

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAIF ABBAS AL-SHIMARY,

Defendant-Appellant.

UNPUBLISHED
December 28, 2010

No. 293096
Wayne Circuit Court
LC No. 09-004134-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANSOR ABBAS AL-SHIMARY,

Defendant-Appellant.

No. 293188
Wayne Circuit Court
LC No. 09-004134-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABDUL KAREEM ABBAS AL-SHIMARY,

Defendant-Appellant.

No. 293193
Wayne Circuit Court
LC No. 09-004134-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NASER ABBAS-HABIB AL-SHIMARY,

No. 293256
Wayne Circuit Court
LC No. 09-004134-FC

Before: M.J. KELLY P.J., and K.F. KELLY and BORRELLO, JJ.

PER CURIAM.

Following a joint trial, defendants Naif Al-Shimary (“Naif”), Mansor Al-Shimary (“Mansor”), Abdul Al-Shimary (“Abdul”), and Naser Al-Shimary (“Naser”) were each convicted of first-degree home invasion, MCL 750.110a(2), assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82. Defendants Naif, Mansor, and Abdul were also each convicted of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Naif was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 140 to 360 months for the home invasion conviction, 90 to 180 months for the assault with intent to do great bodily harm conviction, and 40 to 72 months for the felonious assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant Mansor was sentenced to concurrent prison terms of 10 to 20 years for the home invasion conviction, five to ten years for the assault with intent to do great bodily harm conviction, and one to four years for the felonious assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant Abdul was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 26 to 80 years for the home invasion conviction, 20 to 40 years for the assault with intent to do great bodily harm conviction, and 5 to 15 years for the felonious assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Lastly, defendant Naser was sentenced to concurrent prison terms of 3 to 20 years for the home invasion conviction, 1-1/2 to 10 years for the assault with intent to do great bodily harm conviction, and one to four years for the felonious assault conviction. All four defendants appeal as of right. Their appeals have been consolidated for this Court’s consideration. We affirm in each appeal.

Defendants, who are brothers, were convicted of breaking into the house of their brother-in-law, Habib Marzok, and then violently assaulting Marzok. There was evidence of a prior dispute between the victim and defendants’ father that allegedly led to the incident. The principal evidence at trial was the testimony of the victim and his two sons, Karar Marzok and Safaa Marzok, who were consistent in stating that the defendants broke into their home, that defendants Naif, Mansor, and Abdul had firearms, and that all four defendants assaulted the victim and fled.

I. DOCKET NO. 293096 (DEFENDANT NAIF AL-SHIMARY)

A. RIGHT TO PRESENT A DEFENSE

Defendant Naif argues that the trial court denied him his right to present a defense when it excluded evidence of an Internet posting indicating that the victim’s son had attempted to extort money from the defendants by promising that the charges would be dropped in exchange for \$60,000.

A trial court's decision to admit evidence is generally reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court's determination whether a proponent has sufficiently authenticated an item for admission into evidence is also reviewed for an abuse of discretion. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Although a defendant has a constitutional right to present a defense, US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). In this case, the trial court did not preclude defendants from presenting evidence of extortion attempts, but rather precluded admission of a document that could not be authenticated. MRE 901(a) provides that for a document to be admissible, it must be authenticated by the introduction of sufficient evidence to "support a finding that the document is what the proponent claims it to be." *People v Howard*, 226 Mich App 528, 553; 575 NW2d 16 (1997).

During the cross-examination of Safaa, defense counsel attempted to impeach Safaa's "sincerity" and give a reason for the charges by introducing a message on Safaa's page which was allegedly posted by Safaa. Outside the presence of the jury, defense counsel sought admission of a copy of a January 15, 2009 MySpace posting that "seems to be coming from a Safaa 09," which stated:

[T]ell ur grandpa give us 60,000\$ and we'll drop the charges, that's how we will pay 4 damages he caused.

After the prosecutor objected on the basis of foundation and authenticity, the trial court asked Safaa if he wrote the message. Safaa responded, "No, I didn't." The defense made no further offer of proof. The trial court excluded the document because there was no evidence to establish its authenticity. In this case, defendants were unable to authenticate the document under MRE 901(a). Further, contrary to what defendant Naif argues, the trial court did not preclude the defendants from otherwise presenting a defense that the charges were the product of an extortion attempt. It only precluded admission of a document that could not be authenticated. The court permitted defendants to ask Safaa if he ever requested money from anyone to drop the charges in this case, but he denied doing so. Accordingly, the trial court did not violate defendant Naif's constitutional right to present a defense. Nor did the trial court abuse its discretion in determining that the MySpace page had not been properly authenticated.

B. DOUBLE JEOPARDY

Defendant Naif next argues that his dual convictions and sentences for both assault with intent to do great bodily harm less than murder and felonious assault violate his double jeopardy right not to be subjected to more punishment than the Legislature intended. Because this issue was not raised below, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

The validity of multiple punishments under the double jeopardy provisions of the United States and Michigan Constitutions is generally determined under the “same-elements test,” which requires the reviewing court to determine “whether each provision requires proof of a fact which the other does not.” *People v Smith*, 478 Mich 292, 305, 315-316; 733 NW2d 351 (2007) (citation omitted). Our Supreme Court has determined that multiple convictions of assault with intent to do great bodily harm less than murder and felonious assault do not violate the constitutional double jeopardy protections because the two crimes have different elements. *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007). This Court is bound to follow decisions of our Supreme Court. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002). Accordingly, there was no error.

C. JURY INSTRUCTION

Defendant Naif also argues that he is entitled to a new trial because the trial court erroneously failed to instruct the jury on the definition of a firearm.

In this joint trial, codefendant Abdul’s objection to the trial court’s instruction preserved this issue for review. See *People v Brown*, 38 Mich App 69, 75; 195 NW2d 806 (1972). Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court “examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant’s rights by fairly presenting to the jury the issues to be tried.” *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

As defendant Naif observes, during its deliberations, the jury requested guidance on the felony-firearm charge relating to codefendant Abdul only. The jury asked if it mattered whether the weapon was a toy. Earlier, during trial, a police officer was questioned about a plastic rifle stock that Karar had obtained from the long rifle that codefendant Abdul allegedly used during the offense. The officer stated that he did not know whether the stock came from a toy gun. In response to the jury’s request asking whether it mattered if the weapon was a toy for purposes of felony-firearm, the trial court instructed the jury, “That’s a decision for the jury and there is no instruction as to that question.”

Any error in the trial court’s response with respect to codefendant Abdul did not affect defendant Naif. A court is not required to define the term “firearm” in a felony-firearm instruction where the defendant does not argue that the weapon at issue was not a firearm. *People v Hunt*, 120 Mich App 736, 742; 327 NW2d 547 (1982). The evidence at trial indicated that defendant Naif possessed a blue steel handgun. There was no evidence suggesting, nor did defendant Naif argue, that this weapon may have been a toy. Further, the jury’s request for guidance on the definition of a firearm related only to codefendant Abdul. Under these circumstances, there was no error in failing to instruct the jury on the definition of a firearm with respect to the felony-firearm charge relating to defendant Naif.

D. DEFENDANT NAIF’S STANDARD 4 BRIEF

Defendant Naif raises several issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit. Because defendant Naif did not advance any of these issues below, they are unpreserved and our

review is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

1. PROSECUTION'S CHARGING DISCRETION

Defendant Naif first argues that the prosecution abused its discretion by charging him with first-degree home invasion, because it did not ask his sister if he had permission to enter his sister's house. "[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The prosecutor has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). A prosecutor abuses his discretion only if "a choice is made for reasons that are 'unconstitutional, illegal, or ultra vires.'" *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996).

Here, there is no indication in the record that defendant Naif had his sister's permission to enter the home at the time of the charged offense. On the contrary, the evidence indicated that entry was gained by forcibly breaking open the front door, after which defendant Naif and his codefendants confronted the occupants of the home without warning. These facts support the prosecutor's decision to charge the defendants with first-degree home invasion. See *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2). Defendant Naif does not offer any information suggesting that the charge was brought for an unconstitutional, illegal, or other improper reason. Accordingly, we reject this claim of error.

Within this issue, defendant Naif also contends that the prosecutor knowingly used the victim's perjured testimony that defendants took \$5,000 from his home during the incident. A prosecutor has a constitutional duty to inform the trial court and a criminal defendant when a government witness offers perjured testimony. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). A prosecutor may not knowingly use false testimony to obtain a conviction, and must correct false evidence when it is presented. *Id.* at 277. Absent proof that the prosecutor knew that trial testimony was false, reversal is unwarranted. *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001). Defendant Naif does not explain why the victim's testimony should be considered false beyond his unsupported statement in his brief that the victim "never had \$5,000 in his life." Because there is no record support for defendant Naif's claim that the victim's testimony was false, let alone that the prosecutor knew that it was false, and we can discern no indication of perjury from the record, defendant Naif has failed to demonstrate a plain error.

2. DOUBLE JEOPARDY

Defendant Naif also argues that his sentences for home invasion, assault with intent to do great bodily harm less than murder, and felonious assault violate the constitutional double jeopardy protection against multiple punishments for the same offense. As previously discussed in section I(B), *supra*, it is well established that dual convictions of assault with intent to do great bodily harm and felonious assault do not violate the constitutional double jeopardy protections.

See *Strawther*, 480 Mich 900. Further, the offense of first-degree home invasion¹ has elements that assault with intent to do great bodily harm less than murder² and felonious assault³ do not. Therefore, convictions and sentences for all three offenses is permissible. Consequently, defendant Naif is not entitled to resentencing on this basis.

3. SENTENCING

We also reject defendant Naif's claim that he is entitled to resentencing because the trial court failed to consider all mitigating factors when imposing his sentence. Defendant Naif was sentenced within the sentencing guidelines range of 72 to 360 months. This Court must affirm a sentence within the guidelines range absent an error in scoring the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). On appeal, defendant Naif has not demonstrated that the guidelines were erroneously scored or that the trial court relied on inaccurate information. Defendant Naif contends that he should have been scored five points for prior record variable (PRV) 2 and ten points for PRV 7. According to the sentencing information report ("SIR"), the trial court did score only five points for PRV 2. Further, the trial court's score of 20 points for PRV 7 was correct because defendant Naif had "2 or more . . . concurrent convictions." MCL 777.57(1)(a). As previously discussed, defendant Naif's double jeopardy claims are without merit and, therefore, do not affect the scoring of PRV 7. Therefore, we affirm defendant Naif's sentences.

For the same reasons, we reject defendant Naif's alternative ineffective assistance of counsel claim. Because defendant Naif has not demonstrated a basis for an objection, defense counsel's inaction in this regard did not constitute ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to assert a futile position).

II. DOCKET NO. 293188 (DEFENDANT MANSOR AL-SHIMARY)

A. DOUBLE JEOPARDY

¹ The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. See *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2).

² "Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997).

³ The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007).

Defendant Mansor first argues that his dual convictions and sentences for both assault with intent to do great bodily harm less than murder and felonious assault violate his double jeopardy right not to be subjected to more punishment than the Legislature intended. Codefendant Naif raised this same claim in his appeal and our analysis of codefendant Naif's claim in section I(B), *supra*, is equally applicable here. For those same reasons, defendant Mansor likewise is not entitled to resentencing on this basis.

B. RIGHT TO PRESENT A DEFENSE

Defendant Mansor lastly argues that the trial court denied him his right to present a defense when it excluded evidence of the Internet posting showing the attempt to extort money from defendants. Codefendant Naif raised this same claim in his appeal. Our analysis of this issue in section I(A) of this opinion applies equally here. As explained previously, the trial court did not abuse its discretion by excluding the Internet posting on the ground that it had not been authenticated. Further, for the same reasons previously stated in this opinion, the trial court did not violate defendants' right to present a defense.

III. DOCKET NO. 293193 (DEFENDANT ABDUL AL-SHIMARY)

A. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant Abdul argues that defense counsel was ineffective for failing to call the alibi witnesses listed on his witness list.⁴ Because defendant Abdul failed to raise an ineffective assistance of counsel claim in the trial court in connection with a motion for a new trial or request for an evidentiary hearing, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness and that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

Defendant Abdul's witness list provides: "All witnesses contained in Defendant's Notice of Alibi." Defendant Abdul has not provided a copy of his notice of alibi on appeal, and no notice for defendant Abdul is contained in the lower court record. Further, on appeal, defendant

⁴ Defendant Abdul also raises this same claim in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

Abdul has not identified his proposed alibi witnesses, provided witness affidavits, or identified any evidence of record establishing what testimony they could have provided. Defendant Abdul has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), and he has failed to meet that burden. His unsupported assertion in his brief that the unspecified witnesses would have supported an alibi is insufficient to demonstrate that he was deprived of a substantial defense. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Consequently, there is no basis to conclude that defense counsel's performance fell below an objective standard of reasonableness, or that there is a reasonable probability that the result of the trial would have been different had the witnesses been called. *Frazier*, 478 Mich at 243.

B. SUFFICIENCY OF THE EVIDENCE

Defendant Abdul next argues that the evidence did not support his convictions because there was insufficient evidence of his identity as one of the assailants.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offenses beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness may be sufficient to support a conviction for a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Id.*

In this case, three eyewitnesses—the victim and his two sons, Safaa and Karar—positively identified defendant Abdul as the person with the rifle during the criminal episode. According to their testimony, defendant Abdul's face was entirely exposed during the offense. Safaa testified that the area was well lit, and there was nothing blocking his view of defendant Abdul. The record reveals that Safaa and Karar spoke to Abdul. Further, defendant Abdul was recognizable to the witnesses because he is the victim's brother-in-law, and Safaa and Karar's uncle. Karar stated that he had known the defendants all of his life. Viewed in a light most favorable to the prosecution, this evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that defendant Abdul was one of the perpetrators. Although defendant Abdul argues that the witnesses' testimony was not credible, this Court will not interfere with the jury's role of determining issues of weight of the evidence and the credibility of the witnesses. *Wolfe*, 440 Mich at 514. Rather, this Court must draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). There was sufficient evidence of defendant Abdul's identification to support his convictions for the charged offenses.

C. CRUEL AND UNUSUAL PUNISHMENT

Defendant Abdul lastly argues that he is entitled to resentencing because his 26-year minimum sentence for first degree home invasion, despite being within the sentencing guidelines range, constitutes cruel and/or unusual punishment, contrary to US Const, Am VIII, and Const 1963, art 1, § 16. Defendant Abdul did not advance a claim below that a sentence within the sentencing guidelines range would nonetheless be constitutionally cruel or unusual. Therefore, we review this unpreserved claim of constitutional error for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 752-753, 763-764.

Defendant Abdul's 26-year minimum sentence is within the sentencing guidelines range of 99 to 320 months for first-degree home invasion. Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence, neither of which is alleged to have occurred here, this limitation on review is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). But a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), and a sentence that is proportionate is not cruel or unusual punishment, *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Here, defendant Abdul contends that his sentence is cruel or unusual because of his age (29 years at the time of sentencing). This factor is insufficient to overcome the presumptive proportionality of defendant Abdul's sentence, especially considering the criminal record he has accumulated and the extremely assaultive nature of the offenses. Because defendant Abdul has not overcome the presumptive proportionality of his sentence, we reject his claim that his sentence is cruel or unusual.

IV. DOCKET NO. 293296 (DEFENDANT NASER AL-SHIMARY)

A. PROSECUTOR'S CONDUCT

Defendant Naser first argues that he was denied a fair trial because the prosecutor impermissibly argued facts not in evidence. Because defendant Naser did not object to the prosecutor's challenged remark at trial, we review this unpreserved claim of misconduct for plain error affecting defendant Naser's substantial rights. *Carines*, 460 Mich at 752-753, 763-764. This Court will not reverse if the alleged prejudicial effect of the prosecutor's remark could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant Naser relies on the following emphasized remark made during the prosecutor's closing argument:

[W]ith regard to Naser Abbas Al-Shimary we know that he aided and abetted with the crime of home invasion, assault with intent to commit murder and assault with intent to do great bodily harm less than murder and felony-firearm.

And how do we know that? We know that he, of all the Defendants, called Safaa on the phone and tried to gain entry into the house that way. And

less than two minutes or three minutes after he called Safaa, him [sic] and his brothers are breaking into the house. We know from Safaa that Naser was in the bedroom hyping up everyone. Hyping up his brothers. And how was he hyping up his brothers? He was hyping them up jumping on the bed and *telling them to speaking in Arabic and English to kill, to kill Habib*. We know that he was involved. He was supposed to be the person to get them into the house without having to break in. But that wasn't successful. But he was in there and he's hyping them up. [Emphasis added.]

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). We agree that there was no evidence to support the prosecutor's statement that defendant Naser told his codefendants to "kill" the victim. Thus, defendant Naser has established a plain error. However, defendant Naser has not established that his substantial rights were affected. *Carines*, 460 Mich at 752-753, 763-764. The defendant bears the burden of showing actual prejudice, *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006), and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Carines*, 460 Mich at 752-753, 763-764.

Viewed in context, the prosecutor's improper statement did not cause defendant Naser's conviction. The prosecutor's remark was focused on establishing defendant Naser's participation in the crimes. While there was no evidence that defendant Naser was the person who stated "kill" the victim, there was evidence that defendant Naser was in the victim's bedroom with his codefendants, that he threatened the victim, and that he was jumping on the victim's bed during the attack, yelling "get him," and "hying up" his codefendants. There was also evidence that defendant Naser struck the victim in the back with a crowbar during the episode.

Moreover, any prejudicial effect from the statement could have been cured by a timely instruction upon request. *Watson*, 245 Mich App at 586. Indeed, the trial court later instructed the jury that the lawyers' statements and arguments are not evidence, and that the jury was to decide the case based only on the properly admitted evidence. These instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

In a related argument, defendant Naser argues that defense counsel was ineffective for failing to object to the prosecutor's remark. In light of our conclusion that the trial court's instructions were sufficient to dispel any possible prejudice, defendant Naser cannot demonstrate a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Frazier*, 478 Mich at 243. Consequently, defendant Naser's ineffective assistance of counsel claim cannot succeed.

B. RIGHT TO PRESENT A DEFENSE

Defendant Naser lastly argues that the trial court denied him his right to present a defense when it excluded evidence of the Internet posting showing the attempt to extort money from

defendants. Codefendant Naif raised this same claim in his appeal and our analysis of this issue in section I(A) of this opinion applies equally here. As explained previously, the trial court did not abuse its discretion by excluding the Internet posting on the ground that it had not been authenticated. Further, the trial court did not violate defendants' right to present a defense.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello