STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2009
v	No. 280782 Saginaw Circuit Court
RALPH HARVEY COTTENHAM II, Defendant-Appellant.	LC No. 98-015034-FC

Before: Donofrio, P.J., and K.F. Kelly and Beckering, JJ.

PER CURIAM.

This is the second time this matter has been brought before this Court. In the underlying action, on August 18, 1998, a jury convicted defendant of assault with intent to murder, MCL 750.226, and carrying a dangerous weapon with unlawful intent, MCL 750.226. The trial court sentenced defendant as an habitual offender second, MCL 769.10, to fifteen to thirty years in prison for the assault with intent to murder conviction and sixty to ninety months' imprisonment for the carrying a dangerous weapon conviction. Defendant appealed as of right and this Court affirmed defendant's convictions and sentences. *People v Cottenham*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 1999 (Docket No. 214353) (*Cottenham I*). Defendant then filed a petition for writ of habeas corpus with the U.S. District Court for the Eastern District of Michigan on November 21, 2002, that was denied. Defendant appealed the denial of his petition for writ of habeas corpus to the U.S. Court of Appeals for the Sixth Circuit. On August 21, 2007, the Sixth Circuit reversed the federal district court's judgment denying defendant's petition and remanded the case with instructions to grant a conditional writ of habeas corpus in order to give "the State of Michigan 120 days within which to provide [defendant] with an opportunity to file a notice of appeal pursuant to Michigan law and to proceed with a direct appeal on the merits if he so wishes, or failing that, to release him." On August 31, 2007, the U.S. District Court for the Eastern District of Michigan issued an order as directed by the U.S. Court of Appeals for the Sixth Circuit. In accordance with the federal court orders, and defendant's wishes, on November 1, 2007, this Court remanded the matter to the trial court for the appointment of appellate counsel, MCR 7.208(G). Defendant, having been appointed counsel, filed a motion in the circuit court for a new trial combined with an evidentiary hearing on January 3, 2008. The prosecutor answered on February 1, 2008, requesting that the trial court

deny defendant's motion. On March 6, 2008, the trial court held a *Ginther*[1] hearing where both parties presented witnesses and at the end of the hearing, the trial court requested supplemental briefing from the parties. Both parties submitted supplemental briefs as requested. On May 7, 2008, the trial court issued an opinion and order denying defendant's motion for new trial finding that defendant was not denied the effective assistance of counsel at trial, sufficient evidence was presented to the jury regarding the charged crimes, and, the verdict was not against the great weight of the evidence. Defendant now appeals to this Court by virtue of the conditional writ of habeas corpus. For the reasons set forth below, we affirm the decision of the trial court.

I

The essential facts are not in dispute. On the night of November 17, 1997, at approximately 11:00 p.m., defendant called Robert John Rondo. Defendant had two children with Rondo's daughter, Diane, with whom he had been in a previous relationship. Defendant told Rondo to give his children a hug and a kiss and tell them he loved them. He also stated "you will not hear from me no more," before hanging up the phone. Rondo testified that he could detect that defendant had been drinking because he slurred "a couple words" but also testified that defendant "definitely was talking plain and he understood me."

Shortly thereafter, around 12:30 a.m. on November 18, 1997, defendant unexpectedly showed up at Jodi Johnson's place of work, Frankenmuth Care Center. Defendant and Johnson had been dating, but Johnson had recently broken up with defendant because she had decided to go back to her husband. Defendant went inside and proceeded to the west hall where Johnson worked. Defendant found Johnson and asked her to come outside because he wanted to talk to her. The two went outside to talk. Initially they stayed near the entrance double doors but Johnson's cigarette lighter did not work so they walked into the parking lot to defendant's car. While in the parking lot, Johnson smelled alcohol on defendant's breath.

Defendant asked Johnson why she left him. Johnson did not reply. Johnson testified at trial that defendant said "it [is] time for you to die," and pulled a knife from his jacket pocket. Johnson described the knife as "fat." Johnson tried to run away, but defendant tackled her from behind. Defendant stabbed Johnson three times, once in the side of her cheek, once in her neck, and once in the side of her eye. During the stabbing, Johnson was screaming and attempting to fight back. Defendant said something to Johnson about blood. A coworker of Johnson, Sandra Conway, witnessed the attack through the building's double doors. Conway saw defendant with an object in his hand strike Johnson four or five times about her head. Conway told another coworker to call 911 and then ran out of the building yelling. Conway watched defendant get up and run to his car without difficulty. Conway threw a brick at defendant as he jumped in his car in an attempt to dissuade him from coming back. Defendant started his car and drove out of the parking lot. Johnson's coworkers took her back into the building while they awaited the paramedics and the Frankenmuth Police Department. Johnson was taken to St. Mary's Hospital where she received medical attention for her wounds. Johnson was unable to see out of her right eye for three months and only regained 85% of her vision in that eye.

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

Between 1:00 a.m. and 1:30 a.m. later that same night, defendant called his friend Byron Robinson. Defendant stated that his car was broken down and wanted assistance in trying to get his car working or a ride home. Robinson obliged and met defendant. Robinson stated that he had been drinking with defendant in the late afternoon the previous day, he could smell alcohol on defendant when he arrived, and, in his opinion, defendant was drunk. The two were unable to repair defendant's car and Robinson drove defendant home. Robinson testified that, during their conversation on the ride home, defendant referred to Johnson stating, "I didn't mean it or something, and he said something about screwing her up . . . ."

After dropping defendant off, Robinson approached a uniformed Buena Vista police officer, James Edward Baker, while he was on a traffic stop. Robinson asked Baker if there was an all points bulletin out on anyone or if anyone had been hurt in Frankenmuth, and the officer responded in the negative. Baker testified at trial that Robinson told him that defendant had, "bragged that he had beaten up his girlfriend[.]" Baker located defendant's vehicle and had it impounded. Blood stains were found on the steering wheel and in other locations in defendant's vehicle. The police never attempted to match the blood stain evidence to any individuals. Police also found an empty twelve ounce beer can in the vehicle. Police arrested defendant at his home.

By the time of trial, defendant and Johnson had become engaged to one another and Johnson had since given birth to their child. Defendant's theory of the case was that he lacked the specific intent to commit murder.

II

Defendant first argues that his convictions should be overturned because there was insufficient credible evidence at trial to prove him guilty of the crimes. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must "'view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id*., quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). And it is solely the role of the trier of fact to weigh the evidence and judge the credibility of witnesses. *Wolfe, supra* at 514.

In order to secure a conviction for assault with intent to murder, the prosecution must prove beyond a reasonable doubt that there was "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The elements of the crime of carrying a dangerous weapon with unlawful intent are (1) carrying a dangerous weapon, (2) with the intent to unlawfully use the weapon against another person. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). As stated above, in reviewing a challenge to the sufficiency of the evidence, the evidence is viewed in the light most favorable to the prosecution. At issue in the present case is whether the prosecution presented evidence from which any rational trier of fact could conclude beyond a reasonable doubt that defendant possessed the requisite intent to kill. "The intent to kill may be proved by inference from any facts in evidence. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *McRunels, supra* at 181.

Defendant argues specifically that he could not form the specific intent to kill due to intoxication. The crime in the case occurred on November 18, 1997, and prior to the enactment of MCL 768.37 that abolished voluntary intoxication as a defense in this state, with the exception of the voluntary consumption of a substance without knowledge of its intoxicating effects.[2] See *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004). Therefore, we must apply the law in Michigan as it stood on the date of the crime. At that time, voluntary intoxication was a defense to specific intent crimes. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). And assault with intent to murder is a specific intent crime because it requires an intent to cause a specific result above and beyond the act of the assault. See *People v Disimone*, 251 Mich App 605, 611; 650 NW2d 436 (2002). But, the defense of intoxication will only negate the specific intent element of the crime charged if the degree of intoxication is so great as to render the accused incapable of entertaining the intent. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995); *People v Savoie*, 419 Mich 118, 134; 349 NW2d 139 (1984). We will not overturn a finding of specific intent on the basis of intoxication in the absence of overwhelming evidence of the requisite level of incapacitation. See *People v Anderson*, 166 Mich App 455, 476-477; 421 NW2d 200 (1988).

Although there was evidence that defendant consumed alcohol on the day in question, our review of the record indicates that there was simply no evidence that defendant was intoxicated to the point at which he was incapable of forming the intent to commit the charged crimes. *King, supra* at 428; *Savoie, supra* at 134. Rondo, Johnson, and Robinson all testified that while they could detect that defendant had been drinking, defendant was able to communicate clearly and understood what was being said to him throughout the night. Johnson and Robinson saw defendant and stated that he had no difficulty ambulating. Before the attack, defendant thought to call Rondo and clearly instructed him to pass a message to his children. Defendant was able to enter the care center, seek out Johnson, and find her in her assigned wing. Johnson was able to understand defendant's threats before and during the attack. And when Conway came out of the building yelling, defendant had the wherewithal to get up off of Johnson, run to his car, get in his car, and drive away from the scene without any problems. Further, shortly after the attack, when his car broke down, defendant's mind was clear enough to phone Robinson for help in getting the car running. In fact, when Robinson arrived, defendant was able to assist Robinson in attempting to fix the car. The facts of this case neither support nor contradict the jury's finding that defendant, regardless of the claim of intoxication, formed the intent to kill and the intent to unlawfully use his knife against another person. *Anderson, supra* at 476-477.

Defendant also asserts in his brief on appeal that he did not have the requisite intent to commit the charged crimes because "the victim was not dead" and "the injuries were not life threatening." The evidence shows that defendant drove to the victim's workplace, found her, threatened her, and ultimately attacked her about the head and neck with a large knife he brought concealed in his jacket. As a result of the attack, Johnson sustained injuries requiring hospitalization. One of the paramedics testified that the wound on Johnson's left neck was a

[2] The act took effect on September 1, 2002, and applies to crimes committed on or after that date. 2002 PA 366.

puncture wound within an inch of Johnson's jugular vein. The facts of the case belie defendant's claims, and it is but coincidence that Johnson is still alive.

III

Next, defendant argues that his convictions must be reversed because they are against the great weight of the evidence or involve a miscarriage of justice. To determine whether a verdict is against the great weight of the evidence, the Court must determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Where the verdict is against the great weight of the evidence, a new trial may be granted on some or all of the issues. MCR 2.611(A)(1)(e). However, "[a] verdict may be vacated only when it 'does not find reasonable support in the evidence, but is more likely to be attributed 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), quoting *Nagi v Detroit United Rwy*, 231 Mich 452, 457; 204 NW 126 (1925). Because the record is replete with evidence sufficient for a reasonable jury to have convicted defendant, we hold that the verdict was consistent with the great weight of the evidence.

IV

Defendant next argues that the trial court denied defendant a fair trial and his due process rights by: giving incomplete instructions, erring in its evidentiary rulings by allowing irrelevant and unfairly prejudicial evidence before the jury, failing to control the prosecuting attorney, and failing to grant defendant's motion for a new trial. We will address each of defendant's assertions in turn.

A.

Defendant argues that the trial court erred in ruling on certain evidentiary issues. We review preserved evidentiary issues for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes." *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007). Further, "[a] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). This Court reviews unpreserved evidentiary issues for plain error affecting defendant's substantial rights. MRE 103(d); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first assigns error to the trial court's ruling regarding the following question defendant posed to the victim, Johnson.

Defense Attorney: Do you think [defendant] was trying to kill you?

Prosecutor: Objection, Your Honor. That's a question for the jury.

The Court: I'll sustain the objection. Describe the actions.

On appeal, defendant asserts that this testimony was admissible under both MRE 701 and MRE 704. MRE 701 limits lay witness testimony to only "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." And MRE 704 states that, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The prosecutor responds in its brief on appeal that the trial court properly exercised discretion excluding the evidence because it pertained to an issue to be decided by the jury, not by Johnson, who was clearly biased and had become hostile by the time of the trial. Our review of the record reveals that at trial, defendant did not properly frame the issue in terms of lay opinion testimony and did not voice a contention that the testimony should be admitted as opinion evidence. Because the question did embrace an ultimate issue to be decided by the trier of fact and defendant did not state that the testimony should be admitted as opinion evidence under MRE 701, the trial court did not err when it sustained the prosecutor's objection. MRE 704. Moreover, the trial court's instruction, "[d]escribe the actions," cued the requisite factual basis for an opinion of fact or opinion of state of mind rather than a statement of belief. The record fails to support facts from which an opinion could be rationally based.

Defendant also argues that the trial court erred when it allowed the prosecutor to bring out speculative evidence by unqualified witnesses. Specifically, defendant objects to the prosecutor asking a paramedic and a doctor who treated Johnson's wounds about circumstances under which the victim's stab wounds to her temple and neck could have been life-threatening because the questions amounted to mere speculation. Defendant objected to these questions in the trial court, therefore this issue is preserved. With respect to the disclosure of evidence, the trial court has an interest in ensuring fairness, which encompasses avoiding the presentation of speculative facts, and in ensuring that there is a complete and truthful disclosure of the significant facts. *People v Burwick*, 450 Mich 281, 297, 537 NW2d 813 (1995).

The record reveals that the prosecutor's questions concerned the nature of the wounds, their exact location, the seriousness of wounds inflicted, and the close proximity of the actual wound sites to vital structures. This testimony, testimony that was within the knowledge, learning, and expertise of the witnesses, tended to establish that survival was but a coincidence rather than a purposeful design by defendant. The witnesses were trained medical professionals who both actually treated Johnson's injuries. They were aware of the locations of the stab wounds as well as the extent of the injury caused to the victim. Questions to medical professionals regarding whether a stab wound to the temple area or the neck in and of itself could be life-threatening do not amount to mere speculation. And, as we stated above, the prosecution had to show beyond a reasonable doubt that defendant assaulted Johnson with an actual intent to kill which, if successful, would make the killing murder in order to secure a conviction for assault with intent to murder. *Barclay, supra* at 674. These questions went directly to the elements of the assault with intent to murder charge and were not more prejudicial than probative. See MRE 403. Defendant has not established evidentiary error.

B.

Defendant contends that the trial court's refusal to instruct on the proper use of impeachment testimony denied defendant a fair trial. This Court generally reviews claims of instructional error de novo on appeal, but review the trial court's determination that a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). This Court reviews jury instructions in their entirety. There is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. *Id.* "There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

Defendant specifically argues that error occurred because the prosecutor brought out a prior consistent statement to impeach the victim at trial regarding her statement that defendant said "it was time to die" during the attack. Defendant requested that the trial court instruct the jury at that point on the permitted uses of impeachment testimony at that time. The trial court responded that it would provide that instruction to the jury "later." Our review of the record reveals that indeed the trial court did instruct the jury regarding impeachment testimony as part of its final jury instructions at the close of the testimony in the case. Because defendant did not receive the instruction it requested at the exact time it wanted the instruction does not create error. The instructions, as given, even if somewhat imperfect, fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Moreover, at the close of the instructions, the trial court asked counsel if it had any objections to the instructions as given. The prosecutor lodged one objection, but defendant indicated, "[d]efense is satisfied with the instructions." A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Defendant has not established instructional error occurred at trial.

C.

Defendant argues that the trial erred when it took no action regarding the prosecutor's actions at trial. Defendant presents no argument, authority, or analysis in support of this issue. Instead, defendant only incorporates arguments raised in section V of this opinion. Therefore, we will address the issues raised in section V below.

D.

Defendant argues that the trial court erred by denying defendant's motion for a new trial. While the trial court held an evidentiary hearing on the matter, it erred when it denied defendant's motion by opinion and order dated May 7, 2008. This Court reviews the decision of a trial court to deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Again, a trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes. *Kahley, supra* at 184. Once more, defendant cites no authority and raises no new arguments within this issue, but rather merely incorporates arguments raised in other issues in this appeal. These issues include defendant's insufficiency of the evidence claim and great weight of the evidence claim we analyzed above at sections II and III as well as an alleged incompetence of counsel claim that

we analyze below at section VI. Because defendant has established error in none of the issues he references, the trial court did not abuse its discretion when it denied defendant's motion for new trial. *Cress, supra* at 691.

V

Defendant next argues that the prosecutor engaged in multiple instances of misconduct that deprived him of a fair trial. In *Dobek, supra* at 63-64, this Court set forth the general principles regarding a claim of prosecutorial misconduct:

> Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. "The propriety of a prosecutor's remarks depends on all the facts of the case." A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. [Citations omitted.]

With one exception noted below, defendant did not object to the any of the instances of alleged misconduct at trial, and did not preserve his issues for appeal. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Therefore, we limit our review of the unpreserved errors to plain error affecting defendant's substantial rights. *Id*., citing *Carines, supra* at 763.

A.

First, defendant argues that the prosecutor improperly brought out irrelevant and highly prejudicial evidence including: defendant was dating a married woman (the victim), defendant lived with the victim in an unmarried state, defendant had illegitimate children, that Rondo was "like" a father-in-law, and testimony that defendant told Rondo that to give his kids a hug and a kiss and that he loved them and that they would not hear from him anymore. The prosecutor may permissibly introduce all relevant evidence, including evidence that is probative of a matter that the defendant does not dispute. *People v Mills*, 450 Mich 61, 71, 537 N.W.2d (1995), mod 450 Mich 1212 (1995). The prosecution bears the burden of proving all elements of the crime beyond a reasonable doubt, regardless of whether a defendant disputes an element. *Id*. at 69-70. Evidence is considered unfairly prejudicial if admitting it would create a danger that marginally probative evidence would be given undue weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

Here, defendant admits on appeal that his theory of the case was lack of intent. The prosecutor's theory of the case was that defendant attacked Johnson with a knife because he was upset that she had recently broken up with him to go back to her husband. Thus, that the victim was married was relevant. Moreover, defendant's telephone call to Rondo containing the message to defendant's children was relevant because it went straight to the issue of intent, namely his planning and awareness that the events about to take place could result in defendant not seeing his children again. And the prosecutor only brushed over the fact that defendant had

children outside of marriage by virtue of explaining Rondo's relationship to defendant. All the testimony of which defendant complains had little tendency if any to be unfairly prejudicial, but was highly relevant to explain the relationship between defendant and the victim and defendant's distress over the victim. *Ortiz, supra* at 306. The evidence was also particularly relevant to the issues of motive and intent. *Id*. The prosecutor did not err.

B.

Second, defendant argues that the prosecutor misstated the law during voir dire and closing arguments with respect to the intoxication defense because he blurred the distinction between general intent and specific intent and as a result may have misled the jurors. The previous panel of this Court has already expressly taken up this issue, considered it, and rejected it in *Cottenham I, supra* at slip op p 2. "[A]n appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). Thus, we are explicitly barred from considering this issue by the law of the case doctrine. *People v Mitchell*, 231 Mich App 335, 340; 586 NW2d 119 (1998) (noting that the law of the case doctrine "bars reconsideration of an issue by an equal or subordinate court during subsequent proceedings in the same case.") However, were we to consider the issue anew, we would find and conclude consistent with the *Cottenham I* panel.

C.

Third, defendant asserts that the prosecutor denigrated defendant and his defense by misstating the law relative to specific and general intent and blurring the distinction between the two concepts at trial. This issue is merely a rehashing of the previous issue couched in slightly different terms, presumably in an attempt to circumvent the law of the case doctrine. Be that as it may, we will review this unpreserved issue for plain error affecting defendant's substantial rights. We evaluate the prosecution's comments in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). The prosecution must not denigrate the defendant. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Defendant has not explained how the jury was misled. The comments were nothing more than a discussion of the issue of intent with the observation that to be intoxicated does not necessarily require the determination that intent was lacking. The prosecutor necessarily stated to the jury that the court would specifically instruct on the issue. We have reviewed the record and even if we were to assume that the prosecutor misstated the law during voir dire and closing arguments, the record reveals that the trial court properly instructed the jury regarding specific intent. The trial court also instructed the jury that "[i]f a lawyer says something different about the law, follow what I say." Moreover, the trial court instructed the jury to decide the case based on the evidence at trial and that the attorneys' statements, arguments, and questions were not evidence. Jurors are presumed to follow the trial court's instructions unless the contrary is clearly shown, which defendant has not done here. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Defendant has not shown that the prosecutor denigrated him or his defense and has not established plain error.

Further, defendant alleges that the prosecutor improperly denigrated the presumption of innocence by implying that defendant needed to call witnesses when he asked during cross-examination of defendant if a coworker was there to testify and if Johnson's mother was there to

testify. Defendant objected at trial to the prosecutor's line of questioning regarding whether defendant's coworker and Johnson's mother were there to testify at trial. Thus, this issue is preserved for our review. With respect to this preserved issue, defendant must show that the error was not harmless and that he incurred prejudice as a result of the error before reversal is warranted. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

While the prosecutor's questions to defendant regarding the availability of these two witnesses may have been improper, any resultant error was harmless because the prosecutor's reference was brief, and once defendant objected, the questioning ceased. Defendant did not ask for a curative instruction contemporaneously with his objection, and "where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Though, when instructing the jury at the close of the proofs, the record displays that the trial court indeed instructed the jury that defendant was not required to prove his innocence or do anything at all. Defendant has failed to show that the error was not harmless and that he incurred prejudice as a result of the error, thus reversal is not warranted. MCL 769.26; *Lukity*, *supra* at 495.

D.

Finally, we reject defendant's assertion that the "cumulative effect" of any prosecutorial misconduct requires reversal because defendant has not shown any error and thereby was not deprived of a fair trial.

VI

Defendant contends that he received ineffective assistance of counsel at trial due to various errors. Following an evidentiary hearing pursuant to *Ginther*, *supra*, the trial court denied defendant's motion for a new trial. We review the trial court's factual findings for clear error, and the ineffective assistance question de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended on other grounds 481 Mich 1201 (2008). Clear error is established when, although there is evidence to support a finding, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id*. at 130.

In *Dendel*, *supra* at 124-125, quoting *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court stated:

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. at 687. To demonstrate prejudice, the

> defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. *See People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

A.

Defendant argues that because defense counsel failed to use all of his peremptory challenges during voir dire he caused the forfeiture of an essential argument on appeal which amounted to ineffective assistance of counsel. At trial at the beginning of voir dire, the following occurred:

> *The Court*: Now, I'm going to ask you if you know either the attorney or any of the witnesses I've named here. If you do, would you raise your hand and we'll recognize you. And if you will give us a minute to get your number because we have to get that.
>
> We'll start in the back. The lady back there, your name, ma'am?
>
> *Juror*: Michele Bruske.
>
> *The Clerk*: That would be number 530.
>
> *The Court*: And who do you know, ma'am?
>
> *Juror*: The – Ralph.
>
> *The Court*: I have a little hearing –
>
> *Juror*: Ralph, the defendant.
>
> *The Court*: How do you know Mr. Cottenham?
>
> *Juror*: He had a run-in with my boyfriend. He broke out the windshield of my car.
>
> *The Court*: I'll excuse you from this then.

Regarding this exchange, in his previous appeal, defendant argued that the trial court abused its discretion by denying his challenge to the jury array. This Court analyzed the issue and held that defendant's failure to exhaust all of his peremptory challenges at trial constituted a forfeiture of this issue on appeal, stating as follows:

> Defendant first argues that the trial court abused its discretion by denying his challenge to the jury array after a prospective juror declared that defendant

had broken the windshield of her car and "had a run-in" with her boyfriend. Although the trial court immediately excused this prospective juror, defendant argued that the entire array was contaminated by her comment. The trial court offered to give a curative instruction to the jury that it was not to consider any comments of prospective jurors as evidence. Defendant refused, choosing instead to not mention the comment further to the jury array. Defendant did not ask any prospective jurors whether the comment would affect their ability to impartially consider the evidence of the case, and he only exercised eight of his twelve peremptory challenges. At the close of voir dire, defendant expressed his satisfaction with the jury. Under these circumstances, we conclude that defendant has forfeited his challenge to the jury array.

A party forfeits a challenge to jury composition where that party fails to exhaust all of the available peremptory challenges. *People v Rose*, 268 Mich 529, 531; 256 NW 536 (1934); *People v Hubbard (After Remand)*, 217 Mich App 459, 467; 552 NW2d 493 (1996). An exception exists where the exercise of all peremptory challenges would be unintelligent and pointless. *Hubbard, supra* at 467; *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). "A peremptory challenge is exercised unintelligently and pointlessly when the exercise would not prevent error, eliminate its prejudice, or further demonstrate the error and its prejudice." *Hubbard, supra* at 467-468. In this case, defendant could have questioned prospective jurors regarding their reaction to the comment at issue and then exercised peremptory challenges if he was not completely satisfied that all the jurors would be impartial. Also, defendant refused the trial court's offer of a curative instruction. Defendant failed to attempt to eliminate the prejudicial effect of the comment or to further demonstrate its prejudice. Exhaustion of defendant's peremptory challenges would not have been unintelligent or pointless. Therefore, defendant's failure to exhaust all of his peremptory challenges constitutes a forfeiture of this issue on appeal. [*Cottenham I, supra* at slip pp 1-2.]

In the instant case, defendant asserts that his trial counsel's failure to use all of his peremptory challenges amounted to ineffective assistance of counsel at trial. "[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy." *People v Johnson*, 245 Mich App 243, 259; 639 NW2d 1 (2001). The decision whether to challenge a juror for cause or to exercise a peremptory challenge is a matter of trial strategy that seldom rises to a level of ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). After reviewing the record it is clear that defense counsel made a strategic decision to move forward with the jury as assembled rather than gambling on a new jury created by removing four jurors for the sole reason of exhausting his remaining peremptory challenges. While apparently choosing not to exhaust the challenges hindered defendant on appeal, it was defendant's trial counsel's responsibility to best represent defendant at trial. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen did not work does not constitute ineffective assistance of counsel. *Id*. Defendant has not demonstrated error.

B.

Defendant next argues that at trial, defense counsel failed to call available witnesses in support of the defense of intoxication. Specifically, defendant notes that while his counsel did call Robinson who testified defendant had been drinking, there were at least two other witnesses who could corroborate the defense that were not called, Troy Reese, a coworker, and defendant's mother, Patsy Ishman. Defendant states in his brief on appeal that Reese would have testified that "on the day of the assault that he and the Defendant had been doing a lot of drinking." Defendant points to Ishman's testimony at the *Ginther* hearing that when police came to arrest defendant approximately four hours after the incident, he was so drunk that an officer had to hold defendant up while she put clothes on the defendant.

"The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defendant has not demonstrated the he was deprived of the substantial defense of intoxication because his counsel did not call Reese or Ishman to testify at trial. Rondo testified that it was apparent to him that defendant had been drinking during defendant's telephone call that was only an hour or so before the attack. Johnson testified that defendant smelled alcohol on defendant and it was clear that he had been drinking. Robinson also testified that he had been drinking with defendant earlier in the day and also that defendant was drunk only an hour or so after the attack. Additionally, there was evidence that police found an empty beer can in defendant's car. And, defendant himself testified extensively about his drinking on the date of the incident. Because the evidence of drunkenness was presented at trial through other witnesses, Reese's and Ishman's testimony, neither of which was in closer temporal proximity to the attack, would only have been cumulative. Thus, defense counsel's decision to rely on testimony that was closer in time to the incident was sound trial strategy and did not deprive defendant of a substantial defense. *Id*.

C.

Next, defendant argues that defense counsel's failure to move to suppress Rondo's statement about defendant's statements during the phone call amounted to ineffective assistance of counsel. As we concluded above in section V. A., defendant's telephone call to Rondo containing the message to defendant's children was relevant because it went straight to the issue of intent, namely his planning and awareness that the events about to take place could result in defendant not seeing his children again. While defendant argues other interpretations of the challenged statement, the ultimate determination was for the jury. And, we conclude that the evidence was more probative than prejudicial. Hence, trial counsel was not ineffective for failing to bring a futile motion to suppress. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

D.

Defendant also argues that defense counsel's failure to move to suppress the victim's statement to police that defendant said "it's time to die" to the victim during the attack, or, at least cross-examine the victim about the statement in light of her desire to recant her testimony, amounted to ineffective assistance of counsel. Defendant relies on contrary testimony provided by the victim in a post-trial affidavit as well as her testimony at the *Ginther* hearing that

defendant never said "it's time to die." This issue was raised and addressed at the *Ginther* hearing where the trial court made the following factual findings:

> Having held an evidentiary hearing, and having opportunity to view the witnesses, the Court finds the testimony of the attorneys and officer to be credible and finds the testimony of Johnson, who had by then reconciled and become engaged to the Defendant, to be incredible and unreliable with regard to alleged attempts to recant. The Court finds the prosecutors were not engaged in activities to conceal and prevent Johnson from recanting. Nor does the Court find that defense counsel was told of a desire to change her testimony but instead opted not to use that information.

"Where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy." *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). In fact, the *Canter* Court observed that "[t]here is no form of proof so unreliable as recanting testimony." *Id*. at 559. With regard to defendant's ineffective assistance of counsel claim, the trial court determined that the attorneys' testimony was more credible than Johnson's testimony regarding her desire to recant her testimony. Credibility determinations are crucial, and the trial court is in the best position to assess credibility. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). With that in mind, we have reviewed the trial court's factual findings for clear error and found none. *Dendel, supra* at 124. And, after de novo review, we have concluded that trial counsel was not ineffective for failing to file a motion to suppress evidence, or ask questions during cross-examination regarding a subject of which he was not aware. *Id*. Defendant has not established error.

E.

Defendant argues that defense counsel's failure to object during voir dire and closing arguments to the prosecutor's misconduct with respect to his comments concerning the intoxication defense amounted to ineffective assistance of counsel. We determined in Section V. C. above that no error resulted from the prosecutor's statements and even if we were to assume that the prosecutor misstated the law during voir dire and closing arguments, the record reveals that the trial court properly instructed the jury regarding specific intent and jurors are presumed to follow instructions. *McAlister, supra* at 504. Defense counsel was not ineffective for failing to object to this matter at trial because no error existed. Trial counsel is not ineffective for failing to advocate a meritless position. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

F.

Finally, defendant argues that defense counsel's failure to cross-examine medical personnel about the effects of drugs the victim was given after the attack amounted to ineffective assistance of counsel. Specifically, defendant asserts that eliciting testimony regarding the side-effects of pain medication Johnson was given at the hospital may have discredited her initial account of the incident in her statement to police. Defendant has offered no medical basis whatsoever for this claim, and therefore, defendant has not met his burden of establishing the factual predicate for this claim. *See Hoag, supra* at 6. In any event, the record reveals that Johnson gave the same account of the incident at the preliminary examination long after she was

discharged from the hospital as she did to police shortly after the incident. Therefore, attempts to discredit Johnson in the manner suggested would have been fruitless and defense counsel was not ineffective for not employing a futile strategy. *Goodin, supra* at 433.

VII

Defendant raises nine issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No 2004-4, Standard 4. We will address each issue in turn.

A.

Defendant first argues that his sentences of 15 to 30 years imprisonment for assault with intent to murder, and 5 to 7 ½ years imprisonment for carrying a dangerous weapon with unlawful intent, both enhanced pursuant to the second habitual offender statute, are disproportionate to the offense and the offender, thus the trial court abused its discretion in sentencing defendant. Because the offenses for which defendant was convicted occurred before January 1, 1999, the former judicial sentencing guidelines apply to this case. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). Although defendant did not object at the time of sentencing, a defendant is not required "to take any special steps to preserve the question of the proportionality of [ ][his] sentence . . . ." *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). Consequently, the appropriate standard of review is for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990).

The principal of proportionality requires that a sentence imposed by the trial court be proportional to the seriousness of the circumstances surrounding the offense and offender. *Milbourn, supra* at 635-636. A trial court is required to articulate its reasons on the record to support "the court's decision regarding the nature and length of punishment." *People v Fleming*, 428 Mich 408, 415, 428; 410 NW2d 266 (1987). Regarding defendant's assault with intent to murder conviction, MCL 750.226, the trial court sentenced defendant as an habitual offender second, MCL 769.10, to fifteen to thirty years in prison. The record reveals that defendant's sentencing guidelines range on the conviction was calculated at life or any term of years. A minimum sentence within the guidelines range is presumed to be proportionate. *Milbourn, supra* at 636; *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Defendant has failed to present any unusual circumstances that would overcome that presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

With regard to defendant's carrying a dangerous weapon with unlawful intent conviction, MCL 750.226, the trial court sentenced defendant to sixty to ninety months' imprisonment. The guidelines did not apply to this conviction. Our review of the record reveals that the sentence was proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 635-636.

The trial court stated its reasoning for the nature and length of the punishment on the record as required in *Fleming, supra* at 415, 428. The trial court stated as follows:

> The issue here from the testimony of the physician was that the wound is a – one inch or so one way, the person is blind; another few inches or so the other way,

> the person could be dead. Obviously this is a dangerous situation. There was an aggravated assault charge in the past in addition to malicious destruction.

As articulated by the trial court, defendant's sentencing was not excessive or disproportionate to the crime when considering the calculating, menacing, and sheer brutal nature of the stabbing attack. The sentence was not excessive or disproportionate to the offender considering defendant's criminal history of assaultive behavior as well as his actions on the date in question. *Milbourn, supra* at 635-636. The trial court did not abuse its discretion and defendant is not entitled to resentencing.

B.

Defendant contends that he was denied the effective assistance of counsel at trial when he failed to elicit testimony from Conway regarding her personal bias and self-interest in the outcome of the case. Specifically, defendant asserts that he informed his trial counsel that Conway's testimony would not be trustworthy and she was biased for the following reasons:

> (1) she had a personal dislike for [defendant], as she was very close friends with not only Jodi Johnson outside of her place of employment at the [F]rankenmuth [C]arecenter, but with Jodi Johnson's husband; (2) in the eye's of Sandra Conway [defendant] was breaking up her friends [sic] marriage giving her a personal interest to see [defendant] convicted and sentenced to a long prison term; (3) she relied on Ms[.] Johnson for transportation to and from work at the carecenter; (4) both Jodi Johnson and her husband were entertained quite often at Sandra Conway's home with her live in boyfriend; (5) Sandra Conway's live in boyfriend supplied and engaged in the smoking of marijuana with the couple at the home of Sandra Conway; [and] (6) her eyewitness identification and eyewitness observation was neither credible [nor] reliable.

Defendant does not support his assertions regarding Conway's motivations to lie on the stand, and as a result they are no more than mere speculation. We have reviewed the entirety of Conway's testimony at trial and it is limited strictly to what she witnessed on the night of the incident. There were no questions regarding her opinions of defendant, Johnson, or their relationship. Plainly, defense counsel decided as a matter of trial strategy not to ask questions of Conway in an effort to elicit information about her personal bias out of fear that she may reveal information damaging to defendant, especially since defendant had informed him that Conway hated defendant. If counsel's attempt to discredit failed, a likely outcome given the nature of defendant's suggestions for cross-examination, Conway's testimony may have a heightened effect regarding defendant's guilt. "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 Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant has not established error.

C.

Defendant argues that the trial court judge, the trial court clerk, the prosecutor, defendant's defense attorney, and a Frankenmuth police officer illegally engaged in a conspiracy to illegally convict and sentence defendant. Defendant has provided no evidence to support this

allegation. Defendant had an opportunity to enlarge the record during the *Ginther* hearing before the trial court. The record reflects that defendant's initial trial counsel, the prosecutor, the police officer defendant references, and defendant himself all testified before the same trial judge who presided over defendant's initial trial. We have reviewed the hearing record and although defendant had every opportunity to ask questions of any witness in an effort to buttress his argument that an alleged illegal conspiracy resulted in defendant's conviction, defendant did not do so. As such, there is no factual or legal basis in the record supporting defendant's conspiracy claim. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Defendant has not shown error.

D.

Defendant asserts that he was denied the effective assistance of counsel at trial when his counsel coerced him to testify falsely to being engaged to Johnson while knowing he was not and thus denying defendant a fair trial. Again, defendant has provided no evidence to support his coercion allegations. Defendant had an opportunity to enlarge the record during the *Ginther* hearing before the trial court but provided no testimony at all supporting his allegations that his attorney coerced his testimony regarding his engagement status. In any event, Johnson herself testified at trial, and again at the *Ginther* hearing, that she and Johnson were engaged at the time of trial. Defendant has not explained how testifying to his engagement status, when Johnson had already testified to it, denied him a fair trial. Defendant may not leave it up to this Court to discover and rationalize the basis for his claims on appeal. *Mitcham, supra* at 203.

E.

Defendant contends that the court reporter altered the transcripts denying defendant fair appellate review. Trial transcripts are presumed to be accurate. *People v Abdella*, 200 Mich App 473, 475; 505 NW2d 18 (1993).

> [I]n order to overcome the presumption of accuracy and be entitled to relief, a petitioner must satisfy the following requirements: (1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure [appellate] relief pursuant to subchapters 7.200 and 7.300 of our court rules. [*Id*. at 476 (footnotes omitted).]

Defendant has not overcome the presumption of accuracy. Defendant has not met any of the *Abdella* requirements. *Id*. Defendant did not raise this issue in his previous appeal before this Court and now it has been over ten years since defendant's trial. Even so, defendant had ample opportunity to explore this issue at his *Ginther* hearing, but did not. As a result, defendant has not provided any independent corroboration regarding any alleged alterations or explained how any alterations affected his ability to obtain appellate review of the lower court proceedings.

Defendant has not overcome the presumption of accuracy and is not entitled to appellate relief. *Id*.

F.

Defendant argues that he was denied the effective assistance of counsel at trial because defense counsel abandoned his client and the defense of diminished capacity. Again, defendant has provided no evidence to support his allegation that defense counsel abandoned him or the defense of diminished capacity in favor of the defense of intoxication. Defendant had an opportunity to enlarge the record during the *Ginther* hearing and specifically question his former trial counsel regarding the defense of diminished capacity, but did not do so. Instead, defense counsel provided testimony that as a matter of course he would have discussed trial strategy with defendant prior to trial, shared the evidence with him, and listened to his perspective on the case before deciding on a defense. Defendant provided no testimony at all supporting his allegation of ineffective assistance of counsel with regard to this issue, rather, the evidence adduced at the *Ginther* hearing supports the conclusion that defendant indeed received effective assistance of counsel. Defense counsel's decision to pursue an intoxication defense falls within the purview of trial strategy that we will not second-guess in hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

G.

Defendant next argues that because he was denied a fair and impartial jury trial as well as a meaningful first appeal as of right, he is entitled to, at a minimum, the opportunity to enter reasonable plea negotiations. Defendant's claims are not supported by the record evidence or in law. Defendant's motion for a new trial in the circuit court was denied. Even had defendant prevailed and received a new trial, it would not have been within the purview of the court to grant "plea negotiations" in lieu of a new trial or as an alternative remedy. Defendant has cited no legal authority in support of this argument and we deem it abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

H.

Defendant argues that he was denied the effective assistance of appellate counsel because his appellate counsel failed to raise the issues defendant presents himself in his Standard 4 brief. "The test for ineffective assistance of appellate counsel is the same as that for trial counsel," *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). And appellate counsel "[does] not render ineffective assistance by failing to raise meritless claims." *People v Reed*, 449 Mich 375, 402; 535 NW2d 496 (1995). Because none of the issues defendant raises in his Standard 4 brief merit relief, defendant's appellate counsel was not ineffective for choosing not to bring those particular issues on appeal. *Id*. In any event, the brief submitted by defendant's appellate counsel was well-written, cited the record as well as relevant case law, and raised multiple extensive issues on appeal. Defendant has not received ineffective assistance of appellate counsel. *Pratt, supra*.

I.

Finally, defendant argues that he was denied a fair trial due to the cumulative effect of error committed by the trial court, prosecution, trial counsel, and appellate counsel. Because defendant has failed to demonstrate any error, we dismiss this claim. And, in light of defendant's reliance on myriad claims of ineffective assistance of counsel, we find it prudent to state that, had any or all of the claimed errors occurred, defendant would not have prevailed because the outcome would not have been different in light of the overwhelming evidence of defendant's guilt. *Strickland, supra* at 694.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering