STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2010
v	No. 290545 Wayne Circuit Court
ROOSEVELT LEWANN RUPERT, Defendant-Appellant.	LC No. 08-011660

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison without parole for the murder conviction and two years in prison for the felony-firearm conviction. We affirm.

I

This case arose out of the May 31, 2008, shooting death of John Young. The shooting took place in front of a house located at 11521 Whitehorn Street in Romulus, Michigan. After receiving a dispatch at 10:38 p.m., Sergeant Derran Shelby arrived at the scene and found Young slumped in a lawn chair on the driveway. Young's right temple was wounded, and he appeared deceased. A medical examiner later determined that Young died from a single, contact gunshot wound to the right eyebrow. The bullet was recovered and determined to be medium caliber, either a .38, .357, 9 mm, 10 mm, or .40. No weapon was recovered.

After discovering Young's body, Sergeant Shelby attempted to ascertain what had happened. He spoke to Greenberry Griffin, who appeared to be in a state of disbelief. Griffin told the sergeant that his nephew, defendant, shot Young.[1] Detective Joshua Monte also interviewed Griffin at the scene of the shooting. Griffin said the shooter was Roosevelt Holiday. The detective testified that from "prior contacts with, um, Roosevelt at the Romulus Police Department, we also know him as Roosevelt Rupert" [defendant]. Out of six photographs, Griffin identified defendant as the shooter.

[1] Griffin testified that defendant is actually his second cousin.

Griffin testified that his mother, defendant's great aunt, lived at 11521 Whitehorn Street, and that he lived in the house next door. Griffin had known Young for approximately ten years, had a brotherly relationship with him, and saw him four or five times a week. Young had loaned him approximately $1000 to prevent Griffin's mother's house from being foreclosed. On the day of the shooting, Young came to see him twice. The first time, Griffin paid him $300. The second time, Griffin and Young sat down in lawn chairs on the driveway of Griffin's mother's house.

While they were sitting on the driveway, defendant drove up and parked a white Taurus across the street. Roosevelt Holiday, defendant's father and a paraplegic, was in the car and remained there. Defendant exited the car, approached the two men, and asked about his great aunt. When Griffin said that she was inside the house cooking, defendant went inside and came back out sometime later with a plate of food. Griffin believed that defendant gave the plate to his father. A few minutes later, defendant approached the two men again, holding a marijuana joint or blunt. Defendant asked Young if he wanted to "hit this joint." Young said "no," explaining that he did not drink or smoke because he was diabetic. Defendant said "okay" and then shot Young in the head. Griffin said, "Why?" Defendant then walked away, without saying anything. Griffin subsequently asked a neighbor to telephone the police about the shooting.

At trial, Griffin admitted purchasing crack cocaine from Young. He guessed that Young also sold marijuana. Griffin testified he last used crack cocaine approximately two weeks before the shooting. He and Young had some "fallouts" because Young wanted Griffin to stop using, although Young never cut off his supply. Young had also been upset with Griffin in the past because Griffin owed him money. Griffin initially denied that Young ever threatened him, but eventually admitted that Young always said he was going to beat Griffin up.

Griffin's mother, Dicey Seaberry, testified that on the day of the shooting, she gave defendant a plate of food, which he took outside to his father. Defendant returned to the house and he ate. After eating, defendant left the house. "About five or six seconds or maybe minutes" later, Seaberry heard a sound like a balloon bursting or a firecracker. Five to ten minutes later, Griffin came into the house and said that defendant shot Young.

Maurice Wilkins had known defendant for approximately 20 years. On the day of the shooting, Wilkins went to the home of defendant's uncle, Terry Holiday, who lived on Whitehorn Street across from Seaberry. Terry and several other people were seated in a car on Terry's driveway, facing the street. Wilkins stood next to the car. At some point, he heard a single gunshot from across the street. He then saw defendant walk across the street toward them, get into a white car, and drive away. Everyone scattered. The next day, Wilkins identified defendant as the person he saw crossing the street out of six photographs shown to him by police.

In the early morning hours of June 1, 2008, police searched an apartment in Belleville, Michigan. Defendant's father was in the apartment. He appeared highly medicated and did not provide coherent answers to any of the officers' questions. In one of the bedrooms, the police found mail addressed to defendant, male clothing, and bullets of numerous calibers. No weapons were found. Several officers testified that in August 2003, they participated in a search of the house at 11521 Whitehorn Street. At the time, it was the residence of defendant's father and his father's brother Darrell Holiday. The police found marijuana plants in the backyard and several

guns. Defendant's father gave the police a .38 revolver, which was returned to him in September 2003. The revolver had not been reported stolen or lost since that time.

At approximately 3:00 a.m. on June 1, 2008, defendant came to the police station with his mother and presented himself to the police. He was taken into custody and interviewed. Griffin had informed the police that defendant was wearing a white t-shirt and beige baggy "short pants" at the time of the shooting. A photograph taken at a gas station at 10:10 p.m. on May 31 depicted defendant wearing a white t-shirt and baggy blue jeans. When defendant arrived at the police station, he was not wearing clothing matching either description. Defendant denied changing clothes, denied being at his great aunt's house on May 31, and stated that "he didn't realize anything had happened over there."

At trial, three witnesses testified on defendant's behalf. Defendant's mother, Pamela Stanton, testified that in 2003, defendant lived with her, not his father. Defendant assisted in caring for his father. She volunteered that defendant was in jail in 2004. Anthony Tucker testified that he is a cousin of both Griffin and defendant, and that he had seen 9 mm bullets in Griffin's house on different occasions. Young's daughter, Ayisha Brandon, testified that Griffin called her on Young's cell phone at approximately 3:45 a.m. on June 1. Griffin told her that "Holiday-slash-Rupert" killed Young. Later, Griffin told her that Trey Holiday's son, who she identified as defendant, killed Young. Brandon further testified that the day before the shooting, she saw Young give a pistol to Griffin. Young told her that he gave the pistol to Griffin because he did not want to drive with it in his car. Griffin had registered guns for Young in the past and owed him a lot of money. Brandon testified that she did not know how much money Griffin owed Young, but she told the police Griffin paid Young approximately $900 a month.

II

On appeal, defendant argues that there were numerous instances of prosecutorial misconduct at trial and that his trial counsel was ineffective for failing to object to some of the alleged misconduct. We agree with defendant that some of prosecutor Christine Kowal's questions and statements constituted misconduct. But, because defendant has not established that it is more probable than not that the errors were outcome determinative, his claims of prosecutorial misconduct warranting reversal and ineffective assistance of counsel must fail.

To preserve a claim of prosecutorial misconduct, there must be a contemporaneous objection and request for a curative instruction. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). In this case, defense counsel objected to only some of the prosecutor's alleged misconduct. To the extent that a preserved claim of prosecutorial misconduct is a constitutional issue, it is reviewed de novo, but a trial court's factual findings are reviewed for clear error. *Id*. "[I]n order for prosecutorial misconduct to constitute constitutional error, the misconduct must have so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law." *People v Blackmon*, 280 Mich App 253, 269; 761 NW2d 172 (2008) (emphasis omitted). Nonconstitutional error, even if preserved, is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Id*. at 270; *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or "'seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence.'" *Id*. at 448-449, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where a curative instruction could have alleviated any prejudicial effect reversal is not warranted. *Id*. at 449; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The remarks must be reviewed as a whole and in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Brown*, 279 Mich App at 135. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case, and need not state the inferences in the blandest possible terms. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Defendant first argues that the prosecutor committed misconduct by inserting the word "minute" when the parties stipulated to the findings of the forensic scientist. The prosecutor placed the stipulation on the record, stating that the scientist examined five swabs taken for DNA analysis from the Taurus allegedly driven by defendant, "and it is her [the scientist's] opinion that of the five swabs that were taken of those minute samples, that none again were blood." When the trial court asked if that was a fair and accurate stipulation, defense counsel asked that the word "minute" be deleted because the scientist's report did not refer to the samples as minute and the prosecutor's use of the word could confuse the jury. The jury could conclude that if the samples had been larger, the scientist would have found blood. The court then stated: "Bottom line is the samples that were submitted were not blood on . . . the five swabs, is that a fair and accurate stipulation?" Defense counsel agreed that it was fair and accurate. The prosecutor then offered to prepare a clean copy of the stipulation. On appeal, defendant argues that the prosecutor's insertion of the word "minute" may have been inadvertent, but "could also have been deliberate to achieve just the effect that worried defense counsel." There is no indication in the record that the prosecutor intended to confuse or mislead the jury by referring to the samples as minute. But even if it was intentional, defense counsel immediately objected and the trial court corrected any error by restating the stipulation for the jury. Considering this correction, defendant cannot establish that the jury was actually confused or mislead. *Blackmon*, 280 Mich App at 270.

Next, defendant argues that the prosecutor improperly elicited testimony from Griffin about the prior occasions when he identified defendant as the shooter. Specifically, the prosecutor questioned Griffin about his statement to police on the morning after the shooting, his testimony at an investigative subpoena hearing, and his testimony at the preliminary examination. Defense counsel did not object to the questioning. Defendant now argues that the questioning was improper because under MRE 801(d)(1)(B), prior consistent statements are only admissible nonhearsay when they are "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," and the prosecutor only asked

the questions to bolster Griffin's credibility. But as the prosecution points out on appeal, under MRE 801(d)(1)(C), "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." See *People v Malone*, 445 Mich 369, 377; 518 NW2d 418 (1994) ("As long as the statement is one of identification, Rule 801(d)(1)(C) permits the substantive use of any prior statement of identification by a witness as nonhearsay, provided the witness is available for cross-examination."). Here, Griffin testified at trial, and was subject to cross-examination, concerning his prior statements identifying defendant as the person he saw shoot Young. The testimony was admissible as prior statements of identification under MRE 801(d)(1)(C), and the prosecutor committed no misconduct.

Defendant argues that Detective Monte's testimony that defendant had "prior contacts" with Romulus police officers was improper and attributable to the prosecution. The detective testified that when he interviewed Griffin at the scene of the shooting, Griffin identified the shooter as "Roosevelt Holiday." The prosecutor then asked: "What process or what procedure do you use in order to facilitate the name that Mr. Griffin is giving you with an actual face, with a legal identity?" The detective responded: "Through prior contacts with, um, Roosevelt at the Romulus Police Department, we also know him as Roosevelt Rupert. To clarify who we were specifically talking about, I prepared what's called a photo line-up which contains a picture of Roosevelt." At that point, defense counsel objected, and the trial court instructed the jury to "[d]isregard any testimony regarding prior contacts." The basis of defense counsel's objection is not included in the record, and defendant does not explain on appeal why the testimony was improper. Arguably, the testimony was improper because it may have suggested to the jury that defendant committed prior bad acts. See MRE 404(b). Even so, in general, unresponsive answers to a prosecutor's questions by a prosecution witness are not attributable as misconduct to the prosecutor unless the prosecutor knew, encouraged, or conspired with the witness to provide the unresponsive testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, there is no evidence that the prosecutor deliberately elicited the detective's "prior contacts" testimony. While police witnesses have a special obligation not to venture into forbidden areas when testifying, *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983), defendant provides no support for his assertion that Detective Monte's testimony should be attributed to the prosecution. Defendant cites *People v Page*, 41 Mich App 99, 102; 199 NW2d 669 (1972), which stands for the proposition that unresponsive, improper testimony by a police officer may warrant a mistrial, not that such testimony is attributable to the prosecution. Moreover, defendant has not established that the testimony was outcome determinative. See *Blackmon*, 280 Mich App at 270. Detective Monte made only one brief reference to defendant's prior contacts with the police and the trial court immediately instructed the jury to disregard the reference. Jurors are presumed to follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). See also *Ackerman*, 257 Mich App at 449; *Watson*, 245 Mich App at 586.

Defendant next argues that the prosecutor committed misconduct by eliciting testimony from Stanton about defendant receiving payment for caring for his father and defendant's prior conviction. We agree. During direct examination, defense counsel questioned Stanton about defendant's living arrangements. Stanton testified that in 2003, defendant lived with her on Elm Court in Romulus, and that he continued to live with her until "he was in jail in 04." Defense counsel then asked about defendant's contact with his father. Stanton testified that defendant

was his father's "home care provider," but did not live with his father. Immediately thereafter, on cross-examination, the following exchange occurred:

> *Q [Prosecutor]*. . . . just so we're clear on the last point, the State of Michigan pays your son to take care of your father?
>
> *A [Stanton]*. At the time he did—no, he pays him to take care of his father. He's his home care provider.
>
> *Q*. So you're getting state aid benefits for the son to take care of the father? We as taxpayers are paying for the son to take care of the father?
>
> *Defense Counsel*. Objection, Your Honor. First of all, that assumes facts not in evidence. I don't recall any testimony as to who paid who, and even if it is—
>
> *The Court*. She can ask. Go ahead.
>
> *Defense Counsel*. But I haven't finished my second one, because who pays him is not relevant to why we're here, Judge.
>
> *The Court*. She can ask to what his employment or source of income is. Go ahead, the defendant's source of income.
>
> *Q [Prosecutor]*. You used the specific term caregiver. That implies that your son—that your son, Roosevelt Rupert, is being paid by the state to take care of Roosevelt Holiday Sr., correct?
>
> *Defense Counsel*. Objection, that—
>
> *The Court.* Overruled.
>
> *A [Stanton]*. He's his home care provider.
>
> *Q [Prosecutor]*. Okay. Which home care provider means he's—he has a classification of being paid by the state to take—right, because of your husband's disability?
>
> *A.* He's not my husband. That's their kids' father. He's taking care of him because he's paralyzed . . . .
>
> *Q*. Right. And he's a home caregiver?
>
> *A.* Right.
>
> *Q*. And he's being paid?
>
> *A.* Not right now; my daughter is.

Q. So your daughter's being paid by the state?

A. Right now she is.

Q. And prior to that your son, Roosevelt Rupert, was being paid by the state as a home caregiver?

A. In 03?

Q. Yeah.

A. I suppose so because he had quite a few home providers.

Q. Okay. So in other words, so you had your own son taking care of his own father not out of gratitude but rather to get paid by the State of Michigan?

A. Not for me.

Defense Counsel. Objection, Your Honor.

Q [Prosecutor]. That is what your son was doing nonetheless?

A [Stanton]. Can you—I don't understand what you're saying, ma'am. He's his home care provider. That means he take care of him as far as he come over to his home and provide him for his care.

Q. Okay.

A. That's all he was doing. He wasn't living with him.

Q. So he did that in 03, right?

A. (Nods in the affirmative).

The Court. Is that yes?

A [Stanton]. Yes.

Q [Prosecutor]. And he did that in 04?

A. He was locked up in 04.

Q. For what?

A. For home invasion.

Q. What is that?

A. Um, home invasion.

Q. What is that?

A. Breaking in someone's home I suppose.

Q. And did he go to court on that?

A. Yes, he spent almost a year-and-a-half in prison or in jail.

Q. Okay. So during that time was he still getting checks from the state?

A. No, he was not.

Q. Okay. So back in 03 he's getting paid by the state to what, go take care of his father part-time?

A. Right.

The prosecutor's questions pertaining to defendant's residence in 2003, the amount of time he spent at his father's residence in 2003, and the reason for his presence at his father's residence were relevant to the case. Several officers testified that in August 2003, they participated in a search of the house at 11521 Whitehorn Street, where defendant's father resided at the time. The officers found marijuana plants in the backyard and several guns, and defendant's father turned over a .38 revolver. In response to defense counsel's questions, Stanton testified that in 2003, defendant lived with her, not with his father, but that defendant worked as his father's home care provider. Considering that the prosecutor was attempting to establish, among other things, that defendant had access to his father's gun, her follow-up questions about defendant caring for his father at his father's home in 2003 were relevant.

That said, the prosecutor's repeated questions about defendant being paid by the state to care for his father were completely irrelevant and constituted misconduct. Although the trial court stated otherwise in overruling defense counsel's objections, there is no apparent proper reason for introducing such evidence. It appears that the prosecutor repeatedly asked about defendant's receipt of payment at least in part because Stanton failed to answer the questions directly. Nonetheless, the prosecutor's questions were, at best, irrelevant and, at worst, designed to improperly prejudice the jury against defendant. At least two of the prosecutor's questions suggest the latter. The prosecutor first asked: "So you're getting state aid benefits for the son to take care of the father? We as taxpayers are paying for the son to take care of the father?" She later asked: "So in other words, so you had your own son taking care of his own father not out of gratitude but rather to get paid by the State of Michigan?" Such questions certainly put defendant in a negative light and were improper.

In regard to the prosecutor's questions regarding defendant's prior conviction, it appears that Stanton's initial statement that defendant "was locked up in 04" was unsolicited and, therefore, should not be attributed to the prosecution. See *Hackney*, 183 Mich App at 531. But the prosecutor subsequently asked several follow-up questions regarding defendant's prior conviction for home invasion. Defense counsel did not object to the questions. On appeal, defendant asserts that the questions were intended to elicit improper, bad-acts evidence. See

MRE 404(b). Again, these questions were irrelevant and appear to be designed to improperly prejudice the jury against defendant.

For the reasons indicated, we agree with defendant that the prosecutor committed misconduct by eliciting testimony from Stanton about defendant receiving payment for caring for his father and defendant's prior conviction. The prosecutor's questions were improper and we do not condone her conduct in any way. But, in this particular case, defendant cannot establish that it is more probable than not that the errors were outcome determinative. See *Blackmon*, 280 Mich App at 270; *Ackerman*, 257 Mich App at 448-449. Although the testimony was irrelevant and put defendant in a negative light, the properly presented evidence establishing defendant's guilt was substantial. Griffin testified that he observed defendant shoot Young in the head at close range. Griffin's testimony about the details of the shooting corresponded with the medical examiner's findings regarding Young's wound and cause of death. Further, at least three witnesses, Sergeant Shelby, Detective Monte, and Seaberry, testified that Griffin told them defendant shot Young almost immediately after the shooting. Brandon testified that Griffin telephoned her and identified defendant as the shooter later that night. Griffin consistently repeated the same story about the shooting. Although Griffin was the only eye-witness to the shooting, Seaberry testified that defendant left her house minutes before the shooting, and Wilkins testified that immediately after the shooting, he saw defendant walk away from the driveway where the shooting occurred and then drive away. Defendant presented himself to the police a few hours after the shooting, and although he denied being at the scene of the shooting or changing his clothes, several witnesses confirmed that he had been at the scene and photograph evidence revealed that the clothes he was wearing close to the time of the shooting were different than those he wore to the police station. Given the evidence presented at trial proving defendant's guilt, he cannot establish that but for the prosecutor's misconduct, the results of the trial would have been different.

Next, defendant argues that the prosecutor committed misconduct by questioning Tucker about the smell of marijuana outside the house at 11521 Whitehorn Street. During direct examination, Tucker testified that he saw 9 mm bullets in Griffin's house on different occasions. During cross-examination, the prosecutor asked Tucker how frequently he visited Griffin's house and the house at 11521 Whitehorn Street, which she referred to as the "Holiday house." Tucker testified that he saw a gun, but no ammunition, at that house. The following exchange subsequently occurred:

> *Q [Prosecutor]*. Okay. And, sir, and you're telling us that you hung out—you hung out with Mr. Griffin notwithstanding a 40-year age difference?
>
> *A [Tucker]*. I didn't hang out with him. I was to his house a couple of times.
>
> *Q*. And just as you've been to the Holiday house where they grow all the marijuana in the back?
>
> *A*. I have no idea.
>
> *Q*. Didn't you tell Sergeant Czernik that you used to play horseshoes at the Holiday house?

A. I have no idea.

Q. I told him they played horseshoes at the time. I wasn't–

Defense Counsel. Objection here.

The Court. Hold on.

Defense Counsel. [The prosecutor] is now attempting to link something to 2003. I don't think she established whether he was at that house five years ago, and in this statement that he gave the police has nothing to do with a place or time.

The Court. That's what she's asking about. Overruled. Proceed.

Q [Prosecutor]. When were you at the Holiday house?

A [Tucker]. Um–

Q. How often do you go there?

A. The last time I've been there?

Q. Yeah.

A. Probably couple weeks ago.

* * *

Q. Okay. And how often have you been to the Holiday house over the 21 years that you've been on earth, sir?

A. All my life.

Q. Okay. So then you were there in 03 when they were growing all the marijuana plants in the backyard?

A. Um, no, I was not.

Q. I thought you said you were there all your life?

A. I wasn't there when they were growing marijuana. I have no knowledge of no marijuana being grown.

Q. Even though you could smell it from the sidewalk?

Defense Counsel. Objection, Your Honor. That calls for him to speculate.

The Court. Sustained.

Prosecutor. I have nothing further.

On appeal, defendant takes issue with the prosecutor's final question regarding the smell of marijuana outside the 11521 Whitehorn house, asserting that there is nothing about the smell of marijuana in the record and that the question was irrelevant. Based on the earlier exchange between defense counsel and the trial court, it is apparent that the prosecutor was attempting to link Tucker's observations at the house with evidence seized during the 2003 search. Although it is unclear on what basis the prosecutor asked about the smell of marijuana in particular, defense counsel immediately objected, the objection was sustained, and the prosecutor asked nothing further. Moreover, numerous witnesses had already testified that there were marijuana plants growing outside the house at 11521 Whitehorn Street in 2003. Therefore, defendant cannot establish the prosecutor's isolated reference to the smell of marijuana outside the house prejudiced the jury against him. *Blackmon*, 280 Mich App at 270.

Defendant also argues that the prosecutor made numerous improper statements during closing arguments. Defense counsel objected only twice. First, defendant argues on appeal that the prosecutor improperly stated that "you rarely see a contact wound" and that defendant decided to "blow [Young's] head off." Defendant does not explain why these statements were improper. In making the first statement, the prosecutor was attempting to distinguish contact wounds from other more common gunshot wounds, and to prove that a contact wound to the head is evidence of premeditated, intentional murder. Further, the medical examiner testified that Young died from a single, contact gunshot wound to the right eyebrow. Thus, while the prosecutor's statement that defendant decided to blow Young's head off certainly was not "bland," it was a reasonable inference arising from the evidence and her theory of the case. *Bahoda*, 448 Mich at 282; *Dobek*, 274 Mich App at 66.

Later, the prosecutor twice stated that Young did not know why he was killed. Again, defendant does not explain why making those statements constituted misconduct. The prosecutor made the statements while explaining to the jury that there was no apparent motive for the murder. She indicated that no one, other than defendant, knew why Young was killed, including Young himself. The prosecutor made a reasonable inference from the evidence and the statements were not improper. *Bahoda*, 448 Mich at 282; *Dobek*, 274 Mich App at 66. During her rebuttal statement, the prosecutor again addressed the apparent absence of motive in this case, responding to defense counsel's closing argument regarding motive. She briefly referred to a recent case in which two kids beheaded their friend without any apparent motive. Defense counsel objected, and the trial court instructed the prosecutor to limit her argument to the facts of the instant case. We agree with defendant that by referencing an unrelated, gruesome murder case, the prosecutor risked inflaming the jury. We note, however, that the prosecutor focused her remarks, both before and after that particular reference, on the issue of motive, defense counsel immediately objected, and the prosecutor was instructed not to deviate from the facts of the case at issue, which she did not. Therefore, defendant cannot establish that the prosecutor's brief reference constituted outcome-determinative error. See *Blackmon*, 280 Mich App at 270; *Brownridge*, 237 Mich App at 216.

Defendant argues that later in her rebuttal argument, the prosecutor attempted to shift the burden of proof to the defense "by suggesting to the jury that the defense should produce the gun and ask the prosecution to test it." At trial, the prosecution's theory of the case was that defendant shot Young with his father's gun—the same gun that the police confiscated in 2003

and later returned to defendant's father—and that defendant had access to it at the time of the shooting. The defense theory was that Griffin had Young's gun at the time of the shooting, that Tucker saw 9 mm bullets in Griffin's house, and therefore, that Griffin shot Young. During rebuttal, the prosecutor stated: "[W]hy not produce the gun and say, 'Hey, Prosecutor, here's the gun, match it up, see–do a forensic analysis on it. Here's the gun, here's the bullet that came out of Mr. Young, we'll show you it wasn't the gun.' But they don't want to do that." The prosecution argues on appeal that the prosecutor's statements did not improperly shift the burden of proof because, considered in context, her statements were made in response to the defense theory, and defense counsel's statements during his closing argument, that defendant's access to his father's gun was irrelevant and that Griffin shot Young using a different gun.

> "Where a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." [*People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999), quoting *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).]

While there may be some merit to the argument that the prosecutor's statements were simply an attack on defendant's alternate theory of the case, her statements came very close to shifting the burden of proof. A prosecutor may not comment on a defendant's failure to present evidence, *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), and the prosecutor's statements in this case may have suggested to the jury that defendant had a duty to produce his father's gun—the gun she claimed was the murder weapon—for testing, and that he failed to meet that burden. To the extent the prosecutor's statements could have been interpreted in this manner, they were improper. We note, however, that the prosecutor stated during closing arguments, as did the trial court in its final instructions to the jury, that the prosecution bears the burden of proving each element of the crime beyond a reasonable doubt. Again, jurors are presumed to follow the court's instructions. *Graves*, 458 Mich at 486. See also *Ackerman*, 257 Mich App at 449; *Watson*, 245 Mich App at 586.

Finally, defendant argues that during her rebuttal, the "prosecutor belittled and denigrated the jury system, the role of the defense, and the presumption of innocence by utilizing a hypothetical, in which the prosecutor takes and [sic] gun and shoots the court reporter in the presence of the jury." At the conclusion of her rebuttal argument, the prosecutor stated:

> Now, presumption of innocence, and this is my final point, yes, as the defendant's seated here in court, he's presumed innocent and you must carry that assumption. But once, ladies and gentlemen, the evidence is in and you are instructed on the law, that cloak comes off, ladies and gentlemen. It is no different that if I stood here right now, grabbed Sergeant Monte's handgun and I guess I'll carry over my example from voir dire–
>
> *Defense Counsel*. Objection.
>
> *Prosecutor*. –and shot and killed–

Defense Counsel. The cloak doesn't come off until they bring that verdict off; just a little technicality.

The Court. And we need to—you're overtime.

Prosecutor. This is my—60 seconds, Your Honor.

> It's as if I came in here and I shot and killed Ms. Cavanagh, like we talked about in voir dire, grabbed her gun, grabbed his gun, shot and killed her dead in front of the 14 of you. Guess what, ladies and gentlemen? I'd be arrested, I'd be sitting at my trial six or eight months from now, I'd be sitting here with my attorney. All 14 of you as well as everyone in this courtroom, including Judge Ryan, would be in that witness room there because you would be witnesses to this crime. And guess what, ladies and gentlemen? While I'm sitting here, there would be 14–14 new jurors in the box, and notwithstanding that you saw me do what I did, my attorney would be saying, 'Jurors, Ms. Kowal is presumed innocent."

During his closing argument, defense counsel emphasized that defendant was presumed innocent. In response, the prosecutor gave the jury a hypothetical regarding the presumption of innocence, explaining that even if there is eye-witness testimony establishing that a crime occurred, the accused must be presumed innocent in every case until the jury determines culpability by weighing the evidence during deliberations. The prosecutor certainly selected a dramatic hypothetical to describe the presumption of innocence and risked inflaming the jury by describing a scenario where a murder occurred in the courtroom in front of the jurors. While it is often extremely difficult to detect from a transcript whether a speaker's tone is sarcastic, we question the prosecutor's true motive behind delivering such a hypothetical, which was repugnant. Arguably, however, her statements were made in response to defense counsel's closing argument and for the purpose of explaining the presumption of innocence; as such, they were not improper in principal, although we do not condone future use of such a hypothetical.[2]

For the reasons indicated, we agree with defendant that some of the prosecutor's questions and statements at trial were improper. We reiterate that the prosecutor committed misconduct by eliciting testimony from Stanton about defendant receiving payment for caring for his father and defendant's prior conviction. The prosecutor's questions were completely irrelevant and appear designed to improperly prejudice the jury against defendant. Further, there were several other occasions during the trial when the prosecutor risked inflaming the jury, and where her questions and comments arguably constituted misconduct. Such conduct is unacceptable and, in some cases, might warrant reversal.[3] Nonetheless, in this particular case,

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[2] Defendant also asserts in his brief on appeal that this is not the first case in which this particular prosecutor has been accused of improper conduct. The cases referenced by defendant in that regard are irrelevant here and we will not consider them in reaching a decision.

[3] As we have noted, the assistant prosecutor's conduct in this case can only be kindly categorized as overzealous. The misconduct did not result in a reversal in this case, but we strongly caution the prosecutor that such overzealousness in the future may result in a reversal and a miscarriage

(continued…)

the properly admitted evidence establishing defendant's guilt was substantial, and the trial court gave the jury numerous curative instructions. Therefore, defendant cannot establish that the instances of misconduct in this case, even when considered together, were outcome determinative. See *Blackmon*, 280 Mich App at 270; *Ackerman*, 257 Mich App at 448-449. Therefore, despite the prosecutor's misconduct, reversal is not warranted.

Alternatively, defendant argues that his trial counsel was ineffective for failing to object to some of the prosecutor's alleged misconduct. A claim of ineffective assistance of counsel should be raised by a motion for new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *Rodriguez*, 251 Mich App at 38. Because defendant failed to raise this issue in a motion for a new trial or a *Ginther* hearing, our review of the issue is limited to the existing record. *Id*.

To establish ineffective assistance of counsel, defendant must show that his trial counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *Id*.

To the extent the prosecutor's complained-of conduct was proper, it was unnecessary for defense counsel to object. Counsel cannot be counsel is not ineffective for failing to make futile objections. See *Thomas*, 260 Mich App at 457. Further, "this Court will not second-guess counsel regarding matters of trial strategy." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defense counsel may have elected not to object to some of the prosecutor's questions and comments, such as the prosecutor's questions regarding defendant's prior conviction and some of her statements during closing arguments, to avoid drawing further attention to them. Moreover, for the reasons indicated, defendant cannot establish that the outcome of the proceedings would have been different had his trial counsel objected to all of the prosecutor's alleged misconduct. See *Henry*, 239 Mich App at 146. Therefore, defendant's claim of ineffective assistance of counsel must fail.

III

Defendant further argues on appeal that the trial court abused its discretion in restricting defense counsel's redirect examination of Tucker. We disagree.

During direct examination, Tucker admitted that he was interviewed by Sergeant Philip Czernik after the shooting, and that it would have been important to inform the sergeant about observing bullets at Griffin's house, but he did not do so because the sergeant did not specifically ask him about ammunition. During redirect examination, Tucker testified that after the shooting, he gave a statement to the police. Before questioning Tucker any further about the statement, defense counsel approached the bench. Defense counsel requested to admit the portion of

(…continued)

of justice.

Tucker's statement when he indicated that Griffin "approached him on the street and told [him], 'I have a problem with [Young] because I owe him $1500.00, he keeps beating me up.'" Defense counsel argued that the evidence was admissible under the rule of completeness because the prosecutor had already questioned Tucker about his statement to the police during cross-examination. The trial court held that the rule of completeness was inapplicable because defense counsel sought to admit a portion of Tucker's statement that was unrelated to the subject matter previously introduced by the prosecutor. The court further held that the evidence was inadmissible for impeachment purposes because Griffin had already admitted that Young threatened him.

Defendant argues that the trial court abused its discretion in precluding defense counsel from questioning Tucker about his statement to the police; specifically, the portion of the statement when he quotes Griffin as saying that Young kept beating him up. We review a trial court's decision to exclude evidence for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

On appeal, defendant does not assert that the portion of the statement at issue was admissible under the rule of completeness. The rule of completeness, MRE 106, provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." "MRE 106 does not automatically permit an adverse party to introduce into evidence the rest of a document once the other party mentions a portion of it. Rather, MRE 106 logically limits the supplemental evidence to evidence that 'ought in fairness to be considered contemporaneously with it.'" *People v Herndon*, 246 Mich App 371, 412 n 85; 633 NW2d 376 (2001). As the trial court indicated, the portion of Tucker's statement that defense counsel sought to admit was wholly unrelated to the limited subject referenced by the prosecutor during cross-examination. The prosecutor had only referenced the absence of information in the statement about Tucker observing bullets in Griffin's house. Accordingly, the trial court properly determined that the rule of completeness did not apply.

Defendant now asserts that the portion of the statement at issue was admissible to impeach Griffin. According to defendant in his brief on appeal, "Griffin eventually and reluctantly did admit to being threatened, but he tended to minimize [Young's] threats of bodily harm and never gave any testimony that Young actually beat him up," as Tucker's statement indicates, and "Tucker could have impeached Griffin on that highly significant issue." Under MRE 613(b), the rule cited by defendant, "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Defendant has not demonstrated that Griffin's trial testimony was inconsistent with the statement Tucker reported him making. During cross-examination, defense counsel asked Griffin if Young threatened him with physical harm, which Griffin reluctantly admitted. Griffin was never asked whether Young actually physically harmed him. Therefore, because defense counsel failed to lay a foundation for impeachment, MRE 613 is inapplicable as well.

Defendant devotes a large portion of his brief on appeal to arguing that he was denied his right to confront the witnesses against him and to present a defense. For the reasons indicted, the trial court did not abuse its discretion in restricting defense counsel's redirect examination of Tucker. Moreover, defendant was permitted to present evidence that Griffin bought cocaine from Young, always owed Young large sums of money, was repeatedly threatened by Young and had been scared of Young because of the threats, and had Young's gun at the time of the shooting. Defendant was not prevented from confronting the witnesses, presenting a defense, or denied his right to a fair trial.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering