STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 2, 2002
v	No. 225999 Kent Circuit Court
SAMUEL OZELL POWELL, a.k.a. "O", Defendant-Appellant.	LC No. 99-006332-FC

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and assault with intent to commit murder, MCL 750.83. We affirm.

Defendant first argues that the circuit court erred by refusing to hold an evidentiary hearing regarding defendant's ineffective assistance of counsel claim. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). We agree with defendant that the circuit court employed faulty reasoning when it denied defendant's motion for a *Ginther* hearing. Nevertheless, because defendant did not meet the threshold requirement of showing that a factual dispute existed which could have been resolved in his favor, no hearing was warranted. We will not reverse a lower court decision where the court reached the right result, albeit for the wrong reason. *People v Mayhew*, 236 Mich App 112, 118 n 2; 600 NW2d 370 (1999).

The circuit court judge who decided defendant's motion for new trial was not the same judge who presided over defendant's criminal trial. For reasons that are unapparent, the circuit court judge determined that any review he could conduct would be limited to a review of transcripts of the trial proceedings. The circuit judge reasoned that only the judge who presided over the trial could ever "know that context well enough to assess whether defendant's claims of an ineffective assistance might, upon further elaboration," satisfy the requirements set forth in *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). We disagree with the circuit court's reasoning. For practical reasons, it is not always the trial judge who presides over post-trial motions, including motions for *Ginther* hearings. Furthermore, an evidentiary hearing under *Ginther* often involves the taking of new testimony that was not part of the trial record, such as testimony from defendant's trial counsel. Yet, despite the circuit court's flawed reasoning, we conclude that defendant was not entitled to an evidentiary hearing to further develop his ineffective assistance claims.

The circuit court correctly noted that a defendant is not automatically entitled to such a hearing, and that a defendant must show the existence of a factual dispute which might, if further developed, possibly be resolved in defendant's favor. In fact, the case which created the right to an evidentiary hearing expressly stated that a hearing is necessary only when a factual dispute exists. *Ginther, supra* at 442. Defendant has not alleged any factual dispute which a hearing might resolve in his favor. In fact, all of defendant's ineffective assistance claims involve undisputed facts of record. A remand is not necessary when there are no disputes of fact, but only legal questions to be resolved. Defendant does not adequately point to areas "in which further elucidation of the facts might advance his position." See *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995).[1]

This failure is reflected by the focus of defendant's first issue, which is the need for defense counsel to explain "why he did what he did." Defendant asserts that a hearing would have "explored the attorney's reasons for not seeking to suppress the evidence" and that in the absence of a hearing, this Court "must speculate about whether those decisions were tactical or ineffective lawyering." We disagree. A defendant, as opposed to his trial counsel, bears a "heavy burden" of establishing that he received ineffective assistance of counsel. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Pickens*, *supra* at 327. Defendant has shown no indication that he would be able to meet either criterion. Defendant simply questions counsel's trial strategy with the benefit of hindsight. This Court will neither second-guess counsel regarding matters of trial strategy, nor assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Thus, although the circuit court's reasoning for denying defendant a *Ginther* hearing was flawed, we conclude that defendant is not entitled to such a hearing.

Relying on the existing record, defendant also contends that his trial counsel was ineffective in several respects. We disagree with each of defendant's contentions.

Defendant contends that his trial counsel was ineffective because he failed to move for suppression of items found during several searches, on the grounds that probable cause did not exist to support the searches. Probable cause to issue a search warrant exists when the facts and circumstances would allow a person of reasonable prudence to believe that the evidence of a crime or contraband will be found in the stated place. *People v Kazmierczak*, 461 Mich 411,

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[1] To the extent that defendant is asking that the case now be remanded to make a record, MCR 7.211 provides a means for requesting a hearing in the trial court to develop evidence. "Within the time for filing a brief, an appellant may move to remand the case when development of a factual record is required for appellate consideration of an issue." MCR 7.211(C)(1)(a)(ii). "Any such motion must be supported by an affidavit or offer of proof regarding the facts to be established." *People v Williams*, 241 Mich App 519, 527 n 4; 616 NW2d 710 (2000). Defendant failed to utilize this procedure.

417-418; 605 NW2d 667 (2000). A magistrate's finding of probable cause is based on all the facts related within the affidavit. MCL 780.653. The affidavits should not be read in a negative or hypertechnical way, but should be interpreted with common sense and in a realistic fashion. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). On appeal from a finding of probable cause, a reviewing court must look at the affidavit and determine whether the information contained therein could have caused a reasonably cautious person to conclude that, under the totality of the circumstances, there was a substantial basis for the finding of probable cause. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000).

