STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2014
v	No. 312007 Jackson Circuit Court
BARBARA JEAN MERCER, Defendant-Appellant.	LC No. 11-004979-FC

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right her jury-trial convictions of two counts of second-degree murder, MCL 750.317, tampering with evidence in a criminal case, MCL 750.483a, and third-degree arson, MCL 750.74. The jury acquitted defendant of conspiracy to commit first-degree murder, MCL 750.157a, and two counts of premeditated first-degree murder, MCL 750.316. The trial court sentenced defendant to two terms of life imprisonment for each of the second-degree murder convictions, 6 to 10 years' imprisonment for tampering with evidence, and 3 to 5 years' imprisonment for arson. For the reasons set forth in this opinion, we affirm.

A. FACTUAL BACKGROUND

On October 31, 2011, Matthew Rentfrow lived across the street from the Shaelee Waterfowl Refuge, a federal preserve in Jackson County. At about 9:00 p.m. that evening, Rentfrow heard a large "boom." Rentfrow looked out his front window and saw a vehicle in the parking lot of the refuge that was engulfed in flames. At the same time, Rentfrow witnessed the red taillights of another vehicle back up and exit the parking lot. Rentfrow called police.

Upon arrival at the refuge, police discovered the charred remains of Anthony "Ant" or "Vito" Hannah and Shemel "Drama" Thomas inside a blue Chevrolet Impala. Hannah and Thomas both had gunshot wounds to the head. Police were familiar with Hannah and Thomas. The two men were considered "mid-to-upper-level" drug dealers with a history of prior convictions. Specifically, at the time of his death, Hannah had crack cocaine at his residence with an estimated street value of anywhere from $25,000 to $100,000 depending on the denomination of sale.

At the time of the offense, defendant lived at a small house located at 3618 Page Avenue in Leoni Township with her boyfriend co-defendant Richard "Ricky" Janish. Defendant's young

son and Jessica Campbell, a friend, also lived at the house. Campbell moved in with defendant about six weeks before the murders and she lived in the enclosed front-porch that had been converted into a bedroom. Janish worked for a wrecker service and defendant and Campbell were unemployed and smoked crack cocaine together. During the week before the murders, the two women smoked crack every day. Defendant primarily purchased crack cocaine from Hannah. Defendant used cash assistance or exchanged sex or household items for the drug.

On Saturday October 29, 2011, Campbell talked with defendant about getting some crack to smoke. In the late evening, defendant called Thomas because she could not reach Hannah and she informed him that she wanted to purchase $150 worth of crack. Defendant told Thomas that she would give him a bag of DVD cases with money inside one of the cases. Defendant did not have $150 so she placed DVD cases into a bag without any money. Campbell then drove defendant to Thomas' house to purchase the drugs and she saw defendant hand the bag of DVDs to Thomas in exchange for the drugs.

As Campbell and defendant drove away, Thomas sent defendant a text message indicating that he was angry and was going to "shoot up the house" if defendant did not give him the $150. Defendant replied that, unbeknownst to her, her ex-boyfriend stole the money, that she had kids in the house and would not "pull that s---" and would have Thomas' money for him. Thomas replied, "dog just have my s---, real talk." The texts occurred between 12:00 and 1:00 a.m. on October 31, 2011.

After receiving the threatening text, Campbell and defendant returned home and smoked all of the crack cocaine. While smoking, defendant spoke with Janish about the text message using her speaker phone. According to Campbell, when Janish asked how they should handle the situation, defendant replied, "we should kill them, ha, ha, ha." Campbell testified that defendant and Janish discussed different ways of killing the drug dealers and burning the bodies with their car. Campbell testified that Janish seemed nervous about the threats, but defendant did not. Later, Campbell admitted that she testified at the preliminary exam that defendant was "terrorized." Campbell did not take defendant and Janish seriously. Defendant denied to police that she had the conversation with Janish, she said Campbell made statements about killing the victims. Janish denied that he planned the crimes with defendant and Campbell, but stated that defendant and Campbell discussed "doing it."

Several hours later on October 31, 2011, at about 9:00 a.m., Thomas sent another text message to defendant stating, "When are you going to have my Cash? I'm not going to do s---. I must have my money." Defendant replied that she would get back with Thomas.

Later that evening, Campbell went with defendant and Janish to take defendant's son trick-or-treating in Napoleon between 7 p.m. and 8 p.m. After trick-or-treating, defendant and Janish wanted to "talk to Drama" so they returned to the house while Campbell took defendant's son to another Halloween event near Napoleon. When Campbell was ready to return home, she made at least 20 attempts to call defendant and Janish, but no one answered the phone.

At approximately 8:37 p.m. that evening, Mark Bradley finished smoking $75 worth of crack cocaine and he called Hannah to purchase some more. Hannah answered the call, but did not converse with Bradley. Instead, Bradley heard Hannah say he "didn't want no part of it" or

that he "had nothing to do with it." Bradley then heard a loud noise akin to a window breaking and he heard Hannah drop his phone. Bradley did not hear anything else and his subsequent calls to Hannah went unanswered.

Evidence showed that defendant contacted Hannah at 8:34 p.m., three minutes before Bradley did, and the phone call lasted 66 seconds. Defendant also made two attempts to call Thomas between 8:20 and 8:35 p.m.

Having been unable to contact either defendant or Janish, Campbell got a ride to defendant's residence. Upon arrival, Campbell noticed that Janish was out back burning something in a burn barrel and inside the home was uncharacteristically clean and smelled of bleach. The rug that had been in Campbell's room was gone, all of her belongings were pushed to a corner, and the room smelled of bleach. Campbell asked defendant about the room, and defendant told her that Janish and Thomas were in a fight and Thomas' blood got on the rug so it needed to be burned. Campbell testified that Janish was pale and looked like he was going to be sick, but defendant was not upset. Eventually, Janish left to work second-shift at his job and defendant and Campbell smoked crack cocaine all night long. Defendant told Campbell that Thomas threw the crack onto the bed while he was fighting with Janish. While smoking, defendant became "paranoid," and called Janish who suggested that she go to a hotel. Defendant and Campbell then went to a Motel 6, signed in under Campbell's name, and paid for the room with a $100 bill. Janish left work earlier than normal that night after Phelps Towing sent him to the crime scene to tow the burned-out Impala.

On November 1, 2011, Campbell saw news on television about the murders. She asked defendant and Janish about the news but they denied any involvement. Campbell testified that it was at that point that she noticed several things about the house. Campbell noticed pillow cases missing from her room, red speckles on the pillows, gloves by the sofa, and a bullet hole in the ceiling. Campbell drove to her mom's home in Napoleon and called police.

Police interviewed Campbell and then searched defendant's residence. Police found a spent shotgun shell near the front porch. Inside Campbell's make-shift bedroom, police discovered "high-velocity" blood splatter on the plastic that was being used as insulation. There was blood splatter on the doorway, blood in the kitchen area, blood on trash cans, blood on the floor, and blood in a mop bucket of water and large pooling of blood on the mattress in the make-shift bedroom. At the north exit to the house, police found blood stains on the cement stairs, pooling of blood on the ground and "brain material" and skull fragments in the area. There were a lot of cleaning materials around the house.

Both defendant and Janish were brought in for interrogation and their police interviews were recorded on DVDs, played for the jury at trial, and transcribed into the lower court record. The following is a summary of the interviews that were admitted at trial:

Janish admitted to shooting both Hannah and Thomas, but he maintained that he initially only intended to "scare" the victims. Janish stated that defendant told him about the threatening text message. When he got home from work on Halloween morning, defendant and Campbell were "conspiring about doing it and doing it and doing it." Later that evening, after trick-or-treating, Janish stated that he and defendant returned to the house and argued. Janish stated that

defendant called Hannah because she wanted to "put an end to" using crack, but he later admitted that defendant made the call to get Hannah to come over to the house.

Ultimately Janish admitted that he walked outside with the gun immediately when the victims pulled into the driveway to "scare" the victims. He maintained that he did not know that the gun was loaded, but at another point during the interview, he agreed that he put a single round in the gun. Janish stated that Hannah was sitting in the passenger-side front seat when he approached with the shotgun. Janish recalled that Hannah stated, "I ain't got no problem with you;" Janish pointed the gun at Hannah and "clicked it" to "scare" Hannah and the gun went "boom."

After shooting Hannah, Janish went back inside the house through the back door and got another round off of the top of a speaker and reloaded the gun. Janish walked to the front of the house where Thomas and defendant were located. He explained that he saw Thomas try to "grab a hold of" defendant, and agreed with police that Thomas was trying to have sex with defendant. Janish stated that he told Thomas to "get off of her," then shot Thomas. Janish initially agreed with police and thought that defendant was wearing a negligee, but stated that he was not really sure and the last thing he recalled was defendant wearing jeans and a t-shirt. Janish denied that defendant invited the victims over to the house to repay them for the crack with sex.

Police questioned Janish about the planning stages of the crime as follows:

> *Q.* Obviously you guys talked about this the day before.
>
> *A.* (Undecipherable) - - *her and Jessie [Campbell] talked about it the day before*
>
> * * *
>
> *Q.* All right. Okay, they did?
>
> *A.* They did, yes.
>
> *Q.* How did it relate to you?
>
> *A.* They - - . . . when I come home Monday morning . . . they were going on and on and on and on about stop it or - - (undecipherable) - - and Jessie, she's like, whatever happens on Somerset stays in Somerset, and that was about it. Because they were conspiring about doing it and doing it and doing it, but that's how it got to me. . . .
>
> * * *
>
> *Q.* I guess what I need to know is, Barbie called them to come over there didn't they? You guys had this set up that you were going to - - take care of this thing - - ?
>
> *A.* (Undecipherable). She was - -

Q. She called them to come over there didn't she?

A. Yeah, she did. Yes she did.

* * *

Q. She knows what you were going to do with the gun, you were going to *go out and scare them*? She was fully aware of that?

A. Yeah, she was fully aware. [Emphasis added.]

After Janish shot and killed Thomas, he told defendant to go buy some gas. Janish agreed that there was a gas can ready in the car for defendant. He agreed with police that he knew ahead of time that he was "going out there to burn them . . . Get rid of the evidence." Janish dragged Thomas' body out the back door and put it in the back seat of the Impala. Janish drove the Impala to the waterfowl preserve with defendant following in her vehicle. At the preserve, Janish removed cash and cocaine from underneath the front seat, poured gasoline inside the vehicle, and then lit it on fire. Janish stated that defendant was "fully aware," that he planned to "scare" the victims with a gun. After confessing, Janish led police to the shotgun he discarded in a swampy field.

Police interviewed defendant twice. At first, defendant voluntarily appeared for a police interview. She gave incomplete answers to many of the questions. Defendant stated that Janish was upset about the text and said he would "take care of it." She explained that Janish planned to "scare" the victims. Defendant admitted that she called Hannah before the victims came to the house. Defendant also stated that she called Thomas and he said that he would meet her in a bit and she said ok. During this interview, defendant stated that Thomas showed up at her house, came in through the front door, pushed her, and tried to have sex with her before Janish shot him.

During the second interview, defendant stated that she called Janish on the night she got the threatening text message and told him about the text. Defendant stated that Janish told her that he would "take care of" the problem and said that "he'd do it so they wouldn't come back." Defendant stated that on the night of the murders, she and defendant returned home after trick-or-treating and discussed the threatening text message. According to defendant, Janish said "call them over here and I'll scare them a little bit and I'll take care of it." Defendant agreed and she called Hannah. Defendant acknowledged that she owed the victims money and that she did not have any cash to pay the victims when they appeared at her house that night. Once the victims arrived, defendant stated that she did not know what happened outside. Defendant stated that Thomas entered the home and was talking to her. Defendant explained that Janish came into the house and shot Thomas when Thomas was standing next to her. She stated as follows:

Q. So he had already pushed you down?

A. We - - he was standing here, here's the front door, and he was standing here . . . I had sat and I got up and we were talking back and forth and he said, just a second, I forgot something, and then he went to turn like this and then I - - like elbow. It's not aggressively pushing me but he pushed me down and then that's when Rick had come - - and he shot him.

* * *

Q. You got knocked down because of why?

A. I don't he didn't move or anything, he was just standing there for a second and then when he - - Ricky come around with the gun and he just kinda looked at him and then looked down at me and then went to turn and then---

Defendant later admitted that when Thomas said he "forgot something," she took it to mean that he "forgot a rubber or something."

Defendant and Janish were charged and tried together before the same jury. Defendant was charged as a principal and under an aiding-and-abetting theory. The court provided a self-defense instruction as to victim Hannah and instructed on the lesser-included offenses of second-degree murder and voluntary manslaughter as to both victims. Defendant was convicted and sentenced as set forth above and defendant appealed.[1]

B. *GINTHER* HEARING

Following her claim of appeal, we remanded this case to the trial court for a *Ginther*[2] hearing to address defendant's claims of ineffective assistance of counsel and retained jurisdiction. *People v Mercer*, unpublished order of the Court of Appeals, entered February 10, 2014 (Docket No. 312007). On remand, defendant argued that counsel was ineffective in the following respects: (1) failing to move to sever the trial and suppress Janish's confession, (2) failing to move to suppress defendant's confession, (3) informing the jury during opening statements that defendant's defense was duress when duress is not a defense to homicide, and (4) failing to join Janish's request for an instruction on defense of others.

Defendant and her trial counsel testified at the *Ginther* hearing. Defendant testified that police threatened her with the death penalty during the police interrogation. Defendant stated that trial counsel did not discuss with her the possibility of suppressing the statement she made to police, severing the trial, or attempting to suppress Janish's statement.

Trial counsel testified that he was aware that this case was potentially a candidate for separate juries, but ultimately he determined the best approach was to join the trials and use Janish's confession to defendant's benefit. Counsel explained that his theory of the case was to show that defendant wanted Janish to threaten and scare the victims. To achieve this, counsel explained that he planned to use Janish's statement in conjunction with defendant's statement to show that Janish shot the victims while defendant merely wanted to scare the victims. Counsel testified that both Janish and defendant's statements showed "what was going on," in regard to

---

[1] In addition to tampering and arson, the jury convicted Janish of second-degree murder for the death of Thomas and voluntary manslaughter for the death of Hannah.

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

drugs and threats from the victims. Counsel explained that the statements allowed him to "get in everything," without having to put defendant on the stand. He testified as follows:

> Well, here's . . . here's where we were, my client had made a statement that all in all wasn't a bad statement. Mr. Janish had made a statement where he took responsibility for having killed both of those young men and he exonerated my client and both [defendant] and Mr. Janish both helped establish what was going on in terms of the drugs being stolen, in terms of them being threatened and that they were reasonably afraid of these—of the victims.

Appellate counsel questioned trial counsel about defendant being charged under an aiding and abetting theory, "[s]o the fact that Mr. Janish was the actual shooter doesn't really exonerate Ms. Mercer, would it?" Trial counsel responded as follows:

> Well, exoneration is - - is a - - - is a job of the jury. I think the question really becomes whether or not by utilizing his statement was it helpful or detrimental to my client? And I think when you have a co-defendant who says, "I shot them, I killed them," not only that, but I can corroborate that the drugs were stolen, I can corroborate that threats were made to shoot our house up, I can corroborate that we were in reasonable fear of harm to ourselves and to [defendant's] small child. As a matter of trial strategy I thought that was - - that was the best way to proceed with [defendant.]
>
> * * *
>
> I weighed whether or not Mr. Janish's statement was helpful, and it was very helpful. You just don't get murder cases where you have somebody else saying I did it. He clearly said, I shot them. She did not shoot them, that we were afraid of them, that we did these things because these were drug dealers who were threatening to shoot our house up and it was a - - it was a viable fear. . . .
>
> * * *
>
> Otherwise, I just I had two guys shot in the head and set on fire for no reason.

Appellate counsel questioned trial counsel about a portion of Janish's confession wherein Janish stated that defendant and Campbell were "conspiring about doing it and doing it." Trial counsel explained that this was a limited remark "out of an hour and a half statement," and although the confession was not perfect, overall the statement was more helpful than harmful.

Counsel testified that he did not think there was a "*Miranda* issue" with respect to defendant's statement to police. In regard to the duress defense, counsel explained that he pursued duress for the conspiracy charge. Counsel testified that he discussed a defense of others instruction in chambers with the trial court and the prosecutor. Counsel explained that the court indicated that defendant was not in a position to assert a defense of others "when she was, in fact, the person whom was being defended against by Mr. Janish. . . ." Counsel testified that he discussed all aspects of the trial with defendant including Janish's confession.

The trial court denied defendant's motion for a new trial, finding that counsel employed an effective trial strategy given the facts and circumstances of the case. The court found that counsel made a tactical decision to admit both statements in an effort to present defendant's side of the story without defendant taking the witness stand. Given all of the physical evidence linking defendant to the crime, the court concluded that the strategy was reasonable. The court also found that counsel was not deficient with respect to the jury instructions. The court reasoned that defense of others did not apply and the reference to duress did not impact the jury verdict. The case returned to this Court following entry of the trial court's order.

C. ANALYSIS

I. DEFENSE OF OTHERS[3]

Defendant argues that the trial court denied her a fair trial and the right to present a defense when it denied the requested instruction on defense of others. Defendant argues that trial counsel was deficient in failing to join Janish's counsel in requesting the instruction.

Defendant was charged as a principal and as an aider-and-abettor. At the close of proofs outside the presence of the jury, the trial court discussed the jury instructions with both defense counsels and with the prosecutor. Counsel for defendant stated as follows:

> Your Honor, in as much as the self defense - - I don't believe that factually the self defense - - defenses 7.2 on to 7.20 apply to my client. I'll defer to Mr. Raduazo [counsel for Janish].

Counsel for Janish requested a self-defense instruction as to victim Hannah on grounds that Janish could have mistaken Hannah's cell phone for a weapon. The trial court agreed to provide the self-defense instruction for both defendants as to victim Hannah. With respect to a defense of others instruction, counsel for Janish indicated that he requested an instruction with regard to victim Thomas and that the instruction had been discussed in chambers. The trial court denied Janish's request for a defense of others instruction. The trial court then asked, "Is there anything else anybody wants to add before we conclude?" counsel for defendant stated, "I don't believe we had any other objections, your Honor." Counsel's affirmative approval of the instructions constitutes waiver. See e.g. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) ("When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver.") However, having reviewed the issue, we conclude that the trial court did not abuse its discretion in failing to provide a defense of others instruction.

We review de novo questions of law arising from the provision of jury instructions. *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013). "However, we review a trial court's determination whether a jury instruction is applicable to the facts of a case for an abuse

[3] We review the issues in the order they were presented in defendant's initial brief on appeal, while considering the arguments presented in defendant's brief after remand.

of discretion." *Id.* "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

Whether defendant was denied her right to the effective assistance of counsel involves a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's factual findings, if any, are reviewed for clear error while questions of constitutional law are reviewed de novo. *Id*.

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998).

The Self-Defense Act (SDA), MCL 780.971 *et seq*., "codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat." *Dupree*, 486 Mich at 708. The SDA requires "that a person have an honest and reasonable belief that there is a danger of death, great bodily harm, or a sexual assault in order to justify the use of deadly force." *Guajardo*, 300 Mich App at 35-36, citing MCL 780.972(1). "The reasonableness of a person's belief regarding the necessity of deadly force depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor." *Id*. at 42 (quotation omitted).

In this case, there was no evidence to support that Janish had a "reasonable and honest belief" that the use of deadly force against Thomas was necessary to prevent imminent death, great bodily harm, or sexual assault. Although Janish informed police that he instructed Thomas to "get off" defendant and to "leave her alone," there was no evidence that Janish had a reasonable belief that Thomas was sexually assaulting defendant or about to cause her harm. Thomas was not an intruder. Rather, defendant invited Thomas into the house. Evidence showed that defendant called and spoke with Hannah three minutes before Janish shot him. Janish and defendant admitted that defendant invited the victims to the house. Evidence supported the inference that Thomas arrived thinking that he was going to have sex with defendant in exchange for the crack cocaine.

Moreover, Thomas was not armed with a dangerous weapon and he did not physically assault defendant. Defendant testified that Thomas pushed her onto the bed in a non-aggressive manner. This evidence did not support that defendant was in imminent danger of death, great bodily harm, or sexual assault. Instead the evidence showed that Janish planned to shoot Thomas irrespective of what he was doing in the front bedroom with defendant. Janish admitted to police that he went outside with a shotgun immediately after the victims arrived. Janish shot and killed Hannah then walked back inside the house through the back door. Janish retrieved another shotgun shell from on top of a speaker, reloaded the shotgun, and walked to the front of the house where Thomas and defendant were located. Janish then immediately shot Thomas in the head. Furthermore, Janish admitted to police that he placed a gas can in the car beforehand

because he knew he was going to burn evidence later that night. This evidence showed that Janish acted according to a plan. He had his shotgun loaded and ready to shoot Thomas before he even saw what Thomas was doing. There was no evidence that Janish acted out of fear that defendant was in imminent danger.

Additionally, the threatening text message defendant received from the victims could not have justified the use of deadly force. Defendant received the text message hours before the shooting. At best the text message showed a potential threat of future harm and "threats of future harm do not constitute imminent danger." *Guajardo*, 300 Mich App at 42.

In sum, the trial court did not abuse its discretion in declining to provide the defense of others instruction and counsel did not act deficiently in failing to request the instruction. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (counsel is not ineffective for failing to advance a meritless position).

II. ADMISSION OF JANISH'S CONFESSION

Next, defendant argues that admission of Janish's confession denied her a fair trial in that it violated the hearsay rule, violated her Sixth Amendment right of confrontation, and that counsel was ineffective for failing to move for separate trials and for failing to object to admission of Janish's confession.

"The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60–61; 728 NW2d 902 (2006). However, "criminal defendants may knowingly and voluntarily waive the most fundamental protections afforded by the constitution." *People v Stevens*, 461 Mich 655, 664; 610 NW2d 881 (2000) (citations omitted).

Here, defendant, through counsel, waived her Sixth Amendment right of confrontation and waived any objection to a joint-trial. Counsel testified at the *Ginther* hearing that he was aware that this case was a potential candidate for separate juries. Counsel explained that he decided the best trial strategy was to admit Janish's confession into evidence to show that defendant did not kill the victims. Counsel explained that he discussed this strategy with defendant. In pursuing this trial strategy, counsel effectively waived defendant's right of confrontation, any objection defendant may have had under the hearsay rule, and any objection to a joint trial. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (defining "waiver" as "the intentional relinquishment or abandonment of a known right." (Quotation omitted)). We proceed by determining whether counsel was ineffective in pursuing this strategy.

To show that she was denied the effective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance "prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Deficient performance constitutes "representation [that] fell below an objective standard of reasonableness[.]" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463

Mich at 600. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

In this case, counsel made a strategic decision to use a joint-trial and Janish's confession to defendant's benefit. At the *Ginther* hearing, counsel articulated that he wanted to use both Janish and defendant's statements to show that defendant did not kill the victims. He explained that he needed the statements to introduce defendant's side of the story to the jury. There was substantial evidence linking defendant to the murders in this case and defense counsel could have reasonably concluded that Janish's confession was more helpful than harmful. Although Janish made damaging statements, including stating that defendant and Campbell discussed "doing it," at another point Janish stated that he only intended to scare the victims and agreed that defendant knew that he was going to use the gun to scare the victims. This aligned with defendant's theory of the case that she intended for Janish to scare the victims.

Moreover, trial counsel's use of Janish's confession at trial showed that he employed his strategy to the benefit of defendant. Counsel argued that defendant was scared of the victims and she and Janish plotted to scare the victims so they would leave her alone. Counsel used parts of Janish's confession to advance this theory. Counsel argued that both Janish and defendant maintained to police that they intended to scare the victims. He reminded the jurors that Janish stated that defendant was aware that he intended to scare the victims, but did not state that defendant knew he planned to shoot the victims. Further, Janish's confession aligned with counsel's argument that defendant was surprised that Janish shot the victims. Counsel noted that both defendant and Janish told police that she "freaked out" after the shooting and defendant stated that she repeatedly asked Janish what he had done. This bolstered counsel's theory that defendant believed Janish was simply going to scare the victims. Counsel's strategy resulted in defendant being acquitted of first-degree murder and conspiracy to commit first-degree murder. Given that counsel did not have many options and considering the overwhelming evidence linking defendant to the murders, counsel made a reasonable strategic decision to use Janish's confession to defendant's benefit and his performance did not fall below an objective standard of reasonableness. *Toma*, 463 Mich at 302.

Additionally, even if we were to conclude that counsel was deficient in introducing Janish's confession, defendant cannot show that but for Janish's confession, the result of the proceedings would have been different.

While Janish's confession contained certain prejudicial aspects, even absent Janish's confession, there was substantial evidence of defendant's guilt. There was evidence that defendant had motive to commit the crimes in that she owed the victims $150 for drugs and she could not pay the debt. See *Unger*, 278 Mich App at 223 ("evidence of motive in a prosecution for murder is always relevant"). Evidence showed that defendant helped plan the murders. Campbell testified that on the morning of the murders, defendant and Janish discussed killing the victims and burning them inside their vehicle and defendant told police that Janish was going to make the victims "go away so they wouldn't come back."

Evidence showed that defendant made arrangements so that she and Janish could commit the murders. Specifically, after trick-or-treating, defendant left her child with Campbell so that

she and Janish would be alone at the house when the victims arrived. Cell phone records and defendant's own admission showed that she contacted the victims immediately before they were killed. In particular, defendant tried to call Thomas and spoke with Hannah less than two minutes before Bradley presumably heard the gunshot that killed Hannah. Defendant admitted to police that she called the victims over to the house per Janish's instructions so that Janish could "take care of it" and "scare them." Defendant did this even, according to her own admission, after Janish told her that he would "take care of them" so they would not come back.

Further, defendant admitted to police that she was wearing a negligee when Thomas arrived. She was in the process of taking her pants off and she stated that she thought that Thomas said he forgot a condom immediately before he was shot. This evidence supported that defendant was either having sex or in the process of having sex with Thomas when he was shot. A rational juror could have concluded that Thomas arrived at the house thinking that he was going to have sex with defendant in exchange for the drugs that she took from him. The same evidence, in addition to the phone calls that defendant made to the victims minutes before their deaths and the fact that defendant had motive to commit the crimes showed that defendant arranged to have the victims come to the house so that Janish could shoot them.

Defendant also made efforts to cover up the crimes. Defendant confessed to police that she put gas in a gas can and followed Janish to the parking lot where he burned the victims in their vehicle. Campbell testified that the house smelled of bleach and was cleaned up when she arrived home on the night of the murders and police found a large quantity of cleaning supplies in the home and blood on numerous items in the house. See *id*. at 226 (attempts to conceal involvement in a crime by destroying evidence is relevant to show consciousness of guilt).

Moreover, the prejudicial effect of Janish's statement was lessened because, in some aspects, it helped defendant's case. Janish took responsibility for shooting the victims. Janish stated that defendant did not invite the victims over to have sex with them. He stated that defendant was fully aware that he planned to "scare" the victims with a gun, but he did not specifically state that defendant was aware he was going to kill the victims.

In addition, Janish gave reasons why he shot the victims that could have tended to disprove the prosecution's theory that he and defendant conspired to kill the victims. In particular, Janish stated that he told Hannah to get off his property and approached Hannah to scare him with a gun. Janish stated that when he went inside he told Thomas to get off defendant and then shot him and at one point he stated that Thomas was trying to have sex with defendant. These aspects of the confession supported that Janish acted on a spur-of-the moment and they may have played a part in the jury acquitting defendant of the conspiracy to commit murder and premeditated murder charges.

In sum, absent Janish's confession, there was substantial other evidence of defendant's guilt, aspects of the confession helped defendant's case, and counsel used parts of the confession to defendant's advantage. Therefore, defendant has failed to show that, but for counsel's decision to admit Janish's confession, there is a reasonable probability that the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

III. VOLUNTARINESS OF DEFENDANT'S CONFESSION

Defendant argues that the statements she made to police were involuntary because police threatened her with federal prosecution and the death penalty if she did not give them a statement. Defendant also argues that trial counsel's failure to object to admission of the statement amounted to ineffective assistance of counsel.

Defendant failed to preserve her voluntariness argument for review because she did not move in the trial court to suppress her statements to the police. *People v Howard*, 226 Mich App 528, 537; 575 NW2d 16 (1997). We review unpreserved constitutional issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Whether defendant was denied her right to the effective assistance of counsel involves a mixed question of fact and constitutional law. *LeBlanc*, 465 Mich at 579. A trial court's factual findings, if any, are reviewed for clear error while questions of constitutional law are reviewed de novo. *Id*.

Defendant voluntarily appeared for her initial interview with police, but she appears to have been taken into police custody at or near the end of that interview. However, the analysis is the same because a noncustodial interrogation may, in some circumstances, give rise to an involuntary statement. *Beckwith v United States*, 425 US 341, 347–348; 96 S Ct 1612; 48 L Ed 2d 1 (1976). Whether a statement is voluntary "is determined by examining the totality of the circumstances surrounding the interrogation." *People v Gipson*, 287 Mich App 261, 265; 787 NW2d 126 (2010). In determining whether a statement was voluntary, a court should consider the following non-exclusive factors:

> [1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

No single factor is determinative and the inquiry turns on the totality of the circumstances. *Id*.

In this case, defendant voluntarily appeared for her initial interview with police. Police informed her that she was free to leave. When defendant was evasive in responding to several questions, one of the detectives stated:

> Here's where I'm at, okay? I've got the FBI breathing down my neck that they want to take over this case. You don't want that, okay?
>
> * * *
>
> Well, here's the whole thing. FBI gets a hold of this case, it possibly brings along with it the death penalty. You don't want that either. Okay? You need to tell us

> what happened so at least we can get them out of this, so we can keep it, you know, here in Jackson.

Thereafter, as discussed above, defendant made some incriminating statements, but she did not admit to killing the victims or to asking Janish to kill the victims. Instead, defendant maintained that her intent was for Janish to scare the victims. Defendant cannot show that police reference to the death penalty amounted to undue coercion. As the Sixth Circuit Court of Appeals has explained, "police can inform a suspect about the potential legal consequences of his crime . . . or even promise that, by cooperating, a suspect can avoid the death penalty . . . without engaging in behavior that is so inherently coercive as to render a suspect's subsequent confession involuntary." *McKinney v Ludwick*, 649 F 3d 484, 491-492 (CA 6, 2011).

Furthermore, the totality of the circumstances shows that defendant's statements were voluntarily made. Defendant voluntarily appeared for the first interview and police informed her that she was free to leave. Defendant was 21 years old and had a 10th-grade education. She had some prior experience with the justice system as she had a juvenile record of four prior misdemeanors and she previously was arrested for failure to pay child support. Defendant was advised of her rights shortly after she voluntarily appeared for the first interview and defendant waived those rights. When police commenced their second interview with defendant—sometime later that day—police re-advised defendant of her rights and defendant again agreed to speak with police. Defendant's interrogation was not lengthy and it appears to have been completed in the course of a couple hours. Defendant was not physically restrained. She did not indicate that she was under the influence of drugs or alcohol. She did not indicate that she was sleep-deprived or lacked nourishment and police offered her water. Defendant did not ask to use a restroom. Police did not physically harm defendant or threaten her with physical harm. Police made arrangements for defendant's son and they agreed to call the person of defendant's choice to take care of her son.

In short, the totality of the circumstances supports that defendant's statements were freely and voluntarily made and the trial court did not err in admitting the statements at trial. *Cipriano*, 431 Mich at 334. For the same reason, defense counsel was not ineffective for failing to object to admission of the statements. See *Ericksen*, 288 Mich App at 201 (counsel is not ineffective for failing to raise a futile objection).

IV. DURESS DEFENSE

Defendant next argues that she was denied her right to a properly instructed jury when the trial court provided a preliminary instruction on duress, which was later withdrawn. Defendant also argues that counsel was ineffective for referencing a duress defense during his opening statements.

This Court reviews de novo questions of law arising from the provision of jury instructions. *Guajardo*, 300 Mich App at 34. "The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *Dupree*, 486 Mich at 702. Whether defendant was denied her right to the effective assistance of counsel involves a mixed question of fact and constitutional law. *LeBlanc*, 465 Mich at 579. A trial court's factual

findings, if any, are reviewed for clear error while questions of constitutional law are reviewed de novo. *Id*. at 599-600.

During voir dire, counsel for defendant informed the prospective jurors that he anticipated a duress defense. The trial court instructed the jury on duress during preliminary instructions. Defense counsel then mentioned duress during his opening statement, arguing "the prosecutor has to prove beyond a reasonable doubt that there was no duress." During rebuttal, the prosecutor informed the jury that duress was not a defense. The trial court provided its final jury instructions wherein the court stated that the duress instruction "was inapplicable in the context of this case. You are not to consider duress in your deliberations in any form."

In this case, with respect to the court's initial instruction on duress, defendant waived any objection to the instruction when her counsel requested the instruction. See *Carter*, 462 Mich at 215. Moreover, defendant cannot show that, but for the references to the duress instruction, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

In this case, even absent the duress instruction, counsel employed a viable defense strategy when he advanced the theory that defendant was not guilty of murder or conspiracy beyond a reasonable doubt. In his opening statement, counsel argued that the victims posed a threat and claimed that defendant planned to scare the victims. He argued that defendant did not hold the gun or pull the trigger and was surprised when Janish killed the victims. During closing argument, counsel repeated the theme, claiming that the victims were dangerous drug dealers who posed a real threat. Counsel argued that defendant was guilty of "conspiring to scare" the victims. Counsel argued that defendant was surprised when Janish killed the victims as evidenced by both defendants' statements to police that she "freaked out" after the shootings. Counsel reminded the jury that, despite the interrogations, defendant did not wavier on her insistence that she only intended to scare the victims and that Janish said the same thing. Counsel also noted that defendant did not even realize there was a dead man outside and he argued that it was reasonable for Janish to think that Hannah's cell phone was a weapon.

Considering that duress was only briefly mentioned at the start of the trial, and considering that counsel advanced an alternate theory during trial, we conclude that defendant has failed to show that, but for the duress instruction, the result of the proceeding would have been different. *Id*.

V. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor committed misconduct that denied her a fair trial when the prosecutor "misstated the law" during closing argument.

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *Dobek*, 274 Mich App at 63. "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id*. at 64. This Court will not find error requiring reversal "where a curative instruction could have alleviated any prejudicial effect" of the statements. *Unger*, 278 Mich App at 235 (quotation omitted). "Curative instructions are sufficient to cure the prejudicial effect of

most inappropriate prosecutorial statements . . . and jurors are presumed to follow their instructions." *Id.*

During rebuttal argument, the prosecutor stated as follows:

> [Y]ou've all heard about hearsay . . . [T]here's a number of exceptions to the hearsay rule. [The exceptions are] based on the concept that if a defendant says something that hurts him it's inherently believable and therefore it's admissible . . . If they say something that favors them it's inherently unbelievable and it's . . . barred by hearsay.

Defense counsel objected, and the trial court instructed the jury that "[t]he hearsay rule is an extremely complicated rule of many parts." The prosecutor continued, arguing that defendant's theory that she intended to scare the victims was "inherently unbelievable." The prosecutor argued that both Janish and defendant admitted to the contents of the phone call to Hannah, therefore it was "inherently believable" because it could be used against defendant.

The prosecutor acted inappropriately when he argued that admissions of a party opponent were "inherently believable." There is nothing in MRE 801(d)(2), (admission of a party opponent), that states that admissions are inherently believable and the prosecutor should not have attempted to explain to a lay jury the academic reasoning underlying the evidentiary rule. Nevertheless, the statement did not deny defendant a fair trial. The prosecutor's statements were isolated and the crux of the statements concerned the credibility of defendant and Janish's assertions that they intended to scare the victims. See *People v Buckley*, 424 Mich 1, 14-15; 378 NW2d 432 (1985) (a prosecutor may comment on a defendant's credibility).

Furthermore, the trial court provided sufficient instructions in this case. *Unger*, 278 Mich App at 235. Specifically, the court instructed the jury that the hearsay rule was "extremely complicated" with "many parts," that the statements and arguments of the lawyers were not evidence that the jury was to determine what each piece of evidence means, that the jury was the only judge of the facts, and that the jury was to give defendants' statements "whatever weight you think the statements deserve." The trial court properly instructed the jury that it was the trier of fact and that the prosecutor's statement was not evidence and jurors are presumed to follow their instructions. *Id*. Defendant was not denied a fair trial.

VI. SENTENCING

Finally, defendant argues that the trial court's life sentences for second-degree murder were disproportionate to the crime and amounted to cruel and unusual punishment.

This issue is unpreserved because defendant did not raise it during sentencing. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). We review unpreserved challenges to the proportionality of a sentence for plain error. *Id*. Similarly, unpreserved Eighth Amendment issues are reviewed for plain error. *Carines*, 460 Mich at 763-764.

Defendant's recommended minimum sentencing range under the guidelines was 225 months to 375 months or life imprisonment. See MCL 777.61 (Sentencing Grid for Class M2

with a PRV Level C and an OV Level III is 225 months to 375 months or life). The trial court sentenced defendant to two life sentences. The court stated:

> I'm considering punishment, rehabilitation, deterrence and the protection of society. Ms. Mercer, even though you didn't pull the trigger here your actions in this particular matter make you just as guilty, if not more guilty.
>
> Even though you didn't pull the trigger you set everything up. You're the drug addict in this matter that caused all these problems. As a result of this . . . their families will never see them again . . . The impacts you had on their lives, your family's lives . . . all over $150 worth of drugs.
>
> * * *
>
> [] [Y]ou could have resolved this instead of setting a trap, creating a situation where you brought them over and basically had Mr. Janish shoot them.

"A sentence is invalid when it is based on improper assumptions of guilt." *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007). However, in fashioning a sentence within limits fixed by law, "[a] trial court may consider facts concerning uncharged offenses . . . and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence." *Id.*

In this case, the trial court did not sentence defendant based on improper assumptions of guilt. Rather, the court considered information that defendant had an opportunity to challenge at trial that was substantiated by a preponderance of the evidence. Specifically, the court focused on the fact that defendant was found guilty of murdering two individuals and the devastating impact of her crimes. The court did not indicate that defendant was guilty of first-degree murder and instead it considered that defendant called the victims over to her house where they were shot. This fact was supported by evidence introduced at trial. Specifically, defendant admitted to police that she called the victims to her home and other evidence showed that defendant's telephone connected with one of the victims' cellular telephone minutes before he was shot. The court did not err in considering that evidence. *Id.*

Defendant separately argues that her sentence was disproportionate and amounted to cruel and unusual punishment in violation of the state and federal constitution.

"Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, this limitation on review is not applicable to claims of constitutional error." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). "However, a sentence within the guidelines range is presumptively proportionate . . . and a sentence that is proportionate is not cruel or unusual punishment." *Id.* (citations omitted). To overcome the presumption of proportionality, "a defendant must present unusual circumstances that would render the . . . sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Here, defendant's sentence fell within the guidelines and she cannot overcome the presumption that the sentence was proportionate. *Id.* Defendant does not present any unusual

circumstances to show that her sentence was disproportionate. Defendant argues that her young age, lack of a criminal record, and her family circumstances render her sentence disproportionate. However, these factors were considered in scoring the offense and prior record variables under the sentencing guidelines. They do not constitute unusual circumstance that render defendant's sentence disproportionate. Here, defendant was 21-years-old when she committed the crimes. Despite her family circumstances, the jury found that defendant murdered two individuals and her life sentence was authorized by law and fell within the recommended sentencing range. She has failed to overcome the presumption that her sentence was proportionate. *Powell*, 278 Mich App at 323. Resentencing is not warranted.

Affirmed.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher