

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BAHAA E. ISWED,

Defendant-Appellant.

UNPUBLISHED

December 18, 2001

No. 219718

Wayne Circuit Court

LC No. 97-009582

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

A jury found defendant Bahaa Iswed guilty of first-degree felony murder,¹ but acquitted him of the alternate charge of first-degree premeditated murder² for the same homicide. The trial court sentenced Iswed to life in prison without the possibility of parole. Iswed appeals as of right. We affirm.

I. Basic Facts

According to Corporal Cyndi Vasliff of the Dearborn Police Department, on October 30, 1997, she was dispatched shortly before 7:00 p.m. to the Big Boy Restaurant located at 13001 Michigan Avenue in Dearborn to investigate a suspicious vehicle (a gray Pontiac 6000) in the back of the parking lot near the dumpster. After running the plate, Vasliff learned that the registered owner of the car had been reported as missing. On closer inspection, Vasliff found traces of blood in the area of the trunk and rear bumper. After her supervisor, Sergeant Brock, arrived, they arranged to have the car towed to the police department garage. When the police opened the car trunk, they discovered “the body of an Arabic female wrapped in a blanket and curtains,” along with a bathroom floor mat, a leather jacket, and a curtain rod. The victim was wearing a gold necklace around her neck and a gold earring was in her hair or near her.

The victim had twenty-five stab wounds, six cutting wounds (or slices), and eighteen blunt-force lacerations, fifteen of which were to the back of the head and two were on the

¹ MCL 750.316(1)(b).

² MCL 750.316(1)(a).

forehead. She had sustained slices to her neck and multiple stab wounds to the front and back of her chest and abdomen. Some of these wounds had penetrated her heart and lungs. In addition, there were superficial cutting wounds on both her hands, which could be characterized as defensive wounds. The victim was later identified as Hala Amine, Iswed's landlord. Amine and her husband, Youssef Chehadi, had lived in the basement apartment of the same house on Jonathon Street where Iswed lived.

During her initial investigation of the car, Vasliff spoke with Ali Pryor, a bus boy at the Big Boy where the car was recovered, who remembered seeing a white male get out of the car and walk toward Michigan Avenue. This person was described to Vasliff as being six foot two, with thick, dark brown, wavy, shoulder-length hair. Pryor was certain the man was not Arabic.

Corporal Jeffrey Garrison of the Dearborn Police Department, following a tip that Chehadi had been seen dumping carpet remnants, searched a dumpster in an alley off of Jonathon Street and Michigan Avenue, where he found two rolled up carpet remnants, which he brought back to the station. Subsequently, Garrison helped execute a search warrant at Amine's house on Jonathon Street. Although it was 2:30 a.m., nobody was home. In the basement, the floor was sticky, and there was reddish material on one wall that appeared to have been wiped. The door to the basement apartment had been broken. In the drain trap of the laundry room, Garrison found an earring that matched one he found in the trunk with Amine's body.

Sergeant Allan Ruprecht of the Dearborn Police Department also helped execute the search warrant at the house on Jonathon Street. He found that the basement tiles were sticky, and in the grout lines there was what appeared to be blood. The blood traces were not obvious and Ruprecht had to look closely for them. In the laundry room, Ruprecht found a man's gold ring on one of the chairs, which he collected. In a plastic grocery bag that was hanging from the doorknob of the laundry room was a woman's headband that appeared to have blood on it. Later in the week, Ruprecht took part in the search of a dumpster that had been brought to the garage of the Dearborn police station. From the dumpster, he located several personal items that had belonged to Amine, including credit cards, her driver's license, bank books, a set of keys to the locks on the house on Jonathon Street, and some papers that apparently belonged to Iswed. In examining the blood on the curtain rod recovered with Amine's body, Ruprecht noticed a fingerprint with sufficient ridge detail for a potential identification, so he sent it to the lab as well.

DNA testing on a blood sample from the laundry room and two places on the curtain rod found with Amine's body revealed that neither Iswed nor Amine could be excluded as potential sources for the blood. More importantly, however, the testing was able to exclude Amine's husband (Chehadi), as well as Ali Atoui and Salem Marai, who were other tenants of the house where Iswed and Amine lived. Fingerprints taken from the items found with Amine's body matched Chehadi, Marai, Amine, Iswed, Violet Qumseiah, who was reportedly Iswed's girlfriend, and Wail Bamieh, Iswed's manager at work.

Sergeant Mark Jabour of the Dearborn Police Department testified that he and his partner, Sergeant George Pajac were assigned to investigate Amine's murder. When they first received the assignment, Chehadi and Marai were already at the police station inquiring about the case. Consequently, the detectives took statements from them both. Later, they obtained a statement

from Atoui. None of these men were under arrest while they were being questioned. In the course of the investigation, Jabour telephoned Iswed and asked him to submit to an interview at the police station. Iswed agreed, and later showed up at Jabour's office.

After speaking to each of the men who lived at the same house on Jonathon Street with Amine, Jabour and his partner tried to verify the information they had obtained from the interviews. Their investigation into Chehadi's and Atoui's whereabouts on the night in question eliminated them as suspects and revealed that Iswed had been at the Big Boy where Amine's body was found.

Jabour and his partner interviewed Iswed again. Iswed was advised of his rights and given an advice of rights form to read and sign. Jabour noticed that Iswed had three or four cuts on his hand, including a laceration on the tip of one index finger where a flap of skin was missing. According to Pajac, Iswed gave the following statement:

I do live at 4956 Jonathon and pay half the rent. My roommate Salem pays the other half. I was convicted on a federal indictment for fraud.^[3] Part of my sentence is to stay at the Monica House located at Livernois and Monica. I began serving my sentence on 9-17-97 and will continue for one hundred and twenty days.

I must report to the halfway house by seven P.M. When I arrive I must sign in and there's always a guard present to watch me sign in. My case worker is Lori Zimba. I work at the Big Boy in Novi and my store manager picks me up at approximately seven fifteen A.M. and drives me to work. After work, a fellow employee Nagi Kaid drives me to my house on Jonathon. Most of the time I take a cab from Jonathon to the halfway house. Question: What hours did you work on 10-28-97? Answer: Eight A.M. to four P.M.

* * *

[Q.] Where do you go after work?

[A.] Nagi Kaid, Ismael, last name unknown, Bahaa, last name unknown, and I went to the Dearborn Nissan. Nagi was driving his dark blue escort.

[Q.] What happened next?

[A.] We left the dealership at about six P.M. and Nagi drove me to my house on Jonathon. I went in the house. They did not come in.

[Q.] Was anyone at home?

³ Iswed expressly elected not to have this information excluded.

[A.] No, but I discovered my kitchen door which lead to the basement was open. That was very unusual. I asked my roommate if he left the door unlocked. He said no. As far as I know only Salem, myself, and Hala have key to that door.

[Q.] Did you go to the basement to check things out?

[A.] No, but I know the side exterior door was locked because I entered the house through that door and had to use my key.

[Q.] What time did you enter the house?

[A.] 6:05 P.M.

[Q.] When you entered the house, was there a car in the driveway?

[A.] No.

[Q.] What time did you leave the house?

[A.] Six thirty P.M.

[Q.] Was there a car in the driveway?

[A.] No.

[Q.] Was Hala's car parked on Jonathon when you left?

[A.] No. I'm certain it was not.

[Q.] Did Lorraine cab take you straight to the halfway house?

[A.] No.

[Q.] Where did you go?

[A.] I had the cab driver take me to McDonalds restaurant on Livernois and I-96. I made my [fare]. The cab left. I went into McDonalds and ate a meal.

[Q.] What did you do next?

[A.] I called the halfway house and told them I would be late. They did not ask me why.

[Q.] What did you do next?

[A.] I ate my meal. Then I called the Checker Cab about seven twenty or twenty-five P.M.

[Q.] Are you allowed to take food to the Monica House?

[A.] Yes.

[Q.] What happened next?

[A.] I was told by Mr. McKinney and Mrs. Zimba of the staff that we would go to my house on Jonathon for a home site check. We left Monica House at eight forty-five P.M. When we arrived at my house Salem's car was in the driveway, but he was not at home. Mrs. Zimba and I went into the house, stayed for less than five minutes, then returned to Monica House arriving at nine forty-five P.M.

[Q.] What did you do on Wednesday, 10-29-97?

[A.] That was my day off so I went to my house on Jonathon, arriving at about eight thirty A.M. I stayed home. Salem was also home and so was Youssef.

[Q.] What happened next?

[A.] Youssef left for his job at eleven A.M. Then he called me at about four P.M. and said that he would be home in about one hour.

[Q.] Did Youssef come home?

[A.] Yes, at about five P.M. At about six P.M. Youssef's brother-in-law, don't know his name, came over and they went to the basement. They stayed in the basement for about one hour. Then his brother-in-law left.

[Q.] What time did you leave the house?

[A.] Seven thirty P.M. Salem drove me to the halfway house and Youssef came with us.

[Q.] When Youssef arrived home at five P.M. did he ever leave the house prior to going with you to Monica House?

[A.] No. I am sure he did not.

[Q.] Do you use the washing machine in the basement at Jonathon?

[A.] Yes. I wash my work clothes once a week.

[Q.] Have you ever heard Youssef and Hala arguing?

[A.] Yes, all of the time. Mostly they argue about having children, Hala wanted to have them and Youssef did not.

[Q.] Did Youssef ever talk to you about his feelings towards Hala?

[A.] He said that he did not love her and only married Hala to obtain a green card. He also said he paid her five thousand dollars so he could have a home in America to live in.

[Q.] Did you take any trash out of your house for pick up this week?

[A.] No.

[Q.] Did you place anything in the trash dumpster at Michigan and River Street?

[A.] Yes, I placed some junk mail in that trash dumpster yesterday, 10-30-97. I don't know what time it was but it was just starting to get dark.

[Q.] Did you ever have any carpet remnants in your flat?

[A.] Yes, two or three that were light blue or light gray.

[Q.] Did you take any of that carpet to the trash dumpster?

[A.] Yes. I took one large piece of carpet and one smaller piece of light carpet to the dumpster on Michigan Avenue between Jonathon and Bingham. I don't know what time it was, but it was just getting dark and it was yesterday.

[Q.] Is there anything else you want to tell us?

[A.] On Wednesday night 10-29-97 just before Salem, Youssef and I approached at the Monica House, Youssef told me that a relative of his, or his wife's, I'm not sure which one, was shot in the head by a black male and that it cost fifteen thousand dollars to ship the body back to the old country.

[Q.] Did Youssef offer you money to kill his wife?

[A.] No.

[Q.] Did you kill Hala?

[A.] No.

Jabour and Pajac then attempted to verify two different cab rides Iswed had supposedly taken. From the Lorraine Cab Company, Jabour tried to get a record of a cab picking up Iswed at the house on Jonathon Street on the relevant date. Because there was no such record, Jabour tried to see if any cabs came to the immediate vicinity to take him as a fare. When that line of inquiry produced no real information, Jabour left a photograph of Iswed with the cab dispatcher. When the dispatcher showed this photograph to the drivers, cab driver Maurice Daniels made contact with the police and was able to select Iswed's photograph from an array.

According to Daniels, on Tuesday, October 28, 1997, he “worked from four thirty to about nine,” and received a dispatch to pick up a fare at the Big Boy located at 13001 Michigan Avenue in Dearborn. The pick-up occurred sometime between six and nine that night and Daniels’ passenger was an Arabic man who wore a black leather jacket and carried a plastic bag, whom he was able to identify as Iswed. Daniels dropped Iswed off at a Sunoco Gas Station located at Fenkell and Wyoming, which was about a fifteen-minute drive.

After being unable to verify all the elements of Iswed’s story through the cab companies, Pajac and Jabour convinced Iswed to give another statement. They again advised him of his rights. In pertinent part, the statement was:

I was in the basement one day when Salem came in the side door and I did tell him that I was late. He did offer me a ride from our house at 4956 Jonathon and I did tell him, no, that I was taking a cab, but it was not on Tuesday, 10-28-97.

[Q.] What day was it that you were in the basement when Salem came home?

[A.] I don’t remember, but I’m sure it was not on Tuesday. I’m sorry.

[Q.] Why would Salem tell us he had seen you wear a gold wedding band and he has seen it in your bathroom?

[A.] I don’t know. I have never worn any type of gold in my life.

[Q.] Is Salem lying about you wearing a gold ring?

[A.] Yes.

[Q.] What should happen to the person who killed Hala?

[A.] I don’t know. It depends on the reason. Maybe she deserved to die.

[Q.] Is there anything else you want to tell us?

[A.] I did not kill her. This statement was given without threat or promise. I knew I could have a lawyer present and that I did not have to answer any questions or give a statement.

Pajac and Jabour then arrested Iswed.

After the police arrested Iswed, Iswed called Bamieh, his manager, and asked him to contact an attorney named Intissar Ann Alkafaji and arrange for her to represent him. Bamieh did so. Subsequently, Alkafaji went to see Iswed and then called Bamieh. She told Bamieh that she was coming to see him with a letter from Iswed. When she arrived at the restaurant where Bamieh worked, she showed Iswed’s letter to him. Though written in Arabic, she had been able to read the letter and said, “Let’s go and get it.” According to Bamieh:

The letter says, Wail, go to the women's bathroom at the Big Boy Restaurant, lift up the ceiling tile, the one above the toilet seat in the corner. Right in the right hand side there's a bag with papers and other contents. Within these contents there's money. Give it to my attorney Intissar plus my check which is equivalent to five hundred and sixty dollars. It says that keep the rest in a safe place, everything that's in the bag. Very important. Thank you, very much. And he signed it Bahaa.

Bamieh could not confirm that it was Iswed's signature because he had never seen Iswed's signature in Arabic before. He understood the letter to refer to the female employee's bathroom, so, at Alkafaji's urging, he retrieved a plastic shopping bag from the location described in the letter. At a table in the lunch room, Bamieh sat with Alkafaji and emptied the contents of the bag. The contents included: (1) \$3,400 in large bills; (2) credit cards; (3) a bank book; and (4) a check book. The name on the bank book was Hala Beydoun.⁴ As Bamieh placed these items on the table, Alkafaji was observing and recording things.⁵ On her instruction, Bamieh made a copy of the letter to him from Iswed, and made a notation on the copy that he had given the \$3,400 to her as a retainer, which was in accord with Iswed's instructions. Alkafaji took the money, but wanted Bamieh to retain possession of the bag and the items. When Bamieh refused to do so, she took the bag with her, along with the original copy of the letter.⁶

After Alkafaji departed, Bamieh received a telephone call from Iswed. Apparently, the attorney told Iswed that Bamieh had refused to keep the items. Iswed was upset that Bamieh had not followed his instructions. Iswed wanted Bamieh to call his attorney and retrieve the items from her. Bamieh never did. Instead, at some point after that, Bamieh contacted the Dearborn police and told them everything that had occurred with regard to the letter and Alkafaji because he knew at the time that he pulled the bag down that Amine had been murdered.

At trial, which commenced on August 26, 1998, the prosecutor's theory was that Amine accused Iswed of stealing from her and that, in response, Iswed knocked her down a set of stairs. Then, in order to silence her, he stabbed her thirty-one times with a kitchen knife, wrapped her body (along with other evidence) and stowed it in the trunk of her own car, then drove the car to

⁴ Amine's former husband was named Hussein Beydoun.

⁵ At trial, the prosecutor had Bamieh examine a bag that could have been the one, and identify its contents for the jury. From that bag, Bamieh pulled out, among other things: (1) several credit cards in the names of Hala Amine, Hala Beydoun, and Youssef Chehadi; (2) a driver's license for Hala Amine; (2) bank statement in for Hala Amine; (3) a social security card in defendant's name; (4) defendant's paycheck file; (5) a check for \$248 on Hala Amine's account [apparently made out to Allstate]; (6) Hala's checkbook; (7) employer records for Hasan Amine; and (8) various other documents and pieces of paper (some less noteworthy than others).

⁶ Lieutenant Robert Brassell of the Dearborn Police Department, assigned to the Detectives Bureau, testified that on November 6, 1997, his secretary told him that there was an attorney at the front desk who wanted to hand a bag over to them. Brassell spoke to the attorney, who identified himself as Raymond Salloum before giving Brassell a plastic Montgomery Wards bag containing some credit cards, some papers and some money. Brassell turned the bag over to Sergeant Pajac.

a Big Boy Restaurant a few blocks away, where he left it. Iswed's theory was that the police and the prosecutor had chosen to focus on the wrong suspect. In his view, the police should have focused on Amine's husband, Chehadi, who had the opportunity, ability, and motivation to commit the offense.

One of the prosecutor's key witnesses was Marai, who said that before October 27, 1997, he had lived with Iswed on the main floor apartment of a multi-unit house on Jonathan Street in Dearborn. The door to the apartment Amine and Chehadi shared opened into a common area of the basement that was used as a laundry room. On October 28, 1998, Marai said that he worked until 7:00 p.m., at which time he drove home. At home, he immediately noticed that Amine's car was parked in the street rather than in its usual spot in the driveway. Taking advantage of what appeared to be an unusual opportunity, Marai parked his own car, a blue Chevy Lumina, in the driveway. On his way into the house, Marai noticed light shining from the basement windows on the driveway side of the house. Marai entered the house through the side door, which brought him to a landing where steps led downstairs into the basement or up into the kitchen area of the apartment he shared with Iswed. Iswed was in the common area of the basement, which was unusual because Iswed was not supposed to be home that day because he was supposed to be spending every evening in a halfway house.

Marai recalled that Iswed called out, "Salem?," and when Marai confirmed that it was him, Iswed came upstairs carrying a plastic grocery bag in his hand. Marai could not see what was in the bag. Iswed asked Marai not to tell anyone that he had seen Iswed at home that day, and gave Marai a small Turkish smoking pipe to hide for him. Marai agreed to do so, later hiding the pipe under the table. Iswed then stated that he was late and that he had to go. Iswed left the house through the side door that led to the driveway. Knowing where Iswed was supposed to be, Marai offered to drive him to his destination. Iswed declined the offer, explaining that he had already called for a taxi cab. After making a second offer to drive him, and again being refused, Marai went up into the apartment. Several seconds later, Marai heard somebody turn off the lights, and a few seconds after that, he heard someone start Amine's car. After moving the curtains aside, Marai looked outside and saw Amine's car being driven away very fast, which "wasn't the way she used to drive." With tires squealing and its headlights off, the car headed toward Ford Road. When Chehadi came home, he could not get into his apartment and could not find his wife, so he asked Marai to call the police, evidently because Chehadi did not speak English very well. Marai, who spoke English, did not call the police, and also did not tell Chehadi that Iswed had been in the basement earlier that evening. The next day, Marai helped Chehadi look around the basement. Together, they noticed that the curtain and curtain rod for the first window along the stairway was missing. They found the nails for the curtain rod bracket in the middle of the common area of the basement, and put them back into their respective holes.

Marai said that, on November 3, 1998, aware that a murder had occurred at the house on Jonathon Street, he asked the Dearborn police to accompany him to his apartment in order to pick up his clothes. At that time, Marai noticed that a set of Iswed's kitchen knives, which were normally sheathed in a wood block, was missing. Marai informed his police escort that the knives were missing. Additionally, Marai was able to identify the blanket found with Amine's

body as one from the apartment he shared with Iswed. Marai was also able to identify a gold ring that the police showed him as identical to a ring Iswed usually wore.

Marai went on to testify that, at some point after the police interviewed him, he talked with Iswed by telephone. Iswed wanted to know what Marai had told the police, and then asked Marai why he had told the police that he (Marai) had recognized keys and a piece of carpet they showed him. Marai told Iswed, "I have to. It's a murder, you know. I have to tell everything." Marai also told Iswed that he had seen the police taking pictures of a dumpster in the Fifth Avenue alley. Iswed wanted to know whether it was the one at the Big Boy or the one at the Pizza Hut.

In his defense, Iswed introduced testimony from a number of witnesses suggesting that Chehadi had a motive and did commit the murder. For instance, Amine's brother said that Amine and Chehadi had been having problems in the time leading to her murder and had lived apart three weeks, though they had reconciled before her death. Additionally, eighteen-year-old Ali Hasan Pryor, a bus boy at the Big Boy Restaurant in Dearborn, testified that on October 29, 1997, he saw a man watch him as he took restaurant trash to the dumpster. The man was sitting in a gray Pontiac 6000. He and Pryor observed each other over the course of the entire twenty or thirty minutes that it took for Pryor to take out the garbage. When defense counsel's private investigator showed Pryor a set of photographs a few weeks before trial, Pryor picked out a picture of Chehadi as the man who had been in the car. Pryor explained that he failed to identify Chehadi as the man in the car from the photographs the police showed him because he had been scared. Pryor admitted telling a police woman that the man in the car was a 6'2" white male and that he was definitely not an Arabic person, but Pryor explained that Chehadi is light-skinned. Despite being Arabic himself, Pryor denied being able to look at Chehadi and tell that he is Arabic.

Qumseiah testified, through an interpreter, that Iswed was "a close friend." According to Qumseiah, on October 28, 1997, around 7:00 p.m., she was with Iswed at the McDonald's on Livernois. Qumseiah frequently drove Iswed home from work, but on this day he told her over the telephone that he was "going to go with the boys to look for a car." Qumseiah's young son wanted to go to McDonald's, where he liked to play, so she arranged to meet Iswed at that particular McDonald's. Sometime before 7:00 p.m., Iswed arrived at the McDonald's by taxi cab. Qumseiah reminded Iswed that it was getting late, so he made a telephone call and then returned to sit with her for about half an hour.

Gerald Borczy, a private investigator with Statewide Investigation, testified that he investigated this case. He learned that it took approximately thirty minutes to drive from the house on Jonathon Street to the halfway house, known as the Monica House, where Iswed was required to report and where he claimed to be on the night of the murder. Moreover, it takes about nineteen minutes to walk from the intersection of Wyoming and Fenkell to the Monica House. In his opinion, if someone was at the house on Jonathon Street at 7:30 p.m., it would be impossible for that person to go to the Big Boy restaurant on Michigan Avenue, hail a cab, be dropped off at Wyoming and Fenkell, and then check into the Monica House at 7:40 p.m., which is the time the log book at the Monica House reflected that he had checked into the facility.

Borczy confirmed that he had shown photographs to Pryor and Pryor identified Chehadi as the person he saw in the parking lot at the Big Boy.

II. Ineffective Assistance Of Counsel

A. Standard Of Review

Iswed first contends that he was denied the effective assistance of counsel when his trial counsel failed to move to suppress identification testimony from Daniels, the cab driver. De novo review is appropriate for this issue because it presents a constitutional question⁷ and does not require us to defer to the trial court in any respect.⁸

B. Legal Standards

As this Court explained in *People v Knapp*,⁹

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

C. Analysis

Daniels saw a photograph of Iswed that the police left at his taxi cab station, identifying him as the person to whom he gave a ride from the restaurant in Dearborn to a gas station in Detroit. Thereafter, Daniels picked Iswed out of an array of photographs that included a smaller version of the same likeness of Iswed. At trial, Daniels again identified Iswed.

Iswed now contends that he was entitled to have an attorney when Daniels made these pretrial identifications. However, the Sixth Amendment right to counsel does not attach to

⁷ See *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

⁸ See, generally, *People v Toma*, 462 Mich 281, 303-305; 613 NW2d 694 (2000) (Supreme Court directly examined the evidence on the record).

⁹ *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

identifications made before the commencement of formal criminal judicial proceedings.¹⁰ Moreover, the *Anderson*¹¹ right to the presence of counsel does not apply at the prearrest “mere suspicion” phase of criminal investigations.¹² Therefore, had defense counsel moved to suppress Daniels’ identification testimony, it would have rested exclusively on whether the procedures were “so unnecessarily suggestive and conducive to irreparable mistaken identification that they amount to a denial of due process.”¹³

“In order to sustain a due process challenge [based on a pretrial identification procedure], a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.”¹⁴ When a previous identification procedure is so impermissibly suggestive that it creates a substantial likelihood of misidentification, the testimony regarding the previous identification must be excluded, but the witness’s in-court identification can still be admissible.¹⁵ The prosecutor need only demonstrate that the witness “had an independent basis to identify the defendant in court.”¹⁶

Under the circumstances in this case, defense counsel’s failure to move to suppress Daniels’ identification testimony was neither deficient nor prejudicial. The police did not leave a picture of Iswed at the cab station because they had evidence that the killer took a cab. Rather, Iswed was one of four men who lived in the same house as the victim, and each man gave the police a statement regarding their whereabouts on the evening she was killed. Iswed himself reported that he took a cab from his residence in Dearborn to a location in Detroit. The photograph the police left at the cab station was simply an attempt to verify Iswed’s story, not necessarily to find incriminating evidence against him specifically. Although Daniels recognized Iswed, he remembered picking Iswed up at a different location, which happened to be where the victim’s body was discovered. Daniels had an adequate opportunity under non-stressful conditions to observe Iswed. If defense counsel had moved to suppress Daniels’ pretrial identification, that motion would have properly been denied. Even if that evidence been suppressed, the trial court would not have erred in allowing the in-court identification because Daniels’ observation of Iswed at trial provided an independent basis for his identification.¹⁷

¹⁰ See *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977); *People v Cheatham*, 453 Mich 1, 9, n 8; 551 NW2d 355 (1996).

¹¹ *People v Anderson*, 389 Mich 155, 168-169; 205 NW2d 461 (1973).

¹² *People v Kurylczyk*, 443 Mich 289, 300-301 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993); *People v Lee*, 391 Mich 618, 625; 218 NW2d 655 (1974).

¹³ *People v Winters*, 225 Mich App 718, 725; 571 NW2d 764 (1997).

¹⁴ *Kurylczyk*, *supra* at 302.

¹⁵ See *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998) (adopting the eight factors listed in *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 [1977]).

¹⁶ *Gray*, *supra* at 114-115.

¹⁷ See *Kachar*, *supra* at 95-96.

A reasonably competent attorney likely would have elected, as defense counsel did, to argue to the jury that Daniels was testifying not from his independent recollection, but from his previous familiarity with Iswed's photograph. Consequently, it would have *disadvantaged* Iswed to exclude the pretrial identification because the in-court identification would be admissible. In other words, allowing the jury to hear this pretrial identification testimony was a risk calculated to counter strong identification evidence that it would hear regardless of objection. We will not second guess this strategy, nor will we conclude that it was deficient simply because it ultimately failed to secure Iswed's complete acquittal.¹⁸

Finally, we cannot ignore the way the DNA evidence convincingly tied Iswed to the scene where Amine was killed and where she was found. In light of this evidence, Iswed cannot demonstrate the requisite prejudice from his attorney's allegedly ineffective failure to move to suppress the testimony, even if he could show deficient performance.

III. Right To Present A Defense

A. Standard Of Review

Next, Iswed argues that he was denied his right to present a defense when the trial court sustained a hearsay objection by the prosecutor. As a result of this ruling, defense counsel was unable to continue to question Chehadi regarding a petition that Amine filed with immigration officials seeking to have him deported. We review a trial court's ruling on evidentiary matters for an abuse of discretion.¹⁹

B. Analysis

Although not clearly articulated to the trial court, the defense contended that this testimony concerning the petition for deportation was admissible regardless of whether Chehadi could accurately recall the contents of the petition. Further, regardless of whether the petition accurately reflected Amine's intentions, the defense evidently maintained that how Chehadi understood the petition was relevant to whether he had a motive to kill his wife. Theoretically, Chehadi could have had a motive to kill his wife if he thought she could arrange his deportation, even if this belief was mistaken. Under this theory, we agree that the question asked by defense counsel did not call for a hearsay response, but properly asked information relevant to motive.²⁰

Nonetheless, not every erroneous evidentiary ruling is an error of constitutional magnitude. In order for the trial court's ruling to rise to the level of a constitutional error, it had to have infringed on Iswed's right to assert a defense in some substantial way.²¹ In the instant case, Iswed was able to develop at trial his theory that there was disharmony between Chehadi

¹⁸ See *Tommolino, supra*; *People v Bart (On Remand)*, 220 Mich App 1, 15, n 4; 558 NW2d 449 (1996).

¹⁹ See *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

²⁰ See *People v Eady*, 409 Mich 356, 361; 294 NW2d 202 (1980).

²¹ See *Toma, supra* at 296.

and Amine. The evidence plainly showed that they had fought and even separated. The ruling did not substantially interfere with Iswed's ability to present his defense.

Nor did this ruling undermine the verdict's reliability.²² Developing Chehadi's motive to kill his wife would have done nothing to change the fact that he had an alibi and that the physical evidence tied Iswed to Amine's death. Consequently, the prejudice to Iswed from the trial court's ruling was minimal. By contrast, the evidence of Iswed's guilt was overwhelming. Considering just the DNA evidence and Marai's testimony placing Iswed at the scene of the killing and identifying him as the one who drove away in Amine's car, which, it turned out, had Amine's body in the trunk, it is clear that any error in precluding this testimony as part of the defense was harmless.

IV. "Opinion" Testimony

A. Standard Of Review

Iswed contends that the trial court impermissibly allowed a police detective to invade the province of the jury by giving an expert opinion on Iswed's guilt or innocence. Again, this is an evidentiary issue that we review to determine whether the trial court abused its discretion.²³

B. Analysis

The testimony to which Iswed objects on appeal concerned the investigation into the murder. Jabour explained how he narrowed the field of suspects to Iswed, excluding Chehadi, Marai, and others. During this phase of examination, defense counsel objected frequently that the officer's testimony constituted hearsay. The trial court sustained these objections, making the prosecutor's task more difficult. Iswed now claims that allowing Jabour to respond "yes" to a single question asking whether Jabour "excluded certain people, suspects in this case" interfered with the jury's duty to determine if Iswed, as opposed to Chehadi or someone else, had murdered Amine.

"[A] witness is not permitted to tell the jury how to decide the case. Thus, a witness is prohibited from opining on . . . the criminal responsibility of an accused, or his guilt or innocence."²⁴ However, the record does not reveal that Jabour commented on Iswed's guilt or innocence, the challenged testimony did not improperly bolster any other evidence in the case, nor was it actually an opinion. Instead, Jabour merely explained how and why the focus of the investigation came to center on Iswed, i.e., the police independently corroborated the stories told by Chehadi, Atoui, and Marai, while the police could not corroborate Iswed's story. Casting the testimony in terms of what the detective did, as opposed to what the people he talked to said, is the manner normally employed to separate testimony regarding relevant conduct from the hearsay

²² *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000).

²³ See *Snider*, *supra* at 419.

²⁴ *People v Drossart* 99 Mich App 66, 79-80; 297 NW2d 863 (1980); see also *People v Peterson*, 450 Mich 349, 374; 537 NW2d 857 (1995).

information that gave rise to the conduct. Allowing the jury to hear this evidence was not error, much less error requiring reversal.

V. Denial Of Counsel

A. Standard Of Review

Iswed also argues that he was denied the assistance of counsel while the jury was deliberating, which he contends was a critical stage in the criminal proceedings. We review de novo this constitutional question.²⁵

B. Analysis

While the jury was deliberating, Iswed's attorney was in another courtroom conducting a preliminary examination. Although defense counsel returned to Iswed's courtroom to address the jury's first note, he was not present when the trial court decided to respond to a second note in which the jury requested to be reinstructed on the elements of the charges it was considering. When the trial court determined it could no longer wait for defense counsel, it sent written copies of the instructions on those charges to the jury. These were the instructions that the trial court had read to the jury earlier, before it had been sent to deliberate, to which the defense did not voice any objection. Later, when defense counsel did return, he objected that the separate specific intent instruction had not also been provided, but by then the jury had indicated that it had reached its verdict.

Iswed now asserts that reinstructing the deliberating jury was a critical stage in the proceeding and that, by deciding to send the instructions to the jury without defense counsel present, the trial court prevented Iswed from obtaining the assistance of counsel during that stage. Consequently, Iswed would characterize this as a complete denial of counsel subject to automatic reversal regardless of prejudice, as required in *United States v Cronic*.²⁶ While we can distinguish the "complete denial of counsel," or situations where counsel is *prevented* from rendering assistance, as contemplated in *Cronic*, from the situation presented by this case, we find it unnecessary to engage in that exercise. We are bound by the Michigan Supreme Court's holding that is directly on point, and which unequivocally states that automatic reversal is not the rule when a court provides an ex-parte supplemental instruction on the law to a deliberating jury.²⁷ Rather, this type of error in making substantive, ex parte communication with the jury "carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an absence of prejudice."²⁸

²⁵ See *Houstina*, *supra* at 73.

²⁶ *United States v Cronic*, 466 US 648, 659, n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

²⁷ See *People v France*, 436 Mich 138; 461 NW2d 621 (1990).

²⁸ *Id.* at 142-143.

In this case, defense counsel made it clear that, had he been present, he would have also requested that the separate instruction on specific intent be provided to the jury. Given that the jury acquitted Iswed on the premeditated theory of first-degree murder, Iswed did not suffer any prejudice with regard to that charge. With regard to the felony murder charge, the specific intent instruction would have applied to the underlying larceny offense, but an explanation of the specific intent required was also included in the written instruction on larceny that was provided to the jury.²⁹ Consequently, because there is no reasonable probability that Iswed was prejudiced by the court's ex-parte substantive communication, we hold that the presumption of prejudice has been effectively rebutted.³⁰

VI. Prosecutorial Misconduct

A. Standard Of Review

Iswed argues that the prosecutor denied him a fair trial by denigrating defense counsel when: (1) during his opening statement the prosecutor suggested that defense counsel might try to distract the jury from the facts by “having fun” with certain witnesses or with certain aspects of their character; and (2) during his rebuttal argument when the prosecutor told the jurors that defense counsel was telling them lies, just like Iswed, and that defense counsel's strategy was to “ship enough lies” to the jury so as to have them believed. Because we independently review instances of alleged prosecutorial misconduct as they individually appear in the record, our review is de novo.³¹ However, with regard to the alleged misconduct in the opening statement, Iswed did not preserve this error by objecting.³² Consequently, our review of that narrow issue is for plain error affecting Iswed's substantial rights.³³

B. Analysis

Although the prosecutor's opening statement remark bordered on improper disparagement of defense counsel, the essence of the remark was that the jury should pay close attention to the evidence. Accordingly, this was not plain error that prejudiced Iswed's substantial rights.³⁴ However, the prosecutor's remarks during rebuttal argument clearly amounted to misconduct. It is improper to make a personal attack on the credibility of defense counsel.³⁵ The rationale behind this rule is that it infringes on the right to the presumption of innocence when the focus of the trial is shifted to defense counsel's personality.³⁶ Nonetheless,

²⁹ See CJI2d 23.1.

³⁰ *France, supra* at 165.

³¹ *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

³² *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

³³ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

³⁴ See *People v Philips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

³⁵ See *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996).

³⁶ *Id.*

this was a lengthy trial with many witnesses and an enormous amount of highly persuasive evidence pointing to Iswed's guilt. The prosecutor's remarks were insignificant in view of the overall record. The jurors were allowed to determine for themselves whether defense counsel had mischaracterized the evidence. Additionally, the trial court's curative instruction specifically told the jury that the prosecutor had no legitimate reason to call defense counsel a liar. Taken together, the factors reveal that, though the remarks were clearly improper, they did not deny Iswed a fair trial.³⁷ Nor does it affirmatively appear that the prosecutor's comments undermined the verdict's reliability, making this error harmless.³⁸

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Donald S. Owens

³⁷ See *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1996).

³⁸ See *Rodriguez*, *supra* at 473-474.