Defendant argues that probable cause did not exist because the information used by police in the search warrant affidavits was stale. The passage of time is a valid consideration in deciding whether probable cause exists. However, this factor must be "weighed and balanced in light of other variables in the equation," including property to be seized, the place to be searched, and the character of both the crime and the criminal. *Russo, supra* at 605-606. There must only be a substantial basis from which to infer a *fair probability* that the items sought were present at that location. *Id*. at 608.

Defendant consistently informed police that the Fisk address was his own, over the four year period preceding the crime. The day before the warrant was sought, a police officer called the telephone number given to him by defendant one year before the crime occurred, and the person who answered the telephone confirmed that mail for defendant would be received by him at the Fisk address. When the affidavit is evaluated with common sense, in a realistic fashion, it is evident that a reasonably cautious person could conclude that the evidence sought would be found at the Fisk address. Thus, counsel was not ineffective for challenging the search on this basis.

Defendant argues that police made no effort to identify the speaker on the telephone, to corroborate the information obtained from the unidentified speaker, to confirm that whomever answered the telephone was speaking from personal knowledge, or to link the items sought to be discovered (weapons, ammunition, or clothing) to that address. However, the standards for search warrant affidavits are not nearly as stringent as defendant implies. A search warrant may be issued on the basis of an affidavit that contains hearsay. *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991); MCL 780.653. Police officers are presumptively reliable and self-authenticating details can establish reliability. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). Further, an independent police investigation which verifies information provided by an informant can also support issuance of a search warrant. *Harris*, *supra* at 425-426.

In the present case, the named witnesses who provided information for the affidavit informed Detective Betz that they personally witnessed what they described. The information provided by the unnamed person who answered the phone at the Fisk street address was reliable because the person answered the phone as if he lived there and he knew defendant well enough to represent that defendant would receive mail sent to the Fisk street address. Defendant supplied the police with the phone number to the Fisk street address. By calling the Fisk street number and asking the individual who answered the phone whether or not defendant still received mail at that address, the police were independently verifying the information. Further, given that defendant had consistently used the Fisk street address as his own when dealing with police, it was more probable than not that the items the police sought would be found there.

Viewing all of the information in the affidavit in a common sense manner, there was a substantial basis from which to infer a *fair probability* that the items sought were present at that location. Therefore, defendant's trial counsel was not ineffective for failing to take this meritless position.

Defendant next argues that the police were not authorized to be at the Fisk Street location and that the clothing police seized there should have been suppressed as "fruit of the poisonous tree" under *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). Along the same lines, defendant argues that all evidence seized from the Oakdale search should have been suppressed under the fruit of the poisonous tree doctrine because police only knew about the Oakdale apartment after encountering defendant during the illegal search of the Fisk address. Because we conclude that the warrant for the search of the Fisk address was legal, these arguments necessarily fail. Accordingly, defendant's trial counsel was not ineffective for failing to challenge the evidence on these grounds.

Additionally, defendant argues that the facts did not give rise to probable cause to support his arrest. Defendant contends that police arrested him after searching the Oakdale residence, which they only knew about because of the search conducted on Fisk street. At the Oakdale residence, police found a grey and orange jersey and an orange hat. Given the consistent eyewitness reports that defendant was wearing a grey and orange jersey and an orange hat at the time of the crime—a relatively distinctive ensemble—the discovery of these items at defendant's apartment gave police sufficient reason to believe that defendant had committed a felony. Thus, the arrest was proper. MCL 764.15(1)(c). Accordingly, defendant's trial counsel was not ineffective for failing to challenge the arrest.[2]

Moreover, defendant argues that the search warrant affidavit was faulty because it "blended" the information received from the various witnesses, thereby making it appear that defendant had been involved in an on-going dispute with others, when in fact he was not. Defendant challenges the affidavit under *Franks v Delaware*, 438 US 154, 156; 98 S Ct 2674; 57 L Ed 2d 667 (1978), which held that false information or information accepted with reckless disregard for the truth may not be relied upon for purposes of probable cause analysis.

A defendant has the right to challenge the truthfulness of an affidavit's factual statements, but must show by a preponderance of the evidence that (1) the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and (2) that the false material was necessary to the finding of probable cause. *People v Williams*, 240 Mich App 316, 319-320; 614 NW2d 647 (2000).

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate

[2] Although defendant argues that police were still in the "investigative stage" and for that reason they lacked probable cause to arrest him, defendant cites no legal support for this proposition. Search warrants based on probable cause often play a large part in the "investigative stage" of any crime.

> falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. [*People v Turner*, 155 Mich App 222, 226-227; 399 NW2d 477, lv den 427 Mich 854 (1986), quoting *Franks*, *supra* at 171-172.]

Defendant's attack is conclusory. It is based on his interpretation of "[t]he various investigative police reports," which he claims "make clear that the defendant was not involved in" previous ongoing altercations and disputes which existed between Charles Jordan and "two other men." Defendant does not refer to specific police reports, leaving this Court to search for support for his proposition. We conclude that police notes taken during the interview with defendant contradict his claim that he was not involved in previous altercations with the victim and other men, as defendant informed police in detail about an altercation on Franklin street where "other people were starting trouble with him and the people that he was with." Additionally, Sonsiree Edmondson informed Betz that defendant *was* one of the other "males" involved in the previous confrontations. Moreover, the interview notes indicate that there was a second altercation "with this same group later in the day."[3] Accordingly, defendant's trial counsel was not ineffective for failing to raise this issue.

Defendant also contends that the warrant for defendant's blood sample was illegal because of *Franks* problems with the supporting affidavit. According to the affidavit, an orange baseball cap was found "at the scene." Defendant contends that this statement is misleading because the cap was found behind a neighbor's house, and the affidavit "suggests a much closer relationship between the hat and the address of the shooting than actually existed." Defendant also contends that the affidavit's statement that the hat was "described by witnesses as being worn" by defendant is misleading because nothing linked this particular hat to defendant. Defendant has not shown that the affidavit's statements were false or that they were inserted into the affidavit with a reckless disregard for the truth. As the affidavit for the search warrant for the Fisk street address explained, the baseball hat was recovered "to the rear of the victim's neighbor's house to the direction of where the shadowed figure was seen and in the probable flight path leading though an opening in the back fence," and this area was part of the crime scene. Defendant concedes as much by arguing that the hat was "missed by dogs and by other officers who had searched the area." Thus, the statement that the hat was found "at the scene" was not misleading or false. Defendant's trial counsel was not ineffective for failing to raise this issue.

Similarly, the statement that "[t]his baseball hat was described by witnesses as being worn by the suspect in this shooting" was not misleading. Eyewitness Fred McClendon informed Betz that he had seen defendant wearing an orange baseball cap while arguing with the

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[3] Even assuming that any of the information regarding previous conflicts was somehow "false" or misleading, it was not necessary to the finding of probable cause. See *Williams*, *supra* at 319-320.

victim before the shooting and he also identified defendant as the one he saw shoot the victim. Thus, although it technically would have been more accurate for Betz to state that an orange baseball hat was described by witnesses as being worn by defendant and that defendant was identified as the shooter, the statement actually made was not "false" and defendant has not shown that it was inserted knowingly, intentionally, or with reckless disregard for the truth. Thus, there is no *Franks* issue with the affidavit which formed the basis of the warrant for the blood sample. Defendant's trial counsel was not ineffective for failing to take this position.[4]

Because the searches were all legal, counsel was not required to move to suppress them. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Thus, defendant has not established that he received ineffective assistance. Also, it was not an abuse of discretion for the trial court to deny defendant's motion for new trial on this basis. *Jones, supra* at 404.

Next, defendant argues that the prosecutor impermissibly bolstered witnesses through the testimony of Detective Betz and argues that his trial counsel was ineffective for failing to object to the prosecutor's misconduct. We disagree.

Prosecutorial conduct which could be considered as improper, when standing alone, does not constitute error if made in response to defense arguments. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In opening argument, the defense argued in detail that McClendon lacked credibility because he gave the police inconsistent versions of what he saw during various interviews and because he lied on the stand during his preliminary examination. Additionally, defense counsel vigorously attacked McClendon's credibility on this basis during cross-examination. Therefore, it was not improper for the prosecutor to rehabilitate McClendon's credibility through Betz. Furthermore, Betz's testimony fell into a category of hearsay exceptions. MRE 803. Defendant's trial counsel was not ineffective for failing to object to this testimony.

Another prosecution witness, Overstreet, provided different answers at trial than he had initially provided to police. Therefore, the prosecutor was entitled to impeach his testimony, both directly and through Betz' testimony. "The credibility of a witness may be attacked by any party, including the party calling the witness." MRE 607.

Defendant contends that the prosecutor improperly bolstered Overstreet's testimony when she asked Betz whether Overstreet told "us out in Newaygo County" what he said when asked about one of defendant's incriminating statements. The prosecutor's brief reference to what Overstreet told "us" was barely noticeable, and could have been interpreted as a colloquial reference to the "prosecutorial team" made up of prosecution and police, as opposed to literally meaning that the prosecutor was physically present at the interview. Moreover, this single reference could not have prejudiced defendant. Although defendant argues that the prosecutor was "essentially trying to get Detective Betz to testify that he agreed with her recollection of

[4] Defendant also alleges without explanation that the blood sample was not voluntarily given because the police threatened to take it by force if defendant did not give it peaceably. Because the police had a legal warrant for the blood sample, it is irrelevant that defendant now claims he did not give it voluntarily.

what Mr. Overstreet had said" there is no indication from the record that Betz was simply being led along by the prosecutor and giving "correct" answers. Betz's answers were detailed and thorough, and when he did not understand the meaning of a question upon direct examination, he indicated as much.

Defendant also argues that "the prosecutor's opening argument strongly suggested that Mr. Overstreet was required by that [plea] agreement to testify against the defendant." Assuming defendant is referring to exhibit 9 attached to his brief, which reflects a portion of the prosecutor's opening statement, we disagree with defendant's characterization.

The prosecutor did not engage in misconduct by referring to the plea agreement. Actually, the fact that a prosecution witness has charges pending against him is particularly relevant to the issue of the witness' interest in testifying and may be admitted for impeachment purposes, even if no plea agreement exists. *People v Brownridge (On Remand)*, 237 Mich App 210, 214-215; 602 NW2d 584 (1999). Generally, the disclosure of a witness "deal" as it relates to a witness' motive is helpful to the defense—not the prosecution—because it damages the credibility of the witness. In this case, although the prosecutor did characterize Overstreet's obligation as the duty to testify *truthfully*, such characterization was accurate, and any such obligation would be no different from any other witness's obligation. Furthermore, questions regarding the credibility of witnesses are to be left to the trier of fact. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified in part by 457 Mich 885 (1998). Overstreet admitted his reluctance to testify and contradicted statements he made earlier to police, so that the prosecutor was forced to impeach him. If anything, the jury's knowledge of the "deal" and of Overstreet's unwillingness to testify voluntarily, coupled with his inconsistent testimony, benefited the defendant because it damaged Overstreet's credibility. We disagree with defendant's assumption that the jury found Overstreet more credible based on the prosecutor's references to the plea agreement, and such references do not by any means constitute prosecutorial misconduct. Accordingly, defendant's trial counsel was not ineffective for failing to object to the prosecutor's actions.

Defendant also asserts that his trial counsel did not understand the meaning of the federal plea agreement, and that counsel's position somehow bolstered Overstreet's testimony. We disagree. Defense counsel criticized Overstreet as a "snitch" in order to damage his character and credibility. Subsequently, he forcefully questioned Overstreet's character by painting him as an uncooperative felon who only testified because he was forced to do so. Counsel's argument could have been interpreted in a number of ways, most of which painted Overstreet as a character unworthy of belief. This was a valid trial strategy. This Court will neither substitute its judgment for that of counsel regarding matters of trial strategy, nor assess counsel's competence with the benefit of hindsight. *Rice*, *supra* at 445. We do not believe that any of these allegations amount to prosecutorial misconduct. Furthermore, defense counsel was not ineffective for proceeding the way he did. Accordingly, neither a new trial nor a *Ginther* hearing was warranted on this basis.

Defendant next contends that the trial court abused its discretion by refusing to hold a hearing or to grant a new trial based on the prosecutor's exercise of due diligence to locate witness Charles Jordan for testimony at trial. Further, defendant argues that defense counsel was ineffective for failing to object to the introduction of Jordan's preliminary examination testimony. We disagree.

MCL 768.26 provides:

> Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.

In addition, MRE 804(a)(5) provides that an unavailable witness is one who is "absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . . by process or other reasonable means, and in a criminal case, due diligence is shown."

Before preliminary examination testimony may be utilized at trial, the trial court should determine whether the prosecution has exercised due diligence in attempting to procure the witness' attendance at trial. See *People v Williams*, 244 Mich App 249, 254-255; 625 NW2d 132 (2001). The test "is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

In this case, the only portion of the record relating to a due diligence finding consisted of the following statement by the court, made after a twenty-two minute conference off the record:

> THE COURT: Ladies and gentlemen, at this point in time, as to due diligence, the Prosecuting Attorney's Office and the various police agencies, have been unable to locate a witness. However, this witness had previously testified at the Preliminary Examination in this matter.
>
> That testimony was under oath. The District Judge was present for that. And at this time the testimony from that witness, as taken at the Preliminary Examination, will be read to you.

The circuit court apparently found that the prosecutor had exercised due diligence, but never expressed on the record the basis for that finding. Because the discussion concerning this question occurred off the record, we are unable to identify what evidence the court used as a basis for that finding. Although the failure to establish due diligence can be error warranting reversal under certain circumstances, as in when the police made insufficient efforts to locate the witness and when the cross-examination of the witness was brief and incomplete,[5] in this case defense counsel thoroughly cross-examined Jordan at the preliminary examination.

Despite the court's failure to place the basis for its due diligence finding on the record, remand is not required because defendant has not shown that prejudice exists or that a failure to remand would be inconsistent with substantial justice. See MCR 2.613(A). Even constitutional errors are reviewed under the harmless error standard, and are harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.

[5] See *Bean, supra* at 690.

People v Mass, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001). Given the substantial amount of testimony which incriminated defendant and which essentially duplicated Jordan's preliminary examination testimony, including the testimony of Hunt, Wilson, McClendon, and both Sonsiree and Sheraye Edmonson, the court's failure to articulate its findings of fact in support of its due diligence finding does not warrant "otherwise disturbing [the] judgment" in this case by remanding it for a hearing. MCR 2.613(A). Defendant has not established that defense counsel was ineffective for failing to object to the admission of Jordan's preliminary examination testimony because he cannot show that he was prejudiced by its admission. See *Pickens*, *supra*, at 327.

Next, defendant argues that the court abused its discretion by refusing to hold an evidentiary hearing regarding his ineffective assistance claims because the transferred intent instruction was improperly given. Defendant does not contend that the instruction given was erroneous. Rather, he contends that there was insufficient evidence to establish that defendant was intending to kill anyone in particular or that the victim died because defendant missed the person he intended to kill. We conclude that defendant's argument is without merit.

Defendant contends that his threats were "generic" and that no one was specifically targeted. However, defendant's argument ignores the principle that intent and premeditation may be inferred from all the facts and circumstances. *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987). Given the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to sustain a conclusion that the defendant acted with the requisite intent. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). As defendant concedes, the evidence showed that the porch where several people were sitting was "sprayed with bullets" in poor lighting, and that defendant did make threats to "shed blood." Defendant's intent to kill someone can reasonably be inferred from that evidence. Furthermore, the evidence suggested that defendant may have intended to kill Jordan, although it could also have been interpreted as showing that he intended to kill the victim, because both Jordan and victim had had previous confrontations with defendant. The trial court did not err in reading a transferred intent instruction, and defendant's trial counsel was not ineffective for failing to object.

Defendant also alleges that the evidence supported an instruction on manslaughter. Although he had reason to believe that someone might be hit when he sprayed the porch with bullets, defendant argues that he was indifferent about the outcome. We disagree. The evidence showed that after a series of confrontations with the victim and his cohorts, defendant attended a party where he consumed alcohol and displayed a gun that he intended to use. Moreover, the evidence showed that defendant had hostilities toward the victim and his cohorts and that defendant threatened to come back to "shed blood." The evidence simply did not support the theory that defendant was "indifferent" about whether or not he killed anyone, and a manslaughter instruction should not have been given. Accordingly, the court did not abuse its discretion in failing to hold a hearing on this issue and counsel was not ineffective for failing to request the instruction.

Finally, defendant argues that the prosecutor made an improper plea to the jury during closing argument by playing on their sympathies for the victims. The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Prosecutorial 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. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Appeals to the jury to sympathize with the victim constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Rather, a prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, but she is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case. *Schutte, supra* at 721. She need neither use the least prejudicial evidence available to establish a fact at issue, nor state the inferences in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). We believe that the prosecutor's argument was not an improper appeal to jury sympathy, but was a proper comment on the evidence presented. The victim did die in his own blood in front of his mother and family. Thirteen-year-old Sheraye Edmonson was shot in the chest. The impetus for defendant's decision to "spray" the porch with bullets was, the record indicates, previous verbal confrontations which may have resulted in defendant's embarrassment. Although defendant may not be pleased with the evidence admitted at trial, such evidence was in fact admitted, and the prosecutor framed her argument based upon that evidence. No improper plea for juror sympathy occurred, and the circuit court did not abuse its discretion by failing to hold a hearing on the issue or by denying a new trial on this basis. Therefore, counsel was not ineffective for failing to object during closing argument.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski