STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2012
v	No. 302370 Genesee Circuit Court
LEONDRE JOVANTAE CARR, Defendant-Appellant.	LC No. 09-025987-FC

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant Leondre Jovantae Carr of first-degree murder, MCL 750.316, two counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for firing several shots at a car with three passengers, injuring his former girlfriend, Reshia Fitzpatrick, and killing her new boyfriend, Dominique Wallace. Defendant challenges the admission of evidence that his family members threatened Reshia causing her to alter her version of events, that Reshia initially told police that she saw defendant holding a gun at the time of the shooting, and that someone fired several shots at Dominique's home on the night before the fatal shooting. The trial court properly admitted the first and third evidentiary items and the admission of the second was harmless in light of Reshia's testimony. Defendant also contends that he is entitled to a new trial because the misconduct of one juror infected the entire proceedings. The trial court properly removed the tainted juror and ensured the remainder of the jury was impartial before proceeding with the trial. Defendant also raises several challenges *in propria persona*, all of which lack merit. We therefore affirm defendant's convictions and sentences.

I. BACKGROUND

Defendant was convicted for shooting at a car in which Reshia, Dominique, and Dominique's father, Shaun Wallace, were riding, killing Dominique and injuring Reshia. Defendant and Reshia had formerly engaged in a romantic relationship and defendant fathered Reshia's son, who was an infant at the time of the incident. Reshia was dating Dominique by that time and had moved with him into Shaun's home about two weeks earlier.

On October 10, 2009, Dominique and Reshia visited the home of Reshia's mother, Janice Fitzpatrick. Reshia's infant son and her toddler daughter from a previous relationship lived with

Janice. While Reshia and Dominique visited with the children, defendant arrived with his brother, Rashad Seals, and a friend, Stevie Patton. Defendant wanted to speak to Dominique alone, but Reshia intervened and an argument ensued. Janice told everyone to leave, so Dominique telephoned Shaun to ask him for a ride.

When Shaun pulled his vehicle to a stop in front of Janice's home, he saw defendant and two other men exit and walk toward the corner. Dominique left the house and entered Shaun's car. Reshia walked to a neighboring home where she had been doing laundry. When Reshia came back outside, defendant called to her. Reshia ignored him and entered Shaun's car. As they drove away, defendant allegedly pulled a rifle from his coat and shot several times toward the car. One bullet shattered the rear window, travelled through the front passenger seat headrest and pierced Dominique's skull. Dominique lived three days before perishing from the gunshot wound. Flying glass from that same bullet struck Reshia's eye and she required surgery to repair the damage.

II. EVIDENCE OF WITNESS INTIMIDATION

Defendant challenges the trial court's admission of Reshia's testimony that defendant's family threatened her before trial. Defendant challenged this testimony at trial on hearsay grounds. He now claims that Reshia's testimony was so unduly prejudicial that its admission denied his right to a fair trial. Defendant's appellate claim is unpreserved as he changed his ground for objection after trial. *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). As such, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To be admissible, evidence must be relevant to an issue or fact of consequence at trial. MRE 402; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. MRE 403, however, permits exclusion of otherwise relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice," confusion, redundancy, or other related concerns. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

The challenged evidence in this case was relevant to explain why Reshia partially recanted her statement implicating defendant. See *People v Burton*, 433 Mich 268, 296; 445 NW2d 133 (1989), overruled in part on other grounds *People v Barrett*, 480 Mich 125; 747 NW2d 797 (2008) ("If our goal were to explain why the complainant recanted, evidence of threats, if present, would be relevant and probative."). Following the shooting, Reshia told Flint police officer Kyle Brandon that she saw defendant standing on the street corner, hiding a long

lack gun underneath his tan jacket. At the hospital, Reshia told "Lieutenant Johnson" that she saw defendant with an AK-47 or "chop" with a laser scope at the time of the shooting.[1]

At trial, Reshia claimed that she saw defendant, Seals, and Patton standing on the corner. She saw a red dot on the ground and thought the men were "playing with . . . a laser." Reshia denied seeing defendant carrying a gun. She admitted that she told Officer Brandon and Lieutenant Johnson that she saw defendant with a gun that day, but claimed that she "was in shock right after it happened, so [she] was mixing some things up."

The prosecutor then questioned Reshia about comments made to her by defendant's family members. Reshia claimed that she was curious about what Seals "had to say about the situation[]" so she visited his MySpace page. On the site's "status bar," Reshia discovered a message "saying [she] was going to end up where [her] boyfriend was." Reshia testified that Seals' message "scared" her and made her "nervous" to testify. Reshia further claimed that "the rest of [defendant's] family" had spoken to her in a threatening manner, but she provided no details.

Defendant contends that the unduly prejudicial effect of this evidence substantially outweighed its probative value because the prosecutor could not prove that defendant encouraged the threats. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The trial court is in the best position to balance between the probative value of the evidence and its danger of causing unfair prejudice. *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010).

The prosecutor never insinuated that defendant encouraged his family members to threaten Reshia. The prosecutor merely tried to establish that the threats, regardless of who made them, had an effect on Reshia. It is of course possible that the jury might have inferred that defendant prompted the threats. However, the jury was not invited to draw such a conclusion absent any direct evidence. There simply is no ground for this Court to conclude that the evidence was unduly prejudicial. We therefore perceive no plain error in its admission.

III. HEARSAY

Defendant also contends that the trial court improperly admitted hearsay testimony from Officer Brandon to impeach Reshia. Defendant asserts that the prosecution actually presented Brandon's testimony to prove the truth of the matter asserted, i.e. that Reshia saw defendant with a rifle. Defendant filed a pretrial motion to exclude the testimony, which the trial court denied. We review a trial court's evidentiary rulings for an abuse of discretion and underlying questions of law de novo. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

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[1] The prosecution did not call Lieutenant Johnson as a witness but Reshia testified regarding her own statements to him.

When Officer Brandon first encountered Reshia, she was hysterical and crying. The officer calmed her down and inquired how she became injured. Brandon testified that Reshia told him that she was riding in a car with her boyfriend and her boyfriend's father when she heard gunshots and the car's rear window shattered. Reshia told Brandon that "she looked out of the rear window of the car and saw three people that she knew standing . . . on the corner of the street." Brandon further testified that Reshia stated, "She – earlier she had seen [defendant] with a weapon . . . . She said it was a long black gun and it was hidden underneath a tan jacket that he was wearing."

"'Hearsay' is a statement, other than the one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Absent an exception, "[h]earsay is not admissible." MRE 802. The prosecution contended that Brandon could testify regarding Reshia's statement after the shooting because the prior statement was inconsistent with Reshia's testimony, Reshia was permitted to explain the inconsistency while on the stand, and defendant had the opportunity to cross-examine Reshia about her statements. See MRE 613.

The trial court improperly admitted Brandon's testimony regarding Reshia's out-of-court statement. "When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement. The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). Reshia never denied that she originally told the police that she saw defendant with a gun. Rather, Reshia claimed that she was confused when she made the statement. Accordingly, the trial court improperly permitted the prosecution to elicit Brandon's testimony for the purpose of proving that Reshia had made a prior inconsistent statement.[2]

Yet, a trial court's improper evidentiary ruling only merits reversal if it results "in a miscarriage of justice" or is "inconsistent with substantial justice." MCL 769.26; MCR 2.613(A). Brandon's testimony regarding the content of Reshia's statement was merely cumulative evidence as Reshia specifically testified that she had in fact told the officer that she saw defendant with a gun. The admission of Brandon's testimony in this regard was therefore harmless.

IV. OTHER "BAD ACTS" EVIDENCE

Defendant challenges the trial court's admission of evidence that he fired several shots at the Wallace home on October 9, the day before the fatal shooting. On October 8, defendant drove Reshia to the Wallace home. Reshia did not want defendant to know that she was living with a new boyfriend and did not want her new boyfriend to know that her ex-boyfriend brought

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[2] We note that defendant's reliance on *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), is misdirected. The *Stanaway* admissibility analysis would only be relevant if the witness denied making the prior inconsistent statement.

her home. Accordingly, she told defendant that she was staying with a female friend who did not want her to bring male friends around. She instructed defendant to introduce himself as her cousin. When the pair arrived at the Wallace home, Shaun was outside. Reshia introduced defendant to Shaun as her cousin. Defendant, realizing that Reshia had lied to him and was living with another man, interjected in an aggressive manner that he was actually the father of Reshia's child.

In the early morning hours of October 9, Shaun returned home after visiting a friend. Dominique and Reshia were asleep in a back room and the home was dark. Shaun turned on the kitchen light and immediately heard gunfire. He ducked and grabbed the telephone to summon police. While he waited for the police to arrive, Shaun discovered a bullet hole in the home's front exterior wall next to a bay window. He found a bullet on the couch across the room. Shaun also discovered a bullet hole in the wall above the kitchen door. The investigating officers found that a car parked in the Wallace driveway was "riddled with bullets" and the side of the house was "shot up."

The prosecution presented evidence connecting the October 9 and October 10 shootings. Investigating officers collected spent shell casings from the Wallace home's driveway. Two of the casings were "7.62" caliber and two others came from a different type of weapon. On the corner near Janice's house, officers found four spent shell casings, all 7.62 x 39 caliber boat-tail rifle ammunition. A forensic analyst found four bullet holes on Shaun's car, all consistent with 7.62 x 39 caliber bullets. Inside the vehicle, the analyst found two fired 7.62 x 39 bullet fragments. Acting on a tip that defendant had been at a party late in the night of October 28, officers searched the party location on October 29. The officers uncovered a loaded 7.62 x 39 caliber SKS semi-automatic rifle hidden under a mattress.

Defendant characterizes the testimony regarding the October 9 shooting as other acts evidence, presented to establish his violent character. Pursuant to MRE 404(b)(1):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To admit other acts evidence, four hurdles must be overcome. First, the prosecutor must present the evidence for a proper purpose, i.e. not to establish the defendant's character or propensity to commit the crime. Second, the evidence must be relevant under MRE 402. Third, pursuant to MRE 403, the danger of undue prejudice from the introduction of the evidence must not substantially outweigh the probative value of the evidence. Fourth, if requested by the defendant, the trial court must give the jury an instruction regarding the limited use of the other acts evidence. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *VanderVliet*, 444 Mich at 74-75. In the trial court, defendant sought suppression of this evidence, arguing that it was not logically relevant and therefore failed the second prong of the *VanderVliet* analysis. In

the alternative, defendant claimed that the evidence was so speculative that the danger of undue prejudice far outweighed the evidence's probative value.

First, we conclude that the prosecutor presented evidence of the October 9 shooting for a proper purpose. The prosecutor was not trying to establish that defendant had a propensity for violence. Rather, evidence connecting the October 9 and October 10 shootings tended to establish defendant's identity at the perpetrator and his motive for targeting Dominique. Further, the sequence of events showed a plan on defendant's part to accomplish his criminal goal.

Second, the evidence was logically relevant. The events of October 9 and 10 are interconnected. Defendant learned that his infant son's mother had moved in with her new boyfriend. Later that night, someone fired several shots at Dominique's house immediately after Shaun turned on the kitchen light and illuminated himself as a target through the home's front-facing bay window. The following day, defendant had a confrontation with Reshia and Dominique. When Reshia and Dominique tried to leave the scene, and while defendant stood on the corner with his friends, someone fired several shots at their vehicle. The same type of weapon was used during both shootings and that type of weapon was later connected to defendant. The logical conclusion is that both shootings were committed by one person and that person was defendant.

Third, there is no danger of undue prejudice from this evidence that could substantially outweigh the evidence's probative value. The prosecutor never suggested that defendant committed both shootings because he was a "bad guy" or because he was prone to violence. The prosecutor simply argued the logical connections in the chain of events to establish that defendant fired the bullets that killed Dominique and injured Reshia. All evidence that tends to establish the elements of the crime is "damaging to some extent," but that does not support suppression. *People v Murphy (On Remand)*, 282 Mich App 571, 582; 766 NW2d 303 (2009).

And finally, the trial court gave a limiting instruction to the jury. The court specifically instructed the jury to consider the evidence only to determine whether defendant "used a plan or a system or a characteristic scheme that he used before or since" and not to consider whether the evidence "show[ed] that he's a bad guy or that he is likely to commit crimes." Under the circumstances, the prosecution's proffered evidence regarding the October 9 shooting was admissible and defendant is not entitled to relief.

V. JUROR MISCONDUCT

Defendant argues that he is entitled to a new trial as a result of juror misconduct. On the sixth day of trial, one juror (Juror A) informed the court that, before the start of the fifth day, another juror (Juror B) had expressed impatience with the length of the proceedings. At the time of this conversation, the prosecution had yet to complete its case and still had four witnesses to present. Juror A stated:

> He didn't only speak to me . . . . [T]here were a few of us in there because we came early. And he said something about getting the case over with. And I said, "Well, we still have to make up our mind, so we could be here a couple of days." And that's when he said what he said.

* * *

He said, "Well, we know he's guilty anyways."

The court summoned Juror B to the stand. Juror B expressed to the court his impatience with the lawyers repeatedly asking the witnesses the same questions. Juror B denied that he had stated an opinion about the defendant's guilt. Even so, the court excused Juror B from service.

The court then brought the remainder of the jury into the courtroom. The court informed the jury that it had excused Juror B because "he had been talking about the case in front of some of you." The court explained its "concerns" with Juror B's conduct:

> One is because if you talk about the case early, you start to form conclusions and opinions. And so, I have to ask – I'm sure some of you heard him, do any of you feel like you were influenced by his conversations? If you do, raise your hands.

No juror responded. The court continued:

> Okay. Now, here's the next question. Right at the start I told you that our rule says that you presume [defendant] to be innocent throughout the case. And the rule is that means he's not guilty when you vote, unless you analyze the evidence and unless you decide whether or not the evidence proves him guilty.
>
> And, is there anybody today that does not presume [defendant] to be innocent? I don't see any hands. So, that means that you all are going to wait to decide the case until we're finished hearing all the evidence. Is that right?
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> * * *
>
> See, we haven't heard all of the evidence.
>
> Okay. That's the way I want it to be. So, we'll continue now.

A criminal defendant has the right to trial by a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). As a general rule, a court "may not invade the sanctity of the deliberative process" and grant a new trial based on juror unfairness or bias "relat[ing] to influences internal to the trial proceedings." *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004). However, a defendant may be entitled to a new trial where the jury is influenced by extraneous factors. *Budzyn*, 456 Mich at 88; *Fletcher*, 260 Mich App at 539. Defendant has the burden to "'establish that . . . extraneous influences created a real and substantial possibility that they could have affected the jury's verdict.'" *Fletcher*, 260 Mich App at 540, quoting *Budzyn*, 456 Mich at 88-89.

Prior to opening statements, the court instructed the jury that it had to presume defendant's innocence unless the prosecution proved otherwise beyond a reasonable doubt. The court also specifically instructed the jurors that they could not discuss the case, even amongst themselves until the court instructed them to begin deliberations. Juror B clearly violated the court's instructions.

Despite Juror B's comments, a new trial is not warranted as defendant failed to establish that those comments affected the remaining jurors' verdict. We find *United States v Hockridge*, 573 F2d 752 (CA 2, 1978), instructive in this regard. In that case, one juror informed the court "that several other jurors had remarked that the defendants were guilty" by the fifth day of an eight-week trial. *Id.* at 756. After interviewing the jurors individually, the court learned that at least six jurors had heard such comments. All the jurors stated that they "would not form any opinion of guilt or innocence until all the evidence was presented." *Id.* The Court of Appeals for the Second Circuit affirmed the district court's decision to continue the trial after the juror interviews because the lower court promptly intervened to "contain[] any spread of the taint" and determined that "the jurors were not prejudiced" by the comments. *Id.*

Similarly here, the court promptly interviewed Jurors A and B and then the jury as a whole. Based on Juror B's statements, the court determined that he was likely biased and removed him from the jury. The court then interviewed the jury members, although as a whole, and discerned that they had not been compromised by Juror B's commentary on defendant's guilt. The lower court was in the best position to gage the jurors' credibility and we will not interfere with its judgment. MCR 2.613(C). Accordingly, we reject defendant's claimed entitlement to a new trial.

VI. REFERENCES TO DOMINIQUE AS A "VICTIM"

In a Standard 4 brief, defendant claims that he was denied a fair and impartial trial because the trial court, prosecutor and a potential juror referred to Dominique as a "victim." Defendant claims that no one should have prejudged Dominique as a victim because defendant's general plea of not guilty placed Dominique's status as a "victim" in question. Defendant's challenge completely lacks merit. Dominique was the victim of a shooting without regard to whether defendant fired the fatal shot. Dominique was not magically transformed into a non-victim simply because defendant denied pulling the trigger.

VII. "SURPRISE" WITNESSES

Defendant also asserts that his trial counsel was ineffective for failing to challenge the prosecution's presentation of two witnesses who were omitted from the prosecution's witness list. Specifically, defendant asserts that trial counsel should have sought the preclusion of testimony from Tai Johnson, who owned the home where defendant's rifle was discovered, and Ryan Larrison, who analyzed the rifle to determine if it could have fired the bullets recovered from the scene. On December 3, 2009, the prosecution filed its list of known witnesses. The prosecution labeled those witnesses that it intended to call at trial. Ryan Larrison was listed as a known witness, but was not labeled as a witness intended to be called at trial. Tai Johnson was not included in the known witness list.[3]

[3] The prosecution's list identifies someone named "Tiara" as a known witness. We find it likely that the prosecution was referring to Tai Johnson.

MCL 767.40a provides, in relevant part:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
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> * * *
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> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
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> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

Pursuant to the statute, the prosecution was required to ask leave of the court to introduce Johnson and Larrison as witnesses at trial. The prosecution undeniably failed to do so. However, the prosecution's violation of the statutory requirement would only warrant relief if it "resulted in a miscarriage of justice." MCL 769.26, cited by *People v Williams*, 188 Mich App 54, 59; 469 NW2d 4 (1991). Defendant was not prejudiced by the admission of these witnesses' testimony. The defense was on notice that Larrison was a potential prosecution witness and therefore counsel had the opportunity to investigate his evidence. Although Johnson was not included in the known witness list, the defense was aware that the suspected murder weapon had been discovered during the execution of a search warrant at a third-party's home. Defendant was certainly on guard that such evidence might be presented and that he would need to rebut his connection to the rifle.

In any event, defendant cannot establish that his trial counsel was constitutionally deficient in failing to object. To overcome the strong presumption that counsel acted competently, the defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances," and must prove a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cullen v Pinholster*, ___ US ___; 131 S Ct 1388, 1403; 179 L Ed 2d 557 (2011), citing *Strickland v Washington*, 466 US 668, 688-692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant cannot establish that the trial court would have rejected the prosecution's request to add these witnesses had defense counsel objected. Accordingly, defendant cannot prove that counsel's failure to object likely affected the outcome of his trial.

III. PROSECUTORIAL MISCONDUCT

Defendant also raises a claim of prosecutorial misconduct in his Standard 4 brief. Specifically, defendant contends that the prosecutor argued facts not in evidence by mischaracterizing the testimony of Reshia and eye witness Patrick Ryals and claiming those witnesses saw defendant shoot at the car on October 10. "Generally, a claim of prosecutorial misconduct is a constitutional issue, that is reviewed de novo" to determine "whether the defendant was denied a fair and impartial trial." *People v Brown*, 279 Mich App 116, 134; 755

NW2d 664 (2008). We must examine the prosecutor's remarks in context to determine if the line has been crossed. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

In rebuttal closing argument, the prosecutor stated:

> Reshia told you when she testified that she was scared to testify. And despite that, she did testify. And she told you what she saw. And there is no doubt that she told the officers things that she didn't tell you.

The prosecutor was referring to the testimony of Officer Brandon and *of Reshia herself* that she told the officer on the night of the incident that she saw defendant with a gun and witnessed defendant shoot toward the car. The prosecutor's argument was based on the evidence. Reshia changed her version of events after the shooting to make defendant look less culpable. Reshia even admitted on the stand that her original statement to the police was more damning than her trial testimony. A prosecutor does not engage in misconduct when he argues the evidence and reasonable inferences arising from that evidence. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995). Not only was the prosecutor's argument based on the record evidence, it also directly responded to defense counsel's averment that Reshia's version of events at trial was the truthful account. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Accordingly, contrary to defendant's assertion, the prosecutor's arguments in this regard were completely appropriate.

In rebuttal argument, the prosecutor also commented on the testimony of Ryals. Ryals lived in Janice Fitzpatrick's neighborhood and called 911 after witnessing the shooting. In relation to Ryals, the prosecutor stated:

> We do have people who testified to what they saw. We know the Defendant was firing the gun. Patrick Ryals saw him do it. They were the only shots heard that evening. The three men on the corner, the Defendant was the one who matched the physical description, the clothing description, and fired the gun.

Contrary to defendant's contention, this argument was consistent with Ryals' testimony. Defendant saw three black males standing on the corner. One man was taller than the other two and was wearing a tan, hooded jacket. This description is consistent with that given by Reshia, Shaun and Janice. Ryals saw that man pull out a "revolver" and shoot four to five times toward the car in which Reshia and Dominique were passengers. The prosecutor also played the recording of Ryals' 911 call into the record during Ryals' testimony. Ryals' testimony was consistent with his statements during the recorded telephone call. Accordingly, the prosecutor also engaged in no misconduct in making these arguments.

Defendant further asserts that counsel was ineffective for failing to object to these instances of alleged prosecutorial misconduct. However, as noted, defendant's challenges completely lack merit and defense counsel could not be considered ineffective for failing to object. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

IX. ASSISTANCE OF COUNSEL

Defendant contends that defense counsel was ineffective for failing to present evidence at trial to support his comment during opening statement that a neighbor described the shooter as five feet and ten inches tall, seven inches shorter than defendant's actual height. Defendant failed to request an evidentiary hearing or a new trial to preserve his challenge and our review is therefore limited to errors apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To merit relief, defendant must establish "a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

On this record we find it highly unlikely that the proposed evidence would have affected the outcome of defendant's trial. Defendant was identified by his former girlfriend as the shooter. Defendant was standing in front of his former girlfriend's mother's house, where he had just visited, when he pulled out a rifle and shot at the victim's car. Given these witnesses' familiarity with defendant, it is unlikely that a stranger's estimation of the shooter's height would have affected the jury's verdict. Accordingly, we discern no basis to award defendant a new trial.

X. REASONABLE DOUBT INSTRUCTION

Defendant contends that the trial court gave the jury a defective reasonable doubt instruction and that his counsel was ineffective in failing to lodge a contemporaneous objection. Yet, the trial court's jury instruction was nearly identical to CJI2d 3.2(3). "This standard jury instruction has repeatedly been held to adequately convey the concepts of reasonable doubt, the presumption of innocence, and the burden of proof." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Defendant cannot establish that the trial court's provision of the standard jury instruction was erroneous. Moreover, defense counsel could not be considered ineffective for failing to raise such a meritless objection. *Snider*, 239 Mich App at 425.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/Mark T. Boonstra