STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2013
v ALEXANDER LYONS, Defendant-Appellant.	No. 306462 Oakland Circuit Court LC No. 2011-236373-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v LAMAR DEANGELO CLEMONS, Defendant-Appellant.	No. 306463 Oakland Circuit Court LC No. 2011-236374-FC

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendants Alexander Lyons and Lamar Deangelo Clemons were tried jointly, before separate juries, on charges pertaining to the February 15, 2011, shooting death of the victim, Johnathan Clements. In LC No. 2011-236373-FC, the jury convicted defendant Lyons of first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b. In LC No. 2011-236374-FC, the jury convicted defendant Clemons of first-degree felony murder. The trial court sentenced each defendant to life imprisonment without parole for the murder conviction, and sentenced defendant Lyons to an additional two-year consecutive term of imprisonment for the felony-firearm conviction. Defendant Lyons now

appeals as of right in Docket No. 306462, and defendant Clemons now appeals as of right in Docket No. 306463.[1] We affirm in both appeals.

I. DETECTIVE ROETTGER'S TESTIMONY

Defendant Lyons first argues that Hazel Park Police Detective Mark Roettger, the officer in charge of the investigation into the victim's shooting, improperly invaded the jury's fact-finding role by opining about the credibility of defendant Lyons, Joseph Browder, a friend of defendant Lyons, and Latasha Pettas, the mother of Browder's child. Because defendant Lyons did not object to Roettger's testimony at trial, this issue is unpreserved. Accordingly, we consider this issue only to ascertain whether any plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although defendant Lyons complains that Roettger improperly testified that Joseph Browder, a friend of defendant Lyons, lied to him during Browder's first police interview, the record reveals that Roettger's references to lies told by Browder occurred during the prosecutor's good-faith inquiries regarding the course of the investigation that Roettger supervised, which was relevant to the genesis of the charges against defendant Lyons. MRE 401; *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007). The record also confirms that Roettger properly offered a lay witness opinion with respect to his view of Browder's veracity because he had interviewed Browder, defendant Lyons, and Pettas, and his testimony was helpful to an understanding of the police investigation. *People v Daniel*, 207 Mich App 47, 57-58; 523 NW2d 830 (1994). Furthermore, Browder himself had already acknowledged at trial to lying to Roettger in his initial statement. Roettger's description of the content of Browder's first statement thus matched Browder's own description of his initial statement. Roettger's later testimony that Browder "started telling the truth" during the second interview similarly matched Browder's prior characterization at trial of the details within his second statement as the truth. Under these circumstances, any impropriety arising from Roettger's testimony about Browder's credibility did not adversely affect defendant Lyons's substantial rights in light of the cumulative nature of Roettger's remarks and the properly admitted evidence of defendant Lyons's guilt. *Carines*, 460 Mich at 763; *People v Smith*, 456 Mich 543, 554-555; 581 NW2d 654 (1998).

Roettger briefly remarked at trial that Pettas, who did not testify, had a kind and sweet nature and told the truth. Concerning defendant Lyons, who also did not testify, Roettger referenced his veracity during a summary of Roettger's two interviews of defendant Lyons. In the first interview, defendant Lyons denied having visited Hazel Park on February 15, 2011, or knowing "anything about a Craig's List [sic] sale" of his cell phone to the victim. In the second interview, defendant Lyons apologized "to the police department for . . . lying and wasting [their] time," and conceded his participation in the charged crime.

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[1] The appeals were consolidated "to advance the efficient administration of the appellate process." *People v Lyons*, unpublished order of the Court of Appeals, entered November 21, 2012 (Docket Nos. 306462; 306463).

Again, however, Roettger's references to Pettas's true statements and good nature and his remarks about defendant Lyons's veracity occurred during the prosecutor's good-faith inquiries about the course of the investigation, a relevant subject. MRE 401; *Dobek*, 274 Mich App at 70-71. Roettger also properly offered a lay witness opinion with respect to his view of defendant Lyons's and Pettas's veracity on the basis of his interviews of Browder, defendant Lyons, and Pettas, and his opinion was helpful to an understanding of the investigation. *Daniel*, 207 Mich App at 57-58. Even assuming some impropriety in Roettger's testimony, the testimony did not adversely affect defendant Lyons's substantial rights in light of the properly admitted evidence of his guilt. *Carines*, 460 Mich at 763; *Smith*, 456 Mich at 554-555.

Concerning defendant Lyons's related assertion that defense counsel was ineffective for failing to object to Roettger's references to the veracity of Browder, defendant Lyons, and Pettas, defense counsel need not have objected to Roettger's proper lay opinion testimony. *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). Furthermore, Roettger's testimony did not affect the outcome of defendant Lyons's trial in light of the properly admitted evidence of defendant Lyons's guilt. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

II. SUFFICIENCY OF THE EVIDENCE

Both defendants contest the sufficiency of the evidence supporting their felony-murder convictions. We review de novo a challenge to the sufficiency of the evidence. *Solmonson*, 261 Mich App at 661.

In reviewing a defendant's challenge to the sufficiency of the evidence supporting his conviction, "a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (internal quotation and citation omitted).

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*Id*. at 400 (internal quotation and citation omitted).]

"[T]he trier of fact, not the appellate court," possesses the prerogative "to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A. DEFENDANT LYONS

Defendant Lyons argues that the evidence was insufficient to support his felony-murder conviction because the evidence failed to show that he intended to kill or harm the victim, and his statement to the police reflected that he fired his gun in response to the victim's movements suggesting that he had a weapon.

A conviction of felony murder requires proof of the following elements:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (i.e., malice), (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)]. [*Carines*, 460 Mich at 758-759 (internal quotation and citation omitted).]

"A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*. at 759. A jury also may infer malice "from the [defendant's] use of a deadly weapon." *Id*.

Jeremy Baker and Beatrice Brockman testified that they arranged to give defendant Lyons a gun on the date of the offense. According to Browder, when defendant Lyons called him on the morning of February 16, 2011, defendant Lyons stated, "I popped this ni**er," and added that he had "f**ked up." Browder testified that he met defendant Lyons to talk further in person, and defendant Lyons elaborated "that he . . . was robbin' a boy," "the boy grabbed the gun," and defendant Lyons shot the boy. Roettger related defendant Lyons's descriptions from his second police statement that defendant Clemons drove him to Hazel Park, after which he told defendant Clemons that he did not intend to sell his phone and asked defendant Clemons, "Do you think I should rob [the victim?]" Defendant Lyons stated that after defendant Clemons agreed that defendant Lyons should rob the victim, defendant Lyons met with the victim and exchanged the phone and the money, and, as the victim looked at the phone, defendant Lyons pulled out a gun, "stuck it to [the victim's] chest" or abdomen, and demanded that the victim return the phone. According to defendant Lyons, the victim turned and "fidgeted a little bit," causing defendant Lyons to believe that the victim might have been "going for a gun," so defendant Lyons shot him. After the victim fell to the ground, defendant Lyons thought that he might still be going for a gun, so defendant Lyons shot him again.

Viewed in the light most favorable to the prosecution, the evidence established that defendant Lyons approached the victim with a gun intending to rob him, placed the gun against the victim's body, and fired a shot while the gun still rested against the victim's abdomen. This evidence was sufficient to permit the jury to find beyond a reasonable doubt that, at a minimum, defendant Lyons "intentionally set in motion a force likely to cause [the victim] death or great bodily harm." *Carines*, 460 Mich at 759. Defendant Lyons's alleged belief that the victim was drawing a gun does not negate or preclude the jury's finding of malice—by approaching the victim with a gun and placing it against his body defendant Lyons still had "intentionally set in motion a force likely to cause [the victim] death or great bodily harm." *Id*.

B. DEFENDANT CLEMONS

Defendant Clemons argues that the jury could not have convicted him of felony-murder based on an aiding and abetting theory because the evidence was insufficient to establish that he assisted defendant Lyons with knowledge of defendant Lyons's intent to rob the victim. The prosecutor predicated the felony-murder charge against defendants on the underlying felony of

larceny.[2] The prosecutor sought a conviction of defendant Clemons as an aider and abettor of the larceny and felony murder.

MCL 767.39 authorizes a defendant's conviction if he aided or abetted the commission of a charged crime. The statute provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

To support defendant Clemons's conviction pursuant to an aiding and abetting theory, the prosecutor was required to show that (1) defendant Clemons or some other person committed the crime charged, (2) defendant Clemons performed acts or offered encouragement that assisted the crime's commission, and (3) either (a) at the time that defendant Clemons gave aid and encouragement, he possessed (i) the requisite intent necessary to support his conviction of the charged crime as a principal, or (ii) knowledge that the principal intended the commission of the charged crime, or (b) "the criminal act committed by the principal is an incidental consequence which might reasonably be expected to result from the intended wrong." *People v Robinson*, 475 Mich 1, 6, 9; 715 NW2d 44 (2006) (internal quotations and citation omitted); see also *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *Carines*, 460 Mich at 757 (internal quotations and citation omitted).

"To place the issue of aiding and abetting before a trier of fact, the evidence need only tend to establish that more than one person committed the crime, and that the role of a defendant charged as an aider and abettor amounts to something less than the direct commission of the offense." *People v Vaughn*, 186 Mich App 376, 382; 465 NW2d 365 (1990). "The phrase 'aids or abets'" encompasses "any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). "In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime." *Id.* at 71. "[W]hether the defendant

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[2] The elements of larceny consist of:

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999) (internal quotation and citation omitted).]

performed acts or gave encouragement that assisted" "must be determined on a case-by-case basis." *Id*. (internal quotation and citations omitted).

Detective Sergeant Craig Fowler's testimony established defendant Clemons's concession that near the time that defendant Lyons disembarked from the Camaro in Highland Park, defendant Lyons communicated to defendant Clemons that he no longer wanted to sell his phone. Although defendant Clemons equivocated about his knowledge of a potential robbery during his second police interview, he ultimately acknowledged that he believed that defendant Lyons probably intended to rob the victim. Defendant Clemons also told Fowler about defendant Lyons's placement of a prior Craigslist advertisement to sell a Ford Thunderbird that he did not really intend to sell, but instead wanted to use to ensnare a robbery victim. Defendant Clemons further conceded that, despite his belief that defendant Lyons likely would rob the victim, defendant Clemons remained in the Camaro awaiting defendant Lyons's return from his encounter with the victim, even after hearing gunshots. Reasonable inferences arise from these circumstances that defendant Clemons assisted defendant Lyons by acting as a getaway driver, with knowledge that defendant Lyons intended to rob the victim. *People v Martin*, 150 Mich App 630, 634-635; 389 NW2d 713 (1986) (affirming the defendant's armed robbery conviction as an aider and abettor where the evidence established reasonable inferences that he had "knowingly acted as the driver of the 'get-away car'"). Accordingly, we reject defendant Clemons's challenge to the sufficiency of the evidence supporting his conviction.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Both defendants raise myriad ineffective assistance of counsel contentions. Because no evidentiary hearing occurred to address either defendant's ineffective assistance of counsel arguments, we limit our review of these arguments "to errors apparent on the record." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel must establish two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Solmonson*, 261 Mich App at 663. With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. Defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute [its] judgment for that of counsel on matters of trial strategy, nor will [it] use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation and citation omitted).

A. DEFENDANT LYONS'S STANDARD 4 BRIEF

Defendant Lyons maintains in his pro se Standard 4 brief that defense counsel was ineffective for failing to object to allegedly unlawful police access to an advertisement that he had posted to an Internet website, but then deleted. Courts have almost uniformly agreed that an individual possesses no reasonable expectation of privacy in "communications made during Internet 'chat room' conversations," "Internet website communications," postings on Internet bulletin board services and social networking websites, "noncontent customer information provided to an Internet service provider by a customer," or Internet usage records. Anno: *Expectation of privacy in Internet communications*, 92 ALR5th 15, §§ 2(a), 4-7, July 2012 supp, §§ 3(d), 4.5, 5-7. Defendant Lyons offers no authority in support of the proposition that a poster's deletion or removal of material previously posted or otherwise communicated to others may resuscitate a reasonable expectation of privacy. Defendant Lyons suggests that "the order for disclosure of electronic communications and subscriber information" violated 18 USC 2701, but he sets forth no explanation that (1) the police "intentionally access[ed] without authorization" his Craigslist posting or exceeded the scope of their authorization to access Craigslist records, 18 USC 2701(a); or (2) the police lacked authorization to access his Craigslist account "by the person or entity providing a wire or electronic communications service." 18 USC 2701(c)(1). Defendant Lyons has not demonstrated that trial counsel committed an objectively unreasonable legal error by failing to object to the police search and seizure of the deleted Craigslist posting.

Defendant Lyons lastly submits in his Standard 4 brief that trial counsel was ineffective for failing to request an instruction regarding statutory involuntary manslaughter, MCL 750.329. According to defendant Lyons, an instruction on statutory involuntary manslaughter was appropriate under the circumstances of this case because the trial court had agreed to instruct the jury with respect to common-law involuntary manslaughter, MCL 750.321.

In *People v Smith*, 478 Mich 64, 66; 731 NW2d 411 (2007), our Supreme Court offered guidance on a similar question, "whether the trial court should have instructed the jury on statutory involuntary manslaughter because it is a necessarily included lesser offense of second-degree murder." The Court explained:

> To apply the [*People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002)/ *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003),] test, we must compare the elements of statutory involuntary manslaughter and second-degree murder. . . . The elements of statutory involuntary manslaughter are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the death resulted from the discharge of a firearm, (4) at the time of the discharge, the defendant was intentionally pointing the firearm at the victim, and (5) the defendant did not have lawful justification or excuse for causing the death. By contrast, the elements of second-degree murder are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death.
>
> Comparing the elements of these offenses, we conclude that statutory involuntary manslaughter under MCL 750.329 is not a necessarily included lesser

> offense of second-degree murder because it is not an "inferior" offense under MCL 768.32(1). It is plain that the elements of statutory involuntary manslaughter are not completely subsumed in the elements of second-degree murder. Statutory involuntary manslaughter contains two elements that are not required to prove second-degree murder: (1) that the death resulted from the discharge of a firearm and (2) that the defendant intentionally pointed a firearm at the victim. Second-degree murder, on the other hand, may be committed without a firearm or even without a weapon of any kind. Because it is possible to commit second-degree murder without first committing statutory involuntary manslaughter, statutory involuntary manslaughter cannot be a necessarily included lesser offense of second-degree murder. [*Smith*, 478 Mich at 70-71 (internal citations omitted).]

The Court additionally observed that "statutory involuntary manslaughter contains two elements that are not required to prove common-law involuntary manslaughter: (1) that the death resulted from the discharge of a firearm and (2) that the defendant intentionally pointed a firearm at the victim," and "[t]hus, . . . statutory involuntary manslaughter . . . is not included in the offense of common-law involuntary manslaughter." *Id*. at 72.

Unlike in *Smith*, 478 Mich at 66, defendant Lyons faced a greater charge of first-degree felony murder, which required proof that he (1) killed a human being, (2) "with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (i.e., malice)," and (3) "while committing . . . any of the felonies specifically enumerated in" MCL 750.316(1)(b). *Carines*, 460 Mich at 758-759. However, "the elements of statutory involuntary manslaughter are not completely subsumed in the elements of" first-degree felony murder; while statutory involuntary manslaughter demands proof "(1) that the death resulted from the discharge of a firearm and (2) that the defendant intentionally pointed a firearm at the victim," first-degree felony murder "may be committed without a firearm or even without a weapon of any kind." *Smith*, 478 Mich at 71. Because a defendant may commit first-degree felony murder without first committing statutory involuntary manslaughter, statutory involuntary manslaughter cannot be a necessarily included lesser offense of first-degree murder. *Id*. Accordingly, trial counsel did not perform deficiently by failing to ask the trial court to instruct the jury on MCL 750.329 as a necessarily included lesser offense. *Dunigan*, 299 Mich App at 589.

B. DEFENDANT CLEMONS

1. BRIEF FILED BY APPELLATE COUNSEL

In defendant Clemons's principal brief on appeal, he initially contends that trial counsel was ineffective for failing to ensure adequate jury instruction clarifying the distinction between an accessory after the fact and aiding or abetting the commission of a felony murder during the commission of a larceny. Our review of the record reveals that the trial court instructed the jury on aiding and abetting in accordance with CJI2d 8.1 and accurately summarized the law

governing aiding and abetting. The instructions also contained a subsequent paragraph that correctly conveyed the content of CJI2d 8.2, the mere presence instruction, and a paragraph that correctly defined an accessory after the fact. CJI2d 8.6(1).[3] Here the prosecutor did not charge defendant Clemons with accessory after the fact, and defendant Clemons does not challenge on appeal the prosecutor's broad discretion to select the charges ultimately brought against him. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Furthermore, accessory after the fact is not an inferior offense to first-degree murder, and defendant Clemons thus had no right for his jury to hear an instruction with respect to being an accessory after the fact. See *People v Perry*, 460 Mich 55, 62-63; 594 NW2d 477 (1999) (observing that the "common-law offense of accessory after the fact is not in the same class or category as murder" and, therefore, "the common-law offense of accessory after the fact is not a cognate offense of murder"). Because defendant Clemons had no legal right to an instruction on accessory after the fact, trial counsel's failure to ensure that the jury received additional instructions consistent with CJI2d 8.6(2) - (6) or 8.7 (outlining the distinction "[b]etween aider and abettor and accessory after the fact") was not objectively unreasonable. *Solmonson*, 261 Mich App at 663. Moreover, we perceive no potential prejudice to defendant Clemons relating to the jury instructions because they apprised his jury in plain terms about the legal distinction between an aider and abettor and an accessory after the fact. *Id*. at 663-664.

Defendant Clemons lastly argues in his principal brief on appeal that trial counsel was ineffective for not sufficiently objecting to Fowler's references to a potential polygraph examination when the prosecutor played defendant Clemons's video-recorded statement. When the recorded statement was played for the jury, defense counsel raised objections at a bench conference, which led the trial court to instruct the jury: "Ladies and gentlemen, you have heard on this recording references to a polygraph. *I am instructing you that polygraph examinations are not admissible in the State of Michigan. So whether or not a polygraph was given is of no consequence in this matter*." (Emphasis added). The parties agree that in the course of defendant Clemons's video-recorded statement, there were several references to his potential willingness to undergo a polygraph examination. However, the trial court's cautionary instruction broadly instructed the jury not to consider the inadmissible matter whether defendant Clemons underwent a polygraph examination, and courts presume that jurors follow the instructions they receive. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). We conclude that defense counsel acted in a reasonably professional manner by seeking the cautionary instruction, and no reasonable likelihood exists that the outcome of defendant Clemons's trial would have differed had defense counsel requested further instruction regarding the polygraph examination. *Solmonson*, 261 Mich App at 663-664.

2. DEFENDANT CLEMONS'S STANDARD 4 BRIEF

[3] A defendant may be charged with being an accessory after the fact, a common-law crime, under MCL 750.505. *People v Lucas*, 402 Mich 302, 304-305; 262 NW2d 662 (1978); *People v Cunningham*, 201 Mich App 720, 722; 506 NW2d 624 (1993).

Defendant Clemons raises additional ineffective assistance of counsel claims in his Standard 4 brief. He first avers that trial counsel did not share with him before trial any "police reports; witnesses [sic] statements; co-defendants [sic] written or video statement[s]" or "his own written statement []or . . . video interrogation." Although defendant Clemons describes this evidence as "vital . . . to . . . his defense," he offers no specific factual details of any information that he lacked during his preparations for trial or the manner in which any of the information may have assisted his defense. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Jackson*, 292 Mich App 583, 601; 808 NW2d 541 (2011). Furthermore, it appears unlikely that access to defendant Lyons's pretrial statements to the police would have assisted defendant Clemons's defense, especially the second recorded statement given by defendant Lyons on February 18, 2011, during which defendant Lyons implicated defendant Clemons in the planned larceny of the victim. *Solmonson*, 261 Mich App at 663-664.

Defendant Clemons next complains in his Standard 4 brief that trial counsel should have called or at least investigated calling Browder and Pettas as potential trial witnesses, because they "had information about what co-defendant Lyons told" them. Defendant Clemons describes as favorable to him Browder's and Pettas's accounts of defendant Lyons having acknowledged shooting the victim, but defendant Clemons identifies no specific information possessed by Browder and Pettas suggesting that defendant Clemons did not participate in the larceny and shooting, or any relevant information that Browder and Pettas possessed regarding defendant Clemons. *Hoag*, 460 Mich at 6. Defendant Clemons also failed to substantiate the possession of any relevant, potentially exculpatory information by "any of four individuals . . . [defendant Lyons] called after he confessed." *Id.*

Defendant Clemons additionally contends that defense counsel was ineffective for failing to object to the prosecutor's questioning of Fowler about the circumstances that occurred between defendant Clemons's first and second interviews, namely defendant Lyons's statement incriminating defendant Clemons in the plan to rob the victim. Defendant Clemons alleges that the self-evident placement before his jury of defendant Lyons's implication of defendant Clemons in the planned larceny violated his right of confrontation. However, the exchange about which defendant Clemons complains consisted of the prosecutor's brief preliminary questioning of Fowler regarding the course of his investigation and the basis for his second interview with defendant Clemons, and was not offered for its truth. *People v Mesick (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009) (noting that if a "challenged statement was not offered for the truth of its contents, it is not hearsay"), citing MRE 801(c); *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) (observing that "a statement offered to show why police officers acted as they did is not hearsay"). "[T]he Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Id*. at 10-11. Thus, defense counsel was not ineffective for failing to make a groundless objection. *Dunigan*, 299 Mich App at 589.

Defendant Clemons makes a related contention that counsel deprived him of a fair trial by asking questions during his cross-examination of Fowler about prior statements by defendant Lyons, which caused the prosecutor to lodge a hearsay objection. The challenged portion of defense counsel's cross-examination of Fowler reveals that counsel elicited (1) that Fowler had used statements made by defendant Lyons in an attempt to prompt defendant Clemons to speak with him, (2) that Fowler believed at the time of the second interview with defendant Clemons

that defendant Lyons had given the police credible information, and (3) Fowler's knowledge of a prior false statement by defendant Lyons that he had "lost his cell phone." Defense counsel explained on the record that his questions were intended to demonstrate that the interviewing officers used "a ruse . . . knowing that the statements that somebody [defendant Lyons] gave is [sic] false, and yet, they're telling this man here [defendant Clemons] something different for the sole purpose of getting him to . . . confess to something." In light of the available evidence that defendant Lyons had offered the police different versions of events at different times, it was not unreasonable for defendant Clemons's counsel to pursue a strategy of showing that the police had tried to prompt defendant Clemons's statement with misinformation given by defendant Lyons. *Payne*, 285 Mich App at 190.

Defendant Clemons lastly asserts in his Standard 4 brief that defense counsel should have moved to suppress Fowler's trial references to an approximate five-minute portion of defendant Clemons's second statement to the police because officers intentionally did not record this portion. Fowler testified that the first "five minutes or so" of defendant Clemons's second statement were not recorded because the officer who "was suppose[d] to turn that on . . . didn't do so." Defendant Clemons has not substantiated any bad faith activity by the police concerning the recording of his second interview. *Hoag*, 460 Mich at 6. Furthermore, defendant Clemons offers no legal authority tending to support an argument that the failure to record the entirety of a defendant's statement renders the entirety of the statement subject to exclusion. See *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004). We conclude that defendant has not substantiated an objectively unreasonable deficiency in defense counsel's failure to file a motion to suppress the recorded statement or object to the statement's incompleteness. *Id.*[4]

IV. AUTOPSY PHOTOGRAPH

Defendant Clemons asserts in his principal brief on appeal that the trial court improperly admitted an autopsy photograph of the victim, on the basis that the minimal probative value inherent in the gruesome photograph was substantially outweighed by the danger that the jury might convict defendant Clemons out of sympathy for the victim. We review "for an abuse of discretion a circuit court's decision concerning the admission of evidence," but consider de novo preliminary legal questions. *People v Dinardo*, 290 Mich App 280, 287; 801 NW2d 73 (2010).

A trial court may within its discretion admit evidence in the form of photographs when they qualify as relevant to issues involved in a particular case according to MRE 401, and any prejudicial effect arising from the photographs does not substantially outweigh their probative value under the balancing test of MRE 403. *People v Mills*, 450 Mich 61, 66, 76; 537 NW2d 909, mod 450 Mich 1212 (1995). "Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal. However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its

[4] To the extent that defendant Clemons alleges that trial counsel's many deficiencies cumulatively operated to deny him a fair trial, he has not substantiated any actual instances of ineffective assistance. *LeBlanc*, 465 Mich at 591 n 12.

gruesome details or the shocking nature of the crime." *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998) (internal citation omitted).

We conclude that the challenged photographs were relevant under MRE 401. Defendant Clemons's plea of not guilty placed at issue all elements of the charged crime. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000); *Mills*, 450 Mich at 69. Accordingly, the prosecutor had the burden of proving beyond a reasonable doubt all elements of the first-degree felony-murder charge, "regardless of whether the defendant specifically disputes or offers to stipulate any of the elements." *Id.* at 69-70. Exhibit 41, which depicted the victim's head and bare torso after his autopsy and a single, close-range, powder-burned entry wound to his abdomen, significantly tended to prove defendant Lyons's malicious intent, an essential element of first-degree felony murder, and an element essential to defendant Clemons's jury's assessment of his guilt as an aider and abettor of the felony murder. *People v Howard*, 226 Mich App 528, 549-551; 575 NW2d 16 (1997); *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995).

Further, any danger of unfair prejudice or needless presentation of cumulative evidence did not substantially outweigh the probative value of the photograph. MRE 403. The photographs possessed substantial probative value with respect to the material issue of the malice inherent in the victim's shooting death. The photograph was not unduly gruesome in light of the brutal nature of the charged crime, especially for an autopsy photograph. *Mills*, 450 Mich at 77-78; *People v Herndon*, 246 Mich App 371, 414; 633 NW2d 376 (2001) Although defendant Clemons suggests that the trial court should have excluded the photograph as unnecessary in light of the medical examiner's testimony about the nature of the victim's wounds, his preparation of a less gruesome diagram of the victim's wound, and the existence of a close-up photograph of the victim's gunshot wound, defendant Clemons ignores that "[p]hotographs are not excludable simply because a witness can orally testify about the information contained in the photographs," and "[p]hotographs may also be used to corroborate a witness' testimony." *Mills*, 450 Mich at 76. We detect no substantial likelihood that the single autopsy photograph might have led defendant Clemons's jury "to abdicate its truth-finding function and convict on passion alone." *Anderson*, 209 Mich App at 536. The trial court acted within its discretion in admitting the autopsy photograph.

V. ADDITIONAL ISSUES IN DEFENDANT CLEMONS'S STANDARD 4 BRIEF

A. PROSECUTORIAL MISCONDUCT

Defendant Clemons raises several prosecutorial misconduct complaints, none of which were preserved with an appropriate objection at trial. Accordingly, we consider these claims only to ascertain whether any plain error affected defendant Clemons's substantial rights. *Carines*, 460 Mich at 774.

We generally review claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a

> prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

We review alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Near the beginning of his closing argument, the prosecutor made remarks that defendant Clemons now argues were improper invocations to sympathize with the victim. However, our review of the entirety of the prosecutor's challenged comments illustrates that in response to defendant Clemons's suggestion in his opening statement that the prosecutor had overcharged defendant Clemons, the prosecutor repeatedly and properly cautioned the jury against allowing sympathy to play any role in its deliberations regarding defendant Clemons. Even assuming that the prosecutor improperly commented on the victim's young age and his family's inability to communicate with him again, those comments were brief and isolated and the trial court cured any potential prejudice when it cautioned the jury that it "must not let sympathy or prejudice influence your decision." *Unger*, 278 Mich App at 235, 238, 240-241.

Defendant Clemons next maintains that the prosecutor improperly summarized the law on aiding and abetting in his closing argument. A review of the remarks in their entirety clarifies that the prosecutor accurately summarized the crux of his theory, in light of the trial record and the reasonable inferences arising from the evidence, that defendant Clemons aided and abetted defendant Lyons's larceny and shooting of the victim. The remarks reflect the prosecutor's recitation of his theory that defendant Clemons should face responsibility for felony murder as an aider and abettor in the victim's larceny and shooting death because defendant Clemons assisted and encouraged defendant Lyons before and during the crimes, with knowledge of defendant Lyons's intent to steal from the victim. Even assuming some legal inaccuracy in the prosecutor's argument, we discern no prejudice to defendant Clemons given the trial court's jury instructions (1) that the jury had the duty to "return a true and just verdict based only on the evidence and [the court's] instructions on the law"; (2) that the jury "must take the law as I give it to you. If a lawyer says something different about the law, follow what I say"; and (3) regarding the legal principles applicable to defendant Clemons's guilt as an aider and abettor in defendant Lyons's larceny from and shooting of the victim. *Unger*, 278 Mich App at 235, 238, 240-241.

Defendant Clemons next complains that during closing argument the prosecutor referenced facts not contained in the trial record, such as a discussion defendants allegedly had shortly before the shooting. Defendant Clemons challenges the emphasized portion of the following argument:

> You'll see on the video from Custom Form that the car turns up Crossley, immediately turns . . . into the bank, and [defendant Clemons] has knowledge that

> a robbery is going to occur. The robbery and the murder don't occur if he just simply keeps on driving. It never happens. If at the point in time that *[defendant] Lyons gets out of the car and walks around the car and walks up to [defendant] Clemons and says, and I don't know exactly what words he used, that I'm going to rob him. Are you with me? Are you going to be here when I'm done?* He says, no. I don't want to be part of this. I'm leaving. I submit to you that even at that point in time [defendant] Lyons would not have continued on because he doesn't have a ride home . . . . The murder would have never happened. [Emphasis added.]

The prosecutor acknowledged that he did not know precisely what discussion passed between the defendants in Hazel Park shortly before the shooting. Furthermore, the evidence gave rise to a reasonable inference that the discussion may have occurred as the prosecutor argued, specifically the evidence of defendant Clemons's police statement concession to his belief that defendant Lyons intended to rob the victim, and defendant Clemons's decision to remain in Hazel Park and act as defendant Lyons's getaway driver. *Schutte*, 240 Mich App at 721.

Defendant Clemons next protests as beyond the scope of the trial record the prosecutor's closing argument about defendant Clemons's knowledge when he drove defendant Lyons to Brockman's house where defendant Lyons retrieved a gun, and defendant Clemons's guilty conscience evidenced in his decision to park behind Brockman's house while defendant Lyons retrieved the gun. Our review of the record reveals that the trial testimony of Baker and Brockman established that in the early afternoon of February 15, 2011, Brockman gave defendant Lyons a .380-caliber handgun that Baker owned, Baker and Brockman were familiar with both defendants and had seen them inside a purple or bluish Camaro, and after giving defendant Lyons the gun on February 15, 2011, Brockman watched defendant Lyons walk from Brockman's house toward the purple Camaro that Brockman had seen defendant Clemons driving. A rational inference arises from the testimony of Baker and Brockman that as a precaution against Brockman seeing the Camaro, defendant Clemons purposefully chose to park partially out of view of Brockman's residence after driving defendant Lyons to pick up Baker's gun on February 15, 2011. *Schutte*, 240 Mich App at 721. Further, defendant Clemons cannot show that the remark adversely affected his substantial rights in light of the trial court's instruction that the attorney's arguments, questions, and statements are not evidence, and the properly admitted evidence of defendant Clemons's guilt. *Unger*, 278 Mich App at 235.

Defendant Clemons further posits that the prosecutor improperly commented during closing and rebuttal arguments on his knowledge of defendant Lyons's bad character solely "to inflame [defendant Clemons's] jury." Contrary to defendant Clemons's contention, the prosecutor's remarks about his knowledge of defendant Lyons's acquisition of a gun and earlier robbery schemes did not intend to cast either defendant as a bad actor who stole from the victim and shot him in conformity with their low moral character, as prohibited under MRE 404(b)(1). Rather, the challenged portions of the prosecutor's closing and rebuttal arguments reflect his appropriate argument on the basis of the trial record that defendant Clemons had knowledge supporting an inference of malice necessary to support his felony-murder conviction. *Schutte*, 240 Mich App at 721.

In defendant Clemons's final prosecutorial misconduct argument, he complains that the prosecutor twice improperly appealed to the jury during his closing and rebuttal arguments. In defendant Clemons's estimation, the first challenged remarks represented an improper "appeal to the prejudice of the jury members by saying you would not be around a bad person," and the second portion of challenged argument constituted an indirect declaration that the prosecutor "would not have charged the defendant if [he] did not think he was guilty and because you and [the prosecutor] are no different you should find defendant guilty on the same facts and law," "because I know the law." We conclude that the first challenged portion of the prosecutor's closing argument constituted a proper appeal to the jury's common sense in examining the evidence supporting the prosecutor's theory that defendant Clemons knew about defendant Lyons's planned larceny before and after it occurred. *Schutte*, 240 Mich App at 721; CJI2d 3.5(9). The second challenged portion was also an appropriate argument on the basis of the evidence and the reasonable inferences arising from it that the jury should find defendant Clemons guilty of first-degree felony murder because he aided and abetted defendant Lyons's larceny and shooting of the victim. *Schutte*, 240 Mich App at 721.

B. RIGHT TO BE PRESENT AT TRIAL

In defendant Clemons's final contention in his Standard 4 brief, he posits that he had an absolute right to appear at portions of defendant Lyons's separate trial, so he would have had the opportunity to hear testimony by Browder and Roettger and view the playing of defendant Lyons's recorded statement. As we have already concluded, however, defendant Clemons did not establish as exculpatory or favorable to him any information possessed by Browder or Pettas (through Roettger), or in defendant Lyons's video-recorded statement on February 18, 2011. Defendant Clemons also offers no specific explanation about what specifically he would have testified to in his own defense had he known of the information he missed during Browder's and Roettger's testimony at the separate portion of defendant Lyons's trial. Even assuming that defendant Clemons had a right to observe testimony offered only in the course of defendant Lyons's trial, he has not demonstrated "any reasonable possibility of prejudice" arising from his inability to view this testimony. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977) (internal quotation and citation omitted).

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood