

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WINFRED ROGER PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

February 2, 2010

No. 288414

Macomb Circuit Court

LC No. 2008-001083-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ISAIAH MAYWEATHER,

Defendant-Appellant.

No. 288415

Macomb Circuit Court

LC No. 2007-005303-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Following a joint trial, defendants Winfred Roger Phillips (Phillips) and Isaiah Mayweather (Mayweather) were each convicted by a jury of first-degree felony murder, MCL 750.316, assault with intent to murder, MCL 750.83, armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Phillips to life in prison for the felony murder conviction, 23 to 65 years in prison for the assault with intent to murder, armed robbery and conspiracy to commit armed robbery convictions, one to five years in prison for the felon in possession of a firearm conviction and two years in prison for the felony-firearm convictions. Mayweather, was sentenced, as a second habitual offender, MCL 769.10, to life in prison for the felony murder conviction, 35 to 65 years in prison for the assault with intent to murder, armed robbery and conspiracy to commit armed robbery convictions, one to five years in prison for the felon in possession of a firearm conviction and five years in prison for the felony-firearm convictions. Phillips appeals as of right in Docket No. 288414, and Mayweather appeals as of

right in Docket No. 288415. These appeals have been consolidated pursuant to MCR 7.211 (E)(2). We affirm.

I.

This case arises out of a robbery and shootings at a party store on Gratiot Avenue in Eastpointe on September 27, 2007. At approximately 10:30 p.m. Mayweather entered the store, purchased some cigar wrappers, and left. At approximately 10:45 p.m., Phillips entered the store wearing a white t-shirt, jeans, and a red bandana. Phillips walked to the back, where an employee, Mohammed Al-Harbi, was working. Seconds later, Mayweather, wearing a black shirt and carrying a black backpack, re-entered the store, approached the manager, Sinan Hanna, at the counter, and asked for a bottle of vodka. Hanna requested Mayweather's identification and Mayweather refused. At the same time, Hanna heard gunshots from the back of the store. Hanna observed Phillips, armed with a gun, chasing Al-Harbi from the store's kitchen toward the office, and heard additional gunshots. Al-Harbi eventually died after having been shot 11 times.

While Phillips chased Al-Harbi, Mayweather pointed a gun at Hanna, moved behind the counter with the gun and stood two or three feet from Hanna. After Hanna opened the cash register and lottery drawers, he put his hands up and Mayweather took the contents of both drawers. Next, Mayweather demanded the store's security videotapes. Security cameras recorded the incident, but Hanna told Mayweather that the store was not equipped with them. Following this rebuff, Mayweather cursed at Hanna and shot Hanna in the head. Hanna survived his suffered injuries, requiring surgery and hospitalization for several days.

Following the robbery, the police released footage from the security cameras to the media. Consequently, the police received several tips identifying defendants as the perpetrators. One informant who immediately identified both defendants was Patricia Pitts. Pitts was formerly Phillips's foster mother, and had other children who are friends with Mayweather. Hanna also participated in a photographic lineup while he was recovering in the hospital. While he was unable to positively identify the person who shot him, he narrowed his choice to two photographs including Mayweather and another individual.

On the day after the robbery, Mayweather drove his wife's Intrepid to visit his sister, Barbara Hamilton. On direct examination by the prosecution, Hamilton denied that she and Mayweather discussed the incident at the store or watched the footage. She also denied that Mayweather requested she care for his children because he planned to leave town. Following Hamilton's testimony, the prosecution called Daniel Nash, Mayweather's parole agent, and Lieutenant Leo Borowsky, who each testified, over the objection by Mayweather, that she had discussed his involvement in the incident with Mayweather and that he requested she care for his children because he was leaving town. Mayweather did, in fact, leave Michigan, and he was arrested by police, after being located through the use of global positioning data, in a Chicago train station. At the time of his arrest, Mayweather initially provided a fictitious name to an officer, but then provided his given name and stated, "I'm the one you are looking for. . . ." The police recovered \$343 in small denominations from him and recovered a dozen \$5 bills and five \$20 bills from his home. The police also searched Mayweather's wife's Intrepid and recovered a \$71 receipt for the delivery of 7-Up the party store by a 7-Up distributor on September 27 at 11:31 a.m., 11 hours prior to the robbery. The storeowner testified that this receipt would have been in the cash register at the time of the robbery.

Several days after the robbery, the police also arrested Phillips in a Grand Rapids home. In the basement of that home, the police recovered a red bandana and jeans similar to those worn by Al-Harbi's shooter.

II.

In Docket No. 288414, Phillips argues that his due process rights were violated because he was tried jointly with Mayweather. Specifically, Phillips claims that, if the trials had been severed, the jury would not have considered inflammatory evidence admitted against Mayweather, including: 1) several witnesses who testified that Hamilton told them that Mayweather implicated himself to her, and 2) a witness who led the police to the Intrepid. We disagree. Phillips failed to move to sever the cases below. Therefore, this issue is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 766-768; 597 NW2d 130 (1999).

In *People v Hana*, 447 Mich 325, 348; 524 NW2d 682 (1994), our Supreme Court held that a defendant is not entitled to severance as a matter of law simply because the defendant and his or her codefendant have antagonistic defenses. Instead, the Supreme Court held, "the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id.* at 349. In other words, the "tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *Id.*, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993).

The charges against defendants arose out of a single criminal incident that involved numerous witnesses and substantially identical evidence. To hold separate trials in these substantially identical cases would have been unnecessarily duplicative and excessive. See *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Defendants both relied on the defense of misidentification and their defenses were not mutually exclusive or irreconcilable. *Hana, supra* at 349. Phillips fails to argue why evidence from witnesses regarding Hamilton's statements and the recovery of the Intrepid would not have been relevant and competent evidence in his separate trial, *Zafiro v United States*, 506 US 534, 540; 113 S Ct 933; 122 L Ed 2d 317 (1993), but regardless, "incidental spillover prejudice, which is almost inevitable in a multi-defendant trial," does not require severance. *Hana, supra* at 349, quoting *Yefsky, supra* at 896. Moreover, any risk of prejudice from a joint trial may be quelled by a proper cautionary instruction. *Id.* at 356. Here, the trial court instructed the jury to consider each defendant separately and to decide the case on the basis of the evidence that applied to each defendant. Nothing prevented the jury from doing as instructed and it was not plain error to jointly try defendants.

Because Phillips was not entitled to severance, his related claim that he was denied the effective assistance of counsel because his attorney failed to move for severance must also fail. Phillips's attorney cannot be deemed ineffective for failing to file a motion to sever which would have been futile. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Next, Phillips argues that the trial court violated his due process rights when it denied his attorney, Timothy Barkovic's motion to withdraw when he realized a former client, David Maki, would testify for the prosecutor. We disagree. This Court reviews a trial court's decision regarding a motion to withdraw for an abuse of discretion. *In re Withdrawal of Atty*, 234 Mich App 421, 431; 594 NW2d 514 (1999).

When it was disclosed that Barkovic previously represented Maki and there were potential conflicts of interest, Phillips consented to Barkovic's continued representation. By waiving any objection to Barkovic's representation, defendant Phillips is precluded from raising this issue on appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Even if we were to consider this issue, however, Phillips failed to show an "actual conflict of interest adversely affected his lawyer's performance." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). MRPC 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Maki's case and Phillips's case are factually distinct. Barkovic represented Maki when he pleaded guilty to breaking and entering a dwelling in 1988. In contrast, Barkovic's representation of Phillips in the instant matter involved felony murder and robbery approximately 20 years later. Moreover, Maki also acknowledged that while he had been unhappy with Barkovic's representation, his case had nothing to do with Phillip's case. Thus, the trial court did not abuse its discretion when it denied Barkovic's motion to withdraw and Phillips' due process rights were not violated because no actual conflict existed.

Phillips also challenges the trial court's order denying his motion for a mistrial following several of Maki's outbursts during his testimony that Phillips had confessed to the instant offenses while they were incarcerated together. We review for an abuse of discretion a trial court's ruling whether to grant a mistrial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A trial court should grant a mistrial "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Bauder*, 269 Mich App 174, 195; 720 NW2d 287 (2006), quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). "When a motion for a mistrial is premised on the unsolicited outburst of a witness, it should be granted only where the comment is so egregious that the prejudicial effect cannot be cured." *Id.*

Phillips alleges that Maki prejudicially portrayed him as a gang member, and portrayed Barkovic as a drug dealer and drunk driver during his testimony. Eventually the trial court expressly described Maki as "uncontrollable" and his testimony as "unresponsive," ordered Maki's testimony stricken, and further instructed the jury to cross out any notes they had taken from Maki's testimony and to disregard Maki's testimony in its entirety. The trial court also instructed the jury not to let its prejudices influence its decision, and further, that evidence of defendants' past crimes was not evidence that they committed the instant offenses. *Bauder*, *supra* at 195.

Because the jury is presumed to follow instructions and instructions are presumed to cure most errors, the trial court did not abuse its discretion when it denied Phillips's motion for a mistrial despite Maki's outbursts. *Bauder*, *supra* at 195.

In a supplemental Standard 4 brief, Phillips argues that he was denied the effective assistance of counsel because his attorney failed to move to suppress Hanna's in-court identification. Phillips maintains that the in-court identification was the product of a suggestive

preliminary examination procedure, which singled him out. He also maintains that the in-court identification lacked an independent basis. We disagree. Phillips did not raise this issue below, so this Court's review is limited to mistakes that are apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Effective assistance is strongly presumed. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

An identification procedure violates a defendant's right to due process of law when it is "unnecessarily suggestive and conducive to irreparable misidentification." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If a pretrial identification procedure was impermissibly suggestive, the witness's in-court identification will not be allowed unless it was based on a sufficiently independent basis to purge the taint of the improper pretrial identification. *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993).

Here, even if the pretrial identification procedure had been impermissibly suggestive, there was an independent basis for Hanna's in-court identification of Phillips. We consider eight factors to determine if an independent basis exists: (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of the observation, lighting, noise and proximity; (3) length of time between the offense and the disputed identification; (4) accuracy or discrepancies in the prelineup or showup description and the defendant's actual description; (5) any previous proper identification or failure to identify the defendant; (6) any identification prior to lineup or showup of another person as the assailant; (7) the nature of the alleged offense and the physical and psychological state of the victim; (8) any idiosyncratic or special features of the defendant. *People v Gray*, 457 Mich 107, 115-124; 577 NW2d 92 (1998).

The fact that Hanna had no prior relationship with Phillips, that approximately 11 months passed between the robbery and trial, and that nothing in the record suggests that Phillips has special physical features, all weigh in Phillips's favor in evaluating whether there was an independent basis for Hanna's identification. However, other facts support the conclusion that Hanna had an independent basis to identify Phillips. Even though Hanna was shot and fell during the robbery, he saw Phillips from the side when he first entered the store and Hanna saw Phillips while he was chasing Al-Harbi. Each time, defendant Phillips was only 8 to 22 feet away.

Phillips, who identifies himself as a "dark black male," also claims that Hanna's previous descriptions of his race were inaccurate and inconsistent. However, when Detective Steven Sellers interviewed Hanna immediately after the shootings, Hanna told him that both perpetrators were black. Approximately six weeks later, at Mayweather's preliminary examination, Hanna described Al-Harbi's shooter, stating, "He was like bigger and he's not a black, it's like lighter

skin, something like that.”¹ Hanna, whose first language is Arabic, later explained, “Because in my language I don’t explain it good.” At Phillips’s preliminary examination and trial, Hanna repeatedly described Al-Harbi’s shooter as black.

Finally, Hanna never failed to identify Phillips or identified another person as Al-Harbi’s shooter. Hanna was initially only “80, 85 percent” sure of his identification at defendant Phillips’s preliminary examination. However, after he saw Phillips from the side, consistent with his view of Al-Harbi’s shooter during the robbery, he was “99 percent” sure of the identification.

On the basis of these factors, we conclude that there was an independent basis for Hanna’s in-court identification of Phillips. Therefore, because a motion to suppress the in-court identification would have lacked merit, the failure of Phillips’s attorney to file such a motion was not ineffective assistance of counsel. *Ackerman, supra* at 455. Moreover, in light of other evidence linking Phillips to the robbery, including Pitts’s identification, the red bandana and jeans recovered at the arrest, and the security cameras’ footage, Phillips failed to show a reasonable probability that the outcome would have been different but for his attorney’s failure. *Id.* at 486.

III.

In Docket No. 288415, Mayweather argues that the trial court erred when it admitted Hanna’s in-court identification. Like Phillips, Mayweather maintains that the in-court identification was the product of a suggestive preliminary examination procedure, which singled him out as the likely perpetrator. He also maintains that the in-court identification lacked independent basis. We disagree. We review a trial court’s decision to admit identification evidence for clear error, which “exists when the reviewing court is left with a definite and firm conviction that a mistake was made.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

Like the identification of Phillips, even if the pretrial identification procedure had been impermissibly suggestive in Mayweather’s case, the trial court did not clearly err when it found independent bases for Hanna’s in-court identification. Several facts weigh in Mayweather’s favor in evaluating whether an independent basis existed, including: 1) Hanna had only narrowed his identification of his shooter in a lineup to Mayweather and an unrelated suspect, 2) Hanna told Detective Sellers he focused more on the gun than the shooter, and 3) Hanna failed to report Mayweather’s scar and correct height to the police. Nevertheless, Hanna had sold cigar wrappers to Mayweather approximately 15 minutes before the robbery, and when Mayweather returned to the store, Hanna was not initially alarmed by his presence. Rather, Mayweather asked to buy liquor and Hanna requested identification. Even when Hanna heard shots being fired and Mayweather pointed a gun at Hanna, Hanna had a good opportunity to observe Mayweather because he stood next to Hanna behind the counter. In light of these competing

¹ Although the prosecution argues that Hanna stated Phillips was “not as black,” rather than “not a black,” no motion to correct any typographical errors in the transcript was filed below or in this Court.

facts and Hanna's certainty of his in-court identifications at the preliminary examination and at trial, this Court is not left with a definite and firm conviction that a mistake was made.

Next, Mayweather argues that the trial court improperly admitted Daniel Nash's and Lieutenant Leo Borowsky's testimony to impeach Hamilton, on the basis that there was no other testimony presented by Hamilton for which her credibility was at issue. We disagree. This issue is not preserved because Mayweather objected to the admission of Hamilton's testimony solely on hearsay grounds. It is well settled that an objection based on one ground at trial is insufficient to preserve an appellate attack based on the different ground. See *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Thus we review this issue for plain error affecting Mayweather's substantial rights. *Carines, supra* at 766-768.

Extrinsic evidence of a prior inconsistent statement is admissible to impeach a witness. MRE 613(b). "The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculcate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). However, a prosecutor may not introduce evidence of a statement that directly inculcates the defendant under the guise of impeachment if (1) the substance of the statement is relevant to the central issue of the case and (2) there is no other testimony from the witness for which his credibility was relevant to the case. *Id.* at 682-683; *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994).

Since Hamilton denied at trial that she and Mayweather discussed the robbery or watched the footage on television, and also denied that Mayweather requested she care for his children when he left town, Nash and Borowsky's testimony contradicting Hamilton was admissible for impeachment purposes. Under *Stanaway, supra*, however, because the substance of Hamilton's statements to Nash and Lieutenant Borowsky was relevant to the central issue of the case, the identity of the perpetrators at the store, this otherwise admissible impeachment evidence would have been properly precluded if Hamilton's credibility was not relevant for purposes other than the testimony being impeached. Here, Hamilton provided substantive testimony connecting Mayweather to the Intrepid where the 7-up receipt was recovered. This testimony was unrelated to her statements to Nash and Lieutenant Borowsky, and was also relevant to the issue of identity. Therefore, Hamilton's credibility was pertinent on other grounds, and therefore, the trial court did not commit plain error when it admitted the impeachment evidence.

Mayweather also alleges several instances of prosecutorial misconduct on appeal. Because the errors Mayweather alleges were not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999).

Even though Nash's and Lieutenant Borowsky's testimony regarding Hamilton's prior inconsistent statements were only admissible for impeachment, the prosecutor improperly argued in his closing and rebuttal arguments that the jury could rely on these prior inconsistent statements to find that Mayweather confessed and felt shame. Regardless of the prosecutor's improper argument, however, the trial court clearly instructed the jury when the testimony was admitted that the use of these prior inconsistent statements was limited. In addition, in its final

instructions to the jury, the trial court repeated that a witness's prior statements could only be considered to determine if the witness testified truthfully. These instructions were sufficient to cure any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Next, Mayweather alleges that, in his closing argument, the prosecutor misstated several facts. First, the prosecutor misstated that a detective testified that Phillips's girlfriend was very helpful when they discussed the shooting, when in fact the detective testified about his conversation with Mayweather's wife and father-in-law. Second, the prosecutor stated that Dorothy Reemer called Pitts to tell her about the video, when Pitts had only testified that she learned about the security cameras' footage when approximately five people whom she did not identify called her. Despite these apparent misstatements, the trial court instructed the jury that evidence included "only the sworn testimony of witnesses, the exhibits admitted into evidence and anything else I told you to consider as evidence." The trial court further instructed the jury that the opening statements and closing arguments did not constitute evidence and the jury should "only accept things the lawyer[s] say that are supported by the evidence." Again, these instructions were sufficient to cure any prejudice. *Long, supra* at 588.

Mayweather also alleges that the prosecutor improperly asserted that the police received "multiple tips" identifying defendants. Contrary to Mayweather's claim, the prosecutor's argument was supported by the record. Hanna testified that he recognized defendants from the robbery and Pitts testified that she identified defendants in the security cameras' footage. Moreover, Sergeant Allen Przywara testified that the police received multiple tips in response to the footage. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) ("the prosecutor is permitted to argue the evidence and all reasonable inferences arising from it.").

Mayweather further alleges that the prosecutor improperly denigrated his attorney in the rebuttal argument. A prosecutor may not attack defense counsel or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, the prosecutor's remarks must be considered in context with the defense attorney's comments and actions. *Id.* at 592-593; see *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003) (invited response doctrine). "An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Watson, supra* at 593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

In his closing argument, Mayweather's attorney questioned the evidence related to the lineup by noting that Detective Sellers, who is a "squared away cop, neatly dressed, crew cut, fit, [and] meticulous" failed to record the results of the lineup in his report. In rebuttal, the prosecutor stated:

They are trying to make you look at the ball somewhere other than the evidence. Should Detective Sellers have put in his report the last sentence on that 6 page report, should he have put in one more sentence in there? Absolutely. Do people make mistakes? Absolutely.

Also in closing argument, Phillip's attorney recalled a recent headline in Oakland County that an innocent man had been sent to jail for nine years. He compared that man's accuser to Hanna and suggested that misidentification "does happen in real life." In rebuttal, the prosecutor stated:

And you know my grandfather . . . had this great saying . . . You know, son, the louder someone yells, the less they say. How desperate is the defense. A 15 year old case of a missing or mistaken [sic], where there was no DNA. True, that is the case here. It is a separate case, a different incident. How desperate is the defense? We'll close the door on this because it is meaningless.

Later in rebuttal, the prosecutor also stated, "They are not entitled to walk from what they have done simply because defense counsel yells that they should." Defendants' attorneys invited the prosecutor's rebuttal. *Watson, supra*. Moreover, in light of the trial court's cautionary instructions, the rebuttal did not deny Mayweather a fair and impartial trial. *Long, supra* at 588.

Mayweather next alleges that the prosecutor improperly attempted to evoke an emotional response from the jury. "A prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice." *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). Likewise, a prosecutor may not appeal to the jury to sympathize with the victim. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). Here, the prosecutor referenced defendants as "convicted felons," and also stated, "The only thing more damning he could have said [to police than 'I'm the one you are looking for' was] I murdered those people, and I had fun doing it." The prosecutor need not limit arguments to "the blandest possible terms." *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). Even if these comments were intended to inflame the jury, the trial court's cautionary instruction that the jury should not be influenced by sympathy or prejudice and its instruction that the attorney's closing arguments did not constitute evidence were sufficient to cure any prejudice. *Long, supra* at 588.

Finally, Mayweather argues that the cumulative effect of the prosecutor's alleged misconduct requires reversal. Although "[t]he cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not," reversal is warranted on such ground "only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). As explained above, the alleged instances of misconduct either did not constitute plain error or were cured by the trial court's instructions to the jury. *Long, supra* at 588. Accordingly, we find that none of the alleged errors seriously prejudiced Mayweather, and he was not denied a fair trial as a result of prosecutorial misconduct.

Mayweather's next argument on appeal is that his due process rights were violated when the trial court admitted Pitts's recollections of identifying defendants in the security cameras' footage. He maintains that Pitts's opinion invaded the province of the jury and she was not qualified as an expert. We disagree. Mayweather's unpreserved argument is reviewed for plain error affecting his substantial rights. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Pitts's testimony was admissible because she testified regarding topics about which she had personal knowledge, including her relationship with defendants, their appearances at the time of the crime, Phillips's change in appearance since the robbery, and her course of action after she viewed the security cameras' footage. MRE 602. Pursuant to MRE 701, a lay witness may testify regarding an opinion or inference if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Pitts's lay opinion regarding the identity of the perpetrators in the footage

was rationally based on her perceptions of the footage and her familiarity with defendants' appearances. Her lay opinion was helpful in the determination of facts in issue, including defendants' identities as the perpetrators. Contrary to Mayweather's claim, Pitts's lay opinion did not bring to bear any specialized knowledge or methods so there was no need for her to be qualified as an expert under MRE 702. Furthermore, even if Pitts's testimony embraced the ultimate issue to be determined by the factfinder, such testimony is acceptable under MRE 704. Because Pitts's testimony was admissible, Mayweather has failed to demonstrate plain error.

Mayweather also argues, as did Phillips, that his due process rights were violated because he was tried jointly with Phillips. Specifically, Mayweather argues that defendants' arguments regarding Hanna's identification in the photographic lineup were antagonistic. We disagree. Again, Mayweather's unpreserved argument is reviewed for plain error affecting his substantial rights. *Carines*, *supra* at 766-768.

Mayweather's attorney argued that the lineup was unreliable. He noted that Hanna could not positively identify Mayweather, but only narrowed the identification of his shooter to two photographs. He also noted that Hanna did not remember the photographs he identified and Detective Sellers, who conducted the lineup, failed to indicate the results of the lineup in his report. On the other hand, Phillips's attorney argued that there was no independent basis for Hanna's in-court identification of him. Even though the evidence showed that the lineup was conducted to identify Hanna's shooter only, Phillip's attorney argued that Hanna failed to identify Phillips and urged the jury to compare the photograph of the unrelated suspect Hanna chose to Phillips.

Again, severance is not required if defenses are merely antagonistic. Rather, defenses must be mutually exclusive or irreconcilable. *Hana*, *supra* at 349. Defendants' defenses were not mutually exclusive. The jury was not prevented from finding that: 1) Hanna's identification of Mayweather in the lineup was hesitant and unreliable, and 2) Hanna's in-court identifications of Phillips were unreliable because he previously failed identify Phillips in any lineups, if it believed the evidence established these findings. Again, the trial court instructed the jury to consider each defendant separately and to decide the case on the basis of the evidence that applied to each defendant. *Id.* at 356. Nothing prevented the jury from doing as instructed and it was not plain error to jointly try defendants. Mayweather also claims ineffective assistance of counsel for his attorney's failure to move to sever the two trials, but his attorney cannot be deemed ineffective for failing to file a motion to sever which would have been futile. *Ackerman*, *supra* at 455.

Mayweather also claims for the first time on appeal that his due process rights were violated because the prosecutor failed to respond to a discovery request for the photographs used in the lineup. We disagree. This unpreserved issue is reviewed for plain error affecting Mayweather's substantial rights. *Carines*, *supra* at 766-768.

MCR 6.201 governs matters related to criminal discovery. Upon request, a party must provide to the opposing side any document, any photograph, or other tangible physical evidence that the party intends to introduce at trial. MCR 6.201(A)(6). Mayweather does not argue, and there is no evidence in the lower court record to suggest, that he made a MCR 6.201(A)(6) request for the photographs in the lineup. Mayweather only argues that he requested "[a]ll witness statements," pursuant to MCR 6.201(B)(3), which requires a party to provide "any

written or recorded statements by a defendant, codefendant, or accomplice,” but does not require the party to provide evidence related to an identification by a complainant. We find that, under these circumstances, the rule is inapposite.²

Even if the prosecutor had erred by failing to produce the photographs, Mayweather was not prejudiced. He claims that, if his attorney had known that Hanna chose Mayweather and an unrelated participant, not Phillips, his attorney would have moved to sever defendants’ trials because their defenses were antagonistic. Mayweather’s claim of prejudice fails because, as we concluded above, defendants were not entitled to severance.

Mayweather’s next argument on appeal is that he was denied a fair trial due to the cumulative effect of the errors he alleges. We disagree. Mayweather’s unpreserved claim is reviewed for plain error affecting his substantial rights. *Carines, supra* at 762-763.

To determine if a defendant received a fair trial, only actual errors are aggregated for their cumulative effect. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Because we conclude that (1) the trial court did not clearly err when it found independent bases for Hanna’s in-court identification, (2) the trial court did not commit plain error when it admitted Nash’s and Lieutenant Borowsky’s testimony to impeach Hamilton, (3) the alleged instances of misconduct either did not constitute plain error or were cured by the trial court’s instructions to the jury, (4) the trial court did not commit plain error when it admitted Pitts’s identification of defendants in the security cameras’ footage, (5) it was not plain error to try defendants jointly and Mayweather’s attorney was not ineffective for failing to file a motion to sever, and (6) the prosecutor did not fail to produce the photographs in the lineup pursuant to MCR 6.201(A)(6), no actual errors cumulatively affected his right to a fair trial.

Mayweather’s last argument on appeal is that the trial court erred by failing to consider his foreseeable ability to repay \$750 in attorney fees and \$229.60 in transcript fees at sentencing as required by *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004), rev’d *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). We disagree. Mayweather’s unpreserved claim is reviewed for plain error affecting his substantial rights. *Carines, supra* at 762-763.

In *Jackson, supra* at 298, our Supreme Court held that the assessment of a defendant’s ability to pay attorney fees is only necessary when that imposition is enforced and the defendant contests his or her ability to pay. Because Mayweather has not alleged any attempt to enforce the imposition of attorney fees, his challenge of the attorney fee award is premature. Because Mayweather cites no binding authority indicating that a presentence ability-to-pay rule applies concerning court costs and a trial court has express authority to assess any costs at sentencing pursuant to MCL 769.1k(1)(b)(ii), we decline to vacate the order for transcript fees or remand with respect to those fees.

² Mayweather alternatively moved for the prosecutor produce the photographs to support his argument that there was no independent basis for Hanna’s in-court identification at the preliminary examination. However, the trial court denied this motion for production and defendant does not challenge the denial on appeal.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder