

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW OWENS, a/k/a ANDREW MOSLEY,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 244413

Muskegon Circuit Court

LC No. 01-046044-FC

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder under alternative theories of premeditated and felony murder, MCL 750.316(1)(a) and (b), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment without parole for the first-degree murder conviction, and two years' imprisonment for each of the felony-firearm convictions, those sentences to run concurrently with each other, but consecutive to the first-degree murder sentence. He appeals as of right. We vacate one of defendant's felony-firearm convictions and its attendant sentence, but affirm in all other respects.

Defendant's convictions arise from the shooting death of DeMarco McBride, who was shot in his home at approximately 8:30 a.m. on May 2, 2001. The victim's brother, James McBride, testified that he heard the sound of gunfire and went to the living room where he saw defendant struggling with the victim, who was trying to stop defendant from shooting. Defendant eventually broke free and ran from the house, firing two more shots toward the victim as he left. In the early afternoon of May 2, 2001, Stanley Hudgins turned himself in to the police and provided information that he was with defendant earlier that day and that defendant was the man who shot the victim. Although he attempted to minimize his involvement in the crime, Hudgins provided valuable information to the police, including the location of the gun that was allegedly used in the crime. Gwendolyn Hathorn, the woman with whom defendant spent the night before the shooting, and Hudgins' girlfriend both testified that they saw defendant before 8:30 a.m. on the morning of the shooting and saw him again around 9:00 a.m. that morning. Defendant changed his clothes during that time frame. This information corroborated Hudgins' version of events. Defendant was arrested on the afternoon of the shooting after an unrelated traffic stop and was lodged in the Kent County Jail. While there, he shared a cell with Anthony Lee, who subsequently testified that defendant admitted to shooting the victim.

I

Defendant first argues that his constitutional right to confront the witnesses against him was violated when the trial court allowed Lee's testimony to be videotaped in advance of trial and then played for the jury at trial in lieu of Lee's live testimony. We conclude that defendant affirmatively waived any claim of error with regard to this issue.

On May 29, 2002, after having obtained several adjournments of trial and changing trial counsel several times, defendant again moved for an adjournment of his trial, which was scheduled for June 4, 2002. The prosecutor objected to the adjournment, arguing that he needed Lee's testimony, that Lee was scheduled to be sentenced for an armed robbery conviction on June 10, 2002, and that Lee would not receive the benefit of his bargain with the prosecutor if he did not testify before his own sentencing.¹ The prosecutor subsequently informed the court, however, that he and defense counsel had discussed a resolution to the problem, specifically the taking of Lee's testimony by videotape. Defense counsel agreed that the videotape would be taken "for trial" and "in lieu of" Lee's testimony. The trial court asked defendant if he agreed with this arrangement and defendant responded affirmatively. Lee's videotaped testimony was taken in defendant's presence, with both the prosecutor and defense counsel examining the witness.

In *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000), our Supreme Court discussed the concept of waiver and its effect on an issue raised on appeal. It defined waiver as "the intentional relinquishment or abandonment of a known right." *Id.* "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights." *Id.* Waiver is available in a broad array of constitutional and statutory provisions. *Id.* at 217-218. A defendant may waive errors related to the admission of evidence by entering into agreements regarding the admission of that evidence. *Id.* In this case, both defendant and defense counsel agreed that Lee's videotaped testimony could be taken "for trial" and "in lieu of" Lee's live testimony. Under the circumstances, defendant affirmatively waived any claim of error with respect to this issue. *Id.* at 219; see also *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) (error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence).

II

Defendant next challenges the admission of his custodial statement, arguing that certain statements made by the detective when questioning him were hearsay. The admission of evidence is generally reviewed for an abuse of discretion. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). However, because defendant did not object to the challenged evidence at trial, we review this unpreserved issue for plain error affecting the outcome of trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹ In exchange for Lee's testimony, the prosecutor agreed to ask the sentencing judge to favorably consider Lee's cooperation in this case.

On May 3, 2001, defendant was questioned by two detectives. During the questioning, one of the detectives asked defendant several questions that were premised on statements allegedly made by defendant's mother. For example, the detective told defendant that his mother said that he admitted his involvement in the shooting, but told her that it was done in self-defense. Defendant denied that his mother made such statements, indicated that the statements were lies if his mother made them, and indicated that the police were fabricating the information to try and obtain information to convict him.

Contrary to what defendant argues, the statements attributed to defendant's mother by the detective were not inadmissible hearsay. MRE 801(c) defines "hearsay" as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See also *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). The detective's questions and the statements attributed to defendant's mother were not offered to prove the truth of the matters asserted therein. Rather, they were part and parcel of defendant's interview and were offered to explain the context of defendant's statements, and to show their effect on defendant's responses. Accordingly, they were not hearsay.

We also reject defendant's claim that his due process rights were violated by the introduction of the detective's questions and statements. Before the jury heard defendant's recorded interview, defendant's mother testified about her contact with defendant on the day of the shooting. She did not testify in accordance with the statements that were attributed to her by the detective during defendant's interview. She was impeached with some prior inconsistent statements, but those statements also did not reveal that she made the statements attributed to her by the detective during defendant's interrogation. Moreover, defendant indicated, during the interview, that he believed the detective was making up information to try and obtain a confession. Defendant correctly observes that a prosecutor may not knowingly use false testimony to obtain a conviction and has a duty to correct false evidence when it appears. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001), citing *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). But the prosecutor in this case did not use false testimony or evidence to obtain a conviction. He did not refer to, or rely on, the alleged statements as truthful, substantive evidence. Indeed, he made no reference to them at all. Moreover, it was apparent, as defendant suggested during his interrogation, that the detectives made the challenged statements in an attempt to mislead or trick defendant into confessing. Further, the jury was specifically instructed with respect to how it should consider defendant's prior statements and the court's instruction did not provide any basis for the jury to consider the detective's interview questions as substantive evidence of defendant's guilt. There was no plain due process error.

We additionally find no merit to defendant's claim that trial counsel was ineffective for failing to object to the introduction of the recorded interview without moving to redact the detective's questions or requesting a cautionary instruction. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 577 (1994). Defendant must overcome the presumption that counsel's challenged conduct constituted sound trial strategy. *People v Charles Williams*, 240 Mich App 316, 331-

332; 614 NW2d 647 (2000); see also *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003) (an appellate court will not second-guess counsel on matters of strategy).

Here, the recorded police interview, as presented, demonstrated that defendant consistently maintained his innocence, even when confronted with alleged statements by his mother implicating him in the charged offense. Moreover, evidence that a detective attempted to obtain a confession from defendant through deceitful tactics reflected negatively on the detectives, who maintained that they were being truthful even when they were not. Defendant has not overcome the presumption that counsel's acquiescence in the use of the recorded statement, as presented, was a matter of trial strategy.

III

Defendant next argues that the prosecutor's impeachment of his mother with her prior statements to the police was improper. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

"A prosecutor cannot use a statement that directly tends to inculcate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). Prior statements are disallowed for impeachment purposes when "(1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Id.* at 683. We agree with defendant that the substance of a portion of his mother's prior statement, that was used to impeach her credibility, was relevant to a central issue in the case. Her prior statement related to defendant's motive, and the prosecutor was trying to prove premeditation by offering evidence of motive. However, defendant's mother offered testimony about other matters that made her credibility relevant. Specifically, she testified about defendant's demeanor and conduct on the day of the offense. She also testified about the length of defendant's visit to her home that day, the fact that he washed his hands while visiting her, and the fact that he only visited her "every blue moon." These facts were important to the case because they differed from information defendant provided to the police when he was interviewed. Because the witness offered other testimony for which her credibility was relevant, the trial court did not abuse its discretion in admitting her prior statements to impeach her trial testimony.

IV

Defendant next raises several challenges to the prosecutor's closing argument. These issues are not preserved because defendant failed to object at trial. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Defendant must demonstrate a plain error that was outcome determinative. *Id.* "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.*

Defendant first argues that the prosecutor improperly argued facts not in evidence when he argued on several occasions that the victim had previously "strip searched" defendant.

Generally, “[p]rosecutors are accorded great latitude regarding their arguments and conduct.” They are “free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.” [*People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).]

A prosecutor is not required to state inferences or conclusions in the blandest terms possible. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

The evidence supported the prosecutor’s argument that defendant was previously strip-searched by the victim. Defendant told the police that he “allowed” the victim to search him after the victim accused him of stealing money. At trial, Hudgins testified that defendant told him about a humiliating incident, that occurred a few months before the shooting. The victim patted defendant’s pockets down and asked him to pull his pants down to show that he did not have the missing money. The prosecutor’s statements that the victim had “strip searched” defendant were based on reasonable inferences drawn from the evidence. There was no error.

Defendant also argues the prosecutor erroneously told the jury in his opening statement that it would hear testimony that the victim made defendant “strip down naked.” While the evidence did not ultimately indicate defendant was required to strip naked, there is no basis for finding that the prosecutor’s statement constituted misconduct. The purpose of an opening statement is to advise the jury what the advocate purposes to show. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). If a prosecutor does not prove what he claimed he would, there is no ground for reversal if the statement was made in good faith. *People v Moncure*, 94 Mich App 252, 261; 288 NW2d 675, vacated on other grounds 409 Mich 905 (1980), citing *People v Davis*, 343 Mich 348, 357; 72 NW2d 269 (1955). Here, where the prosecutor presented evidence that the victim had previously required defendant to remove his pants, it is not apparent that the prosecutor’s earlier statement was made in bad faith. Plain error has not been shown.

Defendant further challenges the prosecutor’s statements that defendant had a very aggressive and macho or arrogant personality. Upon review of the prosecutor’s references to defendant’s personality, only the following remarks were arguably improper:

So I submit the evidence appears overwhelming that the shooter in this case was Andrew Owens. Was it premeditated murder or was it felony murder or was it both? I submit that you have evidence in this case from which you could find the defendant guilty of both premeditated murder and felony murder. I think premeditated murder appears to be the clearest on the evidence in this case. The defendant had an extremely strong motive, having been humiliated with a strip-search. *It did not suit his personality to simply accept that, to let that happen and have no response to it, no answer to it, no settling up of that score*, and nothing was apparently taken at the scene in terms of drugs or money or other things of value. [Emphasis added.]

MRE 404(a) provides that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” To the extent the prosecutor’s argument was an improper character argument, because the prosecutor argued defendant’s personality or character for the purpose of proving action in conformity therewith, the error does not require reversal because defendant cannot demonstrate

that it was outcome determinative. *Watson, supra*. There was strong evidence against defendant, both direct and circumstantial, and the jury was instructed that it had to decide the case based on the evidence. It was instructed that the statements, comments and arguments of the attorneys were not evidence upon which the case could be decided. Further, any lingering prejudice from the prosecutor's remarks could have been cured by a timely instruction had one been requested. *Id.* Thus, reversal is not warranted. *Id.* As this Court observed in *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998), "a well-tried, vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged."

Defendant also argues that the prosecutor improperly expressed his personal opinion of defendant's guilt during closing argument. A prosecutor may not express a personal opinion about a defendant's guilt. *Bahoda, supra* at 282-283. The prosecutor's remarks in this case, however, were not improper personal expressions of defendant's guilt. While the prosecutor used personal words, such as "I think," when making his argument, the arguments were premised upon, and supported by, references to the evidence. If a prosecutor's closing argument is based upon the evidence and does not suggest that the jury should decide the case based on the authority of the prosecutor's office, use of words such as "I believe" or "I want you to convict" are not improper. *People v Swartz*, 171 Mich App 364, 371; 429 NW2d 905 (1988); *People v Jansson*, 116 Mich App 674, 693-694; 323 NW2d 508 (1982).

Finally, defendant argues that the prosecutor improperly argued impeachment evidence as substantive evidence of defendant's guilt during his rebuttal argument. A prosecutor may not use impeachment evidence as substantive evidence at trial. See, e.g., *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). A prosecutor may, however, appropriately argue a witness' credibility based on impeachment evidence. See *Launsbury, supra* at 361, wherein this Court indicated that a prosecutor may argue from the evidence that a witness is not worthy of belief. Our review of the challenged rebuttal argument convinces us that the prosecutor did not improperly use impeachment evidence as substantive evidence. The prosecutor rebutted a specific defense argument by referring to a witness' prior inconsistent statement and arguing that the witness' trial testimony, upon which defendant relied, was incorrect. The prosecutor properly used the impeachment evidence to try to convince the jury that the witness was not credible on a specific point about which she testified at trial.

Defendant also generally argues trial counsel was ineffective for failing to object to each of the above instances of alleged misconduct. With one exception, the challenged arguments did not constitute plain error warranting an objection. Thus, counsel's failure to object to these allegedly improper arguments did not fall below an objective standard of reasonableness. *Stanaway, supra*. With respect to the once instance where an objection may have been warranted, i.e., the character argument, defendant has not demonstrated that, but for counsel's failure to object, the outcome of trial would have been different. *Id.* He has not met his heavy burden of demonstrating that counsel was ineffective. *Charles Williams, supra* at 331.

V

In addition to the above challenges raised by appellate counsel, defendant raises several additional claims of prosecutorial misconduct in a supplemental, pro se brief. The issues raised

were not preserved with an appropriate objection at trial. *Avant, supra*. Therefore, we review the issues for plain error. *Watson, supra*.

Defendant initially argues the prosecutor engaged in improper and prejudicial conduct by raising the issue of bad blood between the victim's family and defendant's family. We disagree. In order to convict defendant of first-degree, premeditated murder, the prosecutor was required to prove that defendant intentionally killed the victim and the act of killing was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Motive is generally relevant to show the intent necessary to commit murder. *Herndon, supra* at 412-413.

In this case, the prosecutor's opening statement properly outlined the motive evidence that the jury was expected to hear, specifically, information about the past relationship between the victim and defendant. Defendant's brother previously shot a member of the victim's family. While defendant and the victim thereafter reconciled and began socializing, the victim accused defendant of stealing several months before the charged offense. The evidence elicited at trial was relevant and within the bounds of the trial court's pretrial ruling, limiting evidence of the prior shooting. The admitted evidence consisted of defendant's statements about the previous shooting. In closing argument, the prosecutor mentioned the prior shooting only in the context of explaining the relationship between defendant and the victim in order to explain his theory of motive. The evidence and argument was relevant and probative of motive, and the prosecutor's conduct in raising the issue and arguing it did not constitute misconduct. We note that defendant does not challenge the trial court's decision that defendant's statements about the prior shooting were admissible.

We also observe that the prosecutor did not argue facts that were not in evidence during his closing argument. *Watson, supra*. When he mentioned "bad blood" in his closing argument, this characterization was a reasonable inference drawn from the evidence presented at trial. A prosecutor is entitled to argue the evidence and all reasonable inferences from that evidence, *Bahoda, supra*, and is not required to state inferences or conclusions in the blandest possible of terms. *Launsbury, supra*.

Defendant next argues the prosecutor argued facts not in evidence when, in opening statement, he indicated there would be evidence defendant was no longer welcome in the victim's home. The opening statement is not argument. Its function is to outline the evidence the jury is expected to hear. *Moss, supra*. Where a prosecutor fails to prove a fact that is mentioned in good faith in opening statement, reversal is not required. See *Moncure, supra*. It is not apparent from the record that the prosecutor's statement was made in bad faith. Moreover, any prejudice that may have been caused by the opening statement was cured by the trial court's instruction that the attorneys' opening statements were not evidence.

Defendant also argues it was improper for the prosecutor to argue defendant retrieved the "black hoody" from Warren's car. Again, we find no error requiring reversal. The argument was a reasonable inference drawn from the evidence. *Bahoda, supra*.

Defendant additionally argues that the prosecutor improperly vouched for Stanley Hudgins' credibility by questioning him about his plea deal and eliciting that he pleaded guilty to lesser charges in exchange for agreeing to provide truthful testimony. Reference to a plea agreement containing a promise of truthfulness is not automatically grounds for reversal.

Bahoda, supra at 276. The prosecutor here disclosed that Stanley was testifying pursuant to a plea agreement and briefly outlined the terms of that agreement. He did not, however, argue or imply that Stanley must be telling the truth because he entered into the plea agreement. The prosecutor also did not insinuate that he was in possession of information that Stanley was, in fact, telling the truth. *Id.* There was no improper vouching. *Id.*

Defendant further challenges the prosecutor's conduct in arguing that James McBride had known defendant for years and could identify him as the shooter. As previously noted, the prosecutor is permitted to argue the evidence and all reasonable inferences to be drawn from the evidence. *Bahoda, supra* at 282. James McBride testified at trial that he had known defendant for years and that defendant was the shooter. The prosecutor's use of this evidence during argument was proper. The fact that McBride also made contradictory statements did not preclude the prosecutor from arguing the evidence that related to his theory of the case. *Id.*

Defendant also argues that the cumulative effect of the prosecutor's errors denied him a fair trial. We disagree because defendant has failed to establish any errors with respect to the prosecutor's conduct.

Defendant additionally argues trial counsel was ineffective for failing to object to the several instances of prosecutorial misconduct discussed above. For the reasons previously discussed, objections to the challenged conduct would have been without merit. Counsel is not required to make frivolous objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Thus, defendant cannot establish that his counsel's failure to object fell below an objective standard of reasonableness. *Stanaway, supra*.

VI

Defendant also challenges the effectiveness of trial counsel by raising numerous issues related to counsel's performance. Because there was no *Ginther*² hearing, our review is limited to errors apparent on the record. *People v Walter Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In considering this issue, we note defendant cites to several police reports and other documents that are not part of the lower court record. For example, he refers to a transcript of Joyce Hudgins' police interview and a letter sent to him by counsel. Nevertheless, we have reviewed the exhibits and conclude that, even if they were properly considered, they fail to demonstrate that defense counsel was ineffective at trial.

Defendant argues counsel was ineffective for failing to adequately interview and investigate Hathorn before trial and for failing to investigate and interview Hathorn's mother, Linda Keys. Absent evidence regarding the extent of trial counsel's pretrial investigation of these witnesses, defendant has failed to establish a necessary factual predicate for his claim that counsel's failure to interview and investigate these witnesses constituted ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1993).

Defendant additionally argues defense counsel's questioning of Hathorn at trial was incomplete or unreasonable, and that the failure to call Linda Keys as a witness compromised his defense. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy and will not assess counsel's performance with the benefit of hindsight. *Id.* at 76-77. Our review of the record reveals that counsel adequately cross-examined Hathorn. Moreover, there is no error apparent from the record with respect to counsel's failure to call Keys as a witness. Indeed, the trial testimony indicated Keys arrived at Hathorn's house at approximately 9:00 a.m., which was after the time of the shooting. She arguably had nothing relevant or probative to contribute to the case. Any minimal contribution she may have made would not have affected the outcome of trial.

Defendant also criticizes counsel's decision with respect to presenting a traditional alibi defense and argues counsel never subjected the prosecutor's case to a meaningful, adversarial test. Defense counsel did not mention an alibi defense or argue that the evidence supported such a defense. Defense counsel did, however, present a theory of the defense, elicit evidence to support that theory, and argue that theory to the jury. He emphasized in opening argument that there was no evidence to connect defendant to the crime except for an endless string of lies and stories told by questionable witnesses. He cross-examined witnesses to establish evidence to discredit their incriminating testimony, and he argued his theory during closing argument. Counsel's decision not to present a traditional alibi defense, but to focus on the whole picture and emphasize the lack of evidence and witness credibility, was not objectively unreasonable. The alibi evidence was extremely weak. Defendant was the only witness who offered such testimony, and he was discredited on other points at trial. We will not second-guess the chosen strategy. *Charles Williams, supra* at 331. While in hindsight the ultimate strategy may have been unsuccessful, this does not establish that counsel was ineffective. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant next argues counsel's failure to request an alibi instruction fell below an objective standard of reasonableness. Defendant testified on his own behalf and offered alibi testimony. Where requested, an alibi instruction must be given. *People v Burden*, 395 Mich 462, 466-467; 236 NW2d 505 (1975). We disagree, however, that the failure of counsel to request an alibi instruction affected the outcome of trial. The omission was harmless because the trial court gave proper instructions on the elements of the crime and the burden of proof. *Id.* Moreover, the alibi defense in this case was weak. Defendant cannot meet his burden of proving that, but for defense counsel's conduct, the outcome of trial would have been different. *Stanaway, supra*.

Defendant also argues counsel was ineffective for failing to object to James McBride's in-court identification of defendant as the shooter because the identification conflicted with McBride's initial statements to the 911 operator and police. Any objection would have been without merit. The in-court identification was relevant evidence and was highly probative of the prosecution's case. The fact that there was competing evidence did not render the in-court identification inadmissible. The matter is one of weight to be given McBride's testimony, not its admissibility. Defense counsel is not required to make frivolous objections. *Torres, supra*.

Defendant argues counsel failed to adequately impeach Moore, McBride, and Stanley Hudgins with information available in various police reports. As previously noted, the questioning of witnesses is deemed a matter of trial strategy, that will not be second-guessed or judged with the benefit of hindsight. *Rockey, supra*. Moreover, our review of the record reveals counsel impeached the witnesses in detail and elicited sufficient information from them at trial to support his closing argument that they were not credible witnesses. Defendant cannot demonstrate counsel's performance fell below an objective standard of reasonableness and that, but for counsel's performance, the outcome of trial would have been different. *Stanaway, supra*.

Defendant additionally argues counsel was ineffective in discrediting Detective Lieutenant Curtis Schram about a statement defendant allegedly made during a police interview. Defendant argues the polygraph examiner who conducted the interview should have been called as a witness. There is no error apparent on the record before this Court. *Walter Williams, supra*. Defendant cannot overcome the presumption that the decision not to call the polygraph examiner as a witness was a matter of sound trial strategy. *Rockey, supra*.

Defendant also poses an untenable argument that counsel should have presented evidence that the prosecutor did not really believe his own witnesses. Defendant asserts the prosecutor made such statements at a *Cobbs*³ hearing. Nothing in the record before this Court supports that assertion. Thus, defendant has failed to establish the factual predicate for his claim. *Carbin, supra*. More importantly, assuming that such evidence existed, defendant cites no authority to support his position that this evidence was relevant, probative, or admissible at trial. Contrary to defendant's repeated representations on appeal, the prosecutor did not improperly vouch for the credibility of his witnesses, nor did he imply or inform the jury that he personally believed any testimony.

Finally, defendant argues that the cumulative effect of counsel's mistakes deprived him of a fair trial. Because defendant has failed to establish the existence of any prejudicial errors in counsel's performance, his cumulative error argument fails.

VII

Defendant next argues the trial court erred in responding to the jury's request for a trial transcript and that counsel was ineffective for waiving the error.

Within an hour after being excused for deliberations, the jury requested several exhibits, reinstruction on the elements of the charged crimes, and a "transcript of the trial." In response to the latter request, the trial court indicated that it could not provide the transcript. Defense counsel expressly approved this response. Counsel's express approval of the trial court's response to the jury extinguishes any error. *Carter, supra* at 216.

Recognizing that the substantive issue is waived, defendant argues that counsel was ineffective for affirmatively approving the trial court's response. We disagree. It is not apparent from the jury's request that it was having trouble recalling testimony and needed to review a

³ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

particular area of the testimony. Rather, the request for a “transcript of the trial” was made shortly after the jury began its deliberations and was made as part of a general request for trial-related items. The context suggests the request was made as part of the jury’s process of gathering all materials they believed might be necessary to reach a verdict. The jury did not express confusion with respect to any particular testimony.⁴ Moreover, defense counsel may have agreed with the trial court’s response as a matter of trial strategy, because he may not have wanted the jury to reread the entire transcript, even if one could be produced. Defendant has not overcome the presumption that counsel’s action was sound strategy. *Charles Williams, supra* at 331-332. For these reasons, we reject defendant’s claim that trial counsel was ineffective.

VIII

Finally, defendant argues one of his felony-firearm convictions must be vacated. We agree. A defendant may not be convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim because such a result violates the prohibition against double jeopardy. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Where a jury returns a verdict against a defendant, finding both first-degree premeditated murder and felony-murder, the judgment of sentence should specify a single conviction of first-degree murder supported by the two theories. *Id.* Here, the trial court properly recognized that there could only be one conviction and one sentence for first-degree murder. Nonetheless, it sentenced defendant for both felony-firearm convictions. This was error. “A defendant can be convicted for only one charge of felony-firearm for each convicted felony.” *People v Harding*, 443 Mich 693, 716-717; 506 NW2d 482 (1993). There was only one felony conviction in this case. Accordingly, one of defendant’s felony-firearm convictions must be vacated.

Affirmed in part, vacated in part, and remanded for correction of the judgment of sentence to reflect a single conviction of felony-firearm. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell
/s/ Pat M. Donofrio

⁴ MCR 6.414(H) requires that, if the jury requests a review of *certain* testimony, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests. Here, the jury’s request was patently unreasonable. It did not request *certain* testimony.