STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD EARL WILBURN,

Defendant-Appellant.

UNPUBLISHED
October 19, 2023

No. 361426
St. Clair Circuit Court
LC No. 21-000801-FC

Before: CAVANAGH, P.J., and RIORDAN and PATEL, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of safe-breaking, MCL 750.531; possession of burglar's tools, MCL 750.116; and attempted larceny in a building, MCL 750.360, MCL 750.92. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 4 to 30 years' imprisonment for his safe-breaking conviction; 34 months' to 30 years' imprisonment for his possession of burglar's tools conviction; and 34 months' to 15 years' imprisonment for his attempted larceny in a building conviction. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

In July 2017, Michael Bowers, a security guard at a mall, saw a man trying to break into an automated teller machine (ATM) with a blowtorch. Bowers testified the perpetrator was Black, about six-feet tall, and had a slender frame. Bowers could not identify the person who committed the crime, though. A crowbar and sunglasses were found near the ATM after the perpetrator fled. Those items were collected as evidence and sent for forensic testing. Defendant's DNA appeared on the crowbar and sunglasses, and five of his fingerprints were on the sunglasses. Defendant's appearance and physique fit the very general descripton provided by Bowers. Defendant was charged with the crimes, convicted of them, and sentenced. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues there was insufficient evidence he committed the charged crimes and thus the trial court erred by denying his motion for a directed verdict. And, even if the court's

denial of his motion for directed verdict was proper, defendant asserts there was insufficient evident to establish his guilt beyond a reasonable doubt. We disagree.

A. STANDARD OF REVIEW

"We review de novo a trial court's decision denying a motion for a directed verdict." *People v McKewen*, 326 Mich App 342, 347 n 1; 926 NW2d 888 (2018). Similarly, "[t]his Court reviews de novo whether there was sufficient evidence to support a conviction." *People v Johnson*, 340 Mich App 531, 548; 986 NW2d 672 (2022) (cleaned up). In analyzing both issues, we must view "the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the crime's elements proven beyond a reasonable doubt." *People v Klages*, 339 Mich App 610, 626; 984 NW2d 822 (2021). See also *People v Quinn*, 305 Mich App 484, 491; 853 NW2d 383 (2014) (applying the same standard of review when considering a trial court's denial of a motion for a directed verdict). Because the jury had the opportunity to observe the witnesses and listen to their testimony, we may "not interfere with the jury's role in assessing the weight of the evidence and the credibility of the witnesses." *Johnson*, 340 Mich App at 548 (cleaned up). We are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id.* (cleaned up). Every reasonable theory of innocence does not need to be negated by the prosecution; it is only required to prove the elements of the crime "in the face of whatever contradictory evidence the defendant may provide." *Id.* (cleaned up). "All conflicts in the evidence must be resolved in favor of the prosecution." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

B. LAW AND ANALYSIS

Defendant was convicted of safe-breaking, possession of burglar's tools, and attempted larceny in a building. The statute proscribing safe-breaking states, in relevant part:

> Any person who, with intent to commit the crime of larceny, or any felony, . . . shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny or felony, be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years. [MCL 750.531.]

"The plain language of the statute requires for its violation, by whatever means accomplished, the larcenous or felonious intent to access a bank, safe, vault, or other depository of money or valuables." *People v Ford*, 262 Mich App 443, 455; 687 NW2d 119 (2004). "In every case the statute does not require that property actually be stolen or that the offender be armed with a weapon." *Id.*

The crime of possession of burglar's tools is codified at MCL 750.116, which states:

> Any person who shall knowingly have in his possession any nitroglycerine, or other explosive, thermite, engine, machine, tool or implement, device, chemical or substance, adapted and designed for cutting or burning through, forcing or

> breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose aforesaid, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years.

"The statute limits the list of tools to those used to open 'any building, room, vault, safe or other depository . . . .' " *People v Osby*, 291 Mich App 412, 414-415; 804 NW2d 903 (2011). Addressing a prior version of the statute, our Supreme Court set forth the following elements for the crime of possession of burglar's tools, which are still relevant to the current statute:

> Three essential elements are involved in this crime: (1) The tool or implement must be adapted and designed for breaking and entering; (2) it must be in the possession of one who has knowledge that it is adapted and designed for the purpose of breaking and entering; (3) it must be possessed with intent to use or employ to same in breaking and entering. [*People v Dorrington*, 221 Mich 571, 574; 191 NW 831 (1923).]

Defendant was also convicted of attempted larceny in a building under MCL 750.360, which states: "Any person who shall commit the crime of larceny by stealing in any . . . building used by the public shall be guilty of a felony." "Because the statute does not define the term 'larceny,' it is afforded its common-law meaning." *People v Thorne*, 322 Mich App 340, 344; 912 NW2d 560 (2017). "Based on the common-law understanding of larceny, the elements of larceny in a building are as follows: (1) a trespassory taking (2) within the confines of a building and (3) the carrying away (4) of the personal property (5) of another (6) with intent to steal that property." *Id*. Because defendant did not complete the larceny, he was charged for attempted larceny in a building under MCL 750.92, which states: "Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same," is guilty of an attempted crime. "Under our statute, then, an 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). "An action in furtherance of the alleged crime must be unequivocal and more than mere preparation to commit the crime." *People v Burton*, 252 Mich App 130, 141; 651 NW2d 143 (2002).

Defendant does not dispute these crimes were committed. Instead, defendant argues there was not proof beyond a reasonable that he was the person who committed them. In other words, defendant challenges identity. "Identity is an essential element of every crime." *People v Fairey*, 325 Mich App 645, 649; 928 NW2d 705 (2018).

We conclude there was sufficient evidence to sustain the jury's conclusion defendant was the person who committed safe-breaking, possession of burglar's tools, and attempted larceny of a building. The prosecution presented evidence from Bowers, who was working security at the Birchwood Mall on the night in question. He stated he walked around the mall when he first arrived at work and did not notice any items near the only ATM in the building. Later, Bowers heard a grinding noise coming from the area of the mall where the ATM was located. Bowers approached the area and saw a man crouched behind the ATM apparently using a blowtorch to try

to break into it. Bowers testified he was too far away to be able to tell who the man using the blowtorch was. However, he believed the man was about six-feet tall, Black, and had a slender build. The jury was able to observe defendant, who fit that generalized description.

When the person trying to break into the ATM noticed Bowers approaching, he fled the building. A crowbar and pair of sunglasses were left behind. Bowers had not previously seen those items during his rounds. A blowtorch was never found. St. Clair County Sheriff's Deputy Timothy O'Donnell testified it was logical the person who was using the blowtorch would also have sunglasses, for eye protection. It was also suspected that the crowbar was intended to be used to pry the ATM open once the blowtorch made a big enough hole in the outside of the device. Defendant's DNA was one of three contributors on each of the following: the handle of the crowbar, the end of the crowbar containing suspected human blood, and on the nose-ridge and earpieces of the sunglasses. There were five identifiable fingerprints on the sunglasses capable of comparison. All of them belonged to defendant.

Defendant's argument focuses on the lack of any witness capable of identifying him and the other contributors of DNA on the crowbar and sunglasses. Defendant is correct that no one observed him commit the crime and identified him as the perpetrator. He is also correct that there were, at least, two other contributors of DNA on the crowbar and sunglasses. There were, seemingly, as many as six additional contributors of DNA—two each per swab. Jennifer Jones, a forensic biologist with the Michigan State Police and an expert in DNA analysis, testified she did not compare the other contributors to see if they were the same people on each swab. Although there was neither specific eyewitness nor determinative DNA evidence, the presence of defendant's DNA on the crowbar and sunglasses certainly supported the theory defendant was the perpetrator.

Moreover, defendant's fingerprints were on the sunglasses. Bowers testified he did not see the sunglasses on the floor of the mall before he saw the man trying to break into the ATM. Based on this testimony, the jury could infer that the person who was trying to break into the ATM dropped the sunglasses on the floor when he fled. "Circumstantial evidence and any reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of a crime." *Johnson*, 340 Mich App at 548 (cleaned up).

We conclude that there was sufficient evidence for the jury to find beyond a reasonable doubt defendant committed the three crimes charged. The jury was aware of all of this evidence, including the other contributors of DNA, the lack of an eyewitness who could identify defendant, and the various limitations with respect to forensic evidence. Indeed, the jury heard testimony that DNA and fingerprints could exist on surfaces for a long period of time, there was no way to know how long the fingerprints and DNA were on a given surface, and there may have been other fingerprints on the sunglasses that were not sufficient for comparison. The jury could infer that the person who handled the crowbar and sunglasses was the person who committed the crime, and it could infer defendant was the person who handled those items because his DNA existed on both of them and his fingerprints were on the sunglasses. These inferences are solidified by the fact that defendant fit Bowers's description. We must defer to the jury's determinations when they are, as here, supported by sufficient evidence. *Johnson*, 340 Mich App at 548. Further, because there was sufficient evidence to support defendant committed the charged crimes, the trial court properly denied his motion for a directed verdict of not guilty.

III. MOTION FOR A NEW TRIAL

Defendant argues the trial court abused its discretion by denying his motion for a new trial on the basis of prosecutorial misconduct and the jury's verdict being against the great weight of the evidence. We disagree.

A. STANDARD OF REVIEW

"This Court reviews for an abuse of discretion a trial court's decision on a motion for a new trial." *People v Hammerlund*, 337 Mich App 598, 615; 977 NW2d 148 (2021). Similarly, "[w]e review a trial court's determination that a verdict was not against the great weight of the evidence for an abuse of discretion." *People v Kosik*, 303 Mich App 146, 154; 841 NW2d 906 (2013). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Hammerlund*, 337 Mich App at 615 (cleaned up). "Claims of prosecutorial misconduct are generally reviewed de novo to determine whether the defendant was denied a fair trial." *People v Dunigan*, 299 Mich App 579, 588; 831 NW2d 243 (2013). De novo review "means that we review the issues independently, with no required deference to the trial court." *People v Beck*, 504 Mich 605, 618; 939 NW2d 213 (2019).

B. GREAT WEIGHT OF THE EVIDENCE

"A verdict is against the great weight of the evidence and a new trial should be granted when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Evans*, 335 Mich App 76, 87; 966 NW2d 402 (2020) (cleaned up). "Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). As our Supreme Court has explained, "absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility for the constitutionally guaranteed jury determination thereof." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (cleaned up). Therefore, when issues involving witness credibility arise, "if it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it, the credibility of witnesses is for the jury." *Id.* at 643 (cleaned up).

Defendant's arguments with respect to this issue are identical to those he made challenging the sufficiency of the evidence. Defendant asserts the jury's verdict was against the great weight of the evidence because of the limited evidence regarding his identity as the person who committed the crimes. "Identity is an essential element of every crime." *Fairey*, 325 Mich App at 649. Defendant once again cites the lack of an eyewitness who could identify him as the perpetrator, the existence of other DNA profiles on the crowbar and sunglasses, and testimony that defendant's DNA and fingerprints could have been on the items for a long time with no way to know how long. As we explained, these are challenges to the weight to be given to the forensic evidence, which the jury considered and decided when it convicted defendant of the crimes. While the evidence is not conclusive, it cannot seriously be claimed "the evidence preponderates heavily against the verdict," which is necessary for granting a new trial on a claim of a verdict being against the great weight of the evidence. *Evans*, 335 Mich App at 87 (cleaned up). Moreover, defendant has not

identified anything on the record suggesting the jury's verdict "was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Lacalamita*, 286 Mich App at 469. Defendant simply disagrees with the jury's weighing of the evidence and its decision to disregard questions he raised about the reliability of the forensic evidence used to convict him. Because the jury's verdict relied on reasonable inferences available from the evidence, we find that the trial court did not abuse its discretion when it denied defendant's motion for a new trial on the basis of the great weight of the evidence.

C. PROSECUTORIAL MISCONDUCT

"A prosecutor 'is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " *Evans*, 335 Mich App at 89, quoting *Berger v United States*, 295 US 78, 88; 55 S Ct 629; 79 L Ed 1314 (1935). "We must evaluate instances of prosecutorial misconduct on a case-by-case basis, reviewing the prosecutor's [actions] in context and in light of the defendant's arguments." *People v Lane*, 308 Mich App 38, 62-63; 862 NW2d 446 (2014). "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.' " *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation omitted). "They are free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id*. (cleaned up). In making those arguments, "[t]he prosecutor need not speak in the blandest of all possible terms." *People v Blevins*, 314 Mich App 339, 355; 886 NW2d 456 (2016) (cleaned up).

"A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). "Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof." *Id*. at 464. "While the prosecution may not use a defendant's failure to present evidence as substantive evidence of guilt, the prosecution is entitled to contest fairly evidence presented by a defendant" *People v Caddell*, 332 Mich App 27, 71; 955 NW2d 488 (2020) (cleaned up). "Moreover, attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). Further, "a prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment." *Fyda*, 288 Mich App at 464.

Defendant challenges the following arguments made by the prosecutor during rebuttal arguments:

> He talks about things that he didn't have. Why didn't they have this? Why didn't they have this? You know, there's no perfect case. This is, this is not a perfect world and he has avenues that he could have chosen to get some of those items himself. It's not all on the police and say: Well, because we don't have this you should think well they didn't do their job. Well, that's not the case here.
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> For instance, he talked about well we don't have the torch. Well you know who determines the facts of a case? The Defendant determines the facts of the case.

> If he runs out with the torch, is that our fault that we don't have the torch? He wants to make you think that: Why don't they have the torch? We don't even have that.

The prosecution asserts these arguments were responding to defendant's arguments in his closing. Pertinently, defendant made the following arguments:

> The Prosecutor told you just now that we know that burglar tools could be proven because of the crowbar and the torch, but—the torch we don't have by the way, which is just among the list of other things that we don't have to help us decide what we know in this case.
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> * * *
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> When I asked these individuals who testified to say well when you compared this DNA you make some sort of a graph that gets printed out, right? That, that there's something to compare. Do we have that to look at? No. Why don't we have that to look at? Well, the Prosecution didn't ask for that. All right. Well, there's nothing I can do about that. It's their case. They have to put forward to you. They can bring forward as much or as little evidence as they want to, but if they choose not to do it I think you have to hold them to task for that.
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> The same with the fingerprint analyst, right. She said: Well, yeah, there's there's—I compare this print to that print, which we can't see, and I thought: Well, do—is there some sort of photograph that you take of this that we can look at to say here's how I know. This point here compared to that point there. See how they match up. We, we don't know that. We just have to take their word for it that they remember this case over some other case.
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> * * *
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> We don't have any photos of the scene. Those were lost. We don't have the security guard's report of what happened. He's the eyewitness to the event because it was lost. We don't have the lab tech's notes because they didn't bring them with them. We don't know who verified Mrs. Jones' hypothesis. Remember she said that someone has to verify it and I asked her who that was and she doesn't know that. I assume that's someplace that they chose not to bring to us. I'm not saying that means that she's not telling the truth. I'm saying these are all things that the Prosecution could have brought to you to try and make their case more strong. They didn't do that.
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> * * *
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> You seem like reasonable folks and we had a chance to talk in the beginning of this case and I know that you took that—your, your responsibilities, your oath seriously, and you may be sitting there—the Prosecution is saying you may have questions. I bet you have a lot of questions. The fact that they can't answer them isn't their fault? I—the fact that, that you can't answer them is considerably their fault.

As the prosecution recognizes, the arguments must be considered in the context of which they were made. Defendant repeatedly asserted the prosecutor could have put forward additional evidence but chose not to do so. Specifically, defendant referenced the blowtorch, the actual data relied on by the DNA experts, and photographs of the fingerprints used in the expert's analysis of them, which were not admitted as evidence. While the prosecutor was not permitted to shift the burden of proof, he was allowed to "attack[] the credibility of a theory advanced by a defendant," because such "does not shift the burden of proof." *McGhee*, 268 Mich App at 635. In this case, defendant's theory was that the prosecutor identified the wrong person as committing this crime because of a failed investigation. To support this theory, defendant directed the jury's attention to evidence not admitted during the trial.

The prosecution was permitted to attack defendant's theory by arguing the jury could rely on the experts' testimony, and asserting defendant could have obtained the documentary evidence and presented it to the jury if he believed it was beneficial to his case. The prosecutor did not argue defendant was *required* to admit the evidence to support his claim of being not guilty of the crimes charged. The prosecutor's arguments on rebuttal were even more understandable given defendant's claim "there's nothing I can do about" the lack of data related to the DNA analysis. Simply put, the prosecutor was permitted to inform the jury there *was* something defendant could have done—he could have admitted the data as a defense exhibit. The prosecutor is permitted to be a vigorous advocate for justice, including attacking the credibility of a theory presented by the defense. *Blevins*, 314 Mich App at 355; *McGhee*, 268 Mich App at 635.

Notably, the prosecutor used some questionable language when arguing defendant determined the facts of the case. It is not difficult to see how this could imply to the jurors that defendant had some responsibility to prove something. However, when considering the argument in context, the prosecutor was merely responding to an argument made by the defense, which was proper. *Lane*, 308 Mich App at 62-63. Although the prosecutor may have been able to phrase his argument in a clearer manner, prosecutors are not required to "speak in the blandest of all possible terms." *Blevins*, 314 Mich App at 355 (cleaned up). Because so much of the focus of defendant's argument was on the absence of certain evidence, it was permissible for the prosecutor to vigorously advocate that the lack of evidence in the form of the blowtorch was determined by defendant's decision to carry it out of the mall when he fled. *Id.*; *McGhee*, 268 Mich App at 635.

To the extent there was any minor prejudice to the defense caused by the prosecutor's arguments during rebuttal, they were cured by the trial court's curative and general instructions provided to the jury. "Jurors are presumed to follow the court's instructions, and instructions are presumed to cure most errors." *People v Ogilvie*, 341 Mich App 28, 35; 989 NW2d 250 (2022) (cleaned up). When jury selection began, the trial court read the following instruction to the room full of potential jurors:

> A person accused of a crime is presumed to be innocent. This means that he [sic] must start with the presumption that the Defendant is innocent. This presumption continues throughout the trial and entitles the Defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.
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> Every crime is made up of parts called elements. The Prosecutor must prove each of the elements of the crime beyond a reasonable doubt. The Defendant is not

> required to prove his innocence or to do anything. If you find that the Prosecutor has not proven every element beyond a reasonable doubt, then you must find the Defendant not guilty.

In the middle of the prosecutor's rebuttal argument, defendant objected on the basis of the prosecutor shifting the burden of proof. After a bench conference, the trial court read the following instruction to the jury before the prosecutor's arguments were allowed to continue:

> Ladies and gentlemen, I want to be clear and want you to be clear and you're going to hear more about this in the final instructions, but it's important that you remember kind of back when we started the case that one of the instructions that I gave you then and one of the instructions that I will give you now is that the Defendant is not required to produce evidence or to do anything. And it sometimes is presented in voir dire: Well, the Defendant could—Defendant's attorney could sit over there and do absolutely nothing and play on their phone all day and they—that would be totally fine. There wouldn't be anything wrong with that. It might not be a strategy that is desirable, but the law doesn't require that they do anything, you know, beyond that. So it's important that you remember that when you evaluate the evidence. Okay.

After the rebuttal argument was complete, the trial court provided the final instructions to the jury. This included informing the jurors that the prosecutor had the burden of proving guilt beyond a reasonable doubt and explaining "[a] Defendant is not required to prove his innocence or to do anything." The trial court instructed the jury regarding the burden of proof three separate times, and defendant has not identified any reason, other than abject speculation, why the jurors would have declined to follow the trial court's very specific and timely instructions. Thus, our presumption the jurors followed those instructions remains intact. *Ogilvie*, 341 Mich App at 35. Moreover, because any prejudice caused by the prosecutor's arguments were minor, the instructions cured the error. *Id.*

D. MISCELLANEOUS ISSUES RELATED TO THE MOTION FOR A NEW TRIAL

Defendant argues the trial court abused its discretion when it denied defendant's motion for a new trial because the trial court improperly analyzed the challenge on the basis of the great weight of the evidence, failed to adequately consider the prejudice caused by the prosecutor's comments shifting the burden of proof, and incorrectly relied on Bowers's description of the perpetrator as supporting defendant's convictions. We disagree.

"MCR 6.431 governs motions for new trial in criminal cases . . . ." *Hammerlund*, 337 Mich App at 615. Under MCR 6.431(B), "the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." When deciding a motion under MCR 6.431(B), the trial "court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record." *Id.* As our Supreme Court explained when reviewing a challenge to an order denying a motion for a new trial, "[a] mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

After he was convicted, defendant moved for a new trial on the basis of prosecutorial misconduct and the verdict being against the great weight of the evidence. As addressed above, the trial court properly concluded the verdict was not against the great weight of the evidence, and any potential prosecutorial misconduct did not warrant reversal given the trial court's curative instruction. Therefore, for the same reasons discussed above, the trial court also did not abuse its discretion by denying defendant's motion for a new trial because defendant did not present a ground that would warrant reversal on appeal. MCR 6.431(B).

In an effort to escape this conclusion, defendant raises a few additional arguments he did not present above. First, defendant argues the trial court improperly reviewed his great-weight argument in the same manner as his motion for a directed verdict of not guilty. This argument is a mischaracterization of the record. When the trial court began its analysis of defendant's great-weight claim, it stated:

> The first part of the motion deals with the record that was developed at the time of trial. That record is no different now than it was when I denied the Defendant's Motion for a Directed Verdict. We're essentially dealing with that same issue although in a little bit different context and with different verbiage and different court rules at p1ay. Not entirely, but somewhat. But essentially it's the same analysis that the Court made back then in denying the Motion for Directed Verdict.

"[A]s the appellant in this case, defendant bears the burden of providing this Court with a record to verify the factual basis of any argument upon which reversal [might be] predicated." *People v Everett*, 318 Mich App 511, 523; 899 NW2d 94 (2017) (cleaned up; alteration in original). Defendant failed to do so with respect to this issue. Briefly, the trial court recognized the legal standards were slightly different, but commented that the analysis was similar. In both instances, defendant was challenging the sufficiency of the evidence related to his identity as the person who committed the crimes. While the legal standards are slightly different between a motion for a directed verdict of not guilty and a motion for a new trial on the basis of the great weight of the evidence, the relevant facts and analysis are still the same. Therefore, the record simply does not support that the trial court analyzed defendant's argument under the wrong legal standard, so this argument must fail. *Id*.

Next, defendant argues the trial court erred because it failed to appreciate the prejudice caused by the prosecutor's misconduct when denying the motion for a new trial. As discussed above, though, the prosecutor's arguments were almost entirely proper because they were attacking a theory presented by the defense. *McGhee*, 268 Mich App at 635. To the extent the prosecutor's choice of words was questionable, the trial court cured any error by repeatedly instructing the jury regarding defendant's burden of proof. *Ogilvie*, 341 Mich App at 35. Defendant's claim the instruction was insufficient to effectively "unring the bell" lacks merit. As noted, any possible prejudice was minimal and the trial court instructed the jury about the burden of proof on three occasions. Further, one of those instructions occurred in the middle of the prosecutor's rebuttal argument during closing. The curative instruction only pertained to the burden of proof, including defendant not being required to present any evidence, and was given after the prosecutor made one of the challenged statements. There simply is nothing in the record to suggest the jury would have reason to ignore the repeated instruction of the trial court on the

basis of a few comments from the prosecutor. Consequently, the trial court did not abuse its discretion when it determined the presumption of jurors following their instructions, and instructions curing most errors, applied in this case. *Id.*

Lastly, defendant argues the trial court abused its discretion by considering Bowers's description of the man who fled from the mall as evidence of defendant's guilt. Defendant moved for a new trial, at least in part, on the basis of the great weight of the evidence. When considering whether a verdict is against the great weight of the evidence, the trial court was required to determine if "the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *Evans*, 335 Mich App at 87 (cleaned up). The trial court acted properly when it noted Bowers described the perpetrator as a Black male who was about six-feet tall and had a slender frame. Defendant does not dispute he fits this description. Instead, he notes that Bowers was too far away to actually identify defendant and was simply guessing about height and body shape. However, the trial court did not state Bowers identified defendant or got a particularly good view of the perpetrator. Instead, the trial court merely noted Bowers's description fitting defendant was one of the myriad facts that ultimately led to the jury's conclusion defendant was guilty of the crimes charged. Because the trial court had to consider all of the relevant evidence and did so, it did not abuse its discretion as alleged by defendant. *Id.*; MCR 6.431(B). In sum, all of defendant's challenges as to how the trial court considered his motion for a new trial lack merit.

IV. FAIR CROSS-SECTION

Defendant argues his right to be tried by a jury chosen from a fair cross-section of the community was violated by a lack of potential jurors who were Black. We disagree.

A. PRESERVATION

"[T]o properly preserve a challenge to the jury array, a party must raise this issue before the jury is empaneled and sworn." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). Defendant did not raise his claim of a violation of his right to have a jury chosen from a fair cross-section of the community until after the jury was empaneled and sworn. Thus, this issue is unpreserved. *Id.*[1]

[1] The prosecution's argument defendant waived this issue lacks merit. Our Supreme Court recently discussed the difference between forfeiture and waiver in *People v King*, ___ Mich ___, ___; ___ NW2d ___ (2023) (Docket No. 162327); slip op at 6-7:

> The United States Supreme Court has made clear that "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). A waiver extinguishes the right, as well as any right to pursue an alleged error on appeal. See *Olano*, 507 US at 733; see also *People v Carter*, 462 Mich 206, 215;

B. STANDARD OF REVIEW

Issues addressing systematic exclusion of a distinctive group "in jury venires are generally reviewed de novo." *McKinney*, 258 Mich App at 161. "However, we review unpreserved constitutional issues for plain error affecting substantial rights." *People v Burkett*, 337 Mich App 631, 635; 976 NW2d 864 (2021) (cleaned up). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To show that a defendant's substantial rights were affected, there must be "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018) (citation omitted).

C. LAW AND ANALYSIS

"A defendant has the right to be tried by an impartial jury drawn from a fair cross section of the community." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 428; 884 NW2d 297 (2015), citing US Const Am VI; Const 1963, art 1, § 20; *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012). In *Bryant*, 491 Mich at 596-597, our Supreme Court reiterated the framework for considering alleged violations of that right, which was initially espoused by the United States Supreme Court in *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979):

> In *Duren*, the United States Supreme Court set forth a more substantive framework designed to evaluate fair-cross-section challenges. Specifically, to make a prima facie case of a violation of the Sixth Amendment's fair-cross-section requirement, a defendant must show:
>
> > (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires

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> 612 NW2d 144 (2000) ("One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.") (quotation marks and citation omitted). On the other hand, when a litigant fails to timely assert a right or object to an alleged error, it is deemed to be *forfeited*, but the error is not extinguished. *Id*. at 215; *Olano*, 507 US at 733.

In support of the claim of waiver, the prosecution cites to defendant's failure to use his final peremptory strike during jury selection, which indicated he was satisfied with the jury chosen. The prosecution does not cite any part of the record where defendant specifically approved of the jury venire from which the jury was chosen. Instead, the record merely shows defendant failed to raise a timely objection to the racial composition of the venire. This resulted in the alleged error being unpreserved, not waived. *King*, ___ Mich at ___; slip op at 6-7.

> from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Bryant*, 491 Mich at 596-597 (citation omitted).]

If a defendant successfully establishes a prima facie case by satisfying all three prongs above, "it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." *Duren*, 439 US at 368.

For the first prong, the United States Supreme Court has identified, at least, "women and certain racial groups" as a "distinctive group" under *Duren*. *Holland v Illinois*, 493 US 474, 485; 110 S Ct 803; 107 L Ed 2d 905 (1990). There is no dispute in this case that the first prong of the above-cited test has been met, because "African-Americans, the group alleged to be excluded, are a distinct group in the community for the purposes of determining whether there is a violation of the Sixth Amendment's fair-cross-section requirement." *Bryant*, 491 Mich at 598. Our Supreme Court held that, in considering the second prong of the above analysis, "a court must examine the composition of jury pools and venires over time using the most reliable data available to determine whether representation is fair and reasonable." *Bryant*, 491 Mich at 599-600. With respect to the third prong of the *Duren* test, our Supreme Court explained "[a] systematic exclusion is one that is 'inherent in the particular jury-selection process utilized.' " *Id*. at 615-616, quoting *Duren*, 439 US at 366.

Defendant's argument fails under the second prong of the *Duren* test. Defendant notes there were no people who were Black in the venire from which his jury was selected. When he belatedly objected to such, the trial court referenced that a lack of Black potential jurors was not unusual in St. Clair Circuit Court. Defendant reasons this is proof of historical underrepresentation of people who are Black on jury venires in St. Clair County. However, the *Duren* test is clear a defendant must prove "that the representation of [the identified] group in venires from which juries are selected is not fair and reasonable *in relation to the number of such persons in the community*[.]" *Bryant*, 491 Mich at 597 (cleaned up; emphasis added). Defendant has not provided any evidence related to the population of people who are Black in St. Clair County. Consequently, there is no support for the conclusion that the lack of people who are Black in jury venires in the county is evidence of them being underrepresented. Obviously, if a given county has an extremely low population of any given minority group, a fair and reasonable representation of that group will be quite small. The trial court's comment about it being a common occurrence for there to be no potential jurors who are Black does not support defendant's claim under *Duren* and *Bryant*. Because defendant has not satisfied the second prong of the *Duren* test, his claim of a violation of his constitutional right to have a jury chosen from a fair cross-section of the community must fail. *Bryant*, 491 Mich at 596-597, citing *Duren*, 439 US at 364.[2]

[2] Defendant's claim also would have failed under the third prong of the *Duren* test. Defendant is required to prove "underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Bryant*, 491 Mich at 597 (cleaned up). Defendant has not identified a single

V. CONFRONTATION CLAUSE

In his Standard 4 brief on appeal, defendant argues his right to confront the witnesses against him was violated by the prosecution's expert in DNA analysis relying on work by DNA analysts who never testified at trial. We disagree.

A. PRESERVATION

To preserve a constitutional claim, a defendant must "raise an objection on the ground" also raised on appeal. *People v Brown*, 326 Mich App 185, 191-192; 926 NW2d 879 (2019). Defendant did not object to the admission of testimony and laboratory reports relying on work performed by DNA analysts who had not testified at trial. Therefore, this issue is not preserved for our review. *Id.*

B. STANDARD OF REVIEW

"[W]e review unpreserved constitutional issues for plain error affecting substantial rights." *Burkett*, 337 Mich App at 635 (cleaned up). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. To show that a defendant's substantial rights were affected, there must be "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Randolph*, 502 Mich at 10 (citation omitted).

C. LAW AND ANALYSIS

"A defendant has the right to be confronted with the witnesses against him or her." *People v Yost*, 278 Mich App 341, 369-370; 749 NW2d 753 (2008), citing US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "The purpose of the Confrontation Clause is to provide for a face-to-face confrontation between a defendant and his accusers at trial." *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998) (cleaned up). "This confrontation is an important right of the defendant because it enables the trier of fact to judge the witnesses' demeanors." *People v Dye*, 431 Mich 58, 64; 427 NW2d 501 (1988) (opinion by LEVIN, J.). "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 US at 68.

The Confrontation Clause is implicated when "testimonial evidence is at issue," and requires such evidence to be subject to cross-examination by the opposing party. *Id.* Put differently, the Confrontation Clause "bars admission of testimonial statements of a witness who

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problem with the jury-selection process capable of causing people who are Black to be excluded from jury venires in a systematic fashion. In the absence of such proof, defendant's argument must fail. *Id.*

did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266; 165 L Ed 2d 224 (2006) (cleaned up). Testimonial evidence includes those statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *People v Fackelman*, 489 Mich 515, 532; 802 NW2d 552 (2011) (cleaned up; alteration in original), citing *Melendez-Diaz v Massachusetts*, 557 US 305, 310; 129 S Ct 2527; 174 L Ed 2d 314 (2009). The United States Supreme Court has concluded laboratory reports prepared while assisting police in an investigation are generally considered to be testimonial. *Bullcoming v New Mexico*, 564 US 647, 664-665; 131 S Ct 2705; 180 L Ed 2d 610 (2011). In *Fackelman*, 489 Mich at 524, 528, our Supreme Court held a defendant's constitutional right to confrontation was violated when a nontestifying expert witness's report was admitted as substantive evidence in a criminal trial. However, "[t]he [Confrontation] Clause [] does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 US at 59 n 9 (quotation marks and citation omitted).

In this case, the crowbar and sunglasses were collected as evidence from the scene of the crime by Detective O'Donnell. From there, the evidence was transported to Morgan Rea, a forensic scientist with the Michigan State Police, who looked for body fluids and swabbed the items for potential DNA. Rea swabbed the handle of the crowbar, some presumptive blood on the crowbar, and the nose and ear areas of the sunglasses. She testified about her process, and her laboratory report was admitted as evidence. The swabs were then forward to another forensic analyst who worked for the Michigan State Police laboratory, Ashley Bolahan. Bolahan processed the swabs, determined there was sufficient DNA for comparison, and prepared a DNA profile. At the time Bolahan performed her work, there was no suspect identified in the case. Bolahan did not testify at trial, and her report was not admitted as evidence.

The DNA profile prepared by Bolahan was forwarded to John MacDonough, a forensic scientist for the Michigan State Police who was an expert in the Combined DNA Index System (CODIS) database. MacDonough used the DNA profile prepared by Bolahan to run through the CODIS database. This resulted in a match to defendant, who had an existing DNA profile in the CODIS database. MacDonough testified about his process, acknowledged he did not prepare any of the DNA profiles, and his report was admitted as evidence. The report indicated it was for investigative purposes only, and requested a known DNA sample from defendant to verify the match.

MacDonough's report was forwarded to Deputy O'Donnell, who began the process of obtaining a known sample from defendant. Deputy O'Donnell was unable to do so until one of the court proceedings in the present case, which was after defendant was already charged with the crimes of which he was eventually convicted. As he recounted in his testimony at trial, Deputy O'Donnell used a search warrant to compel defendant to provide the police with a buccal swab. The buccal swab was forwarded to Rea, who simply cut the swab and forwarded it for further processing. As noted, Rea testified about her involvement in the analytical process.

The swab was forwarded to Kristen Dreffs, who was a forensic technician with the Michigan State Police laboratory. Dreffs extracted the potential DNA from defendant's buccal swab. Dreffs did not testify at trial, and her report was not admitted as evidence. After the extraction was completed, the next step was to forward the evidence to another forensic scientist,

Erica Anderson. She analyzed the sample and prepared a DNA profile. Anderson did not testify at trial, and her report was not admitted as evidence.

Lastly, the DNA profiles prepared by Bolahan and Anderson were forwarded to Jones. As part of her analysis, Jones used the DNA profiles prepared by the other two forensic scientists. Jones acknowledged she did not prepare any of the DNA profiles. Instead, she merely compared those profiles to one another, and ended up with the result there was very strong support that defendant's DNA was one of three contributors from each swab of the evidence. Jones testified at trial, and her report was admitted as evidence. The report specifically states: "Other staff members have processed evidence associated with this report, in addition to the reporting analyst."

Defendant argues his constitutional right under the Confrontation Clause was violated by the lack of testimony from Bolahan and Anderson. He notes he was never provided the opportunity to confront those two witnesses about the DNA profiles they prepared. But the record is abundantly clear that Bolahan's and Anderson's reports *were not* admitted as evidence. Instead, Jones merely relied on the DNA profiles they prepared when comparing defendant's known DNA to the swabs of the evidence.

Defendant contends Jones's reliance on the DNA profiles prepared by witnesses who did not testify was a violation of his rights under the Confrontation Clause. The United States Supreme Court considered a starkly similar factual scenario in *Williams v Illinois*, 567 US 50; 132 S Ct 2221; 183 L Ed 2d 89 (2012) (opinion by Alito, J.). The resulting plurality opinion, along with the concurrence and dissent, were explained by our Supreme Court in *People v Nunley*, 491 Mich 686, 702-704; 821 NW2d 642 (2012) (citations omitted; alterations in original):

> Most recently, the United States Supreme Court issued a plurality opinion in *Williams v Illinois* that addressed whether portions of the expert testimony from a forensic specialist violated the defendant's right of confrontation. Specifically, the expert witness testified that a DNA profile produced by an outside laboratory using semen from vaginal swabs from the victim matched a DNA profile produced by the state police lab using a sample of the defendant's blood. The defendant argued that any testimony from the expert implicating what had taken place at the outside laboratory violated the Confrontation Clause.
>
> The lead opinion concluded that the expert's testimony concerning the outside laboratory did not run afoul of the Confrontation Clause for two reasons. First, the out-of-court statements were related by the expert only for the purpose of explaining the assumptions on which the expert's opinion relied. They were not offered for the truth of the matter asserted. Second, even if the report that the outside laboratory produced had been admitted into evidence, it was not a testimonial document.
>
> With respect to the second reason, the lead opinion emphasized that the report "was not prepared for the primary purpose of accusing a targeted individual," which distinguished the report from the evidence at issue in *Crawford* and its progeny. Rather, the lead opinion reasoned that, viewed objectively, the primary purpose of the report was to catch the perpetrator who was still at large and that no

> one at the outside laboratory could have known that the DNA profile would implicate the defendant. Thus, the lead opinion viewed the report as "very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach."
>
> In a concurring opinion, Justice Thomas disagreed with the lead opinion's two rationales. He nonetheless agreed that the challenged testimony did not violate the Confrontation Clause because the report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' . . . ." The dissenting opinion expressed agreement with Justice Thomas that the statements were offered for the truth of the matter asserted. The dissent, however, concluded that the out-of-court statements were indeed testimonial under *Melendez-Diaz* and *Bullcoming*, noting that although it is relevant to inquire whether the primary purpose of the statement was to establish "past events potentially relevant to later criminal prosecution," *Crawford* and its progeny do not suggest that "the statement must be meant to accuse a previously identified individual[.]"

In *Williams*, the challenged laboratory report "was not admitted into evidence and was not seen by the trier of fact." *Williams*, 567 US at 71. The same is true here.

"A plurality opinion of the United States Supreme Court, however, is not binding precedent." *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). Therefore, the decision in *Williams* is not, on its own, determinative. Nevertheless, in *People v Fontenot*, 333 Mich App 528, 534; 963 NW2d 397 (2020), vacated in part on other grounds 509 Mich 1073 (2022), this Court concluded our Supreme Court, in *Nunley*, had adopted the plurality approach from *Williams*. We are bound by this Court's published interpretation of *Nunley*. *People v Sobczak-Obetts*, 253 Mich App 97, 105; 654 NW2d 337 (2002) (holding a prior published opinion "is binding precedent under the rule of stare decisis, [which] we are not at liberty to revisit . . .").

Having determined that the plurality decision in *Williams* applies in this case, it is clear defendant's argument lacks merit. As relevant to the present case, Jones only referenced that the DNA profiles she relied on were prepared by Bolahan and Anderson. Jones did not testify as to their process nor attempt to validate the veracity of the DNA profiles prepared. Instead, she merely noted she used those profiles to compare the DNA from the evidence to the DNA from defendant's buccal swab, and determined there was a match. In *Williams*, 567 US at 79, Justice Alito determined the Confrontation Clause did not apply in such circumstances, and provided the following analysis:

> This conclusion is entirely consistent with *Bullcoming* and *Melendez-Diaz*. In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in *Bullcoming* that the defendant's blood alcohol level exceeded the legal limit and in *Melendez-Diaz* that the substance in question contained cocaine. Nothing comparable happened here. In this case, the Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate

> profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood. Thus, just as in *Street*, the report was not to be considered for its truth but only for the "distinctive and limited purpose" of seeing whether it matched something else. [*Tennessee v Street*, 471 US 409, 417; 105 S Ct 2078; 85 L Ed 2d 425 (1985)]. The relevance of the match was then established by independent circumstantial evidence showing that the Cellmark report was based on a forensic sample taken from the scene of the crime. [*Williams*, 567 US at 79.]

Similarly, Jones testified she compared two DNA profiles and determined they matched. She did not vouch for the correctness of those DNA profiles. Instead, it was established the DNA profiles were created through a chain of custody beginning with Deputy O'Donnell in both instances and ending with Jones. Because Jones did not rely on the DNA profiles for the truth of the matter asserted in those profiles, the Confrontation Clause simply was not implicated. *Id*.; *Crawford*, 541 US at 59 n 9.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant argues he is entitled to reversal of his convictions and a new trial because his constitutional right to the effective assistance of counsel was violated. We disagree.

A. PRESERVATION

To preserve a claim of ineffective assistance of counsel, a defendant must "move the trial court for a new trial or a *Ginther*[3] hearing," *Jackson*, 313 Mich App at 431, or "by filing in this Court a motion for remand to the trial court for a *Ginther* hearing," *People v Abcumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020) (citation omitted). It is undisputed defendant did not do any of these things, and therefore, this issue is unpreserved. *Id*.

B. STANDARD OF REVIEW

As to ineffective assistance of counsel, generally, "[a] trial court's findings of fact are reviewed for clear error, and whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel is a question of law that we review de novo." *Ogilvie*, 341 Mich App 34 (cleaned up). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Davis*, 509 Mich 52, 68; 983 NW2d 325 (2022) (cleaned up). However, "[a]ppellate review of an unpreserved argument of ineffective assistance of counsel, like this one, is limited to mistakes apparent on the record." *People v Johnson*, 315 Mich App 163, 174; 889 NW2d 513 (2016).

[3] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

C. LAW AND ANALYSIS

"A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions," and the "right to counsel encompasses the right to the effective assistance of counsel." *People v Muniz*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 355977); slip op at 5 (cleaned up), citing US Const, Am VI; Const 1963, art 1, § 20. "The effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Muniz*, ___ Mich App at ___; slip op at 5 (cleaned up). The United States Supreme Court has held that "to receive a new trial on the basis of ineffective assistance of counsel, a defendant must establish that 'counsel's representation fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), quoting *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "When reviewing defense counsel's performance, the reviewing court must first objectively 'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' " *Jackson*, 313 Mich App at 431, quoting *Strickland*, 466 US at 690. "Next, the defendant must show that trial counsel's deficient performance prejudiced his defense—in other words, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Jackson*, 313 Mich App at 431, quoting *Vaughn*, 491 Mich at 669.

"This Court will not find trial counsel to be ineffective where an objection would have been futile; nor will it second-guess matters of trial strategy." *Ogilvie*, 341 Mich App at 34. "Furthermore, because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Muhammad*, 326 Mich App 40, 63; 931 NW2d 20 (2018) (cleaned up).

Defendant first argues defense counsel was ineffective for failing to object to the prosecution shifting the burden of proof. This argument is not supported by the record. Defense counsel *did* object on the grounds that the prosecution was shifting the burden of proof. Although the original bench conference was not transcribed, defense counsel explained what occurred during the conference after the jury left the courtroom. The record is abundantly clear the objection was related to the prosecution shifting the burden of proof because the trial court provided a curative instruction immediately after the objection, and the instruction focused solely on defendant having no burden to present any evidence to prove his innocence. As explained by this Court, "defendant necessarily bears the burden of establishing the factual predicate for his claim." *Id*. (cleaned up). Defendant has failed to do so in this case because his claim relies on a failure of defense counsel to object to prosecutorial misconduct on a given ground, and the record undisputedly establishes defendant did actually object to the alleged misconduct on the same ground. *Id*. As a result, defendant's claim of ineffective assistance of counsel on this ground lacks merit. *Id*.

Second, defendant argues defense counsel should have objected when the prosecution argued facts not in evidence. To determine whether defense counsel should have raised an objection, we must first determine whether the prosecution's alleged argument was improper. "Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *People v*

Anderson, 331 Mich App 552, 565; 953 NW2d 451 (2020) (cleaned up). Defendant challenges the following argument the prosecutor made during rebuttal:

> [Defense counsel] mentioned that there's been no genetic testing on these other two samples of the DNA, the mixture. Those DNA swabs which contain those mixtures were sent through the CODIS database. There was only one hit. The other two, obviously, there wasn't a hit on them. Why? Whose ever DNA that is may not be in the CODIS database. What are we supposed to do? What more can we do with that sample.

Defendant claims this argument was improper because it involved facts not in evidence. Pertinently, defendant construes the prosecution's argument as being that defendant must be guilty because his was the only name that popped up during the search of the CODIS database. This is a stark mischaracterization of the prosecution's claim. Instead, the prosecutor was responding to defendant's contention the prosecution did not do enough to determine who the other contributors of DNA on the crowbar and sunglasses were. The prosecutor noted all of the DNA profiles, including all of the contributors in addition to defendant on the items, were run through the CODIS database. The only match, though, was to defendant. The prosecutor did not claim defendant was guilty because his DNA profile was the only match in the database. Instead, the prosecutor merely explained why the investigation focused on defendant in lieu of other contributors of DNA. This was a fact in evidence because MacDonough, the expert witness with respect to the CODIS database, testified defendant's profile was the only match for the DNA profiles entered into the database. Because the prosecutor did not argue a fact not in evidence, there was no prosecutorial misconduct. *Anderson*, 331 Mich App at 565. In light of the lack of prosecutorial misconduct, any objection from defense counsel would have been overruled because it lacked merit. *Id.* "This Court will not find trial counsel to be ineffective when an objection would have been futile[.]" *Ogilvie*, 341 Mich App at 34. Therefore, this argument lacks merit under the first prong of *Strickland* because defendant's failure to object to the challenged argument was not objectively unreasonable. *Id.*

Third, defendant argues his trial counsel was ineffective for failing to object to the Confrontation-Clause issue. As discussed above, defendant has failed to identify a Confrontation-Clause violation and thus any objection by defense counsel would have been futile. "This Court will not find trial counsel to be ineffective when an objection would have been futile[.]" *Id.* As a result, defendant's alternative argument regarding ineffective assistance of counsel also fails. *Id.* The record also supports a conclusion that defense counsel allowed the evidence to be admitted in the manner chosen by the prosecution for a strategic purpose. During trial, defense counsel's primary strategy was to sow doubt regarding the police investigation and the forensic work performed while the investigation of this case occurred. By allowing the DNA comparison evidence to come in, defense counsel was able to attack the reliability of Jones's testimony. As a general rule, we will not "second-guess matters of trial strategy." *Id.* Therefore, for either reason, defendant's alternative argument of ineffective assistance of counsel fails. *Id.*

Defendant suggests we could remand to the trial court for a *Ginther* hearing if we believe the factual record needed to be developed. But defendant does not identify any factual issues requiring development during an evidentiary hearing held according to *Ginther*. See *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007) (denying a request to remand for a

Ginther hearing "[b]ecause defendant has not set forth any additional facts that would require development of a record to determine if defense counsel was ineffective . . . .").

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Riordan
/s/ Sima G. Patel