

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAPOLEAN DERRON WATKINS,

Defendant-Appellant.

UNPUBLISHED

December 14, 2010

No. 294812

Wayne Circuit Court

LC No. 09-009044-FC

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of assault with intent to murder (AWIM), 750.83, carrying a concealed weapon (CCW), MCL 750.227, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 25 to 50 years for the AWIM conviction, 1 to 7 ½ years for the CCW conviction, and 1 to 7 ½ years for the felon-in-possession conviction. He was also sentenced to a mandatory two-year prison term for the felony-firearm conviction. Having found no errors requiring reversal of defendant's convictions or sentences, we affirm.

I

Defendant was arrested and charged following his alleged involvement in a non-fatal shooting at a Coney Island restaurant on Detroit's west side. The evidence established that, in the early morning hours of December 19, 2008, after an evening of socializing and drinking alcohol, defendant and two friends drove to a Coney Island restaurant at the intersection of Livernois Avenue and Tireman Street. While inside the restaurant, defendant attempted to speak to some female customers, but they ridiculed and rebuffed him. Instead, the female customers chose to speak to defendant's friend, victim Leonardrow Smith. Defendant became angry with Smith and produced a semi-automatic handgun that he had been carrying in his pocket or waistband. Smith testified that defendant began "playing with [the gun] behind [Smith's] head." Smith turned around and confronted defendant, knocking the firearm out of defendant's hand. Defendant's other friend then intervened and broke up the fight between defendant and Smith. At that point, defendant retrieved his gun and Smith believed that the disagreement had been resolved.

Smith picked up his food from the counter, turned, and began walking toward the front door of the restaurant. Defendant followed Smith. As Smith walked out the door of the Coney Island restaurant, defendant shot him once in the back of the head, just behind the right ear. Smith became dazed, stumbled, and fell. Smith then looked up and saw defendant leaving the restaurant. According to Smith, defendant “jumped in the car” and drove away. When police later arrived on the scene, one spent shell casing was recovered from the area of the restaurant’s front entrance.

Smith was transported to Henry Ford Hospital, where he gave a statement to Investigator Robert Lee of the Detroit Police Department. Smith did not specifically recall what he had told Lee at the hospital. However, according to Lee, Smith identified defendant as his assailant. Smith ultimately recovered from his injury.

Smith testified that defendant called him on the telephone approximately one month after the shooting. During the telephone conversation, defendant apparently threatened “to finish the job” and “let bullets fly” if he ever met Smith again.

After providing defendant with written and verbal information concerning his constitutional rights, Detroit Police Officers Terence Sims and Richard Firsdon conducted a video-recorded interview with defendant in March 2009. After waiving his *Miranda*¹ rights, defendant initially admitted that he had shot Smith at the Coney Island restaurant on December 19, 2008. Defendant also initially told the police that he would have killed Smith if he had had more than one bullet in his gun. At the end of the interview, however, defendant recanted, telling the police that he had not shot Smith and that he had not even been at the Coney Island restaurant in question.

At trial, Smith identified defendant as his assailant. The prosecution displayed footage taken from the surveillance cameras at the Coney Island restaurant. The surveillance camera footage showed two men arguing inside the Coney Island restaurant and one man later being shot in the back of the head as he attempted to exit the restaurant through the front door. The prosecution also played the video recording of defendant’s interview with the police. The recording, itself, was admitted into evidence as an exhibit over defense counsel’s objection.

After playing the video recording of defendant’s police interview, the prosecution questioned Officer Firsdon regarding some of the specific exchanges that he had with defendant during the interview. The sound quality of the video was poor, and the prosecution therefore asked Officer Firsdon to highlight and recap the more inculpatory admissions made by defendant during the interview. Firsdon responded to the prosecution’s questions by explaining or summarizing certain of his exchanges with defendant as the prosecution simultaneously showed the corresponding portions of the video recording.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant's primary defense at trial was that he had been in Las Vegas, Nevada, with his fiancée at the time of the shooting. Defendant admitted that he knew Smith from the neighborhood, but denied that he had shot Smith. Defendant testified that, during his interview with the police, he had "just played around most of the time" and had told the police whatever he "thought they wanted [to hear]." Defendant also presented the testimony of Akeem Holmes, who had allegedly spoken to Smith while Smith was in jail on charges stemming from an unrelated incident. According the Holmes, while in jail Smith told him that "he didn't know who shot him."

Following the close of proofs, the jury was instructed with regard to the elements of AWIM, as well the elements of two lesser offenses. The jury was also instructed with regard to the elements of CCW, felon-in-possession, and felony-firearm. The jury rejected the lesser charges and convicted defendant of AWIM. As noted previously, the jury also convicted defendant of CCW, felon-in-possession, and felony-firearm.

Prior to sentencing, the probation department prepared a presentence investigation report (PSIR), placing defendant in Level D-IV of the Class A felony grid. See MCL 777.62. However, at sentencing the circuit court rescored offense variable (OV) 6 from 25 points to 50 points, finding sufficient record evidence that defendant had acted with a premeditated intent to kill. MCL 777.36(1)(a). Thereafter the parties agreed that defendant fell within Level D-V of the Class A felony grid, calling for a minimum sentence of between 135 and 281 months. See MCL 777.21(3)(a); MCL 777.62.

Relying on *People v Castillo*, 230 Mich App 442, 448-449; 584 NW2d 606 (1998), the prosecution requested an upward departure from the sentencing guidelines, recommending a sentence of 30 to 50 years for the AWIM conviction. As possible substantial and compelling reasons for an upward departure, the prosecution noted the fact that defendant shot Smith from behind, the fact that Smith had no opportunity to defend himself, the "viciousness" and "boldness" of the attack, and the fact that defendant abandoned his one-time friend after the shooting, leaving him bleeding at the Coney Island restaurant. The circuit court agreed that there were substantial and compelling reasons for an upward departure in this case. Specifically, the court pointed to defendant's extensive history of anger-management issues, the fact that Smith had lacked an opportunity to defend himself because he was attacked from behind, the fact that defendant abandoned Smith following the assault, the fact that the gunshot to the back of Smith's head was "like an assassination [attempt]," and the fact that defendant called Smith on the telephone after the shooting and threatened to "finish the job." In the end, the court departed above the sentencing guidelines by 19 months,² sentencing defendant to 25 to 50 years in prison for the AWIM conviction.

² As explained earlier, following the circuit court's rescoring of OV 6, the sentencing guidelines called for a minimum sentence of between 135 and 281 months for defendant's AWIM conviction. See MCL 777.21(3)(a); MCL 777.62. Defendant ultimately received a minimum sentence of 25 years, or 300 months.

II

Defendant first argues that the circuit court denied him his constitutional rights to due process and a fair trial when it permitted the prosecution to elicit certain testimony from Officer Firsdon, in which Firsdon highlighted and paraphrased some of his exchanges with defendant during the police interview. We disagree.

Defense counsel preserved this issue for appeal by way of several timely objections to Officer Firsdon's challenged testimony. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). In general, we review for an abuse of discretion the circuit court's decision to admit or exclude evidence. *Id.* Whether a defendant has been denied the constitutional rights to due process and a fair trial are questions of law that we review de novo. *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009).

Without question, defendant was a party opponent, and Officer Firsdon therefore would have been entitled to give accurate testimony concerning the statements that defendant made during the police interview. MRE 801(d)(2)(A); see also *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). But defendant argues that Firsdon did not simply reiterate the statements that he made during the interview. Instead, defendant asserts that Firsdon paraphrased his statements, took certain statements out of context, and improperly presented an editorialized or embellished account of defendant's interview. Defendant cites *People v McGillen*, 392 Mich 251, 263; 220 NW2d 677 (1974), wherein a police witness testified at trial regarding the defendant's response to a specific question during a pretrial interview. In evaluating the police officer's trial testimony, our Supreme Court observed that what the officer had characterized as "the defendant's . . . response" was in actuality

nothing more than the officer's repeated paraphrase of the entire conversation. This is not what the officer was asked. He was not asked to capsule the conversation and give his synopsis. He was asked what the defendant said. It is only the Defendant's statements that may be admissible against him, not the arresting officer's editorialized version of them. [*Id.*]

Defendant claims that Officer Firsdon's editorialized version of events was improper under *McGillen* and that he is entitled to a new trial for this reason.

We acknowledge that Officer Firsdon's testimony did not constitute an exact, verbatim recital of the statements that defendant made during the police interview. Indeed, despite the prosecution's argument to the contrary, it is clear from the transcripts that Firsdon paraphrased certain of defendant's statements, recasting them in his own words. But neither does *McGillen* necessarily support defendant's position in this case. The police officer's statements in *McGillen* "were ruled inadmissible because the prosecution failed to establish that the defendant had knowingly and intelligently waived his *Miranda* rights . . . , not because the arresting officer had given an editorialized version of them." *People v Eccles*, 141 Mich App 523, 525; 367 NW2d 355 (1984) (emphasis added). As this Court has recognized, the fact that the police officer in *McGillen* "deliberately testified to an edited version of [the] defendant's statements went only to the question of the officer's credibility." *Eccles*, 141 Mich App at 525.

In the present case, defendant knowingly and intelligently waived his *Miranda* rights before making any statements to the police. This fact is not disputed on appeal. Accordingly, any editorializing or paraphrasing of defendant's statements by Officer Firsdon "went only to the question of the officer's credibility," *id.*, and does not constitute an independent ground for reversal. This is especially so in light of the fact that the video recording of defendant's interview was actually admitted into evidence as an exhibit. In other words, the jurors had the opportunity to discover any embellishments, exaggerations, or misstatements in Firsdon's testimony by viewing the video recording in the jury room and comparing it to Firsdon's actual testimony.³ It is exclusively for the jury to assess the credibility of the witnesses and decide which testimony to believe. *People v Jones*, 115 Mich App 543, 553; 321 NW2d 723 (1982).

Moreover, even assuming arguendo that Firsdon's testimony was somehow improper, we cannot conclude that it more probably than not affected the outcome of defendant's trial. It is fundamental that evidentiary error does not warrant reversal unless the defendant can establish that the error resulted in a miscarriage of justice—i.e., that it more probably than not affected the outcome of the proceedings. MCL 769.26; *People v Lukity*, 460 Mich 484, 496-497; 596 NW2d 607 (1999). In this case, there was a great deal of evidence tending to prove that defendant was the assailant who shot Smith in the back of the head at the Coney Island restaurant. Smith positively identified defendant as his assailant, defendant initially confessed to the police before recanting his statement, a man matching defendant's physical characteristics could be seen shooting Smith in the head on the restaurant's surveillance video, the spent shell casing found at the scene was consistent with the handgun that defendant was known to carry, and an employee of the Coney Island restaurant identified defendant as the man who had argued with Smith at his restaurant in the early morning hours of December 19, 2008. Given this significant, independent evidence of defendant's guilt, we cannot say that the admission of Firsdon's testimony—even if admitted in error—more probably than not resulted in a miscarriage of justice in this case. See *People v Akins*, 259 Mich App 545, 561; 675 NW2d 863 (2003).

III

Defendant next argues that the circuit court erred by upwardly departing from the sentencing guidelines and imposing a minimum sentence of 25 years for the AWIM conviction. Specifically, defendant contends that the circuit court failed to sufficiently articulate substantial and compelling reasons for the departure. Again, we disagree.

Unlike a challenge to the scoring of the guidelines, no special action is required to preserve a defendant's challenge to the circuit court's upward departure from the guidelines. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); see also *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). In reviewing a departure from the sentencing guidelines range, we review for clear error the existence of a particular factor supporting the departure, we review de novo whether the factor is objective and verifiable, and we review for an abuse of discretion

³ The record establishes that the jurors had both the DVD recording of defendant's police interview and a functioning DVD player available to them in the jury room.

whether the reason is substantial and compelling. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). We also review for an abuse of discretion the extent of the departure imposed. *Smith*, 482 Mich at 300. “A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.” *Id.* “For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant’s conduct and prior criminal history.” *Id.*

A circuit court may depart from the sentencing guidelines range “if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). To qualify as “substantial and compelling” within the meaning of § 34(3), a reason “must be objective and verifiable,” “must be of considerable worth in determining the length of the sentence,” and “should keenly or irresistibly grab the court’s attention.” *Smith*, 482 Mich at 299. To be “objective and verifiable,” a particular reason must be based on “actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). “[A] court may not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight.” *Id.*; see also MCL 769.34(3)(b).

Defendant was convicted of AWIM, which is a Class A felony. MCL 777.16d. Defendant’s offense variable scores and prior record variable scores placed him in Level D-V of the Class A felony grid, with a corresponding recommended minimum sentence range of 135 to 281 months. See MCL 777.21(3)(a); MCL 777.62. The circuit court upwardly departed from this range by 19 months, imposing a minimum sentence of 25 years, or 300 months. As explained previously, the circuit court found that there were several substantial and compelling reasons justifying an upward departure in this case, including defendant’s extensive history of anger-management issues, the fact that Smith had lacked an opportunity to defend himself because he was attacked from behind, the fact that defendant abandoned Smith following the assault, the fact that the gunshot to the back of Smith’s head was “like an assassination [attempt],” and the fact that defendant called Smith on the telephone after the shooting and threatened to “finish the job.”

This Court has already determined, in a factually similar case, that many of these factors are not adequately taken into consideration by the sentencing guidelines. In *Castillo*, 230 Mich App at 443-444, the victim was taken by surprise when the defendant, an acquaintance from school, approached him from behind and forcefully struck him on the head with a blunt object. After a Macomb County jury convicted the defendant of assault with intent to do great bodily harm less than murder, the circuit court upwardly departed from the statutory guidelines and imposed a sentence of 4 to 10 years in prison. *Id.* at 443, 447. On appeal, the defendant argued that the circuit court had “failed to justify this departure because its stated reasons were either already embodied within the guidelines, were factors considered in every case at sentencing, or were simply irrelevant to sentencing.” *Id.* at 447.

This Court in *Castillo* enumerated the factors relied on by the circuit court in upwardly departing from the sentencing guidelines:

(1) The cowardly nature of the assault, (2) the lack of any immediate confrontation prompting the assault, (3) the victim's lack of opportunity to defend himself, (4) the victim's lack of opportunity to avoid the assault, (5) the viciousness of the assault, (6) the boldness of the assault, taking place in broad daylight on a public street, (7) defendant's having abandoned the victim, leaving him unconscious on the street, and (8) the seriousness of the resulting injury. [*Id.* at 448.]

The *Castillo* Court began by observing that the circuit court's stated reasons "all concern the nature and severity of the crime, both of which are indisputably valid, indeed essential, sentencing considerations." *Id.* The *Castillo* Court noted that although OV 7 generally takes into account an offender's exploitation of a vulnerable victim, "the sentencing guidelines did not properly address the attack-from-behind nature of the crime." *Id.* at 448-449. The Court also noted that although OV 2 and OV 13 take into account the nature of a victim's injuries, the sentencing guidelines did not adequately address the circumstances of the crime committed in that case. *Id.* at 449. According to the Court, the near-fatal blow inflicted to a particularly vulnerable area of the victim's head demonstrated that the defendant had "acted with an unusually malevolent frame of mind." *Id.* One cannot help but notice the great similarity between the facts of *Castillo* and those of the instant case.

As in *Castillo*, defendant in the case at bar approached an unwitting victim from behind and inflicted a near-fatal blow to a particularly vulnerable area of his head. The circuit court did not clearly err by finding that Smith lacked an opportunity to defend himself because he was attacked from behind or that the gunshot to Smith's head was "like an assassination [attempt]." These factors were not adequately taken into consideration by the sentencing guidelines, *id.* at 448-449, and were both "capable of being confirmed," *Abramski*, 257 Mich App at 74. We cannot conclude that the circuit court abused its discretion by determining that these factors were sufficiently substantial and compelling to justify an upward departure in this case. *Babcock*, 469 Mich at 264-265.

Nor did the circuit court abuse its discretion by determining that defendant's threatening telephone call to Smith was a substantial and compelling reason to upwardly depart from the sentencing guidelines in this case. *Smith*, 482 Mich at 301. The record evidence supported the circuit court's finding that this threatening telephone call actually took place, and the existence of the telephone call was objective and verifiable because it was "external to the minds of those involved and could be confirmed on the record." *Id.* Further, as our Supreme Court has specifically noted, the making of threats of this nature is not adequately taken into consideration by the sentencing guidelines. *Id.* The circuit court properly determined that defendant's threatening telephone call constituted a substantial and compelling reason for departure.

Similarly, we conclude that the circuit court appropriately considered defendant's extensive history of anger-management issues and the fact that defendant abandoned Smith following the assault in its decision to upwardly depart from the sentencing guidelines. The court did not clearly err by finding that defendant had a longstanding problem with anger management or that defendant left Smith for dead at the Coney Island restaurant after the shooting. The record evidence proved that defendant was frequently unable to control his anger and that this had led to previous violent confrontations. Moreover, the testimony showed that

after shooting Smith, defendant “jumped in the car” and drove away without reporting the incident or attempting to procure medical attention for his former friend. Neither of these matters was adequately taken into consideration by the existing sentencing factors. In addition, both of these reasons were based on “actions or occurrences that are external to the min[d]” and were “capable of being confirmed.” *Abramski*, 257 Mich App at 74. We cannot say that the circuit court abused its discretion by determining that these factors constituted substantial and compelling reasons for an upward departure in this case. *Babcock*, 469 Mich at 264-265.

We also conclude that the circuit court properly exercised its discretion with respect to the extent of the departure imposed. The court upwardly departed from the recommended minimum range by only 19 months. The evidence established that defendant was prone to angry outbursts and episodes of extreme violence. As already mentioned, defendant called Smith following the shooting and threatened his life. Furthermore, the PSIR disclosed that defendant had repeatedly threatened jail staff and had physically assaulted a guard while in jail awaiting trial. The circuit court is specifically authorized to rely on information contained in the PSIR when deciding whether to upwardly depart from the sentencing guidelines in a particular case. MCL 769.34(3)(b). It does not appear to us that the circuit court’s upward departure of only 19 months was in any way disproportionate to the defendant’s conduct or history. *Smith*, 482 Mich at 300. Given defendant’s history of violence and criminal behavior, we cannot conclude that the circuit court abused its discretion by upwardly departing from the guidelines and imposing a minimum sentence of 25 years for defendant’s AWIM conviction. *Id.*

IV

Defendant argues in a supplemental brief filed *in propria persona* that he was denied the effective assistance of counsel in several different ways. We cannot agree. Because defendant failed to preserve his claims of ineffective assistance of counsel by moving for a new trial or a *Ginther*⁴ hearing, our review is limited to errors apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). A criminal defendant’s constitutional right to counsel “encompasses the right to the ‘effective’ assistance of counsel.” *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007); see also *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must generally prove (1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that the representation has so prejudiced the defendant as to deprive him of a fair trial. *Cline*, 276 Mich App at 637. In other words, a defendant must show a reasonable likelihood that counsel’s performance was so deficient that “but for counsel’s unprofessional errors the trial outcome would have been different.” *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.* at 663. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). “Failure to

⁴ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

prove either serious error or prejudice is fatal to [a] defendant's claim of ineffective assistance of counsel." *Solmonson*, 261 Mich App at 668.

A

Defendant first contends that his trial attorney rendered ineffective assistance by failing "to conduct basic pretrial investigation" and by failing to properly prepare for trial. In particular, defendant asserts that his trial attorney "failed to interview any witnesses," failed to "call a crucial witness that could have been outcome determinative," and neglected his "responsibility to at least make reasonable efforts to locate a witness." Defendant also asserts that "[d]efense counsel's failure to call a witness who would testify favorably to defendant's case was not 'sound trial strategy,' as it greatly harmed his client's chances of an acquittal and contributed nothing to the defense in this case," and that "counsel failed to investigate, interview witnesses, or introduce corroborating testimony, under circumstances making it clear that he should have done both."

However, defendant does not identify the "crucial witness" that he believes defense counsel should have located and called to testify. Nor does he explain how this witness would have testified or how this witness's testimony "could have been outcome determinative." In other words, defendant has provided absolutely no clues as to the witness's identity or the substance of the testimony that the witness would have given. He has also failed to explain what additional pretrial investigations his attorney should have performed and how his attorney otherwise failed to prepare for trial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims" *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). By failing to properly brief this matter or further explain how his attorney rendered ineffective assistance of counsel in this regard, defendant has abandoned the issue. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

B

Defendant also contends that his attorney rendered ineffective assistance of counsel by "fail[ing] to file pretrial motions to suppress" and by "fail[ing] to object to inadmissible evidence." However, defendant does not identify which pieces of evidence he believes should have been suppressed or which pieces of evidence he believes were inadmissible. As noted earlier, our review of this issue is limited to the record established below. *Cox*, 268 Mich App at 453. On the record before us, we do not perceive any errors in the circuit court's admission of evidence. Nor does it strike us that any of the evidence introduced in this matter would have been subject to exclusion upon defense counsel's motion to suppress. It is well settled that counsel is not ineffective for failing to file a futile motion or raise a meritless objection. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

C

Defendant next contends that his trial attorney was ineffective for failing to "challenge identification" and for failing to "investigate whether defendant was or was not in Las Vegas at the time the shooting took place." Defendant asserts that because he has distinctive tattoos on

his face, it would have been easy for defense counsel to prove that he was not the shooter. He asserts that defense counsel could have simply asked the prosecution witnesses whether they remembered seeing the distinctive tattoos, and that such questioning would have exonerated him because the witnesses would not have recalled the tattoos. We find it much more likely that counsel made a strategic decision not to raise the issue of defendant's distinctive tattoos with the witnesses. For example, had defense counsel stressed the unique and distinctive nature of defendant's facial tattoos when cross-examining the Coney Island restaurant employee, he might have inadvertently strengthened and solidified the witness's identification of defendant. There are times when it is better *not* to raise an issue at all than to unnecessarily draw the jury's attention to a piece of inculpatory evidence. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). We will not substitute our judgment for that of defense counsel on matters of trial strategy. *Davis*, 250 Mich App at 368.

With respect to defendant's assertion that counsel performed deficiently by failing to further pursue his alibi and by failing to "investigate whether defendant was or was not in Las Vegas at the time the shooting took place," we simply note that counsel is not ineffective for failing to present an alibi defense that he has reason to believe may be false or perjurious. *People v Hubbard*, 156 Mich App 712, 716; 402 NW2d 79 (1986).

D

Defendant further contends that his counsel was ineffective for "fail[ing] to object to the prosecutor's misconduct and other mistakes and omissions." Once again, our review is limited to the record established below. *Cox*, 268 Mich App at 453. The record discloses no instances of prosecutorial misconduct or other prejudicial behavior by the prosecution. Nor does defendant identify any instances of prosecutorial misconduct at trial apart from his bald, unsupported assertion that "there was overwhelming evidence pointing towards prosecutorial fabrication." Defendant's trial attorney did not perform deficiently by failing to raise a meritless objection in this regard. *Rodriguez*, 212 Mich App at 356.

E

Finally, defendant contends in his statement of the questions presented that his attorney rendered ineffective assistance of counsel by "fail[ing] to request a competency evaluation in the face of continued erratic behavior by defendant." However, defendant does not address this claim of error in the text of his brief on appeal. We therefore deem the issue abandoned. MCR 7.212(C)(7); *Martin*, 271 Mich App at 315. At any rate, even if this issue had been properly briefed, there is simply no indication on the record before us that defendant was incompetent to stand trial. Defendant's claim that counsel was ineffective for failing to request a competency evaluation must therefore fail. *People v Mette*, 243 Mich App 318, 332 n 8; 621 NW2d 713 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Peter D. O'Connell