STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2014
v	No. 316549 Wayne Circuit Court
EBONI NIKESHA PERRY, Defendant-Appellant.	LC No. 12-008723-FH

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction of false pretenses involving a value of $20,000 or more, MCL 750.218(5)(a). She was sentenced to five years' probation, three months of which she was to serve in the Wayne County Jail. We affirm.

This case arises from defendant's acquisition of a Federal Housing Administration (FHA) mortgage loan in the amount of $163,156 in 2010. The loan was used to purchase a home at 831 Martin Street, in Atlanta, Georgia (the Martin Street home). The prosecution asserted that defendant acquired the loan through false pretenses.

I. FACTS

At trial, the prosecution presented evidence of events that occurred on July 30, 2010, when defendant allegedly deposited and then immediately withdrew $10,000 in cash from a savings account[1] at Best Bank in Highland Park. Defendant worked at Best Bank as an assistant manager. Defendant told the personal banker that processed her deposit, April Dillapree, that she was trying to buy a home and needed to show there was a certain amount of money in her account.[2] Three minutes after the deposit, defendant withdrew the money to return it to the person that lent it to her. Charles Rupert, a security officer for the bank who investigated the

[1] Defendant was a signatory on the account, but the primary owner of the account was her minor daughter.

[2] Defendant, as a bank employee, was not allowed to process her own transaction.

transaction, reviewed surveillance videos from July 30, 2010. He saw two men in defendant's office give defendant money. Defendant told Rupert that one of the men was her brother, and that he lent her the money. Defendant deposited the money, then went back to the office and returned the money to the man. Defendant told Rupert the purpose of the deposit was to show that she had money to put a deposit on a home. Rupert further testified that in 2010 and 2011,[3] defendant had $10 or less in the account. Valerie Thomas, a personal banker at Best Bank, testified that she signed a verification of deposit form, dated November 15, 2010, for defendant. The document verified that defendant had more than $10,000 in her savings account on August 8, 2010. Thomas never checked to see if the money was in defendant's account; defendant was Thomas's boss, so Thomas signed the document because defendant told her to sign the document. Defendant left the bank in April 2011 and moved to Georgia.

The prosecution also produced testimony regarding defendant's housing loan application and the loan application process generally. Defendant's home loan was funded through American Financial Resources (AFS), and the application was finalized on December 30, 2010. The application included the verification of deposit signed by Thomas, dated November 15, 2010. The loan application also included verification of employment for defendant from a company called Croswell and Associates and a payroll verification statement for Croswell and Associates dated November 12, 2010. The representative from AFS stated that a title company generally represented AFS at mortgage closings. A representative from the closing company stated that, generally, the closing company sends the loan documents to a notary or an attorney, depending on the state. Lisa Abramowicz, a notary, testified that she met with defendant on December 30, 2010, and witnessed defendant sign the final mortgage application. After the loan was finalized, two mortgage payments were made on defendant's loan.

Defendant testified at trial. She testified that a close friend named Dorian Hill lived in Georgia. She refers to Hill as a brother. After defendant's father passed away, she spoke to Hill about moving to Georgia, and then contacted a real estate agent in Georgia. She applied for a mortgage in May 2010. She claimed that on July 30, 2010, she deposited the money at her real estate agent's direction "to show the amount that [Hill] would give her as a gift." Defendant asked Thomas to sign the verification of deposit on July 30, 2010. Defendant met with Abramowicz on December 30, 2010, but did not know she was closing on a loan or purchasing a home. She believed she was signing the documents for underwriting that her real estate agent needed. She did not read the documents before she signed them. Defendant also denied signing many of the loan application documents that bore her signature. She testified that some of the signatures looked like hers, but that she did not sign the documents. Defendant moved to Georgia in April 2011, but never resided in the Martin Street home, never received keys for the home, and never made any payments toward the mortgage.

During opening statements at trial, defendant's attorney stated that codefendant Hill had pled guilty to false pretenses. The trial court then decided to instruct the jury on an aiding and

[3] Specifically, in September 2010, the balance of the account was $2, in December 2010, the balance was $10.03, and on June 25, 2011, the balance was $1.03.

abetting theory, and informed the jury that Hill pleaded guilty to false pretenses. After the trial, defendant was convicted of false pretences. Defendant filed a motion for a new trial, which was denied. Defendant now appeals.

II. PROSECUTORIAL MISCONDUCT

First, defendant asserts that the prosecutor's misconduct denied her a fair trial. We disagree.

"In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defense counsel did not object below to the issues he raises on appeal. Therefore, this issue is unpreserved.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Meissner*, 294 Mich App 438, 455; 812 NW2d 37 (2011). In addition, reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627 (2010).

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Claims of prosecutorial misconduct are reviewed case by case, "and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64. "[P]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53 (2010). They have discretion over "how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *Meissner*, 294 Mich App at 456. "In addition, jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

First, defendant has not shown plain error resulting from the prosecutor's elicitation of testimony from defendant that Valerie Thomas and Lisa Abramowicz lied during their testimony. "It is not proper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact." *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001) (citations and quotation marks omitted). However, "[i]t is not improper for the prosecutor to attempt to ascertain which facts are in dispute." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

During cross-examination of defendant, the prosecutor showed defendant the loan application with defendant's signature on the last page and defendant denied signing the document. Because Abramowicz, a notary, had testified that defendant signed the application in her presence, the prosecutor asked defendant if Abramowicz was lying, and defendant said she

was. Defendant also denied that Abramowicz (1) told her they were meeting on December 30, 2010 to sign documents for a mortgage closing and (2) explained some of the closing documents to her. Because this testimony directly contradicted Abramowicz's testimony, the prosecutor asked defendant if Abramowicz's testimony was untrue, and defendant answered affirmatively. With respect to Thomas, who worked with defendant at the bank, defendant denied that she told Thomas to sign the verification of deposit after defendant made the cash deposit. Because defendant's testimony conflicted with Thomas's testimony, the prosecutor asked if Thomas was lying, and defendant said she was.

While a prosecutor is permitted to ascertain facts that are in dispute, the prosecutor's questioning of defendant regarding whether the witnesses were *lying* was improper. The questions required defendant to comment on the credibility of a witness, and were not merely used to determine which facts were in dispute. However, despite the fact that the questions were improper, we do not find that the questions affected defendant's substantial rights. *Gibbs*, 299 Mich App at 482; *Meissner*, 294 Mich App at 455. There is no indication that defendant's answers affected the outcome of the proceeding. In addition, reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Bennett*, 290 Mich App at 476. In this case, the court instructed the jurors that judging witness credibility was their responsibility alone. "Jurors are presumed to follow their instructions." *Mesik*, 285 Mich App at 542.

Second, the prosecutor did not commit misconduct by asking defendant about whether she read the documents before she signed them. Defendant asserts that these questions, and the prosecution's argument that defendant was "responsible," confused the jury and blurred the lines between defendant's legal responsibility and defendant's criminal responsibility. We disagree. The questions asked by the prosecution were an attempt to clarify defendant's testimony regarding the documents that she allegedly signed. Even assuming these questions confused the jury, the jury was clearly instructed on the elements of false pretenses. See *Bennett*, 290 Mich App at 476. The court's instructions made clear that defendant's failure to read the documents did not amount to false pretenses, and "[j]urors are presumed to follow their instructions." See *Mesik*, 285 Mich App at 542.

Finally, defendant has not shown error affecting her substantial rights arising from the prosecutor's comment that the defense was "smoke and mirrors." It is improper for a prosecutor to suggest that defense counsel is intentionally misleading the jury. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). However, the prosecutor's argument must be viewed in light of defense counsel's argument. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). "An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id.* at 593.

In this case, the prosecutor's comments were made during rebuttal, in response to defense counsel's closing argument. During his closing, defense counsel's primary argument was that defendant was conned by people she trusted, in particular Hill and her real estate agent. Defense counsel supported his argument by pointing out evidentiary issues with the mortgage documents that showed unusual circumstances surrounding the mortgage application, and emphasizing that defendant did not benefit from the transaction. The prosecutor responded by arguing that defense counsel's argument was not reasonable. Specifically, the prosecutor argued:

> Ladies and gentlemen, do not get sidetracked or confused by the smoke and mirrors, which is what the defense is in this case, smoke and mirrors, to try to sidetrack you from what's really going on here.

The prosecutor's comment was not improper because it was in response to defense counsel's argument. See *id*. at 592-593. The prosecutor asserted that defense counsel was raising irrelevant issues and narrowed the issue down for the jury to the $10,000 deposit that defendant made on July 30, 2010. The prosecutor argued that defendant made the deposit to create the illusion that she had more money than she actually did and later lied about having that money in her account when she did not. Moreover, this Court has previously rejected a similar claim that the phrase "smoke and mirrors" constituted misconduct. *People v Rodriguez*, 251 Mich App 10, 40; 650 NW2d 96 (2002). In addition, the trial court instructed the jury that the attorney's statements and arguments are not evidence. The court also instructed the jurors, "You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." Reversal is not required, especially given the court's instructions and defendant's failure to object. See *Gibbs*, 299 Mich App at 482; *Bennett*, 290 Mich App at 476.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant claims that she was denied the effective assistance of counsel. We disagree.

Defendant moved for a new trial on this ground after she was convicted and sentenced. The trial court held a brief evidentiary hearing during which trial counsel testified, and then denied defendant's motion. "Generally, whether a defendant had the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (internal quotation marks and citation omitted). We review findings of fact for clear error and questions of law de novo. *Id*.

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207.

Defense counsel was not ineffective for failing to object to the prosecutor's questions to defendant. As discussed above, the questions relating to defendant reading the documents before she signed were not improper. Trial counsel is not ineffective for failing to make a futile objection or advocate a meritless position. *People v Crews*, 299 Mich App 381, 401; 829 NW2d 898 (2013); *People v Payne*, 285 Mich App 181, 191; 774 NW2d 714 (2009). In regard to the prosecutor's questions that Abramowicz and Thomas were lying, defendant was not prejudiced by defense counsel's failure to object because there was no evidence that defendant's answers

affected the outcome of the proceeding and the court instructed the jurors that judging witness credibility was their responsibility. *Nix*, 301 Mich App at 207.

Defense counsel was also not ineffective for telling the jury during his opening statement that defendant's codefendant, Hill, pleaded guilty to false pretenses, or a related offense. Defense counsel testified at the evidentiary hearing that he revealed this information to support his theory at trial – that defendant was an innocent party who was conned by Hill. By suggesting that Hill admitted to the crime, defense counsel supported his argument that Hill was a con man whom defendant mistakenly trusted. It is presumed that trial counsel used effective trial strategy, and a defendant has a heavy burden to overcome this presumption. *Payne*, 285 Mich App at 190. This Court "will not substitute [its own] judgment for that of counsel on matters of trial strategy," nor will it "use the benefit of hindsight when assessing counsel's competence." *Id*.

Even if defense counsel's performance was deficient, defendant has not shown that this performance caused her prejudice. In fact, defendant provides no support for her contention that "a reasonable probability existed that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). An appellant also "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Payne*, 285 Mich App at 195.

Even overlooking defendant's failure to support this claim, there is not a reasonable probability that the outcome of the trial would have been different absent defense counsel's alleged errors. Any errors caused by the prosecutor's statements were cured by the court's instructions to the jury. The jury was instructed that the attorneys' statements and arguments are not evidence. The jury was also told that judging witness credibility was their responsibility alone. Finally, the jurors were instructed on the elements of false pretenses. "Jurors are presumed to follow their instructions." *Mesik*, 285 Mich App at 542. Furthermore, as discussed below in Section VII, there was ample evidence from which the jury could conclude that defendant made a false representation with the intent to deceive, and someone relied on that representation to his or her detriment. See MCL 750.218; *People v Webbs*, 263 Mich App 531, 532 n 1; 689 NW2d 163 (2004).

IV. JUDICIAL BIAS

Defendant also argues that the trial court's bias denied her a fair trial. We disagree.

Because defendant did not raise any claim of judicial bias in the trial court, this issue is unpreserved. See *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). This Court reviews unpreserved constitutional errors for plain error affecting substantial rights. *Id.*

A defendant has the right to a fair and impartial trial under both the United States and Michigan Constitutions. See US Const, Am VI; Const 1963, art 1, § 20. This right is violated when the trial court's conduct "pierces the veil of judicial impartiality." *People v Conley*, 270 Mich App 301, 307-308; 715 NW2d 377 (2006). Although "a trial judge has wide discretion and power in matters of trial conduct," a trial court pierces the veil of judicial impartiality when its

conduct or comments are "of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Jackson*, 292 Mich App at 598 (citations and quotation marks omitted).

"A defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality." *Id*. (citation and quotation marks omitted). A judge's opinions or judicial rulings are not valid grounds for alleging bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Id.*, quoting *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999) (quotation marks omitted). In addition, "[c]omments that are critical of or hostile to counsel and the parties are generally not sufficient to pierce the veil of impartiality." *Jackson*, 292 Mich App at 598.

Defendant points to many examples of purported judicial bias, none of which are meritorious. The instances of alleged bias asserted by defendant do not reflect a deep-seated favoritism or antagonism, nor do they demonstrate that the trial court's conduct was "of such a nature as to unduly influence the jury." See *id.* First, defendant discusses the trial court's comments during his cross-examination of Joseph Burns, the representative from AFS. The court (1) told the jury "[d]on't fall asleep"; (2) asked defense counsel several times if he had more questions to ask; and (3) responded to defense counsel's affirmative answer by saying "I'd appreciate your expediting them," and "Let's move on a little faster." From the transcript alone, it is difficult to discern the context of these comments. It does appear from the time stamps in the transcript that there was a long pause during which no questions were asked before the trial court said "[d]on't fall asleep." Regardless, the court's comments do not demonstrate judicial bias. A trial judge has wide discretion and power over matters of trial conduct. *Id*. While the court's comments may have been slightly hostile to defense counsel in these instances, that is not enough to overcome the presumption of judicial impartiality. See *id*.

Second, the court's questioning of witnesses did not demonstrate judicial partiality. The court has the right to interrogate witnesses. MRE 614(b). The court may question witnesses to elicit additional information or clarify the witness's testimony. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). The court must ensure that its questions are not "intimidating, argumentative, prejudicial, unfair, or partial." *Id*. We do not agree with defendant that the questions asked by the trial court demonstrated judicial bias. Specifically, the trial court asked Thomas if she thought it was odd that defendant asked her to sign the verification of deposit and asked Dillapree if she thought it was "fishy" that defendant withdrew the $10,000 immediately after she deposited the money. These brief questions were not enough to overcome the heavy presumption of judicial impartiality. See *Jackson*, 292 Mich App at 598.

Furthermore, the court instructed the jury that its comments, rulings, and questions were not evidence, and the jury should only consider the evidence when making its decision. The court also instructed the jurors, "[i]f you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts and you should decide this case from the evidence." Defendant cannot show plain error because these instructions cured any error arising from the court's improper questioning of witnesses. See *Jackson*, 292 Mich App at 597; *Bennett*, 290 Mich App at 476.

Finally, defendant argues that the trial court's evidentiary rulings demonstrated judicial bias. Defendant's argument lacks merit because the court's rulings were not an abuse of discretion, as discussed below in Section V. Furthermore, judicial rulings are not valid grounds for alleging bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Jackson*, 292 Mich App at 598. We also do not agree that the trial court improperly emphasized certain testimony to the jury by asking if the jury could hear what a witness was saying. There is no evidence that the trial court was doing anything other than ensuring the jurors could hear the witness. The trial court also did not show bias when it initially refused to allow a lay person to compare two signatures, especially considering the fact that the trial court allowed the testimony moments later.

V. EVIDENTIARY ISSUES

Defendant also asserts that the trial court abused its discretion in overruling defense counsel's evidentiary objections. We disagree.

"Preserved evidentiary rulings are reviewed for an abuse of discretion." *Unger*, 278 Mich App at 216, citing *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "This Court reviews for an abuse of discretion a trial court's ruling whether to grant a mistrial." *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009).

First, defendant argues that the trial court abused its discretion in admitting the loan documents because there was a question regarding the documents' genuineness. Under MRE 1002, the original of a writing, record, or photograph is required to prove the content thereof. However, MRE 1003 provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

At trial, defense counsel argued that defendant's signature had been forged on many of the documents. Counsel's argument that defendant's signature was forged does not suggest a difference between the documents that were admitted at trial and the original documents. Counsel did not assert that defendant's signature was forged on the copies but not on the originals. Rather, the reasonable inference is that defendant's signature was forged on the original, which was then copied. Whether the signatures were forged, and what weight should be given to the documents, was a question of fact for the jury to decide. See *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). The trial court did not abuse its discretion in allowing those questions to be decided by the jury.

Defense counsel's argument that defendant's signature had been altered implicates MRE 1002 and 1003 because it suggests that the documents admitted were not, in fact, duplicates. Under MRE 1001(4), a "duplicate" is "a counterpart produced by the same impression as the original." If the documents admitted at trial were altered, they were not counterparts "produced by the same impression as the original." See MRE 1001(4). However, defendant did not present any evidence to support his contention that the signatures were altered. MRE 1003 requires that a *genuine question* be raised regarding the authenticity of the original. It is not enough for defense counsel to suggest that the original was altered without providing some support for that claim. In addition, the witnesses testified about how the loan documents were generated and

how they were stored. Therefore, the trial court did not abuse its discretion in admitting the copies of these documents, despite defendant's unsupported claim that they were altered.

Second, the trial court did not abuse its discretion in allowing Burns to testify that AFS relies on truthful information in deciding whether to fund a loan. The prosecutor asked Burns if AFS would have funded defendant's loan if the application contained false information; Burns said no. The prosecutor then asked if AFS relies on applicants providing truthful information, and Burns answered affirmatively. Defense counsel objected, arguing that Burns was not qualified to answer those questions. The court told the prosecutor to lay a foundation. Burns then testified that he did not have formal training in what AFS relies on in a loan application. He said that he does know, however, that the company relies on the information in the closing packages being accurate. He knows this because of courses that he has been required to take through his employment. Burns was then asked if the loan would have been funded if there was not any reliance, and Burns said no. It appears this meant that the loan would not have been approved if AFS knew it contained inaccurate information. Defense counsel again objected, arguing that Burns was not qualified to answer the question, and the court overruled his objection.

Contrary to defendant's argument, the prosecutor's questions did not call for an expert opinion. Under MRE 701, a lay witness may give his opinion if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." It is permissible for a lay witness to give an opinion that does not involve "highly specialized knowledge" and is "largely based on common sense." *People v McLaughlin*, 258 Mich App 635, 658; 672 NW2d 860 (2003). Burns's opinion that a lender would rely on accurate information in a loan application is largely based on common sense. Similarly, his opinion that a lender would be reluctant to approve a loan if it knew that an applicant had lied on the application is also based on common sense. Burns's testimony did not involve "highly specialized knowledge" and the prosecution did not need to qualify him as an expert. See MRE 701; *McLaughlin*, 258 Mich App at 658. Given Burns's testimony that his opinions were based on courses he took as part of his employment, along with the fact that his opinions were largely based on common sense, the trial court did not abuse its discretion in allowing Burns to testify to his opinions.[4]

Third, the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on the prosecution's presentation of evidence of events that occurred after July 30, 2010, the date cited in the information. In denying defendant's motion for a mistrial on this ground, the trial court stated that defendant was on notice of the prosecution's evidence well before trial. In addition, a mortgage is not completed within a day's time, and while the defendant's false representation was made on July 30, 2010, the representation was on a continuum that extended throughout the entire mortgage process.

[4] We also reject defendant's cursory argument that the trial court erred in allowing Andrew Shibley, who testified on behalf of the closing agent, to testify regarding "closings." "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *Petri*, 279 Mich App at 413.

"A mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant and impairs his ability to get a fair trial." *Waclawski*, 286 Mich App at 708 (internal quotation marks and citation omitted). MCL 767.45(1)(b) provides that "[t]he indictment or information shall contain . . . [t]he time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense." Time is not of the essence to the offense of false pretenses. See *People v Breckenridge*, 81 Mich App 6, 10; 263 NW2d 922 (1978); see also *People v Clum*, 213 Mich 651, 656; 182 NW 136 (1921). In addition, MCR 6.112(G) provides:

> Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of . . . *a variance between the information and proof regarding time*, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. [Emphasis added.]

Here, the trial court did not abuse its discretion in concluding that defendant failed to show prejudice. Time is not of the essence in the crime of false pretenses, so the variance in time did not create error in the information or in the prosecutor's presentation of evidence from after July 30, 2010. See MCL 767.45(1)(b); *Breckenridge*, 81 Mich App at 10. Moreover, as stated by the court, defendant received the discovery, including all of the loan documents, before trial began. Thus, defendant was aware of the evidence that the prosecution had, including the evidence of events that occurred after July 30, 2010. It would be unreasonable to assume that the prosecution would not present evidence of the loan itself, given that the information states that defendant committed false pretenses by causing another person to grant her an FHA mortgage loan worth $163,156.13. In addition, it would have been "perfectly proper to permit an amendment at trial changing the dates to that shown by the testimony." *Breckenridge*, 81 Mich App at 10-11. The trial court did not abuse its discretion in denying defendant's motion for a mistrial; defendant has not shown that she was prejudiced and denied a fair trial by the prosecution's presentation of evidence of events that occurred after July 30, 2010. See *Waclawski*, 286 Mich App at 708.[5]

[5] Defendant raises additional evidentiary errors in a cursory manner, including (1) whether the trial court erred when it held that questions posed to defendant were not asked and answered, (2) whether the prosecution improperly impeached defendant using preliminary examination testimony from a nonparty, and (3) whether the trial court improperly refused to allow defense counsel to ask questions regarding the contents of "exhibits" admitted by the prosecution. Defendant's arguments on these issues were insufficiently supported by facts and law. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *Petri*, 279 Mich App at 413. An appellant also "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Payne*, 285 Mich App at 195. In addition, any error in regard to these issues was harmless because the errors were not outcome determinative. There was ample evidence presented to support defendant's conviction. An error in the admission or exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice. MCR

VI. AIDING AND ABETTING INSTRUCTION/AMENDING THE INFORMATION

Defendant argues that her due process rights were violated by the "trial court's sua sponte decision to amend the Information [sic] to include aiding and abetting." It appears that defendant is referring to the court's decision to instruct the jury on aiding and abetting, as the court did not actually amend the information. We disagree.

When the trial court stated that it was going to instruct the jury on aiding and abetting, defendant did not object. Therefore, this issue is reviewed for plain error affecting defendant's substantial rights. See *People v Hanks*, 276 Mich App 91, 92, 95; 740 NW2d 530 (2007).

First, defendant has not shown error because a prosecutor does not need to separately charge a defendant as an aider and abettor. MCL 767.39 abolished the distinction between accessories and principles. See *People v Robinson*, 475 Mich 1, 9; 715 NW2d 44 (2006). MCL 767.39 provides that:

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

Thus, aiding and abetting is not a distinct substantive offense; it is an alternative theory of liability. *Robinson*, 475 Mich at 6; *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999). "[I]t is unnecessary to charge the defendant in any form other than as a principle" and "the fact that the information failed to charge aiding and abetting" does not deny the defendant due process. *People v Lamson*, 44 Mich App 447, 449-450; 205 NW2d 189 (1973).

Accordingly, the trial court did not instruct the jury on a new charge because there was no necessity to amend the information. A prosecutor does not need to indicate on the information that it is charging the defendant as an aider and abettor; charging the defendant as a principle is sufficient. *Lamson*, 44 Mich App at 449-450; see also MCL 767.39; *Robinson*, 475 Mich at 6. In addition, a defendant can be charged as a principle and convicted as an aider and abettor. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds by *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).

Second, defendant argues that she was prejudiced by the court's "amendment" of the information because she was denied the "opportunity to call witnesses to refute the implicit allegation that she knew that Dorian Hill intended to defraud the lender." The trial court may permit the prosecutor to amend the information before, during, or after trial "unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H); see also MCL 767.76; *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). Defendant does not

---

2.613(A); MCL 769.26. An error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009).

indicate which witnesses she would have called or to what they would have testified. Presumably, the only witness able to testify about what defendant knew is defendant, who testified. In addition, the trial court made the decision to instruct the jury on aiding and abetting after defense counsel opened the door to this issue. Defense counsel told the jury in his opening statement that Hill, defendant's codefendant, pleaded guilty to false pretenses.

Finally, defendant does not argue in her brief that the outcome of the trial would have been different if the court had not instructed the jury on aiding and abetting. *Hanks*, 276 Mich App at 92. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *Petri*, 279 Mich App at 413. In addition, as discussed further in Section VII, there was ample evidence for the jury to conclude that defendant committed false pretenses as a principle.

VII. SUFFICIENCY OF THE EVIDENCE

Defendant asserts that there was insufficient evidence to support the jury's verdict. We disagree.

"When reviewing challenges to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could conclude that the prosecution proved all the essential elements of the crime beyond a reasonable doubt." *People v Johnson-El*, 299 Mich App 648, 651; 831 NW2d 478 (2013). This Court "must draw all reasonable inferences and examine credibility issues in support of the jury verdict" and "must not interfere with the jury's role as the sole judge of the facts." *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010).

The elements of false pretenses are: "(1) a false representation as to an existing fact, (2) knowledge by the defendant of the falsity of the representation, (3) use of the false representation with an intent to deceive, and (4) detrimental reliance by the victim on the false representation." *Webbs*, 263 Mich App at 532 n 1; see also MCL 750.218.

Defendant argues that there was insufficient evidence for the jury to conclude: (1) that defendant made a false representation on July 30, 2010 (the date cited in the information); (2) that anyone suffered a loss, or detrimentally relied on the alleged false representation; and (3) that defendant intended to use a false representation to deceive the lender. Defendant's arguments lack merit.

First, as discussed above in Section V, the jury was not precluded from considering dates other than July 30, 2010, when determining if there was evidence that defendant made a false representation as to an existing fact. Second, there was ample evidence that defendant made false representations. Dillapree testified that on July 30, 2010, she made a deposit for defendant into a savings account that defendant shared with her daughter. The deposit was $10,000 in cash, which defendant almost immediately withdrew and returned to the person who lent her that money. Rupert confirmed that a $10,000 cash deposit was made on July 30, 2010, into a savings account on which defendant was a signor. Three minutes later, the money was withdrawn from the account.

The prosecution presented evidence that defendant made the deposit to prove that she had a certain amount of assets, which was required as part of her loan application. Dillapree testified that defendant said she made the deposit to get a home; defendant needed to show that a certain amount of money was in her account. Rupert testified that defendant told him she made the deposit to show that she had money to put a deposit down on a house. Thomas identified her signature on a verification of deposit form and testified that defendant asked her to sign the form, verifying that defendant had $10,005.84 in her account on August 8, 2010. Regardless of when defendant asked Thomas to sign the form or when Thomas actually signed it, it does not appear that either occurred during the three minutes when the money was actually in defendant's account. The security footage from that period of time did not show any interaction between defendant and Thomas suggesting that a verification of deposit form was filled out at that time. Because the verification of deposit form asks for a current balance, evidence that defendant asked Thomas to fill it out at any time other than when the money was actually in defendant's account was a false representation. Furthermore, given defendant's apparent intent to immediately withdraw the money from the account and return it to Hill, any representation that the money was hers was false.

In addition, the verification of deposit form was used to prove that defendant had the money in her account when she applied for the loan, a process that occurred over several months and ended on December 30, 2010. Defendant signed the final loan application on December 30, 2010, which indicated that she had assets of just over $10,000. She did not have $10,000 in her account at any point other than the three minutes following the July 30, 2010 deposit. Rupert testified that the savings account balances from August 2010 to June 2011 were between $1 and $10.03.

Finally, there was evidence of other false representations made by defendant. Defendant's file contained a payroll verification statement for a check from a company called Coswell and Associates, dated November 12, 2010. A typed document bearing defendant's signature indicated that she worked for Coswell and Associates, located in Georgia, from June 2010 "to present." The final loan application in defendant's file, signed by her on December 30, 2010, listed her employer as Guarantee Bank, which had an Atlanta address, and her title as "marketing training manager." It is undisputed that this information regarding defendant's employment was not true; defendant testified that she worked for Best Bank until April of 2011. Dillapree also testified that defendant left Best Bank in April of 2011.

Second, the prosecution presented evidence that someone suffered a loss, or detrimentally relied on the false representation. See *Webbs*, 263 Mich App at 532 n 1. The prosecution presented evidence that AFS detrimentally relied on defendant's false representations in making the decision to fund her loan and the FHA detrimentally relied on defendant's false representations when it made the decision to insure the loan. Burns testified that in his opinion, AFS would not have funded defendant's loan if it knew that her application and file contained false information. Burns said that AFS relies on the veracity of the information it is given. John Niebieszczanski, an FHA employee, testified that the FHA generally does not look at the paperwork for a loan until it is closed, but the FHA depends on the lender abiding by FHA policies. These policies require the lender to consider many factors, including an applicant's deposits, assets on hand, and verification of employment, when determining if a housing loan should be approved and insured. Thus, there was evidence that AFS and the FHA relied on

defendant's statements regarding her employment and her deposits when they funded and insured her loan, respectively. Only two payments have been made on the $163,156 loan; thus, AFS, the FHA, or both have suffered a loss.

Third, there was evidence that defendant used the false representations with the intent to deceive. See *id*. As discussed above, there was plenty of evidence that defendant made false representations. A jury could infer defendant's intent to deceive from the fact that she made the false representations. Defendant withdrew the $10,000 almost immediately after depositing it; she knew it was not in her account or possession after July 30, 2010. Defendant also knew that she did not live or work in Georgia in 2010. Nonetheless, defendant signed documents verifying that this information was true. "Circumstantial evidence and reasonable inferences that arise from [the] evidence can constitute satisfactory proof of the elements of the crime." *Kanaan*, 278 Mich App at 619.

Defendant argues that there was no evidence of intent to deceive because she followed all bank policies and did not try to hide her actions. First, whether defendant followed bank policy is irrelevant; the issue is whether she intended to deceive the lender, AFS, or the FHA, because her loan was an FHA-insured loan. Second, the jury heard the witnesses' testimony regarding the bank's policies and the use of security cameras in the bank that recorded the July 30, 2010 deposit and withdrawal. The jury was free to weigh this evidence as it saw fit, and "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Id.* at 619. The same proposition applies to defendant's testimony that she did not read any of the documents before signing them on December 30, 2010, and that she made the deposit and withdrawal on July 30, 2010, at the realtor's direction, "[t]o show the amount that [Hill] would give me as a gift." While defendant may have presented contradictory evidence, issues of witness credibility are the purview of the jury. *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). The jury concluded that defendant intended to deceive, and this Court will not interfere with that decision. See *id*.

VIII. GREAT WEIGHT OF THE EVIDENCE.

Defendant also argues that the jury's verdict was against the great weight of the evidence. We disagree.

A trial court's decision to grant or deny a new trial on the basis that the verdict was against the great weight of the evidence is reviewed by this Court for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). A court abuses its discretion, "when its decision falls outside the range of principled outcomes." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (internal quotation makes and citation omitted).

Defendant argues that the jury's verdict was against the great weight of the evidence because there was no evidence that she intended to use a false representation to deceive the lender. The circuit court may order a new trial if it concludes the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Lacalamita*, 286 Mich App at 469.

As discussed above, there was evidence to support the jury's conclusion that defendant had the intent to deceive when she made the false representations, so the evidence did not "preponderate[] so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*. Defendant knew that she did not have $10,000 in her account on December 30, 2010, but she signed a document indicating that she did. Defendant also knew that she did not live or work in the state of Georgia in 2010, but she signed documents verifying that this information was true.

In addition, the jury heard the evidence regarding defendant's compliance with bank policies, defendant's testimony and explanations for what occurred, and the fact that no attorney was present at the closing. Questions of credibility are "within the exclusive province of the jury." *Id.* at 470. "'Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.'" *Id.*, quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Conflicting testimony does not warrant a reversal unless the testimony contradicted undisputed physical facts or the witness was so far impeached that the testimony lost all probative value. *People v Roper*, 286 Mich App 77, 89; 777 NW2d 483 (2009).

IX. CUMULATIVE ERROR

Finally, defendant claims that the cumulative effect of the errors she asserts on appeal denied her a fair trial, thus requiring reversal. We disagree.

"We review this issue to determine if the combination of alleged errors denied defendant a fair trial." *Dobek*, 274 Mich App at 106. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Id*. If the defendant has not established any errors, then reversal is not warranted. *Id*.

Reversal on the basis of cumulative error is unwarranted because the cumulative effect of the minor instance of prosecutorial misconduct, the only error found, did not deny defendant a fair trial. See *id*. at 107. Therefore, defendant is not entitled to a new trial.

Affirmed.

/s/ Joel P. Hoekstra
/s/Kurtis T. Wilder
/s/ Karen M. Fort Hood