STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2014
v	No. 312645 Wayne Circuit Court
JAMES WALTER JONES, Defendant-Appellant.	LC No. 11-007866-FC

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the murder conviction and to a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise from the July 26, 2011 shooting death of Herman Price, who was shot while at a gas station in Detroit at approximately 5:30 p.m. The victim was near his car when defendant approached from the rear of the vehicle and began shooting. Witnesses heard defendant fire approximately five shots. The victim suffered five gunshot wounds. The victim was at the gas station with his brother, Devon Price (hereinafter "Price"), and a friend, Eben Curtis, both of whom identified defendant as the shooter. When he was shown a photographic lineup, Curtis initially selected another individual as the shooter, but subsequently identified defendant as the shooter. Both Curtis and Price were familiar with defendant before the shooting occurred. Video surveillance at the gas station captured the shooting, but the recording was insufficient for anyone to identify the shooter from the video.

Another witness to the shooting was unable to identify defendant, but he described the shooter as wearing a white t-shirt and dark pants. The witness followed the shooter to an area near some houses on Lakewood Street. The witness provided the police with the address of a home on Lakewood Street past which defendant ran. Defendant was arrested later that evening at a motel a short distance from the shooting scene. Defendant registered at the motel under the name of an acquaintance who brought him to the motel. At the time of his arrest, defendant was wearing a white t-shirt that had small red specks on it that appeared to be blood, but there was no evidence that the substance had ever been analyzed.

The defense theory at trial was that defendant was misidentified as the shooter. The defense also argued that the prosecution's evidence was not reliable and that the elements of first-degree murder were not established. During his case-in-chief, defendant presented the testimony of Mary Jones, his mother, who recalled that defendant was with his daughter on the day of the shooting. She testified that defendant and his daughter went to the mall at approximately 4:00 p.m., and returned to her house at approximately 5:15 or 5:20 p.m. Thereafter, they had dinner, and defendant took his daughter outside to ride her bicycle. Mary recalled that defendant left her house at "[a]bout six-something" that evening." Mary was unsure about the times to which she testified, and defendant stipulated that he was not using her testimony as an alibi defense. Defense counsel admitted at trial that he did not file notice of an alibi defense because, in his estimation, Mary's testimony was not "technical[ly] [a] legal alibi defense . . . ."

Following his convictions, defendant moved this Court to remand for an evidentiary hearing regarding defense counsel's health and mental acuity as the result of medication, and whether either affected defense counsel's performance at trial. We granted defendant's motion for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Jones*, unpublished order of the Court of Appeals, entered July 10, 2013 (Docket No. 312645); *People v Jones*, unpublished order of the Court of Appeals, entered June 7, 2013 (Docket No. 312645).

At the *Ginther* hearing, defendant testified that his trial counsel told him that he did not want to take the case to trial because he did not have time to properly prepare and that he was experiencing health issues and undergoing treatment "like chemotherapy[.]" Defendant claimed that he wrote a letter to the trial court before trial explaining the matter; however, the trial court denied receiving the letter and the record contained no support of defendant's assertion that he sent such a letter. In addition, the trial transcripts belied defendant's claim that he mentioned the letter on the record. Defendant testified that he believed the court reporter omitted some things from the transcripts.

Defense counsel testified at the *Ginther* hearing and denied having any health problems or taking any medication that would have affected his performance at trial. At the conclusion of the hearing, the trial court found that defense counsel's performance was not affected by any alleged medical condition and that there was nothing in the record to indicate that counsel was not in good health or that counsel's mind was not sound at trial. The trial court noted that counsel acted appropriately during trial.

II. PROSECUTORIAL MISCONDUCT

Defendant first argues that reversal is required because of pervasive misconduct by the prosecutor at trial. Defendant concedes that only some of his claims of misconduct were preserved with an appropriate objection at trial. Preserved claims of prosecutorial misconduct are reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Unpreserved claims of misconduct are reviewed for plain error affecting substantial rights. *Id*. at 274. The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context.

People v McElhaney, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court will not reverse if the prejudicial effect of a prosecutor's comments could have been cured by a timely instruction from the trial court. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

A prosecutor is afforded great latitude during arguments and is permitted to argue the evidence and reasonable inferences that arise from the evidence in support of his or her theory of the case. *Bahoda*, 448 Mich at 282. However, the prosecutor must refrain from making prejudicial remarks. *Id*. at 283. While prosecutors have a duty to see to it that a defendant receives a fair trial, they may use "hard language" when the evidence supports it and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

A. BURDEN SHIFTING

Defendant first argues that it was improper for the prosecutor to elicit testimony that the police did not receive notice that defendant was somewhere other than the scene of the shooting. Specifically, the prosecutor asked Sergeant Kevin Nance, "Sir have you been provided any information in this universe about Defendant being anywhere other than at that gas station on July 26th, 2011, [at] 5:30, say 6:15?" Nance answered in the negative. Subsequently, during closing argument, the prosecutor stated:

> [Defendant] has no alibi or explanation for his whereabouts. None. Where was he? Where was he? So the defense calls a witness, the mother, and under the law, Judge Bill will support me if I ask him on this, you have to file an alibi notice, if you're presenting an alibi. Well, let's say one of you is charged with larceny, at 4:00 p.m. Supposedly you committed shoplifting and you ran out of the store. Let's call it 2:00 p.m. But you were here as a juror, so you would file an alibi notice and you would list several witnesses, probably other jurors, maybe the Judge, to say, hey, I was with these people at 2:00 p.m. in court. That's an alibi notice.
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> Under the law, notice has to be given to the prosecution. That's what the statute says. And then the prosecution can interview that witness. And go over the times, how do you know, who else was there. Because that's what detectives do. So instead I have something slipped in against me, and I'm not crying crocodile tears, but my opponent and friend, [defense counsel], says, look, it's not an alibi notice, we're not claiming alibi. But the mother says, hey, you know, he was at the house until 4:30, five o'clock, I'm not sure.
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> Well, there is no alibi notice here. The fact is if anybody had been with the Defendant between 5:45 and, say, six o'clock, or 5:44 and six o'clock, or 5:44 and 5:49, that person or those people would be here. And you know why? Because the Defendant would know who he was with. See, he's arrested at 1:00 a.m., on July 27th, early Wednesday morning.

> So if he's not the shooter, there would be people to come in here and say he was with me. Yeah, we were together. We were playing poker. We were in a car. We were at a store. Where are those people? None of them, nobody came here in the witness chair, looked at you and said he was with me. And you know why? Because he's the shooter, he was there.
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> But instead the mother is called, but she's not an alibi witness. And she doesn't know anything about times. There is no explanation as to where he was.
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> Now they don't have to present a defense. They're not required to present a defense. But you would think that if one person or more than one can say he was with me, that person would have been here and it would have been the alibi notice.

Initially, we find that the prosecutor's questioning of Nance did not suggest that defendant had the burden of proof; rather, the prosecutor's question was permissible in the sense that it served as a commentary on defendant's theory of the case. See *v Fields*, 450 Mich 94, 111-112, 114-116; 538 NW2d 356 (1995). We also find that the majority of the prosecutor's remarks in closing comprised permissible commentary on defendant's theory of the case and did not impermissibly shift the burden of proof. See *id.* See also *People v Fyda*, 288 Mich App 446, 464; 793 NW2d 712 (2010). For instance, the prosecutor's comments on defendant's mother as a witness were permissible in light of defendant's theory of the case. See *Fields*, 450 Mich at 111-112. However, we are troubled by the prosecutor's comments that, if defendant was not the shooter, he would have called witnesses to verify as much. The prosecutor's comments appear to suggest that defendant had a burden to produce a defense concerning his whereabouts. See, generally, *Fyda*, 288 Mich App at 464. Thus, we find the prosecutor's comments were improper. Nevertheless, we decline to reverse on the basis of this unpreserved claim of prosecutorial misconduct because we find the error to be harmless. The trial court subsequently instructed the jury on the presumption of innocence, the burden of proof, and that the attorneys' arguments were not evidence. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial comments, and jurors are presumed to follow their instructions." *Unger*, 278 Mich App at 235 (internal citation omitted). In light of those instructions, and in light of the evidence against defendant, we find the error to be harmless.

Defendant also argues that the prosecutor improperly shifted the burden of proof when discussing the reason why defendant checked into a motel shortly after the shooting. During closing argument and rebuttal, the prosecutor asked the jury, "Have you heard any explanation in this universe as to why [defendant] had to go to a [m]otel?" and argued that defendant went to the motel and registered under another person's name because he "was on the lam" and was hiding. Defendant did not object to these remarks. It was not improper for the prosecutor to argue that defendant's conduct of checking into a motel after the shooting, under another person's name, was evidence of his intent to hide from the police, thereby supporting an inference of his consciousness of guilt. See *People v Kowalski*, 489 Mich 488, 509; 803 NW2d 200 (2011) (dishonesty or deception can be evidence of consciousness of guilt). Within this context, the prosecutor properly could comment on the absence of any innocent explanation for defendant's conduct to emphasize the strength of the permitted inference. Again, such argument

does not shift the burden of proof. *Fields*, 450 Mich at 111-112, 114-116. The prosecutor did not directly comment on defendant's failure to testify. Accordingly, there is no plain error.

B. ELICITING HEARSAY TESTIMONY

Defendant next argues that the prosecutor improperly elicited hearsay testimony that a witness who lived at a house on Lakewood Street provided information that was supportive of the prosecution's case and that an unnamed individual had identified defendant as being at the house. The record establishes that it was defense counsel who first attempted, unsuccessfully, to elicit from Nance that the Lakewood Street witnesses, none of whom testified, contradicted the testimony of the witness who followed defendant from the gas station to Lakewood Street. The trial court sustained the prosecutor's objection that any such testimony would have been inadmissible hearsay. On redirect examination, the prosecutor immediately thereafter elicited from Nance testimony that Nance received unspecified information from a witness or witnesses that was supportive of the prosecution's case. Defense counsel did not object to the testimony. Subsequently, on re-cross, defense counsel questioned Nance so as to clarify that none of the Lakewood Street witnesses reported seeing defendant enter the Lakewood house. On yet another redirect examination, the prosecutor elicited testimony from Nance that an unnamed witness told him that defendant was at, but did not enter, a house on Lakewood Street. On yet another round of re-cross examination, defense counsel elicited testimony from Nance that the unnamed witness was a 14-year-old who learned defendant's name from the witness's mother and that neither the 14-year-old nor his mother reported the information to the police until five months later, in December 2011.

On appeal, the prosecution admits that the trial prosecutor improperly elicited hearsay testimony from Nance. Thus, we consider whether the testimony was outcome determinative, and conclude that the prosecutor's question and comments, to which defendant did not object, do not warrant reversal. A timely objection could have cured the prejudice, if any, caused by Nance's vague assertion that a witness or witnesses who lived at a house on Lakewood Street provided information that was supportive of the prosecution's case, as well as Nance's testimony that a 14-year-old identified defendant as being at the house on Lakewood Street. See *Unger*, 278 Mich App at 235. Further, to the extent Nance's testimony could serve as evidence identifying defendant as the shooter, such testimony would be cumulative to Price and Curtis's properly admitted identification testimony. In addition, we find that any mention of the 14-year-old witness during closing argument did not prejudice defendant. Therefore, defendant cannot show plain error affecting his substantial rights. See *Abraham*, 256 Mich App at 274.

C. ARGUING FACTS NOT IN EVIDENCE

Defendant next challenges the prosecutor's statement to the jury during closing argument regarding the red spots that were observed on defendant's white t-shirt at the time of his arrest. Record evidence showed that defendant's t-shirt had been sent to the Michigan State Police crime laboratory. The record contains no evidence that the suspected red spots had ever been tested. During closing argument, the prosecutor referenced the red spots, and stated:

> But we do know he has red on his shirt. And I'm not saying to you, ladies and gentlemen of the jury, that that's blood because I don't know. *It was sent to the*

> *crime lab and testing was not completed in time.* But it's something to consider. Probably not worth much. [Emphasis added.]

Defendant argues that this statement was improper because there was no evidence that testing was ever attempted. Defendant contends that the statement could have caused the jury to speculate whether the shirt actually contained blood, whether the blood belonged to the victim, or whether investigators even bothered to test the spots. Defendant did not object to the prosecutor's statement. On appeal, the prosecution concedes that the argument was improper because the record was void of any evidence regarding whether the t-shirt had been tested, or regarding whether testing was not yet complete. Thus, we consider whether the remark was outcome determinative, and conclude that it was not. In making the argument, the prosecutor downplayed the significance of the red spots by stating that the evidence was "[p]robably not worth much." In addition, the prosecutor prefaced his statement about whether the t-shirt had been tested by stating, "I'm not saying to you, ladies and gentleman of the jury, that that's blood *because I don't know*." (Emphasis added). In this context, any improper statement about whether the t-shirt had been tested could have been cured by a timely request for a curative instruction. See *Unger*, 278 Mich App at 235. Indeed, the crux of the prosecutor's argument was that the red spots, which had not been identified, could have connected defendant to the shooting. This was a permissible inference from the evidence presented at trial, and the prosecutor's brief reference to testing that was "not completed in time" does not render the prosecutor's comments outcome determinative.

Defendant next argues that the prosecutor improperly argued facts not in evidence when discussing the statistical likelihood that Curtis would select defendant's photograph in a photographic lineup. Again, there was no objection to the prosecutor's argument. While discussing Curtis's testimony, the prosecutor argued:

> Did he [Eben Curtis] want to be here? No. Not at all. Did he want to testify against somebody he knows in a murder case? No. But as begrudging as he was in his testimony, he looked at James Jones and says that's the shooter. That's two people who both know the Defendant, who both identified him independently of one another.
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> Now think about it. You look at a photo line-up, there's six photos. Probably half the time, the person looking at the photo line-up says I don't recognize anybody or I'm not sure, half the time we have somebody picked out. So the odds of selecting James Jones here are one in six and, when you think about it, it's probably every other time, fifty percent, nobody's identified and so that's one in twelve. And now you have two people identifying him independently. What are the odds of that? What's the likelihood of that? Coupling that with the fact that the Defendant is wearing a white T-shirt 45 minutes later, the fact that Defendant is familiar with the area, the fact that the Defendant knows [the victim.]

Defense counsel did not object to these comments. Defense counsel did, however, in his closing argument, suggest that the prosecutor's assertion about percentages contradicted the testimony of a police officer who testified regarding the photographic lineup process.

On appeal, the prosecution concedes that the comments were improper. Thus, we consider whether the comments were outcome determinative, and conclude that they were not. Although the prosecutor's comments regarding the percentages of a successful identification were not supported by any record evidence, a timely request for a curative instruction could have cured the prejudice in this case. See *Unger*, 278 Mich App at 235. Moreover, the trial court subsequently instructed the jury that the attorneys' arguments were not evidence. In light of these instructions, and in light of the strength of the prosecution's case, we find that the error was not outcome determinative. See *id.* at 235, 238.

Next, defendant argues that the prosecutor argued facts not in evidence when, during rebuttal argument, the prosecutor informed the jury that a gunshot residue test was no longer used by the Michigan State Police or other law enforcement agencies "because it's not a reliable test." It appears the prosecutor's comments were in response to defense counsel's argument, based on the medical examiner's trial testimony that firing a gun produces certain residue, that a person who fires a handgun will have "microscopically [sic] trace evidence" all over himself or herself. Defense counsel then argued that, "if you want to go beyond a reasonable doubt, how about a gunshot residue test? Did you hear about that?"

A prosecutor's comments must be reviewed in context, and a prosecutor is permitted to respond to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, although the prosecutor's comments were responsive to defense counsel's argument, the prosecutor's response included facts that were not in evidence because the record contains no mention of the reliability, or lack thereof, of gunshot residue testing. However, we do not find that the comments constitute plain error requiring reversal. A timely request for a curative instruction could have cured the prejudice, if any, caused by the prosecutor's remarks. Further, the trial court properly instructed the jury that the attorneys' statements and arguments were not evidence. Thus, we decline to find that the prosecutor's improper comments entitle defendant to relief under the plain error standard. See *Unger*, 278 Mich App at 238 (declining to reverse in light of the trial court's instructions that the attorneys' statements were not evidence, and in light of defense counsel's failure to request a timely curative instruction).

Defendant next argues that the prosecutor improperly suggested that Curtis and Price had identified defendant at the scene and that Price had identified defendant multiple times when there was no evidence to that effect. We disagree. Initially, Price testified that on the date of the shooting, he gave a written statement in which he identified the shooter as "James," a person he knew from the neighborhood. Price also identified defendant in a photographic lineup; thus, Price identified defendant on multiple occasions. Further, it was reasonable to infer that Price or Curtis had identified defendant at the scene because the police were able to compile photographic lineups shortly after the shooting. Indeed, Detective Sergeant Ernest Wilson, one of the officers who conducted the photographic lineup in this case, testified that he had already been given defendant's name in advance of the photographic lineup. Where Curtis and Price were the only witnesses in this case who identified defendant, it was reasonable to assume that

one or the other had given the police defendant's name prior to the photographic lineup. See *Unger*, 278 Mich App at 236 (the prosecutor is permitted to argue reasonable inferences from the evidence presented at trial).

D. VOUCHING FOR CURTIS'S CREDIBILITY

Next, defendant argues that the prosecutor argued facts not in evidence and improperly bolstered Curtis's credibility by: (1) arguing that Curtis had not been asked any leading questions before he identified defendant; (2) suggesting that Curtis had given a statement to the police in addition to his identification of defendant in the photographic lineup. A prosecutor may not vouch for the credibility of his or her witnesses by claiming some special knowledge of the witness's truthfulness; however, the prosecutor may argue from the evidence presented at trial that a witness is worthy of belief. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Here, the record does not support defendant's assertion that the prosecutor improperly commented on Curtis's credibility because the prosecutor's arguments were supported by record evidence. Wilson testified regarding the interview where Curtis identified defendant as the shooter and explained that he did not lead Curtis in his identification of defendant. Further, the record reveals that defense counsel elicited, on cross-examination of Curtis, that Curtis had met with police officers on multiple occasions and that, at one point, officers reduced his statements to a written statement that Curtis subsequently signed. On this record, we find that the prosecutor properly referred to facts in evidence and did not impermissibly vouch for Curtis's credibility. See *id.*

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that defense counsel was ineffective for failing to object to the unpreserved claims of prosecutorial misconduct discussed above. We disagree. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the strong presumption that the challenged action constituted sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

As set forth above, the prosecutor's challenged conduct either was not improper or was not prejudicial. Therefore, even in those instances where an objection would have been appropriate, defendant has not shown that he was prejudiced by counsel's failure to object. Thus, defendant's claim for ineffective assistance of counsel must fail. See *id.*

IV. DEFENDANT'S PRO SE STANDARD 4 BRIEF

Defendant raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which warrant relief.

A. PERJURED TESTIMONY

Defendant argues that Price was allowed to commit perjury when he testified, in response to questioning by defense counsel on cross-examination, that he did not know of any possible conflict between defendant and the victim. At the next break in the proceedings, outside the presence of the jury, the prosecutor informed the trial court that Price previously stated that defendant was upset with the victim because defendant believed the victim was encroaching on the territory where defendant sold marijuana. The prosecutor then requested, on re-direct examination, to question Price about marijuana dealings between the victim and defendant. Thereafter, defense counsel vigorously argued that such evidence was inadmissible and that it was unfairly prejudicial to his client. The trial court ruled that the prosecutor would not be permitted to inquire about the marijuana dealings of the victim and defendant on re-direct examination.

On appeal, defendant argues that Price's testimony regarding the lack of a feud between defendant and the victim constituted perjury, and that the perjured testimony entitles him to a new trial.

"[A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). A prosecutor has a duty to inform the defendant and the trial court when a government witness lies under oath. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). A prosecutor may not knowingly use false testimony to obtain a conviction, and must correct false evidence when it is presented. *Id.* Reversal is required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Aceval*, 282 Mich App at 389, quoting *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976).

To the extent that Price may have inaccurately denied knowledge of any conflict between defendant and the victim, the prosecutor satisfied his constitutional duty by alerting the trial court and defense counsel to the alleged discrepancy, and by seeking to correct the allegedly false testimony. The prosecutor sought to establish Price's knowledge that defendant and the victim were involved in the sale of marijuana, and that defendant was upset at the victim because he believed that the victim was encroaching on his territory. It was defendant, however, who objected and successfully foreclosed this line of inquiry.

Because the prosecutor brought the allegedly false testimony to the attention of the trial court and defense counsel, and sought to correct the testimony, there was no plain error. Further, there is no basis for concluding that the allegedly false testimony affected the jury's verdict. The testimony was favorable to defendant because it suggested that defendant had no reason to harm the victim. There is also no merit to defendant's claim that defense counsel was ineffective for failing to elicit that there were problems between defendant and the victim. On the contrary, defense counsel's efforts to exclude this evidence were objectively reasonable because the testimony would have established a motive for defendant to harm the victim and would have cast defendant in an unfavorable light by establishing that he sold marijuana.

B. DEFENDANT'S PRO SE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Defendant raises additional ineffective assistance of counsel claims in his Standard 4 brief. Some of these claims were raised and addressed at a post-trial evidentiary hearing. We review the trial court's findings of fact in relation to those claims for clear error. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Whether those facts satisfy the test for ineffective assistance of counsel presents a question of constitutional law, which we review de novo. *Id*. With respect to those matters that were not raised below, our review is limited to mistakes apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Defendant first argues that defense counsel was ineffective for failing to file a notice of alibi defense. He argues that either Jones or his daughter could have provided an alibi defense. Because trial counsel did not file notice of an alibi defense, defendant could not call any alibi witnesses without leave of the trial court. See MCL 768.20(1); *People v Travis*, 443 Mich 668, 679; 505 NW2d 563 (1993). Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A substantial defense is defined as one that might have made a difference in the outcome at trial. *Id.*

Although defense counsel conceded that he did not file a notice of alibi, the parties stipulated that Mary's testimony did not purport to be an alibi for defendant. Defense counsel explained that her testimony did not involve a technical alibi defense because she was not sure of the actual times she saw defendant. However, defendant was permitted to call her as a witness and she was permitted to testify regarding her recollection of when defendant left her house with his daughter to go to the mall and when they returned. The only other person who defendant claimed to be with at the time of the shooting was his young daughter, but defendant explained at the evidentiary hearing that he did not want her to testify, it is not apparent that she was even competent to testify, and defendant did not present any offer of proof regarding any proposed testimony she could offer. Because defendant has not identified any evidence or testimony that he was unable to present because of counsel's failure to file a notice of alibi, he has not shown that he was prejudiced by counsel's failure to file an alibi notice. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (a defendant bears the burden to "establish[] the factual predicate for his claim of ineffective assistance of counsel[.]").

Defendant next argues that counsel was ineffective for stipulating to the admission of people's exhibits 1 through 14 before viewing them. The record does not support this claim. Defense counsel expressly stipulated to the admission of the exhibits, stating, "*I have seen them all* and have no objection." (Emphasis added). Further, defendant does not challenge the substantive admissibility of any of the exhibits. Therefore, defendant has not shown that counsel was ineffective or that he was prejudiced by counsel's stipulation to the admission of the exhibits.

Next, defendant argues that trial counsel was ineffective for failing to object to the testimony of Dr. Leigh Hlavaty, the deputy chief medical examiner for Wayne County, when Dr. Hlavaty testified concerning an autopsy report that was authored by a different medical

examiner, Dr. Diaz. Dr. Diaz performed the autopsy on the victim, but did not testify at trial. Defense counsel stipulated to the admission of Dr. Diaz's autopsy report at trial.

Although defendant observes that defense counsel could have raised a valid objection to having one medical examiner testify regarding the autopsy results and report of another medical examiner, see *People v Childs*, 491 Mich 906; 810 NW2d 563 (2012); *People v Lewis*, 490 Mich 921; 806 NW2d 295 (2011), the only significance of the testimony was that it established that the victim died from multiple gunshot wounds, which was not a disputed issue at trial. The testimony did not shed any light on the shooter's identity, which was the principal issue at trial. For this reason, defendant cannot show that he was prejudiced by defense counsel's decision to stipulate to Dr. Hlavaty testifying in place of Dr. Diaz.

Defendant again argues that Price committed perjury by falsely testifying that there were no problems between the victim and defendant. As explained previously, defense counsel was not ineffective for successfully excluding evidence of the victim's and defendant's contentious relationship related to their sale of marijuana, given that such evidence would have been highly prejudicial to defendant.

Defendant next argues that defense counsel was ineffective for not requesting that an expert witness be appointed to examine the video recordings at the gas station. Defendant contends that the videos were edited or altered. This issue was explored at the *Ginther* hearing. The record discloses that defendant and defense counsel reviewed the recordings before trial and used them to develop a trial strategy in support of a misidentification defense. Although defendant now maintains that the video recordings were edited and were not representative of what occurred at the gas station, he did not present any offer of proof from a qualified expert in support of this claim. Thus, there is no basis for finding that defense counsel should have been aware of defendant's belief that the recording presented at trial was edited by using defendant's earlier presence at the gas station to make it appear that he was present at the time of the shooting. Given this record, defendant failed to establish support for this ineffective assistance of counsel claim. See *Hoag*, 460 Mich at 6.

For the same reason, we reject defendant's claim that counsel was ineffective for failing to call any additional witnesses at trial. Defendant presented no evidence with regard to the testimony of the alleged witnesses; thus, his claim must fail. See *id.*

Defendant lastly argues that defense counsel's poor health and deficient mental acuity from medications prevented him from properly representing defendant at trial and that counsel's alleged health conditions created a conflict of interest for counsel. This issue was raised and addressed at the post-trial evidentiary hearing. The only evidence produced by defendant on the issue was his own testimony that he overheard his attorney tell the prosecutor that he was undergoing treatment "like chemotherapy" and that his mind was not on the case. While defendant claimed to have raised these concerns in a letter to the trial court before trial, there was no evidence that the court had received any such letter. In addition, defense counsel denied that he suffered from any health problems at the time of trial, or that his conduct was affected by any health issues or medication. The trial court, which had the opportunity to view defense counsel's performance at trial, stated that it found no indication that defense counsel was unprepared or not focused on the trial, and found nothing to indicate that counsel's performance was affected by

any medications or poor health. The court gave examples of defense counsel's conduct and strategies at trial, which the court found demonstrated that counsel was prepared for trial and appropriately represented defendant. After our own review of the trial record, we find no clear error in the trial court's findings. Defendant's claim is meritless.

C. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that he is entitled to a new trial because the jury's verdict is against the great weight of the evidence. In *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003), this Court summarized the standards that apply to this issue:

> The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646 (citation omitted).

Although defendant asserts that there were conflicts in the testimony, the mere presence of conflicting testimony is insufficient to warrant a new trial. See *id.* Further, the primary eyewitnesses, Curtis and Price, both consistently identified defendant as the person who shot the victim. Defendant asserts that the video recordings showed that some of Price's and Curtis's testimony regarding certain details was inaccurate, particularly their testimony concerning how Curtis got to the gas station and whether the victim fueled his automobile before the shooting. However, such discrepancies do not mean that their testimony was deprived of all probative value. The jury could have rationally concluded that the witnesses were mistaken about some of the details, but that both were in a position to identify the shooter and that their identifications of defendant were credible. Finally, contrary to defendant's contentions, where the record reveals that defendant fired several shots at the victim after ambushing him, the evidence does not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. See *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (explaining that first-degree premeditated murder requires a showing of "[s]ome time span between [the] initial homicidal intent and ultimate action . . . .").

D. CUMULATIVE ERROR

Defendant lastly argues that he is entitled to a new trial because of the cumulative effect of the many errors in this case. We have rejected most of defendant's claims of error. Although some of the prosecutor's statements were improper, they did not affect defendant's substantial rights. To the extent that Price falsely testified that there were no problems between defendant and the victim, defendant was not prejudiced because that testimony was favorable to defendant.

Defendant has not established any errors that, when aggregated, deprived him of a fair trial. *LeBlanc*, 465 Mich at 591; *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990).

Affirmed.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher