

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ERWIN UNGER,

Defendant-Appellant.

UNPUBLISHED

March 11, 2021

No. 351832

Wayne Circuit Court

LC No. 18-008702-01-FC

Before: TUKEL, P.J., and JANSEN and CAMERON, JJ.

PER CURIAM.

Defendant, David Erwin Unger, appeals his jury trial convictions of first-degree murder, MCL 750.316, assault with the intent to commit murder, MCL 750.83, and two counts of possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b(1). Unger was sentenced to life imprisonment without the possibility of parole for the first-degree murder conviction, to 60 to 100 years’ imprisonment for the assault with the intent to commit murder conviction, and to two years’ imprisonment for each felony-firearm conviction. We affirm.

I. BACKGROUND

This case arises out of the shootings of two victims at Custom Enterprises, which is a boat repair business that was owned by Unger. There was a boatyard and a single building on the business property. The property was surrounded by a fence, which had barbed wire on top of it, and there was one main entrance gate. At some point, a receiver was appointed in relation to collection proceedings concerning debts owed by Unger. The receiver seized Custom Enterprises’s assets, and a liquidation sale was scheduled. The lock on the main gate was changed.

On September 29, 2018, the murder victim and the assault victim went to Custom Enterprises to help prepare for the liquidation sale. That afternoon, Unger and his girlfriend, Katharine Corbit, went to Custom Enterprises in separate vehicles in order to obtain a boat trailer for a customer. Corbit approached the front gate, which was locked, and asked the murder victim on two different occasions if he would allow her to enter the property. The murder victim denied Corbit access on both occasions. During their second conversation, the murder victim informed Corbit that he and the assault victim were getting ready to leave for the evening. Corbit telephoned

Unger, who was sitting in his vehicle, and reiterated what the murder victim had told her. Unger told Corbit that they “should make sure [the doors to the building get] locked up.”

At some point before 6:00 p.m., Corbit saw the victims enter the building. Although Corbit did not see Unger enter the property, she later saw Unger leave the property by jumping over the fence that surrounded it. Unger approached Corbit’s vehicle and informed her that he had been “looking to see if the trailer was still there[.]” Corbit and Unger then drove their respective vehicles away from Custom Enterprises. Unger went to his father’s home. At 6:04 p.m., the assault victim called 911, and the victims were later transported to the hospital. The murder victim was pronounced dead at the hospital, and a .38-caliber bullet was removed from his chest. The assault victim, who had a bullet lodged in one of his vertebrae, slipped into a coma that lasted 35 days.

A friend of the assault victim, who was present at Custom Enterprises when Corbit spoke to the murder victim,¹ informed law enforcement that the murder victim had been speaking to Unger’s girlfriend through the front gate before the shootings. Corbit and Unger were both arrested. Unger’s cell phone was examined, and a search warrant was executed on the home of Unger’s father. Officers located, among other things, a .38-caliber revolver in a dresser drawer. Unspent .38-caliber bullets were also located in the vehicle that Unger was driving the day of the shootings and when he was arrested.

Unger was charged with first-degree murder, assault with the intent to commit murder, and two counts of felony-firearm. Unger’s defense at trial was that the shootings were not adequately investigated and that there was insufficient evidence presented of Unger’s identity as the perpetrator of the charged crimes. Unger was convicted as charged. Unger was sentenced as described above, and this appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Unger argues that there was insufficient evidence to sustain his convictions. We disagree.

A. STANDARD OF REVIEW

“We review de novo a challenge on appeal to the sufficiency of the evidence.” *People v Henry*, 315 Mich App 130, 135; 889 NW2d 1 (2016) (quotation marks and citation omitted). “To determine whether the prosecutor has presented sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013) (quotation marks and citation omitted). “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015) (quotation marks and citation omitted).

¹ The assault victim’s friend left Custom Enterprises before the shootings.

B. RELEVANT AUTHORITY AND ANALYSIS

Unger argues that there was insufficient evidence of his identity as the perpetrator of the crimes. There is sufficient evidence for a guilty verdict where “a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (citation omitted). “Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime.” *People v Blevins*, 314 Mich App 339, 357; 886 NW2d 456 (2016). “[I]t is well settled that identity is an element of every offense.” *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). A perpetrator’s identity can be established by evidence that is “circumstantial and sometimes requires reliance on an inference founded on an inference” *People v Bass*, 317 Mich App 241, 264; 893 NW2d 140 (2016).

When viewing the evidence in the light most favorable to the prosecution, we conclude that sufficient evidence was presented for the jury to reasonably conclude that Unger’s identity was proven beyond a reasonable doubt with respect to the commission of these crimes. First, the evidence supported that Unger was the only other individual inside Custom Enterprises with the victims at the time of the shooting. Just before 6:00 p.m., Unger suggested to Corbit that they should make sure that the doors to the building were locked. Several minutes later, Corbit saw Unger jump over the fence, and Unger acknowledged that he had been on Custom Enterprises’s property. Corbit and Unger then left the premises. Security camera footage from a nearby building captured Corbit and Unger driving away from Custom Enterprises within seconds of the assault victim calling 911. Officer Javaris Reed noted that Unger’s vehicle appeared to be traveling faster than Corbit’s vehicle. Furthermore, evidence was presented that a cell phone associated with Unger was moving away from Custom Enterprises and toward the home of Unger’s father immediately after the shootings, and that police later recovered a .38-caliber revolver from that home.

In addition to the evidence supporting the reasonable inference that Unger was inside Custom Enterprises at the time of the shooting, the jury could have reasonably concluded that it was Unger who committed these crimes when considering Unger’s motive and behavior. The evidence demonstrated that, on September 29, 2018, Unger did not have access to Custom Enterprises because it was in receivership and a liquidation sale had been scheduled. Indeed, the lock on the front gate had been changed. Despite this, Unger and Corbit went to Custom Enterprises on the afternoon of September 29, 2018, and lingered outside the property. Importantly, in the time before the shootings, Unger parked his vehicle away from the front gate, he did not communicate with the victims, and only communicated with Corbit via cell phone.

Additionally, Unger’s motive could reasonably be inferred from text messages that were sent from a cell phone that was associated with Unger. On September 28, 2018, at 1:56 p.m., a cell phone associated with Unger sent a text message to the cell phone associated with Corbit. The text message stated as follows:

It’s going to be all in the details. It’s going to be all in the organization. It’s how we handle multiple problems at a time. Think of it as war time. We need allies. This hostile takeover is nothing new. It’s new to you, it’s new to me. We need to

educate ourselves as quickly as possible. Putting the right things in place at the right time is how we can compete. Please have trust and faith in me.

At 3:32 p.m., on September 29, 2018, the cell phone associated with Unger sent a text message to a cell phone associated with Corbit. The text message stated, “[i]f I go to jail when I show up to my shop, I hope you know what to do.” At 3:36 p.m., the cell phone associated with Unger sent a text message to a cell phone associated with Corbit’s daughter. The text message stated, “I need to talk to you. Your mom’s going off on me again. There’s two sides to a story. I’m on my way to the shop and I may end up going to jail and I need to communicate.”

Moreover, the manner in which the crimes were carried out supports that they were committed by someone who was familiar with the layout of the building. The victims were shot in different locations inside the building. The assault victim testified that he did not see the individual who had shot him, and further testified that he did not initially realize that he had been shot. A very short period of time after the assault victim was shot in the face, he heard a “pop” and heard the murder victim cry out. The assault victim went into the “tool room,” which Corbit agreed was difficult to locate unless you were familiar with the building.² He found the murder victim alone in the room, but never saw the perpetrator. Thus, the evidence supports that the perpetrator was able to quickly move throughout the building, including in and out of the obscured tool room, to accomplish the crimes. As already stated, Unger was the owner of Custom Enterprises at the time the shootings occurred.

Finally, the jury could have reasonably inferred that it was Unger who committed these crimes when considering the physical evidence. A .38-caliber bullet was removed from the murder victim’s body. A .38-caliber revolver was seized from the home of Unger’s father, which is where Unger went immediately after leaving Custom Enterprises. Six .38-caliber bullets were found in the center console of Unger’s vehicle, which he was driving when he was at Custom Enterprises and when he was arrested. The .38-caliber bullet from the murder victim’s body was tested to determine if it was fired from the revolver that was located at the home of Unger’s father. While the results were “inconclusive,” Officer Reed testified that the shots were likely fired from a revolver because no shell casings were found inside the building.

Although Unger argues on appeal that someone else could have committed these crimes and that other suspects were not thoroughly investigated, the prosecutor “is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury in the face of whatever contradictory evidence the defendant may provide.” *Bailey*, 310 Mich App at 713 (quotation marks and citations omitted). Moreover, Officer Reed testified that several people who were close to Unger were cleared as suspects, as were the two men who brought lunch to the victims at Custom Enterprises in the hours before the shootings, and the assault victim’s friend. Although the assault victim’s friend noted that he saw a sedan as he was leaving Custom Enterprises around 5:30 p.m., and Corbit testified that she had informed police officers that there was another vehicle in the area of Custom Enterprises on September 29, 2018, that gave her the “creeps,” Officer Reed explained that no evidence was found to support that the

² Although an evidence technician testified that she did not have difficulty locating the tool room, she also testified that she was able to find it because she followed the blood and “debris.”

driver was involved in the shootings. The credibility of the witnesses is a question of fact to be determined by the jury and is not to be disturbed on appeal. See *Blevins*, 314 Mich App at 357. Moreover, although the prosecutor’s case was premised on circumstantial evidence, circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the offense. *Id.* We conclude that, when viewing all of the evidence in a light most favorable to the prosecution, the jury could have reasonably concluded beyond a reasonable doubt that Unger committed these crimes.

III. JUDICIAL BIAS

Unger next argues that he is entitled to a new trial because the trial judge erroneously struck part of defense counsel’s closing argument and pierced the veil of judicial impartiality. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

To preserve a claim of judicial bias or misconduct, the claim must be raised in the trial court. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). Although defense counsel did not agree with the trial court’s decision to strike part of his closing argument, defense counsel did not raise a claim of judicial bias or misconduct. Therefore, this issue is unpreserved. See *id.*

Generally, “[t]he question [of] whether judicial misconduct denied [a] defendant a fair trial is a question of constitutional law that this Court reviews de novo.” *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015). However, “[u]npreserved claims . . . are reviewed for plain error affecting a defendant’s substantial rights.” *People v Brown*, 326 Mich App 185, 192; 926 NW2d 879 (2018), amended ___ Mich App ___ (2019) (Docket No. 339318). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to show that a defendant’s substantial rights were affected, there must be “a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.*

B. RELEVANT AUTHORITY

“A defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality.” *Jackson*, 292 Mich App at 598 (quotation marks and citation omitted). “A trial judge’s conduct deprives a [defendant] of a fair trial if the conduct pierces the veil of judicial impartiality.” *Stevens*, 498 Mich at 164. “A judge’s conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge’s conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party.” *Id.* When evaluating the totality of the circumstances,

the reviewing court should inquire into a variety of factors including, but not limited to, [(1)] the nature of the trial judge’s conduct, [(2)] the tone and demeanor of the judge, [(3)] the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, [(4)] the extent to which the judge’s

conduct was directed at one side more than the other, and [(5)] the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial. [*Id.*]

C. ANALYSIS

Unger argues that the trial judge erred by sua sponte striking part of defense counsel's closing argument in which defense counsel argued that a boat and outdrive motors were stolen from Custom Enterprises in an alleged burglary.

Under the first *Stevens* factor, we conclude that the trial court's decision to strike a portion of defense counsel's closing argument was appropriate. During closing argument, attorneys may only argue facts that are part of the record. *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011). A judge has wide discretion in fulfilling his or her duty to control the trial proceeding and to limit the argument of counsel to material and relevant evidence. MCL 768.29; *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006) ("Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct.").

In this case, during defense counsel's closing argument, defense counsel reviewed the evidence presented and argued, in relevant part, that

there were burglaries reported at that location. Did the Detroit Police investigate to determine whether there were any suspects arising from those burglaries? In the course of those burglaries it was reported that some items including boats were missing.

The trial judge interrupted defense counsel and called the attorneys to the bench for a bench conference. After the bench conference concluded, the following colloquy occurred:

The Court: All right. Once again I'm gonna remind the jury that the only thing that is evidence is the evidence that you've heard from the witness stand, that these are arguments, they are not evidence. I don't believe there was any testimony of what, if anything, was taken from any earlier burglaries.

Defense counsel: Well, there was testimony from—

The Court: Items were taken and that's it.

Defense Counsel: There was testimony from Katherine Corbit that outdrives were missing.

The Court: I don't know what that related to.

Defense Counsel: It relates to the boats.

The Court: That's all testimony, none of that came out on the record, counsel, and so I'm asking the jury to disregard that.

Defense Counsel: All right, Your Honor.

The Court: I'm instructing the jury to disregard that. Please proceed.

We conclude that the trial court did not err by striking the portion of defense counsel's closing argument in which he stated that "it was reported that some items including boats were missing." Officer Reed was the only witness who directly testified about the alleged burglary. Although Officer Reed was aware that someone had previously reported a burglary at Custom Enterprises in the months before the shootings, Officer Reed did not testify regarding what, if anything, was stolen from Custom Enterprises. Rather, Officer Reed testified that he was not involved in that investigation and that he was informed about the "suspected burglary" by another officer during the investigation of this case.

Additionally, contrary to Unger's arguments, Corbit did not testify that outdrive motors were stolen in a burglary. Rather, Corbit testified that, when she spoke to the murder victim through the front gate, she "had a conversation with him about outdrives being taken from . . . customers' boats and the cost it would be to replace them." During cross-examination, Corbit agreed that she had informed the murder victim "that there had been some missing outdrives from boats[.]" Corbit was then asked the following question by defense counsel: "And had you reported that previously, that things were missing to the police?" Corbit responded, "Yes." Thus, Corbit did not testify that outdrive motors or boats had been stolen in a burglary. Rather, she only offered vague testimony that outdrive motors were "missing" or had been "taken" and agreed that the fact that "things were missing" had been reported to the police. Because no evidence was presented regarding what, if anything, was stolen in a burglary, the now-challenged decision on the part of the trial court was proper. This factor weighs against the presence of bias.

The second *Stevens* factor considers the tone and demeanor displayed by the trial judge in front of the jury. *Stevens*, 498 Mich at 164. Although appellate courts cannot read tone from the record, certain words may be considered hostile or biased by their very nature, when considered in the context in which they are used. *Id.* at 174-176. Furthermore, trial judges should avoid being argumentative, skeptical, intimidating, or otherwise hostile. *Id.* at 175. In this case, as far as can be construed from the transcript, the trial judge did not speak to defense counsel with a tone that would suggest hostility or bias. Rather, the trial judge attempted to address the issue outside the presence of the jury by calling the parties to the bench. It was defense counsel who challenged the judge's ruling in the presence of the jury. Although defense counsel's challenge caused the jury to hear the disagreement between the trial judge and defense counsel, there is nothing to suggest that the trial judge belittled defense counsel, or demonstrated hostility or bias toward him. Considering the lack of evidence of any improper tone or demeanor, this factor weighs against the presence of bias.

The third and fourth factors in *Stevens* consider the scope of judicial conduct given the length or complexity of the trial and the extent to which the trial judge's interventions were directed at one side more than the other. *Id.* at 164. The trial in this case lasted four days, and Unger only challenges the trial judge's decision to sua sponte intervene during defense counsel's closing argument. This intervention was minor when considering the length of defense counsel's closing argument. Importantly, despite the intervention, defense counsel was able to make his argument that the police did not adequately investigate the shootings or consider other possible suspects.

Defense counsel also specifically named individuals who should have been considered suspects, including individuals who could have committed the burglary, and argued that Officer Reed's testimony was not credible and questioned his competence. There is nothing to suggest that the trial judge's proper ruling created an atmosphere of partiality toward the prosecution or that the trial judge's brief interruption unjustifiably made the jury suspicious of Unger. Indeed, during trial, the trial judge also sua sponte intervened during the prosecutor's questioning of witnesses and, at times, made rulings that were unfavorable to the prosecution's case. Accordingly, the third and fourth *Stevens* factors weigh against bias.

Lastly, under the fifth *Stevens* factor, we must consider the presence of any curative instructions. *Stevens*, 498 Mich at 164. Curative instructions weigh against the presence of partiality toward one party, but are not dispositive. *Id.* at 190. In this case, at the beginning of trial, the trial judge issued a standard preliminary instruction with respect to a judge's duties during trial, i.e., "to make sure that the trial is run fairly and efficiently, to make decisions about evidence and to instruct [the jury] about the law that applies to th[e] case." The trial judge specifically stated, "Nothing I say is meant to reflect my own opinions about the facts of the case" and that "rulings for or against one side or the other are not meant to reflect my opinions about the facts of the case." The trial judge also instructed the members of the jury that, "[a]s jurors, you are the ones who will decide this case." In the final jury instructions, the trial judge issued the following standard instruction:

My comments, rulings, questions, and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law, and to tell you the law that applies to the case. However, when I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about how you should decide this case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

We must assume that the jurors followed the instructions given by the trial judge. See *Stevens*, 498 Mich at 177.

In sum, the totality of the circumstances does not demonstrate a reasonable likelihood that the trial judge's conduct during trial improperly influenced the jury by creating the appearance of advocacy or partiality against Unger. See *id.* at 164. Thus, because Unger has failed to demonstrate plain error affecting his substantial rights, he is not entitled to a new trial. See *Carines*, 460 Mich at 763.

III. UNGER'S STANDARD 4 BRIEF—ASSISTANCE OF COUNSEL

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Unger raises additional issues challenging the effectiveness of defense counsel's assistance. We conclude that none of these arguments have merit.

A. PRESERVATION AND STANDARD OF REVIEW

Unger failed to raise an ineffective assistance of counsel claim in the trial court in connection with a motion for a new trial or in a proper motion for remand to the trial court for a

*Ginther*³ hearing. “Therefore, our review is for errors apparent on the record.” See *People v Abcumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8, lv pending. To demonstrate ineffective assistance of counsel,

a defendant must show: (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; and, (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [*Id.* at ___; slip op at 8 (quotation marks and citations omitted).]

B. RELEVANT AUTHORITY AND ANALYSIS

The effective assistance of counsel is presumed, and “[a] defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy[.]” *People v Rosa*, 322 Mich App 726, 741; 913 NW2d 392 (2018). However, “a court cannot insulate the review of counsel’s performance by calling it trial strategy. Initially, a court must determine whether the strategic choices [were] made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012) (quotation marks and citations omitted; alteration in original). Defense “[c]ounsel always retains the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* (quotation marks and citation omitted). Failing to make an adequate investigation may constitute the “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 and citations omitted).

Unger first argues that defense counsel was ineffective for failing to obtain a court order to enter Custom Enterprises given that Unger had informed defense counsel that there were security cameras on the premises. We disagree. On January 2, 2019, defense counsel moved the trial court to enter an order allowing him to enter the property so that he could “take photographs and . . . video the location” in order to “show [the] jury where things occurred in th[e] building.” Defense counsel indicated that the property had been sold to a third party, who would not allow defense counsel to enter without a court order. Defense counsel did not mention security cameras, and Unger did not assert any objection to defense counsel’s representation of his purpose for seeking access to the property. In response, the prosecutor indicted that there were “crime scene photos,” which were taken by “evidence techs,” “that were turned over” to defense counsel. The trial court expressed concern that it did not have the authority to enter the order that defense counsel was requesting given that the property was private property. The trial court told defense counsel to research the issue, and the court set a “special pretrial” hearing for January 15, 2019.

At the January 15, 2019 hearing, Unger was represented by substitute counsel. Substitute counsel informed the trial court that defense counsel had informed her that there was no longer a need for the trial court to rule on the pending motion because the issue had been “resolved.”

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

Substitute counsel did not provide any explanation. The trial court accepted substitute counsel's statement, and the hearing proceeded. At the end of the hearing, substitute counsel stated that, although defense counsel had informed her that the issue had been "resolved," Unger was "worried that there may be additional items that [defense counsel] would not have access to" and that Unger "wanted to make sure that the door [was] not closed to bring up those issue at a later date." The trial court stated that "if there [was] something that could be identified . . . that we have reason to believe exists," then defense counsel could address the issue with the prosecutor or bring "it . . . to the Court's attention[.]" The matter was not addressed again on the record.

At trial, Corbit, who had been on the property multiple times before the shooting, testified that there was not a working security-camera system on the property on September 29, 2018. Officer Reed testified that the police searched for security-camera footage that may have captured the shootings, witnesses, or suspects. According to Officer Reed, the only security-camera footage that was located was from a nearby Chrysler building. That camera captured Unger and Corbit traveling away from Custom Enterprises in their respective vehicles.

Thus, there is no basis in the record to conclude that there was a functioning security-camera system at Custom Enterprises that may have captured the shootings, let alone that the new owners of the property kept any security cameras or footage from the day of the shootings. Because "counsel is not ineffective for failing to make a futile motion," Unger has failed to establish that defense counsel was ineffective in this regard. See *People v Foster*, 319 Mich App 365, 391; 901 NW2d 127 (2017).

Unger also argues that he was denied effective assistance of counsel because defense counsel stated in his opening statement that there were security cameras at Custom Enterprises on the day of the shootings. We again disagree. During defense counsel's opening statement, defense counsel stated, in relevant part, as follows:

This is not a guessing game. This man's life is at stake and it's about the facts. And I want you to look at the facts. Is there any blood spatter evidence? Is there any—are there any fingerprints? If there were [sic] blood on the floor in this place[,] are there any shoeprints, any DNA, any video, despite the fact that there actually were security cameras inside of Customs [sic] Enterprise[?]

Although defense counsel misspoke when he stated "that there actually were security cameras inside of" Custom Enterprises on the day of the shootings, the reference to the security cameras was brief. Additionally, it appears that defense counsel made the statement to bolster his argument that the prosecutor would be unable to produce certain evidence during trial, which is a sound trial strategy. The remainder of defense counsel's opening statement emphasized the defense's theory that the shootings were not adequately investigated and that there was insufficient evidence of Unger's identity as the perpetrator of the charged crimes. Defense counsel reinforced this position throughout trial during his examination of various witnesses and during his closing argument.

Furthermore, Unger has failed to demonstrate that there was a reasonable probability that the outcome of the trial would have been different had defense counsel not made the brief statement concerning the security cameras during opening argument. As already discussed, the record

reflects that the prosecution presented substantial circumstantial evidence from which the jury could find beyond a reasonable doubt that Unger committed the charged crimes. Additionally, during the preliminary instructions, the trial court instructed the jury that the attorney's opening "statements are not evidence" and that the arguments were "only meant to help [the jurors] understand how each side views the case." During the final instructions, the jury was instructed that the attorney's statements and arguments were not evidence and the case was only to be decided on the basis of the evidence. "[J]urors are presumed to follow their instructions," and it is presumed that instructions cure most errors. *Stevens*, 498 Mich at 177 (quotation marks and citation omitted). Consequently, we conclude that Unger has failed to establish that he is entitled to the relief he seeks.

Finally, Unger alternatively requests that this Court remand this matter for a *Ginther* hearing. Because Unger has not set forth any facts that would require development of a record to determine if defense counsel was ineffective, we deny Unger's request. MCR 7.211(C)(1)(a).

Affirmed.

/s/ Jonathan Tukel
/s/ Kathleen Jansen
/s/ Thomas C. Cameron