STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2012
v	No. 305153 Ingham Circuit Court
JASON ALAN BROWN, Defendant-Appellant.	LC No. 10-000631-FC

Before: TALBOT, P.J., AND WILDER AND RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree murder, MCL 750.316, conspiracy to commit armed robbery, MCL 750.157a, and armed robbery, MCL 750.529. Defendant was sentenced to life imprisonment for first-degree murder and 171 months to 25 years for armed robbery and conspiracy to commit armed robbery. We affirm.

I. FACTUAL BACKGROUND

This case arises out of the murder and armed robbery of the victim in Lansing, Michigan. Defendant arrived in Lansing and proceeded to spend a significant amount of money purchasing crack cocaine. As a result of this behavior, defendant needed money. Defendant was aware that the victim had recently cashed a large check because defendant accompanied the victim to the party store to cash the check. Defendant and his acquaintance, Jason Morse, decided to rob the victim and split the money. While the events surrounding the murder are disputed, defendant eventually confessed to the police that, according to Morse, defendant strangled the victim to death.

After the murder, defendant met with another acquaintance, Christopher Stipanuk, and they continued to use crack cocaine throughout the day. Later that evening, Stipanuk and defendant planned to meet Morse in an alley to exchange a car, so defendant pulled into the alley to await Morse's arrival. While waiting, defendant began to pound the steering wheel and behave erratically. Defendant then admitted to Stipanuk that he and Morse intended to rob the victim, split the money, and the victim ended up dead.

While defendant and Stipanuk were waiting in the alley, the police received a report of a suspicious vehicle. The police approached defendant's car and Stipanuk immediately informed the police that he had a warrant out for his arrest. Stipanuk then relayed defendant's admission

to the police. While one officer was talking with Stipanuk, another officer noticed drug paraphernalia in the car, and conducted a search of the vehicle. The officer questioned defendant about his drug use but when he was informed of Stipanuk's statements, the officer placed defendant in the back of the patrol car.

Defendant was then transported to the police precinct. An interrogating officer questioned defendant three times regarding the murder, giving defendant his *Miranda* warnings[1] only before defendant's last statement. Defendant was eventually charged with open murder, armed robbery, and conspiracy to commit armed robbery. After a jury trial, defendant was convicted of first-degree murder, MCL 750.316, armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a. Defendant was sentenced to life imprisonment for first-degree murder and 171 months to 25 years for armed robbery and conspiracy to commit armed robbery. Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

"Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). "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). We review the evidence in a light most favorable to the prosecution to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

B. Corpus Delicti

Defendant challenges that there was insufficient evidence to convict him of armed robbery and conspiracy to commit armed robbery without the evidence of his statements, and his statements were inadmissible pursuant to the corpus delicti doctrine. However, defendant's statements were admitted at trial and the jury properly relied upon them. Thus, rather than a sufficiency challenge, an objection based on the corpus delicti doctrine is a challenge to the admissibility of the evidence. *People v Harden*, 474 Mich 862, 862; 703 NW2d 189 (2005).

Even construing this as a challenge to the admissibility of the statements, defendant is still not entitled to relief. This Court reviews a challenge based on the corpus delicti doctrine for an abuse of discretion. *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006). "In a criminal prosecution, proof of the *corpus delicti* of a crime is required before the prosecution may introduce a defendant's inculpatory statements." *People v Schumacher*, 276 Mich App 165,

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

180; 740 NW2d 534 (2007) (emphasis in original). "[T]he rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide) and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). The threshold showing is a preponderance of the evidence. *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002).

Defendant's inculpatory statements were properly admitted pursuant to corpus delicti rule because direct and circumstantial evidence supported a finding that an armed robbery and conspiracy to commit armed robbery occurred. Defendant accompanied the victim to a party store to cash the victim's large check. The victim had $9,600 as a result of this transaction. Soon after, the victim was found strangled in his apartment with only $600 in his wallet. Morse was found with $1,087 and an air pistol in his car, which suggests that a second individual was involved. While certainly circumstantial, this evidence supports a finding that the victim was robbed and that the criminal agency of two individuals was the source of the injury. See *Konrad*, 449 Mich at 269-270. While defendant's confession may have elevated the charges to armed robbery or conspiracy, "a defendant's confession . . . may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances." *People v Cotton*, 191 Mich App 377, 389; 478 NW2d 681 (1991).

C. Armed Robbery

Defendant also argues that there was insufficient evidence to support his armed robbery conviction because the larceny in this case was incomplete. This argument is moot. Defendant candidly admits that he presents this issue hoping that the Michigan Supreme Court would reverse this Court's decision in *People v Williams*, 288 Mich App 67, 75; 792 NW2d 384 (2010). The Michigan Supreme Court, however, affirmed this Court's opinion, recognizing that "an attempted robbery or attempted armed robbery with an incomplete larceny is now sufficient to sustain a conviction under the robbery or armed robbery statutes, respectively." *People v Williams*, 491 Mich 164, 172; 814 NW2d 270 (2012).

D. First-Degree Murder

Defendant also asserts that there was insufficient evidence to support his first-degree murder conviction because the prosecution failed to demonstrate premeditation and deliberation. As defendant notes, it is unclear whether the jury found defendant guilty of first-degree murder based on premeditation and deliberation or based on felony-murder. Nevertheless, defendant does not dispute that the elements of felony-murder were established or that felony-murder does not require evidence of premeditation and deliberation. See *People v Seals*, 285 Mich App 1, 12; 776 NW2d 314 (2009). Defendant also fails to cite any authority for the proposition that the prosecution had to prove the elements of first-degree premeditated murder when it has already proven the elements of felony-murder. In fact, defendant's argument contravenes the plain meaning of MCL 750.316, which specifically allows the prosecution to prove felony-murder without a showing of premeditation or deliberation. Thus, defendant's conviction for first-degree murder does not require reversal.

E. Conspiracy to Commit Armed Robbery

Lastly, in defendant's Standard 4 brief, he raises a challenge to the sufficiency of the evidence for conspiracy to commit armed robbery. "Conspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). According to Stipanuk, defendant admitted that he and Morse intended to "hit a lick"[2] and agreed to split the victim's money. This demonstrates defendant's intent to combine actions with Morse and intent to rob the victim. See *Mass*, 464 Mich at 629. Further, since conflicts of the evidence are resolved in favor of the prosecution, *Unger*, 278 Mich App at 222, defendant's argument that other evidence suggested a lack of concert action is meritless. While defendant also challenges that it was a one-man conspiracy since Morse was not convicted of conspiracy to commit armed robbery, the one-many conspiracy rule "does not apply where alleged co-conspirators are separately tried . . . ." *People v Anderson*, 418 Mich 31, 38; 340 NW2d 634 (1983).

III. DEFENDANT'S STATEMENTS

A. Standard of Review

Defendant gave three statements to the police while being questioned at the precinct and the trial court only admitted the last statement. Defendant now raises four challenges to the trial court's decision to admit this last statement. "This Court reviews a trial court's factual findings at a suppression hearing for clear error, and the court's ultimate ruling de novo." *People v Cohen*, 294 Mich App 70, 74; __ NW2d__ (2011). A finding "is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

B. Arrest

Defendant first argues that his third statement was the result of an illegal arrest and, thus, it was fruit of the poisonous tree and should have been excluded. Defendant suggests that this illegal arrest began when he was placed in the back of the patrol car, which was after the *Terry* stop[3] and was without proper justification. Even assuming arguendo that defendant was illegally arrested, his claim still fails.

When police officers initially approached defendant in the alley, it was because they received a report of a suspicious vehicle and they suspected drug activity. After being approached by the officers, Stipanuk informed the police that he had warrant out for his arrest and that defendant had just admitted to being involved in a homicide. The police placed defendant in the back of a patrol car, which defendant argues was "*after* the *Terry* stop" and occurred without sufficient justification.

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[2] Stipanuk testified that "hit a lick" means to rob someone.

[3] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

However, even if this constituted an illegal arrest, "[t]he mere fact of an illegal arrest does not per se require the suppression of a subsequent confession." *People v Kelly*, 231 Mich App 627, 634; 588 NW2d 480 (1998) (internal quotations and citation omitted). "Intervening circumstances can break the causal chain between the unlawful arrest and inculpatory statements, rendering the confession sufficiently an act of free will to purge the primary taint of the unlawful arrest." *Id.* (internal quotations and citation omitted). Other factors that may be relevant are the time lapse between the arrest and the statement, the flagrancy of the police's misconduct, and antecedent circumstances. *People v Coomer*, 245 Mich App 206, 222; 627 NW2d 612 (2001).

In this case, after defendant was placed in the patrol car and transported to the precinct, the police interviewed other witnesses, conducted a search of the victim's apartment, and discovered the victim's deceased body. Thus, the police confirmed that a murder had occurred and this "new evidence with which defendant was confronted before he made the inculpatory statement was a sufficient intervening circumstance to sever any causal connection between defendant's arrest and his subsequent confession." *Kelly*, 231 Mich App at 636-637; see also *Brown v Illinois*, 422 US 590, 603; 95 S Ct 2254; 45 L Ed 2d 416 (1975) (stating that the presence of intervening circumstances is a relevant consideration in determining the admissibility of a confession after an illegal arrest). Further, more than seven hours passed from defendant's initial detention to when he gave the third statement to the police. Thus, because intervening circumstances and the significant time lapse severed any causal relationship with the alleged illegal arrest, there was no error in admitting defendant's statement at trial. See *Coomer*, 245 Mich App at 222.

C. Voluntariness

Next, defendant contends that his confession and the waiver of his *Miranda* rights were involuntary and the admission of his confession at trial violated his Due Process rights and Fifth Amendment right against self-incrimination. Specifically, defendant argues that his confession and the waiver of his *Miranda* rights was the result of police coercion, sleep deprivation, drug use, and a preexisting physical injury, which resulted in an involuntary confession. We disagree.

"[T]he state bears the burden of proving that the confession was voluntarily given by the defendant, thereby fulfilling the due process guarantee of the Fourteenth Amendment." *People v Cheatham*, 453 Mich 1, 13; 551 NW2d 355 (1996); see also *People v Daoud*, 462 Mich 621, 631; 614 NW2d 152 (2000). Moreover, "if the confession was the result of custodial interrogation, the state must prove that the police properly informed the defendant of his *Miranda* rights and obtained a valid waiver." *Cheatham*, 453 Mich at 13. The analysis for whether defendant's confession was voluntary is essentially the same as whether the waiver of his *Miranda* rights was voluntary. *People v Ryan*, 295 Mich App 388, 397; __NW2d__ (2012).

When confronted with a challenge to the voluntariness of the confession, a trial court must consider:

> whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired. The line of demarcation is that at which

> governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.
>
> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*Ryan*, 295 Mich App at 396-397, quoting *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).]

Under this totality test, the trial court did not err in finding that defendant's third statement to the police was voluntary and admissible. Defendant was approximately 36 years old, he attended college for an amount of time, and he had a lengthy criminal record. During his interrogation, he was allowed to use the bathroom several times and was given several glasses of water and coffee. Although he was in pain from a previous leg injury, he did not require medical attention and the injury did not affect his ability to converse in a responsive manner.

There is also no indication that defendant's alleged drug use interfered with his ability to assert his free will. While "[i]ntoxication from alcohol or other substances can affect the validity of a waiver, [it] is not dispositive." *People v Gipson*, 287 Mich App 261, 265; 787 NW2d 126 (2010). Defendant was responsive to the officer's questions and gave no indication that he failed to comprehend what was happening or what was being asked of him. Moreover, while defendant avers that he was without sleep, he was able to sleep for approximately an hour before giving the third statement to police. Therefore, based on the totality of the circumstances, the trial court did not err in admitting the third statement, as "[d]efendant's will was not overborne, nor was his capacity for self-determination critically impaired. The record reflects that the confession was not the result of intimidation, coercion, or deception." See *Ryan*, 295 Mich App at 398.[4]

[4] While defendant also alleges in his Standard 4 brief that the interrogating officer made promises of leniency, the interrogation video actually reveals that the officer specifically stated that he had no control over the charges brought against defendant.

D. Multiple Statements

Next, defendant asserts that since his first two statements were obtained without notice of his *Miranda* rights, his last statement was impermissibly tainted even though he waived his *Miranda* rights before giving the statement. Defendant cites the United States Supreme Court's plurality opinion in *Missouri v Seibert*, 542 US 600, 612-614; 124 S Ct 2601; 159 L Ed 2d 643 (2004), where the Court suppressed a confession that resulted from a deliberate two-step interrogation process. In *Seibert*, the police failed to give the respondent her *Miranda* warnings when first questioning her. *Id.* at 604-605. After the respondent confessed, the police then gave her *Miranda* warnings, and had her reiterate her confession. *Id.* The Court held that the latter statement was inadmissible and the "circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 617.

That type of two-step interrogation process did not occur in this case. In *Siebert*, 542 US at 605, the time lapse between the two statements was only 20 minutes. In this case, over four hours passed between defendant's first statements and his subsequent *Mirandized* statement. Defendant was even able to sleep in the interim. This significant time lapse provided defendant with the ability to regroup and reevaluate, and "a reasonable person in defendant's shoes could have seen" the latter questioning "as a new and distinct experience, and the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *People v Steele*, 292 Mich App 308, 320; 806 NW2d 753 (2011) (internal quotations and citation omitted); see also *Bobby v Dixon*, __US__, __; 132 S Ct 26; 181 L Ed 2d 328 (2011), (Docket No. 10-1540, issued November 7, 2011) (slip op at 9), quoting *Seibert*, 542 US at 622 (Kennedy, J., concurring in judgment) (stating that "'[f]or example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.'").

Moreover, defendant's later *Mirandized* statement varied significantly from his initial statements. Defendant initially stated that he went over to the victim's house with Morse, Morse entered the house and exited with a gun, and Morse said that the victim gave him $4,000. While defendant admitted that he thought the victim might be dead, this was only because it was unlikely that the victim giving Morse $4,000 and the victim had not returned defendant's phone calls. Over four hours passed with defendant in the interrogation room, where he was allowed to sleep, drink, and use the bathroom. The interrogating police officer then returned and informed defendant that he was being charged with first-degree murder. The officer informed defendant of his *Miranda* rights, which defendant waived. Defendant then admitted that he went to the victim's house with Morse to "generate money." Defendant admitted that he was actually inside the victim's house at the time of the murder, that Morse came in with a gun and a mask, and Morse pointed the gun at both defendant and the victim. Defendant then confessed that, based on what Morse told defendant, defendant went crazy and suffocated the victim to death. Hence, just like the United States Supreme Court found in *Bobby*, __ US at __ (slip op at 8) (emphasis in original), "there is no concern here that police gave [the defendant] *Miranda* warnings and then

led him to repeat an earlier murder confession, because there was no earlier confession to repeat. Indeed, [the defendant] *contradicted* his prior unwarned statements when he confessed to [the] murder."

E. Inevitable Discovery Doctrine

Lastly, in defendant's Standard 4 brief, he challenges that the trial court erred in admitting evidence of the victim's body and address pursuant to the inevitable discovery doctrine. However, the trial court stated that an alternate basis for admissibility was the independent discovery doctrine, which defendant does not challenge. Therefore, we decline to address defendant's arguments, as any error based on the inevitable discovery doctrine would be harmless because of the alternate, unchallenged grounds of admissibility. See MCR 2.613.

IV. PROSECUTORIAL MISCONDUCT

A. Standard of Review

Defendant also asserts numerous instances of prosecutorial misconduct in his Standard 4 brief. "Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Defendant must establish plain error affecting his substantial rights. *Id.* Moreover, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

B. Vouching for Credibility & Opinion of Guilt

Defendant's first alleges that the prosecutor impermissibly vouched for the credibility of various witnesses when stating that the witnesses were telling the truth. Defendant also contends that the prosecutor improperly offered his opinion of defendant's guilt when stating that defendant was guilty. Defendant's arguments misconstrue the caselaw and the prosecutor's comments.

"Generally, [p]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotations and citation omitted). "To determine if a prosecutor's comments were improper, we evaluate the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship of these comments to the admitted evidence." *Seals*, 285 Mich App at 22. If "a timely objection and curative instruction could have alleviated any prejudicial effect of the improper prosecutorial statement, we cannot conclude that the error denied defendant a fair trial or that it affected the outcome of the proceedings." *Unger*, 278 Mich App at 237.

It is true that "a prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness[,]" *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004), and a prosecutor may not "express [his] personal opinion of a defendant's guilt," *Bahoda*, 448 Mich at 282-283. However, "[a] prosecutor may . . . argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). In every statement

defendant objects to about vouching for the credibility of witnesses, the prosecutor argued that the witnesses were credible because the evidence corroborated their testimony.[5] Rather than vouching for the credibility of its witnesses, the prosecution was merely concluding from the facts presented that the witnesses were credible. Similarly, each reference the prosecution made to defendant being guilty was not a personal opinion but offered only as a conclusion from the evidence presented. Furthermore, the trial court instructed the jury that the prosecution's statements were not evidence, and "[j]urors are presumed to follow the instructions of the court." *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011). Defendant has failed to demonstrate plain error affecting his substantial rights.

C. Unsupported By Evidence

Lastly, defendant challenges that the prosecutor made statements unsupported by the evidence. Even assuming, arguendo, that the prosecution mischaracterized the evidence, "a well-tried, vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged . . . ." *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Furthermore, the trial court specifically instructed the jury that the lawyers' comments were not evidence, were only intended to help the jury understand the evidence, and that the jury should disregard any statements that were not supported by the evidence or commons sense. Thus, "any unfair prejudice produced by the challenged comments" was "cured by the trial court's careful and explicit instructions to the jury that it was required to decide the case on the evidence alone and that the lawyer's statements were not evidence." *Green*, 228 Mich App at 693.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Defendant next alleges in his Standard 4 brief that there were numerous instances of ineffective assistance of counsel. Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as "a judge first must find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This issue is unpreserved, however, because defendant failed to make a motion in the lower court for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). See *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Thus, our review is limited to mistakes apparent on the record. *Id.*

[5] Defendant also objects to an interchange between the prosecutor and a witness where the prosecutor clarified that the witness was testifying that he was being truthful. Rather than vouching for the witness's credibility, the prosecutor was merely reiterating the witness's testimony in order to clarify it.

B. Test

In order to establish a claim of ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must then demonstrate that "the deficient performance prejudiced the defense," which "requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687. The Court has held that this second prong is asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel adequately" performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

C. Failure to Investigate and Present Evidence

Defendant challenges that defense counsel failed to investigate and discover significant evidence such as exculpatory witnesses and phone records. "However, [d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (internal quotations and citations omitted). Moreover, despite defendant's claims on appeal, the record is silent with regard to the investigation defense counsel completed, although he did secure funds to hire an investigator. As our review is limited to mistakes apparent on the record, *Cox*, 268 Mich App at 453, defendant has failed to demonstrate that defense counsel's behavior was objectively unreasonable.

Additionally, "[i]t must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). There is no indication in the lower court record that these witnesses would have testified favorably for defendant or that evidence, such as phone records, was actually exculpatory. Additionally, considering the significant evidence presented at trial of defendant's guilt, there is not a reasonable probability that any failure to present this evidence affected the outcome of the trial. See *Strickland*, 466 US at 688.

D. Video Recordings

Next, defendant argues that he was denied the effective assistance of counsel when his counsel refused to provide him with the video recordings of police interviews. There is no evidence in the lower court that counsel actually prevented defendant from viewing these video recordings. Further, even if counsel did behave in this manner, defendant has failed to demonstrate that the outcome of the proceedings would be different but for counsel's errors. Particularly in regard to defendant's statements to the police, defense counsel repeatedly attempted to suppress this evidence, and nothing indicates that defendant's independent review of the video recordings would have affected the result of either the suppression hearing or the trial.

E. Failure to Object

Defendant also asserts that failing to object to instances of prosecutorial misconduct constituted ineffective assistance of counsel. However, the prosecution's comments were proper. "Because the comments were proper, any objection to the prosecutor's arguments would have been futile [and] [c]ounsel is not ineffective for failing to make a futile objection." *Thomas*, 260 Mich App at 457. Moreover, even if the prosecution's comments were improper, the jury was instructed that the statements were not evidence, and juries are presumed to follow thier instructions. See *Meissner*, 294 Mich App at 457. Thus, there is no evidence that any objections would have affected the outcome of the trial. See *Strickland*, 466 US at 688.

F. Cumulative Error

Lastly, defendant contends that counsel's cumulative errors denied him the effective assistance of counsel. "It is true that the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). However, "'[i]n making this determination, only *actual* errors are aggregated to determine their cumulative effect.'" *Id.* at 591 n 12 (emphasis added), quoting *Bahoda*, 448 Mich at 292 n 64. Since we have found no errors, defendant's claim is to no avail.

VI. WITNESS LIST

Defendant argues in his Standard 4 brief that the trial court erred in allowing the prosecution to endorse three witnesses a mere 20 days before trial. However, before trial defense counsel expressed approval with the witness list and acknowledged that both parties agreed to the witnesses to be called. Thus, defendant has waived this issue for appeal. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

VII. TESTIMONY OF STIPANUK AND CERVANTES

A. Preservation & Standard of Review

Lastly, in the supplement to defendant's Standard 4 brief, he challenges the admissibility of Stipanuk's testimony based on hearsay. Defendant also challenges the testimony of Antonio Cervantes, who was in jail with defendant and testified about defendant's incriminating statements. In order to preserve the issue of the admissibility of evidence, "a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *Aldrich*, 246 Mich App at 113. Moreover, the objection at trial must be timely, "interposed between the question and the answer." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

We review for an abuse of discretion preserved claims challenging a trial court's decision to admit evidence. *People v Dinardo*, 290 Mich App 280, 287; 801 NW2d 73 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217. The only relevant objection

defendant offered at trial was that Stipanuk's testimony constituted hearsay. The other grounds he now asserts on appeal are therefore unpreserved. Unpreserved claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. Stipanuk's Testimony

Defendant argues that Stipanuk's testimony was self-serving hearsay and therefore inadmissible, citing *People v Barrera*, 451 Mich 261; 547 NW2d 280 (1996).[6] However, the Court in *Barrera* was interpreting MRE 804(b)(3), a statement against penal interest.[7] *Barrera*, 451 Mich at 269-270. At trial, the testimony of defendant's inculpatory statements was properly admitted pursuant to MRE 801(d)(2), an admission of a party-opponent, which is not hearsay. Defendant raises no challenge based on MRE 801(d)(2).

C. Cervantes's Testimony

Similarly, defendant's challenge to Cervantes's testimony based on its alleged self-serving nature is misplaced, as defendant's inculpatory statements are admissions of a party-opponent, MRE 801(d)(2). Defendant also cites *People v Kelley*, 32 Mich App 126; 188 NW2d 654 (1971), for the proposition that the trial court should have first reviewed the proffered testimony outside of the jury's presence. However, since Cervantes's testimony about defendant's inculpatory statements was admissible as a party-opponent admission, MRE 801(d)(2), it was properly admitted and there was no error in allowing the jury to hear this testimony.

Lastly, defendant challenges that Cervantes's testimony violated the Sixth Amendment as interpreted by the United States Supreme Court in *Kuhlmann v Wilson*, 477 US 436, 459; 106 S Ct 2616; 91 L Ed 2d 364 (1986), because Cervantes was deliberately trying to elicit information from defendant. However, as the Court recognized in *Kuhlmann*, 477 US at 459, the Sixth Amendment protects individuals from state action. In questioning defendant, Cervantes was not acting as a state actor. While Cervantes contacted the FBI to inform them that he had obtained incriminating information about defendant, there is no evidence that the FBI instructed or used Cervantes to elicit information.

VIII. CONCLUSION

Upon a review of all of defendant's claims, we hold that there are no errors requiring reversal. There was sufficient evidence to support defendant's convictions and the trial court properly found that defendant's third statement to the police was voluntary and admissible.

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[6] Defendant also raises several complaints about inconsistencies in Stipanuk's statements during pretrial and trial. Not only has defendant failed to identify the actual error he is objecting to, any issue relating to Stipanuk's credibility at trial is within the province of the jury and will not be second-guessed on appeal. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

[7] Defendant relies on the preliminary examination, where MRE 804(b)(3) was the basis for admission for some of Stipanuk's testimony.

There also were no instances of prosecutorial misconduct or ineffective assistance of counsel requiring reversal. Lastly, any objection to the witness list was waived and there was nothing improper in admitting testimony from Stipanuk and Cervantes. We affirm.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan