STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2017
v	No. 330577 Wayne Circuit Court
DAVONTE DAWAYNE NEWELL, Defendant-Appellant.	LC No. 15-002772-02-FC

Before: MURPHY, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life without parole for the first-degree murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence for a jury to convict him of any type of murder because there was no evidence of his intent. " 'We review de novo a challenge on appeal to the sufficiency of the evidence.' " *People v Henry*, 315 Mich App 130, 135; 889 NW2d 1 (2016), quoting *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "To determine whether the prosecutor has presented sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the prosecutor and determine 'whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' " *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013), quoting *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015), quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

There is sufficient evidence for a guilty verdict where "a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *Tennyson*, 487 Mich at 735 (quotation marks and citation omitted). "The prosecution need not negate every reasonable theory of innocence, but need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant." *People v Henderson*, 306 Mich App 1, 9; 854 NW2d 234 (2014). "Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime." *People v Blevins*, 314 Mich App 339,

357; 886 NW2d 456 (2016). Any and all conflicts that arise in the evidence must be resolved "in favor of the prosecution." *Henderson*, 306 Mich App at 9. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A person is guilty of first-degree murder when they commit a "willful, deliberate, and premeditated killing." MCL 750.316(1)(a). Stated differently, "[a] conviction of first-degree premeditated murder requires evidence that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011) (quotation marks and citation omitted). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*. (quotation marks and citation omitted). "Second-degree murder is any kind of murder not otherwise specified in the first-degree murder statute." *Blevins*, 314 Mich App at 358, citing MCL 750.317. More specifically, "[t]he elements of second-degree murder consist of (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Henderson*, 306 Mich App at 9 (quotation marks and citations omitted). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). It is undisputed that the prosecution relied solely on allegations that defendant or Williams had the intent to kill the victim. "The intent to kill may be proved by inference from any facts in evidence." *Jackson*, 292 Mich App at 588.

Defendant was also charged under an aiding and abetting theory. "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." MCL 767.39. "The phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *Henderson*, 306 Mich App at 10, quoting *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004) (quotation marks omitted). The Michigan Supreme Court has established elements that must be proven in order to support a conviction under an aiding and abetting theory:

> [T]he prosecutor 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. [*People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citations omitted).]

With regard to defendant's conviction of first-degree murder either as the principal or as an aider and abettor, defendant's challenge under sufficiency of the evidence first focuses on the element of intent. Specifically, defendant argues that for first-degree murder, or the lesser included offense of second-degree murder, the prosecution failed to provide sufficient evidence that

defendant had the intent to kill the victim, which the prosecution solely relied on to establish defendant's intent. Alternatively, defendant argues that the prosecution did not provide sufficient evidence that the victim's killing was premeditated or deliberate and, therefore, this Court must reverse defendant's first-degree murder conviction with instructions to enter a conviction for second-degree murder and remand for resentencing. We disagree on both accounts.

"[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). The Michigan Supreme Court has previously discussed the intent element as it relates to charges under an aiding and abetting theory:

> We hold that a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. [*People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006).]

"Intent to kill may be inferred from all the facts in evidence, including the use of a deadly weapon." *Henderson*, 306 Mich App at 11. This Court has held that certain evidence "tend[s] to establish defendant's consciousness of guilt." *People v Unger*, 278 Mich App 210, 225; 749 NW2d 272 (2008). Specifically, "[m]inimal circumstantial evidence is sufficient to show an intent to kill, and that evidence can include a motive to kill, along with flight and lying, which may reflect a consciousness of guilt." *Henderson*, 306 Mich App at 11, citing *Unger*, 278 Mich App at 223, 225-227. Furthermore, evidence that a defendant had the opportunity to kill the victim "is logically relevant in a prosecution for murder." *Unger*, 278 Mich App at 224.

The evidence allowed for an inference that defendant knew of Williams's intent to kill the victim and intended to aid him in so doing. Of particular importance are four separate facts. First, defendant became aware that Williams was planning something when they met up earlier in the day. Defendant recalled that Williams told defendant that he would need defendant on his side for the day. While defendant stated in the interrogation that Williams did not provide names, the jury could have inferred that defendant understood Williams's meaning. Second, defendant reached out to the victim initially to meet up. In so doing, defendant did not inform the victim that he was bringing Williams with him. From those two facts, the jury could have inferred that defendant knew that Williams wanted to kill the victim and aided Williams by setting up the opportunity for Williams to get in contact with the victim, and doing so in a secret manner. Third, defendant voluntarily drove Williams and the victim to a desolate area. Despite defendant's statement that the purpose of the drive was to rob a drug house, rather than to kill the victim, the jury could have inferred otherwise based on the preceding two facts that defendant was aware of Williams's nefarious intent and worked with Williams to get Williams and the

victim in the same car. Additionally, the jury could have inferred that defendant was being dishonest about the purpose of the drive considering that defendant acknowledged that no one in the car had a mask with which to conceal their identities. Fourth, and last, defendant initially lied to police during his interrogation. The jury was permitted to consider that initial misstatement by defendant as showing defendant's guilty conscience and his knowledge of Williams's intent to kill the victim. See *Henderson*, 306 Mich App at 11.

Lastly, the jury was permitted to consider that defendant's original misstatement to the police revealed his consciousness of guilt, that he knew of Williams's intent to murder the victim, and participated willingly. See *Henderson*, 306 Mich App at 11. Considering that "it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent," even this "minimal circumstantial evidence will suffice to establish the defendant's state of mind[.]" *Kanaan*, 278 Mich App at 622. Provided that the jury could permissively infer that defendant knew of Williams's intent to kill the victim, and could further infer defendant's intent to aid Williams in fulfilling that intent, there was adequate evidence to sustain the intent element of defendant's conviction of first- or second-degree murder. *Robinson*, 475 Mich at 15.

Defendant alternatively argues that there was insufficient evidence that his participation in the crime was premeditated and deliberate, as required for a first-degree murder conviction. Given the factual scenario that the jury could have permissibly inferred, described *supra*, it is clear that defendant would have had a chance to "take a second look." *Jackson*, 292 Mich App at 588 (quotation marks and citation omitted). Indeed, the factual scenario provided reveals that there was specific planning involved, particularly that defendant would call the victim to set up a meeting, but would bring Williams with him without the victim's knowledge. As discussed, the jury was permitted to infer that defendant knew of Williams's intent to kill the victim, participated in setting up the meeting that would allow Williams to execute the plan, and drove the victim and Williams to the place where the murder occurred. That was more than adequate time for the jury to determine that defendant premeditated and deliberated his role in the murder of the victim. See *id*. Therefore, there was sufficient evidence to sustain defendant's conviction of first-degree murder on an aiding and abetting theory. *Robinson*, 475 Mich at 15.

Defendant next argues that the prosecution committed error[1] requiring reversal during closing argument. Because defendant failed to make a "contemporaneous objection or request

[1] Although this type of claim is generally referred to as "prosecutorial misconduct," this Court has stated that, "the term 'misconduct' is more appropriately applied to those extreme . . . instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct," but that claims "premised on the contention that the prosecutor made a technical or inadvertent error at trial" are "more fairly presented as claims of 'prosecutorial error[.]' " *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015) (citation omitted). Nevertheless, regardless of "what operative phrase is used, [this Court] must look to see whether the prosecutor committed errors during the course of trial that deprived defendant of a fair and impartial trial." *Id*. at 88, citing *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Here, we will refer to defendant's claim as prosecutorial error, as the argument is limited to technical errors by the prosecutor.

for a curative instruction in regard to any alleged error," this issue is not preserved for review before this Court. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "Generally, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but a trial court's factual findings are reviewed for clear error." *Id*. However, because the issues presented have not been preserved for review, this Court must review the "unpreserved claim for plain error affecting defendant's substantial rights." *People v Roscoe*, 303 Mich App 633, 648; 846 NW2d 402 (2014). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. In order to show that a defendant's substantial rights were affected, there must be "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. As such, reversal is only warranted if defendant was actually innocent and the plain error caused defendant to be convicted, or if the error " 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings' independent of the defendant's innocence." *Id*., quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks omitted; alteration in original).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the 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). When considering allegations of prosecutorial error, this Court must "examine the entire record and evaluate a prosecutor's remarks in context." *Id*. at 64. "Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence" during closing arguments, the prosecutor "is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case[.]" *People v Schumacher*, 276 Mich App 165, 178-179; 740 NW2d 534 (2007) (citations omitted). In cases alleging prosecutorial error based on remarks made by a prosecutor, those remarks "must be examined in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial[.]" *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). In light of that, prosecutors are generally "accorded great latitude regarding their arguments[,]" and are "free to argue the evidence and all reasonable inferences" that arise out of the evidence, especially in respect to the evidence's relation to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks and citation omitted).

The record in this case reveals that the victim was shot six times in the back. Five of those bullets remained in the victim's body, but the sixth bullet was later discovered at the scene of the crime. A firearms expert testified that one of the five bullets found in the victim's body could not be conclusively connected to any gun in the case, including the silver revolver. For the other five bullets – four in the body and one on the ground – there were adequate markings to indicate that they were fired from the silver revolver. There was also evidence that the silver revolver could only be fired five times before requiring to be reloaded, a process that would take a not insignificant amount of time. Given that evidence, during closing argument, the prosecution argued that there must have been a second gun and a second shooter.

The prosecution's statements were not at all improper because the prosecution was "free to argue the evidence and all reasonable inferences" arising out of that evidence. *Bahoda*, 448 Mich at 282 (quotation marks and citation omitted). The prosecution properly listed the evidence: there were six bullets, five of which clearly matched the silver revolver, and a sixth that could not be determined. Defendant takes issue with the prosecution's statement that the last bullet did not match the silver revolver, arguing that it might have come from the silver revolver but the results could not be determined. Regardless of semantics, the evidence clearly showed that the sixth bullet was not a conclusive match to the silver revolver. The prosecution was therefore permitted to argue the inference that the sixth bullet did not come from the silver revolver. Furthermore, the evidence clearly showed that five of the bullets came from the silver revolver, which could only fire five bullets before being reloaded. There was also testimony that reloading the silver revolver could not be done quickly. Given that there were six bullets fired and that one of those bullets did not match the silver revolver, it was well within the realm of reasonableness for the prosecution to argue the inference that there must have been another gun and another shooter. Therefore, because those inferences were reasonable given the evidence, and the prosecution used them to conform to its version of the case, this did not amount to prosecutorial error. See *Bahoda*, 448 Mich at 282. As such, there was no plain error committed by the prosecution in making those arguments. *Roscoe*, 303 Mich App at 648.

Defendant next argues that his defense counsel was ineffective for several different reasons. In order to preserve a claim of ineffective assistance of counsel, a defendant is required to "move the trial court for a new trial or a *Ginther*[2] hearing." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 431; 884 NW2d 297 (2015). The record is plain that defendant never moved for a new trial or for a *Ginther* hearing, so this issue is unpreserved. *Id*. "Appellate review of an unpreserved argument of ineffective assistance of counsel, like this one, is limited to mistakes apparent on the record." *People v Johnson*, 315 Mich App 163, 174; 889 NW2d 513 (2016). " 'The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo.' " *People v Schrauben*, 314 Mich App 181, 189; 886 NW2d 173 (2016), quoting *Brown*, 279 Mich App at 140.

"Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions." *Schrauben*, 314 Mich App at 189-190, citing US Const, Am VI; Const 1963, art 1, § 20. "However, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id*. at 190. The United States Supreme Court has held that "in order to receive a new trial on the basis of ineffective assistance of counsel, a defendant must establish that 'counsel's representation fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), quoting *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "When reviewing defense counsel's performance, the reviewing court must first objectively 'determine whether, in light of all the

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

circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' " *Jackson (On Reconsideration)*, 313 Mich App at 431, quoting *Strickland*, 466 US at 690. "Next, the defendant must show that trial counsel's deficient performance prejudiced his defense—in other words, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Jackson (On Reconsideration)*, 313 Mich App at 431, quoting *Vaughn*, 491 Mich at 669 (quotation marks and citation omitted).

This Court does not "second-guess counsel's trial strategy or assess [trial counsel's] competence with the benefit of hindsight." *Schrauben*, 314 Mich App at 191. Likewise, this Court will not find trial counsel to be ineffective where, even if it had made an objection, that objection would have been futile. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant first argues that trial counsel was ineffective for failing to object to the prosecution's allegedly inappropriate statements during closing argument. We disagree because, as just discussed, the prosecution's closing argument was not improper. Therefore, because any objection by trial counsel would have been futile, given that the prosecution's arguments were not improper, trial counsel was not ineffective for failing to so object. *Id*.

Next, defendant, in his Standard 4 brief, argues that trial counsel was ineffective for failing to object to certain jury instructions. Because there was no error in the jury instructions, we disagree. " 'A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.' " *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006), quoting *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "Challenges to jury instructions are considered 'in their entirety to determine whether the trial court committed error requiring reversal.' " *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012), quoting *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). However, "an imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *People v Kowalski*, 489 Mich 488, 501-502; 803 NW2d 200 (2011).

Defendant argues that trial counsel should have objected when the trial court failed to provide the entire instruction required from the Michigan Supreme Court's decision in *People v Handley*, 415 Mich 356; 329 NW2d 710 (1982). The crux of that instruction was to ensure that the jury knew that it was entitled to consider a lesser included offense in two separate situations: (1) if it determined that defendant was not guilty of the principal offense (here, first-degree murder) or (2) if the jurors were unable to agree on defendant's guilt with respect to the principal charge. See *id*. In light of that decision, the Michigan Supreme Court promulgated M Crim JI 3.11(6) to comport with *Handley*. A review of *Handley*, M Crim JI 3.11(6), and the instruction provided by the trial court reveals that there was no substantive error with the trial court's jury instruction. Stated differently, the jury instruction used by the trial court "fairly presented the issues to be tried and adequately protected [] defendant's rights." *Kowalski*, 489 Mich at 501-502. As such, its imperfect nature was "not grounds for setting aside a conviction[.]" *Id*. Similarly, because there was no error with the trial court's jury instructions with respect to *Handley*, trial counsel was not ineffective for failing to object to that jury instruction, because it would have been futile. See *Thomas*, 260 Mich App at 457.

Defendant next argues, in his Standard 4 brief, that trial counsel was ineffective for failing to object to the trial court's jury instructions that improperly led the jury to believe that there was no option to find defendant not guilty of all counts. However, the record is clear that the jury was aware that it was able to find defendant not guilty of all counts. "It is axiomatic that jurors are presumed to have followed their instructions." *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). As such, the jury instruction used by the trial court "fairly presented the issues to be tried and adequately protected [] defendant's rights." *Kowalski*, 489 Mich at 501-502. In such circumstances, its imperfect nature was "not grounds for setting aside a conviction[.]" *Id*. Similarly, because there was no error with the trial court's jury instructions, trial counsel was not ineffective for failing to object to that jury instruction, because it would have been futile. See *Thomas*, 260 Mich App at 457.

Defendant's next argument in his Standard 4 brief is that his defense counsel was ineffective for failing to call additional witnesses. "Decisions regarding whether to call or question a witness are presumed to be matters of trial strategy." *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "Trial counsel's failure to a call a witness is only considered ineffective assistance if it deprived the defendant of a substantial defense." *Putman*, 309 Mich App at 248. "A substantial defense is one that could have affected the outcome of the trial." *Id*. "The defendant 'bears the burden of demonstrating both deficient performance and prejudice[;] the defendant [also] necessarily bears the burden of establishing the factual predicate for his claim.' " *People v Cooper*, 309 Mich App 74, 81; 867 NW2d 452 (2015), quoting *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (alterations in original).

In particular, defendant argues that his defense counsel was ineffective for failing to call a witness from the residential area surrounding the site of the shooting. Defendant asserts that such a witness would be able to testify regarding whether there was a break between shots fired, insisting that if there was a break in shooting, the theory of a second shooter and second gun would have been debunked. Defendant's claim that defense counsel was ineffective for failing to call an alleged witness that would testify to a pause between shots five and six necessarily fails because there was no evidence that such a witness existed. Indeed, it is equally likely that any witnesses within earshot of the crime were specifically not called by defense counsel because they would have testified that there was no pause between shots. Therefore, because there is no evidence in this case that a witness would have been available to testify that there was a break between shots, defendant failed to establish the factual predicate for his argument and there was no error apparent on the record. *Johnson*, 315 Mich App at 174; *Cooper*, 309 Mich App at 80.

Defendant also claims that defense counsel was ineffective for failing to obtain an expert witness on the issue of firearms. This argument is likewise without merit. "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Once again, defendant has failed to establish a factual predicate for his claim. Defendant posits that there may have been a ballistics expert available that would have testified that the sixth bullet could actually have been shot from the silver revolver. However, defendant has provided no affidavit or other evidence

that such an expert witness exists or to what that witness's testimony would be. Defendant's argument must fail. *Johnson*, 315 Mich App at 174; *Cooper*, 309 Mich App at 80.

We also reject defendant's argument that defense counsel was ineffective for failing to properly cross-examine witnesses. "[H]ow to question witnesses [is] presumed to be [a] matter of trial strategy." *Putman*, 309 Mich App at 248. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey*, 237 Mich App at 76-77. Defendant first takes issue with the cross-examination of the medical examiner. Defendant states that because the medical examiner testified that the bullets entered the victim's body at an upward trajectory, defense counsel should have asked what angle a gun would have to be fired to obtain that entry. Defendant suggests that the medical examiner would have corroborated testimony from the ballistics expert that the gun would have to have been tilted backwards. Once again, this argument fails because he has not established that the medical examiner would have testified to that fact. Indeed, defendant fails to establish that the medical examiner was even competent to testify at what angle a gun must be fired in order to result in a given entry wound. This failure to create a factual predicate for this claim of error is fatal to defendant's argument. *Cooper*, 309 Mich App at 80.

Defendant also argues that defense counsel should have better cross-examined Officer Brad Cox regarding his interaction with defendant at 4:00 a.m. the morning after the shooting. Defendant suggests that Officer Cox's testimony was inconsistent, but a review of the record reveals no such inconsistency. Therefore, defendant failed to establish a factual predicate for his claim that Officer Cox made inconsistent statements. *Cooper*, 309 Mich App at 80.

We similarly reject defendant's argument that defense counsel failed to properly cross-examine the victim's girlfriend regarding her allegedly inconsistent description of the car that picked up the victim on the day of the murder. However, in his statement to the police, defendant plainly stated that he picked up the victim on the day of the crime. Therefore, it was not objectively unreasonable for defense counsel to not impeach the victim's girlfriend on her prior statements, when doing so would have been inconsistent with what defendant himself stated, i.e., that he picked up the victim. *Jackson (On Reconsideration)*, 313 Mich App at 431.

Finally, defendant argues that his counsel should have better cross-examined the officer that interviewed the resident that identified gunshots on the day of the shooting. Defendant asserts that defense counsel should have asked that officer if the resident stated that there was a pause between shots. First, defendant provides no evidence that the resident would have testified as alleged by defendant. *Cooper*, 309 Mich App at 80. Second, asking the officer to testify regarding what the resident told him would have been inadmissible hearsay. A failure to attempt to admit hearsay evidence is not grounds for finding an attorney ineffective. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Affirmed.

/s/ William B. Murphy
/s/ Christopher M. Murray
/s/ Michael J. Kelly