STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO MANDELL MOORE,

Defendant-Appellant.

UNPUBLISHED
November 19, 2020

No. 350397
Wayne Circuit Court
LC No. 18-002543-02-FC

Before: STEPHENS, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of armed robbery, MCL 750.529.[1] The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to serve 20 to 40 years' imprisonment. We affirm.

This case arose from the February 2018 robbery of a store in Hamtramck. The prosecution presented evidence that defendant and two other men[2] entered the store while its only other occupants were employees Amelia Jaszczolt and Robert Hutton. Jaszczolt described one of the men as having "bulgy" eyes and sporting dreadlocks, and identified defendant at trial as that man.

According to the testimony, defendant grabbed Jaszczolt's neck from behind and pulled Jaszczolt into the store's back room. Hutton attempted to intervene, but both employees stopped resisting the men when one pointed a gun at them. Defendant eventually took possession of the gun. Jaszczolt ultimately opened the store's safe, and defendant and the other two men fled with

[1] The jury found defendant not guilty of a second count of armed robbery.

[2] Bryce Killing pleaded guilty to two counts of armed robbery in connection with this incident, and was sentenced to serve 6 to 20 years' imprisonment. This Court denied Killing's delayed application for leave to appeal. *People v Killing*, unpublished order of the Court of Appeals, entered September 24, 2019 (Docket No. 350076). Apparently the police never identified a third suspect.

some of the safe's contents. According to the store's manager, approximately $7,000 was missing from the safe after the robbery. Jaszczolt called 911 after defendant and the other two men left the store.

The police detained defendant and another man found walking near the store shortly after the robbery. A police officer took Hutton and Jaszczolt to the site where defendant and the other man were held. Both identified defendant, who was then in handcuffs, as one of the men who robbed the store during this live showup[3].

I. APPELLATE COUNSEL'S ISSUE

IDENTIFICATION TESTIMONY

Following his arrest, defendant moved to suppress Jaszczolt's and Hutton's identifications of him, and requested a *Wade* hearing.[4] The trial court held an evidentiary hearing, after which it denied the motion. Appellate counsel argues that the trial court erred because the identifications were the result of an impermissibly suggestive identification procedure. We disagree.

A trial court's factual findings in a suppression hearing are reviewed for clear error. *People v Sammons*, 505 Mich 31, 41; 949 NW2d 36 (2020). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). The application of law to the facts is a constitutional matter subject to review de novo. *Sammons*, 505 Mich at 41.

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). "Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do." *Perry v New Hampshire*, 565 US 228, 244; 132 S Ct 716; 181 L Ed 2d 694 (2012). However, "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Id.* at 245. "Exclusion of evidence of an identification is required when (1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable." *Sammons*, 505 Mich at 41.

---

[3] "A showup is '[a] police procedure in which a suspect is shown singly to a witness for identification . . . .' " *People v Sammons*, 505 Mich 31, 35 n 1; 949 NW2d 36 (2020), quoting *Black's Law Dictionary* (11th ed) (alteration in the original).

[4] As this Court has explained, an evidentiary hearing on a motion to suppress identification testimony "is commonly referred to as a *Wade* hearing, referencing the federal Supreme Court's decision in *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)." *People v Craft*, 325 Mich App 598, 602; 927 NW2d 708 (2018).

"[A]n improper suggestion often arises when the witness[,] when called by the police or prosecution[,] either is told or believes that the police have apprehended the right person," and "when the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998) (quotation marks and citation omitted). Our Supreme Court observed that "[t]he inherently suggestive nature of showups has long been beyond debate." *Sammons*, 505 Mich at 41.

"There are instances in which a fair and nonsuggestive procedure simply is not possible." *Id*. at 47. Prompt on-the-scene pretrial identifications "are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance." *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997).

The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993). *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972) provides a nonexclusive list of factors for determining whether an unnecessarily suggestive identification is nonetheless reliable. *Sammons*, 505 Mich at 50. "The factors are (1) 'the opportunity of the witness to view the criminal at the time of the crime,' (2) 'the witness' degree of attention,' (3) 'the accuracy of his prior description of the criminal,' (4) 'the level of certainty demonstrated at the confrontation,' and (5) 'the time between the crime and the confrontation.' " *Id*., quoting *Manson v Brathwaite*, 432 US 98, 114; 97 S Ct 2243; 53 L Ed 2d 140 (1977).

In his motion to suppress, defendant argued that the pretrial identification procedure was impermissibly suggestive because the witnesses, who arrived together, were asked to identify him during a live showup while he was wearing handcuffs. At the evidentiary hearing held on defendant's motion, Hutton and Jaszczolt testified regarding the robbery and their interactions with defendant. The prosecutor also presented a recording of Jaszczolt's 911 call as evidence at the hearing.

Jaszczolt indicated that one of the men wore gray and the other men wore black, that she believed they were 19 to 20 years' old, and that they had ski masks. She testified that the men came into the store unmasked, and pulled something onto their faces when going to the back of the store, although she did not relay that information to the 911 operator. She believed defendant was wearing gray clothing while in the store.

Jaszczolt explained that she looked at people "in their face," and testified that she observed defendant's eyes, nose, and hair. She testified that defendant had "something around his neck, which [she] believed was a ski mask," and added that she did not see defendant "put on the ski mask." Jaszczolt testified that she mentioned defendant's braid during her 911 call and that when she spoke with a police officer after the robbery, she said that the person who "dragged" her had dreadlocks.

According to Hutton, during the robbery one of the men wore "[g]ray on gray," one wore "black on black" and had dreadlocks, and the third wore "black and navy." Hutton added that the three men put on masks while in the store's back storage room.

Hamtramck Police Officer Brian Thome testified that he detained and handcuffed defendant shortly after the robbery, and that defendant was wearing all black attire when handcuffed. Officer Naseer Golla testified that he responded to the store after the incident, and Jaszczolt told him the men involved in the incident had "ski masks around their neck[s]." He was also told that one of the men had dreadlocks. Golla transported Jaszczolt and Hutton in his police vehicle to a nearby location in order to "conduct a live show up."

According to Jaszczolt, the police did not tell her where she was going while transporting her, and told her nothing when she arrived at the site of the showup. Jaszczolt testified that she had an opportunity to view defendant's face when he approached her in the store, and unhesitatingly identified defendant at the showup. She further testified that she did not discuss the robbery with Hutton while they were being transported to the showup in a police vehicle.

Hutton testified that he went to the showup in the same police vehicle as Jaszczolt, and once there identified defendant as one of the persons involved in the incident. He reiterated that defendant was wearing "black on black" during the incident, but stated that when he identified defendant at the showup he was wearing a "black top" and "gray bottoms."

In denying defendant's motion, the trial court did not first explicitly address whether the identification procedure was suggestive or necessary, the first two of the three *Sammons* factors regarding the disqualification of identification evidence. But, with respect to the second factor, this Court has recognized generally that "on-the-scene" pretrial identifications "are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance." Thus, the on-the-scene identification could be considered necessary.

As to the third factor, whether the identification was reliable, *Sammons*, 505 Mich at 41,

the trial court clearly and specifically addressed each of the *Biggers* factors. The trial court explained that there was considerable and credible evidence that Hutton and Jaszczolt had the opportunity to observe defendant for approximately 10 to 15 minutes, that the description provided during the 911 call was consistent with the subsequent identifications, that both witnesses had a high level of certainty regarding the identifications, and that only 10 to 15 minutes elapsed between the robbery and the identifications. The court stated that any discrepancies between a witness's initial description of a suspect and that suspect's actual appearance relates to weight of the evidence rather than its admissibility. The trial court noted that the witnesses did not speak to each other regarding the identification of defendant, provided separate identifications, and Officer Golla did not suggest to the witnesses that defendant was among the men who robbed them. The court declared that, "based on the totality of the record, the Court must deny the . . . motion to suppress the identification . . . at the on scene identification."

Rather than argue that the trial court improperly applied those factors when it found that the identifications were reliable, appellate counsel argues only that the trial court necessarily found that the procedure was impermissibly suggestive when it reached the question of reliability and therefore it should have granted defendant's motion to suppress. But the trial court's analysis indicated that it found the identifications to be reliable, thus admissible, regardless of the extent to which the pretrial showup was suggestive or unnecessary. Appellate counsel's reliance on the theory that the trial court implicitly found that the showup was excessively and unnecessarily suggestive, to the exclusion of argument challenging the court's application of the *Biggers* factors to the totality of the circumstances, thus fails to attack the conclusion at which the trial court actually and expressly arrived.

We are satisfied from our review of the record that the trial court ruling was neither factually nor legally flawed. The *Biggers* factors all demonstrated indicia of reliability, such that the trial court did not err when it concluded that Jaszczolt and Hutton could reliably identify defendant at trial, and thus properly denied defendant's motion to suppress.

II. DEFENDANT'S ISSUES *IN PROPRIA PERSONA*

A. PROSECUTORIAL MISCONDUCT

Defendant, in his Standard 4[5] brief, first argues that he was denied a fair trial by prosecutorial misconduct[6]. To preserve a claim of prosecutorial misconduct, "a defendant must have timely and specifically objected below, unless an objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). In this case, defendant raises a number of contentions in support of his argument that his trial was tainted by prosecutorial misconduct, but no objections were made in the trial court with respect to any of the contentions, leaving those claims unpreserved.

"Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Vandenberg*, 307 Mich App 57, 61; 859 NW2d 229 (2014). To avoid forfeiture under the plain-error rule, the defendant must establish that an error occurred, that it was plain, and that it affected substantial rights. *People v Buie*, 285 Mich App 401, 407; 775 NW2d 817 (2009). "The third prong requires a showing of prejudice, which occurs when the error affected the outcome of the lower court proceedings." *People v Putman*, 309 Mich App 240, 243; 870 NW2d 593 (2015). The reviewing court should reverse only when the defendant is actually

[5]Defendant filed a pro se brief pursuant to Administrative Order No. 2004-6, Standard 4, 471 Mich cii (2005), otherwise known as a "Standard 4 Brief."

[6] The term "prosecutorial misconduct" is commonly used in reference to any allegation of impropriety on the part of a prosecuting attorney, but claims of error stemming from allegations of the prosecuting attorney's inadvertence are "better and more fairly presented as claims of 'prosecutorial error,' with only the most extreme cases rising to the level of 'prosecutorial misconduct.'" *People v Cooper*, 309 Mich App 74, 88; 867 NW2d 452 (2015).

innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court considers claims of prosecutorial misconduct on a case-by-case basis, and the prosecutor's remarks must be considered in context. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010).

1. Identification

First, defendant asserts that the prosecutor improperly argued that Jaszczolt and Hutton identified defendant despite knowing that the identification resulted from a suggestive procedure. Defendant further argues that Jaszczolt's identification testimony at trial was unreliable and false, as it contradicted other descriptions of defendant that she provided.

A review of the record reveals that the prosecutor properly stated in closing argument that Hutton and Jaszczolt each identified defendant as one of the men who robbed the store. They did, in fact, identify defendant at trial. Contrary to defendant's assertion otherwise, the prosecutor's statement during closing argument that the surveillance video depicted defendant was also supported by Hutton's and Jaszczolt's identifications of defendant as one of the men depicted on the video. To the extent that defendant argues that the witness's identification was not credible due to conflicting details provided during the 911 call and/or at the *Wade* hearing, "[w]itness credibility and the weight accorded to evidence is a question for the jury, and any conflict in the evidence must be resolved in the prosecution's favor." *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). Further, the trial court instructed the jury that, "[t]he lawyers' statements, the lawyer[s'] arguments, and , any commentary" were "not evidence." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham*, 256 Mich App at 279.

Nevertheless, defendant contends that conflicting evidence regarding his appearance demonstrated that Jaszczolt and Hutton provided false testimony, and that this resulted in an unfair trial. "It is well established that 'a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . .' " *People v Smith*, 498 Mich 466, 475-476; 870 NW2d 299 (2015), quoting *Napue v People of State of Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). However, it is the defendant's burden to demonstrate that challenged evidence was in fact false. See *People v Bass*, 317 Mich App 241, 272; 893 NW2d 140 (2016). Moreover, that a witness's testimony conflicts with the witness's earlier statements does not demonstrate that a prosecutor presented perjured testimony. *People v Parker*, 230 Mich App 677; 690; 585 NW2d 753 (1998). Reversal is unnecessary where a prosecutor does not attempt to conceal the contents of the witness's conflicting prior statements from defense counsel, and where defense counsel was provided ample opportunity at trial to impeach the witness's credibility with any earlier inconsistent statements. *Id*.

Here, during the evidentiary hearing on the motion to suppress, Jaszczolt confirmed that she told a 911 operator that the men who robbed the store had on ski masks, but later clarified that the men came into the store with the masks around their necks, and that she did not see defendant put on a ski mask. Similarly, Jaszczolt testified during trial that defendant never placed anything over his face during the robbery. During cross-examination, Jaszczolt agreed that she told a 911 operator that the men who robbed the store "all had ski masks on," and agreed that that was a mistake because she was upset during that call. Defense counsel thus ably cross-examined

Jaszczolt regarding this inconsistency. And there is no indication that the prosecutor attempted to conceal the inconsistency from the defense. Therefore, defendant has not demonstrated that the prosecutor erred in this regard. The same holds true regarding Jaszczolt's purportedly inconsistent trial testimony and the information provided to the 911 operator regarding defendant's braid or braids. Defense counsel elected not to ask Jaszczolt about that aspect of 911 call during trial and, again, there is nothing to indicate that the prosecutor concealed Jaszczolt's previous statements from the defense. Defense counsel had ample opportunity to impeach her regarding this inconsistency even if counsel elected to forgo that opportunity.

Defendant further contends that Jaszczolt's testimony that defendant had a beard at the time of the robbery conflicted with his being beardless at the time of his arrest, but defendant misconstrues the challenged testimony. Jaszczolt actually testified that she believed defendant was older than the other men involved in the robbery because she could see "the, like, facial hair, and stuff like that" which indicated "that he was older than the other two." She did not provide any other details regarding defendant's facial hair, and defense counsel did not inquire further. Jaszczolt's references to facial hair did not necessarily indicate the existence of a cultivated beard, as opposed to a person who merely had not recently shaved. In addition, although defendant contends he did not have a beard at the time of his arrest, he presented no such evidence below, and "may not now expand the record on appeal." *People v Nix*, 301 Mich App 195, 203; 836 NW2d 224 (2013). Thus, it is impossible to determine from the record if defendant had some form of facial hair at the time of his arrest.

Regardless, absent compelling circumstances, the jury determines the credibility of the witnesses. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). It is thus the province of the jury to decide if a witness's identification is accurate. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000). To the extent that Jaszczolt's description of defendant's appearance during cross-examination at trial may have varied from any of her previous descriptions, that inconsistency was for the jury to resolve. And again, that a witness's testimony conflicts with the witness's earlier statements does not necessarily indicate that the prosecutor presented perjured testimony. *Parker*, 230 Mich App at 690.

Defendant asserts that the prosecutor should have recognized Jaszczolt's lack of trustworthiness because she attempted to influence Hutton's testimony by using hand gestures from the gallery. The situation to which defendant refers will be discussed in greater detail below when addressing defendant's claim of ineffective assistance of counsel, but here we are satisfied to note that Jaszczolt's inappropriate conduct occurred after she finished providing her own testimony, and that the prosecutor agreed with defense counsel that Jaszczolt should be examined under oath regarding that incident. Therefore, there is no reason to impute any such impropriety on Jaszczolt's part to the prosecutor.

2. Vouching

Defendant next asserts that the prosecutor engaged in impermissible vouching when she argued that Hutton's cellphone was found in the grass next to defendant after defendant had thrown the cellphone on the ground. We disagree.

"A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully," but "[a] prosecutor may . . . argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). "The record must be read as a whole, however, and the allegedly impermissible statements judged in the context in which they are made." *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

Defendant's argument does not appear to pertain to the prosecutor's using the prestige of her office to vouch for the credibility of a witness, or implying that she had some special knowledge that a witness testified truthfully. The evidence at trial established that during the robbery, defendant took Hutton's cellphone at gunpoint and that the cellphone was found after the robbery a "very short distance" from where defendant was arrested, "like, on the grass" and the challenged statement was consistent with that evidence. Defendant offers no further explanation concerning how the challenged statement constituted impermissible vouching, thus abandoning the argument on appeal. See *People v Henry*, 315 Mich App 130, 148; 889 NW2d 1 (2016).

Defendant also asserts that the prosecutor engaged in impermissible vouching during her closing argument when she dismissed the possibility that it was a mere coincidence that defendant had approximately the same amount of money stored in his right sock during his arrest as that which was contained in one of the deposit bags taken from the store. Defendant's assertion lacks merit.

Evidence at trial showed that one of the deposit bags taken from the store safe during the robbery contained approximately $5,570, and the police officer who detained defendant after the robbery testified that he found $5,575 in defendant's right sock, "rubber banded, together, in a stack." Defendant presented three witnesses, each of whom claimed to have given defendant substantial amounts of money before the robbery, to provide an alternate explanation for the money found on his person at his arrest.

The prosecutor began her closing argument as follows: "Mere coincidence? Absolutely not," and went on to assert that it was not a coincidence that defendant had in his right sock after the robbery an amount of cash very close to the amount stored within one of the stolen deposit bags. The prosecutor also offered argument regarding the incredible nature of the testimony provided by defendant's witnesses, and asked the jury how reasonable was it that defendant was purportedly "walkin' [sic] around, with over five thousand dollars, tucked in his sock, for over two months." A prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *Howard*, 226 Mich App at 548. The prosecutor's argument that such a coincidence was incredible was properly based on the evidence and did not constitute improper vouching.

3. 911 Transcript

Finally, defendant argues that the prosecutor erred when she refused to order a transcript of the 911 call recording to resolve any disputes regarding precisely what was said during that call. Defendant's contention is based in part on Jaszczolt's testimony during the evidentiary hearing on

the motion to suppress, where Jaszczolt insisted that she used the word "braid" rather than "gray" after she listened to a recording of the 911 call.

Defendant cites *Band v Livonia Assoc*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989)[7] to support his position. In that case, this Court explained that the court rules[8] required appellants to file a copy of the full transcripts of testimony and other proceedings in the trial court. Defendant's reliance on *Band* is misplaced because that decision does not recognize any duty on part of the prosecutor to provide transcripts of an audio recording at or before trial, but instead addresses the responsibility of appellants concerning the filing of transcripts for the appellate record. Defendant also cites *People v Perry*, 115 Mich App 533, 537-538; 321 NW2d 719 (1982), which is also inapplicable, as that case addressed a court reporter's alleged failure to transcribe tape recordings that were admitted as exhibits at trial.

Defendant contends that the prosecutor was nevertheless required to provide a transcript of the recording of the 911 call because a reviewing court would be unable to verify the factual basis of defendant's argument without it. Defendant's argument fails for two reasons. First, "[t]here is no general constitutional right to discovery in a criminal case." *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). Discovery in criminal cases is left to the discretion of the trial court, and may be ordered "when, in the sound discretion of the trial judge, the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression." *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). Defense counsel affirmatively recognized the limits of a prosecutor's duty with respect to discovery by stating, after the evidentiary hearing, when the trial court was orally rendering its decision to the parties, that there "was a request made . . . for a transcription" of the recording of the 911 call, but that "the Prosecutor's not required to do that."

Second, the actual contents of the 911 call at issue are not relevant to defendant's specific argument concerning whether the prosecutor had a responsibility to furnish a transcript of that recording. There is nothing in the record to suggest that a copy of the recording of the 911 call was not provided to defendant's trial counsel before trial. The recording was played during both the evidentiary hearing, and during trial. Defendant does not explain why the trial court or the jury, respectively, would not be equipped to resolve any dispute regarding the contents of that recording, or why a third-party transcription would be the most appropriate avenue for resolving

---

[7] Under MCR 7.215(J)(1), published cases issued before November 1, 1990, are not binding on this Court. While this Court is not "strictly required to follow uncontradicted opinions from this Court decided before November 1, 1990, those opinions are nonetheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019) (quotation marks and citation omitted).

[8] MCR 7.210(B)(1)(a) states that the "appellant is responsible for securing the filing of the transcript as provided in this rule," and that generally "the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal."

any such dispute. In short, defendant has failed to demonstrate that the prosecutor erred by not providing a transcript of the recording of the 911 call.

B. ASSISTANCE OF COUNSEL

To preserve a claim of ineffective assistance of counsel, a defendant must file a motion for a new trial based upon ineffective assistance of counsel or for a *Ginther*[9] hearing to develop a record to support the claim. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant did not do so. As a result, "our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012), citing US Const, Am VI; Const 1963, art 1, § 20. Generally, "in order to obtain a new trial, a defendant must show 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." *Trakhtenberg*, 493 Mich at 51. See also *Strickland v Washington*, 466 US 668, 694-696; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

"Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases," and "[t]here is accordingly a strong presumption of effective assistance of counsel." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). That a particular strategy ultimately failed does not demonstrate that a defendant was denied the effective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Speculation that a different outcome may have occurred is not sufficient to demonstrate prejudice. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

1. Inconsistent/Contradictory Evidence

Defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to address and challenge the prosecution's use of inconsistent and contradictory evidence. Although defendant contends that the inconsistent and contradictory evidence included the 911 call recording, the surveillance video recording of the robbery, and the testimony of the police officers who appeared at trial, defendant does not explicitly identify any misrepresentations or inconsistencies in connection with those pieces of evidence, aside from that involving his facial hair. We surmise that defendant is implicitly relying on the arguments he made regarding the prosecutor's use of inconsistent and contradictory evidence, in support of his claim of prosecutorial misconduct. Because we concluded above that defendant has failed to bring any prosecutorial error to light, we conclude here that any objections relating to those allegations would have been futile. "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).

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

To the extent that defendant separately and specifically contends that his trial counsel should have impeached Jaszczolt by contrasting her testimony that defendant had facial hair during the robbery with her not having described defendant's facial features when she called 911 after the robbery, this contention lacks merit. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

As noted, Jaszczolt testified during cross-examination that she believed defendant was older than the other men involved in the robbery because she could see "the, like, facial hair, and stuff like that" suggesting "that he was older than the other two." Defense counsel did not question Jaszczolt further regarding defendant's facial hair, but did ask if she was upset or startled when she saw defendant's face as he pointed a firearm at her, and also why her written description of defendant following the showup mentioned that defendant had changed his clothing since the robbery. Jaszczolt admitted that she did not "recall everything" about defendant's clothing during the robbery, but reiterated that she was certain about the details of defendant's face.

Although defense counsel chose not to impeach Jaszczolt's testimony by eliciting greater detail concerning her recollection of defendant's facial hair, he nonetheless pursued other avenues through which to cast doubts on her credibility, such as highlighting the stress of the robbery and Jaszczolt's uncertainty about what clothing defendant wore during it. "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has failed to show that defense counsel missed a strategic opportunity by declining to cross-examine Jaszczolt over defendant's facial hair.

2. Mistrial

Defendant next contends that his trial counsel should have moved for a mistrial after Jaszczolt tried to nonverbally communicate with Hutton while he testified. We disagree.

Jaszczolt testified on the first day of trial, and Hutton testified on the second day. While Hutton was being cross-examined regarding his testimony that defendant apparently changed his clothing after the robbery but before the showup, the trial court briefly interrupted by stating, "Excuse me, you two are gonna have to leave." The rest of Hutton's testimony proceeded without interruption, and afterward the trial court excused the jury from the courtroom.

The trial court then explained that during Hutton's testimony it noticed a woman who he believed was Jaszczolt sitting in the gallery next to a young man, and observed some "snickering" and "laughing" coming from them. The court noted that the jury did not appear to notice Jaszczolt and her companion, but stated that it had intended to have a deputy speak with them during a break to ask them to change their behavior or leave the courtroom. The court further explained that, later during Hutton's testimony, the court observed Jaszczolt looking at Hutton while "mouthing words" and at the same time "making gestures with one of her hands" as if she were "stroking her face" or "stroking a beard." It was in response to the latter display that the court ordered both Jaszczolt and her companion to leave the courtroom.

The prosecutor and defense counsel agreed that Jaszczolt and Hutton should be questioned separately regarding the situation while the jury was excused. Jaszczolt admitted that she tried to communicate with Hutton while he was testifying by mouthing words and using gestures, because she wanted Hutton to "raise his voice" and calm down at times. On cross-examination, Jaszczolt agreed that she traveled with Hutton to court on that day, but denied that she spoke with him about her trial testimony, or that she made any gesture in front of her chin or around her neck to communicate with Hutton.

Hutton testified that he saw Jaszczolt sitting in the gallery, and saw her make a hand gesture he interpreted as an instruction "to breathe" or "slow down," but saw no other attempt at communication. Hutton confirmed that Jaszczolt was sitting in the first row outside the bar behind the prosecutor, and that he could not see Jaszczolt when the prosecutor was sitting down because the prosecutor obstructed his view. He also denied speaking with Jaszczolt about the trial.

Defense counsel opined that Jaszczolt's testimony that she did not make any gesture around her neck was incredible given the trial court's statements about the gestures she made. He opined that Hutton was credible, however, and agreed that Hutton's view of Jaszczolt was impeded when the prosecutor was seated. Defendant's trial counsel thus conceded that Jaszczolt's actions had no impact on Hutton's testimony.

The trial court found that Jaszczolt attempted to nonverbally communicate with Hutton. While the trial court suspected that Jaszczolt's beard-stroking gesture may have been an attempt to remind Hutton that defendant may or may not have had a beard during the robbery, the trial court noted that Hutton never described defendant as having facial hair during trial. The trial court explained that it would have been suspicious if Hutton had mentioned a beard during his testimony under these circumstances, but because that did not occur the trial judge believed that the trial should continue. Defense counsel expressed agreement with the trial court. After the witnesses were excused, defense counsel asked that Jaszczolt not be permitted to return to the courtroom, and the trial court assented.

Defendant asserts that his trial counsel should have moved for a mistrial in response to Jaszczolt's actions, but he does not identify any prejudicial consequence of Jaszczolt's inappropriate actions. Rather, the trial court and defense counsel agreed that Hutton's testimony was not affected by Jaszczolt's attempts to nonverbally communicate, given that Hutton did not offer any testimony regarding the status of defendant's facial hair at the time of the robbery. "A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Because the irregularity at issue was not of the severity required to justify a mistrial, defense counsel would have had nothing to gain by requesting one, and thus counsel's forbearance in the matter was not ineffective assistance. See *Ericksen*, 288 Mich App at 201.

3. Facial Marking

Defendant next argues that he was denied the effective assistance of counsel because his trial counsel failed to challenge Hutton's and Jaszczolt's identifications of defendant on the basis of their not having mentioned defendant's distinctive facial marking, or to address the general fallibility of eyewitness identifications. However, it bears repeating that the trial court denied

defendant's pretrial motion to suppress the identifications, leaving defense counsel with no basis for challenging the admissibility of the identifications at trial. Although defense counsel did not question Hutton or Jaszczolt regarding defendant's purported distinctive facial marking, defense counsel did focus much of his closing argument on the suggestive nature of the showup and the fallibility of memory. Indeed, defense counsel argued that the showup was "tainted" because Jaszczolt and Hutton were shown, and asked to identify, defendant at the same time and in the presence of one another. Counsel contended that, even though Hutton and Jaszczolt believed that they provided honest testimony, they had "adopted a memory" that defendant was the man who robbed them as the result of the suggestive nature of the showup.

Defendant's trial counsel also noted that the trial court would instruct the jury regarding witness credibility, and how "people can say things, and honestly believe what they say, but they can still be wrong." And the trial court did later instruct the jury that "[p]eople see and hear things differently, and witnesses may testify honestly, but simply be wrong about what they thought they saw or remembered."

For these reasons, we reject defendant's claim that he was convicted without the benefit of the effective assistance of counsel.

C. JUDICIAL IMPARTIALITY

Generally, the question "whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo." *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015). Defense counsel raised no objections relating to judicial bias or judicial misconduct in the trial court. We review unpreserved claims of judicial impartiality for plain error affecting substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011); *Stevens*, 498 Mich at 180 n 6.

A criminal defendant is entitled to a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). But, "[a] defendant must overcome a heavy presumption of judicial impartiality when claiming judicial bias," and when "determining whether a trial judge's conduct deprives a defendant of a fair trial, this Court considers whether the trial judge's conduct pierces the veil of judicial impartiality." *People v Willis*, 322 Mich App 579, 588; 914 NW2d 384 (2018) (quotation marks and citation omitted). Judicial misconduct "violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the [trial court's] conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Stevens*, 498 Mich at 171.

A claim of judicial misconduct requires a "a fact-specific inquiry, and this Court considers the 'cumulative effect' of any errors." *Willis*, 322 Mich App at 588, quoting *Stevens*, 498 Mich at 171-172. "Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). "A single instance of misconduct generally does not create an appearance that the trial judge is biased, unless the instance is so egregious that it pierces the veil of impartiality." *Willis*, 322 Mich App at 588 (quotation marks and citation omitted). The factors a reviewing court should consider include, but are not limited to

> the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial. [*People v Swilley*, 504 Mich 350, 371; 934 NW2d 771 (2019) (quotation marks and citation omitted).]

In this case, defendant does not identify any specific instances of behavior or actions by the trial judge that support his claim of judicial misconduct. Rather, defendant's arguments are reiterations of his arguments in support of his claim of prosecutorial misconduct and ineffective assistance of counsel. "Repeated rulings against a litigant, no matter how erroneous, and how vigorously and consistently expressed, are not disqualifying." *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995) (quotation marks and citation omitted).

Briefly considering defendant's arguments in any event, defendant first asserts that the trial court improperly permitted the prosecutor to rely on an impermissibly suggestive identification of defendant where other evidence presented at trial showed that the identification was unreliable. As discussed above, defendant failed to demonstrate that the prosecutor improperly relied on Hutton's and Jaszczolt's identifications of defendant, and therefore, defendant's claim of error also necessarily fails here. Further, that the court concluded after the suppression hearing that those identifications were reliable thus admissible did not itself indicate bias. See *Wayne Co Prosecutor*, 210 Mich App at 155.

Defendant next argues that the trial court improperly permitted the prosecution to introduce the recording of the 911 call into evidence despite the controversy over whether certain words were used in the recording, and that the trial court was not able to properly review that evidence without a transcript of that recording. Again, the prosecution was not required to provide a transcript of the 911 recording, and defendant does not explain why the trial court needed a transcript when the recording itself was admitted into evidence for all to hear, or why the jury, acting as the factfinder, would have been unable to resolve any question regarding the contents of the 911 recording without recourse to a court reporter's transcription.

Defendant also asserts that the trial court permitted the prosecutor to vouch for the testimony of its witnesses and draw unsupported inferences. This assertion fails for the same reasons set forth above in that the prosecutor did not vouch for her witnesses or draw unsupported inferences, and the trial court instructed the jury that the lawyers' arguments were not evidence.

Defendant additionally contends that the trial court erred when it permitted the trial to continue after Jaszczolt attempted to nonverbally communicate with Hutton during his testimony. As discussed above, the trial court permitted the trial to continue after Hutton and Jaszczolt were examined under oath outside of the presence of the jury, and it found that Jaszczolt had not actually influenced Hutton's testimony regardless of her intent. Defendant once again does not explain how the trial court's decision was erroneous, or how he was prejudiced by Jaszczolt's conduct,

and thus brings no judicial misconduct to light.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Deborah A. Servitto
/s/ Anica Letica