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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2026 11:33 AM
v	No. 373724 Oakland Circuit Court
JASON JUAN KELLAR, Defendant-Appellant.	LC No. 2020-273852-FC

Before: MURRAY, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to murder (AWIM), MCL 750.83, and two counts of carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Following his convictions, defendant moved for a new trial asserting ineffective assistance of counsel on several bases, which the court denied. On appeal, defendant asserts the trial court abused its discretion when it denied his motion for a new trial, raising the same ineffective-assistance arguments he raised in the motion. We affirm.

I. BACKGROUND

This case arose out of the shooting of Jorie Edwards and Alexis Sugura-Rubio in the early morning hours of December 3, 2019. At the time, Jorie had been dating defendant and had moved in with his family a couple of months prior. But on December 2, 2019, she told defendant she wanted to return to her mother Joyce Marie Christian's house.

According to Jorie, defendant drove her to her mother's house in Pontiac at approximately 9:00 p.m. Rather than remain at her mother's house, however, Jorie contacted Alexis who picked up Jorie at around 10:00 p.m. Jorie, Alexis, and defendant had all gone to high school together, and Jorie had dated Alexis prior to starting a relationship with defendant. Jorie testified that she continued communicating with Alexis while living with defendant, and that defendant did not want her to maintain contact with Alexis.

Alexis drove Jorie to his house where they talked for a couple of hours before Alexis drove Jorie back to her mother's house. Jorie testified that while with Alexis, defendant texted and called her multiple times. Defendant asked her to share her location and when Jorie refused, he texted, "That's a problem."

When Alexis and Jorie arrived back at her mother's house, Alexis pulled his car in front of the driveway with the driver's side facing the curb, and they continued their conversation. According to Jorie, at some point during the conversation, she noticed bright lights from a car that had pulled up behind them, and the car remained there for approximately 20 minutes. She could not see who was driving, but she heard gunshots coming from behind her. Alexis drove away, but both he and Jorie had been shot, and his car was hit with gunfire causing it to spin out.

Jorie testified that when Alexis's car spun around, she got a good look at the shooter's car, which she described as a black truck. She still could not see the shooter, but responded "yes" when asked, "when the car first pulled up and you thought you may have recognized it at that time, or you believe you recognized it at that time, did you think it was [defendant] in the car?"

Alexis also testified about the shooting. He said that as he and Jorie sat in his car outside of Jorie's mother's house, a vehicle that appeared to be an SUV pulled up from behind. Alexis testified that within seconds, the shooting started. According to Alexis, when the SUV pulled up, he observed that it was defendant driving. He saw defendant when the door opened and defendant stepped out. Defendant was holding a gun, and when Alexis heard the shots, he pulled away.

Christian, Jorie's mother, testified that she did not observe the shooting, but was awoken by the sound of gunfire at approximately 1:00 a.m. According to Christian, Jorie called her within minutes screaming in terror. Jorie said she was in the car with Alexis and had been shot. Over defense counsel's objection, Christian stated that she asked Jorie who shot her, and that Jorie said defendant.

Ultimately, defendant was convicted and sentenced as described above. Defendant then moved for a new trial or a *Ginther*[1] hearing asserting his counsel was ineffective for failing to: (1) properly move to quash the bindover based on the lack of credibility of Alexis's testimony; (2) move for dismissal based on a violation of defendant's right to a speedy trial; (3) properly advise defendant of the consequences of a plea offer; (4) properly qualify witness Steve Wittebort as an expert witness; (5) properly object to Jorie's testimony that defendant shot her; and (6) properly object to Christian's testimony regarding what Jorie said on the phone. The trial court denied the motion.

II. ANALYSIS

On appeal, defendant asserts that the trial court abused its discretion by denying his motion for a new trial. "This Court reviews for an abuse of discretion a trial court's decision on a motion for a new trial. *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012). A trial court

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

abuses its discretion when its decision falls outside the range of principled outcomes. *Id*." *People v Hughes*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 367172); slip op at 2.

"[W]hether a defendant had the effective assistance of counsel is a mixed question of fact and constitutional law. This Court reviews findings of fact for clear error and questions of law de novo." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (quotation marks and citation omitted). "Clear error exists if the reviewing court 'is left with a definite and firm conviction that the trial court made a mistake.' " *Hughes*, ___ Mich App at ___; slip op at 2-3, quoting *People v Abcumby-Blair*, 335 Mich App 210, 227-228; 966 NW2d 437 (2020).

"A criminal defendant has a fundamental right to the effective assistance of counsel." *People v Brown*, 351 Mich App 356, 374; 35 NW3d 669 (2024), citing US Const, Am VI, and Const 1963, art 1, § 20.

> To establish ineffective assistance of counsel, defendant must first establish that counsel's performance was deficient, which requires this Court to consider "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *People v Leffew*, 508 Mich 625, 637; 975 NW2d 896 (2022). Defendant must also demonstrate that he was prejudiced by counsel's error. To establish prejudice, defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. (quotation marks and citation omitted). "Reasonable probability means 'a probability sufficient to undermine confidence in the outcome.' " *Id*. (citation omitted). [*People v Thurmond*, 348 Mich App 715, 740; 20 NW3d 311 (2023).]

" 'Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise.' " *People v Baham*, 321 Mich App 228, 236; 909 NW2d 836 (2017), quoting *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

A. INEFFECTIVE ASSISTANCE - PRETRIAL

Defendant asserts that trial counsel was ineffective for several reasons prior to trial.

1. MOTION TO QUASH

First, defendant argues that counsel was deficient for failing to move to quash the district court's decision to bind him over for trial.

At defendant's preliminary examination, Detective Cody Johnson, Alexis, and Jorie testified regarding the shooting. Like at trial, Jorie testified that she never saw who fired the gun, and Alexis provided the only identification testimony, stating that he saw defendant exit the vehicle with a gun in his hand. At the close of the hearing, the district court found probable cause to bind defendant over for trial, stating:

> So the People have carried their burden as far as establishing for a probable cause standard there was an assault with intent to murder Alexis and Jorie. And it's not so much it was 22 bullet shots. I know the People been waving that as a flag. It

> doesn't matter if it's one bullet, two bullets or twenty-two bullets. A gun is a deadly weapon. It was fired into the passenger car with two people sitting in it and they got struck. You have one witness that says it was [defendant]. That's for the jury to decide if indeed it was [defendant].
>
> Generally,
>
> the purpose of a preliminary examination is to determine whether a crime was committed and whether there is probable cause to believe that the defendant committed it. More specifically, in order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony based on there being evidence of each element of the crime charged or evidence from which the elements may be inferred. [*People v Crumbley*, 346 Mich App 144, 167; 11 NW3d 576 (2023) (quotation marks, citations, and alterations omitted).]

"[I]t is well settled that identity is an element of every offense," *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), and "[p]robable cause requires enough evidence to cause a person of ordinary caution and prudence to conscientiously entertain a reasonable belief of the defendant's guilt," *Crumbley*, 346 Mich App at 167 (quotation marks and citations omitted).

> During a preliminary examination,
>
> the magistrate ha[s] not only the right but, also, the duty to pass judgment not only on the weight and competency of the evidence, but also [on] the credibility of the witnesses. We have also held that a magistrate may not decline to bind over a defendant where there is a conflict of evidence, or where there is a reasonable doubt as to this guilt; all such questions should be left for the jury upon the trial. [*People v Anderson*, 501 Mich 175, 184-185; 912 NW2d 503 (2018) (quotation marks and citations omitted; alterations in original).]

"Absent an abuse of discretion, reviewing courts should not disturb a magistrate's decision to bind a criminal defendant over for trial." *People v Plunkett*, 485 Mich 50, 57; 780 NW2d 280 (2010). "The district court abuses its discretion by binding over a defendant when the prosecution has failed to present sufficient evidence to support each element of the charged offense." *Crumbley*, 346 Mich App at 167-168 (quotation marks and citation omitted).

Defendant argues that Alexis provided the only identification testimony at the preliminary examination, and the district court failed to consider the credibility of Alexis's testimony. Defendant asserts Alexis was likely lying about having seen defendant because the area was dark and he was in a love triangle with defendant and Jorie.

We reject this argument. There is no indication in the preliminary examination transcript that the district court failed to consider Alexis's credibility. Rather, the court heard the testimony from both Alexis and Jorie regarding the nature of Jorie's relationships with Alexis and defendant and the darkness at the time of the shooting, and found probable cause for bindover on the AWIM and felony-firearm charges, explicitly acknowledging that it would be up to the jury to determine whether to believe Alexis's identification testimony. See *Anderson*, 501 Mich at 185 ("[A]

magistrate may not decline to bind over a defendant where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt; all such questions should be left for the jury upon the trial.") (quotation marks and citation omitted). And the testimony supports the court's probable cause determination. Alexis testified that he and Jorie were sitting in his car outside of her mother's house when a car pulled up. He saw defendant exit the car with a gun in his hand and start shooting, hitting both him and Jorie. Alexis admitted that weeks before the incident, defendant told Alexis to leave Jorie alone. Although she confirmed that she did not actually see the shooter, Jorie testified that she saw a car pull up before hearing gunshots, and believed that defendant was the only person who would want to shoot her. Finally, detective Johnson testified that he arrived on the scene and found 22 shell casings. This testimony serves as evidence of each element of the crimes charged—AWIM and felony-firearm,[2] and constitutes "enough evidence to cause a person of ordinary caution and prudence to conscientiously entertain a reasonable belief of the defendant's guilt." *Crumbley*, 346 Mich App at 167 (quotation marks and citations omitted). Accordingly, any attempt by defense counsel to quash the bind over would have been unsuccessful, and " '[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.' " *Baham*, 321 Mich App at 236, quoting *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Moreover, any error in a bindover is harmless when a defendant is convicted at trial on the basis of sufficient evidence. *People v Lewis (On Remand)*, 322 Mich App 22, 30-31; 910 NW2d 404 (2017). And defendant does not challenge the sufficiency of the evidence at trial. Thus, the trial court did not abuse its discretion when it denied defendant's motion for a new trial on this basis.

2. SPEEDY TRIAL

Defendant next asserts that trial counsel performed deficiently by failing to move to dismiss the case for a violation of defendant's speedy-trial right. "Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and constitutional law." *People v Smith*, 351 Mich App 1, 9; 34 NW3d 593 (2024).

> Both the United States and Michigan Constitutions guarantee criminal defendants the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. "[A] defendant's right to a speedy trial is not violated after a fixed number of days." *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Rather, when evaluating a speedy-trial claim, the reviewing court is required to balance four factors: "(1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Id*. at 261-262. "Following a delay of eighteen months or more, prejudice is presumed, and the

[2] The elements of felony-firearm are (1) that the defendant committed a felony, (2) while he or she had a firearm in his or her possession. *People v Bryant*, 319 Mich App 207, 212; 900 NW2d 360 (2017). "The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (quotation marks and citation omitted).

> burden shifts to the prosecution to show that there was no injury." *Id*. at 262. [*Smith*, 351 Mich App at 9-10.]

"The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *Id*. at 10 (quotation marks and citation omitted). Here, defendant was arrested in December 2019, and was not tried until October 2024. This approximately 58-month delay created a presumption of prejudice. However, the record demonstrates that much of the delay was not directly attributable to the prosecution. "In assessing [the second] factor, reviewing courts may consider which portions of the delay were attributable to each party when determining whether a defendant's speedy trial rights have been violated and may attribute unexplained delays—or inexcusable delays caused by the court—to the prosecution." *Id*. at 10 (quotation marks and citation omitted). "Although delays and docket congestion inherent in the court system are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Id*. (quotation marks and citation omitted).

As the trial court found in its order denying defendant's motion for a new trial, much of the delay was the result of pandemic restrictions or adjournments either requested, or agreed to, by defense counsel. Beginning in April 2020, the Michigan Supreme Court issued orders implementing measures related to the pandemic, including suspending jury trials. See, e.g., Administrative Order No. 2020-10. At a pretrial hearing on July 9, 2020, the court said that it could give the parties a trial date for October 2020, but that it was unsure whether trial could occur at that time, or when courtroom proceedings would restart. At the next pretrial hearing on October 15, 2020, defense counsel requested time to submit motions, in response to which the court stated, "You're gonna have some time because, uh, we are—we're just now at the Oakland Circuit Court, we just got permission to proceed with jury trials," and "we're gonna do our best to get going with the, uh, incarcerated defendants first." Defense counsel asked for another pretrial on December 10, 2020, because she still had motions to submit, and at a status conference on March 18, 2021, the prosecutor indicated that discussions about resolving the case were ongoing, and that defense counsel planned to contact defendant regarding those discussions, which defense counsel confirmed. At the next pretrial on May 13, 2021, the court indicated that no trial dates were being set at that time due to the Covid numbers in Oakland County. The same was true on June 17, 2021, when the court informed the attorneys: "I note that, uh, things are constantly changing with the COVID-19 numbers. I'm gonna give a brief update. We are anticipating that we will get more trial dates because things are getting better in Michigan and across the country. As of right now, we don't have any additional criminal trial dates." But at the pretrial hearing on August 5, 2021, the court stated:

> Uh, we don't have any new trial dates for this year. Uh, we were only given three dates for each judge. I'm sharing my courtroom with 13 circuit judges because I'm one of the five plexiglassed courtrooms. I've asked for more dates but I haven't received them yet. If we get any dates, I'll let you know. But meanwhile, we're probably looking at next year.

This Court has held that "delays caused by the COVID-19 pandemic are not attributable to the prosecution when evaluating a speedy-trial claim." *Smith*, 351 Mich App at 6.

On January 27, 2022, defense counsel asked for an adjournment in the matter to work toward a possible resolution, but prior to the June 21, 2022 pretrial hearing, defense counsel, D. Ann Parker passed away, and defendant had not yet obtained new counsel, so the matter was adjourned for the retention or appointment of new counsel. At the August 2, 2022 and May 16, 2023 pretrial hearings, defendant was represented by Mitchell Ribitwer, but by July 11, 2023, Richard Taylor had substituted in as defendant's attorney. At that hearing, the prosecutor and defense counsel agreed that the matter should be adjourned to continue discussions regarding a resolution. The matter was adjourned again on September 26, 2023. At that hearing, the prosecutor indicated that he realized certain discovery had not previously been provided to defense counsel, a delay attributable to the prosecution, but stated further:

> It also has been brought to my attention Brother Counsel intends to call a witness, uh—a expert witness in this case. Uh, he did provide me with a copy of his CV as well as a report to review. But in light of the additional discovery, uh, I think it's prudent, uh, for a – an adjournment and hopefully the last adjournment in this matter to allow all parties the chance to review the necessary discovery.

The court expressed concerns over the length of the case but agreed to adjourn trial to March 2024. On March 5, 2024, the prosecutor indicated that defense counsel had only just provided a report from the proposed expert witness, just a few days before trial, and would need more time to review that report and potentially request a *Daubert*[3] hearing, to which defense counsel agreed. Thus, even where the prosecution requested adjournment, it was often caused, at least in part, by a delay on the part of the defense. Accordingly, the second factor for determining whether he was denied a speedy trial does not weigh in defendant's favor.

Nor does the third factor, which is the assertion of the right to a speedy trial. *Smith*, 351 Mich App at 15. " '[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.' " *Id*., quoting *Barker v Wingo*, 407 US 514, 532; 92 S Ct 2182; 33 L Ed 2d 101 (1972) (alteration in original). Defendant did not assert his right to a speedy trial before his motion for a new trial. He argues that this is evidence of defense counsel's deficient performance, but as noted above, much of the delay was caused by pandemic restrictions, which was not attributable to the prosecution, the death of defendant's first attorney, and the replacement of that attorney. It would have been inconsistent for defendant to demand a speedy trial when his own attorney needed time to prepare. And regardless, as will be discussed below, defendant has failed to establish he suffered prejudice as a result of the delay.

To demonstrate that he suffered a violation of his right to a speedy trial, a defendant must show prejudice, which can take the form of prejudice to his person or prejudice to his defense. *Smith*, 351 Mich App at 15.

> Pretrial incarceration necessarily results in a degree of prejudice to the person. And while anxiety caused by a lengthy delay can occur, anxiety alone cannot establish a speedy-trial violation. Yet [i]mpairment of defense is the most serious form of

[3] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

> prejudice in the context of a speedy-trial claim because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. Loss of memory caused by the passage of time can also prejudice the defense. But in considering prejudice, a reviewing court should look for examples about how the delay between arrest and trial harmed the defendant's ability to defend against the charges. [*Id*. at 15-16 (quotation marks and citations omitted; alteration in original).]

Defendant argues that he was prejudiced because he was incarcerated for five years prior to trial, but this is a gross misstatement. In fact, defendant was monitored on a tether for the majority of the time between his arrest and trial. And the assertion in his reply brief that although he was not incarcerated that entire time, he suffered anxiety for five years, is patently insufficient by itself to establish prejudice. Nor was defendant prejudiced as a result of the death of his first attorney, as the only prejudice apparent from the record is the further delay caused by finding new counsel. See *People v White*, 331 Mich App 144, 148; 951 NW2d 106 (2020). Defendant has not met his burden of establishing that trial counsel performed deficiently by failing to assert his right to a speedy trial.

3. PLEA DEAL

Defendant next argues that his trial counsel failed to properly advise him of the consequences of a proposed four-year plea deal and, but for counsel's ineffective assistance, he would have accepted the plea offer.

"Defendants are entitled to the effective assistance of counsel when considering or negotiating a plea agreement." *White*, 331 Mich App at 148.

> Defense counsel's obligation was to properly advise defendant regarding the nature of the charges or the consequences of the guilty plea and the possible defenses to the charges to which the defendant is pleading guilty, so defendant has the ability to make an intelligent and informed choice from among his alternative courses of action. The proper remedy for ineffective assistance of counsel during plea negotiations will depend on the circumstances of the case, but it could potentially entail resentencing or requiring a rejected plea to be reoffered. [*Id*. (quotation marks and citations omitted).]

The defendant bears the burden of establishing a factual predicate for his argument, which in the context of pleas means that "a defendant must show the outcome of the plea process would have been different with competent advice." *Id*. at 148-149 (quotation marks and citation omitted). Specifically,

> [w]hen a defendant claims to be prejudiced by rejecting a plea offer on the basis of ineffective assistance of counsel, the defendant must show (1) that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances); (2) that the court would have accepted its terms; and (3) that the

> conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Id*. at 149-150 (quotation marks and citation omitted).]

Defendant failed to establish a factual predicate for this argument. He attached to his motion for a new trial an unsigned and unnotarized affidavit in which he stated that attorney Taylor apprised him of an offer from the prosecution to plead guilty in exchange for a four-year prison sentence, but that "[a]t no time . . . did Mr. Taylor advise [him] to take the plea offer, to reject the plea offer, or of the consequences of [him] going to Trial." He stated that if he had better understood the consequences, he would have accepted the plea offer.

Because it is unsigned and unnotarized, defendant's offer of proof is not a sworn affidavit. *Rataj v Romulus*, 306 Mich App 735, 755 n 8; 858 NW2d 116 (2014) (reasoning that an unsigned and unsworn affidavit is not an affidavit at all).[4] And defendant's assertions are contradicted by the record. Specifically, the record belies defendant's assertion that had he been fully informed, he would have accepted the plea. At sentencing, defendant stated: "The Prosecutor offered me four years multiple times including the last day of the trial but I couldn't. I couldn't accept something that I – I didn't do." Further, his district court return indicates that conviction for AWIM may result in a life sentence. And defendant did not explain in his motion for a new trial, or now on appeal, what more information he would have needed from his attorney to make an informed decision. Accordingly, defendant has failed to meet his burden of establishing that trial counsel performed deficiently by failing to adequately inform him of the consequences of going to trial as opposed to taking a plea deal, and was not entitled to a new trial on this ground.

4. EXPERT WITNESS

Finally, with regard to his assertions of ineffective assistance before trial, defendant argues that counsel provided ineffective assistance by failing to request that Wittebort be qualified as an expert witness. Specifically, he asserts trial counsel failed to conduct a proper investigation to determine whether Wittebort could be so qualified.

On the final day of trial, defense counsel announced his intention to call Wittebort, a private investigator and former police officer, as a witness, to which the prosecutor objected. The prosecutor argued:

> In speaking with Defense Counsel, he is not being admitted as an expert with regard to his analysis. But effectively my understanding of the testimony that I anticipate is he will get up and testify as to doing his own reconstruction of that scene in 2023. Uh, and then, speak to the credibility thereof of the witnesses that

[4] Defendant argues in his appellate reply brief that although he submitted an unsigned affidavit in support of his motion for a new trial, he did timely sign the affidavit, attaching a signed affidavit sworn on May 15, 2025. But he fails to point to where in the record he filed this affidavit with the trial court and cannot expand the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). And even if defendant's affidavit had been properly signed and sworn, his ineffective assistance arguments fail nonetheless.

testified and their ability to see or not see the Defendant at the time in question. It's—again, it's not expert testimony so I believe the only other admissible grounds for it to be admitted would be lay opinion testimony under rule 701.

But my concern at this point with the one difference in circumstances which I would certainly highlight in cross if it were admitted, uh, it invades the province of the jury. I'm not sure how we can go to that location, simulate what he believes to have occurred. I believe the issue of credibility of what the witnesses could have seen at that time is best left to the testimony that was presented and for the jury to assess their credibility. But the situations are not analogous in the sense that there's a different timeframe. He doesn't know exactly what position of the vehicles at that time. Uh, the lighting could have been different in four or five years from them.

And additionally, there's nothing within his resume to support that he even, uh, has the ability to reconstruct the crash consistent with the principles and practices of people who engage on a regular basis. Effectively, it'd be as if I or anyone else went to the scene, re—and tried to take pictures of it and say based on my review at this point, uh, I don't think this person could of D—identif—identified or there is credibility issues with regard to witnesses.

Defense counsel highlighted Wittebort's law enforcement background and stated in response:

And not only, Your Honor—and I would say that his first report which was done at the crime scene—it was done I believe in 20—February of 2020 when he was initially contacted by Ann Parker who was the initial attorney for [defendant]. And he did an—an analysis of the scene. Not just going to the scene and saying this is what I think. Uh, it was—he had copies of the police reports, he had all the information that was available to his fellow—former law enforcement agents as well as, uh, whatever visual and, uh, pictorial, uh, evidence in order to go to the scene at that point in time to—to replicate, uh, based on the testimony and statements of Jorie Edwards as well as Alexis Rubio in terms of what their—what their observations were. And what their statements were to the police officers that were contained in the report in terms of what actually occurred. Or what they thought occurred.

However, defense counsel reiterated Wittebort was not being proffered as an expert.

The court allowed Wittebort to testify as a lay witness, but declined to admit his report into evidence or to allow him to provide anything close to expert testimony. As a result of the court's restrictions, Wittebort testified only that he conducted an independent investigation and drafted several reports.

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "Defense counsel's failure to investigate and attempt to secure a suitable expert witness to assist in preparing

the defense may constitute ineffective assistance." *People v Carll*, 322 Mich App 690, 702; 915 NW2d 387 (2018). "While an attorney's selection of an expert witness may be a paradigmatic example of trial strategy, that is so only when it is made *after* thorough investigation of the law and facts." *People v Ackley*, 497 Mich 381, 390; 870 NW2d 858 (2015) (quotation marks, citation, and alteration omitted).

Defendant has again failed to establish the factual predicate for this assertion of ineffective assistance or demonstrate that counsel acted deficiently. In his unsworn affidavit, defendant asserted that it was his belief Wittebort conducted an investigation into the shooting and prepared a report that would have contradicted Alexis's testimony regarding the ability to see defendant as the shooter, and that "[a]t no point during the eighteen months that Mr. Taylor represented [him], [was he] aware of him taking any steps to ensure that Mr. Wittebort would be qualified as an expert and that his investigation report would then be admissible during [his] Trial."

The record, however, demonstrates otherwise. Wittebort apparently conducted an investigation into the circumstances of the shooting, attempting to reconstruct the shooting to determine whether Alexis could have plausibly identified defendant as the shooter under the specific conditions present at the time. The prosecutor indicated he had been provided those reports. Indeed, at the March 5, 2024 hearing on a motion to adjourn, the prosecutor discussed the matter and stated he would likely request a *Daubert* hearing. Further, defense counsel had clearly studied Wittebort's background, relaying to the court that he was a private investigator with a background as a law enforcement officer. Nevertheless, defense counsel declined to present Wittebort as an expert witness, and defendant has failed to overcome the presumption that this decision constituted sound trial strategy. He did not attach to his motion for a new trial Wittebort's resume, affidavit, or reports, to support either that he could have qualified as an expert witness, or what his testimony would have been. And, for good reason, the prosecutor indicated he would have objected to any attempt to qualify Wittebort as an expert and allow him to testify regarding his reconstruction of the shooting. As the prosecutor argued, even with the assistance of the police reports and Wittebort's asserted crime scene knowledge, recreating the exact circumstances from the night of the shooting—the lighting, positioning of the cars, etc—would have been impossible, and any testimony or report with those findings would have been flawed. Accordingly, we conclude that defendant has failed to demonstrate ineffective assistance of counsel on this basis.

B. INEFFECTIVE ASSISTANCE AT TRIAL

Defendant also argues that defense counsel provided ineffective assistance at trial.

1. JORIE'S TESTIMONY

First, defendant asserts that counsel performed deficiently by failing to object to Jorie's testimony speculating that defendant was the shooter. He challenges the following exchange on direct examination:

> *Q*. So, when the bullets hit, the car spun out. That's what you recall?
>
> *A*. Yes. Once we got down to the end of the street, it's like the car did a whole 180 and then we ended up facing the black truck.

Q. Okay. And at that time, were you able to get a good look at the truck?

A. Yes.

Q. Did you see anybody outside at that time?

A. No.

Q. Uh, based on what you observed of the truck at that time, could you tell what kind of vehicle it was?

A. Yes.

Q. How so?

A. Because the street light, uh, was still on. So, I could still see the car. I knew what the car was when it first pulled up or at least what it looked like. But by the time we were away from it and facing it and the light was on, I could just see the car.

Q. Okay. When the car first pulled up and you thought you may have recognized it at that time, or you believe you recognized it at that time, did you think it was Jason in the car?

A. Yes.

There would have been no reason for defense counsel to object to this testimony on the basis that it was speculative, because, as the trial court reasoned in its order denying defendant's motion for a new trial, Jorie was clearly testifying on the basis of her own speculation, not as a matter of fact. Defense counsel does not perform deficiently by failing to make baseless objections. *Baham*, 321 Mich App at 236. And on cross-examination, defense counsel made it clear to the jury that Jorie's testimony was speculative with the following exchange:

Q. Okay. Uh, you get to the hospital and at some point you called—you called your mother and you said to your mother—do you say anything to—to your mother about who—who may have shot you?

A. Yes.

Q. Okay. And what do you say to your mother?

A. That Jason shot me.

Q. But you never—you never saw anybody shooting at you; am I correct?

A. No.

Q. You never saw anybody shooting at you?

A. No.

Q. And so, when you made that statement, you were simply speculating as to who shot you?

A. Uh, I don't feel like I was. No. I feel like it's a fact.

Q. Well, let's—let's backtrack that. You just simply—you said that—

A. No. I didn't see it. Yes. I guess it would—

Q. Okay.

A. –be a speculation since I didn't see it.

This amounted to sound trial strategy because it supported defendant's argument that the evidence of his identification as the shooter was flawed and not credible. Indeed, during his closing argument, defense counsel stated:

> [I]t is important to remember that when Jorie—when she first testified in February 2020 she said that, again, we know that her mother testified that when she spoke to her daughter that evening after she was injured—injured she said [defendant] shot me. But we also know that when she testified to that same fact under oath, she said I was simply speculating. I don't know who shot me. I didn't see who shot me. And she said it again, uh, when she testified a few days ago. That was pure—pure speculation. I simply lied.

Accordingly, defendant failed to establish that defense counsel performed deficiently, and the trial court did not abuse its discretion by denying his motion for a new trial on this basis.

2. CHRISTIAN'S TESTIMONY

Defendant next asserts that counsel provided ineffective assistance by failing to properly object to Christian's testimony that Jorie told her defendant was the shooter. Defendant points to the following testimony by Christian on direct examination:

> *Q*. So, let's say ballpark around one o'clock a.m. you hear the gunshots. Jorie calls you after you fall onto the floor. About how long after the gunshots do you feel that it was before you got the phone call?
>
> *A*. It—it seemed, uh, like immediate. Like, within minutes of me being crunched on the floor, uh, Jorie called me screaming.
>
> *Q*. Uh, she called you screaming. Can you describe how she sounded on the phone?
>
> *A*. She was, uh, screaming in terror. Like, she was sobbing and, uh, crying and screaming.

Q. When you got the phone call, could you tell where she was? Did it sound like it was coming from the house?

A. I didn't know. I mean, I—I said—I asked her. I said, where are you? I—I—you know, and she's like it—I'm in a car with, you know, with—with Alexa (sic). I went, you—we—and, you know, I was shot.

* * *

Q. No problem. I know it's traumatic to relive it. So, uh, prior to hanging up the phone, did Jorie tell you who shot her?

A. Yes.

At that point, defense counsel objected on the basis of hearsay, to which the prosecutor responded that Jorie's statement to Christian was an excited utterance, and defense counsel stated:

> I understand that he, uh, elicited that type of testimony from Ms. Christian in reference to her conversation with Jordie [sic] but clearly, uh, she's responding in—in terms of a question. Not in terms of her in—in—it was a question I believe and if I'm—I'm mistake if I heard it correctly, she asked her—Ms. Christian asked her who—who shot her and then she responded as opposed to her in a (indiscernible)—in a—in an excited, uh, discourse stating or blurting out who she thought or believed shot her.

Ultimately, the trial court overruled defense counsel's objection under MRE 803(2), which provides that "[a] statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused" is not excluded by the rule against hearsay.

Like he did in support of his motion for a new trial, defendant argues not that defense counsel improperly objected under MRE 803(2), but that he made the wrong argument in support of that objection. Specifically, defendant asserts:

> The problem in this case is that the Court relied on MRE 803(2), which permits the admission of hearsay when "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Yet, the declarant, [Jorie], is in a car communicating with her mother, Ms. Christian. Whether or not there was a startling event or condition relies on additional hearsay testimony from Ms. Edwards because at this point in the Trial only Detective Johnson and Deputy Sheriff Ready had testified—neither with firsthand knowledge of any startling event or condition. Thus, while it is safe to say that Trial Counsel relied on the correct rule in making his objection, he also failed in that the issue was that there was no evidence in the Trial Court Record of a startling event or condition at this stage of the proceedings.

We reject defendant's argument. Defendant is incorrect that at the time of Christian's testimony, no foundation had been laid for the excited utterance, as Christian herself testified that on the evening of December 2, 2019, Jorie had returned home from living with defendant, and at

about 1:00 a.m. that next morning, she was awoken by the sound of gunshots outside of her home, not long after which Jorie called to tell Christian she had been shot. And regardless, Christian's testimony was followed by that of Jorie and Alexis, who testified to the events of that night. Accordingly, even if defense counsel performed deficiently on the basis proffered by defendant, he cannot establish that he suffered prejudice as a result. The prosecution could have simply recalled Christian following the testimony of Alexis and Jorie.[5]

C. CUMULATIVE ERROR

Finally, defendant asserts that the trial court abused its discretion when it denied his motion for a new trial because of cumulative error. As defendant has failed to demonstrate ineffective assistance on any basis, his cumulative-error argument necessarily fails.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark T. Boonstra
/s/ Michael J. Riordan

[5] Because defendant does not make any additional argument regarding the application of MRE 803(2) in this circumstance, we need not consider whether the trial court otherwise properly admitted the testimony as an excited utterance. Nonetheless, the trial court's admission of the testimony was proper. Jorie's statements arose out of a startling occasion—she and Alexis being shot, and her statement that defendant shot her certainly related to that startling occasion. And Christian testified that she received the phone call from Jorie within minutes after she had been awoken by the gunshots, and it sounded like she and Alexis were still in the car. Although Jorie later testified that she called her mom from the hospital, she stated that she was hysterical and crying, and that she and Alexis had driven straight to the nearest hospital following the shooting.