STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2009
v JOENELL MARQUIS HAWTHORNE, Defendant-Appellant.	No. 280289 Wayne Circuit Court LC No. 07-005557-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DIONTE MARQUIS NEAL, Defendant-Appellant.	No. 281666 Wayne Circuit Court LC No. 07-007697-FC

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Following a joint trial before separate juries, defendants Joenell Hawthorne and Dionte Neal were each convicted of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant Neal was also convicted of felon in possession of a firearm, MCL 750.224f. Defendant Hawthorne was sentenced to two terms of life imprisonment for the murder convictions, and a concurrent prison term of 23 to 48 months for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant Neal was sentenced to two terms of life imprisonment for the murder convictions, and concurrent prison terms of 29 to 60 months for the felon-in-possession conviction and 29 to 48 months for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant Hawthorne appeals as of right in Docket No. 280289, and defendant Neal appeals as of right in Docket No. 281666. The appeals have been consolidated for this Court's consideration. We affirm, but remand for modification of each defendant's judgment of sentence to reflect a single conviction and sentence of first-degree murder, supported by two alternative theories.

Defendants' convictions arise from the fatal shooting of Fred Mumford. Mumford's roommate, Arthur Stakley, had previously allowed three men to enter Mumford's house under the pretense that they were there to meet Mumford. When Mumford returned shortly thereafter, he was shot while entering the house. He received eight gunshot wounds, causing his death. The principal issue at trial was Stakley's identification of defendants Hawthorne and Neal as the two shooters.

I. Docket No. 280289

Hawthorne first argues that Stakley's identification testimony was insufficient to identify him as a participant in the offense.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in the light most favorable to the prosecution. *Id*. at 515.

"The credibility of identification testimony is a question for the trier of fact that we do not resolve anew. Moreover . . . positive identification by witnesses may be sufficient to support a conviction of a crime." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

At trial, Stakley testified that there were two shooters, and identified Hawthorne as the taller of the two shooters. Stakley identified Hawthorne as the taller shooter in a pretrial photographic array, but then also identified David Jenkins as the taller shooter in a second photographic array. Stakley also identified Hawthorne at Hawthorne's preliminary examination, but again also identified Jenkins as the taller shooter when Stakley appeared at a second preliminary examination. When Stakley was shown photographs of both Jenkins and Hawthorne together, however, he stated that Hawthorne was the taller shooter.

Although there were some conflicts and inconsistencies with Stakley's identification of Hawthorne as the taller shooter, Stakley provided explanations for his prior identifications and inconsistent testimony and statements, and the credibility of his identification testimony at trial in light of those conflicts and inconsistencies was for the jury to resolve. Stakley's identification testimony was not so incredible that the jury could not believe it. Viewed in a light most favorable to the prosecution, Stakley's testimony identifying Hawthorne as the taller of the two shooters was sufficient to establish Hawthorne's identification beyond a reasonable doubt.

Hawthorne next argues that trial counsel was ineffective for not requesting the appointment of an expert witness in the area of eyewitness identification. Because Hawthorne did not raise this ineffective assistance of counsel claim in the trial court, our review is limited to errors apparent from the record. *People v Matuszak,* 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). "[D]efendant must overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In this regard, defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Id*. "Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

The record does not support Hawthorne's claim that defense counsel did not call an expert witness on eyewitness identification because she failed to adequately investigate the case when preparing for trial. On the contrary, the record discloses that counsel was aware that Hawthorne's identification would be a principal issue at trial, and that there were problems with Stakley's identification of Hawthorne as a participant in the offense. At trial, defense counsel thoroughly cross-examined Stakley regarding his identification testimony, and was successful in eliciting several conflicts and inconsistencies between his testimony at trial and his prior preliminary examination testimony, his prior police statements, and his prior photographic identifications. Counsel may have reasonably decided that an expert witness was not necessary because she would be able to effectively reveal the problems with Stakley's identification testimony through cross-examination at trial. Defendant has not overcome the presumption of sound trial strategy. Further, because the problems with Stakley's identification testimony were fully explored and presented to the jury at trial, defendant has not demonstrated that the failure to call an identification expert deprived him of a substantial defense. Thus, Hawthorne has not established that defense counsel was ineffective for failing to call an identification expert.[1]

Hawthorne next argues that he was improperly convicted and sentenced for two counts of first-degree murder for a single killing. We agree. Multiple convictions of first-degree felony murder and first-degree premeditated murder for a single killing violate the constitutional protection against double jeopardy. *People v Zeitler*, 183 Mich App 68, 71; 454 NW2d 192 (1990). In such a situation, the defendant may be sentenced for only one conviction, and the

[1] Hawthorne alternatively requests that this Court remand for an evidentiary hearing on this issue so that he may further develop the record. Because he has not made an offer of proof in support of this request, we conclude that remand is not warranted. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

judgment of sentence should specify that the conviction is for a single count of first-degree murder, supported by two alternative theories. *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006); *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001); *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998). Because Hawthorne's judgment of sentence erroneously reflects two convictions and sentences for first-degree murder, we remand for modification of the judgment of sentence, consistent with *Bigelow*, and direct that a corrected copy be forwarded to the Department of Corrections.

II. Defendant Hawthorne's Standard 4 Brief in Docket No. 280289

Defendant Hawthorne raises several issues in a pro se standard 4 brief, none of which has merit. He first argues that the evidence did not support his conviction of first-degree premeditated murder because there was insufficient evidence of premeditation and deliberation.

To convict a defendant of first-degree murder, the prosecution was required to prove that the defendant intentionally killed the victim and that the killing was deliberate and premeditated. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.*

> To show first-degree premeditated murder, some time span between [the] initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation. The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a "second look." [*People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (quotations and citations omitted).]
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> Premeditation and deliberation both
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> may be inferred from the circumstances surrounding the killing. Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. [*Anderson, supra* at 537 (citations omitted).]

Generally, there must be evidence of "a thought process undisturbed by hot blood." *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998) (quotation and citation omitted). Circumstantial evidence and reasonable inferences that arise from the evidence may be sufficient to prove the elements of the crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

Contrary to what Hawthorne argues, the circumstances support an inference of premeditation and deliberation. Viewed in a light most favorable to the prosecution, the evidence indicated that Hawthorne and two others went to Mumford's house, confronted Stakley, and forced their way inside. When Mumford returned shortly thereafter, he was shot by Hawthorne and Neal while entering the house, while his key was still in the door. The evidence that Hawthorne and Neal ambushed Mumford as he was entering the house, that Mumford was in a defenseless position when he was shot, and that Hawthorne and Neal acted in concert supports

an inference that the killing was deliberate and premeditated. The evidence was sufficient to support Hawthorne's conviction of first-degree premeditated murder.[2]

Hawthorne next argues that trial counsel was ineffective for (1) not presenting an alibi defense, (2) failing to present any defense at all, and (3) failing to argue the theory that Stakley was responsible for the shooting. Because this issue was not raised in the trial court, our review is limited to errors apparent from the record. *Matuszak, supra* at 48.

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis, supra* at 368. This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy and ineffective assistance of counsel will not be found merely because a strategy does not work. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987).

The record does not support Hawthorne's claim that defense counsel failed to investigate an alibi defense. On the contrary, the record indicates that defense counsel contemplated presenting an alibi defense, but ultimately chose not to do so as a matter of strategy. According to the prosecutor's statements at sentencing, authorities had possession of numerous recorded telephone calls that defendant made from jail, which would have undermined any alibi defense that was presented. Further, defendant acknowledged on the record at trial that he and defense counsel had discussed the potential alibi defense, and that defendant agreed with the decision not to present any alibi witnesses. Given this record, defendant has failed to overcome the presumption that an alibi defense was not pursued as a matter of sound trial strategy, and there is no basis to conclude that any alibi defense would have been substantial. Thus, Hawthorne has not established that defense counsel was ineffective for not presenting an alibi defense.

Hawthorne also argues that defense counsel was ineffective because she failed to present any defense at all, no matter how "anemic." Hawthorne does not explain, however, what other defense should have been pursued and, therefore, has not established that he was denied the effective assistance of counsel for this reason. Moreover, Hawthorne's argument ignores the defense position that the prosecution had not met its burden of proof. Defense counsel aggressively cross-examined the prosecution's primary witness, Stakley, and argued that his testimony was so inconsistent that it could not be believed, thereby requiring a verdict of not

[2] We also find no merit to Hawthorne's argument that the trial court's reasons for denying his motion for a directed verdict were invalid. Furthermore, because this Court's review of this issue is de novo, this argument would not afford a basis for relief regardless of the trial court's reasoning. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

guilty. Thus, there is no basis for concluding that defense counsel was ineffective for this reason.

Hawthorne's final argument is that defense counsel was ineffective for failing to pursue a theory that Stakley was responsible for the shooting. This argument was not strongly supported by the evidence, which indicated that Stakley contacted and cooperated with the police, received an injury to his head that was consistent with his account of the events, and that two guns were used during the shooting. Although Stakley had gunshot residue on his hands and face, as well as blood, testimony indicated that he could have acquired the residue when he tried to resuscitate Mumford. Because the evidence did not credibly suggest that Stakley was responsible for the shooting, defense counsel was not ineffective for failing to pursue that theory.[3]

Hawthorne next argues that his due process right to discovery of information possessed by the prosecution, *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), was violated when the prosecutor failed to disclose six discs containing recordings of Hawthorne's telephone calls from jail. Because this issue was not raised below, our review is limited to plain error affecting Hawthorne's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Brady requires the prosecution to disclose evidence in its possession that might lead a jury to entertain a reasonable doubt about the defendant's guilt, regardless of whether the evidence was requested. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994); *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id.* at 281-282.]

The record in this case does not indicate that the discs were not disclosed before trial. Further, there is no basis for concluding that the challenged evidence was favorable to defendant.

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[3] Hawthorne alternatively requests that this Court remand this case for an evidentiary hearing on his ineffective assistance of counsel claim. However, the letters from his family simply indicate that there were possible alibi witnesses, which is not disputed. The record discloses that an alibi defense was not pursued as a matter of trial strategy, not because Hawthorne did not have witnesses who were willing to support it. Because Hawthorne's affidavit is unsigned, we decline to consider it. *People v Budzyn*, 456 Mich 77, 92 n 14; 566 NW2d 229 (1997); *People v Sloan*, 450 Mich 160, 177 n 8; 538 NW2d 380 (1995), overruled on other grounds in *People v Hawkins*, 468 Mich 488, 502; 668 NW2d 602 (2003). Accordingly, we decline Hawthorne's request for a remand.

On the contrary, according to the prosecutor's representation at sentencing, the recordings would have discredited any alibi defense. In addition, because the evidence involved Hawthorne's own recorded conversations while in jail, he should have been aware of the evidence and could have requested the recordings himself. For these reasons, there is no merit to Hawthorne's argument that his due process right to the discovery of exculpatory information was violated.

III. Docket No. 281666

Neal first argues that improper remarks during the prosecutor's closing and rebuttal arguments denied him a fair trial. Because Neal did not object to any of the challenged remarks at trial, this issue is not preserved and our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763.

We review allegations of prosecutorial misconduct case-by-case to determine whether the prosecutor's conduct deprived the defendant of a fair trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Prosecutorial comments must be evaluated in context. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

A prosecutor is afforded great latitude in closing argument. *Id*. at 282. Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he is permitted to argue the evidence and reasonable inferences that arise from the evidence in support of his theory of the case. *Id*.; *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). While the prosecutor has a duty to see that a defendant receives a fair trial, he may use "hard language" when it is supported by the evidence, and he is not required to phrase his arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). However, the prosecutor must refrain from making prejudicial remarks. *Bahoda, supra* at 283.

A prosecutor's comments must be considered in light of the defense theories and arguments presented. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not require reversal where they are made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). A prosecutor must also refrain from denigrating the defendant or defense counsel with intemperate and prejudicial comments. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). While prosecutors are free to argue the evidence,

> [a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. The prosecutor may not question defense counsel's veracity. When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality. [*People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008) (citations and quotations omitted).]

Neal argues that the prosecutor improperly referred to "tricks" by the defense and efforts to "twist" the truth or promote ideas that were only half true. In *Unger*, this Court found that similar remarks were improper because they suggested to the jury that the defense was trying to

distract the jury from the truth. *Id*. at 238. In that case, the prosecutor made references to "a deliberate attempt to mislead" and "fool the jury," and to confuse the issues by using "red herrings." *Id*. However, this Court concluded that a timely objection and curative instruction could have alleviated any prejudice, and that the jury was instructed that the statements of counsel were not evidence. Accordingly, reversal was not required. *Id.*; see also *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

In this case at bar, the prosecutor's comments suggested that the defense positions were wrong by focusing on why the evidence did not support the defense theories. Because the prosecutor's arguments remained focused on the evidence, they did not amount to an improper attack on defendant or defense counsel. Thus, there was no plain error.

Neal also argues that the prosecutor improperly bolstered her witnesses, but does not identify the specific comments that support this argument. To the extent that he is referring to the prosecutor's comments about the officers who were involved with this case, made at the end of the prosecutor's rebuttal argument, he has failed to show plain error. A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness. *Bahoda, supra* at 276. "[H]owever, the prosecutor may argue from the facts that a witness should be believed." *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Here, the prosecutor's comments were made in response to defense counsel's closing argument, which characterized the police investigation as "very poor." The prosecutor referred to the evidence to explain why the jury should find that her witnesses were credible; the comments did not convey any special knowledge of which the jury might not be aware. Because the comments were based and the evidence and were responsive to defense counsel's remarks, there was no plain error.

Neal's final argument regarding prosecutorial misconduct is that the prosecutor impermissibly commented on his decision not to testify, thereby suggesting that he had to produce evidence to prove his innocence. A prosecutor may not comment on the defendant's failure to testify or present evidence because such argument may shift the burden of proof to the defendant. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). But a prosecutor does not shift the burden of proof by merely attacking the credibility of a defense theory. *McGhee, supra* at 635. Once a defendant advances a theory that, if true, would exonerate him, comment on the validity of that theory does not shift the burden of proof to the defendant. *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999).

Contrary to what Neal argues, the challenged comments cannot reasonably be interpreted as a request for evidence from the defense. The comments focused on the lack of evidence in support of the defense theories; none of the comments suggested that defendant had to produce evidence. Accordingly, the prosecutor did not violate Neal's right to remain silent.[4]

[4] Although Neal argues that defense counsel was ineffective for failing to object to the prosecutor's remarks, because the remarks were not improper and because an attorney is not required to make a futile objection, counsel was not ineffective for failing to object. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Neal next argues that the trial court erroneously instructed the jury on felonious assault as a lesser offense of assault with intent to do great bodily harm. Neal asserts that because felonious assault is not a necessarily included lesser offense of assault with intent to do great bodily harm, instruction on that offense was improper under MCL 768.32(1) and *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Any error in instructing the jury on felonious assault was waived because Neal specifically requested that instruction. *Unger, supra* at 234. We also reject Neal's argument that defense counsel was ineffective for requesting a felonious assault instruction. Neal has failed to overcome the presumption that defense counsel requested the instruction as a matter of sound trial strategy. *Gonzalez, supra* at 645.

However, as with defendant Hawthorne, we remand for modification of the judgment of sentence to reflect that Neal was convicted of a single count of first-degree murder, supported by two alternative theories, and for a corrected copy of the judgment to be forwarded to the Department of Corrections.

IV. Defendant Neal's Standard 4 Brief in Docket No. 281666

Neal argues that improper comments by the prosecutor during closing argument denied him a fair trial. Again, because there were no objections to the prosecutor's remarks, we review this issue for plain error affecting Neal's substantial rights. *Carines, supra* at 763.

Specifically, Neal argues that the prosecutor improperly vouched for the credibility of her witnesses through the following remarks during closing argument:

> But having said that, ladies and gentlemen, I just want to go over a couple of things here with you. *The main thing that I want to talk to you about here is that this case in large part is going to be based on the credibility and the believability of Mr. Arthur Stakley.* And during jury selection some of the legal principles were put out there, and one of them being that one person's testimony, if you believe that testimony, is all you need to base your verdict on if you believe it. And I'm going to tell you here, go over Mr. Stakley's testimony with you, but you have more than just his testimony. And I'll point that out to you. We've already all seen it. But there are things about this case including the physical evidence that support Arthur Stakley's testimony.
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> *The other thing too is is [sic] that Arthur Stakley says, and he's honest about it,* he says that I may have seen those two people together, together, about a week before this happened but he wasn't sure. He's honest to tell you that. He's sure about who he saw in the house that day, but whether he had seen them before or not, he wasn't sure about that. So, when you're going to be told about all these inconsistencies that Mr. Stakley has said, think about whether they're really material inconsistencies. That's why we have live trials so that people can come in here in live and living person and display and use their words in a way that doesn't translate on paper. And some of you, I think, are very aware about how translation can be very important in getting something across. Very extremely important. And that's why you have the live body in here.

* * *

> Mr. Stakley may not be the most articulate of individuals but that's not a requirement. And just because somebody might not have the verbal, oh, I don't know, the verbal knowledge to use words and to describe things, you know, to a T, doesn't mean they don't know what they've seen. Are we going to base believability, we're only going [sic, to] believe somebody who can speak well. By the way, I'm sure I'm not right now.
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> But we don't do that. That's not what you gauge. You take a look at what he has to say to you. Did he make an honest effort to answer the questions or did he argue with the lawyers. No, he didn't. He did not. He was cooperative. He did not try and argue. Why? *Because he's telling you the truth. And that's what happens when somebody's telling the truth.* The truth, ladies and gentlemen, cannot be changed. You can trip somebody up on their words, but think again about those inconsistencies, are they really material. That's why you have to see it in person so that you know from your gut by looking at them, is this person being truthful to me. [Emphasis added.]

Although the prosecutor argued that Stakley was telling the truth, her argument was based on the evidence, not any special knowledge she may have possessed about Stakley. Accordingly, the remarks were not improper. *Bahoda, supra* at 276; *McGhee, supra* at 630.

According to Neal, the prosecutor improper interjected issues broader than his guilt or innocence through the following remarks:

> *And when we talk about premeditation, I'm going to go over this again, because did you notice -- first of all, let me tell you this, it's reasonable to think that nobody was on the phone with Fred Mumford when he [Stakley] answered the door, that was a ploy to get in the door.* Do you really think they wanted Fred Mumford to come home? No. They wanted to get in and out of there with no conflict if they can. *But if Fred Mumford, who knows them, comes in, they're gonna have to light him up. And that's what he did.* And did you notice there was no exchange of words between the Defendants when Fred Mumford came in the door. Nobody said shoot him, get him, because they knew, they knew if he comes in the door, you open fire. *They didn't even have to consult with each other and they Swiss cheesed him right there on the spot in his own home.* That's premeditation. That's a plan on what you're going to do if the homeowner comes home, the homeowner who knows him. [Emphasis added.]

"A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice* (*On Remand*), 235 Mich App 429, 438; 597 NW2d 843 (1999). Here, however, the prosecutor's remarks related to the evidence and reasonable inferences arising from the evidence. *Ackerman, supra* at 450. They did not interject issues broader than Neal's guilt or innocence, and were not improper.

Neal also argues that the prosecutor improperly appealed to the jury's civic duty through the following comments:

> *Now, you've taken an oath. You took an oath to return a true and a just verdict based on the facts. This is not the day where you say, you know what, I don't like the system or what it stands for so I'm going to, I'm going to use my chance here or I don't like what happened to a friend or family member and nows [sic] my chance to get back. No. You took an oath to return a true and just verdict.*
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> Again, I'm asking you to use your common sense but also a little bit of savvy when you put it together. And when you really -- you're going to look at and come down and you're going to say does Arthur [Stakley] know what he's talking about. Yes, he does because he came across that way on the stand. He was consistent and he couldn't be shaken on any material fact. When he had that misidentification, he cleared it up, recognized it right away, and unbeknownst to him there was this connection that they just can't get around. Can't do it. *When you do that, the only true and just verdict here is a guilty verdict because Fred Mumford's life was foolishly and unjustifiably taken.*
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> And I'm just going to just say one more time, we are not here to make value judgments about anybody's life orientation or their activity, what they're doing, because that's not what this case is about. It's a human life that was taken. All too often in our society, that's what we do. We justify behavior toward people or what happens to people because of who they are or what they're doing. But that's not the issue. *So stay straight and narrow on the issue. And when you do that, it will be a guilty verdict.* [Emphasis added.]

A prosecutor may not intentionally interject inflammatory comments with no apparent justification except to arouse the jurors' prejudices. *Bahoda, supra* at 266. Nor may a prosecutor appeal to a jury's civic duty by asking the jurors to decide the case on the basis of their fears or prejudices, or other issues broader than the defendant's guilt or innocence. *Id*. at 282-285. The prosecutor's argument did not offend these principles, as she did not urge the jury to convict Neal based on considerations other than the evidence, and her comments only reminded the jurors that they had taken an oath to decide the case based on the evidence. This was not improper. *McGhee, supra* at 636; *Matuszak, supra* at 56.[5]

Neal next argues that defense counsel was ineffective because she failed to properly present his motion to suppress Stakley's pretrial identification. Although the record supports Neal's argument that defense counsel failed to present a proper legal basis for suppressing Stakley's pretrial identification of Neal, Neal has not demonstrated that a valid basis exists for either suppressing the pretrial identification or excluding Stakley's identification testimony at trial. Therefore, Neal has not established prejudice. *Pickens, supra* at 338.

[5] Defense counsel was not ineffective for failing to object to the prosecutor's arguments, because any objection would have been futile. *Darden, supra* at 605.

We also reject Neal's argument that the cumulative effect of multiple errors deprived him of a fair trial, *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002), because we have not found any errors at trial.

In sum, we affirm defendants' convictions and sentences in Docket Nos. 280289 and 281666, but remand for modification of each defendant's judgment of sentence to reflect a single conviction and sentence of first-degree murder, supported by two alternative theories consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray