STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 6, 2011
v IDRIS LADELL YOUNG, Defendant-Appellant.	No. 296724 Saginaw Circuit Court LC No. 09-032953-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DEMARCUS TREVELL YOUNG, Defendant-Appellant.	No. 296725 Saginaw Circuit Court LC No. 09-032753-FC

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendants Idris Young and Demarcus Young were tried jointly, before a single jury. Idris was convicted of carjacking, MCL 750.529a, conspiracy to commit carjacking, MCL 750.157a, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. Demarcus was convicted of carjacking, conspiracy to commit carjacking, assault with intent to commit murder, MCL 750.83, carrying a concealed weapon ("CCW"), MCL 750.227, and two counts of felony-firearm. Idris was sentenced as a habitual offender, third offense, MCL 769.11, to concurrent prison terms of 9 to 45 years for the conspiracy conviction and six to ten years for the felon-in-possession conviction, to be served consecutive to prison terms of 22-1/2 to 45 years for the carjacking conviction and three concurrent two-year terms of imprisonment for the felony-firearm convictions. Demarcus was sentenced to concurrent prison terms of 18 to 40 years each for the carjacking and conspiracy convictions, 23 to 45 years for the assault conviction, and three to five years for the CCW conviction, to be served consecutively to concurrent two-year terms of imprisonment for each felony-firearm conviction. Idris appeals as of right in Docket No.

296724, and Demarcus appeals as of right in Docket No. 296725. For the reasons set forth in this opinion, we affirm the convictions and sentences in both appeals.

Defendants' convictions arise from an incident outside the Blue Diamond liquor store in Saginaw, Michigan on May 16, 2009. As the victim entered the store, he observed two men standing outside. One man, whom the victim identified as Demarcus, was wearing a thick coat, which was unusual because of the warm weather. The other man, whom the victim identified as Idris, had the lower part of his face covered with his shirt or a cloth. According to the victim, as he walked by defendants, Idris made a gesture like he was racking a gun and made direct eye contact with the victim, with a "cold look" in his eyes. When the victim left the store, Demarcus pointed a gun at him and told him to surrender his car keys. When the victim hesitated, Demarcus told him he was "not playing." The victim turned, ducked, and ran. He heard one gunshot as he ran. A videotape from the store's surveillance cameras showed that Demarcus fired a second time, and tried to fire a third time, but his gun jammed.

I. SUFFICIENCY OF THE EVIDENCE

Both defendants argue that the evidence at trial was insufficient to support their convictions. A claim of insufficient evidence is reviewed de novo by reviewing the evidence in a light most favorable to the prosecution "to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 461 (2010), quoting *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595, lv den 268 Mich App 600 (2005). "Circumstantial evidence and reasonable inferences may be satisfactory proof of the elements of a crime." *Lewis*, 287 Mich App at 365. Issues involving the interpretation or application of a statute are reviewed de novo as questions of law. *People v Houthoofd*, 487 Mich 568, 579; 790 NW2d 315 (2010).

A. IDRIS'S IDENTIFICATION

We first address Idris's claim that the evidence was insufficient to establish his identity as one of the perpetrators. Identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "Identity may be shown by either direct testimony or circumstantial evidence." *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967).

The victim could not identify Idris from a photographic array which was presented to him by investigating officers. However, while waiting to testify at the preliminary examination of Demarcus, the victim noticed Idris in the courtroom on an unrelated matter and told the investigating officer that Idris was the other man involved in the attempted carjacking. At trial, the victim identified both Idris and Demarcus as the two persons who committed the offense. The victim testified that Demarcus was the person wearing the thick coat who produced the gun, and that Idris was the person with the partially covered face who made the gun-racking gesture and gave a cold stare as the victim entered the store. This testimony was sufficient to establish Irdris's identity as one of the two perpetrators and though Idris questions the credibility and reliability of the victim's identification testimony, this Court will not interfere with the jury's role of assessing the weight and credibility of identification testimony. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005); *People v Edwards*, 55 Mich App 256, 259-260; 222

NW2d 203 (1974). Further, "an appellate court must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact . . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974), as quoted in *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 440 Mich 1201 (1992).

B. CARJACKING

Both defendants argue that the evidence was insufficient to establish the crime of carjacking, because it was undisputed that an actual larceny of a motor vehicle was never completed.

The carjacking statute, MCL 750.529a, provides, in pertinent part:

> (1) A person who *in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle,* is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.
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> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" *includes acts that occur in an attempt to commit the larceny, or during commission of the larceny*, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

The paramount goal of statutory interpretation "is to ascertain and give effect to the Legislature's intent." *People v Flick*, 487 Mich 1, 10; 790 NW2d 295 (2010). "The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used." *Id.* at 10-11. Every word of a statute should be given meaning, and no word should be treated as surplusage or rendered nugatory if at all possible. *People v Wilcox*, 486 Mich 60, 71; 781 NW2d 784 (2010).

Defendants argue that the phrase "in the course of committing a larceny" contemplates a completed or actual larceny, not an attempted larceny. In *People v Williams*, 288 Mich App 67; 792 NW2d 384 (2010), lv gtd ___ Mich ___ (3/23/2011), this Court considered this identical issue in the context of construing the companion armed and unarmed robbery statutes, MCL 750.529 and MCL 750.530, respectively. Like the carjacking statute, the unarmed robbery statute, MCL 750.530(1) and (2), proscribes conduct "in the course of committing a larceny," which the statute defines as including "acts that occur in an attempt to commit the larceny, or during commission of the larceny[.]" The armed robbery statute, MCL 750.529, incorporates the same conduct proscribed under MCL 750.530.

In *Williams*, 288 Mich App at 75-76, this Court concluded that the robbery statutes incorporate acts taken in an attempt to commit a larceny, regardless of whether the act is completed, explaining:

> The legislative definition of "in the course of committing a larceny" specifically "includes acts that occur in an attempt to commit the larceny. . . ." The term "attempt," which is not defined within the statute, is recognized to mean:
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> **"1.** The act or an instance of making an effort to accomplish something, esp. without success. **2.** *Criminal law.* An overt act that is done with the intent to commit a crime but that falls short of completing the crime. Attempt is an inchoate offense distinct from the attempted crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed. [Black's Law Dictionary (8th ed.).]"
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> As such, the statutory language specifically considers and incorporates acts taken in an attempt to commit a larceny, regardless of whether the act is completed. This is consistent with the language of MCL 750.530(2), which distinguishes, by the use of the word "or," acts committed in "an attempt to commit the larceny" from those acts occurring "during the commission of the larceny" or any subsequent acts comprising flight or efforts to retain any property. The term "or" is "used to connect words, phrases, or clauses representing alternatives." *Random House Webster's College Dictionary* (1997). Hence, an attempt to commit a larceny comprises a separate and distinct action and is not merely a component of a completed larceny. In addition, we would note that MCL 750.530(2) defines "in the course of committing *a* larceny" (emphasis added) and not "*the* larceny." The term "a larceny" denotes a more generic, non-specific or generalized act. The fact that the term "the larceny" is subsequently used within this subsection of the statute merely denotes a reference back to the more generalized "a larceny." Logically, acts taken in the process of committing a larceny necessarily include steps or behaviors occurring at any point in the continuum, despite whether they are successfully completed. This language necessarily demonstrates the Legislature's intent to include attempts to commit a larceny, both by implication and by the specific language contained in this statutory provision.

The Court in *Williams* noted that the carjacking statute, MCL 750.529a, "is almost identical to the wording of MCL 750.530." *Williams*, 288 Mich App at 79. The Court also examined prior versions of the statutes and commented, "Once again, the Legislature removed the language 'robs, steals, or takes,' insinuating that the revised statute was intended to include attempts to commit the designated crime." *Id.* The Court also noted that the bank robbery statute, MCL 750.531, had not been amended by 2004 PA 128, and that MCL 750.531 clearly included language that encompassed an attempt to commit bank robbery. *Williams*, 288 Mich App at 80-81. The Court stated that the language of MCL 750.531 "demonstrate[d] that the concept or legislative act of including language that encompasses an attempt within the statutory definition of a crime is neither unusual nor inconsistent with the most current revisions pursuant to 2004 PA 128." *Id.* at 81. The Court observed that the revisions to MCL 750.529, MCL 750.529a, and MCL 750.530 "now render all of the statutes within this chapter of the Penal Code internally consistent." *Id.*

In consideration of our analysis in *Williams*, we reject defendants' argument that the failure to establish a completed larceny precluded their convictions for carjacking. The evidence that Demarcus threatened the victim with a gun while demanding his car keys was sufficient evidence of an act in the course of committing a larceny of a motor vehicle as defined in the carjacking statute. Accordingly, we reject this claim of error.

C. AIDING AND ABETTING

We next address Idris's claim that the evidence did not support his convictions because it established that Demarcus was the person who assaulted the victim with a gun, and there was insufficient evidence to prove that Idris aided or abetted Demarcus in the commission of the offense.

Every person concerned in the commission of an offense, whether he directly commits the offense or procures, counsels, aids, or abets in its commission may be prosecuted and convicted as if he directly committed the offense. MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). A conviction under an aiding and abetting theory requires proof of the following elements:

> "(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 or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." [*Id.*, quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004).]

Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor; nor is mere mental approval, passive acquiescence, or consent sufficient. *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983).

An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in planning or executing the crime, and evidence of flight after the crime. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

The carjacking statute, MCL 750.529a(1), provides:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

Viewing the evidence in the light most favorable to the prosecution, *McGhee*, 268 Mich App at 622, we find there was sufficient evidence that Idris assisted Demarcus in committing a carjacking, with the requisite intent to be convicted under an aiding and abetting theory. The evidence showed that Idris was lingering outside the store with his brother Demarcus, late at night, for no apparent reason. Demarcus was armed with a gun and was wearing a thick coat despite the warm weather. Idris was attempting to conceal his face and, as the victim walked by to enter the store, Idris made a gesture like he was racking a gun and made direct eye contact with the victim, which the victim described as a "cold look." The jury could infer from this evidence that Idris was not merely standing outside the store with his brother, but rather was aware of Demarcus's intent to commit a carjacking against a lone victim. The evidence that Idris attempted to conceal his face coupled with his actions in mimicking the racking of a gun and his cold eye contact with the victim as he entered the store was evidence of Idris's supportive role in the offense. Further, a reasonable jury could find that Idris's actions were intended to intimidate the victim and make Idris's presence known to him, so that the victim was more likely to comply with Demarcus's demand. Accordingly, the evidence was sufficient for a reasonable jury to have convicted Idris of aiding and abetting a carjacking.

D. CONSPIRACY

Both defendants also argue that there was insufficient evidence to support their convictions for conspiracy. The elements of conspiracy are: (1) the defendant intended to combine with another person; and (2) the participants intended to accomplish an illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). The prosecutor was required to prove that the parties "specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). A conspiracy is complete upon formation of the agreement; therefore, no overt act in furtherance of the conspiracy must be shown to support a conviction. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). When multiple assailants coordinate an attack, it is reasonable to infer that they entered into a conspiracy. *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982), overruled on other grounds in *People v Sturgis*, 427 Mich 392; 397 NW2d 783 (1986). Proof of a conspiracy may be derived from the circumstances, acts, and conduct of the parties during the crime, and inferences are permissible. *Justice*, 454 Mich at 347. Minimal circumstantial evidence is sufficient to prove intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

The record evidence demonstrated that the victim saw defendants come from an abandoned gas station near the store. After the victim parked his car, he noticed that Demarcus was wearing a thick coat despite the warm weather, and that Idris was attempting to conceal his face with a shirt or bandana. Defendants were in close proximity to one another at all times. The evidence of defendants' association, unusual dress, and attempts to conceal their identity, together with Idris's intimidating conduct toward the victim as he was entering the store, and Demarcus's assault of the victim as he was leaving the store, viewed in a light most favorable to the prosecution, support a legally cognizable inference that Idris and Demarcus were acting together in pursuit of a common plan to carjack the victim. Accordingly, when reviewing the evidence in a light most favorable to the prosecution, *McGhee*, 268 Mich App at 622, we find there was sufficient evidence to support defendants' conspiracy convictions.

E. ASSAULT WITH INTENT TO COMMIT MURDER

Demarcus argues that there was insufficient evidence to support his conviction of assault with intent to commit murder. The elements of assault with intent to commit murder are (1) an assault; (2) with an actual intent to kill; (3) that, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). Demarcus argues that there was insufficient evidence of his intent to kill the victim. "A factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). A jury may infer an intent to kill from "the manner and use of a dangerous weapon." *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997). Here, the evidence showed that Demarcus fired at least two shots at the victim after he resisted Demarcus's demand to surrender his car keys, and attempted to fire a third shot but his gun jammed. Viewing the evidence in the light most favorable to the prosecution, *McGhee*, 268 Mich App at 622, we find that Demarcus's repeated discharge of a gun at the victim was sufficient evidence of an intent to kill to support the jury's verdict. *Dumas*, 454 Mich at 403.

II. SCORING OF OFFENSE VARIABLE 13

Demarcus argues that resentencing is required because the trial court erroneously scored 25 points for offense variable (OV) 13 of the sentencing guidelines.

We review the trial court's scoring decision to determine whether the court properly exercised its discretion and whether the evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The interpretation of the statutory sentencing guidelines is reviewed de novo as a question of law. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

A score of 25 points is appropriate for OV 13 when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43. The instructions provide that "all crimes within a 5-year period, *including the sentencing offense*, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a) (emphasis added). The instructions further provide that "[e]xcept for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12." MCL 777.43(2)(c).

Initially, we reject any suggestion that the carjacking and assault convictions could not be considered for purposes of OV 13 because they were subject to being scored under OV 12 (contemporaneous felonious criminal acts). An offense may be scored under OV 12 if it occurred within 24 hours of the sentencing offense and has not and will not result in a separate conviction. MCL 777.42(2)(a). Because Demarcus was convicted of carjacking and assault, the trial court properly declined to score those offenses under OV 12.

Demarcus further argues that even if the carjacking and assault convictions can be counted for purposes of OV 13, his conspiracy conviction could not be counted because conspiracy is classified as a public safety crime, MCL 777.18, not a crime against a person. In determining whether a conspiracy conviction may be counted for purposes of OV 13, the trial

court is required to look to the underlying offense. *People v Jackson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 294964, issued February 17, 2011), slip op at 2-3. The underlying offense in this case is carjacking. Because carjacking is a crime against a person, it is proper to count Demarcus's conspiracy conviction for purposes of OV 13. Thus, Demarcus's convictions for carjacking, conspiracy to commit carjacking, and assault with intent to commit murder establish the requisite three crimes against a person to support the trial court's 25-point score for OV 13.[1]

III. ISSUES RAISED IN DEMARCUS YOUNG'S PRO SE STANDARD 4 BRIEF

Demarcus Young raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

Demarcus raises several claims of ineffective assistance of counsel. Because he did not raise these claims in a motion for a new trial or move for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To prevail on a claim of ineffective assistance of counsel, Demarcus must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009).

Demarcus presents several claims that he contends demonstrate that he was deprived of the effective assistance of counsel. Many of the claims involve general allegations that defense counsel performed deficiently, without identifying the factual bases for the claims. For example, Demarcus asserts that defense counsel was ineffective for failing to object to the prosecutor's misconduct and improper questions, or move for a mistrial on the basis of the prosecutor's misconduct, but does not identify the particular questions or conduct that he believes were improper. He also argues an ineffective assistance of counsel claim in the context of challenging the trial court's conduct, claiming that the court repeatedly violated the Code of Judicial Conduct, improperly acted as a 13th juror, and improperly denied defense motions and overruled valid objections, but again does not identify the particular conduct of the court that he is challenging. These unspecified allegations do not warrant appellate relief. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v*

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[1] At sentencing, the prosecutor also made reference to an earlier juvenile adjudication and a separate carjacking incident as establishing further support for the 25-point score for OV 13. These other matters are not referenced in Demarcus's presentence report. Accordingly, we do not rely on them as a basis for upholding the trial court's 25-point score for OV 13.

Waclawski, 286 Mich App 634, 679; 780 NW2d 321 (2009), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Many of Demarcus's other ineffective assistance of counsel claims are based on matters that the record discloses defense counsel properly pursued at trial. For example, the record discloses that defense counsel was successful in obtaining a copy of the victim's recorded police interview for use at trial, that counsel objected to the trial court's decision to re-read the jury instructions in response to a jury note during deliberations, that counsel objected to Officer Howe's opinion testimony, that counsel moved for a directed verdict of the carjacking charge on the ground that a completed larceny was not committed, and that counsel requested lesser offense instructions. Because the record discloses that defense counsel raised and pursued these matters at trial, there is no basis for concluding that counsel performed deficiently with respect to those matters.

Demarcus also argues that defense counsel was ineffective for failing to object to the joinder of his trial and codefendant Idris Young's trial. Demarcus contends that the joint trials dissuaded him from testifying because doing so would have "involved" Idris, thus suggesting that he might have exculpated himself by inculpating his brother Idris. Demarcus also argues that counsel was ineffective for failing to call him as a witness. The decision whether to call Demarcus to testify was a matter of strategy that this Court will not second-guess. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Further, without an affidavit or other offer of proof of how Demarcus would have testified, there is no factual basis for his claim that he was prejudiced by the joint trials, or by counsel's failure to call him to testify, or that counsel's failure to request severance or call Demarcus as a witness was objectively unreasonable.

Demarcus also argues that counsel was ineffective for failing to file an interlocutory appeal after the jury's verdict and before sentencing. However, Demarcus fails to explain what purpose an interlocutory appeal would have served. It was not unreasonable and therefore not ineffective assistance of counsel for trial counsel to first challenge Demarcus's convictions in a post-judgment motion for a directed verdict of acquittal or a new trial. Further, the filing of a post-judgment motion for directed verdict did not prejudice Demarcus's ability to later challenge his convictions in this appeal as of right.

Having reviewed Demarcus's numerous ineffective assistance of counsel claims in light of the available record, we find no basis for relief.

In a manner similar to his claims of ineffective assistance of counsel, Demarcus presents a list of instances of alleged judicial misconduct or bias. Because Demarcus did not move to disqualify the trial judge under MCR 2.003 or otherwise object to the trial court's conduct at trial, this issue is not preserved. We review unpreserved claims of error for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763.

A court commits misconduct if it engages in conduct that evidences partiality or that could influence the jury to the defendant's prejudice. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). In addition, the following principles govern a trial court's disqualification for bias:

> MCR 2.003(B)(1) provides that a judge is disqualified when the "judge is personally biased or prejudiced for or against a party or attorney." Generally, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 554; 730 NW2d 481 (2007). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a "'deep-seated favoritism or antagonism that would make fair judgment impossible'" and overcomes a heavy presumption of judicial impartiality." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001) (citations omitted). [*In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009).]

Our review of the record does not support Demarcus's claims of judicial bias or judicial misconduct. Demarcus's mere claim that the trial court violated the Code of Judicial Conduct, without specifying the factual basis for this claim, is insufficient to present this issue for review. *Waclawski*, 286 Mich App at 679. Demarcus also argues that the trial court's handling of an incident during jury selection (when a prospective juror allegedly referred to the defendants as "thugs") shows that the court was biased. On the contrary, the court's decision to dismiss the juror in question and to question the remaining jurors to ascertain whether they heard the remark reflects the judge's effort to achieve fair judgment. Thus, there is no merit to this claim. Further, there is no basis in the record for finding that the trial court was somehow complicit in the delayed disclosure of the victim's recorded police statement. Demarcus's remaining claims are based on adverse rulings by the trial court, but without a showing of either deep-seated favoritism or antagonism inconsistent with fair judgment. Thus, Demarcus has failed to overcome the heavy presumption of judicial impartiality.

Next, Demarcus raises several claims of prosecutorial misconduct. Because there was no objection to the prosecutor's conduct at trial, our review of this issue is limited to plain error affecting Demarcus's substantial rights. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Most of Demarcus's claims lack any factual explanation and, therefore, are not properly presented for review. *Waclawski*, 286 Mich App at 679. Several other claims do not directly involve the prosecutor's conduct. The only claims involving the prosecutor's conduct that are identified with any specificity are those relating to the delayed disclosure of the victim's recorded statement and the prosecutor's introduction of Detective Peters allegedly perjured testimony that Cooper did not view the store surveillance video until after the photographic lineup was conducted.

A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). The perjury claim is apparently based on a conflict between the victim's preliminary examination testimony that he watched a surveillance recording at the store immediately after the offense, and Peters's testimony that the photographic lineup was conducted before the victim viewed the surveillance recording.

However, this alleged conflict apparently arises from the fact that the victim viewed the surveillance recording on two separate occasions, once at the store immediately after the offense and again after the photographic lineup was conducted. Peters appears to have been referring to the sequence of events on the date of the photographic lineup. The victim admitted that he viewed the surveillance video on that date after the photographic lineup was conducted. Thus, Peters's testimony was not patently false.

Furthermore, to be entitled to relief on the basis of perjured testimony, a defendant must establish a reasonable likelihood that the false testimony affected the jury's verdict. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Demarcus raises this issue in the context of arguing that, but for Peters's allegedly false testimony, the victim's identification testimony would have been suppressed. He contends that his identification in the photographic lineup was the product of an impermissibly suggestive identification procedure, that procedure being the victim's prior viewing of the surveillance video at the store on the date of the offense.

"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). The court must evaluate the fairness of an identification procedure in light of the totality of the circumstances to ascertain whether the procedure qualifies as so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification. *People v Kurylczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993); *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

In this case, the victim's prior viewing of the surveillance video does not render Demarcus's identification in the photographic lineup as impermissibly suggestive. An identification procedure is impermissibly suggestive if it gives rise to a likelihood of *misidentification*. *Kurylczyk*, 443 Mich at 311-312. The videotape was not created for the purpose of identifying Demarcus. Viewing the video recording would have only afforded the victim the opportunity to see on the recording what he had already witnessed. It did not increase the likelihood that he would misidentify Demarcus in a photographic lineup conducted several days later. Moreover, the victim testified at an evidentiary hearing related to this issue that he could not recall whether he viewed the surveillance video before or after the photographic lineup. He further stated that the faces were distorted in the video, and that he remembered the perpetrators' faces from witnessing the incident. The trial court found that the victim was credible when he testified that he identified the perpetrator's face based on his recollection of the incident, and not from viewing the videotape. Given this record, Demarcus fails to provide this Court with a basis for concluding that Peters's challenged testimony concerning the timing of the photographic lineup affected the admissibility of the identification evidence.

Demarcus also argues that the surveillance videos were suggestive because the perpetrators depicted in the videos had their faces covered, whereas the subjects in the photographic lineup did not have covered faces. He also argues that the recording was somehow suggestive because the quality was poor and the perpetrators' faces were not perceptible. Neither of these factors would render the photographic procedure unduly suggestive. They do not create a substantial likelihood of the victim misidentifying Demarcus in the photographic

lineup. Indeed, these factors undermine Demarcus's contention that the victim's identification was based on the videotape rather than his own independent recollection.

For these reasons, Demarcus is not entitled to relief on the basis of the identification issue.

Demarcus also argues that he was denied a fair trial by the prosecutor's delay in disclosing the victim's recorded police statement. Although he contends that he did not realize until he received the statement that his proposed testimony would jeopardize his brother Idris, he fails to explain how this testimony would jeopardize his brother. Further, the recorded statement was available and used by defense counsel at trial, and Demarcus did not raise any claim at that time that he was somehow prejudiced by any delay in producing the statement. Given this record, there is no basis for finding that any delay in producing the statement denied Demarcus a fair trial.

We lastly address Demarcus's claim that the trial court improperly acted as a "thirteenth juror" by "siding with the majority" in response to a note from the jury during deliberations. Jury instructions are reviewed as a whole to determine if the trial court made an error requiring reversal. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003). When a jury requests a supplemental instruction, the trial court's response should address the jury's request and not mislead the jury. *Id.* at 311.

During deliberations, the jury sent the court a note which asked for guidance with respect to a juror who was unwilling to follow the law as instructed by the trial court. The record does not support Demarcus's claim that the trial court "took sides" through its response. Indeed, the jury's note did not indicate whether the majority of jurors were in favor of conviction or acquittal. The trial court responded by merely repeating its original instructions concerning adherence to the court's legal instruction. The court repeated the instructions regarding consensus and resolution of disagreements, which were not slanted in favor of either side. Accordingly, there is no merit to this issue.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro