STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 2, 2004
v	No. 248341 Wayne Circuit Court
LANCE ELLIOTT MCNEAL, Defendant-Appellant.	LC No. 02-011056-01

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree felony murder, MCL 750.316(1)(b), and first-degree home invasion, MCL 750.110(a)(2). Defendant was sentenced to concurrent terms of life imprisonment for the first-degree felony murder conviction and ten to twenty years' imprisonment for the first-degree home invasion conviction. We affirm in part and vacate in part.

I. FACTS

On August 3, 2002, defendant saw Tanganyika Shack, an ex-girlfriend, at the store and followed her home. Defendant entered Shack's house and encountered two people, Patricia Krisel and Tyrone Isbell. Shack testified that she asked him to leave, and defendant did subsequently leave. According to Krisel, later that night defendant was repeatedly calling the house, sounding more agitated with each call. Krisel and Shack both claim that after the last phone call they heard glass breaking in the kitchen at which time they ran to the stairs. Shack testified that she heard defendant hollering and that she saw him trying to break the kitchen window with some kind of object.[1] Shack also testified that she hit her house alarm buttons, and ran upstairs to barricade herself and Krisel in a bedroom.

Defendant testified that Shack let him into the house. According to defendant, he went to the basement to confront Isbell because Shack and Krisel "owed [Isbell] money," and Isbell "came at him" swinging a hockey stick. Defendant testified that he then pulled out a knife and

[1] Shack was later impeached with a prior out of court statement where she claimed that she never saw anyone come into the house.

swung at Isbell "two or three" times. Defendant further testified that after a struggle he went upstairs into the kitchen and Isbell came at him carrying a garden hoe and a pair of garden shears, at which point defendant stabbed Isbell again. Defendant left and threw the knife out of his car window. Isbell died from multiple stab wounds, and the record reveals that he was stabbed ten times.

II. JURY INSTRUCTIONS

We generally review de novo claims of instructional error. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, there is no basis for reversal if the instructions adequately protected defendant's rights by fairly presenting to the jury the issues to be tried. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997); *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

Jury instructions must be objected to at trial in order to preserve the issue on appeal. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). Issues that are not preserved will be evaluated for a plain error affecting the defendant's substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, the defendant must show that the error was plain, i.e., clear and obvious, and affected the defendant's substantial rights by prejudicing the outcome of the proceedings. *Id*. Reversal is warranted only where the plain error resulted in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*.

A. Manslaughter Instruction

Defendant contends that the trial court denied him a fair trial by refusing to instruct the jury on manslaughter because defendant's theory of the case rationally supported imperfect self-defense. We disagree. Defendant, who was charged with first-degree murder, MCL 750.316(1)(a) and (b), requested that the trial court instruct the jury regarding voluntary manslaughter, MCL 750.321, based on imperfect self-defense, thus, this issue is preserved.

The resolution of this issue is controlled by *People v Cornell*, 466 Mich 355; 646 NW2d 127 (2002), and MCL 768.32(1), which provides, in pertinent part:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

MCL 768.29 requires the court to "instruct the jury as to the law applicable to the case."

Voluntary manslaughter is an inferior or necessarily included offense of murder under MCL 768.32(1) because "the elements of voluntary and involuntary manslaughter are included in the elements of murder." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). A

requested jury instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element which is not part of the lesser included offense and a rational view of the evidence would support it. *Cornell, supra* at 357. "Consequently, when a defendant is charged with murder, an instruction for voluntary . . . manslaughter must be given if supported by a rational view of the evidence." *Mendoza, supra* at 541, citing *Cornell, supra* at 356. Harmless error analysis is applicable to jury instruction errors involving necessarily included lesser offenses. *Cornell*, *supra* at 362.

Here, a rational view of the evidence does not support the notion that defendant shot the victim after being provoked and while under the influence of the heat of passion; nor does it support a voluntary manslaughter instruction premised on imperfect self-defense. In *Mendoza, supra* at 540, our Supreme Court provided:

> Regarding voluntary manslaughter, both murder and voluntary manslaughter require a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. However, the element distinguishing murder from manslaughter--malice--is negated by the presence of provocation and heat of passion.

"Thus, to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id*. at 535. Provocation is not an element of voluntary manslaughter; rather, provocation "negates malice and reduces a killing that would otherwise be murder to manslaughter." *People v King*, 98 Mich App 146, 150; 296 NW2d 211 (1980). Alternatively stated, adequate and reasonable provocation that "causes the defendant to act out of passion rather than reason" "mitigate[s] a homicide from murder to manslaughter." *People v Pouncey,* 437 Mich 382, 389; 471 NW2d 346 (1991).

In the present case, there was no evidence that defendant was acting in the heat of passion caused by adequate provocation to the degree that defendant lost control. On the contrary, defendant testified that he stabbed the victim in self-defense. Further, even if the jury were instructed on voluntary manslaughter, it would have rejected the "adequate provocation" argument and convicted defendant of first-degree felony murder, making any error harmless; as any kind of "adequate provocation" argument would essentially mirror the self-defense argument that the jury rejected. See MCL 769.26.

In Michigan, the concept of imperfect self-defense recognizes that murder may be mitigated to voluntary manslaughter if a defendant would have been entitled to invoke lawful self-defense had he or she not been the initial aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). With respect to defendant's argument that a voluntary manslaughter instruction was proper based on imperfect self-defense, defendant's own testimony conflicts with this position. Imperfect self-defense applies only where a defendant would otherwise have been entitled to a self-defense claim had the defendant not been the initial aggressor. *Butler*, *supra* at 67. The evidence in this case does not support a voluntary manslaughter instruction. Defendant testified that he was not the initial aggressor, and that Isbell came at him on two occasions. Because defendant testified

he was not the initial aggressor reversal is not warranted. We find, on review de novo, that the trial court did not error when it declined to instruct the jury on voluntary manslaughter based on imperfect self-defense because the theory was not supported by a rational view of the evidence.

B. Cumulative Effect of Jury Instruction Errors

Defendant next argues that the cumulative effect of several errors existing in the trial court's instructions to the jury amounted to error requiring reversal. We disagree.

1. Partial Set of Instructions

Defendant contends that the trial court erred requiring reversal when it only attached the murder instructions to the jury verdict form. Defense counsel objected when the trial court stated that it would only provide the jury with the written Criminal Jury Instructions (CJIs) for first-degree premeditated murder, first-degree felony murder, and second-degree murder and, thus, the issue is preserved.

MCR 2.516(B) provides, in relevant part:

> (5) Either on the request of a party or on the court's own motion, the court may provide the jury with
>
> (a) a full set of written instructions,
>
> (b) a full set of electronically recorded instructions, or
>
> (c) a partial set of written or recorded instructions if the parties agree that a partial set may be provided and agree on the portions to be provided.

MCR 2.516(B)(5)(c) prohibits providing a partial set of written jury instructions to the jury during deliberations without the consent of both parties; however, any error is deemed harmless except upon a showing of prejudice. *People v Riley*, 156 Mich App 396, 402-403; 401 NW2d 875 (1986), overruled in part on unrelated grounds *People v Lane*, 453 Mich 132; 551 NW2d 382 (1996). A trial court's erroneous decision to give partial written instructions to the jury without the defendant's consent may be found to be harmless error when the defendant was not denied a fair trial, the error was not so offensive to the maintenance of a sound judicial process that it could never be considered harmless, the instructions were given in apparent good faith and were accurate, the court's actions were not adverse to the judicial process, and the error was harmless beyond a reasonable doubt. *Riley, supra* at 402-403, citing *People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972).

The jury was given a copy of all of the lesser included offenses for the murder charge, which a rational view of the evidence supported. Apparently, defendant is challenging the fact that the jury was not provided a copy of the CJIs for the defenses; particularly self-defense. The trial judge provided verbal instructions on the theory of self-defense and other instructions that were requested and proper, however, written instructions were not provided to the jury. We find that defendant was not denied a fair trial. The trial court's erroneous use of partial written instructions was not so offensive to the maintenance of a sound judicial process that it could

never be considered harmless. There is nothing in the record to support that the partial written instructions were not given in apparent good faith and they were not, nor does defendant contend that they were, inaccurate. And, there is no prejudice in the present case, as the jury was given all instructions for the murder offense, including the lesser included offenses that were supported by a rational view of the evidence; and the jury was verbally instructed with regard to all other instructions. Furthermore, the trial court's actions were not adverse to the judicial process, but, rather, the court attempted to carry out its responsibility in the manner it considered most effective. Finally, we conclude that the error was harmless beyond a reasonable doubt. See *id*. Accordingly, error requiring reversal did not occur.

2. Recitation of Michigan Criminal Jury Instructions

Defendant claims that the jury instructions read by the trial court were inconsistent with the standard CJIs and also makes several specific error contentions. We note that defendant did make a general objection that the jury instructions should be consistent with the CJIs and should be read verbatim. However, a proper objection regarding the instruction must specify the precise objection or offense requested. See, generally, *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004). Because defendant did not object to the specific instructions he now challenges we will review his claims for plain error that affected his substantial rights. *Carines, supra* at 763-764.

A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Aldrich*, *supra*. The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). No error results from the omission of an instruction if the instructions as a whole covered the substance of the omitted instruction. *People v Kurr,* 253 Mich App 317, 327; 654 NW2d 651 (2002). Use of the Michigan Criminal Jury Instructions is not mandatory. *People v Petrella*, 424 Mich 221, 227; 380 NW2d 11 (1985); *People v Miller*, 182 Mich App 482, 487; 453 NW2d 269 (1990). Specifically, in *People v Vaughn*, 447 Mich 217, 235 n 13; 524 NW2d 217 (1994) overruled on other grounds in *Carines, supra* at 766, our Supreme Court provided:

> We emphasize to the bench and bar that our ruling is not a demand that the standard jury instructions be literally adhered to in any given case. The Michigan Criminal Jury Instructions do not have the official sanction of this Court, *Petrella, supra*, and their use is not mandatory but, instead, remains discretionary with the capable trial judges of this state. *Id*. Nothing in this opinion should be interpreted as limiting in any way the proper exercise of judicial discretion when instructing a jury. Trial judges remain free to use all or part of those standardized instructions that they deem proper for adequately instructing a jury, and should not hesitate to modify or disregard a standard instruction when presented with a clear or more accurate instruction. *Id*.; *People v Dykhouse*, 418 Mich 488; 345 NW2d 150 (1984).

Thus, generally, we find that the trial court was not required to give the Michigan CJIs verbatim. We will address defendant's specific contentions, *infra*.

i. First-Degree Premeditated Murder Instruction

Defendant claims with regard to the instruction for first-degree premeditated murder, that the trial court gave an instruction for premeditation, but not deliberation. This claim is without merit as the trial court did instruct on deliberation even though it did not give the CJI verbatim. The trial court did instruct the jury with regard to deliberation as follows:

> That is, the person has thought about what they're going to do, has an opportunity not to commit the offense, to take a second look and not to do it.
>
> The law does not state how much time a person has to deliberate, as long as there's enough time between the time that the act is done and the time the person has thought about it. As long as there's enough time for the person to change his mind and not commit the offense.

The trial court's instruction on deliberation and first-degree premeditated murder did not mirror the standard instruction, but read as a whole it did correctly define the concepts. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Dumas*, *supra* at 396; *Wolford*, *supra* at 481. The first-degree premeditated murder instruction given by the trial court fairly presented the charge and protected defendant's rights. Therefore, the trial court's failure to give the standard jury instruction for first-degree premeditated murder was not plain error. Further, defendant's substantial rights were not affected as he was not convicted of first-degree premeditated murder, but, rather, first-degree felony murder which does not require premeditation and deliberation.[2]

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[2] In *People v McCoy*, unpublished per curiam opinion of the Court of Appeals (Docket No. 234042), this Court reversed the defendant's first-degree premeditated murder conviction when the trial court "failed to adequately define and distinguish premeditation and deliberation and indeed, failed to provide the jury with any definition of deliberation," and because the jury may have found defendant guilty of second-degree murder rather than first-degree premeditated if properly instructed. However, recently, our Supreme Court in lieu of granting leave to appeal reversed this Court's decision in *McCoy*, *supra*, and found no error (or at best harmless error) in the nonstandard instruction presented to a jury that first-degree murder included the elements of premeditation and deliberation, *People v McCoy*, 469 Mich 984; 672 NW2d 853 (2004), and Justice Corrigan, concurring, added that there was no error because "premeditation and deliberation" are words that are within the "common-sense understanding of the jurors," *id*. "An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001) citing *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993). Our Supreme Court's order in *McCoy*, *supra*, 469 Mich 984, does not contain a concise statement of the applicable facts and, thus, is not binding precedent. But it is persuasive that the instruction given in the present case was

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ii. Felony Murder Instruction

Defendant next contends that the trial court failed to give the proper instruction for felony murder in that it instructed the jury on more than one occasion that an element could be satisfied by intent to do "bodily harm" rather than "great bodily harm." Moreover, defendant contends that the trial court indicated that a mere killing would satisfy felony murder. The trial court's felony murder instruction deviated slightly from standard instruction but taken as a whole it conveyed the correct meaning of the concept. The trial court properly instructed the jury that "He can either intend to kill or he intends to do great bodily harm. . ." And, the trial court stated, "the difference between murder in the first degree premeditated murder and murder in the first degree in the commission of a felony is that you don't have to specifically intend to kill the victim. You could either intend to kill, or intend to do great bodily harm. . ." The jury also had the written standard CJIs to refer to during deliberations. Further, a review of the challenged instructions reveals the trial court did not instruct the jury that a mere killing would satisfy the elements for felony murder but, rather, when read in its entirety the trial court was properly instructing the jury with regard to felony murder. Immediately after stating that a murder with a home invasion conviction was required to support a felony murder conviction, the trial court it went on to explain the proper standard. Viewing the jury instructions in their entirety, *Aldrich, supra* at 124, there is no plain error that affected defendant's substantial rights. Furthermore, any prejudice was cured because the jury had a copy of the standard CJI for felony murder to review during deliberations which provided the proper standard.[3]

iii. Justification or Excuse Instruction

Defendant also claims that the trial court erred in failing to instruct the jury pursuant to CJI2d 16.1(6) and CJI2d 16.4(5) that first degree premeditated murder and first-degree felony murder must "not be justified, excused or done under circumstances that reduce it to a lesser crime." This issue is without merit. The commentary to CJI2d 16.1 and CJI2d 16.4 provide that this instruction may be omitted if there is no evidence of justification or excuse and the jury is not being instructed on manslaughter or any offense less than manslaughter. Defendant's

(…continued)

significantly more explanatory and actually defined deliberation, while deliberation was not defined in *McCoy*; a case in which our Supreme Court decided it was not error or, at best, harmless error. Unlike *McCoy*, the trial court in the present case did distinguish between premeditation and deliberation.

[3] We do not find where the trial court instructed the jury that the intent to do bodily harm was sufficient rather than intent to do great bodily harm. It appears the only time the trial court instructed without using "great bodily harm" was when it was instructing that "doing an act in total disregard that the likelihood of the act would cause death or bodily harm, and it's done in the commission of a felony." However, defendant did not challenge this part of the instruction at trial or in his brief on appeal and, thus, the issue is abandoned. See MCR 7.212(C)(5); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Regardless, any error or confusion was cured by trial court giving the jury a copy of the Michigan CJI for felony murder.

defense was self-defense and the jury was properly instructed on self-defense; and there was not evidence supporting any other justification or excuse. And, the jury was not instructed on manslaughter. Furthermore, the commentary for both CJI2d 16.1 and CJI2d 16.4 provide that the justification or excuse instruction may be inserted there, but is "more commonly given at a later time." The instruction was given at a later time. For the above reasons, defendant's issue is without merit.

iv. Order of Deliberations Instruction

Defendant further claims that trial court failed to give an order of deliberations instruction, CJI2d 3.11, as required by *People v Handley*, 415 Mich 356; 329 NW2d 710 (1982). Defense counsel made no objection to the omission and, thus, we review this challenge for plain instructional error affecting defendant's substantial rights. *Carines, supra* at 763-764.

CJI2d 3.11, the order of deliberations instruction, provides in pertinent part:

> (5) In this case, there are several different crimes that you may consider. When you discuss the case, you must consider the crime of [*name principal charge*] first. [If you all agree that the defendant is guilty of that crime, you may stop your discussions and return your verdict.] If you believe that the defendant is not guilty of [*name principal charge*] or if you cannot agree about that crime, you should consider the less serious crime of [*name less serious charge*]. [You decide how long to spend on (*name principal charge*) before discussing (*name less serious charge*). You can go back to (*name principal charge*) after discussing (*name less serious charge*) if you want to.]

In *Handley, supra*, our Supreme Court required that an order of deliberations instruction be given when there are both principal and lesser included offenses. In *Handley, supra*, the trial court instructed the jury regarding possible verdicts of first-degree murder, second-degree murder, and manslaughter. *Id*. at 357-358. But the trial court also instructed the jury that it must acquit the defendant of the first-degree murder charge before considering the other charges. *Id*. On appeal, our Supreme Court held that a jury should be instructed to consider the principal charge first, and if the jury fails to convict or acquit or is unable to agree whether to convict or acquit on the principal charge, then it may turn to lesser offenses. *Id*. The Court further stated that an instruction would not be deemed erroneous unless it conveyed the impression that there must be an acquittal on one charge before a lesser charge could be considered. *Id*.

Although Michigan courts are generally not required to adhere to the instructions of CJI2d, *Petrella, supra* at 277, the Supreme Court in *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995), specifically noted that CJI2d 3.11 "is a sound instruction, and we continue to direct that it be given." In the present case, we conclude that although it is error not to give an order of deliberations instruction, reversal of defendant's conviction is not required. It is not the duty of the trial court to request instructions, it is that of defendant and defense counsel. Nonetheless, as noted in *Handley, supra* at 358-360, the purpose of its holding was to avoid a situation where the jury believed that it was required to unanimously find the defendant not guilty of the principal charge before it could consider the lesser charge. See also *Pollick, supra*. Here, the jurors were not expressly or impliedly instructed that they had to acquit defendant of first-degree murder before they could consider the charge of second-degree murder. And, a

review of the jury instructions in their entirety reveals that an error requiring reversal did not occur. See *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Any error resulting from the failure to give the order of deliberations instruction did not rise to the level of plain error that affected defendant's substantial rights; i.e., did not result in the conviction of an innocent person or seriously affect the fairness, integrity or public reputation of the proceedings and we decline to grant relief on this matter. *Carines*, *supra* at 763-764.

v. Specific Intent Instruction: First-Degree Premeditated Murder

Defendant next claims that the specific intent instruction for first-degree premeditated murder given by the trial court was erroneous. It is unclear what exactly defendant is arguing with regard to this issue, but, apparently, is challenging the specific intent instruction given for the first-degree premeditated murder instruction. The trial court specifically stated that specific intent means "the perpetrator intended to cause the death of another person." The trial court then went on to describe to the jury how it is determined what a person's intent is. In addition, the trial court informed the jury that "specific intent is defined as a conscious decision of the mind to do a certain act."

We find that the trial court adequately described specific intent to the jury. To the extent defendant is arguing something beyond this, the issue as been abandoned because defendant has not properly articulated his position or cited an support for his contentions. To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions involved. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Defendant in the present case did not properly raise or address the issue, as his argument is not clear. "'An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.'" *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Such cursory treatment constitutes abandonment of the issue. *Id.*

vi. Credibility and Impeachment Instructions

Defendant also finds fault with trial court's instruction regarding credibility and impeachment by defendant's prior convictions. Once again it is difficult to ascertain exactly what defendant is arguing. To properly present an appeal, an appellant must appropriately argue the merits of the issues. *Jones (On Rehearing)*, *supra* at 456-457. Defendant did not clearly articulate what exactly he was challenging. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *Watson*, *supra* at 587. Defendant has cited no applicable authority and his argument is unclear, thus, this issue has been abandoned. Nonetheless, to the extent we understand defendant's argument we find no plain error.

To the extent we understand defendant's argument, defendant is arguing the jury should have been instructed as to CJI2d 3.4, impeachment of defendant by a prior conviction, and CJI2d 3.6, witness credibility. Defendant did not specifically request that these instructions be given

and, thus, we review for plain error affecting defendant's substantial rights. Although, defendant did not request, the trial court instructed on credibility and impeachment as follows:

> [T]here are certain things that we call impeachment evidence . . . . brought to your attention to help you decide if you wish to believe the witness under oath.
>
> * * *
>
> Now, if there were any statements made outside of the court, any unsworn statements, and you look at that and find that it was different, that it was inconsistent with what the witness said in court, that's not evidence.
>
> However, you may use that to help you decide whether you wish to believe the witness. That's all that's for. It's not direct evidence, it is what we call impeachment evidence.
>
> And if you decide that a witness has stated something differently outside of court than something in court, then look at it and see whether this is a difference of great importance or whether it's a difference of merely detail.
>
> * * *
>
> Now, it has been brought to your attention that the defendant in this case has previously been convicted . . . That is not brought to your attention to say that if he committed a crime in the past he must be guilty of this offense.
>
> That is brought to your attention for you to determine if you wish to believe his testimony under oath, and that's all that's for.
>
> If you believe a witness has been untruthful or testified falsely to you, you may disregard all of his testimony. If you believe he's partly truthful, you may accept that part which you accept and reject the part which you do not accept.
>
> Now, you decide the question of credibility, apply the same tests to all the witnesses, the defendant, the expert witnesses, the police, the complainant.

The trial court paraphrased the standard jury instructions and conveyed the same meaning. Reviewing the instructions give in their entirety, the trial court's instructions regarding impeachment of defendant by a prior conviction and credibility of witnesses did not constitute plain error affecting defendant's substantial rights.

vii. Specific Intent Instruction: First-Degree Home Invasion

Defendant, in a standard 11 brief, contends that the trial court erred requiring reversal when it failed to give the jury the specific intent instruction for first-degree home invasion. We disagree.

The elements of first-degree home invasion applicable to this case are as follows:

> A person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling. [MCL 750.110a(2); see also *People v Silver*, 466 Mich 386, 390; 646 NW2d 150 (2002).]

According to the statute, defendant did not need to have the requisite intent to commit assault or a felony when entering the house. The statute requires that: (1) defendant entered the house without permission; (2) defendant committed an assault or felony while entering, being present in, or exiting the dwelling; and (3) defendant was either armed with a dangerous weapon, or another person was lawfully present in the dwelling.

The prosecution charged that defendant entered a home without permission and committed a murder, a felony, while entering, present in, or exiting the dwelling where Shack was lawfully present. Therefore, the prosecutor was not required to prove defendant's intent at the time of the entry; rather, it was required to prove that defendant committed a felony while in the dwelling. The trial court's instructions properly presented all the elements of first-degree home invasion to the jury. Obviously, the jury found defendant committed murder because they found he committed felony murder, which means that the jury at least found he committed second-degree murder (a felony) in the course of an enumerated felony. Felony-murder is a general intent crime, requiring evidence of one of the three intents necessary to prove second-degree murder; essentially first-degree felony murder is second-degree murder committed in the course of an enumerated felony. *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980); *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). The instructions, as a whole, fairly presented the issues, set forth the elements of first-degree home invasion and protected defendant's rights.

3. Cumulative

Lastly, defendant contends that cumulative effect of the lower court's instructions denied defendant a fair trial. We review this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). "Even if somewhat imperfect, [jury] instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Canales, supra* at 574. "[O]nly actual errors are aggregated to determine their cumulative effect." *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). We have only found two instructional errors, one was the failure to give the order of deliberations instruction, which was not preserved, and the second was trial court's giving the jury only a partial set of instructions which was preserved. Because we conclude that defendant has failed to show any prejudicial or actionable error, defendant's argument concerning cumulative error is unavailing. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). We find that there was no instructional error of consequence, and the cumulative effect was harmless.

III. PRIOR BAD ACTS EVIDENCE

Defendant's next issue on appeal is that the trial court erred in refusing to require the prosecution to make a preliminary showing of admissibility of other alleged crimes, wrongs or acts of defendant against a key prosecution witness in violation of MRE 404(b). We disagree, as this issue is without merit.

On appeal, a party may not seek appellate review of the admission of bad acts evidence unless they make a timely objection. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). Defense counsel made a timely objection to the unsolicited testimony by Shack during cross-examination, which he is now challenging. Defendant also made a motion in limine to exclude evidence of prior bad acts. Thus, this issue has been properly preserved.

The prosecutor did not offer any "bad acts" evidence, but, rather, Shack made unsolicited remarks during cross-examination by defense counsel on two separate occasions. On the first occasion, Shack was unresponsive to defense counsel's questions as follows:

> Q: You didn't have any physical confrontation right then, did you?
>
> A: Oh, no, not at that time, but he assaulted me –
>
> Q: No, my question is –
>
> A: -- three times
>
> THE COURT: No, no, just answer the question directly that he asks. I know you want to get things out, but we have to follow certain rules. So just only answer what he asks you.

Further along in cross-examination, Shack made more unsolicited remarks as follows:

> Q: So he was saying something coming through the window?
>
> A: He was hollering something. It's not the first time. I've had to call the police –
>
> Q: Ma'am.
>
> A: -- Several times on him –
>
> Q: Ma'am.
>
> A: -- for being outside my house talking
>
> * * *
>
> MR. EDISON: Judge, she's non-responsive.

THE COURT: Okay, I'll sustain your objection, it's non-responsive. Now continue.

The witness' comments were unresponsive to defense counsel's questioning, and the trial court correctly directed the witness to answer only the questions asked and sustained defense counsel's objection. Because the prosecution did not attempt to admit evidence of bad acts, and the outbursts came from an unresponsive witness who was responding to defense counsel's questions, there was no requirement to make a preliminary showing of admissibility. There has also been no showing that Shack was directed in anyway to testify in this manner by the prosecution. Although Shack's testimony may have inappropriately implied that defendant assaulted her on three separate occasions, this unsolicited testimony does not warrant a mistrial. Where error involved unsolicited remarks by a witness, "[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzoles*, 193 Mich App 263, 266; 483 NW2d 458 (1992). In the instant case, neither the prosecutor nor the trial court can be held responsible for Shack's unresponsive, unsolicited answers to proper questions asked of her by the defense counsel. An objection was made to the statements and the trial court sustained the objections. No reversible error can be found in the instant case because defense counsel solicited the challenged testimony. Furthermore, defendant has not shown that the statements by Shack were so egregious they prejudiced the outcome of the trial. See *Gonzoles, supra*.

IV. IMPEACHMENT BY PRIOR CONVICTIONS

Defendant also argues that the trial court erred and abused its discretion by allowing defendant to be impeached by prior convictions involving theft that were not probative of veracity. We disagree.

This Court reviews a trial court's decision to admit or exclude evidence, including evidence of prior convictions for impeachment purposes, for an abuse of discretion. *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002). "'An abuse of discretion occurs 'when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but [the] defiance [of it] . . . ."'" *People v McDaniel*, 256 Mich App 165, 168; 662 NW2d 101 (2003), leave held in abeyance *People v McDaniel*, unpublished order of the Supreme Court, issued September 11, 2003 (Docket No. 123437) quoting *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002) quoting *Michigan DOT v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). Decisions on close evidentiary questions do not normally amount to an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). If an abuse is found the issue is subject to harmless error analysis. *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988). Whether a preserved error was harmless depends on the nature of the error and its effect on the reliability of the verdict in light of the weight of the untainted evidence. *McDaniel, supra*. The error is presumed to be harmless, and the defendant bears the burden of showing that it resulted in a miscarriage of justice. *Id.*

A witness's credibility may be impeached with prior convictions, MCL 600.2159, but only if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). MRE 609 provides in part:

> (a) **General Rule**. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
>
> (1) The crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs the prejudicial effect.

Because crimes of dishonesty or false statement are directly probative of truthfulness, they are admissible under MRE 609(a)(1) without regard to the balancing test of MRE 609(a)(2)(B). *People v Allen*, 429 Mich 558, 593-594; 420 NW2d 499. Crimes of theft are minimally probative, and are, thus, admissible only if the probative value outweighs the prejudicial effect. *Id.* at 595-596. The probativeness and prejudice are to be measured by the following factors laid out in MRE 609(b):

> (b) Determining Probative Value and Prejudicial Effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

All other crimes must be excluded. *Allen, supra* at 596.

Defendant was convicted of two counts of first-degree retail fraud in 1995 and 1996, and convicted of receiving and concealing property in 1999. The trial court determined that defendant's prior convictions for receiving and concealing stolen property and two first-degree retail fraud convictions, contained an element of "truth, honesty and false statement." Whether the two retail fraud convictions, contained an element of dishonesty or false statement depends on the factual circumstances underlying the convictions; but retail fraud convictions are certainly considered theft crimes. *People v Parcha*, 227 Mich App 236, 246-247; 575 NW2d 316 (1997). There is nothing on the record for this Court to ascertain whether defendant's retail fraud convictions contained an element of dishonesty or false statement, thus, the balancing test of MRE 609(a)(2)(B) should be applied; and was. Although we conclude receiving and concealing stolen property is not necessarily a crime of dishonesty, it is, for purposes of MRE 609, a theft crime. See *People v Clark*, 172 Mich App 407, 418-420; 432 NW2d 726 (1988). And, the trial court conducted a proper test as provided in MRE 609(b).

The trial court did improperly find that defendant's prior convictions involved honesty and false statements; as there was no showing of this. But the trial court properly conducted a balancing test under MRE 609(b), treating the convictions as crimes of theft; not crimes that contained an element of dishonesty or false statement. In conducting its balancing test, the trial court found that none of the convictions were more than ten years old; they were not similar as the prior convictions were theft offenses and the current offense was a homicide; the prior convictions were indicative of veracity in this situation where the credibility of witnesses was in question; and the trial court did not believe that allowing impeachment by the prior convictions would keep defendant from testifying. Defendant's prior convictions were less than ten years old, and were punishable by imprisonment in excess of one year or death under the law under which defendant was convicted. MRE 609(a)(2). And, defendant's prior convictions were recent, and the "recentness of the crime accents [the] probative value." *Allen, supra* at 611. Additionally, defendant testified to his own version of events at trial and was not dissuaded by the introduction of the evidence. Further, there was an obvious discrepancy between defendant's testimony and that of Shack and Krisel. Finally, the former convictions for retail fraud (one apparently for not returning a rental car) and receiving and concealing stolen property, are not similar to the instant offenses of first-degree home invasion and first-degree murder. See, generally, *id*. (similarity of prior conviction to crime charged weighs against admission of evidence of prior conviction).

Defendant testified that he was let into the house by Shack and that he was helping Shack and Krisel deal with a problem they had with Isbell. Shack and Krisel, on the other hand, testified that defendant broke into the house uninvited and that they barricaded themselves in a bedroom to avoid him. Contrary to defendant's contention, the trial court was not weighing Isbell's drug use as relevant to determination of admission of defendant's prior convictions; nor did it condition impeachment on the impeachment of the prosecution's witnesses. But, instead, the trial court was just noting that there were questions of credibility. There is an obvious question of credibility in the differing testimony of defendant and that of Shack and Krisel. Thus, evidence of defendant's prior theft crimes was probative of his veracity because of the credibility questions and were more probative based on the recentness. The prejudice is minimal because the offenses are totally different. See *Allen, supra* at 606. Therefore, allowing use of the retail fraud convictions and the receiving and concealing stolen property convictions to impeach defendant, when properly balanced for probative value versus prejudicial effect, was not an abuse of the trial court's discretion. This is at best a close evidentiary question as to whether all three prior convictions should have been admitted, but, as noted, decisions on close evidentiary questions do not normally amount to an abuse of discretion. *Sabin (After Remand), supra* at 67. Based on the above, we cannot say the admission of the impeachment evidence was so palpably and grossly violative of fact and logic that it evidenced a perversity of will or a defiance of judgment, *McDaniel, supra,* and, thus, we find no abuse of discretion.[4]

[4] Even if there was an abuse of the trial court's discretion, defendant is not entitled to relief because given the testimony and evidence, we find no basis to conclude that it is more probable than not that error in permitting defendant to be impeached with evidence of the prior conviction, if any at all occurred, undermines the reliability of the jury's verdict. *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000).

V. TRIAL COURT BIAS

Defendant's next issue is that the trial court engaged in repeated instances of bias against the defense and denied defendant a fair trial due to judicial bias and impartiality. We disagree. Defendant's argument concerning judicial bias is without merit. Defendant did not raise any objection below and, thus, the issue has not been preserved for appeal. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Therefore, defendant must establish plain error that affected the outcome of the trial. *Carines, supra* at 763-764.

The appropriate test to determine whether the trial court's comments or conduct demonstrated judicial impartiality is whether they were of such a nature to unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). The trial court has wide discretion in the matter of trial conduct; but, this power is not unlimited. *Id*. at 698. Portions of the record should not be extracted in part to show that there was bias against the defendant; instead the record should be reviewed in its entirety. *Id.* at 697-698. "A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). The defendant must prove either actual personal or prejudice "against either a party or the party's attorney." *Id.* at 503. Here, defendant failed to demonstrate factual support for his claim of judicial bias. See MCR 2.003(B)(1). A judge's repeated rulings against a party do not require disqualification. *People v Fox (After Remand)*, 232 Mich App 541, 559; 591 NW2d 384 (1998).

The first alleged instance of judicial bias defendant cites occurred directly after jury voir dire during a discussion between the trial court and defense counsel regarding preliminary issues. The trial court asked defense counsel to be brief and directly to the point. Defense counsel, then, brought a motion in limine for the trial court to exclude prior alleged bad acts that occurred between Shack and defendant. The trial court responded that it could not decide because there had been no questions in that regard, that it could not yet rule as to relevance, and that it was up to defendant to object if a question was asked that might not be proper. The trial court, after continuing insistence from defense counsel, stated that it was "not going to take anymore of this nonsense," that the proper time to make an objection was after the prosecution asked a question, and that it "cannot make a ruling in a vacuum."

The trial court was trying to explain to defense counsel that it could not make an intelligent preliminary ruling on the evidence without knowing the relevance to the case. The trial court further stated that defense counsel could make an objection to the evidence at the appropriate time when the prosecution attempted to introduce it. Although, this discussion occurred outside the presence of the jury, defendant claims that he was prejudiced because Shack brought up prior bad acts when she was being cross-examined as discussed in depth, hereinbefore, and that if the trial court permitted a preliminary hearing it could have admonished Shack before she went on the stand. There was no plain error in regard to the trial court failing to make a preliminary ruling as to prior bad acts that the prosecution did not even intend to introduce. The comments by Shack which defendant claims were prejudicial were unresponsive comments that were made while defense counsel was cross-examining Shack. Judicial rulings themselves almost never constitute a valid basis for alleging bias unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Wells, supra* at 391.

Defendant has presented no reasonable basis for concluding that the trial judge's ruling on the preliminary matters displayed such deep-seated favoritism or antagonism.

Defendant also argues that the trial court made unnecessary comments regarding the value of the evidence he wished to present and exclude, and displayed a negative attitude toward defense counsel and their trial strategy. A review of the section of the record which defendant cites indicates that defense counsel was attempting to get the trial judge to rule on the admissibility of evidence that the prosecution had not yet attempted to admit. The trial court indicated that it was not necessary to examine this until the prosecution attempted to submit the evidence. Defense counsel said, "Judge, you don't have to get all huffy about this." And, the trial court responded "You have gotten started right from the beginning . . . breaking every single rule that this Court is familiar with, and I have let it go." Defendant claims that trial court showed further bias towards defense counsel when it referred to defendant's trial strategy as "poppy cock." The exchange occurred over defense counsel's objection to prosecution wanting to present evidence of the deceased's cancer illness on relevance and hearsay grounds. The trial court sustained the objection on hearsay grounds. The trial court's comments did not in any way unduly influence the jury, as no jury was present, or deprive defendant of a fair and impartial trial. Comments critical or hostile to counsel are ordinarily not supportive of a finding of bias or partiality. *Wells, supra* at 391. In any event, the brief remark does not reasonably demonstrate actual bias or partiality against the defense, but rather is more naturally understood as a warning to defense counsel who was becoming argumentive with the trial court and an expression as to the merits of defendant's contentions. In context, the trial judge's remarks reflect that this was an opinion formed on the basis of defense counsel's conduct in handling the case. Such opinions during the course of the trial process do not constitute bias or partiality where, as here, they do not show deep-seated favoritism or antagonism that would render the exercise of fair judgment impossible. *Id*. This is particularly so, here, as the remarks were directed at defense counsel, not defendant. *Id*. at 391-392. Further, the challenged statements were made outside the presence of the jury and did not prejudice defendant in that regard.

As discussed, *supra*, the trial court properly declined to instruct the jury on the request for manslaughter because defendant's theory of the case and his testimony did not support a manslaughter instruction. Thus, this contention does not support a claim of judicial bias.

In addition, defendant contends that the trial court made critical rulings against him by allowing for impeachment by prior theft convictions. However, as discussed, hereinbefore, the trial court did not abuse its discretion in allowing defendant to be impeached by his prior convictions that were probative of his veracity, and minimally prejudicial with regard to his home invasion and murder charges. As such, the trial judge's conduct in this regard does not support a finding of judicial bias.

For the most part, defendant's claim is based on various rulings by the trial court denying his motions. However, as noted, judicial rulings themselves almost never constitute a valid basis for alleging bias unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Wells, supra* at 391. Defendant has presented no reasonable basis for concluding that the trial judge's rulings on various matters displayed such deep-seated favoritism or antagonism. Rather, a trial judge is supposed to make rulings. In the present case, the trial judge displayed no evidence of bias. Accordingly, no plain error exists affecting the outcome of the trial.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant further claims that his trial counsel was ineffective because he failed to engage in meaningful pretrial discovery to support defendant's theory of self defense and failed to engage in an effective cross-examination of the prosecution's expert witness. We disagree.

Our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). This Court previously denied defendant's request for a *Ginther*[5] hearing as unnecessary. See *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995) (remand is unnecessary if a defendant fails to show a factual dispute or an area in which further elucidation of facts might advance his position). Defendant has not demonstrated that remand for an evidentiary hearing concerning ineffective assistance of counsel is warranted. See *Ginther, supra*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id.* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

A. Pretrial Discovery

Defendant contends that he asked his counsel whether an evidentiary hearing could be requested to obtain evidence in support of his self-defense theory. In particular, defendant claims that he wanted his trial counsel to obtain the hockey stick and the garden hoe, which defendant claimed that Isbell used to assault him with, as evidence. According to defendant, trial counsel declined to request an evidentiary hearing.

Defendant testified that Isbell came at him and swung a hockey stick at him twice, and that is when defendant pulled out a knife and the two began struggling. And, defendant testified that he stabbed Isbell because Isbell swung the hockey stick at him. Defendant also testified that Isbell subsequently "charged" him with a garden hoe because he was upset that he had been

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

stabbed, and defendant stabbed him again. A photograph was presented into evidence, which revealed the garden hoe that defendant claimed Isbell went after him with. Further, a police officer testified that the garden hoe was laying right in the middle of the floor.

As noted, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *People v Hampton*, 176 Mich App 383, 385; 439 NW2d 365 (1989). Decisions regarding what evidence to present are matters of trial strategy, which will not be second guessed or assessed with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The failure to present evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995) vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* There has been no showing on this record as to what the presentation of the hockey stick or the garden hoe would have added. Defendant contends that Isbell's fingerprints may have been found on the items if discovered. However, fingerprints may not have been found on them, and who knows what type fingerprints would have been found on these items by the time defense counsel would have retrieved them; one being a child's hockey stick and the other being a garden hoe. Defendant testified with regard to Isbell possessing these items, and there was no contrary testimony. It may very well have been trial strategy not to request discovery of evidence, which may end up damaging to defendant and would be cumulative to the testimony. The presentation of the hockey stick and garden hoe would not have changed the outcome of the proceedings. The failure to discover and present the hockey stick and the garden hoe did not deprive him of a substantial defense, a prerequisite to appellate relief. *Daniel*, *supra* at 58. Moreover, there was overwhelming evidence to convict the defendant on this charge of first-degree felony murder, as there were ten stab wounds, which is inconsistent with self defense. On this record, we find that defendant has failed to affirmatively demonstrate that his trial counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *Pickens*, *supra* at 338. Nor has defendant either overcome the strong presumption that his trial counsel's assistance constituted sound trial strategy, or shown that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). We reject defendant's claim that defense counsel's failure to comply with each of defendant's requests to take certain actions demonstrates ineffective assistance of counsel. "A difference of opinion between defendant and defense counsel on trial tactics does not mean that there was ineffective assistance of counsel." *People v Cicotte*, 133 Mich App 630, 637; 349 NW2d 167 (1984).

B. Cross-Examination of Medical Witness

Defendant alleges that defense counsel lacked effectiveness in his cross-examination of the medical expert called by the prosecution. Upon review of the record, defense counsel's cross-examination of Dr. Yung Chung was not unreasonable or prejudicial. And, the fact that trial counsel did not question further about the specifics of the stab wound may very well have been trial strategy. Defendant claims that had his counsel examined the medical examiner on the wounds it would have revealed that six of the ten were superficial; supporting his theory of self-

defense. However, Dr. Chung had already testified that all stab wound are serious in the bleeding that they cause. It may have been trial strategy for defense counsel not to question further on this subject in an effort not to highlight for the jury Dr. Chung's testimony that every stab wound was serious. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. See *People v Matuszak*, ___ Mich App ___; ___ NW2d ___ (Docket No. 244817, issued July 13, 2004) slip op p 8. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Again, as noted above, there is overwhelming evidence to convict the defendant on his charge of felony-murder. Out of ten total stab wounds, there are six as argued by the defendant to be superficial. Even if is six stab wounds were superficial, four were not superficial, which is enough to support that any error did not affect the outcome of the proceedings. On this record, we find that defendant has failed to affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *Pickens, supra* at 338. Nor has defendant either overcome the strong presumption that his trial counsel's assistance constituted sound trial strategy, or shown that there was a reasonable probability that, but for an error by his trial counsel, the result of the proceeding would have been different. *Toma, supra* at 302-303.

VII. SUFFICIENCY OF THE EVIDENCE

Defendant also argues that the evidence presented at trial was insufficient to find defendant guilty of felony murder. We disagree.

We review sufficiency of the evidence claims by considering the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999)*; People v DeKorte*, 233 Mich App 564, 567; 593 NW2d 203 (1999). This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); *Fletcher, supra* at 561. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Questions of credibility and intent should be left to the trier of fact to resolve. *People Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Intent may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *Carines, supra* at 757; *Fennell, supra* at 270. All conflicts in the evidence must be resolved in favor of the prosecution. *Fletcher, supra* at 562.

The elements of felony murder are provided in *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995) (overruled in part on other grounds *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001)), as follows:

> The elements of felony murder are: (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; MSA 28.548. *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993). [See also *Carines, supra* at 758-759.]

"The facts and circumstances of a killing may give rise to an inference of malice . . . A jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *Turner, supra* at 566, quoting *People v Flowers*, 191 Mich App 169, 176-179; 477 NW2d 473 (1991). "Malice is a permissible inference from the use of a deadly weapon." *Id*. at 567.

Defendant concedes in his brief on appeal that there was sufficient evidence to support the underlying felony of first-degree home invasion, and, presumably, that there was a killing. Defendant's argument is that there was insufficient evidence to show the requisite state of mind for felony murder, i.e., "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." *Id*. at 566. During trial, the prosecution presented the testimony of Dr. Chung, which revealed that Isbell died from ten stab wounds. Defendant acknowledged that he had a knife and stabbed Isbell during his testimony. Thus, the jury may have inferred malice because defendant used a deadly weapon and stabbed Isbell ten times. See *Carines, supra* at 759 ("Malice may also be inferred from the use of a deadly weapon."). Minimal circumstantial evidence is sufficient to support a finding that the defendant harbored the requisite intent. *Fennell, supra* at 270-271. The fact there was ten stab wounds also supports a finding of malice. See *Turner, supra* at 567. When viewed in a light most favorable to the prosecution, the evidence supports that defendant had the requisite intent, malice, to support a felony murder conviction.

Defendant's claim was that he acted in self-defense, and he testified to the jury, in this regard, that he was protecting himself from Isbell who he claims had hockey stick and a garden hoe.[6] This is a question of whether the jury believed defendant, which is a question of credibility that was properly resolved by the jury. See *Avant, supra* at 506. For the above reasons, the prosecution presented sufficient evidence, when viewed in a light most favorable to the prosecution, to support defendant's conviction for first-degree felony murder.

VIII. DOUBLE JEOPARDY

Defendant contends that his convictions and sentences for both first-degree felony murder and first-degree home invasion violated his constitutional protection against double jeopardy. The prosecution concedes and we agree. A double jeopardy claim presents a question of law, which is reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d

[6] We note that self-defense requires that defendant act, "upon a reasonable belief that he is in danger of death or serious bodily harm." *People v Shelton*, 64 Mich App 154, 156; 235 NW2d 93 (1975). Defendant never testified that he was in fear for his life.

528 (2001). Defendant was convicted of first-degree felony murder, MCL 750.316(1)(b) and the underlying felony of first-degree home invasion, MCL 750.110(a)(2). The trial court sentenced defendant for both convictions. A criminal defendant may not be twice placed in jeopardy for a single offense. US Const, Am V; Const 1963, art 1 § 15; *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). And, this protection against double jeopardy attaches to multiple punishments for the same offense. *People v Green*, 196 Mich App 593, 594-595; 493 NW2d 478 (1992). This Court has previously held that where a defendant was convicted for both felony murder and the underlying offense of breaking and entering, the "convictions of and sentences for both felony murder and the predicate offense violated [defendant's] right against double jeopardy…." *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998), and the conviction and sentence for the lower offense was vacated. *Id*. Therefore, we vacate defendant's first-degree home invasion conviction and sentence.

IX. FAILURE TO PRODUCE A WITNESS' CRIMINAL WARRANTS

Defendant's asserts that reversal is required because defendant was denied due process by the prosecution's failure to produce evidence of Shack's criminal warrants that were pending when she testified at trial. We disagree.

There was no objection made at trial, and defendant, in his supplemental brief, claims to have learned of Shack's two pending warrants only after sentencing. But in defendant's affidavit attached to his brief on appeal he acknowledges that he knew Shack "had been arrested" and as a result "had pending charges in the State of Michigan," six months prior to trial. Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). We will not allow defendant to harbor error as an "appellate parachute" by allowing him to assign error to a failure to produce information that defendant was aware of. *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002); see also *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Regardless, the prosecution's failure to provide defense counsel with information concerning witness Shack's pending warrants does not require reversal.

Due process requires disclosure of certain information possessed by the prosecution if that evidence might lead a jury to entertain a reasonable doubt about a defendant's guilt. *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1999) citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and *Giglio v US*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Lester, supra* at 281, quoting *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985). In *Lester, supra* at 281-282, this Court reiterated what a defendant must prove to establish that a prosecutor violated this rule:

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *United States v Meros*, 866 F2d

1304, 1308 (CA11, 1989), cert den 493 US 932; 110 S Ct 322, 107 L Ed 2d 312 (1989).

And, regarding impeachment evidence this Court in *Lester, supra* at 282-283, provided:

> The failure to disclose impeachment evidence does not require automatic reversal, even where, as in the present situation, the prosecution's case depends largely on the credibility of a particular witness. *Bagley*, 473 US at 676-677; *Giglio, supra* at 154. The court still must find the evidence material. *Id*.; *United States v Trujillo*, 136 F3d 1388, 1393 (CA 10, 1998), cert den ___ US ___; 119 S Ct 87; 142 L Ed 2d 69 (1998). Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley, supra* at 682; *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Bagley, supra*. Accordingly, undisclosed evidence will be deemed material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." [*Kyles v Whitley*, 514 US 419, 435; 115 S Ct 1555; 131 L Ed 2d 490 (1995).] In determining the materiality of undisclosed information, a reviewing court may consider any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. *Bagley, supra* at 683.
>
> In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case. In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. *United States v Payne*, 63 F3d 1200, 1210 (CA 2, 1995), cert den 516 US 1165; 116 S Ct 1056; 134 L Ed 2d 201 (1996).

Defendant contends that Shack had two outstanding warrants for her arrest at the time of trial, one for drugs (felony) and the other for larceny (misdemeanor), and that this information was not provided in the criminal history of Shack, which defendant was provided. The prosecution contends that this information was not in the LEIN possessed by the prosecution and was not discovered until after sentencing.

Defendant was not denied due process when the criminal report submitted by the prosecution did not include the pending charges against Shack. First, apparently, defendant did posse this information and could have obtained further information with reasonable diligence. Defendant's brief on appeal has an affidavit attached to it from defendant which reveals that defendant was aware six months prior to trial that Shack had been arrested and had pending charges. Thus, there is no *Brady* violation by the prosecution because defendant possessed the information. See *Lester, supra* at 281-282.

In addition, there is nothing on the record supporting that the prosecution "suppressed" the evidence from defendant. The prosecution in its brief on appeal contends that defendant was given the criminal history that was in the LEIN system. There is nothing to refute this. Our review is limited to the record, MCR 7.210 et seq.; see also *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), affirmed in part, reversed in part on other grounds 462 Mich 415 (2000), and nothing on the record supports that the prosecution failed to give defense counsel information it had. As such, defendant has not established that the prosecution possessed the information regarding Shack.

Lastly, defendant has made no showing that the pending charges would have been admissible for impeachment purposes. Apparently, the pending charges were for misdemeanor larceny and a felony drug charge. Shack had not, at the time of trial, been convicted on the charges contained in the pending warrants. Generally, a witness may not be impeached with prior arrests or charges that did not result in conviction. *People v Layher*, 464 Mich 756, 766; 631 NW2d 281 (2000); *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973). No showing has been made; nor can we ascertain how this evidence shows Shack's interest in the matter, her bias or prejudice, or her ulterior motive. *Layher*, *supra* at 767-768. And, even if these were convictions rather than charges; neither misdemeanor larceny or drug charges are would be admissible for impeachment under MRE 609. Misdemeanor larceny does not contain an element of dishonesty or false statement, MRE 609(a)(1), and cannot used as a theft, MRE 609(a)(2) because it is not punishable by imprisonment in excess of a year. *Parcha*, *supra* at 245. And, the drug charge alone does not meet the requirements to be used for impeachment under MRE 609. Further, defendant's trial counsel was aware of one prior conviction, according to an affidavit attached to defendant's supplemental brief on appeal, but did not impeach with it. Finally, Shack's testimony was corroborated by the testimony given by Krisel, and a new trial is generally not required where a witness' testimony is corroborated by another witness. *Lester*, *supra* at 283. As such, there is not a reasonable probability that the outcome would have been different. For the above reasons, no denial of due process exists requiring reversal.

X. PROSECUTORIAL MISCONDUCT

Generally, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but the trial court's factual findings are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Watson*, *supra* at 586. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Unpreserved prosecutorial misconduct issues are reviewed for plain error that affected defendant's substantial rights. *Carines*, *supra* at 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

A. Failure to Disclose Shack's Entire Criminal History

As discussed, hereinbefore, there is nothing on the record supporting that the prosecution intentionally failed to disclose any information regarding Shack's criminal history. Further, apparently, defendant was aware of Shack's pending criminal charges. For this reason and the reasons stated in Section IX, even if the prosecution improperly failed to disclose the information it did not result in a miscarriage of justice. See *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

B. Cross-Examination of Ernestine Craig

Defendant contends that prosecutorial misconduct occurred because the prosecution did not refresh Ernestine Craig during direct examination. Defendant did not object and, thus, the issue is not preserved and reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. This issue is without merit.

Defendant cites no authority to support his contentions that the prosecution must refresh a witness' recollection and we are unaware of any such authority. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, and he may not give an issue cursory treatment with little or no citation of supporting authority. *Watson, supra* at 572. By his failure to cite any relevant authority, defendant has abandoned this issue. *Id.* Furthermore, this issue is meritless because the information that defense counsel retrieved from the witness was through leading questions which the prosecution is not permitted to ask on direct examination. Lastly, the alleged failure did not affect the outcome of the trial because the jury heard the testimony on cross-examination. Thus, there is no plain error affecting defendant's substantial rights.

C. Prosecution's Closing and Rebuttal Arguments

Defendant next raises various issue regarding the prosecution's closing and rebuttal arguments. Defense counsel did not object to any of the challenged comments made by the prosecution during closing or rebuttal argument and, thus, our review is limited to plain error affecting defendant's substantial rights. See *Carines, supra* 763-764.

Defendant argues that the prosecution made improper arguments concerning the credibility of defendant and Shack when the prosecution commented that defendant had three convictions, was thief, and that the defense witnesses did not have "any trouble like that in the past." Defendant contends that the prosecution was knowingly using false evidence to obtain a conviction.

First, the prosecution never said that the witnesses had no prior convictions, just that their criminal history was not like defendant's criminal history. Second, the only conviction Shack had was the one that defense counsel was aware of according to his affidavit attached to defendant's supplemental brief on appeal. Third, even though there may be charges pending against a witness that is not the same as convictions, which is what defendant was impeached with. Lastly, the prosecution did not make any false statement, and it only commented based on the evidence that the prosecution witnesses were more credible than defendant. Reviewing the challenged statements in context, there was no false statement and no misconduct in the

statements because the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987); see also *Schutte, supra* at 722. Thus, the challenged comments made by the prosecution did not constitute plain error affecting defendant's substantial rights; even if error the comments cited by defendant were not outcome determinative.

In a standard 11 brief, defendant argues that the prosecutor denied him a fair trial by expressing a personal belief in his guilt and by expressing belief in the truth of the witnesses' versions. Defendant did not object to the prosecutor's remark at trial; therefore, absent plain error affecting his substantial rights, he is not entitled to relief. *Carines, supra* at 763-764. Defendant also contends that his trial counsel was ineffective in failing to object to the challenged comments. It is unclear exactly what comments of the prosecution defendant is challenging and, thus, to the extent defendant's argument is not clear, defendant has abandoned the issue. See *Watson, supra* at 587; *Jones (on Rehearing), supra* at 456-457. Nonetheless, a review of the transcript page cited in defendant's standard 11 brief reveals only proper credibility arguments from the evidence and, thus, no prosecutorial misconduct.

Although a prosecutor may not vouch for the credibility of a witness by implying that he has some special knowledge that the witness is testifying truthfully, *Bahoda, supra* at 276, a prosecutor may argue on the basis of evidence presented that a witness is credible. *Schutte, supra* at 722. The prosecution argued that an important aspect of the case is whether defendant was invited into the home or broke into the home, and that the witnesses' testimony and the surrounding circumstances support that defendant broke into the home uninvited. Viewing the challenged remarks in context, the prosecutor was not arguing that he had some special knowledge that the witnesses' testimony was truthful; rather, he was arguing that the evidence supported that the prosecutions witnesses' testimony was more credible than defendant's testimony.

In addition, the prosecutor did not state a personal belief in defendant's guilt. Viewing the prosecutor's argument in context, it was a proper argument on the evidence rather than an expression of a personal belief in defendant's guilt. See *People v Johnson*, 46 Mich App 212, 218; 207 NW2d 914 (1973). The prosecutor was merely expressing a belief that the evidence presented was sufficient to prove the matter at issue. The prosecutor's closing argument and rebuttal argument, read in context, was based on the evidence and was proper. *Schutte, supra; People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). And, any prejudicial effect of the remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). Thus, appellate review is precluded.

For the above reasons, no plain error occurred, *Carines, supra*, and defense counsel did not render ineffective assistance by failing to object to the remarks. *Carbin, supra*. "Trial counsel is not required to advocate a meritless position." *Snider, supra* at 425. Because defendant has not established that any of the prosecutor's comments during closing or rebuttal argument resulted in plain error, defendant cannot meet his burden of showing that "there is a reasonable probability that, but for counsel's error [if any], the result of the proceedings would have been different," thus, defendant's argument that he was not afforded effective assistance at trial fails. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

D. Cross-Examining Defendant With Regard to Prior Sentences

In defendant's standard 11 brief he contends that reversal is required because the prosecutor extensively cross-examined defendant concerning sentences resulting from prior convictions, then amplified the errors by emphasizing the testimony in closing arguments. Moreover, defendant argues that the cumulative effect of these prosecutorial violations denied defendant due process and the right to a fair trial resulting in a miscarriage of justice. And, defendant argues that his trial counsel was ineffective for failing to object to the cross-examination. We disagree as there is no error that requires reversal.

In order to preserve an issue of prosecutorial misconduct an objection must be made in a timely and specific manner. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Callon,* 256 Mich App 312, 329; 662 NW2d 501 (2003). This issue has not been properly preserved and will be reviewed for a plain error affecting defendant's substantial rights. *Carines, supra* at 763-764; *Rodriguez, supra* at 10.

The prosecution elicited testimony from defendant on the length and details of his prior sentences. Although, use of the length of defendant's sentences are not proper, *People v Rappuhn*, 390 Mich 266, 274-275; 212 NW2d 205 (1973), we find no error affecting defendant's substantial rights. Upon review of the questioning, we find that the improper questioning was not outcome determinative and it did not affect defendant's substantial rights. Defendant is not entitled to a new trial simply because the jury was informed of the prior sentences as a result of the admission of evidence to which he did not object.

We further find that that there is not a reasonable probability that, but for counsel's failure to object, the result of the proceedings would have been different. *Bell*, *supra*; *Carbin, supra* at 599-600; *Harmon, supra* at 531. Furthermore, it may have been trial strategy not to further emphasize the sentences, and defendant has not overcome the presumption that the challenged action is sound trial strategy. *Daniel, supra* at 58.

XI. CUMULATIVE ERROR

Finally, we find that there was no culmination of errors requiring reversal. We review this issue to determine if a combination of errors denied defendant a fair trial. *Knapp, supra* at 387. Because we conclude that defendant has failed to show any prejudicial or actionable error, defendant's argument concerning cumulative error is unavailing. See *Daoust, supra* at 16. We find that there was no error of consequence or significance, and the cumulative effect of the errors discussed, *supra*, was harmless.

Defendant's first-degree felony murder conviction and sentence are affirmed and defendant's first-degree home invasion conviction and sentence are vacated.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Henry William Saad