosecutor presented evidence that Lanier knew that Baragar kept the gun in a locker at the Outriders' clubhouse and that, after the offense, Lanier approached Baragar and requested that he remove the gun from the clubhouse. Baragar subsequently observed that the gun was not in the same condition as it had been when he last saw it at the clubhouse. The gun had been cleaned, and three bullets were missing.

Evidence also showed that while Lanier was incarcerated in the Kalamazoo County Jail, he admitted to an inmate that he had killed his boss "execution style" and that he conspired with another inmate to persuade the inmate to falsely confess to the crime in exchange for various favors. Notably, this Court has held that a defendant's attempt to procure perjured testimony may be considered as evidence of guilt, as is "fabrication . . . of evidence by bribery[.]"<sup>7</sup>

Viewed in a light most favorable to the prosecution, the evidence showed that Lanier had a motive to kill Atkinson, he was in the vicinity of the crime during the relevant timeframe, he had access to the murder weapon, he attempted to fabricate evidence to shift suspicion away from himself, and he admitted that he had shot his boss "execution style." The evidence in this case clearly rose above mere reasonable speculation of guilt.<sup>8</sup> We conclude that the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that Lanier was the person who killed Atkinson with premeditation and deliberation.

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<sup>6</sup> *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 641 (2010); *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967).

<sup>7</sup> *People v Ranes*, 58 Mich App 268, 272; 227 NW2d 312 (1975) (citations omitted).

<sup>8</sup> See *Newman v Metrish*, 543 F3d 793, 796 (CA 6, 2008).

### III. CHALLENGES TO DETECTIVE WOLFE'S TESTIMONY

#### A. STANDARD OF REVIEW

Lanier raises numerous claims of error associated with Detective Matthew Wolfe's testimony. He argues that both the prosecutor and Detective Wolfe improperly vouched for other witnesses' credibility and improperly offered their opinions on the guilt or innocence of Lanier and other possible suspects. Lanier also contends that Detective Wolfe improperly invaded the province of the jury by offering his own conclusions of the significance of evidence instead of leaving these matters to the jury to resolve.

Lanier's arguments involve claims of evidentiary error and prosecutorial misconduct. To preserve a claim that the trial court improperly admitted evidence, a defendant must raise a timely objection or motion to strike, stating the specific ground of the objection if the specific ground is not apparent from the context.<sup>9</sup> Similarly, a defendant must preserve claims of prosecutorial misconduct by contemporaneous objection and request for a curative instruction.<sup>10</sup> In this case, Lanier objected to some, but not all, of the matters that he now raises on appeal.

This Court reviews a preserved claim of evidentiary error for an abuse of discretion.<sup>11</sup> A trial court abuses its discretion when its decision falls outside the range of principled outcomes.<sup>12</sup> This Court reviews *de novo* preserved claims of prosecutorial misconduct, viewing the prosecutor's conduct in context to determine whether the defendant was denied a fair and impartial trial.<sup>13</sup> But this Court reviews *unpreserved* claims of evidentiary error and prosecutorial misconduct for plain error affecting the defendant's substantial rights.<sup>14</sup> The defendant must show that (1) there was an error, (2) the error was plain, and (3) the plain error affected the defendant's substantial rights.<sup>15</sup> Even if these requirements are satisfied, relief is appropriate "only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence."<sup>16</sup>

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<sup>9</sup> MRE 103(a); *People v Moorer*, 262 Mich App 64, 67-68; 683 NW2d 736 (2004).

<sup>10</sup> *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

<sup>11</sup> *People v Gipson*, 287 Mich App 261, 262; 787 NW2d 126 (2010).

<sup>12</sup> *Id.*

<sup>13</sup> *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010).

<sup>14</sup> *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Erickson*, 288 Mich App 192, 199; 793 NW2d 120 (2010) (prosecutorial misconduct); *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005) (evidentiary claims).

<sup>15</sup> *Carines*, 460 Mich at 763.

<sup>16</sup> *Id.* (quotation marks and citations omitted).

## B. PICKUP TRUCK TESTIMONY

Lanier argues that Detective Wolfe improperly testified that a pickup truck depicted on gas station surveillance videos, which resembled Lanier's vehicle, was ruled out as actually being Lanier's truck because its location did not correspond with Lanier's cellphone records. Specifically, Detective Wolfe testified that "once we [the police] got the cellphone records we were satisfied that it was not his vehicle." Lanier characterizes Detective Wolfe's testimony as improperly "vouch[ing] for the accuracy of his own conclusions and that he 'had the guilty man.'"

As Lanier points out, an investigative detective is not permitted to vouch for a defendant's guilt by suggesting or implying that the jury should suspend its own powers of critical analysis and judgment in deference to the police.<sup>17</sup> However, contrary to Lanier's argument, Detective Wolfe did not offer an opinion on Lanier's guilt or innocence, or vouch for the accuracy of his own conclusions. He merely explained why he ruled out a certain vehicle as Lanier's vehicle: because it did not comport with Lanier's cellphone records with respect to Lanier's location at the time the calls were placed. This was not an opinion regarding Lanier's guilt, and the jury was free to determine on its own whether Detective Wolfe's reasoning was sound. Moreover, Detective Wolfe acknowledged that Lanier's vehicle was not "one of a kind" and that the driver of the truck could not be seen on the video. Detective Wolfe's testimony did not invade the jury's province of weighing all the evidence. Accordingly, we conclude that there was no plain error in the admission of Detective Wolfe's testimony in this regard.

## C. INVESTIGATION OF KETCHAM'S CONFESSION

Lanier challenges Detective Wolfe's testimony regarding his investigation of Ketcham's false confession and his conclusion that Lanier attempted to bribe Ketcham to confess. Lanier contends that Detective Wolfe improperly invaded the province of the jury by "laying out" the "scheme" between Lanier and Ketcham instead of allowing the jury to draw its own conclusions regarding whether there was an established relationship between the two men. Lanier also complains that the prosecutor improperly used words such as "scheme" or "conspiracy" to refer to Lanier's alleged dealings with Ketcham.

Police officers are permitted to offer opinion testimony related to topics with which they have personal knowledge or experience, which does not rely on scientific, technical, or specialized knowledge.<sup>18</sup> Police testimony can be characterized as lay or expert.<sup>19</sup> If the officer is testifying to his perceptions, then his testimony is lay testimony; if the officer is testifying based on his training and experience, he is offering expert testimony.<sup>20</sup> MRE 602 permits a lay witness to testify on matters for which he has personal knowledge. In addition, MRE 701

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<sup>17</sup> *People v Humphreys*, 24 Mich App 411, 419; 180 NW2d 328 (1970).

<sup>18</sup> *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988).

<sup>19</sup> *People v Dobek*, 274 Mich App 58, 77-78; 732 NW2d 546 (2007).

<sup>20</sup> *Id.*

provides that lay opinion testimony is admissible if it is rationally based on the perceptions of the witness and is helpful to the determination of a fact in issue.

Here, Detective Wolfe's testimony was based partly on evidence that the prosecutor had already introduced regarding Ketcham's false confession and partly on Detective Wolfe's personal knowledge of statements that Lanier and Ketcham had made during monitored telephone calls and visits. Detective Wolfe's testimony about the plan and his characterization of it as a "scheme" was rationally based on his knowledge and observations that Lanier had told others that a "stranger" confessed to the crime when, in fact, the stranger was Lanier's acquaintance and Lanier prematurely revealed his knowledge of the confession before Ketcham actually made it. Significantly, all of the facts underlying Detective Wolfe's interpretation of Lanier's interactions with Ketcham were presented to the jury, thereby enabling the jurors to independently assess the validity of Detective Wolfe's interpretation. Accordingly, there was no error, plain or otherwise.

#### D. VOUCHING FOR BARAGAR AND STALEY

Lanier argues that Detective Wolfe improperly vouched for the innocence and credibility of Outriders members, Karl Baragar and Jesse Staley, by testifying, over Lanier's objection, that he did not discover any evidence linking Staley or Baragar to Atkinson's shooting death. Lanier further contends that the prosecutor engaged in misconduct by eliciting this testimony.

A prosecutor may not vouch for the credibility of a witness by implying some special knowledge that the witness is testifying truthfully.<sup>21</sup> Here, however, the prosecutor did not elicit, nor did Detective Wolfe suggest, the existence of any special information, unknown to the jury, that Staley and Baragar were not lying.

A detective may not offer his personal opinion that there was insufficient evidence to justify any other suspect's arrest, thereby suggesting to a jury that a defendant was guilty and all other suspects were innocent.<sup>22</sup> However, Detective Wolfe did not affirmatively state that Staley and Baragar were innocent; he only stated that his investigation did not turn up any evidence linking them to the crime. Detective Wolfe's testimony that his investigation did not reveal any evidence implicating other possible suspects did not constitute improper vouching for their innocence.

Lanier also challenges Detective Wolfe's testimony that Baragar was cooperative after an immunity agreement was in place. Lanier did not object to this testimony at trial and admission of the testimony did not constitute plain error. Detective Wolfe permissibly testified that he had not acquired any information indicating that Baragar had been untruthful or uncooperative. Such testimony did not constitute improper vouching.

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<sup>21</sup> *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009).

<sup>22</sup> *Cooper v Sowders*, 837 F2d 284, 287 (CA 6, 1988).

Similarly, Lanier argues that Detective Wolfe was improperly permitted to offer his affirmative conclusion that only Lanier could have killed Atkinson, because there was no evidence linking other suspects to Atkinson. We find no merit to this issue. Detective Wolfe was questioned at trial regarding other potential suspects. He explained what evidence he discovered during his investigation and his reasons for eliminating other persons as possible suspects. Detective Wolfe's testimony that his investigation did not reveal evidence implicating other potential suspects was not an affirmative statement that Lanier was the only person who could have committed the crime, but rather a factual account of the results of his investigation. The testimony was not improper vouching because it did not suggest that Detective Wolfe had any special knowledge other than the information derived from his investigation, which was presented to the jury. Accordingly, there was no error.

#### E. CELLPHONE TESTIMONY

Lanier argues that Detective Wolfe improperly affirmed that Lanier's cellphone was near the crime scene during the relevant timeframe. At trial, an AT&T representative testified concerning the process by which cellphone towers transmit cellphone calls, how that information is recorded, and how that information can be used to determine a cellphone's approximate location at the time of use. Detective Wolfe testified at trial, without objection from Lanier, that he placed calls from Lanier's cellphone from various locations and compared the data to the records of Lanier's cellphone use on the morning of January 15, 2009. We disagree with Lanier's unpreserved argument that Detective Wolfe's testimony was improper expert testimony regarding telephone communications and was both unnecessary and duplicative of the testimony of the AT&T representative. Whereas the AT&T representative interpreted Lanier's cellphone records to correlate the location of his cellphone at the time of the cellphone transmissions, Detective Wolfe's testimony merely recounted his perceptions of his own experiments. His testimony did not depend on specialized knowledge. There was no plain error.

#### F. TESTIMONY REGARDING LANIER'S RELATIONSHIP WITH SHYLA STALEY

Lanier challenges Detective Wolfe's testimony regarding the nature of Lanier's relationship with Shyla Staley, Jesse Staley's sister, which was used to negate a defense suggestion that Lanier may not have been a party to telephone calls sent and received from his cellphone near the time of the offense. The evidence showed that Lanier's cellphone was used during an exchange of calls with Shyla Staley during the timeframe of the offense and, as previously indicated, Lanier's cellphone usage was part of the basis for establishing Lanier's proximity to the crime scene during that timeframe.

There was evidence that Jesse Staley frequently used Lanier's cellphone to call Shyla Staley, and Jesse Staley testified at trial that he had used Lanier's cellphone to exchange telephone calls with his sister on the date of the offense. However, the prosecution attempted to show at trial that Lanier was involved in a relationship with Shyla Staley and, therefore, had reason to call her himself, thus countering the suggestion that Jesse Staley, and not Lanier, was the only person who could have made the phone calls during the timeframe of the offense. Lanier now argues that the prosecutor improperly used hearsay to establish through Detective Wolfe the nature of Lanier's relationship with Shyla Staley.

Hearsay is “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>23</sup> “Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule.”<sup>24</sup> In addition, MRE 602 precludes a witness from testifying on a matter “unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Detective Wolfe’s testimony regarding the nature of Lanier’s relationship with Shyla Staley was not based on his personal knowledge, but on assertions made by others. Thus, the testimony was arguably inadmissible under MRE 602 and 802.

Yet, the prosecutor asserts that Lanier opened the door to Detective Wolfe’s testimony regarding the number of telephone calls between Lanier’s cellphone and Shyla Staley’s cellphone by eliciting Detective Wolfe’s testimony that he did not learn from either Shyla Staley or Jesse Staley who used Lanier’s cellphone during those calls. The prosecutor maintains that he was therefore entitled to elicit testimony regarding the information that Detective Wolfe discovered in his investigation regarding who was using Lanier’s cellphone during the calls with Shyla Staley, and what reasons Lanier had to talk to Shyla Staley.

In *People v Verburg*,<sup>25</sup> this Court rejected a defendant’s argument that the trial court improperly allowed the victim’s sister to give hearsay testimony of the victim’s statements. The Court held that the defendant opened the door to the testimony by asking the victim, “What exactly did you tell Jessica that day?” with the apparent intent of eliciting inconsistencies.<sup>26</sup> This Court reasoned that “[t]he defense, through its cross-examination of all the witnesses, but especially the victim, made the issue of what the victim told his sister material.”<sup>27</sup> According to this Court, “the jury was entitled to hear that evidence in the light of the material positions of the parties.”<sup>28</sup>

Here, Lanier elicited Detective Wolfe’s testimony that he had *not* received information that Lanier, and not Jesse Staley, was the other party to the calls between Lanier’s and Shyla Staley’s cellphones. Lanier was clearly drawing on Detective Wolfe’s investigation, especially his interviews with witnesses, to establish his theory that Jesse Staley, and not Lanier, was the person communicating with Shyla Staley via cellphone while the phone was in the vicinity of the crime scene. Accordingly, Lanier opened the door to further questioning regarding information that Detective Wolfe obtained on this subject, and the testimony was admissible.

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<sup>23</sup> MRE 801(c); see also *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

<sup>24</sup> *Gursky*, 486 Mich at 606, citing MRE 802.

<sup>25</sup> *People v Verburg*, 170 Mich App 490, 498; 430 NW2d 775 (1988).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 498-499.

<sup>28</sup> *Id.* at 499.



## G. TESTIMONY REGARDING IMMUNITY AGREEMENT

Lanier argues that the prosecutor improperly vouched for Baragar's credibility by having Detective Wolfe read Baragar's immunity agreement to the jury. We disagree. Mere reference to an agreement that contains a promise to testify truthfully against a defendant is not improper.<sup>29</sup>

The agreement here explained the terms and conditions of immunity, without declaring Baragar's innocence. And neither the prosecutor nor Detective Wolfe suggested that the government had some special knowledge that Baragar was testifying truthfully. Although the agreement referred to the prosecutor's "belief that Mr. Baragar was not involved in the murder as either a principal or an aider or abetter," it also provided that if he did "participate in or plan the murder or provide the weapon . . . this entire agreement is null and void." Thus, the letter reflects the prosecutor's uncertainty over Baragar's involvement and unwillingness to affirmatively concede that Baragar was entirely innocent. At most, the letter implied that there was no known evidence implicating Baragar, but that implication was consistent with the evidence presented at trial and is not the same as vouching for his innocence.

Lanier raises a similar unpreserved argument that Detective Wolfe impermissibly vouched for Jesse Staley's innocence and credibility. Detective Wolfe's statement that "he [Jesse Staley] had nothing to hide" relates to Detective Wolfe's prior statement that Jesse Staley had indicated that he had no need for immunity. Viewed in context, the testimony refers to Jesse Staley's belief in his own innocence, not Detective Wolfe's opinion of Jesse Staley's innocence. Accordingly, there was no plain error.

## H. TESTIMONY REGARDING LACK OF PHYSICAL EVIDENCE

We find no error in Detective Wolfe's testimony that he did not have any reason to believe that the absence of gunshot residue evidence, bloodstain evidence, and fingerprint evidence was significant or exculpatory. The testimony was responsive to defense counsel's cross-examination of Detective Wolfe on this subject. Further, although Lanier correctly observes that Detective Wolfe was not qualified as an expert in these fields, the prosecutor established an adequate foundation for Detective Wolfe's limited testimony that many different variables can affect the outcome of these forensic tests. Accordingly, there was no error.

## I. TESTIMONY REGARDING LANIER'S Demeanor DURING INTERVIEW

Lanier challenges Detective Wolfe's testimony regarding Lanier's nervous demeanor during his police interview. Lanier argues that the prosecutor's line of questioning was "vouching in a different guise" by asserting that guilty suspects are often nervous, thereby implying that Lanier was guilty. To the extent Lanier argues that Detective Wolfe was insinuating that he had special knowledge, not available to the jury, to assess Lanier's guilt from his demeanor, we disagree. Detective Wolfe did not testify to any conclusions regarding Lanier's demeanor. Further, the interview was videotaped and played for the jury at trial, so the

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<sup>29</sup> *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

jury had the opportunity to draw its own conclusions regarding Lanier's demeanor. Accordingly, we find no error.

#### J. PROSECUTORIAL MISCONDUCT RELATED TO DETECTIVE WOLFE'S TESTIMONY

To the extent Lanier argues that the prosecutor committed misconduct by eliciting improper testimony from Detective Wolfe, it is well-established that misconduct cannot be based on a prosecutor's good-faith efforts to admit evidence.<sup>30</sup>

### IV. OTHER-ACTS EVIDENCE

#### A. STANDARD OF REVIEW

Lanier challenges the trial court's admission of evidence of his methamphetamine use and poor job performance. Lanier contends that the evidence was inadmissible under MRE 404(b)(1) and that the trial court erred in denying his motion in limine to exclude the evidence. This Court reviews the trial court's admission of similar acts evidence under MRE 404(b) for an abuse of discretion.<sup>31</sup>

#### B. LEGAL PRINCIPLES

MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material[.]" In *People v Marlin*,<sup>32</sup> the Michigan Supreme Court explained:

To admit evidence under MRE 404(b), the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and is *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character. The prosecution thus bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity. Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly

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<sup>30</sup> *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

<sup>31</sup> See *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

<sup>32</sup> *People v Marlin*, 487 Mich 609, 615; 790 NW2d 607 (2010).

admit evidence that may nonetheless also give rise to an inference about the defendant's character. Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice. . . ." MRE 403. Finally, upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes.

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>33</sup>

### C. ANALYSIS

In this case, evidence that Lanier used methamphetamine and performed poorly during window installation jobs for Precision Windows was relevant to Lanier's business relationship with Atkinson. This evidence was therefore probative of the issue of motive. The evidence showed that Atkinson had become dissatisfied with Lanier because of his poor work performance and unreliability, which Atkinson believed was attributable to Lanier's suspected drug use. The evidence showed that Atkinson intended to meet with Lanier to confront him about these matters on the morning that Atkinson was killed inside his office. Thus, the evidence was relevant to explain Atkinson's purpose in meeting with Lanier on January 15, and to show a possible motive for Lanier to act out against Atkinson.

Lanier's methamphetamine use was also relevant to explain Lanier's reaction to the confrontation with Atkinson. At trial, witnesses Danielle Larkin and Danny Grim testified that regular methamphetamine users often feel paranoid, not only when they are high on the drug, but also when they are between highs. Thus, evidence of Lanier's methamphetamine use was relevant to show its possible influence on Lanier's perception of the conflict with Atkinson and was probative of why Lanier may have reacted so severely by shooting Atkinson. Accordingly, the evidence was relevant for proper noncharacter purposes.

Further, because the evidence was important to explaining Atkinson's purposes for confronting Lanier and to show a possible motive for Lanier to shoot Atkinson, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Accordingly, we conclude that the trial court did not abuse its discretion in allowing the evidence.

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<sup>33</sup> MRE 401.

## V. TESTIMONY REGARDING EFFECTS OF METHAMPHETAMINE USE

### A. STANDARD OF REVIEW

Lanier argues that the trial court erroneously allowed Danielle Larkin to testify regarding the effects of methamphetamine on a user. Lanier argues that the testimony was improper because Larkin was not qualified as an expert and because the testimony violated the trial court's pretrial ruling excluding expert testimony on the effects of methamphetamine. This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence.<sup>34</sup>

### B. LEGAL PRINCIPLES

MRE 602 provides:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of 703, relating to opinion testimony by expert witnesses.

MRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

And MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

### C. ANALYSIS

We conclude that MRE 602 and MRE 701 permitted Larkin's testimony and, contrary to Lanier's contentions, Larkin did not offer expert testimony subject to MRE 702.

Larkin testified that she had regularly used methamphetamine for five years, and that it caused her to feel paranoid and hyperactive. She was prone to overreact to events. She stated

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<sup>34</sup> *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

that these effects occurred not only when she was under the immediate influence of the drug, but also between highs. She also explained that these effects are not recognized during periods of active use and that the extent of these effects is noticed only after becoming clean and sober. She also stated that the duration of a drug high depends on the quality and quantity of the drug, and the extent of regular use.

Larkin's testimony was within the parameters of MRE 602 and 701 because it was based on her personal experiences using methamphetamine and associating with other methamphetamine users. Larkin's testimony regarding the effects on other users was very general, and she acknowledged that individual circumstances may vary. Significantly, Larkin did not offer an opinion on Lanier's use, and she admitted that she did not know how often Lanier used methamphetamine. She also did not offer an opinion on how Lanier's methamphetamine use related to his criminal activity. The trial court's decision to allow the evidence pursuant to MRE 602 and 701 was within the range of reasonable outcomes, so the trial court did not abuse its discretion.

Although Larkin was not qualified as an expert under MRE 702, there was no need to do so because her testimony was not based on facts beyond her personal knowledge and experiences. Her testimony was not the equivalent of expert testimony, nor did the prosecutor present it as such. Therefore, the testimony did not violate the trial court's pretrial order excluding expert testimony on the effects of methamphetamine. Accordingly, there was no error.

## VI. TESTIMONY REGARDING MICHAEL KETCHAM'S STATEMENTS

### A. STANDARD OF REVIEW

Lanier argues that the trial court erred in allowing Michael Griffis and Detective Wolfe to testify regarding Ketcham's hearsay statements related to his relationship with Lanier. The trial court concluded that the statements were not hearsay because they were the statements of a co-conspirator. Nevertheless, Lanier contends that the prosecutor failed to establish the existence of a conspiracy with independent evidence and, therefore, Ketcham's statements were not admissible under MRE 801(d)(2)(E). This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence.<sup>35</sup>

### B. LEGAL PRINCIPLES

MRE 801(d)(2)(E) provides that a statement is not hearsay if the statement is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." To qualify under this exclusion, the proponent of the statements must establish three things. First, the proponent must establish by a preponderance of the evidence that a conspiracy existed through independent

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<sup>35</sup> *Starr*, 457 Mich at 494.

evidence.<sup>36</sup> Second, the proponent also must establish that the statement was made in the course of the conspiracy.<sup>37</sup> This requirement is construed broadly, and statements that prompt the listener, who need not be one of the conspirators, to respond in a way that promotes or facilitates the accomplishment of the illegal objective will suffice.<sup>38</sup> Third, the proponent must establish that the statement furthered the conspiracy.<sup>39</sup>

A conspiracy exists when two or more persons combine with the intent to accomplish an illegal objective.<sup>40</sup> It is not necessary to offer direct proof of the conspiracy; it is sufficient if the parties' circumstances and conduct establish an agreement in fact.<sup>41</sup> Circumstantial evidence and inference may be used to establish the existence of the conspiracy.<sup>42</sup>

### C. ANALYSIS

The prosecutor established through Deputy David Johnson and Detective Wolfe that Lanier told his father that he was jailed in the same cell block as Ketcham, who was the nephew of an Outriders member and an acquaintance or friend. Subsequently, Lanier attempted to distance himself from Ketcham, referring to him as a stranger who had confessed to Atkinson's murder, although Lanier knew Ketcham and mentioned his confession *before* Ketcham actually made the confession. When Lanier's girlfriend, Lisa Bridgeman, referred to Ketcham as "Wart's nephew" in a telephone call, Lanier redirected her by replying that he had never met Ketcham. These circumstances were sufficient independent evidence that Lanier and Ketcham had conspired for Ketcham to falsely confess in exchange for material favors from Lanier. Accordingly, Ketcham's statements were not hearsay.

## VII. GRIFFIS'S OPINION TESTIMONY

### A. STANDARD OF REVIEW

Lanier argues that Griffis gave improper opinion testimony of Lanier's guilt. This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence.<sup>43</sup>

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<sup>36</sup> *People v Martin*, 271 Mich App 280, 316-317; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

<sup>37</sup> *Id.* at 317.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Starr*, 457 Mich at 494.

## B. LEGAL PRINCIPLES

“[A] witness cannot express an opinion on the defendant’s guilt or innocence of the charged offense.”<sup>44</sup> However, “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”<sup>45</sup>

## C. ANALYSIS

Here, defense counsel asked Griffis whether Lanier denied killing Atkinson, apparently to undermine the inference that Lanier’s attempt to bribe Ketcham reflected Lanier’s consciousness of his own guilt. Griffis stated that Lanier “never said I didn’t kill him; he just said I’m not guilty.” Lanier opened the door to the prosecutor’s redirect examination question concerning whether Lanier appeared to be sincere when he stated, “I’m not guilty.” Griffis’s testimony on redirect examination did not embrace the ultimate question of Lanier’s guilt or innocence, but rather was an opinion of Lanier’s sincerity at the time he made the statement. The opinion was rationally based on Griffis’s perception of Lanier and, therefore, was proper under MRE 701.

## VIII. PROSECUTORIAL MISCONDUCT

### A. STANDARD OF REVIEW

Lanier raises several claims of prosecutorial misconduct. Because Lanier did not object to the prosecutor’s alleged misconduct at trial, these claims are not preserved. Accordingly, our review is limited to plain error affecting Lanier’s substantial rights.<sup>46</sup>

### B. STATEMENT REGARDING ALIBI WITNESS

Lanier argues that it was improper for the prosecutor to state in his rebuttal argument that Lanier’s attempt to shift blame to Jesse Staley was incongruous with his pretrial notice that Jesse Staley would testify as an alibi witness. Lanier argues that it was improper to refer to the notice of alibi because it was not in evidence. A prosecutor is not allowed to argue facts not in evidence.<sup>47</sup> But prosecutors are free to argue the evidence and all reasonable inferences arising therefrom as it relates to their theory of the case.<sup>48</sup>

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<sup>44</sup> *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985).

<sup>45</sup> MRE 704.

<sup>46</sup> *Ericksen*, 288 Mich App at 199.

<sup>47</sup> *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

<sup>48</sup> *Unger*, 278 Mich App at 236.

Although the alibi notice was not itself introduced into evidence, Jesse Staley's alibi testimony was in evidence. Lanier relied on Jesse Staley's testimony to establish that he was at the Outriders' clubhouse in Kalamazoo at the time Atkinson was killed in Portage, but then also suggested that it was Jesse Staley who used Lanier's cellphone in Portage during the timeframe of the offense. The prosecutor's remarks that Lanier was attempting to shift blame to the alibi witness were reasonably based on the evidence. Accordingly, there was no plain error affecting Lanier's substantial rights.

### C. DENIGRATION OF DEFENSE COUNSEL

Lanier argues that the prosecutor's use of the terms "ludicrous," "most preposterous," and "ridiculous" when referring to defense counsel's attempt to shift blame to Jesse Staley improperly denigrated defense counsel and attacked counsel's veracity. A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury.<sup>49</sup> The jury's focus must remain on the evidence, and not be shifted to the attorneys' personalities.<sup>50</sup>

Here, the prosecutor's argument did not involve a personal attack on defense counsel's credibility or suggest that counsel was intentionally attempting to mislead the jury. The prosecutor was underscoring the inconsistency of Lanier's reliance on Jesse Staley to provide an alibi defense while also attempting to shift blame to Staley. The focus of the argument was the alleged inconsistency in Lanier's position, not his or counsel's personality.

### D. PRESENTATION OF EXCLUDED EVIDENCE

Lanier contends that the prosecutor committed misconduct by playing a recording for the jury during rebuttal argument, after the trial court had excluded it from evidence. The recording that the trial court excluded was one in which Lanier stated, "I'm falsely accused" and then laughed at his own denial of guilt. However, the recording that was played during closing argument was one in which Lanier laughed after stating, "These phone calls are recorded for my innocence." Because the recording that was played during closing argument was not the same recording that had been excluded, there is no merit to this issue.

### E. SHIFTING THE BURDEN OF PROOF

Lanier accuses the prosecutor of shifting the burden of proof by suggesting that Lanier was obligated to prove that another individual committed the homicide. "A defendant in a criminal case has a constitutional right against compelled self-incrimination and may elect to rely on the 'presumption of innocence.'"<sup>51</sup> "A prosecutor may not imply in closing argument that the

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<sup>49</sup> *Id.*; *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984).

<sup>50</sup> See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

<sup>51</sup> *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995).



defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof.”<sup>52</sup> A prosecutor also may not comment on the defendant’s failure to present evidence, because such an argument is an attempt to shift the burden of proof.<sup>53</sup> But “a prosecutor’s argument that inculpatory evidence is undisputed does not constitute improper comment,”<sup>54</sup> and when a defendant advances an alternate theory or alibi, the prosecutor does not improperly shift the burden of proof by pointing out weaknesses in the defendant’s case.<sup>55</sup> The prosecutor may comment that evidence against the defendant is uncontroverted or undisputed, even if the defendant is the only individual who might have contradicted the evidence.<sup>56</sup>

Here, Lanier suggested that there was reasonable doubt concerning his guilt because other individuals, namely Haney, Stinson, Baragar, Ketcham, and Staley were all potential suspects. The prosecutor did not shift the burden of proof by arguing that there was no evidence to support Lanier’s theory that these other individuals may have committed the charged crime.

#### F. COMMENT ON LANIER’S SILENCE

Lanier argues that the prosecutor improperly commented on his invocation of his right to remain silent. This issue is based on the prosecutor’s following remarks made during his opening statement:

Now he hasn’t come out and literally admitted the crime—at least not to law enforcement. He’s too smart and too self-protective for that. But there’s absolutely no doubt that he did it.

\* \* \*

At one point during his police interview when confronted with the illogic of his story and his numerous lies, he was asked what he had to say in light of all the evidence against him.

And he said, well, prove it; prove I did it.

\* \* \*

One point he slips; and he says, I don’t think I killed him. But that’s about as close as he’ll come to allow himself to actually outright confess.

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<sup>52</sup> *Fyda*, 288 Mich App at 463-464.

<sup>53</sup> *Id.* at 463.

<sup>54</sup> *Id.*

<sup>55</sup> *Fields*, 450 Mich at 111-112.

<sup>56</sup> *Id.* at 115.

“A prosecutor may not comment on a defendant’s silence in the face of accusation, but may comment on silence that occurred before any police contact.”<sup>57</sup> “A defendant’s constitutional right to remain silent is not violated by the prosecutor’s comment on his silence before custodial interrogation and before *Miranda*<sup>58</sup> warnings have been given.”<sup>59</sup> The Constitution does not protect a defendant’s right to silence unless he asserted that right during a custodial interrogation situation, or after his *Miranda* rights were given.<sup>60</sup>

Detective Wolfe testified that Lanier agreed to a police request for an interview. Lanier was not under arrest at the time, and he was free to leave the police station. Further, he did not assert his right to remain silent. The prosecutor’s remarks did not refer to Lanier’s silence, but rather to the significance and effect of statements that Lanier made during his police interview. Accordingly, there was no plain error.

### G. REFERENCE TO RELIGION

We reject Lanier’s argument that the prosecutor improperly interjected religion and Lanier’s religiosity when he asked Detective Wolfe if Lanier would have been interested in theology books that were in a package that was discovered missing from a customer’s garage on the day that Lanier had access to the garage while installing windows on the customer’s home.

MRE 610 provides:

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness’ credibility is impaired or enhanced.

And MCL 600.1436 provides:

No person may be deemed incompetent as a witness, in any court, matter or proceeding, on account of his opinions on the subject of religion. No witness may be questioned in relation to his opinions on religion, either before or after he is sworn.

Here, there was no statutory violation, because neither Lanier nor any other witness was questioned in relation to an opinion on religion. There also was no violation of MRE 610. It is apparent from the context of the questioning that the prosecutor was not attempting to draw a correlation between Lanier’s religiosity and credibility. Rather, Lanier had elicited from Detective Wolfe that a package of theology books that was missing from a customer’s garage was not discovered during a search of Lanier’s residence. The apparent purpose of the

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<sup>57</sup> *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005).

<sup>58</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 LEd2d 694 (1966).

<sup>59</sup> *McGhee*, 268 Mich App at 634.

<sup>60</sup> *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992).

prosecutor's question on redirect examination was to show that Lanier may not have kept the books because they had no particular value to him given their esoteric content. Although the trial court sustained Lanier's objection on the basis of speculation, because the prosecutor did not attempt to elicit the evidence for a purpose that MRE 610 prohibits, the prosecutor did not act in bad faith<sup>61</sup> and, accordingly, there was no misconduct.

## IX. INSTRUCTIONAL ERROR

Lanier argues that the trial court erroneously instructed the jury that his statements, if proven false, could be considered as circumstantial evidence of guilt. Lanier contends that the instruction was not applicable because his allegedly false statements, which concerned his timeline of activities on the morning of the offense and his claim that Atkinson had authorized him to alter a customer check, did not relate to an essential element of the charged offense. This Court reviews de novo claims of instructional error involving questions of law.<sup>62</sup> But this Court reviews for an abuse of discretion a trial court's determination that an instruction applies to the facts of the case.<sup>63</sup>

Contrary to Lanier's argument, this Court's decisions in *People v Wolford*<sup>64</sup> and *People v Dandron*<sup>65</sup> indicate that a false statement instruction is permissible where the defendant's utterance of a false statement is probative of his guilt. The principal issue in this case was the identity of the killer, and Lanier's whereabouts on the morning of Atkinson's death—especially with respect to his presence at Precision Windows—was relevant to his identity as the killer. Further, Lanier's allegedly false statement that Atkinson permitted him to alter a customer check to make it payable to himself was relevant to the issue of motive. Accordingly, the trial court did not err by giving the instruction.

## X. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. STANDARD OF REVIEW

Lanier argues that reversal is required because he did not receive effective assistance of defense counsel at trial. Because Lanier did not raise this issue below in a motion for a new trial or request for a *Ginther*<sup>66</sup> hearing, our review is limited to errors apparent from the record.<sup>67</sup>

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<sup>61</sup> See *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

<sup>62</sup> *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

<sup>63</sup> *Id.*

<sup>64</sup> *People v Wolford*, 189 Mich App 478, 481-482; 473 NW2d 767 (1991).

<sup>65</sup> *People v Dandron*, 70 Mich App 439, 442; 245 NW2d 782 (1976).

<sup>66</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

<sup>67</sup> *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

## B. LEGAL PRINCIPLES

“To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel’s performance fell below objective standards of reasonableness and that, but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different.”<sup>68</sup>

## C. ANALYSIS

Lanier does not raise any specific claim of ineffectiveness, but rather argues that defense counsel was ineffective for failing to object to the witness testimonies and the prosecutor’s conduct previously discussed in this opinion. Because our analysis of the foregoing issues reveals that Lanier’s claims are without merit, Lanier’s ineffective assistance of counsel claim likewise cannot succeed.<sup>69</sup> Accordingly, we reject this claim of error.

## XI. CUMULATIVE ERROR

Lanier contends that the cumulative effect of the many errors that occurred in this case denied him a fair trial. “The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal.”<sup>70</sup> Reversal is not warranted unless the errors are consequential and denied the defendant a fair trial.<sup>71</sup> Because we conclude that no errors of consequence occurred at Lanier’s trial, we reject his argument that he is entitled to relief under a cumulative error theory.

We affirm.

/s/ David H. Sawyer  
/s/ William C. Whitbeck  
/s/ Donald S. Owens

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<sup>68</sup> *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

<sup>69</sup> *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

<sup>70</sup> *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

<sup>71</sup> *Id.*