STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2012
v	No. 298682 Wayne Circuit Court
JERRELL KEMPLE MOORE, Defendant-Appellant.	LC No. 08-001760-FC

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316(b), felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (second offense), MCL 750.227b, and three counts of assault with intent to rob while armed, MCL 750.89. Defendant was sentenced to life in prison without parole for the felony murder conviction, 6 to 15 years' imprisonment for the felon in possession conviction, five years' imprisonment for the felony-firearm conviction, and 30 to 50 years' imprisonment for each count of the assault with intent to rob while armed convictions. He now appeals as of right. We affirm.

I. BASIC FACTS

Three witnesses testified that defendant entered a residence, armed with a handgun in each hand, and commanded the four individuals to "Get down. You know what time it is." The victim engaged defendant in a physical struggle and was shot and killed. Almost two months later, defendant was arrested for a separate crime during which time he was in possession of a .38 handgun later identified as the weapon that was involved in the victim's shooting. Shortly after defendant's arrest, the three witnesses separately identified defendant in a line-up at the police station. At trial, defendant's theory of the case was misidentification. Defendant was convicted and sentenced as outlined above. He now appeals as of right, raising a myriad of issues through appellate counsel, as well as in a Standard 4 pro se brief.

II. EVIDENTIARY ERROR

Defendant argues that the trial court erred when it admitted a recorded telephone conversation between defendant and a third-party because the recording was irrelevant.

Defendant further argues that, even if relevant, the probative value of the evidence was substantially outweighed by its prejudicial effect. We disagree.

A decision regarding whether to admit evidence is a discretionary decision made by the trial court, and this Court will not disturb such a decision "absent a clear abuse of discretion." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Decisions concerning the admission of evidence first require a de novo review since they generally involve preliminary questions of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). If a trial court admits evidence that as a matter of law is inadmissible, it abuses its discretion. *Id*. A trial court's decision on a close evidentiary question, however, cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). "Relevant evidence" is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998) (quoting MRE 401). Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *People v Feezel*, 486 Mich 184, 197 n 6; 783 NW2d 67 (2010) (quoting MRE 403). The fact that evidence is damaging does not mean it constitutes "unfair prejudice," particularly because "'[a]ny relevant testimony will be damaging to some extent.'" *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995) (quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983)). "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). Further explained, "[u]nfair prejudice exists only where either a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, or it would be inequitable to allow the proponent of the evidence to use it." *People v Murphy (On Remand)*, 282 Mich App 571, 583; 766 NW2d 303 (2009) (internal quotations omitted).

At trial, the jury listened to a recording of a taped conversation that occurred on February 9, 2008, between defendant and an unidentified woman,[1] in which the following exchange occurred:

> *Defendant:* I'm trying to figure out who the f*** this n***** is. You know what I'm saying? I know Day-Day knows, because Day-Day was at the court.
>
> *Unidentified Female Voice:* Okay, okay.

[1] The prosecution and defendant stipulated that the male voice was defendant's voice.

> *Defendant:* And have him holler at the dog or something, you know what I'm saying? See what the ticket is on that s***, yeah.
>
> *Female Voice*: So if they drop that case you be [sic] straight though, right?
>
> *Defendant:* Yeah, because I got the gun case, man. They was laughing at the police up there. Police lying like a mother f*****.

The prosecution argued that the conversation demonstrated defendant's attempt to influence or tamper with one of the witnesses. Specifically, the prosecution argued that when defendant referred to "dog," defendant was referring to eyewitness, Charles Williams, who had just recently testified at the preliminary examination, and when defendant referenced "ticket," it was a disguised way to inquire into how much it would cost for Williams not to testify. Defendant, however, argued that the conversation did not mention Williams or any other witness and it was unclear to whom defendant was referring when he said, "dog," as it could have been a reference to defendant himself.

As the trial court noted, while the conversation was indeed "very coded," it would be reasonable to infer from the conversation that defendant was attempting to secure the nonappearance of Williams by offering to pay the fines that would be assessed if Williams did not appear to testify. At trial, the prosecution elicited testimony that Williams was the only witness that testified at the preliminary examination, which occurred days before the above conversation took place. Given the proximity of these two events and the fact that Williams testified at the preliminary examination, it could be reasonably concluded that defendant discussed interfering with witness Williams. Considering this interpretation, this evidence and the inferences that arise therefrom placed into question defendant's consciousness of guilt as it is well-established "that evidence of a defendant's subsequent efforts to influence or coerce the witnesses against him is admissible where such activity demonstrates a consciousness of guilt on the part of the defendant." *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981).

Further, contrary to defendant's argument, the admission of this evidence did not pose a danger of undue prejudice or misleading the jury. Both the prosecution and defendant explained what they believed was the content of the conversation, and the jury was free to accept either version. Regarding the conversation, defendant testified:

> Basically I was talking to my son's mother, Latasha Smith, and she wanted to know the situation that went down and I was breaking it down to her that I had two different cases pending and I was still fighting them. I said I didn't know who Charles Williams was. I didn't know he was "Duker" at the time because I never had got my discovery to let me know that. So I didn't know who they was talking about when they said that.

Defendant further testified that when he said, "holler at my dog," he was referring to his uncle, whom he called "dog," and in referencing a "ticket," defendant wanted his uncle, "dog," "to see what the ticket was for an attorney." Because the evidence was relevant to an issue at trial and its probative value was not substantially weighed by the danger of undue prejudice, the evidence

was admissible. Accordingly, the trial court did not abuse its discretion in admitting the audio recording.

Lastly, even an evidentiary error was made, defendant bears the burden to establish that the preserved, nonconstitutional error resulted in a miscarriage of justice, *Lukity*, 460 Mich at 495-497, and this Court will presume that it is not a "ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative." *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002). An evidentiary error is "'outcome determinative' if it undermine[s] the reliability of the verdict." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). In reviewing the error's effect on the verdict, this Court should "focus on the nature of the error in light of the weight and strength of the untainted evidence." *Id*. Overall, the record weighs overwhelmingly in favor of the verdict. Three witnesses testified that defendant entered the residence, armed with a handgun in each hand, and commanded the individuals to "Get down. You know what time it is." Before defendant could take any further action, the victim engaged defendant in a physical struggle. The victim was shot during a physical struggle with defendant. Almost two months later, defendant was arrested for a separate crime during which time he was in possession of a .38 handgun. At trial, the handgun was identified as the weapon that was involved in the victim's shooting. Shortly after defendant's arrest, the three witnesses separately identified defendant in a line-up at the police station. Accordingly, given the weight of the untainted evidence, defendant has failed to show that the introduction of the recorded telephone conversation was outcome-determinative.

III. JURY INSTRUCTIONS

Defendant next argues that he was deprived of his right to a properly instructed jury because of three alleged instructional errors discussed below. We disagree.[2]

This Court reviews claims of instructional error de novo. *People v Wade*, 283 Mich App 462, 464; 771 NW2d 447 (2009). Jury instructions are reviewed in their entirety to determine if an error requiring reversal has occurred. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). "The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). "The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). "Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried, and sufficiently protect the defendant's rights." *Chapo*, 283 Mich App at 373. Further, this Court finds no error "from the absence of an instruction as long as the instructions as a whole cover the substance of the missing instruction." *Kurr*, 253 Mich App at 327.

[2] By expressing satisfaction with the trial court's instruction, defendant waived review of this issue. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009); *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). We, nonetheless, review this issue as it relates to defendant's ineffective assistance of counsel claim.

A. ALIBI INSTRUCTION

Defendant first argues that the trial court erred by failing to instruct the jury sua sponte on his alibi defense. We disagree.

Regarding the trial court's obligation to instruct the jury on the defendant's theory at trial, our Supreme Court has explained:

> A criminal defendant has the right to have a properly instructed jury consider the evidence against him. However, a trial court is not required to present an instruction of the defendant's theory to the jury unless the defendant makes such a request. Further, when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge. A trial court is required to give a requested instruction, except where the theory is not supported by evidence. [*People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000), quoting *Mills*, 450 Mich at 80-81 (internal citations omitted).]

Further stated, "[w]hen a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury *unless* such instruction is requested by the accused." MCL 768.29 (emphasis added). As such, a trial court is not required to instruct the jury, sua sponte, on the defendant's theory, including an instruction on an alibi defense. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000) ("Michigan law is clear that a trial court's failure to give an unrequested alibi instruction is not error requiring reversal where proper instruction is given on the elements of the offense and on the requirement that the prosecution must prove each element beyond a reasonable doubt."). Accordingly, the trial court did not err in failing to instruct the jury, sua sponte, on defendant's alibi defense.

In any event, in reviewing the instructions in their entirety, the instructions given covered the substance of the missing instruction. The trial court provided the following jury instructions on "identification":

> One of the issues in this case is the identification of the Defendant as the person who committed the crime. The Prosecutor must prove beyond a reasonable doubt that the crime was committed and that the Defendant was the person who committed it. In deciding how to [sic] dependable an identification is think about things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness has seen or known the offender before, how far away the witness was, whether the area was well lighted and the witnesses' state of mind at the time.
>
> Also think about the circumstances at the time of the identification. How much time had passed since the crime. How sure the witness was about the identification and the witnesses' state of mind during the identification. You should examine the witnesses' examination testimony carefully. You may consider whether other evidence supports the identification because them [sic] it

> may be more reliable. However, you may use the identification testimony alone to convict the Defendant as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the Defendant was the person who committed the crime.

The instructions regarding identification covered the substance of defendant's alibi defense; that is, without testimony identifying defendant as the individual who was present at the residence, the jury could not have found that defendant was the perpetrator. Therefore, defendant's rights to present a defense and to a properly instructed jury were protected. Accordingly, defendant has failed to establish any instructional error requiring reversal.

B. VERDICT FORM

Defendant next argues that he was deprived of his right to a fair trial because the jury was not presented with an opportunity to return a general verdict of not guilty for the first-degree murder and lesser included offenses. We disagree.

"[A] criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty." *Wade*, 283 Mich App at 467. A verdict form is defective, thus requiring reversal, when it does not present an option to find a defendant generally "not guilty" or an option to find the defendant "not guilty" of the lesser included offenses. *Id*. at 467-468.

Here, the verdict form provided in pertinent part:

> Count 1 & 2
> Homicide (Jerome Griffin)
>
> (*Mark only one box*)
>
> □ Not Guilty; or
>
> □ Guilty of First Degree Felony Murder; or
>
> □ Guilty of First Degree Premeditated Murder; or
>
> □ Guilty of Both; or
>
> □ Guilty of the lesser included offense of Second Degree Murder

The above verdict form clearly provided the jury with an opportunity to return a general verdict of not guilty. The jury was first presented with the option of finding defendant generally not guilty of the offenses listed below. Once the jury determined that defendant was guilty of homicide, and only at this point, was the jury required to determine whether defendant was guilty of felony murder, first-degree premeditated murder, or the lesser included offense of second-

degree murder. Therefore, the jury had the option to find defendant generally not guilty, which implicitly includes finding defendant not guilty of the lesser included offense of second-degree murder.

Defendant, however, argues that the verdict form at issue is similar to the verdict form that was deemed to be defective by this Court in *Wade*. In *Wade*, this Court held that the following verdict form was defective:

> POSSIBLE VERDICTS
>
> YOU MAY RETURN ONLY ONE VERDICT FOR EACH COUNT.
>
> COUNT 1-HOMICIDE-MURDER FIRST DEGREE-PREMEDITATED (EDWARD BROWDER, JR)
>
> __ NOT GUILTY
>
> __ GUILTY
>
> OR
>
> __ GUILTY OF THE LESSER OFFENSE OF-HOMICIDE-MURDER SECOND DEGREE (EDWARD BROWDER, JR.)
>
> OR
>
> __ GUILTY OF THE LESSER OFFENSE OF-INVOLUNTARY MANSLAUGHTER-FIREARM INTENTIONALLY AIMED (EDWARD BROWDER, JR.)
>
> COUNT 2-WEAPONS-FELONY FIREARM
>
> __ GUILTY
>
> __ NOT GUILTY [283 Mich App at 465.]

After reviewing the jury instructions and verdict form in *Wade*, this Court concluded that, "[d]espite the trial court's efforts to clarify the verdict form with its instructions, because of the way the verdict form was set up, the jury was not given the opportunity to find defendant either generally not guilty or not guilty of the lesser-included offenses such that his constitutional right to a trial by jury was violated." *Id*. at 468. A plain review of the verdict forms highlights that the deficiency that was present in *Wade* is not present here. Unlike *Wade*, the verdict form here does not limit or restrict a finding of "not guilty" to only one offense. The "not guilty" option provided is set apart from the offenses, thereby indicating to the jury that it has an option to find defendant generally "not guilty" of all of the listed offenses below. Accordingly, defendant was

not deprived of his right to have the jury presented with the opportunity to return a general verdict of not guilty.

C. LARCENY INSTRUCTION

Lastly, defendant argues that he was deprived of his right to a properly instructed jury because the trial court provided a defective and confusing instruction on felony murder larceny. We disagree.

The predicate offense for the felony murder charge was attempted larceny. The trial court provided the following instruction for attempted larceny:

> The predicate offense for felony murder is attempted larceny of any amount. The elements that must be shown is [sic] that the Defendant attempted to take someone else's property. At the time of the attempt it was done without the consent of the individual involved and that the Defendant intended to permanently deprive the owner of the property.

The instructions provided more than adequately covered the elements of attempted larceny. "The elements of larceny from a person are (1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence." *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004). Under MCL 750.92, "an 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). The trial court properly instructed the jury on the elements of consent and intent while highlighting that the jury had to find an attempted larceny, not a completed larceny. Therefore, the jury was properly instructed on attempted larceny.

Defendant also argues that the trial court confused the elements of attempted larceny by giving the following instruction:

> In determining whether the act causing the death occurred while the Defendant was committing or attempting to commit the crime of larceny, you should consider the length of time between the commission of the assault with – or the larceny -- attempted larceny and the murder, the distance between the scene of the attempted larceny and the scene of the murder, whether there is a causal connection between the murder and the attempted larceny, whether there is a community of action between the attempted larceny and the murder and whether [sic] was committed during an attempt to escape.

In providing the above instructions, the trial court was instructing the jury on one of the elements of establishing felony murder, i.e., whether defendant was committing or attempting to commit a felony, i.e., larceny, when the act that caused the victim's death occurred. Accordingly, defendant was not deprived of his right to a properly instructed jury.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to establish that he committed the predicate crime of attempted larceny for the felony murder conviction. We disagree.

This Court reviews de novo a sufficiency of the evidence challenge. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). There is sufficient evidence to sustain a conviction if, after reviewing the evidence in a light most favorable to the prosecution, it is determined that a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). This Court is "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). If any conflicts arise while reviewing the record, they must be resolved in favor of the prosecution. *Wilkens,* 267 Mich App at 738.

To prove felony murder, the prosecution must establish the following elements:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the predicate felonies specifically enumerated in [the statute . . .]. [*Nowack*, 462 Mich at 401, quoting *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).]

Attempted larceny is a predicate felony under the felony murder statute. MCL 750.316(b). As stated above, attempted larceny is the attempted taking of someone's property without consent with the intent to steal or deprive the owner of the property. *Thousand*, 465 Mich at 164; *Perkins*, 262 Mich App at 271-272. "The intent to commit a larceny can be inferred from the nature of defendant's acts." *People v Grahlfs*, 34 Mich App 64, 66; 190 NW2d 707 (1971).

There was sufficient evidence for a reasonable jury to find that defendant committed attempted larceny. At trial, three witnesses testified that defendant entered the residence while holding a handgun in each hand. Defendant was neither a resident nor an invitee. Upon entering the residence, defendant said, "You know what time it is. Get down." At trial, the witnesses characterized the events as an attempted robbery. The victim interrupted defendant and either grabbed or punched defendant. A tussle ensued and the victim was subsequently shot. Meanwhile, the three witnesses ran out of the residence. While defendant argues that there was nothing to suggest that he intended to commit an act of larceny, a jury could reasonably infer that defendant's unlawful entrance into the residence and command to "get down" or "lay on the floor," "you know what time is it," while holding two guns, indicated that he intended to commit a larceny inside of the residence, and all reasonable inferences are drawn in support of the verdict. *Nowack*, 462 Mich at 400. Accordingly, in viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence for a reasonable jury to conclude that defendant committed an attempted larceny.

V. PROSECUTORIAL MISCONDUCT

Defendant argues that he was deprived of his right to a fair trial when the prosecution implied that the burden of proof shifted to defendant, offered its personal opinion regarding defendant's credibility, vouched for the credibility of its witnesses, impermissibly incorporated facts not present in the record, and made a thinly veiled appeal to the jurors' sense of civic duty during closing arguments. We disagree.

"Because the challenged prosecutorial statements in this case were not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error." *Unger*, 278 Mich App at 235. "Reversal 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). This Court will not find "error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005).

In reviewing for prosecutorial misconduct, this Court must determine "whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *Id*. at 63-64. The defendant bears the burden to show that the alleged prosecutorial misconduct resulted in a miscarriage of justice. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Issues of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Further, "[p]rosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Brown*, 279 Mich App at 135. "Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *Unger*, 278 Mich App at 236. As such, prosecutors "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id.*

A. SHIFTING THE BURDEN OF PROOF

Defendant first argues that the prosecution improperly implied that the burden of proof was shifted during closing arguments. We disagree.

"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). The prosecutor made the following statements during closing argument:

> You have to decide and determine facts. If you decide that the sun rises in the west and sets in the east, in this case those are facts contrary to all human experience. So you have a lot of power, because you can determine what the facts of this case are. You have a lot of power because you determine which testimony you credit and which testimony you don't credit. I'm here to tell you that we heard from one liar; that man (indicating the Defendant).

> What you can do is say, "Okay. He's lying because he's on the hot seat." You can also look to determine why he's lying. Because Counsel said to you when he was selecting you that they don't have a burden to do anything. Remember when we went through playing cards or doing crossword puzzles – or whatever, and that burden didn't shift until they decided to call a witness. Once they decide to call a witness – is what happened today – earlier today when Mr. Moore decided to testify on his own defense, you can look at that defense with the same minute exactitude that you put on the People's case. You can look and see if that defense doesn't satisfy you[,] you can make a determination that it is false testimony and you can make a determination as to why it's false and reject what that person said.

We are not convinced that the prosecutor improperly shifted the burden of proof. Taken in context, it is clear that the prosecutor was merely raising issues of credibility and the jury's role in making those determinations. The prosecutor argued that any evidence presented by defendant was subject to a credibility determination; there was no implication that defendant must prove something or present a reasonable explanation for damaging evidence. Even if the comments could be perceived as improperly shifting the burden of proof, the trial court cured any prejudice by giving the following instructions on the burden of proof:

> Every crime is made up of parts called elements. The Prosecutor must prove each element of the crime beyond a reasonable doubt. This is called the burden of proof. It is the Prosecutor's burden and it does not shift if the Defendant takes the stand. The burden remains with the Prosecutor. The Defendant is not required to prove his innocence or to do anything. If you find that the Prosecutor has not proven every element beyond a reasonable doubt then you must find the Defendant not guilty.

Because the instructions emphasize the prosecution's burden and this Court presumes that the jury follows such instructions during deliberations, defendant has failed to establish prejudice. *Fyda*, 288 Mich App at 465.

B. ATTACKING DEFENDANT'S CREDIBILITY AND VOUCHING FOR ITS WITNESSES

Defendant next argues that the prosecution offered its personal opinion regarding defendant's credibility and improperly vouched for the credibility of the prosecution's witnesses. We disagree.

A prosecutor may not vouch for the credibility of his witnesses to the effect that the prosecution has special knowledge regarding the truthfulness of the witness testifying. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may, however, argue from the facts in evidence that a witness is worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). During closing arguments, a prosecutor may comment on his own witnesses' credibility, "especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Throughout closing arguments, the prosecution repeatedly attacked defendant's credibility by illustrating perceived inconsistencies and deficiencies in defendant's testimony. The prosecution was merely arguing from the facts at hand regarding whether the record supported a finding that defendant was credible. Further, the prosecution did not vouch for the credibility of the three eyewitnesses, Williams, Michael Ross, and Kuntie Robinson, who identified defendant as the assailant. The prosecution focused on the consistencies between their testimony, the physical evidence, and the testimony from other witnesses to show that they were credible witnesses. The prosecution also highlighted that there was nothing on the record to indicate that the eyewitnesses had a reason or motivation to lie regarding the identification of the assailant. As permitted, the prosecution argued from facts on the record regarding whether its witnesses were worthy of belief. In any event, because a timely instruction could have cured any alleged prejudice, defendant has failed to establish that there was error requiring reversal. Nevertheless, the trial court thoroughly instructed the jury on its role in making credibility decisions and also instructed the jury that the attorneys' statements and arguments are not to be considered during deliberations and such instructions are presumed to be followed, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

C. ARGUING FACTS NOT IN EVIDENCE

Defendant also argues that the prosecution improperly introduced "facts" during closing arguments that were not supported by the record. We partially agree but conclude that any prejudice was cured by the jury instructions.

"A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case." *Dobek*, 274 Mich App at 66 (internal citations omitted). Defendant argues that the prosecution impermissibly argued that the recorded jail telephone conversation was evidence that defendant intended to tamper with a witness because there was no evidence to support that conclusion. As discussed above, the telephone conversation could have been reasonably interpreted to mean that defendant was attempting to tamper with a witness. The prosecution was not introducing facts into the record, but rather, made arguments based on inferences arising from the record.

The prosecution, however, impermissibly made the following comment about "facts" not present on the record:

> I'm here to tell you, Ladies and Gentlemen, we have a lot of homicides where we ain't [sic] got anybody coming in here and say "X", "Y" or "Z".

At this juncture, defendant objected, the trial court sustained the objection, and the prosecution moved on to another subject. While the prosecutor's comment was improper, the trial court's instructions that the jury "may only consider evidence that's been properly admitted" when deciding the case and that the attorneys' statements are not evidence, cured any prejudice. *People v Parker*, 288 Mich App 500, 512; 795 NW2d 596 (2010).

D. APPEALING TO CIVIC DUTY

Lastly, defendant argues that the prosecution made a "thinly veiled" appeal to the jurors' sense of civic duty. We disagree.

"A prosecutor may not advocate that jurors convict a defendant as part of their civic duty, but allegations of prosecutorial misconduct must be examined and evaluated in context." *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003) (internal citation omitted). In discussing the credibility of the witnesses, the prosecution said, "You've got to stand for something or you'll fall for anything." While this isolated phrase appears to implicitly hint at a sense of civic duty, in reviewing this statement in context of the surrounding arguments, the prosecution was not advocating for the jurors to convict defendant as part of their civic duty but, rather, was relating back to issues of credibility and how the evidence demonstrated defendant's guilt. Shortly before and immediately after making the above statement, the prosecution said, "we're not asking for charity." After first saying, "we're not asking for charity here," the prosecution then said, "That's all been proven and based upon all of that." These statements do not suggest or imply that the prosecution was asking the jury to make a baseless or unsupported decision on credibility or guilt, or that the prosecution was advocating for the jury to find defendant guilty simply because it was their civic duty to do so. Even if the above statement was viewed as an improper civic duty argument, any prejudice was cured by the cautionary instruction given that the attorneys' statements or arguments are not evidence. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Lastly, even if any of the prosecution's statements were prejudicial, reversal is not warranted because defendant has failed to establish that the errors resulted "in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Callon*, 256 Mich at 329.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was deprived of his right to the effective assistance of counsel when defense counsel failed to advance an alibi defense and raise the alleged instructional errors as discussed above. We disagree.

An ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*. This Court reviews a trial court's decision to either grant or deny a motion for a new trial for an abuse of discretion. *Blackston*, 481 Mich at 460. "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *Id*.

Both the United States and Michigan Constitutions guarantee the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient and that such deficiencies prejudiced the defendant's case. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defense counsel performed deficiently if his performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Avant*, 235 Mich App 499, 507-

508; 597 NW2d 864 (1999). To establish prejudice, a defendant must show that a reasonable probability exists that, but for counsel's error, the outcome of the proceedings would have been different. *Carbin*, 463 Mich at 600. This Court presumes that a defendant received effective assistance of counsel and places a heavy burden on the defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defense counsel is afforded wide latitude on matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and this Court will not substitute its judgment for that of defense counsel, review the record with the added benefit of hindsight on such matters, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), or second-guess defense counsel's judgment on matters of trial strategy. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). The failure to call a witness or present other evidence only constitutes ineffective assistance of counsel when it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A defense is substantial if it is one that might have made a difference at trial. *Hyland*, 212 Mich App at 710. Additionally, defense "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 US at 691.

A. FAILURE TO INVESTIGATE

Defendant has failed to establish that defense counsel failed to investigate or deprived defendant of a substantial defense. At the *Ginther*[3] hearing, the trial court found defendant and his alibi witness, Patrick Hurt, to be incredible and credited defense counsel's testimony regarding defense counsel's investigation of defendant's alleged alibi witnesses. The record supports the trial court's findings of fact, and it is well-known that "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). The record shows that defense counsel investigated the alleged alibi witnesses but was unsuccessful in locating any information to assist him in his search. Defense counsel also attempted to contact defendant's brother and mother to gather more information on the whereabouts of the alibi witnesses. An investigator was appointed and was also unable to locate any of the alleged alibi witnesses. The day before trial, Hurt contacted defense counsel and indicated that he would arrive at court the following day. Hurt, however, never appeared. Defense counsel then called Hurt several times but was unable to contact him. Shortly after speaking with Hurt, defense counsel filed a motion for an adjournment but later learned that Hurt would not cooperate at trial. Accordingly, because defense counsel made a reasonable effort to investigate and produce the witnesses, defense counsel did not perform deficiently.

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

B. FAILURE TO OBJECT TO JURY INSTRUCTIONS

Defendant also argues that defense counsel was ineffective for failing to object to several alleged instructional errors at trial. Regarding the failure to request an alibi instruction, defense counsel adequately explained that his decision to not ask for such an instruction was a matter of trial strategy. At trial, defendant was presented with the opportunity to testify regarding his alibi defense. The prosecution, however, thoroughly weakened defendant's credibility and undermined defendant's alibi defense before the jury. As noted above, none of defendant's alleged alibi witnesses appeared or testified at trial. Considering these facts, it was reasonable for defense counsel to conclude that, as a matter of trial strategy, the presentation of an alibi instruction would have harmed defendant as it would have reminded the jury of defendant's weak defense. Further, the instructions on identification covered the substance of defendant's alibi defense, and, therefore, defendant has failed to establish prejudice resulting from the lack of an alibi instruction.

Regarding the other alleged instructional errors, defense counsel was not ineffective for failing to object to the verdict form and the felony murder larceny jury instructions. As discussed above, the verdict form was not defective and the instructions given on attempted larceny properly instructed the jury on the elements of the charged offense. Counsel need not raise a meritless objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Accordingly, the trial court did not err in denying defendant's motion for a new trial.

VII. DEFENDANT'S STANDARD 4 BRIEF

A. INEFFECTIVE ASSISTANCE OF COUNSEL

(1). FAILURE TO INVESTIGATE

In his Standard 4 brief, defendant first argues that defense counsel was ineffective by failing to investigate and produce the alibi witnesses at trial. We disagree. As discussed above, because defense counsel made a reasonable effort to investigate and produce the witnesses, defense counsel did not perform deficiently. Nevertheless, even if defense counsel had failed to adequately investigate, considering the weight of the evidence against defendant, defendant has not established any deficiency in defense counsel's performance that has undermined confidence in the verdict.

(2). FAILURE TO OBTAIN EXPERT ON IDENTITY

Defendant next argues that his second attorney, Robert Slameka, was ineffective for failing to object to the trial court's patent dismissal of defendant's request for an expert witness on the issue of identity and should have also produced such a witness at trial. We disagree.

Because defendant did not raise this issue in the motion for a new trial or at the *Ginther* hearing, this Court's "review is limited to mistakes apparent from the existing record." *People v Powell*, 278 Mich App 318, 324; 750 NW2d 607 (2008). During a pretrial hearing, defense counsel placed on the record defendant's request "to get an order from the court to find an expert on the issue of identity." The trial court instantly responded, "There's no such thing. There is no such thing. No one can tell the jury how to judge the issue of identity. You can take that away.

That doesn't exist. There's no such thing." The issue received no further discussion. While it is unclear what particular kind of expert the trial court believed defendant was requesting, there are experts that deal with general issues of identity, that is – experts that could testify about issues that may affect a witness's ability to make an identification or misidentification. See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999); see also *People v Kurylczyk*, 443 Mich 289, 316; 505 NW2d 528 (1993). However, even assuming defendant demonstrated "a nexus between the facts of the case and the need for an expert", *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006), defendant bears the burden to establish that the failure of defense counsel to further raise this issue and independently produce an expert at trial was not part of trial strategy. *Cooper*, 236 Mich App at 658.

Essentially, defendant argues that an expert would have assisted the jury by explaining how consuming alcohol and marijuana affected the eyewitnesses' ability to identify or misidentify defendant. Because this information could also be drawn from the jury's common knowledge regarding the effects that such intoxicants would have on one's memory or perception, defense counsel could have reasonably believed that "the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious:" that consuming alcohol and marijuana would affect the witnesses' memories and perceptions. *Id*. Given that this evidence may have been unhelpful, it would have been reasonable trial strategy to conclude that this issue could be best addressed by attacking the witnesses' perceptions and memories on cross-examination. And, in fact, defense counsel at trial implemented this strategy. Defense counsel thoroughly raised the issue of identification and misidentification at trial. On cross-examination, defense counsel sought to undermine the witnesses' identification by probing into the witnesses' consumption of alcohol and marijuana that evening. Defense counsel also elicited discrepancies between the witnesses' testimony regarding the amount of intoxicants consumed by the witnesses and the span of time over which such intoxicants were consumed. Therefore, defendant has failed to establish that he was deprived of a substantial defense because defense counsel did not present an expert on this issue. Further, defendant has not demonstrated that defense counsel's performance was deficient or that such alleged deficiencies resulted in prejudice. *Carbin*, 463 Mich at 599-600.

B. PHOTOGRAPHIC LINE-UP

Lastly, defendant argues that the trial court erred in admitting the photographic line-up because the line-up was conducted outside of the presence of counsel and defendant was available for a corporeal line-up. We disagree.

Because defendant failed to preserve this issue, this Court's review is limited to plain error affecting substantial rights. *Carines,* 460 Mich at 763-764. Further, "[w]here issues concerning identification procedures were not raised at trial, they will not be reviewed by this Court unless refusal to do so would result in manifest injustice." *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

Photographic identifications should not be used "when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *Kurylczyk*, 443 Mich at 298 n 8. "In the case of photographic identifications, the right of counsel attaches with custody." *Id*. at 302. The rule, however, "that a defendant is entitled to counsel at a corporeal lineup, as opposed

to a photo lineup, when he is in custody, usually, requires that custody be pursuant to the offense in relation to which the lineup is held." *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986). The record is limited on the circumstances regarding defendant's hospitalization after he was arrested on the morning of December 31, 2007, but it was established that defendant was arrested that morning. Assuming defendant was in custody at the hospital, it appears that defendant was in custody solely on the charges in association with the December 31, 2007, events, not the charges relating to the November shooting. While defendant was in custody, because he "was not in custody on the charge to which the photo lineup was related," defendant was not entitled to counsel during the December 31, 2007, photographic line-up that occurred at Williams's residence. *Id*. Therefore, defendant has not established any error relating to the pretrial identification procedure.

Additionally, defendant has failed to establish that the photographic line-up was unduly suggestive. A defendant's right to due process of law is violated when a pretrial identification procedure is employed that is so suggestive in light of the totality of the circumstances that there is a substantial likelihood that it resulted in a misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The defendant bears the burden to establish that the pretrial identification procedure employed was impermissibly suggestive. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). In reviewing the photographic line-up, there is nothing indicating that the police employed a suggestive procedure. Further, there was no evidence suggesting the police assisted or encouraged Williams to select defendant from the photographic line-up. Overall, defendant simply makes conclusory statements regarding the suggestiveness of the photographs. Even assuming the photographic line-up was impermissibly suggestive, testimony concerning the identification is inadmissible unless it is established that that there is an independent basis for the witness's in-court identification "that is untainted by the suggestive pretrial procedure." *Kurylczyk*, 443 Mich at 303; *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995). Along with Ross and Robinson, Williams had an ample opportunity to view defendant and memorize defendant's facial features. Williams testified that defendant entered the residence and stood close to Williams. Additionally, Williams testified that he was able to clearly see defendant's face as there was nothing hindering his view. Thus, there was a sufficient independent basis for Williams to identify defendant. Accordingly, defendant has failed to establish plain error concerning the photographic identification evidence, and therefore, the trial court did not err in admitting such evidence.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly