STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2007
v ANDY THOMAS ANDERSON, Defendant-Appellant.	No. 272307 Alger Circuit Court LC No. 05-001721-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MICHAEL MELTON, Defendant-Appellant.	No. 272308 Alger Circuit Court LC No. 05-001722-FC

Before: Owens, P.J. and Bandstra and Davis, JJ.

PER CURIAM.

Defendant Andy Thomas Anderson (Anderson) appeals as of right his conviction for second-degree murder, MCL 750.317, and defendant Michael Keith Melton (Melton) appeals as of right his conviction for first-degree murder, MCL 769.12 in these consolidated appeals. We affirm.

On October 3, 2005, inside Camp Cusino, a level one corrections facility in Alger County, David Green was killed by a single stab wound to the chest, which penetrated his heart. Witnesses testified that Anderson and Melton went to Green's room, armed with shanks, to avenge an earlier assault on Anderson and that Green was stabbed during the ensuing scuffle. The jury convicted Anderson of second-degree murder; the jury convicted Melton of first-degree murder.

Shackling

Defendants each argue on appeal that the trial court violated their rights to due process and deprived them of a fair trial by ordering that they remain shackled during trial. We disagree.

This Court reviews a trial court's decision to restrain a defendant during trial for an abuse of discretion under the totality of the circumstances. *People v Dixon,* 217 Mich App 400, 404-405; 552 NW2d 663 (1996). As this Court explained in *Dixon,*

> Freedom from shackling is an important component of a fair trial. Consequently, the shackling of a defendant during trial is permitted only in extraordinary circumstances. Restraints should be permitted only to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. [*Id.* (citations omitted).]

We agree that the trial court did not clearly articulate its reasoning for requiring that defendants remain shackled on the record before trial. However, the trial court's comments throughout the proceedings, including those made in ruling on defendants' post-trial motions, indicate that the trial court was concerned with maintaining security and ensuring an orderly trial, considering the nature and circumstances of this case, with a substantial number of inmate witnesses testifying against defendants, and considering the size and layout of the courtroom, which placed the witnesses, parties, public and jury in close proximity to one another. The trial court specifically alluded to the need for defendants to be segregated at their current placement and referenced information received from the Department of Corrections as impacting its decision. Moreover, all inmates – defendants and witnesses alike – were shackled throughout the trial, which clearly suggested that defendants were restrained for neutral security purposes and not because the trial court predetermined them guilty. Therefore, we conclude that the trial court did not abuse its discretion in ordering that defendants remain shackled during trial.

Further, even were we to conclude otherwise, considering the overwhelming evidence presented against them and that the jury necessarily was aware that defendants were incarcerated at the time of the offense and at the time of trial, defendants cannot establish that they were prejudiced by the presence of the restraints. Therefore, reversal is not required. *People v Robinson,* 172 Mich App 650, 654; 432 NW2d 390 (1988).

Sufficiency of the Evidence

Anderson argues that there was insufficient evidence presented at trial to support his conviction and that his conviction was against the great weight of the evidence. We disagree.

When determining whether there was sufficient evidence presented to support the jury's verdict, this Court reviews the evidence de novo, in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell,* 260 Mich App 261, 270; 677 NW2d 66 (2004); *People v Legg,* 197 Mich App 131, 132; 494 NW2d 797 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher,* 260 Mich App 531, 562; 679 NW2d 127 (2004). It is for the trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to

those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *Legg, supra* at 132. "Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993); *Fennell, supra* at 270.

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), quoting *People v Dykhouse*, 418 Mich 488, 508-509; 345 NW2d 150 (1994). A jury may infer the malice for second-degree murder "from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm, as well as from the use of a deadly weapon." *Carines, supra* at 759.

The prosecutor argued that Anderson and Melton acted in concert in assaulting Green and that Anderson aided and abetted Melton in murdering Green. To convict a defendant of aiding and abetting a crime, the prosecutor must establish that (1) a crime was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave aid and encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004) citing *Carines, supra* at 768. As our Supreme Court explained, in *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006):

> [A] defendant must possess the criminal intent to aid, abet, procure or counsel the commission of an offense. A defendant is criminally liable for the offenses that the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense or alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

Testimony presented at trial indicated that Anderson was furious with Green after Green assaulted him, that Anderson and Melton, armed with prison-fashioned knives referred to as "shanks," went to the wing in which Green was housed to avenge Green's assault on Anderson, that Anderson stabbed or attempted to stab Green, that Melton or Anderson stabbed Green in the chest, and that Anderson admitted to another inmate that he participated in an assault on Green. While certainly there was some conflict among the testimony offered by the witnesses to Green's murder, each and every witness placed Anderson in the middle of events as they transpired, as an armed participant in the assault on Green.

Whether as a principal or an aider and abettor, the jury could properly hold Anderson responsible for the actions, along with the natural and probable consequences of those actions, including Green's death. *Robinson, supra* at 15. And, the jury was permitted to infer that

Anderson had sufficient intent to warrant a conviction for second-degree murder from the nature of the assault and Anderson's role in it. *Carines, supra* at 760-761. Therefore, the jury's verdict was supported by sufficient evidence. For the same reasons, the trial court did not err in denying Anderson's motion for a directed verdict at the close of the prosecution's case. *People v Gills*, 474 Mich 105, 113; 712 NW2d 419 (2006); *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998); *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988).

Anderson also asserts that the jury's verdict was against the great weight of the evidence. A verdict is against the great weight of the evidence where the evidence presented at trial preponderates heavily against the verdict and a serious miscarriage of justice would result from allowing the verdict to stand. *Lemmon, supra* at 642. A jury's verdict may be vacated only when it lacks reasonable support in the evidence, and is more likely attributable to causes outside the record, such as passion, prejudice, sympathy or some extraneous influence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). Absent exceptional circumstances, credibility issues are reserved for the jury and neither the trial court, nor this Court, may substitute its own view of credibility when evaluating the verdict. *Lemmon, supra* at 642. In general, a question as to the credibility of a witness is not sufficient grounds for granting a new trial, unless the testimony contradicts indisputable facts or laws, is patently incredible or defies physical realities, is so inherently implausible that a reasonable juror could not believe it, or has been seriously impeached and the case is marked by uncertainties and discrepancies, such that there is a real concern that an innocent person may have been convicted. *Id.* at 643-644.

Anderson argues that the jury's verdict was against the great weight of the evidence because it was founded primarily on testimony from Robert Odom, which was incredible and which was not corroborated by any physical evidence or other witness testimony. However, while Odom's testimony is, perhaps, inconsistent in some respects with testimony offered by others, Anderson has not shown that it contradicts indisputable facts or laws, is patently incredible or defies physical realities, is so inherently implausible that a reasonable juror could not believe it, or was seriously impeached and the case is otherwise marked by uncertainties and discrepancies such that there is a real concern that an innocent person may have been convicted. *Id*. Rather, the prosecutor presented witness testimony that Anderson was an armed participant in the assault on Green, which resulted in Green's death. The jury was left to weigh the observational skills, vantage points and credibility of a number of witnesses to a sudden, unexpected, and fast-moving series of events, during which Green was fatally stabbed. This was within the jury's exclusive province and will not be disturbed on appeal. *Id.*

Anderson further asserts that the verdicts rendered by the jury in this case are inconsistent and that considering the evidence, the result is a miscarriage of justice. According to Anderson, it is "completely inconsistent and illogical" for the jury to have found him not guilty of aiding and abetting Melton's first-degree murder of Green but guilty of second-degree murder. We disagree.

From the evidence presented, the jury could have rationally concluded that defendants did not have the requisite intent for first-degree murder when they commenced the assault on Green, but that Anderson had the intent to do great bodily harm to Green as he was stabbing at him with a shank (warranting his conviction for second-degree murder). Those conclusions do not contradict the jury's apparent further conclusion that Melton formed the intent to kill Green

during the assault and, after having sufficient time to deliberate, killed Green by stabbing him in the chest. Thus, the jury's verdicts are not necessarily inconsistent.

Further, in *People v Vaughn*, 409 Mich 463; 295 NW2d 354 (1980), our Supreme Court affirmed an inconsistent jury verdict finding the defendant guilty of assault with a dangerous weapon and not guilty of felony-firearm. The Court explained that

> [j]uries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*Id*. at 466.]

Similarly, the jury here was permitted to consider each defendant's individual circumstances and was required to consider separately each defendant's role in Green's murder. In so doing, the jury retained its power to afford a defendant leniency or dispense mercy by "releas[ing] a defendant from some of the consequences of his actions without absolving him of all responsibility." *Id.* For these reasons, we conclude that the trial court did not abuse its discretion in denying Anderson's post-trial motion for a new trial. *Lemmon, supra* at 648 n 27.

Admission of Autopsy Photographs

Anderson argues that the trial court abused its discretion in admitting three autopsy photographs at trial. We disagree.

The decision whether to admit evidence is discretionary with the trial court and will not be reversed on appeal absent an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs where an unprejudiced person would say that there was no basis for the trial court's ruling. *Id*. Generally speaking, evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the case more or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Aldrich, supra* at 114. Unfair prejudice is "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). As our Supreme Court explained in *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995):

> The decision to admit or exclude photographs is within the sole discretion of the trial court. Photographs are not excludable simply because a witness can orally testify about information contained in the photographs. Photographs may also be used to corroborate a witness' testimony. Gruesomeness alone need not

> cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. [Citations omitted.]

While somewhat unpleasant, the photographs at issue here are neither gruesome nor horrific, and there is nothing inflammatory about them. The pictures are factual representations of the injuries suffered by Green, presented in a clinical setting. They illustrate the pathologist's testimony regarding the trajectory of the fatal injury, thereby allowing the jury to determine whether the injury is consistent with the version of events testified to by witnesses and with the prosecution's theory of the case. Anderson has not shown that the probative value of these pictures is substantially outweighed by any danger of unfair prejudice. *Mills,* supra at 79-80. Therefore, the trial court did not abuse its discretion by admitting them into evidence.

Joinder

Anderson argues that the trial court erred in consolidating these cases for trial. We disagree.

This Court reviews a trial court's decision whether join trials for an abuse of discretion. *People v Hana,* 447 Mich 325, 346; 524 NW2d 682 (1994). "A strong policy favors joint trials in the interest of justice, judicial economy, and administration." *People v Harris,* 201 Mich App 147, 152; 505 NW2d 889 (1993). Thus,

> . . . [S]everance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Otherwise stated, the defendant must show that the magnitude of the prejudice denied him a fair trial. . . . [R]eversible prejudice exists when one of the defendant's substantive rights, such as the opportunity to present an individual defense is violated. [*Hana, supra* at 359-360 (internal quotation marks and citations omitted).]

Further:

> Inconsistency of defenses is not enough to mandate severance; rather the defenses must be mutually exclusive or irreconcilable. Moreover, [i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other. [*Id.* at 349 (internal quotation marks and citations omitted).]

Anderson asserts that he was prejudiced by the trial court's decision to join the trials because his and Melton's defenses were antagonistic. In this regard, Anderson's counsel predicted that Anderson would testify at trial in a manner incriminating Melton and exculpating himself, and that, likewise, Melton would testify in a manner exculpating himself and inculpating Anderson. However, Anderson did not testify at all and Melton testified in a manner exculpating himself, but without directly inculpating Anderson. Therefore, Anderson "fail[s] to demonstrate what trial rights were violated" by the joinder or how the jury's determination was unreliable. "There is no indication that either defendant was restricted in his presentation of a defense," or

that the jury was "exposed to evidence that would have been barred from their consideration in separate trials." *Hana, supra* at 360.

Moreover, even were Melton's testimony deemed antagonistic to Anderson's defense, once Melton testified, he waived his Fifth Amendment rights regarding the events in question and thereafter, it became permissible for the prosecution to call him as a witness in Anderson's trial. *Hana, supra* at 361. Therefore, Anderson cannot establish that his substantive rights were prejudiced by the trial court's decision to join the matters for trial. *Id.*

Jury Instructions

Anderson argues that the trial court erred by: instructing the jury on second-degree murder; failing to instruct the jury on manslaughter; and by failing to provide an accomplice instruction regarding Odom's testimony. We disagree.

Anderson objected, before trial, to the jury being instructed on second-degree murder. Therefore, this portion of his claim of instructional error is preserved, and will be reviewed de novo. *People v Marion,* 250 Mich App 446, 448; 647 NW2d 521 (2002); *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). However, Anderson did not request a manslaughter instruction. Therefore, this portion of his claim of instructional error is unpreserved and will be reviewed for plain error affecting defendant's substantial rights. *People v Gonzalez,* 468 Mich 636, 642-643; 664 NW2d 159 (2003); *Carines, supra* at 764-765.

Whether an offense is a lesser-included offense presents a question of law that this Court reviews de novo. *People v Nickens,* 470 Mich 622, 625-626; 685 NW2d 657 (2004); *People v Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005). Jury instructions on necessarily included lesser offenses are permitted only in the circumstance where the charged greater offense requires a jury to find a disputed factual element that is not part of the lesser-included offense and a rational view of the evidence would support such a finding. *People v Cornell,* 466 Mich 335, 357, 359; 646 NW2d 127 (2002). Second-degree murder is a necessarily included lesser offense of first-degree murder; the two offenses are differentiated only by the element of intent. *Id.* at 358 n 13. Thus, consideration of second-degree murder will be proper in a first-degree murder case whenever – and only whenever - the intent element is disputed; where intent is not disputed, however, such consideration is not permissible. *Id.*

Anderson asserts that, because the prosecutor's theory was that he aided and abetted Melton in Green's murder, and because Melton was convicted of first-degree murder, no rational view of the evidence supported a second-degree murder instruction. However, considering the evidence presented, the jury could well have concluded that Melton and Anderson assaulted Green without the premeditation and deliberation necessary for first-degree murder, and the jury could also have concluded that defendants intentionally set in motion a force likely to cause death or great bodily harm with sufficient malice to warrant a conviction for second-degree murder. *Carines, supra* at 759. Thus, an instruction on second-degree murder as a lesser offense of first-degree murder was warranted by a rational view of the evidence presented at trial.

However, contrary to Anderson's assertions, a rational view of the evidence did not warrant manslaughter instructions. Like second-degree murder, both voluntary manslaughter and involuntary manslaughter are necessarily included lesser offenses of murder, distinguished

only by the element of malice. *People v Mendoza,* 468 Mich 527, 540-541; 664 NW2d 685 (2003). Consequently, when a defendant is charged with murder, an instruction for voluntary manslaughter must be given if a rational view of the evidence supports a conclusion that a defendant killed the victim in the heat of passion caused by adequate provocation, and without a lapse of time during which a reasonable person in defendant's position could have controlled that passion. *Id.* at 535. And, an instruction on involuntary manslaughter is appropriate when a rational view of the evidence would support a conclusion that a defendant caused a death, unintentionally and negligently. *Id.* at 540-541.

Anderson never argued that he acted without the requisite malice. Instead, he asserted, through the arguments of his counsel, that he was unarmed and merely assaulted Green with his fists, without any knowledge that Melton might be armed or might have any intention of harming Green. Thus, there was no basis for concluding that the assault on Green was mitigated by "hot blood" or adequate provocation. Therefore, the trial court did not plainly err in not *sua sponte* instructing the jury on manslaughter as a lesser-included offense of murder. *Mendoza, supra* at 547-548*; Gillis, supra* at 138-139.

Anderson also argues that the trial court erred in declining to give an accomplice instruction regarding Odom's testimony. We disagree.

An instruction is only required if supported by the evidence. *People v Ho,* 231 Mich App 178, 189; 585 NW2d 357 (1998). We review for an abuse of discretion the trial court's determination that a requested jury instruction does not apply to the facts of this case. *Gillis, supra*. An abuse of discretion occurs when the result is outside the principled range of outcomes. *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

While there was testimony possibly implicating another inmate, Darnell Norris, in the assault on Green, there was no testimony or evidence tending to establish that Odom was involved in the assault other than in an extremely limited fashion, involuntarily and after the fact. We conclude that the trial court did not abuse its discretion in determining that an accomplice instruction was not applicable under the facts of this case. *Babcock, supra*; *Ho, supra*.

Anderson argues that the trial court erred in failing to instruct the jury to disregard any allegations of dishonesty or thievery by Anderson, as he requested. Even assuming that this was error, "[m]ere error alone in instructing the jury is insufficient to set aside a criminal conviction. Instead a defendant must establish that the erroneous instruction resulted in a 'miscarriage of justice.'" *People v Shaefer,* 473 Mich 418, 441-442; 703 NW2d 774 (2005). This Court will find that there has been a miscarriage of justice only if, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Gillis, supra*; *People v Rodriguez,* 463 Mich 466, 473-474; 620 NW2d 13 (2000). Considering the overwhelming evidence against him, we do not find that a failure to instruct the jury to disregard any allegations that Anderson engaged in thievery affected the outcome of the trial.

Prosecutorial Misconduct

Anderson and Melton each assert that the prosecutor committed misconduct depriving them of a fair trial. We disagree.

The test for prosecutorial misconduct is whether, examining the prosecutor's statements in context, they deprived defendant of a fair and impartial trial. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis and the comments of the prosecutor are to be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). However, she is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Ackerman*, *supra*. A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Anderson first argues that the prosecutor "brought out irrelevant and prejudicial information" by asserting that the jury could infer that all witnesses testified consistently with their prior statements unless otherwise established at trial, by asking a detective when he developed Anderson and Melton as suspects, by stating that the other inmates considered Anderson to be a thief, by noting witness opinion that Green's death was connected to the earlier assault by Green on Anderson, by mentioning that an inmate was injured by Anderson at the conclusion of the earlier fight, by eliciting testimony about and commenting on threats to the inmate witnesses[1] and by inquiring into the reasons the inmate witnesses chose to come forward.

Reviewing the prosecutor's questions in context, we find that each of complained-of instances either constituted a good faith attempt to introduce evidence that was relevant to the investigation into Green's murder or to the motivation of persons involved, or merely addressed background events to "set the stage" for the prosecution's case against defendants.

Anderson next argues that the prosecutor improperly denigrated Melton. Certainly, a prosecutor may not denigrate the defense or a defendant. *Bahoda, supra* at 283. However, a prosecutor may comment on the evidence presented and may argue from the evidence that a witness, including the defendant, is not worthy of belief. *Id*. at 282-283; *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

[1] Anderson also asserts that testimony offered by inmate witnesses that they were being threatened by other inmates for testifying violated his Sixth Amendment right to confront witnesses against him because the inmates issuing the threats were not called to testify at trial. However, this claim is groundless. Assuming the alleged threats were made, those making them were not themselves thereby accusing defendants of anything. No witness testified that someone told him that Anderson killed Green. Rather, the testimony was that someone other than defendants made threats against various inmate witnesses in an attempt to persuade them not to testify. Regardless whether this testimony was hearsay, it did not implicate Anderson's right of confrontation.

During her closing argument, the prosecutor commented that Melton's testimony "has evolved over time and is tainted by his motive and opportunity and ability to fabricate," and that "[t]he story that's been manufactured though really just fails the fall-down-laughing test." The prosecutor continued by commenting on the specifics of Melton's testimony and offering reasons why, considering the other evidence presented, it was not credible. *Bahoda, supra*; *Howard, supra*. This argument was permissible commentary on why Melton was not worthy of belief. Further, even if improper, the prosecutor's comments denigrated Melton; they did not reflect in any way on Anderson or his defense. Therefore, there is no basis for reversal of Anderson's conviction on the basis of her comments about the credibility of Melton's testimony.

Anderson also argues that the prosecutor argued facts not in evidence. We conclude, however, that each of the complained-of instances were permissible comments on the evidence or the inferences fairly and reasonably drawn from the evidence as pertinent to the prosecutor's theory of the case.

Further, we note that the trial court instructed the jury on more than one occasion that the attorneys' statements and arguments were not evidence and should not be considered by the jury as evidence. These instructions were sufficient to dispel any possible prejudice that may have resulted from the prosecutor's comments. *Bahoda, supra* at 281; *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004); *People v Abraham*, 256 Mich App 265, 276; 662 NW2d 836 (2003); *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Anderson next asserts that the prosecutor improperly appealed to the jury's sympathy or civic duty. We disagree.

A prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Nor may a prosecutor urge the jurors to convict the defendant as part of their civic duty. *Bahoda, supra* at 282; *Abraham, supra* at 273. During closing argument the prosecutor noted that Green's life was as valuable as anyone's life and stated that a guilty verdict was the only fair verdict to Green, to the inmate witnesses, and to defendants. However, the prosecutor did not encourage the jurors to suspend their own judgment out of sympathy for the victim or a sense of civic duty and did not inject issues into the trial broader than the defendants' guilt or innocence. The prosecutor clearly indicated that she believed that guilty verdicts were consistent with the law and facts. This argument was not improper.

Anderson also asserts that the prosecutor misstated the law during her closing argument. Even were we to agree, trial court specifically instructed the jurors to disregard any such misstatement and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Anderson also asserts that the prosecutor improperly vouched for the credibility of the inmate witnesses and improperly expressed her personal opinion that Odom was not an accessory after the fact. Certainly, a prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, a prosecutor is free to argue from the facts that a witness is credible. *Howard, supra* at 548. Here, the prosecutor did not imply that she had some special knowledge that the inmate witnesses were testifying truthfully.

Rather, she pointed out circumstances surrounding that testimony to argue that they were credible. Additionally, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility, and that the lawyers' comments are not evidence. These instructions were sufficient to dispel any possible prejudice that may have resulted from the prosecutor's comments. *Abraham, supra* at 276; *Long*, *supra*; *Knapp, supra* at 382-383.

Further, the prosecutor's statements that there was no evidence that Odom was involved in Green's murder and that Odom was "never chargeable as an accessory after the fact, never considered a suspect," do not express a personal belief in Odom's innocence of a criminal offense. Rather, the prosecutor permissibly argued that there was no evidence, nor any reasonable inference from the evidence, to suggest that Odom was part of a plan to murder Green, and thus, that the defense assertions that such involvement offered a motive to lie was without basis in the evidence.

Finally, both Anderson and Melton argue that the prosecutor committed misconduct by repeatedly eliciting unfairly prejudicial testimony about Melton's membership in the Moorish Americans or "Mobites," a religious group of Islamic faith that numerous witnesses testified operated as a gang in the prison system. Anderson asserts that this testimony was irrelevant and prejudicial. Melton argues that the prosecutor elicited this testimony to attack Melton's credibility and to arouse the prejudice of the jurors against Melton's beliefs so as to obtain a conviction on improper grounds.

A prosecutor is not permitted to introduce evidence relating to the religious beliefs of a witness to attack the witness's credibility. MRE 610; *People v Leshaj,* 249 Mich App 417, 420-421; 641 NW2d (2002). Thus, "questioning a witness with regard to the subject of his religious beliefs or opinion is forbidden during a criminal proceeding . . . Likewise, questioning a witness to explore another individual's religious opinions and beliefs is equally offensive." *People v Leonard,* 224 Mich App 569, 594-595; 569 NW2d 663 (1997).

Here, the prosecutor did not question Melton about his religious beliefs, question other witnesses about Melton's religious beliefs, or in any way suggest that those beliefs rendered Melton less credible. In fact, the prosecutor made no inquiry whatsoever into the nature, substance, or effect of Melton's religious beliefs or the beliefs espoused by members of the Mobites. Rather, she merely sought to establish that Melton was a member of the Mobites and that the Mobites operated as a gang at Camp Cusino, protecting members and others from conflict, so as to explain Melton's motive in accompanying Anderson to avenge Green's earlier assault on Anderson, which did not involve Melton in any way, and to explain why some inmates declined to cooperate with detectives investigating Green's murder. Reversal is not warranted where the testimony elicited does not "reveal a defendant's opinion or belief regarding the subject of religion." *Id.* at 595. And, a prosecutor's good faith effort to admit evidence does not constitute prosecutorial misconduct. *Dobek*, *supra* at 70.

Further, because there was no testimony linking Anderson to the "Mobites," there is no basis for any assertion that evidence about its activity was prejudicial to him.

Cumulative Error

Anderson argues that even if this Court does not find that any individual error claimed on appeal mandates reversal, reversal is warranted by the cumulative effect of those errors. We disagree.

In order to reverse on grounds of cumulative error, there must be errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *Knapp, supra* at 387-388. Prejudicial error has not been identified in this case and absent the establishment of such errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (2000).

Ineffective Assistance of Counsel

Melton asserts that his trial counsel was ineffective for failing to object to the prosecutor's question and comment regarding Melton's failure to provide the exculpatory version of events he testified to at trial to detectives when first interviewed by them following Green's murder. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance, Melton must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his counsel's performance was deficient, Melton "must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma, supra* at 302. As noted above, counsel is not ineffective for failing to make a meritless argument or raise a futile objection. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

During her cross-examination of Melton, the prosecutor inquired as to why Melton had not told his exculpatory version of events to detectives when first questioned by them. Later, during closing argument, the prosecutor commented that Melton "didn't tell this tall tale to detectives at that time because he hadn't thought of it yet." Melton's counsel did not object to either the prosecutor's question or her comment during closing argument.

While a prosecutor may argue from the facts that the defendant is not worthy of belief, *Howard*, *supra* at 548; *Launsburry*, *supra* at 361, a prosecutor may not comment on a defendant's post-arrest, post-*Miranda*[2] silence. *Doyle v Ohio*, 426 US 610, 619-620; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). That said, however, a defendant may be impeached by his prior failure to state a fact in circumstances in which that fact naturally would have been asserted. *Goodin*, *supra*; *People v Alexander*, 188 Mich App 96, 103; 469 NW2d 10 (1991). And, a prosecutor may fairly comment on a defendant's opportunity to fabricate testimony after hearing the witnesses against him. *Portuondo v Agard*, 529 US 61, 73; 120 S Ct 1119; 146 L Ed 2d 47 (2000) ("A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate – and indeed, given the inability to sequester the defendant, sometimes essential – to the central function of the trial, which is to discover the truth."). See also, *Jenkins v Anderson*, 447 US 231, 238; 100 S Ct 2124; 65 L Ed 2d 86 (1980) ("[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.")

Melton asserts that the prosecutor's question and comment, fairly taken, refers to both pre-*Miranda* and post-*Miranda* silence in violation of his constitutional rights, and that his counsel was ineffective for failing to object. This Court granted Melton's motion to remand to determine why trial counsel did not object to the prosecutor's question and argument pertaining to Melton's silence. At the subsequent hearing, Melton's trial counsel acknowledged that he was aware that Melton had asserted his right to remain silent when questioned by detectives. Counsel explained that he expected the prosecutor to argue that Melton had the opportunity to conform his testimony to the facts presented at trial and that it was appropriate for her to do so. Counsel also indicated that he "absolutely" understood that comment on post-*Miranda* silence was impermissible, but did not interpret the prosecutor's question and comment as pertaining to Melton's post-*Miranda* silence. Counsel agreed that the question was asked, and the comment was made, in a context relating to Melton's opportunity to conform his testimony to the evidence presented at trial.

The trial court concluded that Melton had not established that his trial counsel was ineffective, considering the prosecutor's single question regarding a pre-arrest, pre-Miranda inquiry by detectives of Melton and single comment during closing argument, coupled with Melton's trial counsel's recognition and understanding of the line of questioning, and the overwhelming evidence presented against Melton at trial, including but not limited to eyewitness accounts of Melton's role in Green's murder and the presence of Melton's DNA on a weapon found in close proximity to the scene.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

We agree that with the trial court that defense counsel fairly understood in context that the prosecutor's question and comment were not directed toward Melton's post-arrest, post-*Miranda* silence, but instead toward establishing that Melton did not tell detectives his exculpatory version of events when first approached by them, when it would have been natural for him to have done so, and that he only developed his version of after listening to all of the witnesses testify at trial. On this basis, Melton's assertion that the prosecutor's question and comment were constitutionally infirm lacks merit. As a result, Melton cannot establish that his counsel was ineffective for failing to object to it. *Matuszak, supra* at 58; *Snider, supra* at 425.

Further, considering the evidence against Melton and the very limited nature of the single question and comment of which he complains, Melton cannot establish that any decision by his counsel not to object to the prosecutor's question or comment affected the outcome of his trial. *Toma, supra* at 302-303. As noted by the trial court, the evidence against Melton, including eyewitness testimony that Melton stabbed Green in the chest, together with the presence of Melton's DNA on the shanks found after the assault, was overwhelming. There is no indication that defense counsel's decision not to object to the prosecutor's single question and comment on Melton's silence, even if impermissible, affected the outcome of the trial.

Melton also argues that his trial counsel was ineffective for failing to object to the prosecutor's references to the Mobites as a gang at trial. However, because those references were permissible, Melton's counsel was not ineffective for failing to object to them. *Matuszak, supra*; *Snider, supra*.

Similarly, Anderson asserts that his trial counsel was ineffective for failing to object to each of the unpreserved issues raised on appeal. However, the issues raised on appeal lack merit. Therefore, Anderson cannot establish that his counsel was ineffective for failing to make futile objections or assert meritless positions during trial. *Matuszak, supra*; *Snider, supra*.

We affirm.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis