STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2011
v HARRY T. RILEY, a/k/a HARRY T. RILEY, JR., Defendant-Appellant.	No. 295838 Livingston Circuit Court LC No. 09-018081-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v NOAH RICHARD LOVELL, III, Defendant-Appellant.	No. 298164 Livingston Circuit Court LC No. 09-018082-FC

Before: M. J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

In Docket No. 295838, Harry T. Riley appeals as of right his convictions of armed robbery, MCL 750.529; unlawful imprisonment, MCL 750.349b; torture, MCL 750.85; and first-degree home invasion, MCL 750.110a(2). Riley was convicted following a jury trial and was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 75 to 115 years in prison for his armed robbery, unlawful imprisonment, and torture convictions, to be served before a consecutive term of 13 years, 4 months to 20 years in prison for his first-degree home invasion conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences of both defendants.

In the consolidated appeal, Docket No. 298164, Noah Richard Lovell, III appeals as of right his convictions of armed robbery, MCL 750.529; unlawful imprisonment, MCL 750.349b; torture, MCL 750.85; and first-degree home invasion, MCL 750.110a(2). Lovell was convicted following a jury trial and was sentenced to concurrent terms of 36 years, 8 months to 75 years in prison for his armed robbery and torture convictions, and 10 to 15 years in prison for his

unlawful imprisonment conviction, to be served before a consecutive term of 13 years, 4 months to 20 years in prison for his first-degree home invasion conviction. We affirm.

This case arises out of the armed robbery, unlawful imprisonment, torture, and home invasion of an 84-year-old victim. On the day of the incident, Riley went to the victim's back door wearing a work vest and a hard hat under the guise that he worked for a utility company and wanted to look at the victim's property. The victim walked his property with Riley for approximately 45 minutes. Riley was talking on his cellular telephone during a substantial portion of that time. Cellular telephone call logs showed that Lovell's telephone was in the vicinity of the victim's house and that numerous calls were made to Riley at the time of the crime. Riley's vehicle was rented by Lovell.

Riley followed the victim into his house; at that point, the victim noticed a pry bar on the table in his dinette. As the victim reached for the pry bar, Riley punched the victim in the face so hard that it knocked his dentures out of his mouth and knocked his glasses off of his face. Riley then grabbed the victim and pushed him down the stairs. At the bottom of the stairs, Riley continued to beat the victim, punching and kicking his face and body. Riley repeatedly demanded to know where the victim kept his money, and threatened to kill him. Riley also repeatedly poked the victim's arms, chest, and neck with a knife. The victim lost consciousness several times during the beating. Riley then sat the victim in a chair and bound his wrists and ankles with duct tape. Riley kicked the victim's face with such force that if left a shoe print. During the incident, the victim heard a second individual come halfway down the stairs; from his vantage point, the victim could only see the second individual, a white male, from the waist down. The second individual threatened to kill the victim if he did not reveal the location of the money. Meanwhile, Riley took the victim's coin collection. The victim had a broken jaw, broken nose, cracked eye sockets, three broken ribs, and blood on the brain. The victim stayed in the hospital for over a week, and then spent nearly two months in a rehabilitation center.

The next day, Lovell and Riley met with George Wilson who heard them discussing how they were going to sell coins. Wilson also heard Riley berate Lovell for his time-consuming method of ransacking drawers. A receipt from a hardware store indicating the purchase of a hard hat, pry bar, and work gloves was found in the victim's driveway, and Lovell was identified as the individual who purchased the goods.

Riley first argues that his trial counsel was ineffective for failing to move to suppress evidence pertaining to a photographic lineup and for failing to move for a separate trial. "A claim of ineffective assistance of counsel is a mixed question of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id*. "A defendant that claims he has been denied the effective assistance of counsel must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A defendant must overcome a strong presumption that the

assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." *Id.*

Three weeks after the incident, a state trooper conducted a photographic lineup with the victim at the rehabilitation center. The victim was unable to identify any of the individuals; subsequently, the trooper pointed to Riley's photograph and asked the victim if he recognized that individual. The victim did not. Six weeks after the incident, a detective conducted a corporeal lineup with the victim at the jail, and the victim identified Riley, primarily by voice. The victim also identified Riley at trial.

At a *Ginther*[1] hearing, Riley's trial counsel testified that he made a strategic decision not to file a motion to suppress evidence pertaining to the photographic lineup because he wanted to introduce evidence of the trooper's misconduct at the photographic lineup. The trial court found that defense counsel was not ineffective for failing to file a motion to suppress, and that, in any event, it would have denied the motion because an alternative basis existed for the subsequent identifications.

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "However, in-court identification by the same witness may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure." *Id.*

In this case, the procedure followed by the trooper at the photographic lineup was clearly impermissibly suggestive. See *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004) (when "the witness is shown . . . a group in which one person is singled out in some way, he is tempted to presume that he is the person"). However, no identification occurred at the photographic lineup. The appropriate inquiry is whether an independent basis existed for the victim's subsequent identifications of Riley. *Gray*, 457 Mich at 114-115. "[T]he independent basis inquiry is a factual one and . . . the validity of a victim's in-court identification must be viewed in light of the totality of the circumstances." *People v Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000). In determining if an independent basis exists for the admission of a subsequent identification, a court should weigh the following non-exhaustive list of factors: "(1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of the description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the

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

nature of the offense and the victim's age, intelligence, and psychological state; (8) any idiosyncratic or special features of the defendant." *Id*. at 702-703.

Here, the victim, who was 84 years old at the time of trial, walked his property with his assailant for 45 minutes in the afternoon before he was beaten at great length by that individual. The victim did not identify Riley in a photographic lineup three weeks after the incident, even after the trooper impermissibly suggested that Riley was the assailant. However, the victim positively identified Riley in a corporeal lineup at the jail six weeks after the incident, primarily by voice recognition. The record reveals that the victim was extremely concerned about misidentification, and only made a positive identification when he was absolutely certain, after hearing the individuals in the lineup ask "where's the money?[,]" that Riley was his assailant. On these facts, the trial court did not clearly err in concluding that an independent basis existed for the victim's subsequent identifications of Riley. Accordingly, even if defense counsel had moved to suppress evidence pertaining to the photographic lineup and the trial court had granted the motion, evidence of the victim's subsequent positive identifications of Riley was admissible at trial because an independent basis existed for the identifications. "[T]rial counsel cannot be faulted for failing to raise . . . a motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Any suppression of the photographic lineup, which did not result in an identification, would have made no difference at trial. Additionally, a review of the record indicates that failing to move to suppress the pretrial identification procedure was a matter of trial strategy, "an area in which this Court will not substitute its judgment for that of counsel." *Id*. at 182-183. Defense counsel repeatedly reiterated that he made a strategic decision not to move to suppress evidence concerning the pretrial photographic lineup because he wanted to introduce evidence of the impermissibly suggestive procedure employed by the trooper to try to discredit the remainder of the case. Had defense counsel moved to suppress evidence of the pretrial photographic lineup, and had the motion been granted, he would have been unable to introduce evidence to discredit the police, but the subsequent positive identifications of his client would have still been admitted into evidence. Defendant has not met his burden of demonstrating ineffective assistance of counsel. *Sabin (On Second Remand)*, 242 Mich App at 659.

Riley next argues ineffective assistance of counsel related to the failure to move to sever his trial from Lovell's trial. Riley's trial counsel confirmed at the *Ginther* hearing that it was his professional judgment, after reviewing all of the facts and circumstances in the case, that there was not a basis for either a separate trial or for separate juries, and that there was no tactical advantage to trying to obtain severance. The trial court concluded that defense counsel was not ineffective for failing to move for a separate trial because the defenses of the codefendants were not irreconcilable. "Codefendants do not have an absolute right to separate trials." *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). "In fact, there is a strong presumption in favor of joint trials." *Id*. MCR 6.121(C) provides that "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendants." "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact

occurred at trial, will preclude reversal of a joinder decision." *Id*. at 346-347. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id*. at 349. "'[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.'" *Id*., quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). "The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id*., quoting *Yefsky*, 994 F2d at 897.

Here, Riley's defense theory was misidentification coupled with police misconduct. Lovell's defense theory was that he was not present, or that if he was present, he was merely present, and not an aider and abettor. The defenses were neither inconsistent nor mutually exclusive or irreconcilable; the jury would not have to believe one codefendant at the expense of the other. *Id*. at 349. If the jury found that Riley was misidentified, it could also find that Lovell was not present, or that if he was present, he was not an aider and abettor. Moreover, this Court has held that where a trial court denied a motion for a separate trial filed by a codefendant, as occurred here, defense counsel was not ineffective for failing to move for a separate trial because it would have been unsuccessful and therefore defense counsel "was not obligated to pursue the matter." *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994). Riley has not established that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Sabin (On Second Remand)*, 242 Mich App at 659. Further, he has not demonstrated that a reasonable probability exists that, but for defense counsel's strategic decisions not to move for a separate trial, the outcome of the proceedings would have been different. *Id*.

Riley next argues that the trial court erred in admitting Wilson's testimony that the conversation he heard between the codefendants led him to conclude that they were guilty of the charged offenses. However, the challenged testimony was not admitted at trial, but rather, at an evidentiary hearing; therefore, no error occurred.

Riley next argues that the trial court erred in compelling Wilson to testify regarding his delivery of marijuana. "[W]here . . . immunity is sufficient, the witness is required to answer even though such answers are self-incriminating." *In re Watson*, 293 Mich 263, 274; 291 NW 652 (1940). Riley does not dispute this. Rather, he argues the testimony was irrelevant and unfairly prejudicial. We review unpreserved evidentiary errors for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). "Relevant evidence is evidence 'having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.'" *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004), quoting MRE 401. "Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible." *Id*. at 553; MRE 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Id*.; MRE 403.

Here, defense counsel for Lovell sought to impugn Wilson's credibility by demonstrating that his motivation for contacting and cooperating with the police was to avoid prosecution for delivery of marijuana. The evidence of Wilson's involvement with drugs was thus relevant to his credibility. And "[t]he credibility of a witness is always an appropriate subject for the jury's consideration." *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). Further, the

probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Discerning Wilson's motivation for contacting and cooperating with the police was highly probative of the veracity of the information he provided to the authorities, as well as his overall credibility. That Wilson happened to deliver marijuana to Riley was a peripheral yet requisite detail necessary to discredit Wilson by attacking his motivation for contacting and cooperating with the police. While the testimony was prejudicial, it was downplayed: once defense counsel for Lovell established that Wilson delivered marijuana to Riley as a point from which to start his line of questioning, he thereafter used the universal term "somebody" in reference to the recipient of the marijuana. On the record, the probative value of evidence of Wilson's involvement with marijuana (and related delivery of marijuana to Riley) was not substantially outweighed by the danger of unfair prejudice. Riley has failed to demonstrate plain error affecting his substantial rights.

Riley next argues that his trial counsel was ineffective for failing to object when the trial court compelled Wilson to testify regarding his delivery of marijuana to Riley. Our review is limited to errors apparent on the record in this regard. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "To prove that counsel has been ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *Id*. at 57-58. The trial court did not err in compelling Wilson to testify regarding his delivery of marijuana to Riley, "and any objections by defense counsel on those grounds would have been meritless." *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). "[C]ounsel is not ineffective for failing to raise futile objections[.]" *Id*. Moreover, "[d]efense counsel is given wide discretion in matters of trial strategy and there is accordingly a strong presumption of effective assistance of counsel." *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). "Declining to raise objections can often be consistent with sound trial strategy." *Id*. Here, defense counsel for Riley may have decided that raising an objection to Wilson's response would emphasize Riley's receipt of marijuana. Further, both codefendants greatly benefited from the elaborate attack on Wilson's credibility by focusing on his motivation for contacting and cooperating with the police. Riley has failed to overcome the strong presumption that counsel's failure to object was a matter of trial strategy, and has not demonstrated that, but for counsel's failure to object, the result of the proceeding would have been different. *Sabin (On Second Remand)*, 242 Mich App at 659.

Lastly, Riley argues that the prosecutor's comments highlighting the victim's and Wilson's military service constituted improper vouching and improper civic duty arguments. Where "there was no contemporaneous objection or request for a curative instruction in regard to any alleged error [of prosecutorial misconduct] . . . review is limited to ascertaining whether plain error affected [the] defendant's substantial rights." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). While "[a] prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness . . . 'the prosecutor may argue from the facts that a witness should be believed.'" *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009), quoting *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Further, "a prosecutor may not urge the jurors to convict the defendant as part of their civic duty." *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

The prosecutor's comments during opening statement regarding the victim's military service were made in the context of providing personal background information about the victim. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), aff'd *People v Tilley*, 405 Mich 38; 273 NW2d 471 (1979). When the victim was called to the stand, he testified regarding his military service. The prosecutor's comments during closing argument regarding Wilson's military service were made in the context of explaining Wilson's motivation for contacting the police—his military solidarity with the victim. The prosecutor was not suggesting that he had special knowledge of the victim's and Wilson's truthfulness, nor was he urging the jurors to convict Riley as part of their civic duty. *Seals*, 285 Mich App at 22; *Abraham*, 256 Mich App at 273. Indeed, the prosecutor was not even arguing, as is permissible, that the victim and Wilson should be believed. *Seals*, 285 Mich App at 22. Rather, the prosecutor's comments concerning the victim's life history and Wilson's motivation for contacting the police were benign and did not unfairly place issues into the trial that were more comprehensive than Riley's guilt or innocence, and did not "unfairly encourage[] jurors not to make reasoned judgments." *Abraham*, 256 Mich App at 273. Riley has failed to demonstrate plain error. Moreover, even if the challenged remarks were determined to constitute plain error, the error did not affect Riley's substantial rights. The jury was instructed that the arguments of the attorneys were not evidence, and jurors are presumed to follow their instructions. *People v Parker*, 288 Mich App 500, 512; 795 NW2d 596 (2010).

Riley also argues that his trial counsel was ineffective for failing to object to the allegedly improper comments. As noted above, the prosecutor's comments regarding the victim's and Wilson's military service were not improper, "and any objections by defense counsel on those grounds would have been meritless." *Cox*, 268 Mich App at 453. "Because counsel is not ineffective for failing to raise futile objections, defendant is not entitled to relief on this unpreserved issue." *Id*.

Lovell first argues on appeal that insufficient evidence existed to sustain his convictions. We review "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In reviewing sufficiency of the evidence claims, we "examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *Id*. at 196. We "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "The prosecutor is not required to present direct evidence linking the defendant to the crime." *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). "Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *Kanaan*, 278 Mich App at 619. "All conflicts in the evidence must be resolved in favor of the prosecution." *Id.*

Lovell argues that there was no evidence that he was in the victim's house during the crimes, or was Riley's accomplice. Thus, he is challenging the evidence of his identity as a perpetrator. Lovell also argues that there was insufficient evidence that the second person in the house intended the crimes of armed robbery, unlawful imprisonment, and torture.

In viewing the evidence in the light most favorable to the prosecution, we find that the prosecutor established that Lovell purchased a hard hat, pry bar, and work gloves at a hardware store the day before the crimes. In reference to the pry bar, the hardware store manager heard Lovell's companion inquire: "are you going to buy that tool to beat that guy's ass[?]" Lovell was identified as the individual who rented the vehicle seen in the victim's driveway at the time the crimes occurred. Cellular telephone call logs showed that Lovell's telephone was in the vicinity of the victim's house and that numerous calls were made to Riley at the time of the crime. While the victim was bound (false imprisonment), Riley severely beat him (torture) and poked him with a knife while stealing his coin collection (armed robbery). While this was occurring, the other individual in the house threatened to kill the victim if he did not reveal the location of his money. When Lovell and Riley met Wilson the next day, Wilson heard them talking about how they were going to sell coins, and heard Riley berate Lovell for the method he used to ransack drawers.[2]

"Identity may be shown by either direct testimony or circumstantial evidence." *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Here, ample circumstantial evidence exists, as set forth above, identifying Lovell as one of the perpetrators of the charged offenses. Additionally, "a person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001); MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime[,] had knowledge that the principal intended its commission at the time he gave aid and encouragement[,]" *id*. at 495-496 (quotation omitted), or "that the charged offense was a natural and probable consequence of the commission of the intended offense." *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "The aiding and abetting statute encompasses all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Izarraras-Placante*, 246 Mich App at 496. Further, "[a] defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." *Robinson*, 475 Mich at 15. Here, the evidence showed that Lovell performed acts and gave encouragement that assisted the commission of the crimes. *Izarraras-Placante*, 246 Mich App at 495-496. Further, circumstantial evidence exists that Lovell intended the charged offenses of armed robbery, unlawful imprisonment, and torture. Viewing the evidence in a light most favorable to the

[2] Lovell argues that Wilson recanted this testimony, pointing to a "Declaration of George Wilson[,]" attached as an appendix to Lovell's brief on appeal. However, MCR 7.215(A)(1) provides that "[i]n an appeal from a lower court, the record [on appeal] consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." The Wilson declaration is "not a part of the lower court record and, therefore, cannot be considered" by this Court. *Seals*, 285 Mich App at 21.

prosecution, resolving all evidentiary conflicts in its favor, a rational trier of fact could have found beyond a reasonable doubt that Lovell was guilty of the charged offenses.

Lovell next argues he is entitled to a new trial on the basis of newly discovered evidence in the form of a declaration by Wilson recanting his trial testimony. However, we will not consider the allegedly newly discovered evidence because it is not a part of the lower court record and not properly before this Court. *Seals*, 285 Mich App at 21; MCR 7.215(A)(1). Even if we were to sever Wilson's testimony from the record, we would find that legally sufficient evidence existed for a reasonable jury to have found Lovell guilty on all charges beyond a reasonable doubt.

Lovell next argues that the trial court erred in denying his motion for a separate trial. We review unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). As previously set forth, MCR 6.121(C) provides that "[o]n a defendant's motion, the court must sever the trial of defendants on related offense on a showing that severance is necessary to avoid prejudice to substantial rights of the defendants." A defendant must show in the trial court that his rights will be prejudiced if severance is not granted. If a defendant does not make that showing in the trial court or show on appeal that such prejudice actually occurred at trial, he is not entitled to relief. *Hana*, 447 Mich at 346-347. "[A] defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Id*. at 346 n 7.

Here, Lovell has failed to demonstrate that his substantial rights were prejudiced at trial due to the trial court's denial of his motion for a separate trial. On appeal, Lovell argues that severance was necessary so that Riley could testify to *exculpate* him. However, Lovell argued in the trial court, and provided a sworn affidavit averring, that severance was necessary because Riley could testify to *inculpate* him. Because Riley did not testify at all, there is no significant indication on appeal that the requisite prejudice in fact occurred at trial. Accordingly, Lovell has failed to demonstrate plain error affecting his substantial rights and reversal of the joinder decision is precluded.

Lovell next argues that the prosecutor engaged in misconduct when he made the following comments during rebuttal closing argument:

> [W]hat did [defense counsel for Lovell] tell us about what your client did[?] You sat and attacked everybody in this case and you didn't once tell us what did your client do. What's he responsible for[?]

We review preserved claims of prosecutorial misconduct de novo. *Abraham*, 256 Mich App at 272. "A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). Here, the prosecutor critiqued defense counsel for Lovell's strategy during closing argument of attacking the prosecutor, police, and prosecution witnesses instead of discussing the actions taken by Lovell or lack thereof. This implied that Lovell had to prove something, and arguably, it impermissibly shifted the burden of proof. However, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's

argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, the objectionable narrative was made in response to the argument of Lovell's defense counsel, and does not rise to the level of an error requiring reversal. *Id*. Further, the jury was instructed that the arguments of the attorneys were not evidence, and jurors are presumed to follow their instructions. *Parker*, 288 Mich App at 512. While we find the remark improper, Lovell was not entitled to relief based on the challenged comment. *Kemmebrew*, 220 Mich App at 608.

Lovell also argues that the prosecutor's comments regarding his strategy of alternate defenses were improper. Where "there was no contemporaneous objection or request for a curative instruction in regard to any alleged error [of prosecutorial misconduct] . . . review is limited to ascertaining whether plain error affected [the] defendant's substantial rights." *Brown*, 279 Mich App at 134. "[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory" is appropriate. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). "[O]nce the defendant advances . . . a theory, argument on the inferences created" is permissible. *Id*. Here, the prosecutor's comments on Lovell's alternate defense theories were appropriate, and Lovell has failed to establish plain error affecting his substantial rights.

Lovell next argues that the trial court erred in its instructions concerning circumstantial evidence and aiding and abetting. However, Lovell waived any error concerning those instructions by affirmatively agreeing to them. *People v Harper*, 479 Mich 599, 642-643 n 72; 739 NW2d 523 (2007). Additionally, no mistakes are apparent on the record concerning the jury instruction for circumstantial evidence; therefore, Lovell is not entitled to relief on this unpreserved claim of ineffective assistance of counsel.

Lastly, Lovell takes issue with the trial court's imposition of an upward departure from the minimum sentencing guidelines range. "[C]ourts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

> Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the [Michigan Supreme] Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history. [*Id*. at 299-300, quoting *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003).]

The trial court sentenced Lovell to 36 years, 8 months to 75 years in prison for his armed robbery and torture convictions, an upward departure of 12 years, 11 months. "Substantial and compelling reasons for departure exist only in exceptional cases." *Smith*, 482 Mich at 299. This was such a case. Here, the trial court's stated substantial and compelling reasons for departure were the unusual nature of the home invasion in that it was planned to occur while the victim was present; the steps Lovell took to prevent the victim from calling for help, leaving him to die; and Lovell's pattern of using his paving business to prey on elderly homeowners. Those reasons were not clearly erroneous. *Id*. at 300. Further, those reasons were objective and verifiable, of considerable worth in determining the length of the sentence, and keenly or irresistibly grabbed the court's attention. *Id*. at 299. The trial court did not abuse its discretion in determining that the reasons given were substantial and compelling enough to justify the departure. *Id*. at 300. The minimum sentence imposed was proportionate to Lovell's conduct and prior criminal history, and constituted an appropriate exercise of discretion. *Id*. at 300. The sentences imposed fall within the range of principled outcomes; therefore, Lovell is not entitled to relief on this issue.

Affirmed.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello