STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 29, 2010
v	No. 286104 Wayne Circuit Court
CHRISTOPHER SEIBA, Defendant-Appellant.	LC No. 07-014314-FH

Before: SAWYER, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b(1), but acquitted him of an additional charge of assault with intent to do great bodily harm less than murder with a motor vehicle. He was sentenced to a two-year term of imprisonment for the felony-firearm conviction, and five years' probation for the assault convictions. We affirm.

Defendant's convictions arise from an altercation with Sarmad Sako on June 29, 2007. At trial, Sako testified that defendant approached him on the street as Sako was walking toward a barbershop. According to Sako, defendant produced a gun and fired it in the air. He then grabbed Sako by the neck, placed the gun against Sako's chest, and told Sako that he could kill Sako if he wanted. Defendant then punched Sako and struck him twice on the head with the gun, causing the gun to discharge both times. Sako testified that he chased after defendant and told him to drop the gun. A third person intervened and pushed Sako, enabling defendant to get inside his car. Sako claimed that defendant then struck him with the car, causing him to fly in the air, roll over the hood, and bounce off the windshield. Sako was treated at a hospital, but did not suffer any serious injuries or broken bones.

Defendant was charged with one count of felonious assault for assaulting Sako with a gun, and two counts of assault with intent to do great bodily harm—one for physically assaulting Sako with the gun and the other for assaulting Sako with the motor vehicle. Defendant was also charged with a single count of felony-firearm. With defense counsel's agreement, the trial court also instructed the jury on felonious assault as a lesser offense of the assault with intent to do great bodily harm charge involving the assault with the motor vehicle. The jury acquitted defendant of the motor vehicle charge, but convicted him of the remaining charges.

I. ADMISSIBILITY OF SAKO'S MEDICAL RECORDS

Defendant contends that the trial court erred in admitting Sako's medical records into evidence. He says that the records were not admissible because he did not receive sufficient notice of the prosecutor's intent to introduce the records and because they were not properly authenticated.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Preliminary questions of law concerning admissibility, such as whether a rule or statute precludes the admission of the evidence, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The trial court admitted the records under MRE 803(6), which provides that the following records of regularly conducted activity are not excluded by the hearsay rule, MRE 801:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or *by certification that complies with a rule promulgated by the supreme court* or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [Emphasis added.]

Here, the prosecutor did not offer the testimony of a custodian or other qualified witness, but instead relied on a certificate from Donna Cyr, the hospital's medical records custodian, which indicated that the records provided were true copies of Sako's original medical records.

MRE 902 provides, in pertinent part:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> * * *
>
> (11) The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that
>
> (A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) The record was kept in the course of the regularly conducted business activity; and

(C) It was the regular practice of the business activity to make the record.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. [Emphasis added.]

Defendant argues that Cyr's certificate was not valid because it was not notarized. Defendant correctly observes that an affidavit that is not notarized is not valid. See *Wood v Bediako*, 272 Mich App 558, 562-563; 727 NW2d 654 (2006); *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005). The trial court concluded that Cyr's certificate was not invalid because MRE 902(11) does not require an affidavit, only "a written declaration under oath," and Cyr's certificate stated that it was made "after first being sworn." We need not determine whether the "written declaration under oath" requirement could be satisfied without the certificate being notarized because, even it could, Cyr's certification does not indicate that Sako's medical records were made contemporaneously with his treatment, that the records were kept in the course of regularly conducted business activity, or that it was a regular practice of the hospital to create such records. Thus, the certificate does not comply with MRE 902(11)(A) – (C). Accordingly, plaintiff could not rely on the certificate to satisfy the requirement in MRE 803(6) that the foundational component be "shown . . . by certification that complies with a rule promulgated by the supreme court."

Further, we disagree with plaintiff's suggestion that the medical records were admissible because Sako's identification of the documents as his medical records was sufficient to satisfy MRE 901(a) (the requirement of authentication is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims") or because production of the records pursuant to a subpoena was sufficient to satisfy MRE 901(9) ("[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result"). Notwithstanding the foregoing arguments, the medical records are still hearsay and, to be admissible under the hearsay exception in MRE 803(6), it was necessary that the foundational requirements specified in that rule be shown by "testimony of the custodian or other qualified witness" or by "*certification* that complies with a rule promulgated by the supreme court or a statute permitting certification." Neither requirement was met in this case. Therefore, the trial court erred in admitting the medical records into evidence.

However, we hold that the erroneous admission of the medical records was harmless. An error in the admission of evidence does not require reversal unless it is more probable than not that a different outcome would have resulted without the error. *Lukity*, 460 Mich at 494-495. Sako testified that defendant punched him, hit him twice with a gun, and then struck him with his car. The medical records did not reveal any serious injuries or broken bones. The records added little to Sako's own testimony concerning the injuries he sustained during the assault. Further, to the extent that more serious injuries to Sako's back and legs are described in the medical records, those injuries were related to the alleged assault with the car. The jury acquitted defendant of that charge, thereby indicating that the medical records did not adversely influence its verdict.

Under the circumstances, it is not more probable than not that a different outcome would have resulted if the medical records had not been admitted.

Defendant further maintains that admission of the medical records violated his Sixth Amendment right of confrontation. We disagree.

Under the Confrontation Clause, an out-of-court testimonial statement of a witness absent from trial is not admissible for its truth unless the declarant is unavailable and there has been a prior opportunity for adequate cross-examination. *Crawford v Washington*, 541 US 36, 50-51, 53-56, 59, 61; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A statement is testimonial if its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006); *People v Bryant*, 483 Mich 132, 139; 768 NW2d 65 (2009), cert gtd __ US __; __ S Ct __; __ L Ed 2d __ (3/1/2010). Conversely, a statement is not testimonial if it is made "under circumstances objectively indicating that the primary purpose . . . is to enable police assistance to meet an ongoing emergency." *Id*.

Here, Sako's medical records contain statements made by him to medical personnel for purposes of medical diagnosis and treatment, and statements made by medical personnel to document their findings, diagnoses, and course of treatment. The statements were made in the context of responding to a medical emergency, before any police investigation, not for the purpose of establishing or proving past events for use in a later criminal prosecution. Therefore, the medical records are not testimonial and their admission did not violate defendant's right of confrontation.

II. SUFFICIENCY OF THE EVIDENCE AND GREAT WEIGHT OF THE EVIDENCE

Defendant also avers that there is insufficient evidence of intent to support his assault with intent to do great bodily harm conviction. He alternatively argues that the conviction is against the great weight of the evidence. We disagree.

This Court reviews a challenge to the sufficiency of the evidence by reviewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). This Court must resolve all credibility disputes in favor of the jury's verdict. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

"The elements of assault with intent to do great bodily harm less than murder are (1) an assault, i.e., 'an attempt or offer with force and violence to do corporal hurt to another' coupled with (2) a specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996) (citation omitted).

Here, Sako's testimony that defendant threatened him, punched him in the mouth, and then twice struck him in the head with a gun hard enough for the gun to discharge, viewed in a light most favorable to the prosecution, is sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant assaulted Sako with the intent to cause great bodily harm.

Though evidence may be legally sufficient to support a conviction, a new trial should be granted where a verdict is against the great weight of the evidence, but "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (citation omitted). We review a trial court's decision denying a defendant's motion for a new trial for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Here, defendant's great weight argument is based on his claim that Sako's testimony was not credible. "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *Lemmon*, 456 Mich at 642 (citation omitted). Where the question is one of credibility, the jury's verdict may not be overturned unless the directly contradictory testimony has been so far impeached that it was "deprived of all probative value or that the jury could not believe it." *Id.* at 643. In this case, defendant failed to show that the credibility of Sako's testimony, or other evidence, was deprived of all probative value. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

III. JURY INSTRUCTIONS

Defendant also asserts reversal is required because of several instructional errors. He says that the trial court erred by failing to give a special unanimity instruction, by failing to instruct the jury on the use of prior inconsistent statements, and by denying his request for a missing witness instruction, CJI2d 5.12, based on the prosecutor's failure to produce a listed witness, Steven Markus, for trial.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions are reviewed as a whole rather than piecemeal. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Because defendant did not request a special unanimity instruction, or an instruction concerning the use of prior inconsistent statements, those issues are not preserved.[1] Accordingly, we review these unpreserved claims of instructional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767, 772-773; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

A. UNANIMITY REQUIREMENT

Defendant argues that the trial court improperly instructed the jury that it could convict him of felonious assault if it found that he assaulted Sako with either a handgun, an automobile, or both, and that these alternative options violated his right to a unanimous jury verdict.

[1] Indeed, defendant indicated that he had no objections to the instructions as given. Therefore, the unanimity and impeachment issues could be deemed waived. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). But, because defendant raises these same issues in the context of his separate ineffective assistance of counsel claim, we will address them.

Defendant's argument is based on an inaccurate understanding of the charges and the trial court's jury instructions.

"A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006). "Under most circumstances, a general instruction on the unanimity requirement will be adequate." *Id*. "However, the trial court must give a specific unanimity instruction where the state offers evidence of alternative acts allegedly committed by the defendant and 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *Id*. (internal quotations and citation omitted).

In this case, as in *Martin*, the trial court gave a general unanimity instruction. Contrary to what defendant argues, however, the felonious assault charge did not rest on alternative factual theories, i.e., that defendant assaulted Sako with a gun, with a car, or both. Defendant was charged with a single count of felonious assault, which was based on his alleged use of a gun to assault Sako. Defendant was also charged with two separate counts of assault with intent to do great bodily harm less than murder—one for assaulting Sako with a gun and the other for assaulting Sako with a car. With defense counsel's agreement, the trial court also agreed to instruct the jury on felonious assault as a lesser offense to the assault with intent to do great bodily harm count involving the car. During its instructions, the trial court made clear that defendant was charged with two separate offenses involving the handgun—assault with intent to do great bodily harm and felonious assault—for which the jury had the option of finding defendant either guilty or not guilty for each, and one offense involving the motor vehicle, for which the jury had the option of finding defendant guilty as charged of assault with intent to do great bodily harm, guilty of the lesser offense of felonious assault, or not guilty.

Because the charged felonious assault count was not based on alternative factual theories, the failure to give a special unanimity instruction with respect to that count was not plain error. Further, because the jury had the option of convicting defendant of felonious assault as a lesser offense of assault with intent to do great bodily harm in relation to the charged assault with the motor vehicle, and unanimously acquitted defendant of that offense, there is no basis for concluding, as defendant now argues, that his felonious assault conviction may have been based on some jurors finding him guilty of felonious assault with the motor vehicle. Thus, defendant has failed to show that any confusion with the trial court's jury instructions affected his substantial rights.

B. PRIOR INCONSISTENT STATEMENTS

Defendant also argues that the trial court erred by failing to give CJI2d 4.5(1), governing the use of prior inconsistent statements. Defendant argues that such an instruction should have been given because he impeached Sako's credibility at trial by introducing evidence that Sako had previously made statements that were inconsistent with his trial testimony.

CJI2d 4.5(1) provides:

> If you believe that a witness previously made a statement inconsistent with **[his / her]** testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true. [Boldface in the original.]

It is apparent that CJI2d 4.5(1) is a cautionary instruction intended to protect against the jury improperly considering a witness's prior inconsistent statement for its truth, i.e., as substantive evidence. In this case, however, defendant does not contend that there was any danger that the jury might improperly consider a prior inconsistent statement for substantive purposes. Instead, he complains that the jury was not instructed that it could consider Sako's prior inconsistent statements in assessing Sako's credibility. However, the trial court separately instructed the jury in accordance with CJI2d 3.6 on its responsibility to determine witness credibility, and the various factors it could consider in evaluating credibility. This instruction was sufficient to protect defendant's rights. In sum, because defendant does not claim that there was any danger that the jury might improperly consider a prior inconsistent statement as substantive evidence, and the trial court instructed the jury on appropriate factors to consider in evaluating a witness's credibility, defendant has failed to show that the failure to give CJI2d 4.5(1) was either a plain error or affected his substantial rights.

C. MISSING WITNESS INSTRUCTION

Defendant argues that the trial court erred in denying his request for a missing witness instruction, CJI2d 5.12, based on the prosecutor's failure to produce Steven Markus, a listed witness, for trial. A trial court's decision whether to give a missing witness instruction will not be disturbed on appeal absent a clear abuse of discretion. *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995).

CJI2d 5.12 provides:

> [*State name of witness*] is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

Such an instruction may be appropriate where a prosecutor fails to produce a listed witness who has not been properly excused. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

A prosecutor must identify those witnesses he intends to produce at trial, and may only amend his witness list by leave of court, for good cause shown (or by stipulation of the parties). MCL 767.40a(3) and (4); *Burwick*, 450 Mich at 289. A prosecutor may be relieved of his duty to produce an endorsed witness by showing that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). A trial court's findings whether a prosecutor exercised due diligence to locate and produce a witness for trial are reviewed for clear error. *People v DeMeyers*, 183 Mich App 286, 291; 454 NW2d 202 (1990). A finding is clearly erroneous "if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999).

Here, the police were unable to locate Markus to serve him with a subpoena, and he did not appear at trial. The officer in charge testified that he attempted to serve Markus, but his home appeared to be vacant. The prosecutor also represented that an investigator from the prosecutor's office was unable to locate Markus. Although the evidence of reasonable efforts was not overwhelming, we are not left with a definite and firm conviction that the trial court erred in finding that reasonable efforts were made to produce Markus for trial. In light of this determination, the prosecutor was relieved of his obligation to produce Markus, and defendant was not entitled to a missing witness instruction.

IV. THE PROSECUTOR'S CONDUCT

Additionally, defendant claims that reversal is required because the prosecutor's conduct denied him a fair trial. We disagree.

A prosecutor's conduct is reviewed on a case-by-case basis, and challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting a defendant's substantial rights. *People v Odom*, 276 Mich App 407, 413; 746 NW2d 557 (2007). Appellate relief is precluded if a curative instruction could have eliminated any possible prejudice. *Id.* at 722; *Noble*, 238 Mich App at 660.

A. SPURIOUS OBJECTIONS

Defendant argues that the prosecutor interfered with his cross-examination of witnesses by making spurious "asked and answered" objections, which defendant contends have no basis in the rules of evidence. We disagree.

Defendant cites no authority for his claim that a prosecutor's objection to questioning can constitute misconduct. A prosecutor is an advocate and has not only the right, but the duty to advocate his case vigorously. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989); see also *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). Moreover, there is no merit to defendant's argument that "asked and answered" objections have no basis in the rules of evidence. Under MRE 403, a trial court has discretion to exclude relevant evidence "if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In this case, the prosecutor made four "asked an answered" objections, all of which the trial court sustained. Therefore, the record does not support defendant's argument that the prosecutor's objections were spurious. The prosecutor was properly acting in his role as an advocate in asking the court to exercise its discretion to avoid the needless repetition of evidence. There was no misconduct.

B. ELICITING SPECULATION CONCERNING MOTIVE

Defendant argues that the prosecutor improperly elicited Sako's speculative testimony that defendant might hate him. We disagree.

A prosecutor "has the discretion to prove his case by whatever admissible evidence he chooses." *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002). A finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *Noble*, 238 Mich App at 660. In this case, the prosecutor's questioning was not calculated to elicit testimony that defendant hated Sako. Sako testified that he and defendant had argued the day before the offense. The prosecutor asked Sako what the argument was about. Sako responded, "Just arguing. . . . I guess he hated me or something." Under MRE 701, a lay witness may offer "opinions and 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." The prosecutor's questioning was not improper.

C. ELICITING INADMISSIBLE HEARSAY

Defendant argues that the prosecutor improperly elicited inadmissible hearsay from Sako concerning the contents of his medical records, and what he was told by medical personnel. We disagree.

As indicated previously, a finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *Noble*, 238 Mich App at 660. The record discloses that the prosecutor was permitted to ask Sako whether he could identify the medical records as his own, and whether he was told that he needed further treatment after an MRI was performed. Sako's responses to these questions did not involve the admission of out-of-court statements and, therefore, did not involve hearsay under MRE 801. The prosecutor was also permitted to use post-hospitalization records to refresh Sako's recollection concerning the names of his treating physicians. However, the trial court repeatedly sustained defendant's objections to questions addressing the contents of the medical records, such as what diagnosis was made, and what the doctors told Sako, including whether he needed another MRI. In sum, the record does not support defendant's claim that the prosecutor was permitted to elicit medical hearsay. Thus, there was no misconduct.

D. TESTIMONY CONCERNING THE MISSING WITNESS

Defendant claims that the prosecutor elicited inadmissible speculation from the officer in charge concerning why a witness might refuse to cooperate with the police. We disagree. Throughout the trial, defense counsel raised an issue about Sako's failure to produce any witnesses to corroborate his version of what happened. Defendant's theory was that, since there were no witnesses, Sako must be lying. A prosecutor properly may respond to defense arguments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). As an advocate, the prosecutor here was entitled to respond to defendant's theory by showing that there are other reasons why a witness might fail to come forward. Further, the officer's testimony was within the scope of his knowledge and experience, and was therefore admissible under MRE 702.

E. COMMENTING ON DEFENDANT'S FAILURE TO TESTIFY

Defendant alleges that the prosecutor improperly commented on his failure to testify. We disagree. We review this unpreserved issue for plain error.

Because a defendant has a right not to be compelled to incriminate himself, a prosecutor may not comment on a defendant's failure to testify. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). Nor may a prosecutor undermine a defendant's presumption of innocence by suggesting that the defendant has an obligation to prove anything. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), overruled in part by *Fields*, 450 Mich at 115 n 24; see also *Id.* at 115. However, "the protective shield of the Fifth Amendment should not be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *Id.* at 109 (citation omitted).

Thus, a prosecutor may argue that particular evidence is undisputed, even if the defendant is the only witness who could have controverted the evidence. *Id*. at 115. Further, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory that, if proven, might exonerate him, the prosecutor's comment on "the inferences created," including the defendant's failure to call witnesses or produce corroborating evidence, "does not shift the burden of proof." *Id.* at 115-116.

Here, in his closing argument, the prosecutor stated that there was no evidence that the events did not happen as Sako testified. The prosecutor added that it was probably difficult for Sako to prosecute this case, having known defendant and his family for many years, and asked, "why would he do something like that if it didn't happen?" The prosecutor argued that there was more than enough evidence to convict defendant. The prosecutor's remarks were proper comments on the evidence, including defendant's failure to produce evidence or witnesses in support of his theory of self-defense. There was no misconduct.

F. VOUCHING FOR SAKO'S CREDIBILITY

Defendant argues that the prosecutor improperly vouched for Sako's credibility during closing and rebuttal. Defendant failed to object to all but one of the challenged remarks.

"A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). However, a prosecutor is free to comment on the evidence, to draw all reasonable inferences from the evidence, and to argue how the evidence relates to the prosecution's theory of the case. *Marji*, 180 Mich App at 538. Thus, the prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *Howard*, 226 Mich App at 548.

Here, the prosecutor argued that Sako's testimony was truthful and relied on reasons grounded in the evidence to support his argument. He did not suggest that he or the government had some special knowledge that Sako was telling the truth. There was no misconduct.

V. AVAILABILITY OF TRANSCRIPT TO REVIEW TESTIMONY

Defendant argues that reversal is required because the trial court improperly instructed the jury that no transcript would be provided, and failed to inform the jury that it could ask to rehear testimony. We disagree. Because defendant did not object to the trial court's instructions, this issue is unpreserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763; *Aldrich*, 246 Mich App at 124-125.

MCR 6.414(J), formerly MCR 6.414(H), provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

A trial court's response to a jury's request to review testimony is reviewed for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

In this case, however, no request to review testimony was ever made. Instead, defendant challenges the trial court's preliminary jury instruction, given before the start of trial, in which the court advised the jurors that they would be permitted to take notes during the trial, and then added:

> Be advised that, when you finish this trial and you begin your deliberations, I am not going to provide you a copy of the transcript that Ms. Lownie is preparing as the court stenographer. That's not for your purposes. You're not going to be given a transcript.

This instruction was a variation on CJI2d 2.17, which addresses note taking. Viewed in context, the trial court's instruction was not improper. It was not given in response to a jury's request to review testimony, but rather during the court's preliminary instructions in the context of explaining the role of note-taking. Moreover, the court did not categorically rule out the re-hearing or re-reading of testimony. Accordingly, there was no plain error. We also reject defendant's argument that the trial court had an obligation to affirmatively inform the jury that it could ask to review testimony after deliberations started. There is no such requirement.

VI. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also says that he is entitled to a new trial because defense counsel was ineffective. The trial court addressed this issue following an evidentiary hearing and concluded that defendant was not denied the effective assistance of counsel. We agree with the trial court.

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

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must

further show that he was prejudiced by the error in question. *Id.* at 312-314. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A. DEFENDANT'S TESTIMONY

Defendant argues that defense counsel was ineffective for not allowing him to testify in support of his claim of self-defense. We disagree.

"Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defense counsel testified that he advised defendant not to testify because he would make a poor witness. Defendant and his girlfriend both agreed that defendant chose to accept counsel's advice. After viewing defendant's testimony at the evidentiary hearing, the trial court agreed that defendant would have been a poor witness, and that defense counsel made a reasonable strategy decision in advising defendant not to testify. Although defendant claims that defense counsel never advised him that the ultimate decision whether to testify was his, and that he would have testified had he known this, the trial court rejected these claims as non-credible. Defendant has failed to show that this determination was clearly erroneous and, accordingly, has not overcome the presumption of sound trial strategy.

B. CHARACTER WITNESSES

Defendant argues that defense counsel was ineffective for failing to call character witnesses to testify as to defendant's peaceful and non-violent character. We disagree.

At the evidentiary hearing, defendant's cousin and defendant's employer both testified that defendant had a reputation for being a good person and a hard worker. As the trial court found, however, neither witness testified that defendant had a reputation for being peaceful and non-violent. Thus, defendant failed to establish support for his claim that these witnesses were competent character witnesses with respect to his alleged reputation for peacefulness and non-violence. Accordingly, defendant has failed to show that counsel was ineffective for not calling these witnesses at trial.

C. IMPEACHMENT

Defendant contends that defense counsel was ineffective for failing to impeach Sako with an inconsistency in his statement to the police. The inconsistency involved whether Sako was leaving or approaching the barbershop at the time of the altercation with defendant. Counsel's decision whether and how to impeach a witness is a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). To overcome the presumption of sound strategy, defendant must show that counsel's alleged impeachment error may have made a difference in the outcome. *Id.*; *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defense counsel explained that he made a strategy decision to impeach Sako with his preliminary examination testimony rather than his police statement. The trial court found that this decision was reasonable. Defendant has not overcome the

presumption of sound strategy. Further, whether Sako was leaving or approaching the barbershop was a minor point. Defendant has also failed to show that there is a reasonable probability that impeachment on this minor point would have affected the outcome.

D. FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT

Defendant also argues that defense counsel was ineffective for failing to object to the unpreserved matters discussed in section IV of this opinion. We concluded in section IV that defendant's allegations of prosecutorial misconduct are without merit. An attorney is not ineffective for failing to raise a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

E. IMPEACHMENT WITNESSES

Defendant argues that defense counsel was ineffective for failing to call witnesses to impeach Sako's credibility. We disagree.

Defendant's proposed witnesses had no personal information or knowledge concerning the charged crimes. With respect to impeachment evidence, MRE 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, *may not be proved by extrinsic evidence*. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . . [Emphasis added.]

Thus, to the extent the proposed witnesses sought to offer extrinsic impeachment evidence, their testimony was not admissible. See *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981). Furthermore, defense counsel explained that he did not call defendant's brothers in an attempt to impeach Sako's testimony because he felt that doing so was unnecessary, given that counsel felt that he had thoroughly impeached Sako through other means, and because he believed that there was a danger that their testimony might be unfavorable to defendant. Defendant has failed to overcome the presumption of sound strategy. The trial court also found that the proposed witnesses' testimony was not relevant to defendant's character for peacefulness, and had no bearing on the facts of this case. This finding is not clearly erroneous. For these reasons, defendant cannot succeed on this claim of ineffective assistance of counsel.

F. IMPEACHMENT INSTRUCTION

Defendant argues that defense counsel was ineffective for failing to request CJI2d 4.5(1), governing the use of prior inconsistent statements, which would have advised the jury that it could consider Sako's prior inconsistent statements to determine his credibility. As previously indicated in section III(B), *supra*, the trial court gave a general witness credibility instruction, which was sufficient to guide the jury in evaluating Sako's credibility and protect defendant's substantial rights. Further, because the primary purpose of CJI2d 4.5(1) is to protect against the jury improperly considering a witness's prior inconsistent statement for its truth, and defendant does not contend that there was any danger that the jury might improperly consider a prior inconsistent statement for substantive purposes, defendant has failed to show that he was

prejudiced by the failure to give CJI2d 4.5(1). Thus, this ineffective assistance of counsel claim cannot succeed.

VII. NEWLY DISCOVERED EVIDENCE

Defendant claims that the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence. We disagree.

A trial court's decision on a motion for a new trial is reviewed for abuse of discretion. *Lemmon*, 456 Mich at 641. On appeal from a trial court's denial of a motion for a new trial based on newly discovered evidence, the trial court's findings of fact are reviewed for clear error and its ruling on the motion is reviewed for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). A finding is clearly erroneous "if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *Hermiz*, 235 Mich App at 255. Due regard is given to the trial court's opportunity to evaluate the credibility of witnesses. MCR 2.613(C).

To be entitled to a new trial on the basis of newly discovered evidence, a defendant must show (1) that the evidence, not merely its materiality, was newly discovered, (2) that the new evidence is not cumulative, (3) that the defendant could not have, by the use of reasonable diligence, discovered and produced the evidence at trial, and (4) that the new evidence would make a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). In determining whether newly discovered evidence warrants a new trial, a trial court may exercise its discretion and evaluate the credibility of the evidence. *Id*.

Evidence that testimony introduced at trial was perjured can be grounds for a new trial. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). However, recantation testimony is traditionally regarded as suspect and untrustworthy. *People v Canter*, 197 Mich App 550, 559-560; 496 NW2d 336 (1992).

At the evidentiary hearing, the brother of defendant's fiancée testified that a friend telephoned Sako, in his presence, and put the call on speaker phone. The witness heard Sako state that if defendant's family paid him $20,000, he would go to court and "admit that I lied about everything." Sako also stated that he had paid Markus $2,000 to falsely tell the police that he had seen the incident. This evidence is newly discovered and could not have been presented at trial because the statements were made after defendant's conviction. However, the trial court evaluated the evidence and determined that, if true, it merely established that Sako offered to change his testimony for money, not that he admitted that the assault did not occur as he testified. We are not left with a definite and firm conviction that the trial court erred in finding that Sako did not admit that he perjured himself and, therefore, conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial on the basis of newly discovered evidence.

VIII. CUMULATIVE ERROR

Defendant argues that even if a single error does not require reversal, the cumulative effect of multiple errors deprived him of a fair trial. We disagree.

"Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of errors may add up to error requiring reversal" if the defendant "was denied his right to a fair trial." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998), overruled on other grounds by *People v Miller*, 482 Mich 540, 561; 759 NW2d 850 (2008). The only error that occurred in this case was the erroneous admission of the Sako's medical records, which was harmless. Because no other errors occurred, there can be no improper cumulative effect.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad