STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2019
v	No. 346401 Wayne Circuit Court
RODNEY BROWN, Defendant-Appellant.	LC No. 17-007272-01-FH

Before: BECKERING, P.J., and BORRELLO and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Rodney Brown, appeals as of right his jury trial convictions of two counts of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, and two counts of carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] The trial court sentenced defendant to concurrent terms of 1 to 10 years' imprisonment for each AWIGBH conviction, and to two years' imprisonment for each felony-firearm conviction, to run consecutive to his AWIGBH sentences, but concurrent to one another. Finding no error requiring reversal, we affirm.

I. BACKGROUND

Defendant's convictions arise from the shooting of George Parks and Larnel Brown in the early morning hours of July 29, 2017. Larnel got into a fistfight with Terrell Jenkins outside of the Woodward Bar and Grill shortly after the bar closed. A large group of people were watching the fight until several gunshots were fired into the alley where the fight was taking

[1] Defendant was charged with three counts of assault with intent to murder, MCL 750.83, and three counts of AWIGBH for actions directed at three victims, as well as separate counts of felony-firearm associated with each of the felony charges. The jury acquitted defendant of all three counts of assault with intent to murder, four counts of felony-firearm, and the AWIGBH count concerning Brandon White, also known as Brandon Hearns.

place. Larnel and George were both shot in the leg, and defendant was shot in the hand. Brandon White was also injured, but it is unclear whether the laceration to his arm was a gunshot wound.

Richard Allen testified that, after hearing the first gunshot, he looked around and saw defendant fire a gun into the air. Defendant then fired two shots with his arm extended straight out at chest height, aimed in the alley toward Larnel and Terrell. Brandon also testified that he saw defendant shoot a gun in Larnel's direction. After the gunfire ended, Larnel saw defendant standing in the mouth of the alley with a gun in hand, but did not see defendant shooting. Defendant was the only person seen with a gun.

Testifying in his own defense, defendant acknowledged that he was lawfully carrying a gun at the time of the shooting and removed it from his holster when he was attacked by a much larger man while Larnel and Terrell were fighting. Defendant indicated that his attacker was choking him and he feared for his life. He intended to shoot the attacker, but the attacker tried to wrestle the gun away from defendant. According to defendant, the gun discharged four times while they struggled over it. Defendant did not know whose finger was on the trigger or where the gun was pointing, but the last shot struck defendant in the hand. Defendant did not know what happened to the gun in the aftermath. Richard, Larnel, and Brandon did not see anyone attacking defendant in the manner he described at trial. Richard, however, testified that he saw a tall, dark-skinned man attempt to disarm defendant shortly after defendant stopped shooting. Richard indicated that defendant and the other man were "struggling" and "tussling" over the gun, but Richard did not see what happened next, where the man went, or what happened to the gun.

II. PROSECUTORIAL MISCONDUCT[2] OR ERROR

On appeal, defendant raises several claims of prosecutorial misconduct or error. "[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 on a case-by-case basis, and this Court must consider the alleged error in the context of the full record. *Id*. at 64. "Generally, prosecutors are accorded great latitude regarding their arguments, and are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). Furthermore, a "good-faith effort to admit evidence does not constitute misconduct." *Dobek*, 274 Mich App at 70.

Defendant advances several intermingled claims of prosecutorial misconduct or error, alleging that the prosecutor manipulated an audio recording to mislead the jury, improperly

[2] This Court has recognized that although "prosecutorial misconduct" is a commonly accepted term of art in criminal appeals, it is a misnomer when referring to allegations that do not involve violations of the rules of professional conduct or illegal activity. *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015). Less egregious conduct involving inadvertent or technical error is more properly characterized as "prosecutorial error." *Id*. at 88.

impeached Richard and Larnel with prior statements, interfered with defense counsel's closing argument, and made several improper remarks during her own closing argument. We will address each of defendant's arguments separately.

A. CROSSFIRE EVIDENCE AND ARGUMENT

Defendant first argues that the prosecutor manipulated and mischaracterized evidence by playing only small clips of statements he made during a recorded phone call in which he used the term "crossfire." Defendant maintains that the prosecutor intentionally misled the jury about defendant's statements in order to negate defendant's claim of self-defense. We disagree.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defense counsel did not object to the prosecutor's cross-examination of defendant concerning the recorded phone call or her closing arguments about defendant's use of the term crossfire and his claim of self-defense. Accordingly, this issue is unpreserved. "A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010). "To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003).

In *People v Smith*, 498 Mich 466, 470; 870 NW2d 299 (2015), the Michigan Supreme Court considered a claim of prosecutorial misconduct involving the prosecutor's duty to correct "substantially misleading, if not false, testimony of a key witness . . . ." In that case, the defendant was charged with first-degree felony murder, MCL 750.316(1)(b), arising from the death of a known drug dealer. *Smith*, 498 Mich at 470-471. A codefendant and a second eyewitness were present when the victim was killed, and the prosecutor was aware that the uncharged eyewitness had been paid by the Federal Bureau of Investigation for his assistance in its investigation of the defendant's activities and role in the victim's death. *Id*. at 471. At the defendant's murder trial, the witness admitted that he had been compensated "by a federal agency for [his] cooperation," but also testified that he had not been paid for his cooperation "in relation to 'this case,' i.e., the prosecution of the defendant for [the victim's] murder." *Id*. at 472 (first alteration in original). Thereafter, the prosecutor posed narrow questions that enabled the witness to testify that he had not been specifically paid for his testimony in the state case. *Id*. The *Smith* Court explained that, "[b]y itself, such cautious presentation of testimony might not have been problematic because the prosecution was careful not to elicit outright false testimony." *Id*. at 472-473. However, during cross- and redirect-examinations, the witness was further questioned on the matter and repeatedly indicated that he "had not been compensated for his testimony at the defendant's trial and also that he had not been otherwise compensated for 'cooperating' 'with regards to this case.' " *Id*. at 474.

The Court concluded that the overall impression conveyed by the witness's testimony was false:

> Clearly, the jury could have interpreted this statement to indicate that [the witness] had never been paid for his involvement with the investigation of the . . . homicide, not merely that the Genesee County Prosecuting Attorney's office had not compensated him for "testimony" or cooperation with the defendant's formal prosecution. The latter point might have been true; the former point was plainly misleading and likely untrue, as the prosecutor well knew, having elicited [a federal agent's] testimony at the pretrial hearing. This former point, however, was never corrected or clarified at trial, nor was the true nature or extent of [the witness's] participation or compensation as an informant put before the jury. Rather, the prosecutor exploited the potential confusion . . . by reminding the jury of [the witness's] denials during closing argument, cementing the false notion that [the witness] had only been paid for his cooperation in other cases, and attempting to advance his credibility as a result of that fact[.] [*Id*.]

The Court held that the prosecutor's act of capitalizing on the false impression created by the witness's testimony was inconsistent with her duty to correct false testimony and did not comport with well-settled principles of due process. *Id*. at 481-482. Furthermore, because the defendant was convicted solely based on testimony from witnesses who had "significant credibility issues," the Court determined that the prosecutor's conduct violated defendant's right to due process and required appellate relief. *Id*. at 483.

In this case, defendant contends that the prosecutor engaged in similar misconduct with her treatment of the "crossfire" issue. Sometime before defendant was released from jail on bond pending his trial, he engaged in the following discussion during a recorded phone call with a friend named Ricki:

> *Defendant*: And I didn't even have—it wasn't even my situation honestly.
>
> *Ricki*: These phone calls are recorded.
>
> *Defendant*: I know. It was Terrell's situation. Like they jumped on Terrell like the week before.
>
> *Ricki*: Oh, but if it's self-defense, it's self-defense regardless of whose beef it is.
>
> *Defendant*: Sure. It was Terrell.
>
> *Ricki*: Self-defense is self-defense.
>
> *Defendant*: *It was Terrell. They jumped on Terrell the week before and then I was just happen to get caught in the crossfire Wednesday*.
>
> *Ricki*: Oh, defended yourself and boom, here we are.
>
> *Defendant*: Yeah.
>
> *Ricki*: Okay, okay.

> *Defendant*: *I just so happened to get caught in the crossfire and it's like a hundred fights, but I don't anything like—you know, I haven't really—I haven't been saying anything*. [Emphasis added.]

Defendant argues that by asking him to define crossfire as a situation involving more than one gun, then introducing only the italicized statements from his phone call, the prosecutor intentionally misled the jury into believing that defendant was using "crossfire" literally, rather than metaphorically, and that his self-defense theory was fabricated. We are unpersuaded.

Defendant's insistence that he used "crossfire" metaphorically to indicate that he was caught in the middle of Larnel's fight with Terrell misses the point of the prosecutor's line of questioning, which was less about "crossfire" than about the differences in defendant's accounts of the shooting incident. The prosecutor set the snippet of recorded conversation in the context of questions aimed at showing that defendant's initial account of his injury did not entail self-defense against a larger man who was strangling him. The record evidence shows that defendant told medical personnel who treated his injury that he was "hit with stray bullet in left hand." In addition, he told Ricki in the recorded conversation that he was caught in crossfire. Regardless of the meaning defendant gave "crossfire," these explanations differ from what he told the jury, i.e., that he pulled his gun because a taller, heavier man was choking him and he thought he was going to die. Moreover, defendant's explanation to medical personnel that a stray bullet hit him, dovetails with his explanation to Ricki that he was caught in the crossfire. Thus, unlike the prosecutor in *Smith*, 498 Mich at 474, the prosecutor in this case did not present evidence that she *knew* to be false or misleading. Rather, the prosecutor's comments arguably were attempts to piece defendant's early explanations of his injury into a coherent whole for purposes of comparing them with his later account.

Defendant's related argument alleging the impropriety of the prosecutor's closing argument is also unpersuasive. In pertinent part, the prosecutor argued as follows:

> Now, remember, before that search warrant was executed, all the firearms examiner could tell you is that all these four casings at the scene were fired from one gun. Didn't find the gun in the car that Terrell Jenkins drove him to the hospital in. Didn't find the gun in his car at the scene. So at that point all we can say is one gun fired those shots, all four of those shots.
>
> But it was after the search warrant was executed at his house in early November when we were able to physically tie him to that scene with that gun. So now, there's physical evidence that says you were there and your gun was there and it fired four times. So what do you do now? What do you do now, ladies and gentlemen? You start spinning a story 'cause you've got to answer why your gun's there. Before we couldn't prove it was his gun. But now we know that's his gun. Then we begin the story about being choked.

> Here's the problem with that. And you heard the jail calls. [Defendant] is under the impression that none of the calls are recorded.[3] Well, wouldn't it make you even more likely he would be very honest with his very good friend Ricki? He's talking to a very good friend on the phone from jail and he doesn't think it's being recorded? Don't you think at that point he would say, oh, my God, you would not believe what happened to me, this guy tried to choke me to death. He doesn't tell her that because the search warrant hadn't been executed on his house yet. . . . The only time he says that is when he is tied to the scene now with his gun.
>
> * * *
>
> I asked him sir, what's a crossfire and he indicates when two guns are shooting. Well, his testimony—strike that. His conversation with his very good friend talked about what was crossfire, what is a crossfire. That's not what he told you here by his own definition. But, again, remember all this took place before the defendant could be physically tied by the evidence to the scene with his gun.

The thrust of the prosecutor's closing argument was that defendant did not claim that he pulled his gun because someone was choking him until after police were able to link his gun to the shooting. The prosecutor grounded this argument in the evidence admitted at trial and in reasonable inferences arising therefrom. See *Seals*, 285 Mich App at 22. That defendant disagrees with this interpretation of the evidence does not make the prosecution's properly grounded argument improper.

Even if we were to conclude otherwise, defendant would not be entitled to appellate relief because he cannot demonstrate that the prosecutor's conduct affected his substantial rights. *Jones*, 468 Mich at 356; *Parker*, 288 Mich App at 509. Prior to playing the audio clips, defendant testified that he did not see multiple guns shooting on the night of the incident, and that the incident did not involve crossfire. After playing the first audio clip, the prosecutor asked defendant if he was telling Ricki that he "got caught in the crossfire," and defendant answered: "Of their fight. You didn't play the rest of it." Considering defendant's prior testimony and his response to the prosecutor's statement, the jury was aware that defendant disagreed with the prosecutor's characterization of the conversation and that defendant maintained that he was simply caught in the midst of "their fight."

Furthermore, even if the prosecutor had not introduced defendant's prior statements to discredit his testimony about the alleged attack on him that preceded the shooting, the prosecutor presented ample evidence from which the jury could have found, beyond a reasonable doubt, that defendant did not act in self-defense. It is undisputed that defendant was armed with a .40-caliber handgun on the night of the shooting and intentionally withdrew it from his holster. The

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[3] Although defendant indicated in the phone call that he was aware it was being recorded, defendant testified that he did not know his calls were recorded.

ballistics evidence from the case was consistent with a .40-caliber firearm and there was no evidence that any other weapon was involved. In addition, despite slight variations in the witnesses' accounts, Richard and Brandon both recalled seeing defendant fire a gun into the alley, and both men agreed that no one was assaulting defendant at that time. Larnel also saw defendant standing in the mouth of the alley with a gun in hand after the shots were fired, but did not see anybody attacking or choking defendant. Finally, Richard testified that he saw someone attempt to wrestle the gun away from defendant *after* defendant had shot into the alley. From this evidence, the jury could have determined that defendant was not attacked by an unidentified assailant and, therefore, was not acting in self-defense.

B. IMPEACHMENT WITH PRIOR STATEMENTS

Defendant next argues that the prosecutor improperly impeached Richard and Larnel with prior statements and treated the impeachment evidence as substantive evidence in her closing argument. Although we agree that the prosecutor's reference to Richard's out-of-court statement in closing argument was improper, defendant has not established entitlement to relief on this basis.

This Court reviews preserved claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). As a general matter, a witness who denies memory of a prior inconsistent statement may be impeached with extrinsic evidence of that statement. *People v Shaw*, 315 Mich App 668, 683; 892 NW2d 15 (2016). Furthermore, under MRE 607, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." However, a prosecutor may not impeach a witness with a prior statement when "(1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997).

When Richard described a stranger's attempt to disarm defendant after the shooting, he did not recall any shots being fired during the struggle. The prosecutor asked Richard if he remembered telling a police officer that defendant had been shot during the struggle, and Richard answered no. Later, the prosecutor elicited testimony from Detroit Police Officer Lynn Woods indicating that Richard reported that defendant's hand was shot when an unknown person tried to wrestle the gun away from defendant. Richard's prior statement was relevant to a central issue at trial because it affected the credibility of defendant's self-defense theory. Nonetheless, the statement was not improper under *Kilbourn* because Richard testified at length about the circumstances surrounding the shooting. Richard testified to the conduct of Larnel, Terrell, and Brandon leading up to the fight between Larnel and Terrell, to the location of the fight and the size of the crowd, to the shots fired, to taking Larnel to the hospital, and to his interactions with police after the incident. Thus, Richard's credibility was relevant to matters beyond the veracity of his inconsistent statement. Accordingly, there was nothing improper about the prosecutor's impeachment of Richard.

Turning to the prosecutor's impeachment of Larnel, defendant directs this Court's attention to the prosecutor's request to admit a recorded statement in which Larnel purportedly

identified defendant as the shooter. The prosecutor attempted to lay a foundation for the recorded statement by playing a "snippet" of the recording. After Larnel confirmed that the voice on the recording was his own, the prosecutor said, "And I ask you about a recording that you made at the hospital. Is this [Proposed Exhibit 68] the recording you're talking about, sir?" Larnel answered yes, and the prosecutor moved for admission of the recording as a prior consistent statement involving identification. See MRE 801(d)(1). The trial court sustained defense counsel's objection, and no further testimony concerning the recorded statement was elicited.

The record does not support defendant's contention that the prosecutor improperly impeached Larnel with his recorded statement. Although the "snippet" that was played before the jury was not transcribed, the prosecutor's follow-up question only related to the circumstances in which the statement was made, which suggests that the content of the statement was not yet apparent. The prosecutor then moved to admit the full recording, again suggesting that the substance of Larnel's recorded statement had not been published to the jury yet. Thus, it does not appear that the statement was in fact introduced at trial.

Defendant also argues that the prosecutor erred by referring to Richard's prior statement as substantive evidence in closing argument. Defendant correctly asserts that the prosecutor cited Richard's statement, introduced through Officer Woods, as evidence from which the jury could conclude that defendant had been shot when the unidentified man tried to disarm him. When extrinsic evidence of a prior statement is offered for impeachment purposes, it can only be used to evaluate the credibility of the witness, and not to prove the content of the statement. *Shaw*, 315 Mich App at 683. The trial court sustained defense counsel's objection, indicated that the jury would be instructed about impeachment evidence, and stated that Richard's statement "was not substantive evidence." After the attorneys finished their closing arguments, the trial court's final instructions to the jury included the following:

> You have heard evidence that before the trial witnesses made statements that may be inconsistent with their testimony here in in [sic] court. You may consider an inconsistent statement made before the trial only to help you decide how believable the witness's testimony was when testifying here in court. However, if the earlier statement was made under oath, then you may also consider the earlier statement as evidence of the truth of whatever the witness or witnesses said in the earlier statement when determining the facts of this case.

Thus, it is clear that the trial court correctly instructed the jury about the limited use for which a witness's prior inconsistent statement can be considered and, immediately after the prosecutor's improper reference to Richard's statement, told the jury that it was not substantive evidence. Because this Court presumes that the jury followed its instructions, *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011), defendant has not established that the prosecutor's improper remark deprived defendant of a fair trial.

C. INTERFERENCE WITH DEFENSE COUNSEL'S CLOSING ARGUMENT

Next, defendant argues that the prosecutor improperly interfered with defense counsel's closing argument. We disagree.

Defendant failed to preserve this issue for review by contemporaneously objecting and requesting a curative instruction. See *Bennett*, 290 Mich App at 475. Thus, we review defendant's claim under a plain error analysis. *Parker*, 288 Mich App at 509; *Jones*, 468 Mich at 356.

In support of this claim of error, defendant directs this Court's attention to several instances in which the prosecutor interrupted defense counsel's closing argument. For instance, the prosecutor objected when defense counsel repeatedly criticized the prosecutor's use of leading questions during direct-examination. Later, when defense counsel spoke about Terrell having been subpoenaed to appear for an investigative interview, at which neither the judge nor defense counsel was present, the prosecutor objected and requested an instruction about the legality of investigative subpoenas. Finally, defense counsel urged the jurors to speak up if, during deliberations, they disagreed with other jurors' recollections of the evidence. When it appeared that defense counsel was beginning to advise the jury how it would be instructed if it could not reach a unanimous decision, the prosecution objected again, and the matter was addressed off the record.

Defendant now asserts that the prosecutor's interference with defense counsel's closing argument deprived him of a fair trial, but does not attempt to explain his rationale for this conclusion. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (quotation marks and citation omitted; alteration in original). By presenting only a conclusory argument on this point, defendant has abandoned review of this issue.

Even if this issue had not been abandoned, the prosecutor's objections were not improper. The purpose of closing arguments is to "sharpen and clarify the issues for resolution by the trier of fact . . . ." *People v Clark*, 453 Mich 572, 584; 556 NW2d 820 (1996), quoting *Herring v New York*, 422 US 853, 862; 95 S Ct 2550; 45 L Ed 2d 593 (1975). The jury's role in a criminal trial is to determine questions of fact. *People v Anderson*, 322 Mich App 622, 632; 912 NW2d 607 (2018). The trial court, on the other hand, is responsible for controlling the presentation of evidence, "so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a). By focusing much of his closing argument on procedural requirements and compliance that were matters for the trial court to decide, defense counsel drew the jury's attention away from its fact-finding role. Because a litigant must "raise objections at a time when the trial court has an opportunity to correct the error," *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006) (quotation marks and citation omitted), it was not improper for the prosecutor to interrupt defense counsel's closing to raise good-faith objections to what the prosecutor perceived as inappropriate arguments. Defendant had not established prosecutorial error in this regard.

D. PROSECUTOR'S CLOSING ARGUMENTS

Defendant also argues that prosecutor made several improper remarks during her closing argument. More specifically, defendant asserts that the prosecutor implied personal knowledge

about defendant's claim of self-defense, shifted the burden of proof, commented on defendant's failure to present evidence, and appealed to the jurors' sympathies and sense of civic duty. We disagree.

Defense counsel objected when the prosecutor purportedly appealed to the jurors' sympathies and sense of civic duty, but did not otherwise raise these challenges to the prosecutor's closing argument before the trial court. Accordingly, only that portion of defendant's claim of error is preserved. See *Bennett*, 290 Mich App at 475. To the extent that this issue is preserved, in part, we review claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. See *Mann*, 288 Mich App at 119.

In defendant's articulation of his first claim of error, he contends that the prosecutor's closing argument improperly implied personal knowledge that defendant's claim of self-defense was fabricated, shifted the burden of proof, and commented on defendant's failure to present evidence. These arguments are not within the scope of defendant's statement of the first question presented, which focuses exclusively on the prosecutor's alleged manipulation of defendant's recorded statement. As such, these issues are not properly before this Court for appellate review. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Moreover, in his briefing of this issue, defendant points only to the portion of the prosecutor's closing argument that addressed defendant's phone call, and makes no other attempt to identify specific improper arguments made by the prosecutor. By failing to articulate fully the factual basis for his arguments, defendant has effectively abandoned these issues. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008) ("Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.") (quotation marks and citation omitted).

In any event, we disagree with defendant's characterization of the prosecutor's closing argument. We did not discover any statements that could be construed as implying personal knowledge about the veracity of defendant's self-defense theory. Instead, the prosecutor consistently tied her disbelief of defendant's testimony to the record evidence and reasonable inferences arising from the evidence. *Seals*, 285 Mich App at 22. For instance, the prosecutor noted that while defendant claimed that he was choked and struck in the head with such force that it caused his vision to blur, he did not report any neck or head injuries to the hospital staff, and his medical records reflected no abnormalities during his physical examination. Defendant's medical records also reflected a statement in which he indicated that he was "randomly hit" by a gunshot in the parking lot of a bar, even though he testified that he was struck by a bullet from his own gun while defending himself. The prosecutor further observed that none of the witnesses saw defendant being attacked in the manner he described, and opined that the specific details of defendant's description of the struggle he endured were impractical. Because the prosecutor focused on the evidence presented and the impracticality of defendant's testimony, the prosecutor did not imply personal knowledge regarding defendant's self-defense claim.

There is likewise no indication that the prosecutor shifted the burden of proof regarding self-defense to defendant or commented on his failure to present evidence. To the contrary, the prosecutor explicitly stated that she bore the burden of establishing that defendant did not act in self-defense. She then urged the jury to find that she had met that burden because none of the evidence was consistent with defendant's testimony. It would be unreasonable to believe that a

stranger attacked defendant without provocation; a more reasonable view of the evidence suggested that defendant only struggled with the unknown person after the shooting, when that person attempted to disarm him. In other words, the prosecutor did not remark on defendant's failure to present evidence—she argued that the evidence presented did not support a finding of self-defense. The prosecutor did not err in this regard. See *People v Fyda*, 288 Mich App 446, 464; 793 NW2d 712 (2010).

Defendant also argues that the prosecutor improperly appealed to the jurors' sympathies and sense of civic duty. Although defendant is correct that arguments of that nature are improper, see *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), we again disagree with defendant's characterization of the prosecutor's argument. The prosecutor's description of the shooting may have painted a vivid picture of the incident as "every citizens' worst nightmare," but prosecutors are given "wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66. Because the prosecutor's argument was premised on record evidence, it was not improper, and defendant has not established that the prosecutor's argument deprived him of a fair trial.

III. JURY INSTRUCTIONS

Defendant next argues that the trial court erred by failing to instruct the jury during the trial about the distinction between prior statements used for impeachment and prior sworn statements that can serve as substantive evidence. We disagree.

A trial court's refusal to issue a particular instruction is reviewed for an abuse of discretion. *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). An abuse of discretion occurs when the trial court's ruling falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

In support of this claim of error, defendant relies solely on *People v Smith*, 158 Mich App 220; 405 NW2d 156 (1987).[4] In *Smith*, this Court held that the trial court erred by failing to sua sponte instruct the jury about accomplice testimony when the purported accomplice's role as such was a close question and the case hinged on the relative credibility of the alleged accomplice and the defendant. *Id*. at 229-230. This Court acknowledged that the jury was aware of the alleged accomplice's motivation to lie and that the jury had received general instructions regarding witness credibility, but held that the instructions were "insufficient given the credibility contest presented . . . and the strong emphasis placed by the Supreme Court on accomplice instructions in the face of a close fact question that is nothing more than a credibility contest between defendant and accomplices." *Id*. at 230.

Defendant's reliance on *Smith* is misplaced because the trial court's instructions in this case were not as limited as were those at issue in *Smith*. Instead of only instructing the jury

[4] Decisions of this Court issued before November 1, 1990, are not precedentially binding. *People v Baham*, 321 Mich App 228, 242 n 3; 909 NW2d 836 (2017), citing MCR 7.215(J)(1).

about general considerations for determining witness credibility, the trial court issued the more specific model instruction regarding prior inconsistent statements used to impeach witnesses. See M Crim JI 4.5. Therefore, the jury was specifically advised that unsworn prior inconsistent statements could only be used to assess the veracity of a witness's in-court testimony. Although this instruction was not issued until the end of the trial, *Smith* offers no support for defendant's argument that the jury should have been instructed about impeachment evidence at an earlier time. Furthermore, while both the prosecutor and defense counsel repeatedly used prior inconsistent statements to impeach various witnesses at trial, there was nothing particularly unusual about defendant's trial and, despite the number of witnesses and length of the testimony, the factual underpinnings of the case were not difficult to comprehend. As such, defendant has not demonstrated that the trial court's refusal to provide midtrial instructions concerning impeachment evidence fell outside the range of principled outcomes.

IV. MISTRIAL

Next, defendant argues that the trial court erred by denying his motion for mistrial. We disagree.

We review the denial of a motion for mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "The trial court abuses its discretion when its decision falls outside the range of principled outcomes." *People v Lane*, 308 Mich App 38, 60; 862 NW2d 446 (2014).

"A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Dickinson*, 321 Mich App 1, 18; 909 NW2d 24 (2017) (quotation marks and citation omitted). The moving party must establish that the "error complained of is so egregious that the prejudicial effect can be removed in no other way." *Id*. (quotation marks and citation omitted). In ruling on a defendant's motion, the trial court may consider whether the prosecutor intentionally introduced or emphasized improper information. *Lane*, 308 Mich App at 60.

On the fourth day of trial, the prosecutor moved for admission of defendant's medical records. When defense counsel questioned the relevance of the records, the prosecutor said, "It goes along with a statement made by Richard Allen as it relates to how the defendant injured himself." Defense counsel immediately objected, indicating that there had been "no statement made by Richard Allen." After the jury was excused, defense counsel moved for a mistrial, arguing that the prosecutor's comment suggested to the jury that Richard's prior statement had been introduced as substantive evidence, when it was only admissible for purposes of impeachment. The trial court agreed that Richard's statement was not substantive evidence, and the prosecutor argued that the medical records were still admissible because they corroborated Detective Przybla's testimony that he saw defendant's injured hand at the hospital directly after the shooting and supported the inference that defendant was shot at the scene. Defense counsel conceded that the medical records would be admissible for that purpose, but maintained that the prosecutor's original explanation was improper and prejudicial. The trial court denied the motion for a mistrial and ruled that "putting aside . . . the comment about Mr. Allen," the records were admissible. The trial court also denied defense counsel's request that the jury be instructed

about the "impropriety" or "wrongness" of the prosecutor's comment, reasoning that "[s]ometimes people just misspeak."

The trial court did not abuse its discretion by denying defendant's motion for a mistrial. At the time of the prosecutor's comment, the jury had already heard from Officer Woods that Richard reported defendant's hand being injured during the postshooting struggle for the gun. The jury also knew that Richard did not remember making that statement and that, at trial, he testified that he did not see what happened to defendant after the struggle began. Considering the earlier testimony, the prosecutor's reference to Richard's statement did not place anything before the jury that it had not already heard.

Furthermore, we are unpersuaded by defendant's argument that the prosecutor's comment suggested to the jury that Richard's prior statement was substantive evidence. At the time of the prosecutor's remark, the jury had not yet been instructed about the limited purpose for which impeachment evidence could be considered. Therefore, it would be unreasonable to assume that the jury placed legal significance on the prosecutor's brief comment. Furthermore, we defer to the trial court's determination that the prosecutor's comment was inadvertent, as the trial court was in a superior position to assess such matters. See *People v Blevins*, 314 Mich App 339, 362; 886 NW2d 456 (2016), citing *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881) (indicating that in close questions that turn on the credibility of a declarant, reviewing courts defer to the trial court's superior opportunity to assess the declarant's credibility).

At any rate, any prejudicial effect arising from the prosecutor's comment was diminished by the subsequent proceedings. First, defendant's medical records were admitted in evidence, so the jury was free to look at the exhibit and assess how it affected the credibility of Richard's testimony. The prosecutor also questioned defendant about the information he reported to the hospital staff, eliciting defendant's agreement that the information he gave the hospital was inconsistent with his testimony at trial. In particular, defendant reported that he "went to a bar and there was a fight [in the] parking lot and a gunshot randomly hit [him]." Thus, even if Richard's prior statement about defendant's injury had not been introduced or mentioned at trial, the jury could still have determined from defendant's own statements that he was not injured in the course of defending himself. In addition, the jury was properly instructed before its deliberations about how it could use prior inconsistent statements, and there is no indication that jury failed to understand or apply the model instruction. To the contrary, we assume that the jury followed its instructions. *Mahone*, 294 Mich App at 212. Accordingly, the prosecutor's comment was not so egregious and prejudicial that it impaired defendant's right to a fair trial, *Dickinson*, 321 Mich App at 18, and the trial court did not abuse its discretion by denying the motion for a mistrial.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that he was denied the effective assistance of counsel. We disagree.

A claim of ineffective assistance of counsel generally involves "a mixed question of fact and constitutional law," in which this Court reviews the trial court's factual findings for clear error and questions of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, because defendant failed to preserve this issue by moving for a new trial or evidentiary hearing before the trial court, "this Court's review is limited to mistakes apparent from the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

A defendant who claims he or she was denied the effective assistance of counsel bears a heavy burden to overcome the presumption of effective assistance. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). To do so, the defendant must generally satisfy the two-part test derived from *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), by showing that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012). The defendant bears "the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant takes issue with defense counsel's failure to listen to all of the jailhouse phone call recordings provided by the prosecutor, leaving counsel unable to effectively respond when the prosecutor introduced portions of a phone call defense counsel had yet to review. Under the first prong of the *Strickland* test, the defendant "must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Trakhtenberg*, 493 Mich at 52. Defense counsel "always retains the 'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *Id*., quoting *Strickland*, 466 US at 691. Thus, while an attorney can choose to forgo a particular investigation, that decision must be the product of reasonable professional judgment. *Trakhtenberg*, 493 Mich at 52-53. According to defendant, defense counsel received 23 recordings, each of which was approximately 30 minutes long, four days before trial and listened to 9 or 10 recordings before returning to other trial preparations. Counsel purportedly made this decision because, in the recordings he reviewed, defendant refused to discuss "the specifics of the incident" over the phone. Defendant also contends that the prosecutor told defense counsel that she did not intend to introduce the recordings at trial. Under these circumstances, defense counsel's decision to focus on other matters in the days preceding the trial was not objectively unreasonable, as he had every reason to believe that the recordings did not contain anything of evidentiary value to the case.

Defendant has likewise failed to establish a reasonable probability that, but for counsel's failure to review the subject recordings, the outcome of the trial would have been different. *Id*. at 51. As previously noted, when the prosecutor called defendant's attention to his use of the term crossfire in the phone call, defendant answered: "Of their fight. You didn't play the rest of it." Although defendant agreed with the prosecutor's suggestion that a crossfire required the involvement of two or more guns, defendant personally described a crossfire as being caught in a situation that was not "necessarily intended for me or anyone else, whoever." Based on defendant's testimony, the jury could have surmised that defendant used the term crossfire in a figurative sense, as defendant maintains on appeal. We, therefore, reject defendant's suggestion that the prosecutor's method of impeaching defendant was devastating to his defense. Defendant

has not established a reasonable probability that the outcome of the trial would have been different had defense counsel listened to the recording and taken steps to place defendant's statements in context.

Defendant alternatively argues that he is entitled to relief under the standard set forth in *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), which recognized that there are rare instances in which counsel's performance was so deficient that prejudice is presumed. *People Kammeraad*, 307 Mich App 98, 125; 858 NW2d 490 (2014). In *Cronic*, 466 US at 659-660, the United States Supreme Court identified three such circumstances: first, where the defendant is completely denied counsel at a critical stage; second, where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; and, third, where a fully competent lawyer would be unable to provide effective assistance under the circumstances. " 'For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, [the] difference is not of degree but of kind.' " *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), quoting *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843; 152 L Ed 2d 914 (2002) (alteration in original). "The *Cronic* test applies when the attorney's failure is *complete*, while the *Strickland* test applies when counsel failed at specific points of the proceeding." *Frazier*, 478 Mich at 244.

Defendant seems to suggest that defense counsel's performance falls within the third scenario described in *Cronic* because no reasonable attorney would have been prepared to rebut the prosecutor's use of the recording under the circumstances in which it was produced. The Supreme Court cited *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932), as an example of a situation where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 US at 660-661. In that case, on the day of trial, the trial court appointed an out-of-state attorney to represent the defendants, who were charged with highly publicized capital offenses. *Id*. at 660. The attorney indicated that he was not prepared to proceed at that time, as he had not familiarized himself with the case or local procedure. *Id*. The trial court attempted to resolve the problem by ordering that the out-of-state lawyer "represent the defendants, with whatever help the local bar could provide." *Id*.

Defendant's case is clearly distinguishable. Defendant's retained counsel is a licensed attorney in the state of Michigan, and there is no reason to believe that he was unfamiliar with the controlling substantive law, criminal procedure, or evidentiary rules involved in defendant's trial. Defense counsel first appeared on defendant's behalf the day that defendant was arraigned in district court. Considering his involvement from the onset of defendant's case, there can be no suggestion that defense counsel lacked familiarity with the evidence against defendant, even if his review of the recorded phone calls was limited. To the contrary, it is clear from defense counsel's cross-examinations and objections that he was well prepared for trial and vigorously advocated on defendant's behalf. Accordingly, defendant's alternative argument under *Cronic* is unpersuasive. This is simply not a case in which defendant can or has claimed a complete deprivation of the effective assistance of counsel. Instead, defendant asserts a discrete, isolated instance of deficient performance that is properly reviewed under the two-part *Strickland* test, *Frazier*, 478 Mich at 244, and defendant has not established either requirement for relief under *Strickland*.

VI. HEARSAY

Lastly, defendant argues that the trial court erred by ruling that a hearsay statement made by an unidentified declarant was admissible as an excited utterance. We find no error requiring reversal. We will not disturb a trial court's decision to admit evidence "absent an abuse of discretion, which occurs when the court 'chooses an outcome that falls outside the range of principled outcomes.' " *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014), quoting *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013).

At issue here is a statement made by an unidentified man as he attempted to disarm defendant. According to Richard, after defendant stopped shooting, the man attempted to disarm defendant and shouted, "Put the f*****g gun down . . . ." The prosecution argued, and the trial court agreed, that the statement was admissible because it fell within the "excited-utterance" exception to the prohibition against hearsay. See MRE 803(2). Without deciding whether the challenged statement was an excited utterance, we conclude that the trial court did not abuse its discretion by admitting the statement because the statement was a command, and commands are not assertions subject to the rules prohibiting the introduction at trial of hearsay. See *People v Jones (On Rehearing after Remand)*, 228 Mich App 191, 204-205; 579 NW2d 82 (1998) (concluding that the command, "Bitch, come out!" was not hearsay because it contained no assertion and was incapable of being true or false).

A statement that falls within the definition of hearsay may not be introduced at trial unless it is deemed admissible under one of the exceptions to the general rule against hearsay. MRE 802; *Musser*, 494 Mich at 350. " 'Hearsay' is a statement, other than the 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). "A 'statement' is (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). However, commands are not assertions for purposes of the hearsay rule; they are incapable of being true or false. *Jones*, 228 Mich App at 204-205. Like the words "Bitch, come out" in *Jones*, the words "Put the f***ing gun down . . ." constitute a command, not an assertion; they do not qualify as a "statement" for purposes of MRE 801(a). Accordingly, the trial court's decision to admit this evidence did not fall outside the range of principled outcomes, and we will not disturb that decision on appeal. *Douglas*, 496 Mich at 565; see also *People v Mayhew*, 236 Mich App 112, 118 n 2; 600 NW2d 370 (1999) (indicating that this Court will not reverse the trial court where it reached the right result for the wrong reason).

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Michael J. Kelly