STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2002
v	No. 226316 Wayne Circuit Court
JAMES OTIS HARDMAN,[1] Defendant-Appellant.	LC No. 99-001267

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a term of life imprisonment without the possibility of parole for one count of first-degree murder, and a concurrent term of 285 months' to 40 years' imprisonment for the assault with intent to murder conviction. The court also imposed a consecutive two-year term for the felony-firearm conviction, and vacated defendant's felony murder and armed robbery convictions. Defendant appeals as of right, and we affirm.

I.

Defendant first raises five alleged instances of instructional error, which this Court reviews de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). This Court reviews jury instructions as a whole to determine whether error requiring reversal occurred. *Id.* The jury instructions must include all elements of the charged offenses, and must not omit material issues, defenses, and theories that the evidence supports. *Id.* Even when somewhat imperfect, jury instructions do not qualify as erroneous provided that they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *People v Knapp*, 244 Mich App 361, 376; 624 NW2d 227 (2001); *Bartlett*, *supra*.

[1] The correct spelling of defendant's surname is "Hardeman." However, for consistency and to avoid any possible confusion, we utilize defendant's name as it is spelled in the Judgment of Sentence.

Of the five alleged instances of instructional error, defendant preserved with an objection at trial only his contention that the trial court erred in instructing the jury with respect to the meaning of reasonable doubt. The record reflects, however, that the trial court properly instructed the jury concerning the meaning of reasonable doubt consistent with CJI2d 3.2. *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999).

Because defendant failed to timely object at trial to the four remaining allegedly erroneous instructions, and thus has failed to preserve his arguments for appeal, we review these instructions only to determine whether any plain error affected defendant's substantial rights, which generally requires a showing of prejudice. *Knapp*, *supra* at 375. Our review of the instructions in their entirety indicates that the trial court correctly instructed the jury regarding (1) the intent elements necessary to convict defendant of first-degree premeditated murder, *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998), felony murder, *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999), and the lesser-included offense of second-degree murder, *People v Wofford*, 196 Mich App 275, 277-278; 492 NW2d 747 (1992), and (2) the jury's prerogative to determine the facts of the case on the basis of whatever evidence it believed, including expert testimony. We need not address defendant's third unpreserved claim of instructional error premised on the trial court's reading of CJI2d 4.14, the standard cautionary instruction regarding dog-tracking evidence, because defendant cites no authority supporting his argument that the instruction does not apply when a defendant introduces dog-tracking evidence to impeach a prosecution witness' testimony. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

With respect to defendant's last unpreserved claim of instructional error, we note that the trial court did omit a phrase from CJI2d 3.11(5) indicating that the jury could consider lesser-included offenses if it did not agree on verdicts regarding the primary charges. *People v Handley*, 415 Mich 356, 357-361; 329 NW2d 710 (1982). However, the instructional error did not affect defendant's substantial rights because defendant was not prejudiced by the error. *Carines*, *supra* at 763-764. Defendant did not challenge at trial the degree of his culpability for the victim's murder, but primarily challenged his identity as the shooter, claiming he was innocent. We also note that the erroneous instruction did not affect the jury's determination of the credibility of Wanda Hall, the sole eyewitness to defendant's crimes.

II.

Defendant next argues that the trial court improperly restricted his cross-examination of witnesses during trial. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

A.

The trial court did not abuse its discretion in refusing to permit defendant to impeach a prosecution witness with his 1993 juvenile adjudications for larceny from a building, MCL 750.360, and second-degree retail fraud, MCL 750.356d. The second-degree retail fraud adjudication was inadmissible under MRE 609(a)(1) because defendant failed to substantiate that the witness' adjudication involved an element of dishonesty or false statement, as opposed to an element of theft. *People v Parcha*, 227 Mich App 236, 245-247; 575 NW2d 316 (1997).

Furthermore, the second-degree retail fraud adjudication, a misdemeanor, did not qualify for admission under MRE 609(a)(2)(A) because it was "punishable by imprisonment for not more than 1 year." MCL 750.356d(1). The larceny from a building adjudication involved an element of theft and constituted a felony punishable by imprisonment for more than one year. MCL 750.360; MRE 609(a)(2)(A). However, in light of the six- to seven-year age of the adjudication and the fact that the adjudication involved larceny, "the most basic of theft offenses," we cannot characterize as an abuse of discretion the trial court's determination that the adjudication did not have significant probative value regarding the witness' credibility. MRE 609(a)(2)(B); *Parcha*, *supra* at 245.

B.

We also reject defendant's suggestion that the trial court erred in refusing to permit him to impeach witness Hall's trial testimony by (1) calling a defense investigator who would testify regarding a prior inconsistent statement of Hall concerning her desire to wait until she had an opportunity to speak with another witness, Dwayne Taylor, before reporting the victim's shooting to the police, and (2) introducing certified district court records showing the existence of a bench warrant for Hall's arrest.

"It is a rule of long standing in this jurisdiction that extrinsic evidence may not be used to impeach a witness on a collateral matter, . . . even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)." *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). Extrinsic evidence of impeachment regarding the following does *not* qualify as collateral: (1) matters closely bearing on a defendant's guilt or innocence, and (2) a witness' bias, interest, or opportunity for knowledge. *People v LeBlanc*, 465 Mich 575, 589-590; 640 NW2d 246 (2002); *Rosen*, *supra* at 759.

With respect to the proffered testimony of the defense investigator, defendant argued that the fact that Hall wanted to talk with Taylor, and had the opportunity to speak with Taylor before going to the police, tended to show Hall's bias or motive or opportunity to fabricate a story regarding defendant's involvement in the shooting. However, at trial, both Hall and Taylor denied that they had spoken with each other before offering their statements to the police, and defense counsel acknowledged that he had no evidence that Hall and Taylor ever met to discuss the shooting before either spoke with the police.[2] See *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981). Besides the fact that absolutely no hint of witness collusion existed, Hall's possible reasons for waiting until the day after the shooting to speak with the police did not constitute a matter closely bearing on defendant's guilt or innocence. *LeBlanc*, *supra*. Under these circumstances, the trial court did not abuse its discretion in refusing to permit the investigator's extrinsic impeachment of Hall's testimony. Further, it is highly unlikely that the outcome of the trial would have been different had the evidence been admitted.

[2] To the extent defendant wished to apprise the jury of Hall's alleged desire to speak with Taylor before talking to the police, we note that Hall acknowledged at trial that if she had seen Taylor she would have wanted to discuss the shooting with him.

The trial court also properly refused to admit for impeachment purposes the extrinsic evidence of the bench warrant for Hall's arrest, which defense counsel offered as evidence one day after Hall's testimony had concluded, because the documentation of Hall's arrest involved a collateral matter that did not closely bear on defendant's guilt or innocence. *Id.* at 590. Furthermore, defendant does not suggest that the documentation affected Hall's bias, interest or opportunity for knowledge, *Rosen*, *supra*, and fails to explain how the court's exclusion of the documents prejudiced him.[3]

C.

Defendant's suggestion that the trial court unduly restricted his recross-examination of witnesses wholly lacks merit. Defendant's briefs on appeal provide no specific examples of any questions or areas of questioning that the court precluded defendant from pursuing. See *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (noting that a defendant cannot leave it to this Court to ascertain a factual basis for sustaining or rejecting his position). Furthermore, MRE 611(a) explicitly permits a court to "exercise reasonable control over the mode and order of interrogating witnesses . . . so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time . . . ." In light of (1) the large number of witnesses listed, twenty-six, (2) the fact that the trial court permitted broad cross-examination while limiting redirect examination to areas explored on cross-examination, and (3) the fact that the trial court did not absolutely preclude any possibility of recross-examination, and did in fact permit the parties to recross-examine witnesses on several occasions, an abuse of discretion has not been shown.[4]

III.

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[3] Other evidence of record reflected that a bench warrant existed for Hall's arrest.

[4] We briefly note that despite defendant's repeated assertions to the contrary, the trial court's rulings did not infringe on his constitutional right to confront the witnesses against him.

> A defendant has a constitutional right to confront the witnesses against him, US Const, Am VI; Const 1963, art 1, § 20. If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated. Yet, there are limits to this right to confront witnesses. The Confrontation Clause "'guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Rather, the Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony. [*People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998) (citations omitted, emphasis in original).]

The instant record reflects that notwithstanding the challenged evidentiary rulings discussed above, defendant had at least a reasonable opportunity to test the truthfulness of Hall's and the other witnesses' testimony, which encompassed questioning regarding the witnesses' involvement in drug dealing and use, extended questioning concerning Hall's memory of the shooting, and repeated questioning regarding the grant of immunity that one witness received.

Defendant challenges two other evidentiary decisions of the trial court, arguing that the court abused its discretion in admitting gruesome photographs of the crime scene and in admitting Hall's testimony concerning defendant's prior drug purchases.

A.

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

We find that the challenged photographs qualified as relevant under MRE 401. Defendant's plea of not guilty placed at issue all elements of the charged crimes. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000); *Mills*, *supra* at 69. Accordingly, the prosecutor had to carry the burden of proving beyond a reasonable doubt all elements of the charged crimes, including first-degree premeditated murder, "regardless of whether the defendant specifically disputes or offers to stipulate any of the elements." *Mills*, *supra* at 69-71. People's exhibits 7, 8, 12, 31 and 32, which conveyed that the victim suffered three close range, powder-burned gunshot entry wounds to the head, including one while lying face down on the floor, significantly tended to prove the essential premeditation and deliberation elements of first-degree premeditated murder.[5] *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). It appears that the alternate photographs preferred by defendant did not convey the nature of the victim's gunshot wounds.

The photographs also tended to make more likely than not the accuracy of Hall's account of the events. The photographs depicting two soot-stained gunshot wounds to the back of the victim's head and one to his temple, the last of which apparently was inflicted as the victim lay on the ground, supported Hall's account that before the shooting defendant stood behind the victim cutting his hair, that she heard defendant fire two shots, and then later while she struggled through the back yard snow, she heard another gunshot inside the house.[6] *Mills*, *supra* at 72.

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[5] Exhibit 12 showed a bullet imprint in the kitchen floor, underneath where the victim's head was lying on the floor when the police discovered him. This photograph and the forensic pathologist's testimony, taken together, suggested that the victim had been shot in the right temple at close range while lying on the floor, and that the bullet ricocheted off the floor and lodged in the other side of the victim's head.

[6] With respect to Exhibit 10, the photograph of the safe box found in the kitchen, the police acknowledged moving the safe before taking the photograph and placing the safe into evidence. The photograph had relevance to the case because it illustrated an object that the police found near the victim's body, and which at trial became the subject of some speculation whether it

(continued…)

Furthermore, the probative value of the photographs was not substantially outweighed by a danger of unfair prejudice or needless presentation of cumulative evidence. MRE 403. Although defendant suggests that the trial court should have excluded the photographs because the medical examiner and evidence technician could testify concerning the crime scene and the nature of the victim's wounds, defendant ignores that "[p]hotographs are not excludable simply because a witness can orally testify about the information contained in the photographs," and that "[p]hotographs may also be used to corroborate a witness' testimony." *Mills*, *supra* at 76; see also *People v Doyle (On Remand)*, 129 Mich App 145, 156; 342 NW2d 560 (1983), overruled in part on other grounds in *People v Williams*, 422 Mich 381; 373 NW2d 567 (1985). The photographs had probative value with respect to corroborating Hall's account of the events and the material issue of defendant's intent in killing the victim. The copies of the photographs do not appear unduly gruesome in light of the brutal nature of defendant's crime. *Mills*, *supra* at 77-78; *People v Herndon*, 246 Mich App 371, 414; 633 NW2d 376 (2001). We detect no substantial likelihood of unfair prejudice from the photographs that might lead the jury "to abdicate its truth-finding function and convict on passion alone." *Anderson*, *supra* at 536.

B.

The trial court did not abuse its discretion in admitting evidence of defendant's prior drug purchases from Hall pursuant to MRE 404(b)(1). When evidence of a defendant's other acts has some relevance to a material fact aside from the defendant's propensity to engage in criminal conduct, a court may admit the other acts evidence under MRE 404(b)(1), a rule of inclusion, provided the following circumstances exist: (1) the prosecutor offers the evidence of the defendant's other acts for a proper noncharacter purpose, whether or not specifically enumerated within MRE 404(b)(1); (2) the other acts evidence has relevance, as required by MRE 402; and (3) the probative value of the other acts evidence is not substantially outweighed by a danger of unfair prejudice under MRE 403. *Starr*, *supra* at 496. On the defendant's request, the court may read the jury a limiting instruction concerning its appropriate consideration of the other acts evidence. *Id*.

The primarily contested issue in this case involved the credibility of Hall's identification of defendant as the murderer. Defendant's suggestions that someone else committed the murder at 5755 Iroquois, and that Hall's version of events implicating defendant as the shooter could not be believed, began at defendant's preliminary examination, appeared within pretrial filings by defendant, and were presented to the jury within defendant's opening statement and closing argument. The prosecutor elicited at trial Hall's recollection that before the day of the shooting she had met defendant several times when he visited 5755 Iroquois and purchased cocaine or heroin from her.[7] The prosecutor offered the evidence of defendant's prior drug use not for the

(…continued)

contained any money or drugs. We cannot conclude that the trial court abused its discretion in admitting Exhibit 10, as it does not appear unduly gruesome, showing, in only one corner of the photograph, some blood on a dark hardwood floor.

[7] The prosecutor also inquired of Hall whether she and defendant had gone anywhere outside 5755 Iroquois, to which Hall replied that they had visited "[a]nother crack house." After defendant objected and a bench conference occurred, the trial court sustained defendant's objection to Hall's testimony and advised the jury to disregard it.

purpose of demonstrating defendant's propensity to engage in illegal conduct, but for the proper purpose of bolstering Hall's challenged testimony identifying defendant as the shooter. *People v Fuqua*, 146 Mich App 250, 256-257; 379 NW2d 442 (1985), overruled on other grounds in *People v Gray*, 466 Mich 44; 642 NW2d 660 (2002).

Hall's testimony regarding her familiarity with defendant through several prior drug transactions between she and defendant had significant probative value with respect to the material and contested issue of defendant's identity as the shooter. *Fuqua*, *supra*. The testimony tended to make more probable than not the fact that Hall correctly identified defendant as the murderer. MRE 401. In light of the probative value of the other acts evidence with respect to the central issue in the case, we conclude that no risk of unfair prejudice substantially outweighed the evidence's probative value, especially given that the record otherwise contained abundant evidence that the murder took place in a drug house. MRE 403; *People v McGuffey*, 251 Mich App 155, 163-164; 649 NW2d 801 (2002) (explaining that unfair prejudice results when minimally probative evidence might receive consideration from the jury substantially out of proportion to the logically damaging effect of the evidence).[8]

With respect to defendant's claim that the trial court should have excluded the other acts evidence on the basis of the prosecutor's failure to file the notice required under MRE 404(b)(2), this Court has observed that the absence of notice constitutes plain error. *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001). To ascertain the extent of any prejudice to a defendant arising from the prosecutor's failure to file a notice of his intent to introduce other acts evidence, a reviewing Court should consider, in the context of a particular case, the effect of the lack of notice on the underlying aims of MRE 404(b)(2):

> (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record. [*Hawkins*, *supra* at 454-455.]

For several reasons, we conclude that the prosecutor's failure to file a notice as required by MRE 404(b)(2) did not prejudice defendant. First, the evidence met all the requirements for admissibility under MRE 404(b)(1), and "notice to [defendant] would not have had any effect on whether the trial court should have admitted it at trial, regardless of the record or arguments that could have been developed and articulated following notice." *Id.* at 455. Second, "[b]ecause [defendant] has never suggested how he would have reacted differently to this evidence had the prosecutor given notice, we have no way to conclude that this lack of notice had any effect

[8] We note that while defendant's February 2, 2000, list of requested jury instructions included CJI2d 4.11, the limiting instruction regarding the jury's consideration of uncharged conduct, the record reflects that defendant affirmatively waived the court's reading of this instruction. See *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999) (indicating the trial court does not have a duty to read CJI2d 4.11 sua sponte). The prosecutor expressed a wish that the court read the instruction anyway, but the court ultimately did not read it. Defendant makes no argument on appeal that the court erred in failing to read a limiting instruction.

whatsoever." *Id*. We note that Hall's testimony at defendant's February 1999 preliminary examination provided defendant an indication that she had encountered defendant before the shooting on several occasions involving drug activity. The record reflects that on two separate occasions the parties had the opportunity to place on the record their views regarding the propriety of admitting evidence of defendant's prior drug activities, and that the trial court made its decision while taking into account the parties' positions and according to the proper legal standard.

Accordingly, we conclude that the trial court did not abuse its discretion in admitting the evidence of defendant's prior drug use pursuant to MRE 404(b), and that the prosecutor's failure to give notice resulted in no prejudice to defendant. *Starr*, *supra* at 494; *Hawkins*, *supra*.

IV.

Defendant additionally asserts that the trial court improperly questioned a witness, his father, in an improperly suggestive manner, and displayed impartiality by referring to his father as a liar. Our review of the record indicates that the two challenged instances of questioning by the trial court plainly involved only the court's proper efforts to clarify the testimony of defendant's father concerning facts that he had already discussed during direct examination by the prosecutor. MRE 614(b); *People v Davis*, 216 Mich App 47, 50-52; 549 NW2d 1 (1996). Furthermore, defendant ignores that the court's references to his father as a liar took place in the course of an evidentiary hearing regarding the admissibility of his father's prior statement as substantive evidence, during which the jury had left the courtroom. The court made the statements during the course of its lengthy ruling finding defendant's father's previous statement inadmissible pursuant to MRE 803(5). Accordingly, defendant has not shown that the trial court posed any improper questions or made any inappropriate comments that prejudiced the jury against him or denied him a fair trial.

V.

Defendant next contends that the trial court erred in permitting the prosecutor to call defendant's father as a witness for the sole purpose of impeaching him with a prior inconsistent statement that implicated defendant in the victim's murder. Defendant suggests that the trial court violated the rule in *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), which prohibits impeachment of a witness with a prior inconsistent statement under MRE 613 when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case. *People v Kilbourn*, 454 Mich 677, 682-683; 563 NW2d 669 (1997).

We find that the prosecutor's questioning of defendant's father regarding his prior statement did not tend to prove the central issue in this case, specifically defendant's identity as the perpetrator of the charged crimes. Defendant's father's own prior responses to the officers' questions undisputedly tended to incriminate defendant. However, the trial court prohibited the prosecutor from reading the father's responses. Instead, the prosecutor read only several prior police officer questions of the father, asking the father whether the police had inquired of him as follows: "Did James tell you what happened on Iroquois?"; "Did James tell you that he shot someone else?"; "Did he tell you why he shot the guy?"; "Did your son tell you that he shot

someone on Iroquois?"; and "Did your son tell you what he did with the gun?" Defendant's father denied that he could recall being asked any of these questions. Furthermore, even to the extent that the questions read by the prosecutor might reasonably have raised some inference that defendant's father told the police that defendant had confessed to the shooting, the trial court instructed the jury on three occasions that attorney questions did not constitute evidence, and the jury is presumed to have followed these instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, any error is harmless.

VI.

Defendant next argues that there was insufficient evidence to support his convictions of the charged crimes. In reviewing a criminal defendant's challenge to the sufficiency of the evidence, this Court considers all the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant's guilt proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Defendant does not challenge the lack of evidence with respect to any particular elements of the charged crimes, but only the evidence identifying him as the person who committed them. Hall testified that she knew defendant, who on the morning of the shooting cut the victim's hair in the kitchen of a drug house. Hall observed defendant looking out at her from the kitchen, before she heard gunshots in the kitchen and saw defendant approach her while pointing a gun. Defendant shot twice at Hall, grazing her ear. Shortly before the murder, Taylor brought a large quantity of cocaine into the house, and while defendant was present, Hall and Taylor saw the victim in possession of hundreds of dollars in cash. However, the police found neither a large quantity of drugs nor any cash when they searched the house after the shooting. The victim suffered three very close range gunshot wounds to the back and side of his head.

We conclude that this evidence, and the reasonable inferences arising therefrom, amply supported a rational jury's finding that defendant committed all of the charged crimes beyond a reasonable doubt. MCL 750.83, 750.316(1)(a), (b), 750.529; see also *Carines*, *supra* at 757; *Kelly*, *supra*. While defendant urges us to revisit the jury's apparent credibility determinations with respect to Hall's and Taylor's testimony, this Court will not interfere with the jury's role in determining the weight of the evidence or the credibility of witnesses. *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002).

VII.

Defendant next argues that he was denied a fair trial due to several alleged instances of prosecutorial misconduct.

> 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) (citations omitted).]

This Court reviews 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).

A.

Defendant first complains that the prosecutor advised the jury during his opening statement that it would hear defendant's father's testimony that defendant confessed "that he had shot the guy in the back of the head, . . . two or three times . . . because he thought there was going to be about $28,000.00 of money in the house when it only turned out that there was 400," but that the prosecutor subsequently failed to introduce at trial any evidence substantiating defendant's alleged confession. We accept the prosecution's argument that it acted in good faith intending to introduce evidence concerning defendant's confession, and we note that on appeal defendant makes no suggestion of bad faith by the prosecutor. However, error requiring reversal nonetheless may exist if the prosecutor's unsuccessful, good faith attempt to introduce evidence prejudiced the defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999); *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997).

A preserved, nonconstitutional error does not warrant reversal of a defendant's conviction unless after an examination of the entire cause, it affirmatively appears that the error more probably than not was outcome determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). In the context of this case, it does not affirmatively appear that the prosecutor's statement regarding evidence not subsequently introduced more probably than not determined the outcome of the case. Independent of the prosecutor's unsubstantiated statement, sufficient properly admitted evidence in the form of (1) Hall's and Taylor's testimony, (2) the photographs, and (3) the testimony by a neighbor and the police that tended to corroborate Hall's account of the shooting, supported defendant's convictions. Moreover, the trial court on three occasions instructed the jury that the attorneys' arguments and statements did not constitute evidence, and "[i]t is well-established that jurors are presumed to follow their instructions." *Graves*, *supra*.

B.

After carefully reviewing the several remaining, alleged instances of prosecutorial misconduct during closing arguments, we detect no impropriety. The prosecutor did not denigrate defendant's presumption of innocence, but appropriately presented his theory of the case on the basis of the evidence admitted at trial, specifically that defendant committed the shooting, and properly rebutted defendant's argument that he was an innocent man. *Schutte*, *supra*. While defendant suggests that the prosecutor inappropriately argued facts not of record, we find that the prosecutor appropriately (1) suggested on the basis of the existing record that the alibi testimony of defendant's relatives might lack credibility in light of the fact that they had not previously shared their recollections of defendant's whereabouts with authorities, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), and (2) responded to defendant's arguments that he should have produced at trial the contents of a safe box found at the murder scene. *Schutte*, *supra*. Furthermore, we find no argument or comment by the prosecutor that

denigrated defendant's alibi defense or otherwise approached the level of an improper personal attack on defendant or defense counsel, but only the prosecutor's wholly proper objections or statements concerning evidentiary or procedural issues. *Watson*, *supra* at 592-593. In any event, no error requiring reversal will be found because any possible prejudicial effect of the prosecutor's comments could have been cured with a timely instruction. *Schutte, supra*. Lastly, when viewed in context, the prosecutor's closing argument did not improperly attempt to invoke sympathy for the victim, *People v Dalessandro*, 165 Mich App 569, 580-581; 419 NW2d 609 (1988), but sought to focus the jury's attention on the gravity of defendant's actions and their consequences for Hall and the victim, irrespective of their identities as drug dealers.[9]

VIII.

The existing record reveals that defendant's unpreserved allegations of ineffective assistance of counsel lack merit. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Even assuming that defense counsel should have objected to the trial court's erroneous order of deliberations instruction, as mentioned within part I, *supra*, the erroneous instruction did not prejudice defendant or deny him a fair trial. *People v Rodgers*, 248 Mich App 702, 714-715; 645 NW2d 294 (2001). Furthermore, defense counsel need not have objected to the court's proper instructions regarding the intent necessary to find defendant guilty of first-degree premeditated murder, felony murder, and second-degree murder. *Snider*, *supra* at 425.

With respect to defense counsel's failures to object to the prosecutor's alleged denigrations of defense counsel, defendant's alibi defense, and defendant's presumption of innocence, defense counsel did not render ineffective assistance because, as previously discussed in part VII, *supra*, none of the prosecutor's statements constituted prosecutorial misconduct. *Snider*, *supra*.

IX.

Defendant lastly contends that the cumulative effect of the errors at trial deprived him of a fair trial. The cumulative effect of several minor errors may warrant reversal even when individual errors in the case would not warrant reversal. *Cooper*, *supra* at 659-660. "In order to reverse on the grounds of cumulative error, the errors at issue must be of consequence. In other words, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Knapp*, *supra* at 388 (citations omitted).

Although several errors occurred at defendant's trial, they did not deprive defendant of a fair trial. Hall was the sole eyewitness to the victim's murder. Defendant had an ample opportunity at trial to challenge Hall's credibility, and the testimony of Taylor, whose recollections confirmed Hall's account that defendant was present at 5755 Iroquois on the morning of the shooting to cut the victim's hair. Other properly admitted evidence tended to support Hall's account of the shooting. The jury obviously found Hall's identification of

[9] Moreover, both parties and the trial court cautioned the jury that sympathy should not influence its decision.

defendant as the murderer credible, and we cannot conclude that the errors that occurred at trial seriously prejudiced defendant or affected the jury's credibility determinations. *Knapp*, *supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Christopher M. Murray