STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 18, 2014
v	No. 309313 Ingham Circuit Court
PAUL EDWARD STRANG, Defendant-Appellant.	LC No. 10-000824-FC

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for two counts of felony murder, MCL 750.316,[1] one count of arson of a dwelling, MCL 750.72a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. This was his second trial, the first having resulted in a hung-jury mistrial. Defendant was sentenced to life in prison without the possibility of parole. Following his convictions, defendant's appellate counsel moved for a new trial based on the alleged ineffective assistance of defendant's trial counsel. After a *Ginther*[2] hearing, the trial court denied defendant's motion. Because defendant's trial counsel's performance did not fall below objective standards of reasonableness, and because any errors did not affect the outcome of the trial, we affirm.

This case arises from the deaths of William Beckett and his girlfriend, Monica Moreno. On August 8, 2009, police and firefighters responded to Beckett's home in Lansing, Michigan pursuant to a 911 call made by Kathy Scieszka. They found the home engulfed in flames and black smoke. Firefighters entered the home and found both Beckett and Moreno dead; Beckett was slumped against the wall next to the bathtub and Moreno lay on her back in the living room. There was a strong odor of gasoline on the bodies and inside the home. The bedroom appeared to have been ransacked and a gas can was found in the living room. An arson investigator Brad

[1] The jury found defendant guilty of both first-degree premeditated murder and felony murder of both victims. At sentencing, the trial court granted the prosecution's motion to vacate the convictions for first-degree premeditated murder to avoid any double jeopardy implications.

[2] See *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

Drury later testified that two fires were intentionally set in the home – one in the bedroom and one in the living room.

The Ingham County Medical Examiner, a forensic pathologist, testified that she performed autopsies on both Beckett and Moreno. She stated that Beckett had a bullet in his brain that had entered through his right temple. She further asserted that he had no soot in his airways and a low carbon monoxide level in his blood, facts that allowed her to opine that Beckett died before the fires started. She concluded that Moreno died from blunt force trauma to the head and smoke inhalation, and believed that the lacerations on the left side of Moreno's head could have been inflicted with the butt of a gun. Because Moreno had soot in her airways and a high level of carbon monoxide in her blood, the pathologist concluded that she had been alive, but unconscious, when the fires started.

Kathy Scieszka testified that she lived next door to Beckett and Moreno. On the afternoon of August 8, 2009, she heard glass break outside of her home, and, upon stepping outside, noticed smoke coming out of Beckett's home. She also saw a white male with "pretty short" dark hair protruding from under a backward baseball cap sitting in a silver or gray four-door Buick parked in Beckett's driveway. Scieszka claimed that she had seen the same vehicle at Beckett's home on other occasions. At trial, Scieszka was shown photographs of defendant's mother's Buick and stated that she had "no doubt" that it was the car she had seen in Beckett's driveway. She returned to her home but then decided to write down the Buick's license plate number. When she stepped back outside, the man in the Buick drove away "really fast," and thus Scieszka could not read the license plate. She returned to her home and called 911 at 12:43 p.m. At trial, Scieszka was asked whether defendant was the man she saw in the Buick that day: "I couldn't tell you for sure. He looks like the person that was in the car, but I couldn't tell you that for sure." She stated that defendant had the same build, hair color, and shoulders as the man she saw in the vehicle.

Suzanne Young testified that she lived two houses away from Beckett's home. She stated that, at around 12:40 p.m. on August 8, 2009, she saw a silver four-door vehicle squeal its tires and speed away from the home. She saw a single occupant – a white male approximately 25 to 30 years old with "light to light brown hair." When shown a photograph of defendant's mother's Buick, she testified that it was consistent with the car she had seen.

Brian Twiss, a friend of defendant's, testified that at 12:45 p.m. on August 8, 2009, defendant arrived at his home unannounced.[3] He asserted that defendant asked to use the bathroom and stayed in the home approximately five minutes. He saw no blood on defendant and did not smell gasoline on defendant. He also saw that defendant was driving a silver four-door Buick, which Twiss noticed because defendant usually drove a blue Pontiac G6. Shortly after he left the home, defendant called Twiss and asked him to check his driveway for oil from his G6. Twiss told defendant that he had not driven the G6 to his home; the two argued, and when Twiss would not acquiesce, defendant hung up.

[3] A detective testified that Twiss's home was located 0.97 miles, or a 2.5-minute drive, from the victims' home.

Investigators first contacted Twiss on September 3, 2009. Twiss called defendant, upset that he had put him in such a position. Twiss testified that defendant told him to deny that defendant had been at his home on August 8, 2009. Defendant began to cry, stating that he and his family members' lives were being threatened, leading Twiss to suspect that defendant was involved in Beckett and Moreno's deaths. During his first meeting with detectives, Twiss did not divulge that defendant had visited his home on the day of the murders. Twiss stated that he felt "horrible" and when he met with the detectives again on September 8, 2009, he told them everything he knew.

Jason Strang, defendant's brother, testified that, at the time of the murders, defendant shared a joint back account with their mother. Jason stated that, at approximately 9:00 a.m. on August 8, 2009, their mother drove to pick up defendant with the intention of going to the bank to remove his name from the account. However, the two never made it to the bank and Jason stated that their mother returned home by herself, angry. Jason testified that defendant came to their mother's home later that day from approximately 2:00 p.m. to 4:00 p.m. Once defendant left, defendant called his mother, who left in hurry for defendant's home, driving her Chevrolet HHR. Jason stated that their mother returned within an hour, driving her Buick, and immediately began to clean it out, something he had never seen her do before. At approximately 8:00 p.m. that evening, Jason drove their mother back to defendant's residence to pick up her HHR. When they entered the home, defendant pulled them into a bathroom and said, "No matter what you hear, don't tell anybody anything." Jason stated that he threw up his hands and left, but that his mother stayed behind to converse with defendant. Defendant's mother denied that this conversation occurred, denied that she intended to remove defendant from their joint bank account, and denied that defendant requested her to pick up the Buick on the day of the murders.

Investigators obtained surveillance footage from a local Shell station "either to or from the [crime] scene." The footage revealed a silver four-door Buick "that appeared . . . to be driving erratic" at 12:23 p.m. on the day of the murders. A forensic video analyst testified that the footage contained insufficient visible characteristics to determine whether the Buick matched that owned by defendant's mother. A Buick dealership employee testified that the Buick on the video was the same model as defendant's mother's, but could not conclude that they were the same vehicle.

Derek Emme of the Michigan State Police crime laboratory testified that he processed the crime scene at Beckett's home. He found a Ruger .22 caliber rifle with a broken stock on a living room couch near where Moreno's body had been found. It was stipulated that the Ruger was purchased in 2003 by Michael Renz. Renz's only apparent connection to defendant was that he leased a car from Sundance Chevrolet in 2006 and 2007, while defendant was employed there and served as Renz's "service advisor."

Emme also found three shell casings and two spent bullets in the living room. A Michigan State Police firearms expert determined that the three casing had been fired from the Ruger. The expert found a fired bullet in the couch and compared it to the bullet found in Beckett's brain. He determined that the two bullets were the same caliber and bore the same rifling characteristics, but were too deformed to be matched precisely. Emme also found a pair of work gloves on the living room floor. The gloves, which smelled like gasoline, were swabbed for DNA; a forensic scientist later testified that she found DNA from both defendant and Beckett

on the inside of the gloves, leading to her conclusion that both men had worn the gloves. Police also found evidence of drug dealing, including containers of marijuana and scales for weighing drugs. Construction workers replacing basement drywall later located $80,000 in cash.

The office manager of Sundance Chevrolet testified that defendant was employed as a service advisor for 12 to 13 years before he left in 2009. She stated that defendant was terminated after being caught submitting fraudulent warranty claims. She said defendant asked them not to call the police "because he was afraid people were going to kill him if they found out." Defendant implied that "people that he was getting drugs from or something were going to be after him." Miller claimed that defendant embezzled approximately $600,000 between 2006 and 2009.[4] The prosecution submitted financial records that demonstrated that defendant had essentially no available money by July 2009.

Defendant acknowledged that he had embezzled from Sundance, stating that he spent the money on alcohol and drugs. He acknowledged that he is an alcoholic and drug addict who became addicted to OxyContin after injuring his leg. He claimed that he last saw the victims two days before the murders.

Defendant testified that, on the day of the murders, he drove the Buick in the morning because his G6 was low on gas and tire pressure. He said he drove to purchase drugs from Jerry Maldonado on Gordon Street, which he stated was close to the victims' home. He claimed that, after visiting Maldonado, he drove to Twiss's home to deliver marijuana, a claim Twiss denied. He admitted calling Twiss after he left, but denied attempting to convince him that he had been driving the G6. He also denied that he drove the Buick past the Shell station.

Defendant denied killing the victims. He assumed that, on some other occasion, he had worn the gloves found in Beckett's home, that contained his DNA, because they looked like gloves he wore while employed at Sundance. He claimed he first found out about the murders and fires via phone calls from friends. Defendant admitted that he originally lied to Detective Mark Lewandowski, telling him that he was not in Lansing on the day of the murders. He claimed that he lied because he feared incurring drug charges.

After a nine-day trial, defendant was found guilty and sentenced to life in prison without the possibility of parole. Defendant had retained different counsel for his second trial; that counsel testified that his trial strategy was to advocate a theory that someone other than defendant was responsible for the murders and that police conducted an incomplete investigation that erroneously and prematurely focused only on defendant. The prosecution's theory was that defendant was addicted to OxyContin, ran out of money, and murdered Moreno and Beckett, his drug dealer, after Beckett refused to provide him drugs on credit. The prosecution contended that defendant then set the house on fire in an attempt to conceal evidence of the murders.

[4] Michigan's Offender Tracking Information System reveals that defendant pleaded guilty to embezzlement of more than $50,000 but less than $100,000, MCL 750.174(6), and using a computer to commit a crime, MCL 752.796, on October 22, 2010. He was sentenced to between three and 15 years' imprisonment.

Following the convictions, defendant's appellate counsel moved for a new trial on the basis of ineffective assistance of counsel. After holding a *Ginther* hearing, the trial court denied defendant's motion, and defendant appealed by right.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. "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." *Id.*

Defendant first argues that his counsel's deficient performance caused the trial court to make comments that irreparably damaged his case. This argument does not posit that the trial court committed misconduct; in fact, defendant acknowledges that the comments in question "were warranted by fact and law." Rather, defendant asserts that counsel's performance was so deficient as to elicit repeated remarks from the trial court that prejudiced defendant.[5] Accordingly, if the trial court's comments did not deprive defendant of a fair trial, defense counsel's alleged prompting of those comments cannot constitute ineffective assistance of counsel.

In *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006), this Court restated the analysis required "for determining whether a trial court's comments or conduct deprived a defendant of his or her right to a fair and impartial trial:"

> Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [*Id*. at 307-308, quoting *People v Collier*, 168 Mich App 687, 398; 425 NW2d 118 (1988) (quotation marks and citations omitted).]

[5] At the *Ginther* hearing, the trial court denied that it ever admonished defendant's counsel and stated that, "I never, ever felt this man was operating at any level beyond or less than what a competent good lawyer as [defendant's counsel] has been over the years on a case."

While "a trial court is entitled to control the proceedings in its courtroom, it is not entitled to do so at the expense of a defendant's constitutional rights." *People v Arquette*, 202 Mich App 227, 232; 507 NW2d 824 (1993). A trial judge may deny a defendant "a fair trial by repeatedly interjecting improper and impartial comments and questions." *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992). "The test is whether the judge's questions and comments may well have unjustifiably aroused suspicion in the mind of the jury as to a witness's credibility and whether partiality quite possibly could have influenced the jury to the detriment of defendant's case." *Id*. at 405 (quotation marks, emphasis, and citations omitted).

Defendant cites several examples of the trial court admonishing trial counsel for the improper phrasing of questions or failure to abide by court rules. However, defendant also admits that the court's concerns were "well-grounded." Moreover, viewed in the context of a nine-day trial, the court's comments were rare. Lastly, defendant does not allege nor does the record support a finding that the trial court ever made comments that could have possibly "unjustifiably aroused suspicion in the mind of the jury as to a witness's credibility and whether partiality quite possibly could have influenced the jury to the detriment of defendant's case." *Id*. Accordingly, defendant is not entitled to relief on this basis.

Defendant next argues that counsel proved ineffective by failing to object to the prosecution's elicitation of impermissible opinion of guilt evidence.

Defendant first takes issue with the following testimony of Lewandowski, elicited on direct examination by the prosecutor:

> *Q.* Based upon your investigation with all the witnesses you interviewed, looking at cell phone information, looking at the physical evidence that's been introduced in this trial, the circumstantial evidence, you sought a warrant for the Defendant's arrest, correct?
>
> *A.* Yes.
>
> *Q.* You believe you have the right man, correct?
>
> *A.* Certainly.
>
> *Q.* And still do?
>
> *A.* Yes.
>
> *Q.* Is there anybody as possible suspects that have come up that you can associate with this crime other than [defendant]?
>
> *A.* No.

Defendant also takes issue with the following testimony of Brian Twiss, elicited by the prosecutor, first on direct and then on redirect examination:

Q. All right. Based on that phone call that [defendant] made to you before [the police] got there, did you feel that he might have been a part of these crimes?

A. Yes.

* * *

Q. All right. And at that point on September 3rd, you began to put the pieces of the puzzle together?

A. Yes.

Q. And you thought [defendant] was involved in this murder?

A. Yes.

Q. And you had concern for your family?

A. Yes.

That a witness may not express an opinion concerning the guilt or innocence of the accused is a long-standing rule of law. See, e.g., *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). However, defendant's argument fails because the testimony with which he takes issue was not an opinion of his guilt or innocence.

Contrary to defendant's assertion, Lewandowski did not comment on whether he believed defendant was guilty of the charged crimes. Lewandowski did not comment on whether that evidence was sufficient to support a guilty verdict or imply that he had some particularized knowledge that led him to believe defendant committed the charged crimes. He merely offered his testimony that, as a detective, the evidence led him to suspect defendant and no one else.

Similarly, Twiss stated that he believed defendant might have been involved in the murders. Twiss was merely recollecting his state of mind at the time he spoke to police. In his first interview, Twiss, by his own admission, was less than completely truthful with the investigating detectives. The above-quoted testimony was elicited by the prosecutor in order to explain Twiss's motivation to conceal the truth – his fear that defendant or someone else would retaliate against him or his family were he to implicate defendant. Evidence pertaining to a witness's credibility is generally relevant, *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), and, therefore, Twiss's testimony was proper.

Because neither Lewandowski nor Twiss offered an impermissible opinion of defendant's guilt, counsel was not ineffective for failing to object. *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (counsel is not ineffective for failing to raise meritless or futile objections). Accordingly, defendant is not entitled to relief on this basis.

Defendant next claims his trial counsel ignored, or failed to investigate, potentially exculpatory evidence that deprived him of a substantial defense. "Decisions regarding what

evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citation omitted). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it depressive the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "Similarly, the failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (quotation marks, brackets, and citation omitted).

Defendant's compares his counsel's questioning of witness to that of counsel in his first trial. Defendant first claims that counsel was ineffective for failing to call Jerry Maldonado as a witness. Defendant testified that, at the time of the fire, he was on the same side of town as the victims to meet Maldonado in order to purchase drugs. At the first trial, Maldonado confirmed defendant's story, which resulted in defendant obtaining an alibi jury instruction. At the *Ginther* hearing, counsel explained that he contacted Maldonado, who told him that he now remembered the day of the murders and stated that defendant did not come to his home that day. Such testimony would have contradicted defendant's version of events if offered at trial. Accordingly, counsel's decision not to call Maldonado was a prudent and reasonable exercise of trial strategy.

Defendant argues that counsel should have sought to establish that Maldonado was a drug dealer, that he lived near the victims, that defendant had contact with him on the day of the murders, and that defendant and Maldonado knew each other. Counsel testified that he did not attempt to establish these alleged facts because he did not want to "open a door and invite the Prosecution to call Mr. Maldonado." This is certainly acceptable trial strategy; were the prosecution to call Maldonado, he would have impeached defendant's credibility and proffered alibi. Defendant claims that counsel could have established these facts through Lewandowski, as was done in the first trial. Assuming, arguendo, that counsel could have done so, his explanation for not doing constitutes acceptable trial strategy, i.e., fear of the prosecution procuring Maldonado's potentially damning testimony.

Defendant takes issue with counsel's failure to elicit testimony from Twiss that defendant was not breathing hard or sweating and was wearing a white colored shirt when he arrived at Twiss's home on the day of the murders. Twiss testified as such at the first trial. Counsel stated that he did not ask about the color of defendant's shirt because there was a wadded-up shirt found at the crime scene and anyone who had taken off that shirt would presumably have had a clean shirt on underneath. Counsel "wanted the jury to focus on the shirt that was found at the crime scene and the fact that there was no DNA done on it. I didn't want to focus on the possible explanations of how that shirt was there and how it could have belonged to [defendant]." This constitutes acceptable trial strategy, as does counsel's failure to address whether defendant was sweating or breathing heavily when he arrived at Twiss's home. This alleged fact was rather trivial given the context of the entire trial; moreover, the victims' neighbors testified that the man in the Buick sat there for several minutes before leaving, which could presumably allow the jury to infer that defendant had ceased breathing heavily or sweating, assuming that the commission of the murders and starting of the fires caused those conditions in the first place.

Defendant next argues that counsel should have more aggressively pursued the theory that Alex Wilkes, the brother of prosecution witness David Wilkes, committed the murders. At the first trial, Lewandowski testified that Alex frequently purchased drugs from Beckett and that he matched the physical description of the suspect given by Scieszka and Young. He also stated that police found an empty gas can in the trunk of Alex's late-90s gray Buick and three other empty gas cans in his garage, and that Alex's only alibi was his mother. Counsel testified that he was aware of this previous testimony. When asked why he failed to elicit similar testimony in the second trial, counsel explained:

> I think throughout the trial, the theme of it was the investigation was incomplete and faulty, and that there were other people who could have committed the crime, had reason to commit the crime, and I didn't want to go off on [] trying to prove who did it. That's a Perry Mason type of thing, and I don't think it happens in real life.

This was a reasonable trial strategy. As a successful drug dealer, Beckett presumably had many clients with insufficient alibis for the day of the murders. Defense counsel cannot reasonably be required to investigate every possible potential suspect. Rather, as counsel stated, he was required to pursue a theory that defendant was not guilty of the charged crimes, not prove what other person was culpable. As discussed below, counsel elicited testimony from those in Beckett's circle of acquaintances to the effect that others were suspected, yet not arrested, or, as counsel contended, adequately investigated. Counsel was not required to try the case in the exact manner as defendant's first attorney.

Defendant also takes issue with counsel's failure to elicit Scieszka's testimony from the first trial that Beckett "seemed to have a lot of money," dined out frequently, and purchased expensive items. Defendant alleges that this contradicts the prosecution's theory that Beckett was not ostentatious with his money and, therefore, that few people, including defendant, knew Beckett had money worth stealing. Again, counsel's strategy was to show that the investigation was inadequate and that defendant was not at the victims' home on the day of the murders. As counsel testified, whether Beckett flaunted his wealth was immaterial to that strategy.

Defendant notes an employee of a Buick dealership testified that the car in the Shell video and defendant's mother's car were both Buick LeSabre "Custom Editions" and that few were driven locally. Defendant posits that the jury could have inferred that "Custom Edition" meant the cars were limited production or distinctive as opposed to merely one of four models of LeSabre. Defendant argues that counsel should have elicited such testimony. There is simply no evidence to support defendant's claim. Defendant's nitpicking of counsel's examination of this witness does overcome the presumption of trial strategy.

Broadly, defendant accuses his trial counsel of being unfamiliar with the transcripts of the first trial. However, counsel testified that he reviewed all the relevant transcripts in preparation for the second trial, a fact that is seemingly confirmed by his familiarity with the first trial while testifying at the *Ginther* hearing. Accordingly, defendant is not entitled to relief on his claims that counsel inadequately investigated his case or ignored exculpatory evidence to the extent that it deprived him of a substantial defense.

Defendant next asserts that counsel was ineffective for eliciting a "qualified identification" from Scieszka. On cross-examination, Scieszka responded in the affirmative to the question, "And you have never been able to identify who that individual was [sitting in the car outside the victims' home], right?" Defendant takes issue with trial counsel's subsequent question, "Is [defendant] the gentleman you saw in the car?" to which Scieszka responded, "I couldn't tell you for sure. He looks like the person that was in the car, but I couldn't tell you that for sure." Defendant argues that trial counsel "goaded" Scieszka into offering a more "qualified identification" of the man she saw in the vehicle.

Defendant has not demonstrated how counsel's questioning of Scieszka fell below an objective standard of reasonableness because counsel's questioning was based in acceptable trial strategy. Counsel explained that he was attempting to demonstrate to the jury how Scieszka's testimony "evolved" in favor of the prosecution. Contrary to defendant's implication, the question with which he takes issue was not asked immediately after Scieszka admitted that she could not identify the man in the car. Rather, it was the culmination of a lengthy line of questioning in which trial counsel attempted to establish that Scieszka's story had gradually evolved in favor of the prosecution over the course of the investigation and trials. This was an acceptable trial strategy that we will not second guess with the benefit of hindsight. *Rockey*, 237 Mich App 76-77. Moreover, Scieszka's second statement still did not identify defendant as the man in the Buick and was consistent with her earlier testimony regarding the appearance of the man she observed. Accordingly, defendant is not entitled to relief on this basis.

Defendant also argues that his trial counsel was ineffective for "eliciting harmful testimony" from Scieszka. Counsel asked Scieszka whether she told Lewandowski that she saw a white male walk from the victims' home and get into the Buick. Scieszka denied that she ever made such a statement. Counsel later elicited from Lewandowski that Scieszka had told him that she observed a white male enter a vehicle in the driveway. Defendant argues that Scieszka's denial should have been used to posit that the man in the car had driven to the victims' home to purchase drugs and had never alighted from the vehicle, a strategy pursued in the first trial. However, counsel's questioning was an acceptable exercise of trial strategy. Counsel testified that he sought to impeach Scieszka's credibility and demonstrate that her testimony evolved in favor of the prosecution. These were acceptable aims furthered by counsel's questioning. Moreover, as counsel stated, his strategy was not that defendant was in the Buick but did not commit the murders, but rather that defendant was not at the victims' home at all on the day in question. To suggest otherwise, as defendant argues counsel should have done, would have been contrary to defendant's overall theory of the case. Accordingly, defendant is not entitled to relief on this basis.

Next, defendant argues that counsel was ineffective for failing to object to the admission of evidence that was excluded at defendant's first trial. At trial, the prosecution elicited testimony that the police eliminated Renz, the purported owner of the broken Ruger, as a suspect because he did not match descriptions of the man in the Buick. The prosecution also established, through Sundance business records, that Renz leased a vehicle in 2006 and 2007 and that defendant was his "service advisor." At defendant's first trial, Renz invoked his Fifth Amendment right not to testify, and Lewandowski testified that Renz told him that he did not remember ever purchasing the gun. Moreover, when the prosecution attempted to connect Renz

and defendant through the Sundance business records, the first trial judge sustained a defense objection.

When asked why he did not raise a similar objection in defendant's second trial, counsel stated that he had discussed with defendant whether to "object to everything under the sun" and "decided not to for the reason that we wanted the jury to focus on the theory of the case and keep them focused on it and not move on to side shows." This was an acceptable trial strategy. Accordingly, defendant is not entitled to relief on this basis.

Defendant next takes issue with counsel's presentation of three witnesses – Jacob Perkins, William Perkins, and Wes Hiltner – all of whom defendant alleges damaged his case.

The decision of what witnesses to call is presumed to be a matter of trial strategy. *Rockey*, 237 Mich App 76-77. Defendant has not overcome this presumption. Counsel testified that he called these witnesses to demonstrate that there "were others who were suspected by the friends in the circle of people that knew Mr. Beckett that were not investigated." This was consistent with the defense's overall theory that the investigation improperly and prematurely focused only on defendant. Jacob Perkins testified that defendant was one of three individuals he suspected may have been involved in the murders. William Perkins, apparently somewhat confused by counsel's questions, eventually testified that, at one time, he believed defendant committed the murders, but clarified that he felt that no one was "beyond suspicion." The testimony of both witnesses was elicited as part of an acceptable trial strategy.

Hiltner's testimony is more troubling but still does not entitle defendant to relief. When asked whether he knew the particular financial arrangements during drug deals between Beckett and defendant, Hiltner volunteered, unprompted, that Beckett "even made mention to me that he was done fronting, giving [defendant drugs] on credit. He was done." Defense counsel did not object to this statement, which supported the prosecution's theory that defendant committed the crimes with the intention of obtaining drugs and/or cash. At the *Ginther* hearing, counsel stated that he declined to object as part of his overall strategy not to appear obstructionist and not to draw the jury's attention to unfavorable testimony. The decision not to object to Hiltner's testimony was an acceptable exercise of that strategy. In a vacuum, Hiltner's testimony would be more damaging; however, there was other evidence to establish that defendant was out of money and addicted to an expensive drug sold by Beckett. Further, although motive is undoubtedly helpful in obtaining a conviction, it is not an element of any of the charged crimes, and, therefore, we cannot conclude that the exclusion of Hiltner's statement would have resulted in a different outcome of defendant's trial. *Swain*, 288 Mich App at 643. Lastly, Hiltner's challenged testimony was essentially duplicative of other testimony that defendant does not challenge. Ryan McLaughlin, an individual familiar with Beckett and defendant, testified that Beckett was frustrated with continually giving defendant OxyContin on credit and was seeking to end the relationship. Accordingly, defense counsel was not ineffective for calling Jacob Perkins, William Perkins, and Hiltner as witnesses.

Finally, defendant argues that these alleged instances of ineffective assistance of counsel collectively operated to deny him a fair trial. "It is true that the cumulative effect of several minor errors may warrant reversal where the individual errors would not." *People v Unger*, 278

Mich App 210, 258; 749 NW2d 272 (2008). However, because we have found no error by defendant's trial counsel, there can be no aggregation of errors to form a cumulative effect. *Id.*

Even if we were to accept defendant's alleged instances of ineffective assistance of counsel, we would find that those errors did not affect the outcome of defendant's trial, and therefore do not require reversal. *Swain*, 288 Mich App at 643.

Excluding the testimony with which defendant takes issue, there was ample evidence to support the jury's guilty verdicts. It was well-established that defendant was an OxyContin addict who was short on money and would resort to criminal behavior, previously embezzlement, to fund his addiction. There was testimony that his mother attempted to remove his name from a joint checking account on the day of the murders. Further, there was testimony that Beckett had declined to continue supplying defendant with OxyContin credit. Defendant had reason to believe that Beckett had large quantities of drugs and/or cash in his home.

Two neighbors of Beckett and Moreno described a man consistent with defendant's description sitting in a car consistent with his mother's Buick outside the victims' home as the fire began. A car consistent with the Buick was captured on the Shell station surveillance footage driving erratically. Twiss placed defendant, in an agitated state, at his home minutes after the murders. Defendant's DNA was found on gloves located in the victims' home. Twiss stated that defendant essentially encouraged him to lie, arguing that he had driven a Pontiac G6, not a Buick, to Twiss's home. Defendant's brother stated that defendant told him not to "tell anybody anything" and that his mother immediately cleaned the Buick several hours after the murders. It could reasonably be inferred that defendant had access the presumptive murder weapon via his former employment at Sundance Chevrolet. There was also testimony that defendant was extremely worried about retaliation against himself or his family after the murders.

Defendant argues that courts of other jurisdictions have acknowledged that a previous hung-jury mistrial may be considered as evidence that a defense attorney's allegedly deficient performance was outcome determinative. See *Dowdell v State*, 720 NW2d 1146, 1151 (Ind, 1999); *Bass v State*, 285 Ga 89, 93; 674 SE2d 255 (2009). Without determining whether this principle should apply in Michigan, in this case, defendant's prior mistrial does not support his contention that his trial counsel's performance was outcome determinative. Defendant's trial was not the same as his first – notably, Maldonado, defendant's alibi witness in the first trial, changed his story. A criminal attorney in a second trial is not required to try a case in the exact manner as the attorney in the first trial merely because that first trial resulted in a hung jury. Defendant's second trial counsel articulated and adopted a reasonable trial strategy. The failure of that strategy to obtain an acquittal does not render it ineffective, especially in light of the

significant evidence supporting the jury's verdicts. Thus, we conclude that defendant's alleged errors on the part of his trial counsel did not affect the outcome of the trial. *Swain*, 288 Mich App at 643.

Affirmed.[6]

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

[6] We note that the trial court opined that a different standard of ineffective assistance of counsel might apply to retained attorneys as opposed to appointed attorneys. This is incorrect; the same objective standard of reasonableness applies to all criminal attorneys. *Cuyler v Sullivan*, 446 US 335, 344-345; 100 S Ct 1708; 64 L Ed 2d 333 (1980). However, it does not appear that the trial court relied on this incorrect statement of law in denying defendant's motion for a new trial, and, in any event, such a conclusion of law is reviewed de novo and the court's decision is given no deference. *Jordan*, 275 Mich App at 667.