

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 19, 2012

v

JOSEPH ANTHONY SUTTON,

Defendant-Appellant.

No. 304035
Wayne Circuit Court
LC No. 10-002034-FC

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Defendant, Joseph Anthony Sutton, appeals as of right his jury convictions of felony murder, MCL 750.316(1)(b), first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm (felon in possession), MCL 750.224f. Defendant was sentenced to life imprisonment for the felony murder conviction, life imprisonment for the first-degree premeditated murder conviction, two years' imprisonment for the felony-firearm conviction, and one to five years' imprisonment for the felon in possession conviction. For the reasons stated in this opinion, we affirm defendant's convictions and sentences for felony-firearm and felon in possession, and remand for the trial court to amend defendant's judgment of sentence to reflect one conviction and one sentence for first-degree murder based upon two theories.

Defendant's convictions arise from the murder of Edith Hamilton-Watts, hereafter the victim, who was shot four times inside the Financial Exchange, a check-cashing and food stamp store that she managed. The victim was murdered on February 22, 1996. On the day of the murder, police responded to the scene and discovered the victim's body on the floor in the employee area of the store. The police found a 16-square-inch, freshly cut hole in the roof above a small storage room in the employee area. The safe and the cash drawer were undisturbed. A partial shoe or boot print was recovered from a piece of fallen roofing tar. None of the evidence from the scene contained usable fingerprints. Four fired cartridge cases were discovered in the employee area, and it was determined that the casings were fired from the same gun. An autopsy of the victim revealed that she was shot at close range in the left cheek, left jaw, left shin, and the lower left side of her abdomen. Police suspected that there were likely multiple perpetrators with inside information about the store because a walkie-talkie was recovered, there was no ladder used, the alarm was not tripped, and it appeared that the perpetrators had knowledge of when the money would be available.

Defendant did not become a suspect in the murder until October 2008, when Charmane Murphy, his ex-girlfriend and mother of his daughter, came forward and told police that defendant confessed to committing a murder. Murphy testified that several years ago she and defendant were stopped at a red light near the Financial Exchange when defendant stated: “I killed somebody at the check cashing, food stamp office.” Defendant told Murphy that he shot someone in the head. He informed her that he had worked with two other people, it was an inside job, there was no guard present, they planned to take cash out of the safe, and they broke into the building through the roof of the bathroom. Defendant also stated that the female employee who he shot went to grab her gun but he beat her to the draw. Defendant said he left without taking any money because no one was supposed to be in the store. Defendant also told Murphy that he broke through roofs to get into other businesses, and “he needed certain tools like a saw . . . a sledge hammer to break the roof in and pull back the . . . the tar (sic) it’s like three layers to get into the crawlspace.”¹

Defendant’s cousin, Andre Devon Christian, also testified about an incident where defendant described breaking into a check-cashing store and killing someone. In 2008, Christian lived with defendant, and testified that when defendant was high on cocaine he told Christian that he went by himself to rob a west side check-cashing store, by cutting a hole in the roof of the bathroom ceiling. A woman entered the building when he was inside. Defendant shot her, and left the building. In previous testimony, Christian indicated that defendant committed the robbery with another person, that defendant may have said that he had taken some money during the robbery, and that it was a credit union or bank.

Both Murphy and Christian had motives to implicate defendant in the murder. Murphy and defendant had a tumultuous relationship, and Murphy was involved in a custody dispute with defendant over their daughter. Ten days before approaching police about defendant’s involvement in the murder Murphy was arrested for attempting to break into defendant’s home where her daughter was staying. The day Murphy contacted police about the murder was her daughter’s birthday. Christian was in prison serving a one year sentence for receiving and concealing stolen property when the police approached him about the murder. Christian agreed to testify against defendant, and in exchange his probation term was reduced by a year. Christian admitted he wanted to get out of prison, and shortly after giving a statement to police he was released.

Defendant’s first trial began on October 12, 2010, but a mistrial was declared due to juror misconduct. A new jury was impaneled on October 13, 2010, and on October 21, 2010, the jury convicted defendant of felony murder, first-degree premeditated murder, felony-firearm, and felon in possession. Defendant now appeals his convictions as of right.

I. ADMISSIBILITY OF TESTIMONY

¹ In Murphy’s statement to the police she did not state that defendant told her it was an inside job, that the woman was shot in the head, or that two other men conspired with defendant.

On appeal, defendant argues that Christian's testimony was too remote, vague, and dissimilar to be relevant. Defendant further argues that the testimony's probative value did not substantially outweigh the danger of unfair prejudice. Defense counsel filed a motion in limine to exclude Christian's testimony before trial. The trial court denied the motion, and Christian was permitted to testify.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). We review de novo whether a rule of evidence precludes admission of the evidence. *Id.* "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). The trial court abuses its discretion by admitting evidence that is inadmissible as a matter of law. *Gursky*, 486 Mich at 606.

"Generally, all relevant evidence is admissible at trial." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). MRE 401 provides that relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the action more probable or less probable than it would be without the evidence." *Id.* Evidence is "admissible if it is helpful in throwing light on any material point." *Id.* Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Blackston*, 481 Mich at 461, quoting MRE 403. Unfair prejudice exists when there is a danger that the jury will give the evidence undue or preemptive weight, or when it would be inequitable to admit the evidence. *Id.* at 462.

Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*Id.*]

The proponent of the evidence has the burden of establishing its admissibility. *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). The prejudicial effect of evidence is best determined by the trial court's "contemporaneous assessment of the presentation, credibility and effect of testimony." *People v Vandervliet*, 444 Mich 52, 81; 508 NW2d 114 (1993). For this Court to reverse on the basis of an evidentiary error, it must be more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The trial court denied defendant's pre-trial motion to exclude Christian's testimony, stating:

[T]here is [sic] sufficient similarities between the statements in terms that the building was a building in which financial transactions did occur. That the hole was cut in the roof of the building for the purposes of entry and that the death of a female employee did occur. The relationship between the individuals in terms of

them residing in the same household, when the statement was supposed to have been made.

On appeal, defendant first argues that the trial court abused its discretion because Christian's testimony was too remote in time to be relevant.

Generally, whether the passage of time reduces the probative value of the evidence goes to weight, not admissibility. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). Therefore, just because defendant's statement to Christian occurred 12 years after the charged crimes, and another two years elapsed between defendant's statement and his trial, does not make the testimony too remote to be relevant. Moreover, Christian's testimony was relevant because it had a tendency to make defendant's involvement in the charged crimes more likely.

Defendant also argues that the trial court abused its discretion when it determined that the testimony's probative value was not substantially outweighed by the danger of unfair prejudice.

The testimony was probative because the details of the statement, as testified to by Christian, were sufficiently similar to the essential details of the charged crimes. The charged crimes occurred at a check-cashing and food stamp store. The suspect or suspects entered through the roof of the building. The suspect or suspects shot the victim four times. The suspect or suspects did not take any money. This is consistent with Christian's description of defendant's statement. According to Christian, defendant broke into a financial institution through the roof above the bathroom and shot a female employee. Christian could not remember if defendant had taken any money.

Christian's testimony is also probative because it was corroborated by Murphy's testimony. Defendant also told Murphy that he had broken into a check-cashing store. Defendant told both witnesses that he came in through the roof above the store bathroom and shot a female employee while inside. Murphy's testimony not only corroborated Christian's testimony, but gave the exact location of the store. This further links the charged crimes to defendant's statement to Christian.

Next, Christian's testimony is probative because defendant's statement involved unusual and distinctive crimes. Lieutenant John Morrell researched homicides in Detroit, going back 25 to 30 years and only found one homicide of a female employee involving entry through the roof.

Finally, Christian's testimony was probative because it is logical that defendant made the statement to Christian. Christian is defendant's cousin and lived with defendant at the time of the statement.

Christian's testimony presented some danger of unfair prejudice to defendant; however, this danger did not substantially outweigh the testimony's probative value. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *Blackston*, 481 Mich at 462. Christian's testimony was the only evidence that corroborated Murphy's testimony, and therefore, presented together, strengthened the prosecution's case. However, this was not *unfair* prejudice because defendant's statements were similar to the unusual and distinct crimes. Similarly, there was little danger that the evidence would be given undue or preemptive weight

by the jury because defense counsel was able to impeach Christian with his bias, his prior inconsistent statements, and the passage of time between the crimes and Christian telling the police. Accordingly, the trial court did not abuse its discretion by denying defendant's motion to exclude Christian's testimony.

II. BATSON VIOLATION

Defendant next argues the trial court erred by attempting to cure a *Batson*² violation by reseating only one of four African-American jurors peremptorily excused by the prosecutor.

Whether the trial court properly resolved a *Batson* challenge is a mixed question of law and fact. *People v Knight*, 473 Mich 324, 342; 701 NW2d 715 (2005). We review the trial court's factual determinations for clear error and the legal issues de novo. *Id.* We review de novo whether the proponent of a peremptory challenge has articulated a race-neutral explanation for an excusal. *Id.* at 343. Finally, we review the trial court's factual determination concerning whether the opponent of the peremptory challenge has satisfied the ultimate burden of proving purposeful discrimination for clear error. *Id.* at 344. "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

The Fourteenth Amendment forbids a party from removing a prospective juror solely on the basis of race. *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *Knight*, 473 Mich at 335. There is a three-step procedure to determine if a peremptory challenge is constitutional. *Batson*, 476 US at 96-98; *Knight*, 473 Mich at 335. First, the opponent of the peremptory challenge must establish a prima facie case of discrimination. *Knight*, 473 Mich at 335.

To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a cognizable racial group; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*Id.* at 336.]

The opponent must only show that the facts raise an inference that the proponent of the peremptory challenge acted with discriminatory purpose. *Id.* at 337.

Second, if the trial court determines that the opponent has made a prima facie case of discrimination, "the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike." *Id.* The explanation only needs to be race-neutral, not persuasive or plausible. *Id.*

Third, "if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext, and whether the

² *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

opponent of the challenge has proved purposeful discrimination.” *Id.* at 337-338. In *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003), the United States Supreme Court recognized that the establishment of purposeful discrimination “comes down to whether the trial court finds the . . . race-neutral explanations to be credible.” Credibility is measured by many factors, including the demeanor of the challenger, by how reasonable or improbable to explanations are, and by whether the proffered rationale has some basis in accepted trial strategy. *Id.* “If the trial court finds that the reasons proffered were a pretext, the peremptory challenge will be denied.” *People v Bell*, 473 Mich 275, 283; 702 NW2d 128 (2005), mod 474 Mich 1201 (2005) (citation omitted).

In this case, during voir dire, the prosecutor used peremptory challenges to dismiss African American jurors Marvin Mack, Datoria Marshall, Melanie Lewis, and Frederick Bounds. Before the jury was impaneled, defense counsel raised a *Batson* challenge to the peremptory dismissal of these jurors. The trial court impliedly found that defense counsel established a prima facie case of discrimination because the prosecutor was asked to respond and provide his race neutral reasons for dismissing the jurors.

In regard to Marshall, the prosecutor stated that Marshall was excused because she had therapy scheduled three times a week and her appointments would interfere with the trial schedule. The prosecutor stated that he excused Lewis because she informed him that her grandfather had died suddenly and she wanted to attend his funeral. The trial court did not address, and therefore impliedly accepted, the prosecutor’s race neutral reasons for dismissal of Marshall and Lewis.

In regard to Mack, the prosecutor stated that he excused Mack because Mack was dressed casually in blue jeans and because Mack enthusiastically endorsed some of the concepts that defense counsel brought forward during voir dire. The trial court noted that it did not notice any unusual overly enthusiastic responses from Mack, but accepted the prosecutor’s race neutral explanation for Mack’s excusal because it found that the prosecutor questioned Mack and two other African American males in the same manner but only excused Mack.

Lastly, the prosecutor explained that he excused Bounds because Bounds indicated his co-worker’s son was charged with a crime and treated unfairly. The trial court rejected this reason because another juror also indicated that she felt she had been treated unfairly by the criminal justice system, and that while both Bounds and the other juror indicated they believed they could be fair despite their past experience with law enforcement, only Bounds was excused. Thus, with Bounds reseated and Marshall, Lewis, and Mack excused, the jury was impaneled and the trial proceeded.

On appeal, defendant does not specifically argue that the prosecutor’s race neutral reasons for dismissing Marshall, Lewis, or Mack were pretextual. Rather, defendant assumes that the trial court’s finding that Bounds was improperly excused was tantamount to a rejection of the prosecutor’s race neutral explanations for excusing all four jurors. Accordingly, defendant maintains that the trial court was required to reseate all four jurors. We reject defendant’s argument because it implies that if a trial court determines one challenged juror was improperly excused for discriminatory reasons it must necessarily find that all the challenged jurors were improperly excused. Rather, courts are required to assess the race neutral explanation offered for

each challenged juror individually. See *Bell*, 473 Mich at 289-291; *Knight*, 473 Mich at 347-349; *People v Howard*, 226 Mich App 528, 534-536; 575 NW2d 16 (1997). Further, it is clear from the record that in this case the trial court accepted the prosecutor's race neutral explanations in regard to Marshall, Lewis, and Mack, and reviewing the trial court's determination that these reasons were not pretextual, we find no clear error.

III. PROSECUTORIAL MISCONDUCT

Defendant argues the prosecutor committed misconduct by eliciting inadmissible statements, and by improperly bolstering Murphy's credibility. Defendant also argues in his Standard 4 Brief that the prosecution failed to disclose exculpatory evidence between the preliminary examination and trial.³

We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763, 764; 597 NW2d 130 (1999). This Court will reverse only if "the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A defendant's fair trial is endangered "when the prosecutor interjects issues broader than the guilt or innocence of the accused." *Id.* at 63. A prosecutor's statements must be considered as a whole and in context. *Brown*, 279 Mich App at 135. The statements should be evaluated in light of the evidence presented at trial. *Id.*

A. MURPHY'S TESTIMONY

Defendant first argues that the prosecutor committed misconduct by asking Murphy about what defendant characterizes as "prior bad acts." Specifically, defendant takes issue with Murphy's testimony that defendant stated he broke through roofs to get into businesses, and "he needed certain tools like a sledge hammer to break the roof in and pull back the um the tar (sic) it's like three layers to get into the crawlspace." Because defendant did not object to Murphy's testimony during trial, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764-765.

"The prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as

³ Defendant does not state what information he alleges the prosecution withheld. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

long as that attempt does not prejudice the defendant.” *People v Noble*, 238 Mich App 647, 660-61; 608 NW2d 123 (1999).

In this case, there is no indication that the prosecutor was acting in bad faith. Murphy’s testimony regarding what defendant said was admissible as a statement against interest pursuant to MRE 804(b)(3). Defendant was unavailable because he invoked his right to remain silent. MRE 804(a)(1). Accordingly, defendant’s statement to Murphy was not excluded by the hearsay rule because defendant was unavailable as a witness and the statement “tended to subject the declarant to civil or criminal liability.” MRE 804(b)(3).

We reject defendant’s argument that Murphy’s testimony constituted evidence of defendant’s prior bad acts barred by MRE 404(b) because it is clear from the record that the evidence was admitted as part of the statement defendant made to Murphy in which he admitted committing the murder for which he was charged. In this context, the at issue statement regarding breaking in other businesses by going through the roof was merely part of the statement made to Murphy, and therefore, provided a complete account of defendant’s statement. Further, the record shows that the prosecutor never argued or otherwise attempted to rely on this evidence as being similar acts evidence to show that defendant committed the charged offense. In this context, we find no plain error.

B. VOUCHING

Defendant next argues that the prosecution improperly vouched for the credibility of Murphy’s testimony by asking her if she was being truthful about defendant’s confession to the murder. Specifically, the prosecution asked: “Are you in any way shape or form making up what you’re telling us here today?” Murphy stated that she “would never make up nothing [sic] like this on anybody.” The prosecutor then stated: “You’re not fabricating it?” Murphy replied “no.” Finally, the prosecutor stated: “All right. [Defendant] told you about these things?” Murphy stated “yes.”

“A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses’ truthfulness.” *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

In this case, the prosecutor did not indicate that he had any special knowledge about Murphy’s veracity. In fact, he did not say anything about Murphy’s veracity, other than to ask Murphy if she was telling the truth. Therefore, we conclude that the prosecutor did not improperly vouch for Murphy’s credibility.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues defense counsel was ineffective because he failed to object to Murphy’s testimony that defendant told her he broke into other buildings by cutting through the roof. Defendant also argues in his Standard 4 brief that counsel failed to adequately impeach Christian and Murphy.

Because no evidentiary hearing was held in regard to defendant's claims of ineffective assistance of counsel, our review of defendant's claims is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 312 (quotation and citation omitted).

Defendant first argues defense counsel was ineffective because he failed to object to Murphy's testimony that defendant told her he knew how to break into buildings through the roof.

As previously discussed, Murphy's testimony regarding what defendant said about cutting through the roof was admissible as a statement against interest because the statement "tended to subject the declarant to civil or criminal liability." MRE 804(b)(3). Defense counsel is not required to argue a meritless position or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Therefore, we conclude that defendant has failed to demonstrate that defense counsel's performance fell below an objective standard of reasonableness.

Defendant characterizes the testimony regarding his statement about breaking into buildings through the roof as evidence regarding prior bad acts barred by MRE 404(b). As previously discussed, the record does not support this characterization of the evidence.

Moreover, defendant was not prejudiced by the statement because it was not emphasized by the prosecution, and was merely part of Murphy's explanation of her conversation with defendant regarding the murder. The evidence was not essential to defendant's conviction because Murphy and Christian both testified regarding defendant's statements. Murphy briefly stated that defendant used certain tools to break into businesses through their roofs, and the prosecution did not emphasize the testimony or bring it up later; therefore, it is unlikely that it was outcome-determinative. Accordingly, we conclude that defendant has failed to meet his burden of demonstrating ineffective assistance of counsel.

In his Standard 4 brief, defendant argues that defense counsel was ineffective because he failed to properly impeach Murphy and Christian.

In regard to Christian, defendant argues that defense counsel should have used prison audio recordings to impeach Christian because Christian allegedly admits on the recordings that he knew about the details of the crime because defendant told him about the accusations, and that he wanted to keep defendant in prison so his grandmother could keep defendant's insurance money. Defendant also claims the recordings show that Christian believed defendant would murder Christian and his family if released from prison.

Defendant has failed to establish a factual predicate for his claims because the appellate record contains no transcript or other information about the contents of the contested parts of the

prison audio recordings between Christian and his family members. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Even assuming the audio recordings depict what defendant claims, defendant cannot overcome the presumption that defense counsel's actions constituted reasonable trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). According to defendant, defense counsel had a chance to listen to the audio recordings. Presumptively, defense counsel made a strategic decision about what parts of the audio recordings would most successfully impeach Christian and be least prejudicial to defendant. Defense counsel did use the audio recordings to impeach Christian about his dislike of defendant and his desire to get out of prison. Defense counsel's decision to keep Christian's cross-examination simple by avoiding a life insurance policy theft claim that would have been difficult to substantiate was reasonable. It was also reasonable trial strategy for defense counsel to exclude highly prejudicial testimony that defendant may have made death threats against Christian and his family.

In regard to Murphy, defendant argues that defense counsel should have emphasized the fact that Murphy only informed police about his confession after she was threatened with kidnapping charges in regard to their daughter.

Despite defendant's claims to the contrary on appeal, defense counsel thoroughly and effectively impeached Murphy on the basis of her arrest for attempting to break into defendant's house, taking defendant and Murphy's daughter from school, her desire to get custody of their daughter, her hatred of defendant, her mental problems, and her drug use. Accordingly, defendant has not demonstrated that defense counsel's impeachment of Murphy fell below an objective standard of reasonableness.

V. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution did not present sufficient evidence to prove, beyond a reasonable doubt, that defendant was the perpetrator of the charged crimes.

Sufficiency of the evidence questions are reviewed de novo. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences may be used to prove the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack*, 462 Mich at 400.

Identity of the defendant is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "Identity may be shown by either direct testimony or circumstantial evidence." *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967).

On appeal, defendant only challenges the sufficiency of the evidence regarding his identity as the perpetrator of the charged crimes.

First, the evidence, taken in a light most favorable to the prosecution, shows that defendant confessed to two people that he had committed the crimes. Direct testimony or circumstantial evidence may be used to prove identity. *Id.* Murphy testified that defendant pointed out the check-cashing store while driving by the location of the homicide. Defendant stated that he broke through the roof of the building, in order to rob the store. Defendant told Murphy that he left without taking any money because he shot an employee in the head. Christian similarly testified that defendant told him that he had attempted to rob a check-cashing store by cutting a hole in the roof of the bathroom, shot a woman while inside and then left without any money. Murphy and Christian both identified defendant as the person that confessed to the crimes. Murphy and Christian also both knew defendant well; Murphy dated and had a child with defendant, and Christian was defendant's cousin and lived with defendant.

Second, forensic pathologist expert Carl Schmidt, and Lieutenant William Peterson further connected defendant with the charged crimes. Schmidt and Lieutenant Peterson testified consistently with Murphy's and Christian's testimony. Schmidt testified that the victim was shot two times in the face. Defendant stated that he shot an employee in the head. Lieutenant Peterson believed that there were likely two perpetrators with insider information about the location of the alarms, the safe, and when the money would be available. Defendant told Murphy that the robbery was an inside job, and that two of his friends were also involved.

Finally, despite Murphy's and Christian's biases and prior inconsistent statements, a rational jury could have found that Murphy and Christian were telling the truth about defendant's statements. It is up to the finder of fact to make decisions about credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Therefore, we conclude that there was sufficient evidence to support defendant's convictions.

VI. DOUBLE JEOPARDY

Defendant argues that his right to be protected against double jeopardy was violated. We agree.

We review defendant's unpreserved claim regarding the violation of his right to be protected against double jeopardy for plain error affecting substantial rights. *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005).

"[D]ouble jeopardy protections are violated when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim." *Id.* However, this Court will "uphold a single conviction [and sentence] for murder based on two alternative theories." *Id.* "[T]he proper remedy [in this situation] is to modify the conviction to specify that it is for a single count of first-degree murder supported by two theories." *People v Orlewicz*, 293 Mich App 96, 112; 809 NW2d 194 (2011).

In this case, the jury convicted defendant of both felony-murder and first-degree premeditated murder. The trial judge sentenced defendant to life imprisonment for each of these convictions. Therefore, the trial court plainly erred, and the error affected defendant's substantial right to be free from double jeopardy. Accordingly, we remand for modification of

defendant's judgment of sentence to specify a single count of first-degree murder supported by premeditated and felony-murder theories. *Id.*

In conclusion, we affirm defendant's convictions and sentences for felony-firearm, and felon in possession. We remand for the correction of defendant's judgment of sentence to show that he is convicted of a single count of first-degree murder supported by two theories. We do not retain jurisdiction.

Affirmed in part, remanded for correction of defendant's judgment of sentence.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra