STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v DAMONTAY HARVEY, Defendant-Appellant.	No. 319482 Wayne Circuit Court LC No. 13-001770-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KEON DAJUAN DAVIS, Defendant-Appellant.	No. 319483 Wayne Circuit Court LC No. 13-001770-FC

Before: MURPHY, P.J., and STEPHENS and GADOLA, JJ.

PER CURIAM.

Defendants Damontay Harvey and Keon Dajuan Davis were tried jointly, before separate juries. They were each charged with first-degree premeditated murder, MCL 750.316(1)(a), or felony-murder, MCL 750.316(1)(b) for the shooting death of Calvin Warrington Bryant, and convicted of the lesser offense of second-degree murder, MCL 750.317. The trial court sentenced defendant Harvey to a prison term of 20 to 40 years, and sentenced defendant Davis to a prison term of 30 to 60 years. The court also imposed court costs of $600 against each defendant. Both defendants appeal as of right. In defendant Harvey's case, we affirm defendant's convictions and sentences. In defendant Davis's case, we affirm defendant's conviction, but remand for resentencing. In both cases, we affirm the trial court's authority to impose costs, but remand for a determination of the factual basis for the costs imposed in each case.

I. BACKGROUND

The victim was fatally shot near the intersection of West Warren and McKinley in the city of Detroit on December 1, 2012, at approximately 10:30 p.m. as he was walking away from the Yellow Apple market. There were no witnesses to the shooting. Several surveillance videos obtained from the market were used to identify the victim and the two defendants at the market. Defendants Davis and Harvey separately identified themselves in the videos.

Both defendants arrived at the market in a blue Buick. Video surveillance cameras showed the victim and defendants in the market, each approaching the counter at different times. The videos depicted the victim leaving the store and defendants bypassing the blue Buick and following the victim on foot across Warren. The Buick then followed. The videos did not show the shooting or either defendant in possession of a gun. The videos did include footage of a person entering the Buick after the shooting, after which the vehicle drove away. The prosecution's theory at trial was that defendants were the two males who followed the victim after he left the Yellow Apple market, shot him a short distance from the market, and then left the scene in the blue Buick that was waiting nearby.

II. DOCKET NO. 319482 (DEFENDANT HARVEY)

A. SUFFICIENCY OF THE EVIDENCE

Defendant Harvey first argues on appeal that the evidence was insufficient to support his conviction. He argues that the videos showed nothing more than Harvey walking out of the store behind the victim. We disagree.

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Henry (After Remand)*, 305 Mich App 127, 142; 854 NW2d 114 (2014), lv pending. The reviewing court considers the evidence "in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt." *Id.* (citation and internal quotations omitted). "Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

Viewed in a light most favorable to the prosecution, the evidence established that Harvey and Davis arrived at the market in the same vehicle. They entered the market separately. Harvey walked past the victim while the victim was talking to someone in a light-colored vehicle. Harvey approached Davis in the store and said something into his ear. They both walked out quickly. They passed the car that they arrived in and followed the victim across the street, walking quickly enough to close the gap between them and the victim. The car they arrived in drove away as they were walking away. Just after they and the victim left the camera's range, the victim was shot. Davis and Harvey immediately got into the Buick they arrived in, which an unknown driver had taken to the location where the victim was shot. There was no evidence of any other person present at that moment. This evidence was sufficient to enable the jury to find that Davis and Harvey followed the victim and were with him at the time he was shot, thereby supporting an inference that they were the shooters. Thus, the evidence supported a finding that either Davis or Harvey shot the victim.

Although the evidence did not indicate who shot the victim, the evidence was sufficient to support a finding that the shooter was aided or abetted by the non-shooting defendant. MCL 767.39 provides:

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

"A person who aids or abets the commission of a crime may be convicted as if he or she directly committed the crime." *People v Jackson*, 292 Mich App 583, 589; 808 NW2d 541 (2011). As explained in *Jackson*:

> To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*Id.* (citation and internal quotations omitted).]

"Aiding and abetting describes all forms of assistance rendered to the perpetrator, including any words or deeds that may support, encourage, or incite the commission of a crime." *Id.* Here, the evidence indicated that Davis and Harvey coordinated their movements for a common purpose. Evidence that they arrived in the same vehicle, entered separately but joined inside the store, and quickly walked together following the victim, was sufficient to establish that they were acting in pursuit of a common plan when the victim was shot. Accordingly, the evidence was sufficient to support Harvey's conviction, as either a direct principal or an aider and abettor.

B. SUPPRESSION OF STATEMENT

Defendant Harvey next argues that his police statement to Officer Brian Bowser was inadmissible because it was not voluntarily given, inasmuch as he was a 16-year-old juvenile who was interviewed without a parent being present and the interviewing officer took advantage of Harvey's youth and inexperience with the criminal justice system. Harvey did not preserve this issue by raising it in a pretrial motion to suppress his statement. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Accordingly, our review of the issue is limited to plain error affecting Harvey's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Fifth Amendment of the United States Constitution, and the Michigan Constitution, preclude admission of a defendant's involuntary confession. *People v Tanner*, 496 Mich 199, 243; 853 NW2d 653 (2014); US Const Am V; Const 1963, art 1, § 17. "A criminal defendant enjoys safeguards against involuntary self-incrimination during custodial interrogations." *Henry*, 305 Mich App at 145, quoting *Michigan v Mosley,* 423 US 96, 99-100; 96 S Ct 321; 46 L Ed 2d 313 (1975). When the defendant is a juvenile, the following factors should be considered in determining whether a confession was voluntarily given:

> (1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL § 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. [*In re SLL*, 246 Mich App 204, 209; 631 NW2d 775 (2001) (citation and internal quotations omitted).]

Regarding the absence of a parent during interrogation, the Court in *In re SLL* stated:

> [W]e find that the separation of respondent from his mother, although potentially troublesome in an analysis of the voluntariness of a statement, under the totality of the circumstances here, does not merit a finding that respondent's statement was involuntary. Respondent knew his mother had consented to his talking alone with the officer and that she was readily available to him. No manipulation of respondent or his mother by the police is established by the circumstances. To the contrary everything was done openly and with the knowledge and consent of respondent and his mother. We believe it is clearly erroneous to conclude that interviewing a juvenile under these circumstances constitutes any evidence from which it is reasonable to conclude that the resulting statements were involuntarily made. [*Id.* at 210.]

Here, the totality of the circumstances does not establish that Harvey's statement was involuntary. The interviewing officer was aware that Harvey was a minor and that he had not been previously arrested. The officer read and explained his *Miranda* rights to him, and allowed him time alone to review and consider them. He explained, more than once, that Harvey was not required to speak, and that he could end the interview when he wanted. The officer explained that he was investigating the shooting that occurred on December 1, 2012, near the Yellow Apple party store. Nothing in the videotaped interview indicates that the officer took advantage of Harvey's youth and inexperience to coerce him into giving a statement. There also is no indication that Harvey attempted to request that the interview be terminated. Accordingly, the record does not support Harvey's unpreserved argument that his police statement was not voluntarily given.

Furthermore, because there is no indication in the record that Harvey's statement was involuntary, we reject Harvey's alternative argument that trial counsel was ineffective for failing to move to suppress the statement. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

C. PROSECUTORIAL MISCONDUCT

Defendant Harvey next argues that reversal is required because, in closing argument, the prosecutor improperly appealed to the jury's sympathy and urged it to convict him as part of its civic duty. Because Harvey did not object to the prosecutor's remarks at trial, this issue is not preserved. *Bennett*, 290 Mich App at 475. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013); *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Bennett*, 290 Mich App at 476.

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A reviewing court must consider the prosecutor's remarks in context. *Bennett*, 290 Mich App at 475. "It is improper for a prosecutor to seek the jury's sympathy for the victim." *Dobek*, 274 Mich App at 80 (citation omitted). Further, a prosecutor may not urge the jury to convict as part of its civic duty or on the basis of its prejudices. *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004).

During closing argument, the prosecutor made the following remarks: (1) "You never heard from Mr. Bryant because of course he's dead"; (2) "You heard all of the evidence now ladies and gentlemen and when you go back into that jury room I'm going to ask you to speak for Mr. Bryant because he cannot speak for himself"; and (3) "[P]lease speak for Mr. Calvin Warrington Bryant." These remarks were not overly inflammatory and did not blatantly appeal to the jury's sympathy. See *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863 (2003). To the extent that the remarks can be considered improper, a timely objection and request for a curative instruction would have alleviated any prejudice. Indeed, even without an objection, the trial court instructed the jury that it should not be influenced by sympathy for the victim. This instruction was sufficient to protect Harvey's substantial rights.

Harvey also argues that the prosecutor made an improper civic duty argument by stating, "Whether he pulled the trigger or not the law says he's guilty. I ask that you find him so because justice requires it." This statement was made at the end of the prosecutor's argument detailing the evidence and explaining why it supported a finding of Harvey's guilt. Viewed in context, the prosecutor did not make an improper civic duty argument, but rather permissibly argued in favor of a conviction because the evidence warranted it. Accordingly, there was no error.

In addition, because the prosecutor's remarks either were not improper or did not prejudice defendant's substantial rights, defense counsel was not ineffective for failing to object to the remarks. *Ericksen*, 288 Mich App at 201.

D. JURY INSTRUCTIONS

Defendant Harvey next argues that the trial court erred by instructing the jury on flight. The "trial court's determination whether a jury instruction is applicable to the facts of a case" is reviewed for an abuse of discretion. *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217.

"When issuing jury instructions, a trial court must instruct on all relevant issues, defenses, and theories if they are supported by the evidence." *People v Burks*, 308 Mich App 256, 266; 864 NW2d 580 (2014), lv pending. The trial court gave the following instruction regarding flight:

> There may have been some evidence that the defendant tried to run away after the alleged crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt.

Harvey argues that a flight instruction was not supported by the evidence because there was no evidence that he ran from the police or fled the scene after the shooting. We disagree.

Evidence of flight "is probative because it may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody.'" *Id.*, quoting 29 AmJur2d, Evidence, § 532, p 608. The prosecutor offered evidence that Harvey and Davis arrived at the market in a blue Buick, but left the market's parking lot on foot and proceeded in the same direction as the victim. Shortly thereafter, the victim was shot and the suspects entered a waiting car and left the scene in the car. This evidence supports an inference that Harvey fled the crime scene in the waiting car because of his involvement in the victim's shooting death. The trial court properly instructed the jury that flight also can be consistent with innocence. Accordingly, there was no instructional error.

E. SURVEILLANCE VIDEO EVIDENCE

Defendant Harvey next argues that the trial court erred in permitting Sergeant Brannock and Sergeant Gibson to give improper testimony regarding their observations of the surveillance videos. He contends that Brannock gave improper lay witness testimony by giving his opinion that the subjects in the surveillance videos were defendants, and that Gibson's identification testimony exceeded the scope of his expertise. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Dobek*, 274 Mich App at 93. "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217. Decisions concerning a preliminary question of law, such as the interpretation of the Michigan Rules of Evidence, are reviewed de novo. *Dobek*, 274 Mich App at 93.

MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (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.

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Defendant cites *People v Fomby*, 300 Mich App 46; 831 NW2d 887 (2013), a case that also involved Sergeant Gibson's testimony related to still photos and surveillance footage. In *Fomby*, the defendant argued that Gibson's testimony regarding the identity of individuals in still photos and surveillance footage was improper because conclusions and opinions regarding the identity of the individuals in the still photos and surveillance footage could be drawn by the jury. *Id.* at 48. The Court determined that Gibson's testimony was permissible lay opinion testimony, explaining:

> Gibson was qualified as a forensic video technician, "proficient in the acquisition, production and presentation of . . . video evidence in court[.]" Even if these qualifications do not extend to comparison and identification of individuals within still photographs made from videos, Gibson's testimony was properly admitted as lay opinion testimony under MRE 701.
>
> First, Gibson's testimony was rationally based on his perception. Gibson was not at the scene while the video footage was being recorded and did not observe firsthand the events depicted on the video. Instead, Gibson watched the video, produced short clips of the individuals while they were inside the store, and isolated certain frames to create still images. On the basis of his scrutiny of the video surveillance footage and the still images he created from the video, Gibson provided his opinions regarding the identity of individuals within the video as compared to the still images from portions of the video. [*Id.* at 50-51.]

The Court also noted that Gibson did not identify the defendant in the video or still images, but only "linked individuals depicted in the surveillance video as being the same individuals depicted in the still photographs." *Id.* at 53. Consequently, Gibson did not give an opinion as to whether the defendant was guilty or innocent of the charged offense. *Id.*

Here, Gibson referred to the two males in the videos and still photos as suspect A and suspect B. Gibson never gave an opinion identifying the subjects as the defendants. He clearly stated that he did not identify the individuals in the video as defendants. His testimony explained how to interpret the enlarged video, which to the untrained eye appears to be dots of light moving in darkness. Although most lay persons could probably figure out that the pairs of lights moving in a straight direction were headlights of a car, most lay persons would require instruction to recognize that the moving pixels depict people walking, or to recognize that a white image is a plastic store bag. Gibson's testimony explaining how the enlarged images relate to the images in the original video was within the scope of his expertise on "scientific, technical, or otherwise specialized knowledge" that would "assist the trier of fact to understand the evidence or to determine a fact in issue." MRE 702. Similar to *Fomby*, Sergeant Gibson's

testimony that the moving figures in the enlarged video corresponded to the moving persons in the normal size video, was rationally based on his own observations of the video.

Brannock did not give improper lay witness opinion testimony. Brannock testified from his own observations of the surveillance video and the driver's license copy provided by the store employee, that Davis, who stipulated to his identity, was one of the persons who followed the victim out of the store and across Warren. Harvey did not stipulate to his identity, but Brannock did not identify him. He referred to Harvey in the videos as the second suspect or suspect number two. The jury was left to decide whether Harvey was the person seen in the videos talking and walking with Davis. Accordingly, there was no improper opinion testimony by Sergeant Brannock.

In sum, the trial court did not abuse its discretion in admitting the challenged testimony.

III. DOCKET NO. 319483 (DEFENDANT DAVIS)

A. SURVEILLANCE VIDEO EVIDENCE

Defendant Davis presents the same challenges to Gibson's and Brannock's testimony that co-defendant Harvey raised. As explained in part II(E), the trial court did not abuse its discretion in admitting the challenged testimony.

Davis also complains that exhibits 64 - 69 and 73, and a sequential video that Gibson compiled from the original videos, were never formally admitted into evidence. However, the record discloses that exhibits 63 and 64, the license plate photos, were in fact admitted during Gibson's testimony. The prosecutor also moved to admit exhibits 67 - 69 and 73, during Gibson's testimony. After the prosecutor so moved, the trial court allowed a short break. When the proceeding resumed, the trial court did not address the prosecutor's motion to admit these exhibits, but Gibson thereafter testified that exhibits 67 - 69 and 73 were still photos from the surveillance videos, which were included in a CD, which was admitted as exhibit 105. Because the still photos were duplicative of the still photos on the CDs, it is not more probable than not that any error in failing to formally admit exhibits 67 - 69 and 73 was outcome determinative. Thus, any error was harmless. *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999). The sequential CD also was not admitted, but it is a compilation of the significant clips from the original surveillance camera videos, which were admitted as exhibit 104. There is no indication in Davis's cross-examination of Gibson that he identified anything objectionable in the compilation of the sequential videos. Thus, failure to formally admit the sequential CD was also harmless error.

We reject Davis's argument that Brannock's and Gibson's testimony regarding the videos deprived him of his constitutional right to confront witnesses. The Confrontation Clause, US Const, Am VI, states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" The Michigan Constitution also guarantees this right. Const 1963, art 1, § 20. Davis was afforded the opportunity to cross-examine Brannock and Gibson. He questioned Gibson about the range of the camera, and his compilation of the sequential video. He elicited Gibson's admission that the defendants did not participate in the compilation of the sequential video. He also elicited Gibson's admission that Gibson did not see

a weapon discharge, and that he did not identify the subjects in the videos as defendants. Gibson also admitted that he lost sight of the subjects after they crossed Warren.

There is also no merit to Davis's argument that the videos were inadmissible hearsay. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion." MRE 801(a). The videos shown to the jury contained images that were recorded by surveillance cameras. The surveillance cameras were machines designed to record the inside of the market and its outside premises from different angles. "[A] machine is not a person and therefore not a declarant capable of making a statement." *People v Dinardo*, 290 Mich App 280, 291-292; 801 NW2d 73 (2010). Thus, the videos do not qualify as hearsay.

Davis also argues that Gibson's expert testimony does not qualify as expert testimony because his observations of the videos was not based on scientific, technical, or specialized knowledge. As explained in part II(E) in codefendant Harvey's appeal, Gibson's testimony was based on his technical knowledge of cropping and enlarging videos, and his experience in enlarging videos and identifying subjects composed of enlarged pixels. We agree with Davis, however, that the trial court erred in allowing Gibson to testify regarding his enhancement of a surveillance video still photograph to read the license plate on the Buick. MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court must act as a gatekeeper in determining that expert testimony meets MRE 702's standard of reliability. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781-782; 685 NW2d 391 (2004). Our Supreme Court noted in *Gilbert*, 470 Mich at 701, that MRE 702 was amended in 2004 to incorporate the standards of reliability set forth by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993). "When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known." *People v Kowalski*, 492 Mich 106, 131; 821 NW2d 14 (2012). However, "the trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *Unger*, 278 Mich App at 217 (citation and internal quotation marks omitted).

Here, no record was established explaining the technology that Gibson used to alter a photograph showing the license plate at a steep angle to show the license plate at a flat angle, making it possible to read the characters on the plate. Gibson did not explain the "forensic tools" or software he used to "capture down" the image of the license plate. The trial court failed in its

duty as gatekeeper in regard to Gibson's conversion of the license plate photo into a readable image. There is no basis in the record for determining whether the forensic tools and software involved in the conversion process meet the requirements of *Daubert*, 509 US 579. However, we conclude that this error was harmless. MCL 769.26 sets forth a presumption that an evidentiary error in a criminal case does not warrant reversal unless it resulted in a miscarriage of justice. Under this statute, a preserved, non-constitutional error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 495-496. Evidence that the same Buick was associated with Davis on both the day of the shooting and the day of Davis's arrest was not significant in the totality of the circumstances. The license plate evidence was not necessary to show that Davis arrived at the market in a car, followed the victim on foot to the location where he was shot, and left the scene in the same car, driven by an unknown person who followed Davis to the location of the shooting.

B. SUFFICIENCY OF THE EVIDENCE

Davis also argues that the evidence was insufficient to support his conviction of second-degree murder. As previously discussed, the evidence established that Davis and Harvey arrived at the market together, in a blue Buick driven by a third person. They entered the store separately, but met inside the store and left together. However, they did not leave in the car, and instead followed the victim out of the parking lot and across the street on foot. They moved quickly toward the victim, coming closer to him. A very short time after they left the camera ranges, the victim was shot, and Harvey or Davis got into the Buick, which the driver had moved to the location of the shooting. Viewed in a light most favorable to the prosecution, the evidence permitted a rational trier of fact to find beyond a reasonable doubt that Davis or Harvey shot decedent, aided and abetted by the other. Harvey and Davis's coordinated plan and movement supports an inference that they acted jointly, pursuant to a common plan, although only one of them fired a weapon.

Davis also argues that there was insufficient evidence to show that the identified victim was the actual homicide victim. This argument is without merit. The combination of the video evidence, the testimony of the officers who arrived at the homicide scene, and the identification testimony of the victim's daughter was sufficient to establish beyond a reasonable doubt that the identified victim was the same person who walked away from the market and was fatally shot a short distance from the market.

Davis alternatively argues that the jury's verdict is against the great weight of the evidence. Because Davis did not raise a great weight issue in a motion for a new trial, the great weight issue is not preserved. *People v Cameron*, 291 Mich App 599, 618; 806 NW2d 371 (2011). Therefore, we review that issue for plain error affecting Davis's substantial rights. *Id.* A new trial may be granted if a jury's verdict is against the great weight of the evidence, but only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon,* 456 Mich 625, 627, 635; 576 NW2d 129 (1998); *Unger*, 278 Mich App at 232. Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. *Id.* at 643. Here, the alleged weakness of the prosecution's proofs do not involve witness credibility or conflicting testimony, but rather the strength and reasonableness of the inferences that Davis or Harvey were acting

together, and that one of them shot the victim after they stepped out of camera range and before they got into the waiting car. These were sufficiently reasonable inferences, and the evidence supporting them was not controverted at trial. There were no apparent alternate explanations for why the defendants followed the victim instead of getting back into the Buick they came in, or why they immediately left the scene after the victim was shot. There also was no evidence suggesting another perpetrator. Under these circumstances, the jury's verdict is not against the great weight of the evidence.

C. INSTRUCTIONAL ERROR

Davis raises three claims of instructional error. We review jury instructions as a whole to determine whether error requiring reversal occurred. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). The "trial court's determination whether a jury instruction is applicable to the facts of a case" is reviewed for an abuse of discretion. *Guajardo*, 300 Mich App at 34.

Davis first argues that the trial court erred in denying his request for an instruction on the lesser offense of voluntary manslaughter. "When a defendant is charged with murder, the trial court must give an instruction on voluntary manslaughter if the instruction is supported by a rational view of the evidence." *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013) (citation and quotation marks omitted). "Manslaughter is murder without malice." *People v Mendoza*, 468 Mich 527, 534-535; 664 NW2d 685 (2003). "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id*. at 535. "The degree of provocation required to mitigate a killing from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *People v Tierney*, 266 Mich App 687, 714-715; 703 NW2d 204 (2005) (citation and internal quotations omitted). The provocation must be sufficient to "cause a reasonable person to lose control." *Id.* at 715 (citation and internal quotations omitted).

Davis relies on testimony that the victim had contusions to his left arm and left forearm. Davis argues that this evidence suggests that the victim may have been the initial aggressor, either by engaging defendants in a physical altercation or by drawing his firearm. Even accepting Davis's suggestion that the contusions may have been sustained in an altercation with the defendants, there was no evidence that the victim initiated any altercation. On the contrary, the evidence indicated that it was Davis and Harvey who pursued the victim after he left the market. There is no rational view of the evidence that would have permitted the jury to find that the victim was killed by an act committed in the heat of passion, caused by adequate provocation. Accordingly, the trial court did not abuse its discretion by failing to instruct the jury on voluntary manslaughter.

Davis also argues that the trial court improperly deviated from the standard jury instruction on aiding and abetting when it instructed the jury that, to prove aiding or abetting, the prosecutor was required to prove "that before or during the crime the defendant did or said something to aide [sic], assist, *encourage or incite* the commission of the crime." Davis observes that both M Crim JI 8.1, and its predecessor, CJI2d 8.1, only use the term "assist." He argues that the trial court's inclusion of the additional terms "encourage" and "incite" resulted in an instruction that made it "more comfortable" for the jury to convict Davis.

The use note for M Crim JI 8.1 indicates that the committee chose to replace the statutory phrase, "procures, counsels, aids, or abets" with the term "assists" because the committee "believes 'assists' captures the essence of the prohibited conduct, but a court or counsel may prefer to select, in appropriate cases, a more specific verb from the statutory list." Although the terms "incite" and "encourage" are not used in the statute, this Court has repeatedly held that aiding and abetting "describes all forms of assistance rendered to the perpetrator, including any words or deeds that may support, encourage, or incite the commission of a crime." *Jackson*, 292 Mich App at 589. The trial court's aiding and abetting instruction accurately described the legal concept of aiding and abetting, and "fairly presented the issues to be tried." *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012) (quotation marks and citation omitted). Thus, there was no error.

Lastly, as explained in part II(C), the trial court did not err by instructing the jury on flight. The evidence indicated that Harvey and Davis arrived at the market in a blue Buick, but left the market's parking lot on foot, proceeding in the same direction as the victim. After the victim was shot, the suspects entered a waiting car and left the scene in the car. This evidence supported an inference that Davis fled the crime scene because of his involvement in the victim's shooting death. Consequently, the flight instruction was appropriate.

D. PROSECUTORIAL MISCONDUCT

Davis next argues that improper statements by the prosecutor during closing argument deprived him of a fair trial. Because Davis did not object to any of the challenged remarks, this issue is unpreserved and our review is limited to plain error affecting his substantial rights. *Bennett*, 290 Mich App at 475; *Unger*, 278 Mich App at 235.

Davis asserts that the prosecutor misstated portions of the testimony of a witness, Purvis Charlene Pullen, by erroneously stating that she heard people arguing and heard shots coming from a car. Pullen actually testified that she looked out her window when she heard shots down the street, and she heard voices coming from a car. "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Thomas*, 260 Mich App at 454. To the extent that the prosecutor mischaracterized Pullen's testimony, the misstatement did not materially detract from or add to the prosecution's proofs. The trial court's instruction that the attorneys' statements and arguments are not evidence was sufficient to dispel any prejudice and protect Davis's substantial rights. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). We disagree with Davis's additional argument that the prosecutor's statements concerning ballistics were not supported by the evidence. Although the remarks were not supported by any witness testimony, they were supported by Detective Flores's report, which was admitted pursuant to the parties' stipulation. Accordingly, the remarks were not improper.

Davis also argues that the prosecutor made an improper appeal to the jury's sympathy by stating that the victim was "a man and father," and "a man that lived in our community," but was now dead. The prosecutor also stated, "We never got to hear from him." These remarks were not overly inflammatory and did not blatantly appeal to the jury's sympathy. See *Akins*, 259 Mich App at 563 n 16. To the extent that the remarks can be considered improper, the trial

court's instruction to the jury that it should not be influenced by sympathy was sufficient to protect Davis's substantial rights.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Davis argues that he was denied the effective assistance of counsel at trial because of trial counsel's failure to object to inadmissible evidence and failure to object to the prosecutor's improper remarks. Davis did not raise an ineffective assistance of counsel claim in the trial court by moving for a new trial or a *Ginther*[1] hearing. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). Instead, Davis filed an untimely motion to remand with this Court under MCR 7.211(C). A motion to remand must be filed within the time for filing the appellant's brief. Davis failed to comply with that rule. In his defense, Davis cites this Court's remand authority under MCR 7.216(A)(5). That court rule however is inapplicable here, because additional evidence or development of the factual record is not necessary for appellate consideration of Davis's ineffective assistance claims. MCR 7.211(C)(1)(a)(*ii*). Accordingly, we decline to exercise our authority under MCR 7.216(A)(5), and to that extent deny Davis's motion for remand.

To establish ineffective assistance of counsel, Davis must demonstrate that counsel's performance "fell below an objective standard of reasonableness under prevailing norms," and that counsel's deficient conduct was prejudicial. "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Id*.

Davis's claim of ineffective assistance of counsel based on the admission of inadmissible evidence is without merit. Davis's argument against admissibility of the still photos and sequential video is solely reliant upon the fact that the exhibits were shown to the jury before they were admitted into evidence. Davis contends that the process of publishing before admission is reversible error that warrants a remand or a new trial. Davis cites *People v Johnson*, 83 Mich App 1; 268 NW2d 259 (1978) and *People v Brisco*, 15 Mich App 428; 166 NW2d 475 (1968), in furtherance of his position. Neither case however, supports Davis's contention. The proper articulation of the rule is "that evidence exhibited to the jury but not *offered* or *introduced* is to all intents and purposes considered as evidence. The use of evidence in court inadmissible by direct offer, cannot be condoned entry through the back door and cannot be allowed where entry through the front door has been refused." *Johnson*, 83 Mich App at 13; (emphasis added); (internal citations omitted). Here, the still photos and sequential video *were subsequently* offered as evidence. Further, unlike the cases of *Johnson* and *Brisco*, where the evidence was never admitted, the still photos and sequential video here were duplicative of evidence that was admitted, namely prosecution exhibits 105 and 104. There being no other basis to exclude the exhibits, we will not find that trial counsel was required to object to otherwise admissible evidence. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (an attorney is not ineffective for not objecting to admissible evidence).

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

Davis's second basis for claiming ineffective assistance and requesting remand is prosecutorial misconduct. As discussed previously, the prosecutor's remarks either were not improper or did not prejudice Davis's substantial rights. The prosecutor's remarks regarding Pullen's testimony were properly drawn inferences from the testimony. The prosecutor's statements regarding ballistics were properly drawn from a report admitted into evidence. Accordingly, counsel was not ineffective for failing to object. *Ericksen*, 288 Mich App at 201.

F. CUMULATIVE ERROR

Davis argues that even if no single error requires reversal, the cumulative effect of the many errors alleged on appeal requires reversal. "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." *Dobek*, 274 Mich App at 106.

We have concluded that Davis has established only two meritorious issues: (1) the trial court's admission of Gibson's testimony that he used unspecified technology to "flatten" and read a photograph of an angled license plate, and (2) the failure of the prosecutor to formally admit the sequential video into evidence. As explained, however, these errors were harmless because the license plate evidence did not add significant weight to the prosecution's proofs, and the sequential video was duplicative of the videos from each camera. These errors, cumulatively considered, did not deny Davis a fair trial.

G. SENTENCING

Davis also argues that resentencing is required because the trial court erred in scoring offense variables (OV) 5 and 14 and engaged in judicial fact-finding in violation of *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

Under MCL 777.35(1)(a), OV 5 can be scored at 15 points when "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(2) notes that "[t]he fact that treatment has not been sought is not conclusive." The prosecution requested 15 points be scored based on the statements of the victim's daughter included in the presentence investigation report (PSIR). The victim's daughter stated that the incident altered the course of her life forever, her father was a key factor in her life, she could always talk to him, she was his only biological child, he was like a father to her siblings, she felt she needed therapy, and asked the victim advocate about therapy. Davis argued the record was devoid of evidence as to any serious psychological injury and that the nature of the crime of homicide encompassed the grief experienced by loved ones left behind. "[A] sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a [PSIR]...." *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008) (quotation marks omitted). Further, a PSIR "is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2013). Thus, consideration of the impact statement given by defendant's daughter was not improper.

Under MCL 777.44(1)(a), OV 14 can be scored 10 points when the "offender was a leader in a multiple offender situation." When determining the offender's role, the sentencing court is to "[c]onsider the entire criminal transaction." MCL 777.44(2)(a). The prosecution requested 10 points be scored because Davis was "the adult in this situation and it would be appropriate to score him as the leader in a multiple offender situation." Davis argued that video surveillance showed defendant Harvey as the initiator of contact with Davis and Davis leaving with Harvey. The court agreed with the prosecution that points should be assessed where Davis was the older of the two offenders.

After oral argument in this case, our Supreme Court decided *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (Docket No. 149073, decided July 29, 2015). In *Lockridge*, the Court extended the rule of *Alleyne* to Michigan's statutory sentencing guidelines scheme and concluded that the sentencing guidelines violate the Sixth Amendment because they allow a sentencing judge to find by a preponderance of the evidence facts that are used to score the offense variables, and thus, mandatorily increase the floor of the minimum guidelines range. *Id*. at 373-374, 379, 383, 389.[2] To address the constitutional violation, the Court explained that "[w]hen a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so." *Id*. at 391-392. We are to review a departure sentence for reasonableness. *Id*. at 392. "Resentencing will be required when a sentence is determined to be unreasonable." *Id*. Although the *Lockridge* decision renders Michigan's sentencing scheme advisory, and not mandatory, sentencing courts are still required "to consult the applicable guidelines range and take it into account when imposing a sentence. Further, sentencing courts must justify the sentence imposed in order to facilitate appellate review." *Id*. at 392.

Because Davis did not object to the scoring of the sentencing guidelines on *Alleyne* grounds at sentencing, our review is for plain error affecting substantial rights. *Id*. To establish plain error, a defendant must show that, 1) an error occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[D]efendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Lockridge*, 498 Mich at 394. On remand, the trial court is to determine whether it would have "imposed a materially different sentence but for the constitutional error." *Id*. at 397. If the court determines that it would have, the defendant shall be resentenced. *Id*.

The 15 points scored for OV 5 were not based on facts admitted to by Davis or found by the jury. The 10 points scored for OV 14 were also not based on facts admitted to by Davis or found by the jury.

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[2] Before *Lockridge*, this Court followed *People v Herron*, 303 Mich App 392, 405; 845 NW2d 533 (2013) that *Alleyne* does not implicate Michigan's sentencing scheme.

Davis received a total offense variable score of 105 points, placing him in OV Level III (100 or more points), the highest level of offense severity on the applicable sentencing grid. MCL 777.61. We agree with Davis that a potential 10 or 15-point reduction would place him in OV Level II. Davis's sentence is also not one of an upward departure. Accordingly, we remand the issue of whether resentencing is appropriate in this case to the trial court. *Id*. at 395 citing *US v Crosby*, 397 F3d 103 (CA 2, 2005). On remand, the trial court is to consider whether it would have imposed a materially different sentence, but for the constitutional error; if it would have, Davis shall be resentenced. *Id*. at 397.

IV. COURT COSTS (DOCKET NOS. 319482 AND 319483)

Both defendants argue that the trial court lacked the authority to impose court costs of $600. Although MCL 769.1k(1)(b)(*ii*) authorizes the court to impose "[a]ny cost" at sentencing, defendants argue that the imposition of costs was improper under *People v Cunningham*, 496 Mich 145, 154; 852 NW2d 118 (2014), because an award of costs is not separately authorized by the second-degree murder statute. After *Cunningham* was decided, the Legislature amended MCL 769.1k as "a curative measure to address the authority of courts to impose costs under MCL 769.1k before the issuance of *Cunningham*." *People v Konopka (On Remand)*, 309 Mich App 345, 355; 869 NW2d 651 (2015), (addressing MCL 769.1k, as amended by 2014 PA 352). In *Konopka*, this Court held that MCL 769.1k(1)(b)(*iii*), as amended, authorizes the court to assess "any cost reasonably related to the actual costs incurred by the trial court," and thus "provides for an award of certain costs that are *not* independently authorized by the statute for the sentencing offense." *Id.* at 357-358. This Court further observed that the statute expressly applied retroactively to all costs imposed before June 18, 2014, and rejected the defendant's constitutional challenges to the amended statute and its retroactive application. *Id*. at 357. Although this Court held that the trial court's imposition of costs was not erroneous under the amended statute, it held that remand was required because the trial court did not establish a factual basis for the $500 costs imposed. Thus, it remanded the case to determine whether the costs imposed were reasonably related to the actual costs, as required by MCL 769.1k(1)(b)(*iii*). *Id.* at 359-360, 376.

In this case, the trial court imposed costs of $600 against each defendant. Those costs were imposed on November 19, 2013. In light of MCL 769.1k(1)(b)(*iii*), as amended by 2014 PA 352, the imposition of costs was not erroneous. However, as in *Konopka*, the record does not establish a factual basis for the costs imposed in either case. Accordingly, we remand each defendant's case for determination of the factual basis for the costs imposed pursuant to MCL 769.1k(1)(b)(*iii*).

V. CONCLUSION

We affirm defendant Harvey's conviction and sentence. We affirm defendant Davis's conviction, but remand for resentencing based on *Lockridge*. We affirm the trial court's authority to impose costs in each defendant's case, but remand for determination of the factual

basis for the costs imposed against each defendant pursuant to MCL 769.1k(1)(b)(*iii*). We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael F. Gadola