STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2004
v	No. 246618 Wayne Circuit Court
KU-BASOV DABNEY, Defendant-Appellant.	LC No. 02-002914

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He appeals as of right. We affirm.

I. Facts and Proceedings

Defendant's convictions arise from an incident in which defendant allegedly fired a rifle at his neighbor, Ruth Cross, on February 3, 2002. Defendant lived with his mother, his brother Parish Dabney, and Parish's fiancée Lawanda Melton, on Marlborough Street in Detroit, next door to Cross. Lawanda and Parish were married two weeks after the incident, and Lawanda changed her last name to Dabney.

Cross testified at trial that she was standing outside her house, just after 10:00 p.m., when defendant stepped out of the side door of his house, carrying a rifle. According to Cross, he pointed the rifle at her and said, "Bitch, I hate you." Cross replied, "You are going to jail for pointing a rifle at me." Defendant then fired the rifle four times. Cross testified that defendant's brother, Parish Dabney, also was in the yard with a pistol in his hand. Cross was certain that it was defendant, and not Parish, who fired the shots, and testified that she can tell the two apart because Parish has lighter skin. Cross also testified that she could see defendant "plain as day" because she had large security lights outside her house.

Cross ran into her house and called the police. When the police arrived, they saw defendant run into his house through the side door, carrying a rifle. They followed defendant into a bedroom where they found him trying to hide under a bed with the rifle. Two other adult men were in the bed, trying to hide under the covers, those being Parish, who had recently been paroled from prison, and Van Culver, a neighbor. They had apparently jumped into a bed where

some children were sleeping. Defendant was arrested and placed in a patrol car. When the police returned to the house to investigate Cross' claim that there were other guns in the house, they discovered that Parish had fled the house through a back door. Parish was never apprehended.

The police recovered the rifle that defendant had with him under the bed and two spent cartridges outside defendant's home. Police firearms examiners determined that the spent cartridges were fired from the rifle found with defendant. No fingerprints were found on any of these items.

In addition to testifying about the shooting incident, Cross also testified that a month after the incident, she discovered that defendant's family had been stretching tar paper from her house to her drain pipe, which blocked her view of defendant's back porch. This happened on the day she testified at the 36th District Court, apparently at a proceeding related to this action.

On cross-examination, Cross acknowledged that her relationship with defendant's family was "[n]ot very good." She stated that defendant's mother and the rest of the family stole from her while she was in the process of fixing the house before moving in. She testified that defendant's mother once made a false police report that Cross and other persons at her house were shooting guns. Cross spent a few hours in jail, and then had a stroke. This occurred more than a year before the charged shooting incident. Cross stated that defendant's "whole family is ignorant," and that they always call her a bitch.

Testifying for the defense, Lawanda Melton Dabney stated that she, Parish, defendant, their neighbor Van Culver, and some other guests watched the Super Bowl on television at their house on Marlborough on February 3, 2002. By the end of the game, defendant was drunk and asleep on the floor of the living room. When the game ended, Parish went outside and fired a gun in celebration because his team had won. When he came inside, Lawanda and the others told him that he had been foolish to shoot the gun. Parish kicked defendant to wake him when the police arrived, and Parish, defendant and Culver ran into the bedroom to hide.

Lawanda acknowledged that Parish had recently been paroled and that the shooting incident would have violated his parole. Lawanda testified that she loved Parish and did not want him to return to prison and that her testimony could jeopardize him. However, she claimed that she was testifying because defendant was innocent and she did not want him wrongly convicted. She admitted that she did not tell the police that it was Parish, and not defendant, who fired the gun.

On cross-examination, Lawanda testified that she knew where Parish was, but he was not going to come to court to admit that he fired the gun. The following exchange ensued:

> *Q.* And I'm sure it has been explained to you because of marital privilege you can't be called to testify against him; right?
>
> *A.* Well, no, I didn't know that.
>
> *Q.* You didn't know from watching TV that a wife can't testify against her husband?

A. No.

Q. So you didn't know you were home free testifying it was him, not the other Mr. Dabney?

A. I'm getting confused. Could you repeat that?

Q. You don't know from watching TV that a wife can't testify against her husband?

A. No, I didn't know that I couldn't testify against him. Basically I didn't think I was testifying against him. My only reason of being here is that he did not shoot the gun. He was laying there on the floor asleep when that gun went off.

On redirect examination, Lawanda stated that no one ever told her that she could not testify against her husband. She stated that Parish was upset with her for testifying, and that her marriage was in jeopardy.

Lawanda explained that she did not speak up for defendant at the time of his arrest because the police did not question her and because the police said they were arresting defendant on outstanding warrants, not because of the shooting. She admitted that she did not make any attempt to exculpate defendant before testifying at his trial.

Vivian Culver, Van Culver's mother, testified that she became alarmed when she heard gunshots coming from defendant's house while Van was visiting there, but did not go there to see what had happened. She stated that she was familiar with Cross because they lived in the same neighborhood and that Cross did not have a reputation for truthfulness. Culver did not see who fired the shots.

Elaine Buckner, a police investigator, was called as a rebuttal witness. Buckner testified that she interviewed defendant on the afternoon of February 4, 2002. Defendant gave a statement in which he said, "I was in the house watching the Super Bowl and the next thing that I know, the police was knocking on the door." Defendant did not tell Buckner that he had passed out on the floor, or that he ran into a bedroom after being kicked awake.

II. Prosecutorial Misconduct

Defendant raises several claims of prosecutorial misconduct. A defendant must preserve his claim of prosecutorial misconduct by making a timely and specific objection. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). This Court will not reverse on the ground of prosecutorial misconduct if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003). Review of unpreserved errors is limited to whether the alleged misconduct constituted plain error affecting substantial rights. *Id.* Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant, or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 274-275. This Court examines the entire record in context to determine whether the defendant was denied a fair and

impartial trial because of the alleged misconduct. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

A. Cross-examination of Lawanda Dabney Regarding Marital Privilege

Defendant argues that it was improper for the prosecutor to question Lawanda about her knowledge of the marital privilege because it was irrelevant, because Lawanda had no personal knowledge of the law on marital privilege, because the prosecutor misstated the law, and because it violated the prohibition against commenting on a defendant's reliance on the marital privilege. Although defendant frames this issue as one involving prosecutorial misconduct, in substance it is an evidentiary issue, and we review it as such. Because defendant did not object to the questions regarding marital privilege, the issue is unpreserved, and we review it for plain error. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

We find no error in the prosecutor's line of questioning. Lawanda's understanding of the marital privilege was highly relevant, given her testimony that she was testifying to protect defendant from an unjust conviction, even though her testimony incriminated her husband, whom she loved and wanted to keep out of prison. To the extent Lawanda knew that she had the option of refusing to testify if Parish were on trial and that her testimony at defendant's trial would not jeopardize him, this knowledge was relevant to the credibility of Lawanda's sacrifice-for-justice testimony.

The underlying premise of the prosecutor's questions, i.e., that the marital privilege enabled Lawanda to exculpate defendant without jeopardizing Parish, was not erroneous. MCL 600.2162 provides, in pertinent part:

> (2) In a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent, except as provided in subsection (3).

Subsection (3) of the statute sets forth six exceptions, none of which are applicable here.

Defendant correctly points out that the privilege belongs not to the defendant in a criminal proceeding, but to the testifying spouse.[1] The prosecutor's questions, which incorporated the statement that "a wife can't testify against her husband," did not acknowledge the possibility that Lawanda could testify against Parish if she chose to do so. Nonetheless, the salient point of the prosecutor's question, that Lawanda's testimony did not really pose any risk to her husband, is correct, regardless of which spouse held the privilege.

[1] Before MCL 600.2162 was amended by 2000 PA 182, the privilege belonged to the defendant in a criminal proceeding, and the defendant's spouse could testify for or against the defendant only with the defendant's consent. *People v Hamacher*, 432 Mich 157, 161; 438 NW2d 43 (1989). The 2000 amendment did not alter the privilege as it applied to civil proceedings, where a spouse may testify for or against the other spouse only if the other spouse consents.

Furthermore, contrary to defendant's argument, Lawanda's testimony could not subsequently be used at Parish's trial if she opted to exercise the marital privilege. This Court's decision in *People v Whalen*, 129 Mich App 732, 736-738; 342 NW2d 917 (1983), that a spouse's testimony at a defendant's preliminary examination may be used against the defendant at trial if the defendant exercised the marital privilege at trial, does not compel a different result. In *Whalen*, the spouse's preliminary examination testimony was admissible under the former testimony hearsay exception in MRE 804(b)(1). *Id.* at 737-738. Under this exception, the declarant's prior testimony is admissible only if "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Thus, if Parish were subsequently charged with and tried for the shooting incident, and Lawanda invoked the marital privilege, her testimony from defendant's trial could not be admitted because Parish did not have the opportunity to develop her testimony by direct, cross, or redirect examination. See also *Crawford v Washington*, __US__; 124 S Ct 1354; __L Ed 2d__ (2004). Although Lawanda's testimony could be introduced as a prior inconsistent statement to impeach Lawanda if she gave exculpatory testimony at a trial for Parish, MRE 801(d)(1), Lawanda could avoid this by exercising her privilege not to testify.[2]

Defendant also contends that the questions were improper because Lawanda had no personal knowledge of the law on marital privilege. The purpose of the questioning was to probe Lawanda's knowledge of the marital privilege, not to elicit expert testimony. Accordingly, the questions did not delve into any matter outside of Lawanda's personal knowledge.

Defendant correctly asserts that a prosecutor may not comment on a defendant's reliance on or exercise of the marital privilege. *People v Spencer*, 130 Mich App 527, 533; 343 NW2d 607 (1983). However, this principle is not relevant here, where *defendant* was not exercising the marital privilege. Because defendant has failed to demonstrate a plain error affecting his substantial rights, this unpreserved issue does not warrant appellate relief.

B. Other Wrongs and Acts

Defendant claims that the prosecutor committed misconduct by eliciting Cross' testimony that defendant or his family rearranged tar paper to block Cross' view of defendant's back porch. Defendant contends that this testimony was inadmissible under MRE 404(b), which excludes evidence of other wrongful acts to show a defendant's propensity for criminal behavior. This unpreserved claim of error is also, in substance, an evidentiary issue, and we review it as such.

[2] Assuming that Lawanda's testimony constituted a waiver of the marital privilege, such that she could be made to testify in a future prosecution against Parish, her statements still could not be admitted because of the hearsay limitation. We recognize that if Lawanda were to testify in Parish's favor, the prior testimony or statements could be used for impeachment purposes; however, the statements could not be used as substantive evidence. *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1982). To the extent that the marital privilege issue should not have been injected at trial, the error did not result in the conviction of an actually innocent individual or seriously affect the integrity of the judicial proceedings.

Cross' testimony about the tar paper incident was not precluded by MRE 404(b)(1), because it was probative of something other than defendant's character or propensity to commit the crime. *Knox*, *supra* at 509. Other acts evidence is admissible under MRE 404(b)(1) to show motive. Here, the incident was relevant to the prosecution's theory that the charged shooting incident was related to defendant's animosity toward Cross and his family's harassment of her. Although the prosecutor did not strictly comply with the rules by giving pretrial notice of her intent to use this evidence, as required by MRE 404(b)(2), this deficiency did not affect defendant's substantial rights because the evidence was admissible and defendant does not suggest how he would have reacted differently to the evidence had notice been given. See *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001).

C. Closing Argument

Defendant raises several claims of error in the prosecutor's closing and rebuttal arguments. Defendant did not object to the challenged arguments at trial, so these claims are reviewed for plain error.

Defendant claims that the prosecutor improperly interjected broad social issues into her closing argument by speaking of violence and children, and portraying Lawanda and Culver as bad mothers who did not care if their children were exposed to violence. The prosecutor "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members . . . ." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor also cannot inject issues broader than defendant's guilt or innocence. *People v Cooper*, 236 Mich App 643, 650-651; 601 NW2d 409 (1999).

Viewing the challenged statements in context, we find no plain error. The prosecutor was not appealing to the jury's sense of horror over violence but referring to statements from Lawanda's and Vivian Culver's testimony that cast doubt on their credibility. Lawanda testified that the police handcuffed her during the incident because she tried to get into the room where the police were questioning her children. She explained that she wanted to go to her children because she was worried about their safety with the police. Lawanda also testified that she disapproved of Parish firing the gun, but admitted that she did not remove her children from the house until five days later. Culver testified that she heard gunshots from defendant's house when her son, Van Culver, was visiting there, but she did not go there to see if he was all right. The prosecutor's comments questioned the credibility of Culver's and Lawanda's testimony that they were concerned for their children's safety by pointing out that they did nothing to protect their children from the danger created by the gunfire at defendant's home.

Defendant contends that the prosecutor improperly argued that he was guilty of the shooting incident based on Cross' hearsay testimony that defendant stole from her while she was moving in. Because defendant did not object to the prosecutor's closing argument, we review this issue only for plain error affecting defendant's substantial rights. Cross testified that she learned from neighbors that defendant stole items from her before she moved into her house. As discussed in part III, *infra*, Cross' testimony about the theft was not hearsay because it was not offered to prove the truth of the matter asserted. MRE 801(c); MRE 802; *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999). To the extent the prosecutor argued the evidence

for its truth, the passing reference was fleeting, and a cautionary instruction, had one been requested, could have cured any perceived prejudice. Accordingly, this issue does not rise to the level of plain error affecting defendant's substantial rights.

Defendant also argues that the prosecutor "exploited" the stipulation that he had a prior felony conviction by labeling him a criminal during closing argument. Defendant interprets the closing statement as an insinuation that the prosecutor had special knowledge of his guilt. But we do not view the prosecutor's statements as either vouching for defendant's guilt or otherwise suggesting to the jurors that they should convict defendant for reasons other than the evidence introduced at trial. As this Court observed in *People v Kris Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), a prosecutor "need not confine argument to the 'blandest of all possible terms,' but has wide latitude and may argue the evidence and all reasonable inferences from it." (Citation omitted.) The prosecutor acted within these limitations when she used the term "criminal" in discussing defendant's felon-in-possession charge and in stating that the episode with the rifle showed that defendant was not merely (as Cross described him) "ignorant" but a criminal.

Finally, defendant contends that the prosecutor improperly vouched for Cross' testimony when she stated during rebuttal argument:

> Let's kick it into the common-sense mode. Can you imagine me as a prosecutor getting up and saying, okay, now I'm prosecuting his brother for the same shooting and my victim can't testify that he's the shooter because she's already testified it was him. Does that sound[] like I got a case against the brother?

The prosecutor followed this statement by saying, "Ruth Cross was absolutely positive that that gentleman right there, that gentleman was the shooter."

A prosecutor may not vouch for a witness' credibility or suggest that the government has some special knowledge that a witness' testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, the prosecutor's remarks, viewed in context, do not suggest any special knowledge of Cross' credibility. The prosecutor was responding to defense counsel's argument that Parish, not defendant, was the shooter. It was not improper for the prosecutor to ask the jury to use its common sense and recognize that she had no reason to pursue the wrong brother when the witness was "absolutely positive" of which brother shot at her.

D. Improper Rebuttal Testimony

Defendant argues that Buckner was an improper rebuttal witness. Although defendant frames this issue as one of prosecutorial misconduct, substantively it is an unpreserved claim of evidentiary error.

Defendant contends that Buckner's testimony regarding defendant's statement was not proper rebuttal evidence because it was extrinsic evidence used to impeach Lawanda on a collateral matter. We disagree. The test for evaluating rebuttal evidence is whether it is justified by the evidence it is offered to rebut. *People v Rice (On Remand)*, 235 Mich App 429, 442; 597

NW2d 843 (1999). Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. *Id.*; see also *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). The prosecution cannot introduce evidence on rebuttal unless it relates to a substantive rather than a collateral matter. *Id.*

Buckner's testimony was within the bounds of these restrictions. Defendant's statement to Buckner did not pertain to a collateral matter. Rather, it pertained to where defendant was at and what he was doing when the shots were fired and when the police arrived. Further, defendant's statement that he was watching the Super Bowl when the police arrived tended to undermine Lawanda's testimony, because it omitted the crucial detail that defendant was asleep during the shooting and that he ran into the bedroom because Parish kicked him.

Defendant also argues that the prosecutor infringed on his constitutional right to remain silent by relying on omissions from his statement to Buckner to impeach Lawanda's testimony. In *People v Cetlinski (After Remand)*, 435 Mich 742, 749; 460 NW2d 534 (1990), our Supreme Court held:

> [W]hen an individual has not opted to remain silent, but has made affirmative responses to questions about the same subject matter testified to at trial, omissions from the statements do not constitute silence. The omission is nonverbal conduct that is to be considered an assertion of the nonexistence of the fact testified to at trial if a rational juror could draw an inference of inconsistency.

See also *People v McReavy*, 436 Mich 197, 213-215; 462 NW2d 1 (1990) (holding that under the "rule of completeness," all of a defendant's voluntary statement is admissible, including demeanor and nonresponsive conduct). Thus, defendant's failure to indicate that he was asleep and that he ran into the bedroom when Parish roused him was not silence, and the prosecutor could properly introduce the evidence, and comment on the omissions, on rebuttal.

In sum, defendant's claims of prosecutorial misconduct, and evidentiary error presented as prosecutorial misconduct, are without merit. There was no plain error affecting defendant's substantial rights. *Abraham*, *supra* at 274. Moreover, because we find that no errors were committed, defendant was not prejudiced by the cumulative effect of multiple errors. *Knapp*, *supra* at 387-388.

III. Denial of Motion for a New Trial

Defendant also claims that the trial court erred in denying his motion for a new trial or a *Ginther*[3] hearing. We review the trial court's decision to deny defendant's motion for a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law that are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because a *Ginther* hearing was not held, this

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Court's review is limited to mistakes apparent on the record. *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). A *Ginther* hearing would be warranted only if defendant is able to show a potentially meritorious ineffective assistance of counsel claim that requires further development of the record.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound strategy. *Knapp*, *supra* at 385-386.

Many of defendant's ineffective assistance of counsel claims involve matters that can be reviewed from the record and are previously discussed in this opinion, e.g., trial counsel's failure to object to evidentiary error and prosecutorial misconduct, counsel's failure to object to Cross' testimony that defendant stole from her and altered her tar paper, counsel's failure to object to cross-examination questions regarding the marital privilege, and counsel's failure to object to Buckner's rebuttal testimony. As previously discussed, these challenged evidentiary matters and the prosecutor's conduct and comments for the most part were not improper and, therefore, counsel was not ineffective for failing to object. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002)(defense counsel is not obligated to make meritless or futile objections). Moreover, to the extent some of these matters were objectionable, defendant was not prejudiced by counsel's failure to object; it is not reasonably likely that a different outcome would have resulted had counsel objected.

Defendant also contends that counsel was ineffective for failing to object to Cross' hearsay testimony about prior thefts and other bad acts, specifically that defendant sold drugs, that he often called Cross a bitch, and that she saw people leave defendant's house carrying a sword and a gun before the police arrived. It was not objectively unreasonable for defense counsel to refrain from objecting to this testimony. Cross' testimony that she saw "three girls and one guy" leave defendant's house with a sword, guns, and a knapsack, just before the police arrived, and her comment, "They're drug dealing," was vague, and implicated defendant's family generally without implicating defendant individually. To the extent such testimony might be viewed as improper propensity evidence under MRE 404(b)(1), its prejudicial effect was too weak to demand corrective action by defense counsel. Moreover, the testimony demonstrated Cross' hostile attitude toward defendant and his family, thereby tending to support the defense theory that Cross was biased against them and therefore motivated to falsely accuse defendant.

Cross' testimony that defendant's "whole family had been cursing me out," and that she learned from other neighbors that defendant's family stole from her while she was preparing to move into her house, considered in context, was neither hearsay nor improper propensity evidence. Defense counsel, not the prosecutor, elicited this testimony to show that Cross was hostile toward defendant and his family, and had a motive to falsely accuse defendant. In this context, the testimony was not hearsay, because it was not offered to prove the truth of the matter

asserted. MRE 801(c); *Chavies, supra* at 281. Nor was it improper propensity evidence under MRE 404(b)(1), because it was not introduced to prove defendant's bad character in order to show action in conformity therewith. Considered in this context, and in light of the defense theory that Cross held a grudge against defendant and his family, defense counsel was not ineffective for not objecting to the challenged testimony.

Defendant also argues that trial counsel was deficient in failing to call as witnesses the other persons in defendant's house on the night of the shooting. These witnesses were Van Culver, Quantika King, and Tony Olive (all mentioned in Lawanda's testimony), and the children sleeping in the bed. However, without any record showing how these persons would have testified, there is no basis for determining either that trial counsel erred in failing to call these witnesses, or that any error was prejudicial. When defendant moved for a new trial or *Ginther* hearing in the trial court, he did not submit any affidavits or other documentation to support his claim that trial counsel overlooked a viable defense when he failed to present these witnesses' testimony. Consequently, this claim is merely speculative, and defendant has not demonstrated a need for a *Ginther* hearing to develop an evidentiary record. Furthermore, because these persons were all guests in defendant's house and persons known to defendant and Lawanda, there was no need for trial counsel to ask the prosecutor for assistance in locating these purported res gestae witnesses.

Defendant also claims that trial counsel failed to make use of photographic and physical evidence. During her testimony, Cross identified photographs of the crime scene, which purportedly supported defendant's argument that she could not have seen defendant from where she was allegedly standing, but the photographs were not admitted as exhibits. Defendant now contends that trial counsel was deficient in failing to admit the exhibits. Defendant has not shown that the exculpatory value of the photographs was so high that a different outcome reasonably would have resulted had they been admitted. Accordingly, he has not demonstrated that counsel was ineffective or that a *Ginther* hearing is warranted on this basis.

Finally, defendant contends that trial counsel was deficient in failing to argue the physical evidence, namely, that the police found spent shell casings near the back of defendant's property. He claims that this evidence is inconsistent with Cross' testimony that defendant was near his side door when he fired the shots, and that trial counsel erred in not arguing this evidence. We disagree. This evidence had little potential to undermine Cross' testimony. At most, it showed that Cross was mistaken concerning defendant's exact location; it did not weaken the prosecution's proof of the elements of felonious assault. This argument does not establish either ineffective assistance of counsel or the need for a *Ginther* hearing.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper