STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH ARLELL YOUNG,

Defendant-Appellant.

UNPUBLISHED
December 21, 2021

No. 351793
Wayne Circuit Court
LC No. 19-000964-02-FC

Before: BOONSTRA, P.J., and GLEICHER and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317,[1] possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and tampering with evidence in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, MCL 750.483a(5)(a) and (6)(b).[2] [3]

[1] Defendant was charged and tried on a count of "open murder," but was acquitted of first-degree premeditated murder, MCL 750.316(1)(a), and convicted of the lesser-included offense of second-degree murder.

[2] The jury acquitted defendant of lying to a peace officer regarding a material fact during a criminal investigation, MCL 750.479c(1)(a) and (2)(d).

[3] Defendant was tried together with his father, codefendant Kenneth Arlell Gibson, although each had a separate jury. Kenneth Gibson was convicted of second-degree murder, felon-in-possession of a firearm, MCL 750.224f, lying to a peace officer, and two counts of felony-firearm. Kenneth Gibson appealed those convictions in Docket No. 350958. Initially, the two appeals were consolidated for this Court's review. *People v Gibson*, unpublished order of the Court of Appeals, entered December 11, 2019 (Docket Nos. 350958 and 351793). However, the two appeals were severed after it was discovered that Kenneth Gibson died in prison. *People v Gibson*, unpublished order of the Court of Appeals, entered September 7, 2021 (Docket Nos. 350958 and 351793). Kenneth Gibson's appeal has since been dismissed in an order. *People v Gibson*, unpublished

Defendant was sentenced to 15 to 30 years' imprisonment for his second-degree murder conviction to be served consecutively with 2 years' imprisonment for his felony-firearm conviction, but concurrently with 1 to 10 years' imprisonment for his tampering with evidence conviction. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

On November 29, 2018, defendant left his apartment for a brief period, before returning home. When he arrived, he noticed his door was ajar and suspected someone might be inside. When defendant attempted to push his door open, he felt some resistance and heard someone tell him to get back. Defendant fled the unit of his apartment building and called Kenneth Gibson for assistance. While awaiting Kenneth Gibson's arrival, defendant patrolled the outside of his apartment unit with his gun. Defendant even fired one shot into the air, purportedly as a warning to the person he found in his apartment.

Eventually, Kenneth Gibson was dropped off by someone driving a white car. Security camera footage from a nearby liquor store and restaurant showed Kenneth Gibson getting out of the car, crossing the street to speak with defendant, and defendant going to his car and opening the trunk. In a later interview with police, defendant stated he retrieved another gun from his trunk, gave one of the loaded guns to Kenneth Gibson, and kept one for himself. Defendant and Kenneth Gibson remained outside until defendant's cousins, Robert Gibson and Ebonique Gibson, arrived in a gray minivan, which is visible on the security camera footage.

According to defendant, all four individuals then went inside defendant's unit of the apartment building, which contained four separate apartments. Defendant checked his apartment first, which no longer had anyone inside, and defendant did not notice anything missing. Defendant and his family members then went door-to-door trying to find the person who had been in defendant's apartment, kicking all three other apartment doors in the unit. One of the doors broke open, but revealed no one inside. When they reached the apartment in which the victim was squatting, the victim answered his door in response to defendant's kick.

Defendant and his family members held the victim at gunpoint while defendant walked through the victim's apartment, looking for anyone else inside or anything that might have been taken from defendant's apartment. Defendant noticed his neighbor, Mr. Cass, arriving home at the time. Defendant went outside to speak with Cass, hoping to assure him everything was fine. While outside, defendant heard a gunshot inside the apartment, which was Kenneth Gibson fatally shooting the victim with the gun provided by defendant.

The victim fled, jumped out of the window in his apartment, and ran across the street to Spotlight Liquor Store. The victim later died from the gunshot wound. Defendant told police he heard from Kenneth Gibson that the victim had been shot. Defendant responded by removing his

---

order of the Court of Appeals, entered November 4, 2021 (Docket No. 350958). While we will still discuss Kenneth Gibson's involvement in the case because it is necessary for a proper understanding of the facts, we will ensure that evidence admitted only before Kenneth Gibson's jury is not considered.

television and PlayStation video game console from his apartment, stowing his gun in his trunk, and driving away. Defendant, Kenneth Gibson, Robert, and Ebonique all met up at a separate location and decided they would create a false story and lie to the police.

Defendant initially told police he had an altercation with the victim when defendant first noticed someone was inside his apartment. Only after being confronted with law enforcement's knowledge of significant facts gleaned from the surveillance footage and evidence inside the apartment building did defendant relay the version of facts summarized above. And even while in the interrogation room with his pretrial counsel, defendant deleted probative information from his cell phone.

The jury found defendant guilty of second-degree murder and felony-firearm on a theory of aiding and abetting, and guilty of destruction of evidence for deleting relevant information from his cell phone. This appeal followed. While it was pending, defendant twice moved this Court to remand for a *Ginther*[4] hearing related to his claims of ineffective assistance of counsel, which we denied without prejudice.[5] The case is now before us for plenary review.

II. SUFFICIENCY OF EVIDENCE

Defendant contends there was insufficient evidence to sustain his conviction of second-degree murder. We disagree.

A. STANDARD OF REVIEW AND GENERAL LAW

"We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Henry*, 315 Mich App 130, 135; 889 NW2d 1 (2016), quoting *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "To determine whether the prosecutor has presented sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the prosecutor and determine 'whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' " *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013), quoting *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015), quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

There is sufficient evidence for a guilty verdict where "a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *Tennyson*, 487 Mich at 735, quoting *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). "The prosecution need not negate every reasonable theory of innocence; instead, it need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant." *People v Mikulen*, 324 Mich App 14, 20; 919 NW2d 454 (2018). "Circumstantial evidence and the reasonable inferences that

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

[5] *People v Young*, unpublished order of the Court of Appeals, entered February 27, 2021 (Docket No. 351793); *People v Young*, unpublished order of the Court of Appeals, entered June 18, 2021 (Docket No. 351793).

arise from that evidence can constitute satisfactory proof of the elements of the crime." *People v Blevins*, 314 Mich App 339, 357; 886 NW2d 456 (2016). Any and all conflicts that arise in the evidence must be resolved "in favor of the prosecution." *Mikulen*, 324 Mich App at 20. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Hardiman*, 466 Mich at 428.

B. APPLICABLE LAW AND ANALYSIS

Defendant challenges only the sufficiency of the evidence as related to his second-degree murder conviction. Recently, we discussed the necessary elements for a second-degree murder conviction:

> The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.' " *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted). Second-degree murder evolved from common-law murder, under which "malice aforethought" was understood for centuries to be the "grand criterion" distinguishing murder from less "wicked" homicides. *People v Hansen*, 368 Mich 344, 350-351; 118 NW2d 422 (1962) (citation and quotation marks omitted); *People v Mesik (On Reconsideration)*, 285 Mich App 535, 544-547; 775 NW2d 857 (2009) (citation and quotation marks omitted). [*People v Baskerville*, 333 Mich App 276, 284-285; 963 NW2d 620 (2020).]

In this case, defendant was charged under a theory of aiding and abetting Kenneth Gibson's murder of the victim. "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. "The phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004).

> The general rule is that, to convict a defendant of aiding and abetting a crime, the prosecutor must establish that "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*Id.* at 67-68, quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).]

Defendant's challenge under the sufficiency of the evidence focuses on the element of intent. Specifically, defendant asserts there was no evidence that he intended for the victim to be killed or knew how Kenneth Gibson intended to use the gun when it was handed to him, and defendant was not inside the apartment to witness or encourage the murder when the fatal shot was fired.

In *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006), our Supreme Court provided a helpful and relevant summary of the required intent for an accused charged under an aiding and abetting theory:

> We hold that a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

More generally, "[m]inimal circumstantial evidence and reasonable inferences can sufficiently prove the defendant's state of mind, knowledge, or intent." *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). This is "[b]ecause it can be difficult to prove a defendant's state of mind on issues such as intent . . . ." *People v Kenny*, 332 Mich App 394, 403; 956 NW2d 562 (2020). Consequently, "[a] defendant's intent can be gleaned or inferred from his . . . actions." *Id.*

The trial evidence showed that defendant called Kenneth Gibson to his apartment, handed him a loaded handgun,[6] led an armed party into an apartment unit to find someone defendant believed broke into his apartment, and, at the last minute, went outside to speak to a neighbor. Kenneth Gibson then used the handgun provided to him by defendant to fatally shoot the victim. Defendant participated with Kenneth Gibson in attempts to cover up the crime by leaving the scene of the murder without calling police, creating a false story to make the shooting seem like self-defense, telling that fictitious story to police, and deleting evidence from his cell phone.

Defendant contends the prosecution failed to prove beyond a reasonable doubt that he intended to aid or abet Kenneth Gibson's murder of the victim. Defendant's argument focuses on an alleged lack of evidence that he knew or intended for Kenneth Gibson to shoot and kill the victim. But "[a] defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." *Robinson*, 475 Mich at 15.

While defendant never specifically told police he intended for Kenneth Gibson to shoot and kill the victim, the required intent for second-degree murder is "malice," which "is defined as

---

[6] Defendant contends that Kenneth Gibson "brought the weapon into . . . the apartment," but ignores that he provided the murder weapon.

the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Baskerville*, 333 Mich App at 284 (quotation marks and citation omitted). Relevantly, defendant admits he believed he was being threatened by the victim when they spoke at the doorway to defendant's apartment, and defendant called Kenneth Gibson to come to defendant's apartment to investigate the suspected break-in. Defendant also acknowledged he gave Kenneth Gibson a loaded gun, and they went together inside the unit. When they did not find anyone in defendant's apartment, they began attempting to kick down doors of other units, ultimately finding the victim in his apartment. Defendant and Kenneth Gibson forced their way inside the victim's apartment and held him at gunpoint while defendant searched the apartment. Ultimately, while defendant was outside of the apartment to speak to a neighbor, Kenneth Gibson shot and killed the victim.

In the context of aiding and abetting a murder, we have previously discussed the inferences a jury might permissibly make when hearing a defendant gave a loaded gun to another person:

> We also disagree with [the] defendant's contention that the evidence was insufficient to find him guilty of aiding and abetting second-degree murder. [The principal] was convicted of first-degree murder. The passing of the gun [by the defendant to the principal] unambiguously rendered assistance to the commission of that crime and, indeed, was an indispensable part of the crime. We reject [the] defendant's contention that he was unaware of what [the principal] intended to do with the gun or did not intend the gun to be used in the way that [the principal] used it. There are a limited number of conceivable reasons why an angry individual presently involved in a violent confrontation might demand that a gun be handed to him, and most of them tend not to end in the gun going unused. There are, likewise, a limited number of conceivable ways in which a loaded gun can be used. The overwhelmingly likely inference is that [the] defendant either knew that [the principal] intended to discharge the gun or intended for [the principal] to discharge the gun. Consequently, we find that the evidence is sufficient to support [the] defendant's convictions. [*Blevins*, 314 Mich App at 359 (citation omitted).]

The same is also true here. Defendant was in the midst of a violent confrontation with the victim before anyone else arrived. Although the two did not come to blows, defendant felt resistance on his door when he tried to push it open, and the victim told him to get back and used a curse word. The victim then started counting down, which defendant stated he believed was a threat to use a gun when the countdown reached zero.

Defendant also exhibited knowledge of his involvement in a violent confrontation when he fired a handgun outside of his apartment unit, which he called a warning shot. Kenneth Gibson then arrived, and in the midst of this heated and violent exchange, was handed a loaded gun by defendant. As this Court recognized in *Blevins*, "[t]he overwhelmingly likely inference is that defendant either knew that [the principal, Kenneth Gibson] intended to discharge the gun or intended for [the principal, Kenneth Gibson] to discharge the gun." *Id.* Moreover, defendant did not just merely give Kenneth Gibson a loaded gun, but he waited for two other armed family members to arrive, and then led the way into the apartment building and began kicking doors. Thus, knowing he and three others carried guns, defendant began what could only be described as

a manhunt for the victim. Although defendant told police he never intended to kill the victim, the jury was permitted to make reasonable inferences on the basis of the evidence presented. *Hardiman*, 466 Mich at 428. Here, it was entirely reasonable for the jury to assume defendant and his family members were searching for the victim to shoot and kill him. After all, they had patrolled the parking lot to stop the victim from escaping the apartment unit, had stormed the building with loaded guns, and had kicked all of the doors inside the unit.

In addition to firing a warning shot, giving Kenneth Gibson a loaded gun, calling for assistance from armed family members, storming the building, and kicking doors, defendant also forcefully led the way inside the victim's apartment. While there, the victim was held at gunpoint. Defendant asserts he never intended to shoot the victim, but again, the jury was permitted to infer otherwise. *Id*. Entering forcefully and at gunpoint into the apartment of another person allows for an inference that the aggressors were intending to shoot and kill the person inside.

Lastly, after the murder was committed, defendant formed a plan with his relatives to go to the police and lie. It is well-established in Michigan that "[a] jury may infer consciousness of guilt from evidence of lying or deception." *People v Dixon-Bey*, 321 Mich App 490, 509-510; 909 NW2d 458 (2017) (quotation marks and citation omitted; alteration in original). Thus, from defendant's decision to make a false statement to police, the jury was permitted to infer defendant had a guilty conscience. *Id*.

In sum, considering defendant was in the midst of a violent confrontation with the victim, called family members for assistance, fired a warning shot into the air outside of the building, gave Kenneth Gibson a loaded gun, led a group of three other armed individuals into the apartment unit, kicked down doors, found the victim in his apartment, and held him at gunpoint while searching his apartment, the jury could infer defendant intended to aid and abet Kenneth Gibson with the intent to kill the victim or the intent to cause the victim great bodily harm. *Robinson*, 475 Mich at 15; *Baskerville*, 333 Mich App at 284. Thus, defendant's argument that the prosecution failed to prove he intended to aid and abet Kenneth Gibson's murder of the victim because defendant happened to be outside when the shooting occurred lacks merit.

Alternatively, even if defendant was correct regarding his lack of intent to kill or cause great bodily harm to the victim, his claim would still lack merit. A defendant may also be found guilty of second-degree murder if the jury believed such was a "natural and probable consequence[] of the offense [defendant] intend[ed] to aid or abet." *Robinson*, 475 Mich at 15. At minimum, defendant intended to assist Kenneth Gibson in forcing entry into the victim's apartment and holding him at gunpoint. Indeed, he knew Kenneth Gibson had a loaded handgun because defendant provided it to him. As this Court has noted, there are "a limited number of conceivable ways in which a loaded gun can be used." *Blevins*, 314 Mich App at 359. Considering the nature of a loaded gun and the actions defendant clearly intended to aid and abet, Kenneth Gibson shooting and killing the victim was a "natural and probable consequence[] of the offense [defendant] intend[ed] to aid or abet." *Robinson*, 475 Mich at 15. Therefore, even if the jury believed defendant did not specifically intend for Kenneth Gibson to kill or cause great bodily harm to the victim, there still was sufficient evidence to sustain defendant's conviction of second-degree murder. *Id*.; *Blevins*, 314 Mich App at 359.

In his brief on appeal and in his Standard 4 brief, defendant argues that there was insufficient evidence to sustain his conviction of second-degree murder because Kenneth Gibson told police the victim lunged at him, causing him to fire the gun, or that the shooting was an accident. As noted, to convict defendant of aiding and abetting Kenneth Gibson's commission of second-degree murder, the prosecution was required to prove the crime of murder was committed by Kenneth Gibson. *Moore*, 470 Mich at 67. For this argument, defendant implicitly acknowledges the first two elements of second-degree murder were fulfilled. Stated differently, defendant does not disagree the victim died as a result of Kenneth Gibson's actions. *Baskerville*, 333 Mich App at 284. Instead, defendant appears to suggest that Kenneth Gibson did not have the required intent because the gun fired by accident or that Kenneth Gibson had "lawful justification or excuse for causing the death" of the victim. *Id*. (quotation marks and citation omitted).

In support of his argument, defendant relies solely on testimony from Sergeant Derrick Griffin regarding his interrogation of Kenneth Gibson. During Sergeant Griffin's testimony, he acknowledged Kenneth Gibson said the victim lunged at him and the gun went off by accident. But defendant's jury did not hear the testimony upon which he relies and did not watch Kenneth Gibson's interrogation video. Instead, the record clearly shows that only Kenneth Gibson's jury was present in the courtroom when Kenneth Gibson's interrogation video was played and Sergeant Griffin testified regarding the video's content. Under MCR 7.210(A)(1), "the record [on appeal] consists of . . . the transcript of any testimony or other proceedings *in the case appealed* (emphasis added)." Therefore, we cannot consider defendant's argument regarding testimony from codefendant's trial as it is neither testimony nor a proceeding in this case.[7]

[7] We recognize that defendant told the police that Kenneth Gibson said that he shot the victim after the victim "was reaching for something." As discussed above, Kenneth Gibson's decision to enter the apartment with a loaded gun, participate in kicking down doors, and holding the victim at gunpoint while his apartment was searched was sufficient to demonstrate his intent to kill or cause great bodily harm. *Miller*, 326 Mich App at 735 ("Minimal circumstantial evidence and reasonable inferences can sufficiently prove the defendant's state of mind, knowledge, or intent."); *Blevins*, 314 Mich App at 359 ("There are . . . a limited number of conceivable ways in which a loaded gun can be used."). Further, Kenneth Gibson planned with defendant to go to the police station and tell a false story to the officers. Specifically, Kenneth Gibson originally told police the same version of events defendant first provided, i.e., defendant shot and killed the victim during the initial altercation while defendant was alone. This story was both false and a way to exculpate himself. The jury was permitted to infer Kenneth Gibson's decision to lie to police and to make a false exculpatory statement was evidence of his consciousness of guilt. *Dixon-Bey*, 321 Mich App at 509-510; *People v Seals*, 285 Mich App 1, 5; 776 NW2d 314 (2009) ("[E]vidence that an exculpatory statement is false [can be] circumstantial evidence of guilt.").

In short, even if the jury had heard Kenneth Gibson's claim the victim lunged at him and the gun fired accidentally, the record supported the jury's decision to disbelieve that claim, and instead, to infer Kenneth Gibson fired the gun purposely and without lawful justification. *Baskerville*, 333 Mich App at 284. The medical examiner testified that he found no evidence of close-range firing and a firearms' expert testified that six pounds of pressure was required to pull

III. VIDEO OF DEFENDANT'S INTERROGATION

Defendant argues certain portions of the video of his interrogation should have been omitted from the version played for the jury. We disagree in part, and assuming, without deciding, that defendant is correct in part, we nevertheless affirm because the challenged evidence was not outcome-determinative.

A. STANDARD OF REVIEW

"When the issue is preserved, we review a trial court's decision to admit evidence for an abuse of discretion, but review de novo preliminary questions of law, such as whether a rule of evidence precludes admissibility." *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012). "[W]hen such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, "nonconstitutional, preserved evidentiary errors are not grounds for reversal unless they undermined the reliability of the verdict." *People v Musser*, 494 Mich 337, 363; 835 NW2d 319 (2013).

B. LAW AND ANALYSIS

Defendant contends the trial court's decision to admit the portion of the video during which he was alone with pretrial counsel was an abuse of discretion because it violated the attorney-client privilege. The prosecution, to the contrary, asserts the portions of the video played were not subject to the attorney-client privilege because defendant and pretrial counsel did not make reasonable efforts to ensure their conversation was confidential, and under the crime-fraud exception to the attorney-client privilege. For the reasons stated below, we agree with the prosecution regarding the very brief moments of the interrogation video during which defendant and pretrial counsel discussed defendant deleting information from his cell phone. However, with respect to the other challenged portions, we will assume admission of the evidence was erroneous, without actually deciding so, but affirm because the evidence clearly was not outcome-determinative.

"The crime-fraud exception to the attorney-client privilege is predicated on the recognition that where the attorney-client relationship advances the criminal enterprise or fraud, the reasons supporting the privilege fail." *People v Paasche*, 207 Mich App 698, 705; 525 NW2d 914 (1994). Relying on an opinion of the United States Supreme Court, this Court explained the reasoning behind the exception, stating "the reasons for the protection—the centrality of open client and

---

the trigger on the .9-millimeter weapon used to shoot the victim. Furthermore, Kenneth Gibson removed the shell casing from the shooting site and left after the shooting. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Hardiman*, 466 Mich at 428. Moreover, because we are required to resolve all factual disputes in favor of the jury's verdict, defendant's claim in this regard lacks merit. *Mikulen*, 324 Mich App at 20.

attorney communication to the proper functioning of our adversary system of justice—ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*." *Id*. (quotation marks omitted; alterations in original), quoting *United States v Zolin*, 491 US 554, 562-563; 109 S Ct 2619; 105 L Ed 2d 469 (1989) (emphasis in *Zolin*). Summarizing, this Court opined, "[w]e agree with the Supreme Court's reasoning and determine that where advice from an attorney refers to future, not past, wrongdoing, the crime-fraud exception applies to the otherwise privileged communication." *Paasche*, 207 Mich App at 705. "In order for the crime-fraud exception to apply to the privileges, the prosecution must show that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime or fraud and (2) that the communications were in furtherance thereof." *Id*. at 707 (footnote omitted). "This showing must be made without reference to the allegedly privileged material." *Id*., citing MRE 104(a).

Before moving further, it is important to note that only a brief portion of the video would qualify under this exception to the attorney-client privilege. As noted, the exception exists "where advice from an attorney refers to future, not past, wrongdoing . . . ." *Paasche*, 207 Mich App at 705. According to the prosecution's own argument, pretrial counsel only briefly provides advice on future wrongdoing when he suggested defendant delete evidence of his text message conversations that potentially implicated him in the crime, and blocked the camera to allow defendant to do so. To the extent the prosecution believes the crime-fraud exception applied to the entire conversation between defendant and pretrial counsel, despite a vast majority of the conversation being about the events leading up to and following the shooting of the victim, the prosecution is incorrect. The caselaw at issue clearly states the crime-fraud exception applies only "where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*." *Id*. (quotation marks omitted; alterations in original), quoting *Zolin*, 491 US at 562-563 (emphasis in *Zolin*). Consequently, the analysis for this issue applies only to the brief remarks about defendant deleting information from his cell phone, which is the only "future wrongdoing" allegedly discussed. *Id*. (emphasis omitted).

For the crime-fraud exception to apply, "the prosecution must show that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime or fraud and (2) that the communications were in furtherance thereof," and must do so "without reference to the allegedly privileged material." *Paasche*, 207 Mich App at 707, citing MRE 104(a). In support of the argument in this regard, the prosecution notes defendant's cell phone records showed he made contacts to Robert and sent text messages to Kenneth Gibson during the time defendant was inside the interrogation room alone with pretrial counsel. Further, at the time defendant sent text messages to Kenneth Gibson, the police were speaking with him, and thus, saw that defendant was trying to contact Kenneth Gibson. Lastly, the prosecution asserted defendant's cell phone records also showed defendant deleted information from his cell phone during the time he was alone in the room with pretrial counsel.

On the basis of that information, none of which involved the actual recorded communications between defendant and pretrial counsel, the trial court did not abuse its discretion by determining the prosecution had shown "a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime or fraud and (2) that the communications were in furtherance thereof." *Paasche*, 207 Mich App at 707. In other words, defendant's contacts with people who were involved in the crime, including Kenneth Gibson and Robert, along with evidence defendant

deleted probative information from his cell phone at a time when he was alone with pretrial counsel, was enough to show the crime of destruction of evidence was committed in the interrogation room, and that defendant's conversation with pretrial counsel assisted with the commission of such. Consequently, for the brief time periods when the issue of deleting information was discussed, the video of the conversation between defendant and pretrial counsel was properly admitted under the crime-fraud exception to the attorney-client privilege. *Id.*

As noted, defendant also argues that the remainder of his conversation with pretrial counsel should have been redacted from the video. Assuming the evidence was improperly admitted, we still affirm. "A preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (quotation marks and citation omitted). Stated differently, "nonconstitutional, preserved evidentiary errors are not grounds for reversal unless they undermined the reliability of the verdict." *Musser*, 494 Mich at 363. "[T]he appropriate inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *Lukity*, 460 Mich at 495 (quotation marks and citation omitted). According to our Supreme Court, the burden of proving such is on defendant. *Id.*

In arguing for reversal, defendant contends that the challenged portions of the video allowed the jury to hear incriminating statements about defendant's involvement in the victim's murder. Defendant is correct that he told pretrial counsel he had just lied to the police about his original story. Defendant then informed pretrial counsel of a different version of events, which was the final version of the story he eventually told police. Pretrial counsel encouraged defendant to tell the truth to the police, and scolds him for lying to pretrial counsel before coming to the police station. Once the police come back to the room, defendant apologized for lying originally, and then relayed the new story, which he also told pretrial counsel.

Defendant does not contend the portions of his interrogation with police were inadmissible. Thus, the "untainted" evidence included all of the same incriminating statements defendant made to pretrial counsel. Defendant also made and signed a written statement, which contained nearly all of the same incriminating statements. Defendant's written statement was admitted at trial, and is not being challenged in this appeal. Therefore, regardless of whether the statements made by defendant that were potentially subject to the attorney-client privilege should have been admitted, the jury still would have heard all of the same information directly from defendant. Importantly, defendant's conversation with pretrial counsel between segments of the interrogation did not include any additional plan to lie to the police and did not contain more inculpatory information than he eventually told police. In fact, considering that the jury was privy to information that defendant told the exact same version of events to his attorney as he told to the police, the jury might have been more likely to believe defendant's claims of limited involvement in the shooting death of the victim. Defendant, in statements made both to pretrial counsel and the police, significantly limited his participation in the murder. Because the exact same evidence would have been admitted by defendant's undisputedly admissible statements to police, both oral and written, defendant's claim he is entitled to a new trial because the video of his purportedly confidential statement to pretrial counsel was played to the jury, lacks merit. *Lukity*, 460 Mich at 497. Stated differently, defendant failed to meet his burden of showing "it is more probable than not that the error was outcome determinative." *Burns*, 494 Mich at 110 (quotation marks and citation omitted).

Consequently, reversal in this case is not warranted even if admission of the evidence was improper. *Id*.

Finally, defendant contends the trial court abused its discretion by admitting portions of the video of his interrogation where the officers aggressively question him and accuse him of lying. The prosecution contends the trial court properly admitted the evidence because it provided context to defendant's answers to questions asked by the police. The trial court determined that the aggressive questioning and confrontation was admissible as a valid interrogation technique. "An interrogator's questions are not ordinarily offered for the proof of the matter asserted; accordingly, the questions are typically not hearsay." *People v Clark*, 330 Mich App 392, 424; 948 NW2d 604 (2019), citing MRE 801(c). "Nevertheless, it may be proper for the trial court to redact an interrogator's question or statement when the statement is not relevant to providing context for the accused's answer or is otherwise excludable under MRE 403." *Clark*, 330 Mich App at 424-425, citing *Musser*, 494 Mich at 354-359. Moreover, "[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

As noted, the prosecution contends Detective White's statements about defendant's credibility were included in the video because they provided context for an understanding of defendant's statements. In addressing a similar issue, our Supreme Court in *Musser*, 494 Mich at 353-354, clarified that

> where the proponent of the evidence offers an interrogator's out-of-court statements that comment on a person's credibility for the purpose of providing context to a defendant's statements, the interrogator's statements are only admissible to the extent that the proponent of the evidence establishes that the interrogator's statements are relevant to their proffered purpose.

Further, "[e]ven if relevant, the interrogator's statements may be excluded under MRE 403 and, upon request, must be restricted to their proper scope under MRE 105." *Musser*, 494 Mich at 354. Our Supreme Court insisted that, "to ensure a defendant's right to a fair trial, trial courts must vigilantly weed out otherwise inadmissible statements that are not necessary to accomplish their proffered purpose," noting that, "[t]o hold otherwise would allow interrogations laced with otherwise inadmissible content to be presented to the jury disguised as context." *Id*. (quotation marks and citation omitted).

Neither party undertakes significant analysis of the numerous times Detective White commented on defendant's credibility during the interview. While the prosecution generally asserts the comments provided context to defendant's statements, there is no serious attempt to explain the contextual value of even a single instance of Detective White accusing defendant of lying and being a liar. We have reviewed the entire interrogation video and have found a significant number of comments about defendant's credibility made by Detective White. Once again, we believe the correct course is to assume the challenged portions of the video were improperly admitted, and to address whether the error was outcome-determinative. Because it clearly was not, reversal is not warranted.

Again, "[a] preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Burns*, 494 Mich at 110 (quotation marks and citation omitted). The burden of proving outcome-determinative error is on defendant. *Lukity*, 460 Mich at 495.

In the brief on appeal filed by defendant's counsel and in his Standard 4 brief, there is no assertion of any prejudice to the defense by the improper admission of Detective White's statements during the interrogation. Instead, the briefs merely note the comments invaded the jury's role of assessing credibility and state that defendant is entitled to a new trial. Defendant has not identified any of the comments specifically at issue, has not explained how they created prejudice, and has not analyzed the untainted evidence against the inadmissible remarks of Detective White. Having failed to even attempt to engage in such analysis, defendant clearly has failed to bear his burden of proving outcome-determinative error. *Lukity*, 460 Mich at 495. Thus, on that ground alone, we would affirm. *Id*.

We also note, though, the record shows that, had defendant engaged in such analysis, it would have shown a lack of prejudice. Notably, defendant does not challenge his statements made to police during the interrogation where he repeatedly admits that his original story was a lie he created with his family to exculpate themselves. Defendant also acknowledges that his decision in that regard was shortsighted and impaired his credibility. Defendant affirmed in his written statement that the original story told to police was a lie, created with the intent of saving Kenneth Gibson from suspicion. Consequently, even if Detective White's statements had been redacted from the video of the interrogation before it was played into evidence, the jury still would have been aware of defendant's understanding he originally lied to police and thereby undermined his credibility. Considering the similar evidence was admissible and untainted evidence, any allegation of outcome-determinative error by defendant would have been seriously undermined. *Id*.

Moreover, during trial, defendant moved the trial court to instruct the jury that Detective White's statements in the interrogation video were not evidence. The trial court obliged, and read the following instruction to the jury before deliberations began: "The lawyers[']statements and arguments, the police officers[']statements during the video interview are not evidence. They are only meant to help you understand the evidence and each side's legal theories." It is axiomatic that, "[j]urors are presumed to follow the court's instructions, and instructions are presumed to cure most errors." *People v Mullins*, 322 Mich App 151, 173; 911 NW2d 201 (2017). Thus, the jury presumably heard the instruction from the trial court and followed the instruction to avoid considering Detective White's questions and comments as evidence of defendant's credibility or guilt. *Id*.

In sum, considering defendant stated he lied to police and acknowledged his credibility had been damaged in undisputedly admissible evidence, and the trial court instructed the jury to not consider Detective White's statements during the interrogation as evidence, the record does not support "it is more probable than not that the error was outcome determinative." *Burns*, 494 Mich at 110 (quotation marks and citation omitted). Thus, despite the trial court's assumed error, reversal and a new trial is not warranted. *Id*.

IV. JURY INSTRUCTION REGARDING FLIGHT

Defendant asserts the trial court abused its discretion by instructing the jury regarding flight. We disagree.

A. STANDARD OF REVIEW

"We review de novo claims of instructional error . . . ." *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018), (quotation marks and citation omitted). However, "we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion." *People v Craft*, 325 Mich App 598, 604; 927 NW2d 708 (2018) (quotation marks and citation omitted). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

B. LAW AND ANALYSIS

The trial court did not abuse its discretion when it overruled defendant's objection and instructed the jury regarding flight.

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Head*, 323 Mich App 526, 537; 917 NW2d 752 (2018) (quotation marks and citation omitted). "One of the essential roles of the trial court is to present the case to the jury and to instruct it on the applicable law with instructions that include . . . any material issues, defenses, and theories that are supported by the evidence." *Craft*, 325 Mich App at 606-607 (quotation marks and citation omitted). "Further, when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge." *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). "Jurors are presumed to follow the court's instructions, and instructions are presumed to cure most errors." *Mullins*, 322 Mich App at 173.

During trial, the prosecution introduced evidence of Officer Sandra Whitfield responding to the crime scene in her patrol car shortly after the shooting. While defendant was in his car, Officer Whitfield pulled her patrol car, with lights flashing but no siren, behind defendant's vehicle. Officer Whitfield and her partner exited the police car, but did not approach defendant's car. Officer Whitfield's dashcam footage showed defendant slowly pull away from the scene of the shooting. Defendant later voluntarily came to the police station to make a statement. Over defendant's objection, the trial court gave the following jury instruction regarding flight:

> There has been some evidence that the defendant tried to run away or run away after the alleged crime or was accused of the crime or the police arrested them or the police tried to arrest them.
>
> This evidence does not prove guilt. A person may run for innocent reasons such as panic, mistake or fear. However, a person may also run because of a consciousness of guilt.
>
> You must decide whether the evidence is true, and if true, whether it shows that the defendant had a guilty state of mind.

Defendant argues the above jury instruction should not have been given because the evidence showed he drove away slowly and later voluntarily came to the police station to make a statement regarding the shooting. The trial court's decision to give the instruction was not an abuse of discretion so long as "a rational view of the evidence supports the instruction." *People v Armstrong*, 305 Mich App 230, 240; 851 NW2d 856 (2014). Defendant suggests there was no evidence he "ran" from the police, but merely drove away from the scene of the crime. However, "[e]vidence of flight is admissible to support an inference of consciousness of guilt . . . ." *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008) (quotation marks and citation omitted). Further, "[t]he term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). In other words, the flight instruction is relevant in situations other than when a defendant literally runs from police. *Id*.

As relevant to the present case, the flight instruction is appropriate when a defendant "flee[s] the scene of the crime . . . ." *Id*. Here, the evidence showed that defendant had been told that the victim was shot. Defendant, who stated he was outside at the time, heard the gunshot. Instead of contacting police, or even waiting for them to arrive, defendant packed up his most valuable belongings—a television and PlayStation video game console—and drove away in his car. Indeed, defendant even drove away when a police officer pulled directly behind his car with emergency lights activated. Although Officer Whitfield acknowledged she did not try to stop defendant, such action was not required for a flight instruction. Instead, it was enough that "a rational view of the evidence," *Armstrong*, 305 Mich App at 240, supported that defendant "fle[d] the scene of the crime," *Coleman*, 210 Mich App at 4.

Defendant also argues the trial court should not have given the instruction because he voluntarily came to the police station later in the day. Defendant's decision to come to the police station, while relevant to the weight of the evidence of his original flight from the scene of the shooting, does not negate that he did indeed flee from his apartment building after the victim was fatally shot. Our rationale is supported by our Supreme Court's analysis regarding a similar issue:

> In this homicide case, the prosecutor introduced as circumstantial evidence of [the] defendant's consciousness of guilt that he had been arrested in Georgia two weeks after the homicide. After being released from jail in Georgia, [the] defendant returned to Michigan where he was arrested. The fact that he voluntarily returned to Michigan does not necessarily mean that [the] defendant did not *initially* flee to Georgia out of fear of apprehension. [*People v Smelley*, 485 Mich 1023, 1023 (2010).]

Similarly, defendant originally fled the scene of the crime, but later decided he should go and speak with police. Notably, defendant only did so after crafting a false story with his family in an effort to exculpate himself from any incriminating actions. Nevertheless, defendant's original decision to leave his apartment building after the shooting was enough to satisfy the requirement for the instruction related to flight despite his later decision to go to the police station. *Id*.

Because a rational view of the evidence supported that defendant fled the scene of the crime, *Armstrong*, 305 Mich App at 240, and defendant's later decision to speak with police

voluntarily did not negate his original flight, *Smelley*, 485 Mich at 1023, the trial court did not abuse its discretion when it gave the instruction related to flight, *Craft*, 325 Mich App at 604.

V. POTENTIAL BIAS OF JUROR

Defendant contends the trial court should have granted defendant's request to excuse Juror AZ for cause during jury selection. We disagree.

A. STANDARD OF REVIEW

Generally, "[t]he decision to grant or deny a challenge for cause is within the sound discretion of the trial court." *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994) (quotation marks and citation omitted). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *People v Korkigian*, 334 Mich App 481, 489; 965 NW2d 222 (2020) (quotation marks and citation omitted). However, "once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause." *People v Eccles*, 260 Mich App 379, 383; 677 NW2d 76 (2004). Generally, "[w]hether defendant was denied his [constitutional] right to an impartial jury . . . is a constitutional question that we review de novo." *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012).

B. LAW AND ANALYSIS

The trial court did not abuse its discretion or impair defendant's right to a fair and impartial jury by denying defendant's for-cause challenge to a potential juror.

" '[T]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial "indifferent" jurors.' " *People v Jendrzewski*, 455 Mich 495, 501; 566 NW2d 530 (1997), quoting *Irvin v Dowd*, 366 US 717, 722; 81 S Ct 1639; 6 L Ed 2d 751 (1961). "[J]urors are presumed to be . . . impartial, until the contrary is shown." *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008) (quotation marks and citation omitted). "A trial court ensures that a jury is impartial by conducting voir dire and removing biased jurors before impaneling the jury[.]" *People v Haynes*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350125); slip op at 7. "The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Miller*, 482 Mich at 550.

"MCR 6.412(D)(2) provides that if 'the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel.' " *Miller*, 482 Mich at 546. Three such grounds, under MCR 2.511(D)(2) through (4), are that the person "is biased for or against a party or attorney," or "shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;" and "has opinions or conscientious scruples that would improperly influence the person's verdict[.]" "[T]o determine whether an error in refusing a challenge for cause merits reversal," this Court and our Supreme Court have established a "four-pronged test . . . ." *Legrone*, 205 Mich App at 81, citing *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 241; 445 NW2d 115 (1989). Specifically, reversal requires a "showing on the record that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to

excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable." *Legrone*, 205 Mich App at 81, quoting *Poet*, 433 Mich at 241.

Defendant contends Juror AZ's answers to certain questions during voir dire revealed an inherent bias regarding individuals accused of crimes, such as defendant in this case, and he is entitled to a new trial. Defendant's argument fails under *Legrone* because defendant did not use a peremptory challenge to excuse AZ, he did not use all of his peremptory challenges, he did not express a wish to peremptorily excuse other jurors, and he has not alleged any juror besides Juror AZ was objectionable. *Id.*

But, because defendant later contends that trial counsel was ineffective for failing to use a peremptory strike against Juror AZ, we will address the question of whether Juror AZ actually was biased.

During voir dire, Juror AZ initially expressed a clear understanding of the prosecution's burden of proof and asserted that he would find defendant "not guilty" if he were required to decide before any evidence was admitted. Juror AZ also agreed defendant did not have to prove anything during trial. Later, during questioning by defendant, Juror AZ gave concerning answers about the presumption of innocence, stating he did not believe defendant would be on trial if he had not done anything wrong. After being corrected, Juror AZ insisted he could be fair and impartial, and agreed he would not assume anything before hearing evidence.

Defendant thereafter moved to strike Juror AZ for cause, asserting "he admits that the defendant must be a little guilty or he wouldn't be here." The trial court denied counsel's request, stating, "I'm not going to excuse him for cause . . . ." Again, defendant did not use a peremptory strike to remove Juror AZ, so he remained on the jury.

We note that when Juror AZ was provided with simple, clear, and straightforward questions, his answers were likewise clear and showed no bias. However, as the parties engaged in further voir dire and asked more nuanced questions, Juror AZ's responses became less clear. Whether his apparent belief defendant must have done something wrong to be on trial was legitimate or a result of confusion, the outcome remains the same. Once Juror AZ was corrected regarding the burden of proof and presumption of innocence, he agreed he would not assume anything. He then stated he could be fair and impartial, verifying his previous claim in the same regard.[8]

[8] See MCL 768.10 ("The previous formation or expression of opinion or impression, not positive in its character, in reference to the circumstances upon which any criminal prosecution is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, such opinion or impression not being positive in its character, or not being based on personal knowledge of the facts in the case, shall not be a sufficient ground of challenge for principal cause, to any person who is otherwise legally qualified to serve as a juror upon the trial of such action: Provided, That the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath, that he verily believes that

Ultimately, after observing the voir dire, the trial court apparently believed Juror AZ's assertions that he would not assume defendant's guilt and could be fair and impartial. We "defer[] to the trial court's superior ability to assess from a venireman's demeanor whether the person would be impartial[.]" *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000); see also MCR 2.517(C). After all, "[p]erhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions," which are all things we are unable to observe on appeal. *Unger*, 278 Mich App at 258. Thus, we defer to the trial court's apparent assessment, *Williams*, 241 Mich App at 522, and rely on the trial court's determination that Juror AZ was not biased against defendant and would be a fair and impartial juror.

Our conclusion is buttressed by a published decision addressing a factually similar issue. In *People v Lee*, 212 Mich App 228, 249; 537 NW2d 233 (1995), this Court considered a claim the trial court erred by denying the defendant's for-cause challenge to a prospective juror who "express[ed] some concern about her ability to keep in mind that defendant was presumed innocent." The panel provided the following reason for affirming the trial court's decision not to excuse the prospective juror for cause:

> Despite some concerns that it might be difficult for her to do so, [the prospective juror] assured the court that she could be fair, would follow the court's instructions, and would decide the case exclusively on the basis of the evidence.
>
> We find no error with the trial court's decision not to excuse [the prospective juror] for cause. [The prospective juror] did not indicate that she had a state of mind that would prevent her from rendering a just verdict. Nor did she possess opinions that would have improperly influenced the verdict. Rather, she stated—apparently credibly to the trial court—that she would decide the case consistent with the requirements of the law. The court therefore was not required to dismiss her for cause. [*Id*. (citations omitted).]

A similar analysis applies here. Pertinently, while Juror AZ "express[ed] concern about [his] ability to keep in mind that defendant was presumed innocent," he assured the trial court he could be fair and impartial and would not assume anything. *Id*. His understanding of his responsibility in that regard was further supported by his statement he would find defendant "not guilty," if he were required to render a verdict before any evidence was presented. If Juror AZ truly and inescapably believed defendant was guilty simply for being on trial, he would not have answered in such a manner. Thus, as in *Lee*, 212 Mich App at 249, the trial court in the present case did not abuse its discretion in concluding Juror AZ was not biased, and therefore, did not have to be stricken for cause.

---

he can render an impartial verdict according to the evidence submitted to the jury on such trial: Provided further, That the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror.")

Because defendant has not satisfied his burden of showing a biased juror served on his jury, he has failed to present a legitimate claim his right to a fair and impartial jury was violated. *Miller*, 482 Mich at 550.

VI. EXTRANEOUS INFORMATION PROVIDED TO JURY

Defendant, in his Standard 4 brief, argues the jury was tainted by extraneous information from a juror who knew the victim. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

"[I]ssues for appeal must be preserved in the record by notation of objection . . . ." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). In the present case, there is no dispute defendant did not object to the trial court's decision regarding how to handle Juror DB's claim she knew the victim. Thus, this issue is not preserved for our review. *Id.*

Generally, "[w]hether defendant was denied his [constitutional] right to an impartial jury . . . is a constitutional question that we review de novo." *Bryant*, 491 Mich at 595. "We review unpreserved claims of nonstructural, constitutional error for plain error." *People v Buie*, 285 Mich App 401, 407; 775 NW2d 817 (2009). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. To show that a defendant's substantial rights were affected, there must be "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018) (quotation marks and citation omitted).

B. LAW AND ANALYSIS

The trial court did not plainly err and defendant's right to a fair and impartial jury was not impaired by the trial court's handling of Juror DB's extraneous knowledge of the case.

Defendant contends Juror DB's knowledge of the victim, along with the possibility that she might have shared that information with other jurors before being excused, tainted the jury against him. "An allegation of juror misconduct, even if the alleged misconduct . . . actually occur[red], will not warrant a new trial unless the party seeking the new trial can show that the misconduct [was] such as to affect the impartiality of the jury or disqualify [the jurors] from exercising the powers of reason and judgment." *People v Dunigan*, 299 Mich App 579, 586; 831 NW2d 243 (2013) (quotation marks and citation omitted). "During their deliberations, jurors may only consider the evidence that is presented to them in open court." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Id.*

To be successful in a claim regarding extraneous information obtained by the jury, a defendant has the burden to show both that "the jury was exposed to extraneous influences," *id.*,

and "that there was 'a real and substantial possibility that [the extraneous influences] could have affected the jury's verdict.' " *Haynes*, ___ Mich App at ___; slip op at 9, quoting *Budzyn*, 456 Mich at 89. "Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Budzyn*, 456 Mich at 89.

On the third day of trial, which was the first day evidence was presented after jury selection, the trial court received a note from Juror DB. The note stated, "I didn't hear you when you said, if we knew any of the people to say something," and informed the trial court, "[t]he boy who died is a very close friend of mine[, a]nd I am very uncomfortable doing the case." The trial court provided the parties with the information from the note at the end of the day, and instructed them that they should consider how it should be handled and be prepared to address the issue the following day.

The next day, Juror DB was brought into the courtroom to address her note. She admitted that she knew the victim relatively well and did not feel comfortable going forward in the case. The trial court asked Juror DB if she told anyone else that she knew the victim. Juror DB acknowledged that she told Juror LF, providing the following explanation: "When I went out there she was walking next to me and I told her, I'm like I feel uncomfortable. And she was like why. I'm like cuz the boy that got killed I knew him. That was it."

The trial court excused Juror DB and called Juror LF into the courtroom to determine the information she may have obtained from Juror DB. Juror LF agreed that the only conversation she had with Juror DB was, "[s]he told me that she knew the victim and I told her she needed to let the [j]udge know." Juror LF insisted there were no other conversations. Juror LF remained on the jury.

On appeal, defendant contends that his jury might have been provided extraneous information from Juror DB about the victim, which prejudiced him. Defendant asserts the trial court should have investigated further into the conversation between Jurors DB and LF to ensure they were not overheard by other jurors. In order to be successful on this claim, defendant has the burden to show both that "the jury was exposed to extraneous influences," and that they "created a real and substantial possibility that they could have affected the jury's verdict." *Budzyn*, 456 Mich at 88-89. The only evidence on the record regarding a potential extraneous influence was Juror DB's conversation with Juror LF. And the only information Juror DB shared was that she was friends with the victim. There was nothing on the record reflecting that Juror DB had any extraneous information about the crime or defendant's involvement in it. Juror LF confirmed Juror DB's explanation about the extent of their conversation, noting that Juror DB shared nothing else. Defendant's suggestion that other jurors may have overheard the conversation between Juror DB and Juror LF is not supported by the record. In any event, at most, the other jurors may have heard that Juror DB was friends with the victim and was told by Juror LF to let the judge know that information. In other words, none of the jurors were provided with any information about the crime in question, other than that Juror DB was friends with the victim. Consequently, even if the jury was exposed to "extraneous information" about Juror DB's relationship with the victim, there was no record support "that there was 'a real and substantial possibility that [the extraneous influences] could have affected the jury's verdict.' " *Haynes*, ___ Mich App at ___; slip op at 9,

quoting *Budzyn*, 456 Mich at 89. Consequently, the trial court did not err, plainly or otherwise, in handling Juror DB's disclosure, and thus, defendant's claim lacks merit. *Id*.

VII. JURY DELIBERATIONS

Defendant, in his Standard 4 brief, argues that the trial court improperly coerced the jury to reach a unanimous verdict after it denied a deliberating juror's request to be removed. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

The jury began its deliberations after 2:40 p.m. on Friday, September 6, 2019, which resumed the following Monday, after they were provided with certain requested exhibits. The jury asked numerous questions pertaining to the law and facts, which the trial court answered after consultation with counsel. The next day, more notes followed shortly before 10 a.m. One note "personally addressed to" the trial court read:

> Dear Judge, I am juror number 10[.] [C]an I please be excused from this jury[?] My mother has cancer and her appointment is tomorrow and I take her and I am losing so much money by not working. This is too much. I can't give my all. Too many things going on.

The court responded to the juror's note, "not at this time. Sorry."

Other notes followed, including one at 2:16 p.m. that read: "W[]e[']re divided on [a] verdict. We feel that we are a hung jury on one of the counts." In response, the court read a slightly modified version of the standard deadlock jury instruction, M Crim JI 3.12, urging the jurors to "carefully and seriously consider the views of [their] fellow jurors" and cautioned them that "none of you should give up your honest beliefs about the weight or affect of the evidence only because of what your fellow jurors think, or only for the sake of reaching agreement."

The jury resumed deliberations. On Wednesday, September 11th, at 10:56 a.m., the jury returned its verdicts.

The record does not reveal any objection by defendant to the trial court's responses to these notes. "Because defendant failed to object, we apply the plain-error rule . . . ." *People v Walker*, 504 Mich 267, 276; 934 NW2d 727 (2019). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. To show that a defendant's substantial rights were affected, there must be "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 764-765 (quotation marks and citation omitted).

B. LAW AND ANALYSIS

The trial court did not plainly err in its response to the juror's and the jury's notes.

"[W]hile a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundament right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is protected by removing a juror unable or unwilling to cooperate." *People v Tate*, 244 Mich App 553, 562; 624 NW2d 524 (2001). "Removal of a juror . . . is therefore at the discretion of the trial court, weighing a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate." *Id.*

We conclude that the trial court did not abuse its discretion in declining to remove the juror. At the trial's onset, the court explained that the trial was anticipated to last two weeks. Juror 10 did not mention any issues with her mother, but did note that serving would be a financial burden, even though she would "be okay." Although the trial ended within the timeframe anticipated, the jury deliberations continued into a third week.

Recognizing that the trial court's response to the juror's note was exceedingly succinct, it nevertheless stated that the juror would not be excused from the jury "at this time" and apologized for the juror's predicament, adding "[s]orry." Notably, the trial court's response to the juror was not coercive in any manner—the trial court did not urge or pressure the juror to reach a consensus or give any indication the juror would only ever be able to complete jury duty if she reached an agreement with the other jurors. Indeed, the record does not contain any information regarding whether the juror in question was a holdout on the single count upon which the jury initially could not agree. Instead, it is at least equally likely that the juror was in the majority and may have merely been expressing frustration with a different holdout. Consequently, on the record presented to this Court, there simply is no evidence other than defendant's conjecture, that the juror in question, as a result of the trial court's denial, felt coerced in any manner to give up her beliefs in order to reach a verdict.

Moreover, the court's later response to the jury's revelation that it was potentially deadlocked on one count encouraged all of the jurors to re-examine their views without giving up their honest beliefs. "When a jury indicates it cannot reach a unanimous verdict, a trial court may give a supplemental instruction—known as an *Allen* [*v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896),] charge—to encourage the jury to continue deliberating." *Walker*, 504 Mich at 276 (footnote omitted). "The goal of such an instruction is to encourage further deliberation without coercing a verdict." *Id.*

Our Supreme Court adopted a standard deadlock jury instruction in *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974), which is "incorporated into our model jury instructions." *Walker*, 504 Mich at 277, citing M Crim JI 3.12. "Although the model instruction is an example of an instruction that strikes the correct balance, it is not the only instruction that may properly be given." *Walker*, 504 Mich at 277-278 (citation omitted). Pertinently, our Supreme Court recently recognized that M Crim JI 3.12 "is an example of an instruction that strikes the correct balance," with respect to fear of coercion while encouraging the jury to continue working toward a unanimous verdict. *Walker*, 504 Mich at 277-278. Thus, the trial court's use of an instruction

consistent with M Crim JI 3.12 in response to the jury's indication it might be hung on a single count was appropriate and did not create a danger of causing "a juror to abandon his [or her] conscientious dissent and defer to the majority solely for the sake of reaching agreement[.]" *Walker*, 504 Mich at 278 (quotation marks and citation omitted; alterations in original).

Juror 10 is presumed to have followed the court's instructions. *Mullins*, 322 Mich App at 173. And the record reflects that, after being sworn, the jurors unanimously agreed with the verdict. Moreover, when individually polled and asked if the verdict reported by the jury's foreperson was her verdict, Juror 10 responded affirmatively.

In the end, nothing in the record supports defendant's position that "[t]his was a hasty deliberation." To the contrary, despite Juror 10's personal circumstances, she continued to deliberate until consensus on the single count in dispute was reached. Defendant has not demonstrated plain error occurred in the trial court's response to Juror 10's note.

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues he is entitled to reversal of his convictions and a new trial on the basis of ineffective assistance of counsel. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

"Because no *Ginther* hearing was held, review is limited to errors apparent on the record." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007) (citation omitted). "The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *People v Schrauben*, 314 Mich App 181, 189; 886 NW2d 173 (2016), quoting *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

B. LAW AND ANALYSIS

Defendant's constitutional right to the effective assistance of counsel was not violated during the trial court proceedings.

Defendant alleges trial counsel and pretrial counsel rendered ineffective assistance of counsel warranting reversal and a new trial. "Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions." *Schrauben*, 314 Mich App at 189-190, citing US Const, Am VI; Const 1963, art 1, § 20. "However, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Schrauben*, 314 Mich App at 190. The United States Supreme Court has held that "in order to receive a new trial on the basis of ineffective assistance of counsel, a defendant must establish that 'counsel's representation fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), quoting *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "When reviewing defense counsel's performance, the reviewing court must first objectively 'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' " *Jackson*, 313 Mich App at 431, quoting *Strickland*, 466

US at 690. "Next, the defendant must show that trial counsel's deficient performance prejudiced his defense—in other words, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Jackson*, 313 Mich App at 431, quoting *Vaughn*, 491 Mich at 669.

This Court will not find trial counsel to be ineffective where an objection would have been futile; nor will it second-guess matters of trial strategy. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "The defendant 'bears the burden of demonstrating both deficient performance and prejudice[;] the defendant [also] necessarily bears the burden of establishing the factual predicate for his claim.' " *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015), quoting *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (alteration in *Cooper*).

Defendant, in the brief on appeal filed by counsel and in his original Standard 4 brief on appeal, argues trial counsel was ineffective for failing to meet with defendant in jail to prepare for trial. An attorney's failure to meet with a defendant between preliminary examination and trial, on its own, is not sufficient to prove a claim of ineffective assistance of counsel. *People v Payne*, 285 Mich App 181, 189; 774 NW2d 714 (2009). See also *People v Dixon*, 263 Mich App 308, 396-397; 688 NW2d 308 (2004). Instead, in such circumstances, when "the record reveals that defense counsel was prepared for trial, displayed an adequate knowledge of the evidence, and was fully prepared to cross-examine the prosecution's witnesses," we have declined to "conclude that counsel's performance in this regard fell below an objective standard of reasonableness." *Payne*, 285 Mich App at 189. Thus, the operative issue is whether trial counsel was adequately prepared for trial, not whether trial counsel regularly met with defendant to discuss the case. *Id.*

For this issue, defendant argues trial counsel's failure to meet with him resulted in defendant not seeing the video of his interrogation or the surveillance videos from Spotlight Liquor Store or the restaurant. Defendant, in a supporting affidavit attached to his brief on appeal, asserts his inability to view those exhibits changed the outcome of trial because he *might have* decided to take a plea agreement or testify at trial to clarify his story. Interestingly, defendant does not aver he *would have* done either of those things, even though he was at trial, and thus, undoubtedly has now viewed the evidence in question. Further, defendant certainly participated in the interrogation, and therefore, had a relative understanding of what occurred during his discussions with police.

To be successful, defendant has the "burden of establishing the factual predicate of his ineffective assistance claim." *People v White*, 331 Mich App 144, 148; 951 NW2d 106 (2020) (quotation marks and citation omitted). The trial court record, along with defendant's affidavit on appeal, simply do not create a factual predicate supporting defendant's claim of ineffective assistance of counsel. First, the trial court record shows defendant's trial counsel was reasonably prepared for trial and had handled the preliminary examination. See *Dixon*, 263 Mich at 397 (This Court declined to grant a new trial on counsel's failure to meet with defendant between preliminary examination and trial, in part, because "[t]he preliminary examination transcript reveal[ed] that defense counsel had been apprised of the relevant facts of the case," and therefore, defendant could not show prejudice). Second, despite defendant's allegation he did not have a chance to review the evidence of his interrogation, trial counsel adequately argued a motion to suppress the interrogation on an array of legal grounds. Third, trial counsel made relevant, though meritless,

objections to Juror AZ's potential bias as a result of his answers during voir dire and the trial court's decision to give a jury instruction related to flight. Fourth, throughout the trial, defendant's trial counsel effectively cross-examined the prosecution's witnesses. Fifth, trial counsel presented an effective strategy, focusing his arguments on Kenneth Gibson's role and Kenneth Gibson's ultimate decision to pull the trigger as defendant was standing outside.

In contrast to these facts, defendant alleges that trial counsel did not meet with him in jail from April through August 2019. Notably, though, defendant avers trial counsel always met with defendant in the holding cell at the trial court when defendant was present for pretrial motions, which took place on May 17, June 28, and August 5, 2019.

While defendant claims he would have potentially sought a plea agreement or decided to testify if trial counsel had met with defendant and shown him the videos to be introduced at trial, he has not averred he actually would have done those things. Further, defendant has not provided any evidence, nor even any assertions, regarding whether such a plea deal was possible, whether the plea deal would have been better than the 15 to 30 years' imprisonment he received for his second-degree murder conviction when he faced life imprisonment without the possibility of parole on the charge of open murder,[9] what his alleged testimony would have been, or how such testimony would have changed the outcome of trial. Additionally, defendant's decision regarding whether to testify at trial was made after the videos, including a redacted version of defendant's interview, were played for the jury. Defendant has not explained how his decision regarding whether to testify would have changed if he had been shown the videos a few months before his decision, instead of days before his decision. In short, defendant has only alleged his trial counsel failed to meet with him in a manner of defendant's liking, without making a showing that trial counsel was unprepared for trial. Defendant's failure to establish the factual predicate for his claim—which required him to show trial counsel was unprepared for trial, not just that he did not meet with defendant—dooms this argument of ineffective assistance of counsel to failure. *Id*.; *Payne*, 285 Mich App at 189.

Defendant, in his Standard 4 brief, also argues his pretrial counsel was ineffective for failing to instruct him to remain silent instead of participating in the interrogation and for not realizing the interrogation room was being recorded when defendant asked to speak privately. As to the first issue, defendant's argument lacks merit on the basis of a decision of our Supreme Court. Specifically, the Court stated that when evaluating the performance of counsel as related to advice on a defendant's decision to make a statement to police, "counsel cannot be faulted for advising defendant on the facts defendant had communicated to him." *People v Frazier*, 478 Mich 231, 244; 733 NW2d 713 (2007). After noting that "[w]hat defendant ultimately told the police and

[9] Our review of the record reveals that the prosecution initially offered defendant the opportunity to plead guilty to second-degree murder and felony-firearm with a sentence agreement of 17 to 30 years' imprisonment for the murder to be served consecutively to the two-year sentence for felony-firearm. The prosecution would then dismiss the remaining felony charges.

Negotiation continued. One the first day of trial, the offer remained the same, but the sentence for second-degree was reduced to 14 years, and then, 12 years' imprisonment. Defendant rejected those revised offers.

what he told defense counsel were two different things," the Court reasoned that, "[i]f defendant had given counsel the same version of events that he furnished the police, counsel would most likely have advised defendant differently." *Id*. The *Frazier* Court also noted the "[d]efendant insisted on talking with the police in order to obtain a favorable plea bargain." *Id*. at 246.

In the present case, defendant admitted to meeting with his family members and crafting a false version of events to tell police. The contrived story involved defendant entering his apartment unit alone, while Kenneth Gibson waited outside, and having an altercation with the victim. They agreed to tell police defendant and the victim had a scuffle after defendant found the victim inside defendant's apartment, the scuffle led downstairs, and defendant shot the victim after defendant saw the victim reach for a gun. The obvious intent of the story was to establish self-defense and stopping an active burglary as the reasons for the shooting. Defendant told the same version of events to his pretrial counsel before going to the police station to make a statement. On the basis of that information from defendant, pretrial counsel agreed defendant should speak with police.

Once defendant's story started to fall apart during the interrogation when he was confronted with certain evidence, pretrial counsel's surprise and concern was evident. The video interrogation shows pretrial counsel's decision to recommend speaking to police was on the basis of defendant's false story. Thus, like in *Frazier*, 478 Mich at 243-246, counsel's advice was made on the basis of being misled by defendant. Pretrial "counsel cannot be faulted for advising defendant on the facts defendant had communicated to him." *Id*. at 244. Therefore, pretrial counsel's advice to defendant was only faulty because he was misled by defendant, and consequently, the record does not support defendant's claim pretrial counsel rendered ineffective assistance of counsel. *Id*.

Defendant next challenges pretrial counsel's alleged belief that the interrogation was not being recorded. Initially, we note that the record does not support such an assertion because pretrial counsel's behavior in the interrogation room showed an obvious understanding he was being recorded. Instead, pretrial counsel's mistaken belief was that the recording could not be used at trial even if he and defendant had made no effort to have their discussion in a confidential manner. Even so, there seems to be no excuse for pretrial counsel's decision to have a frank discussion with defendant without taking any precautions—other than occasional whispering—to ensure confidentiality in a room he knew was being audio- and video-recorded. It is beyond dispute that pretrial counsel's representation in that regard fell below an objective standard of reasonableness. *Strickland*, 466 US at 690.

However, to be entitled to relief on a claim of ineffective assistance of counsel, defendant also has to prove there was a reasonable probability that, but for pretrial counsel's failure to ensure confidentiality of their conversation, the outcome of trial would have changed. *Id*. at 694. For the reasons discussed in Section III of this opinion, defendant's conversation with pretrial counsel being played to the jury was not prejudicial to his defense.[10] Defendant's discussion with pretrial

[10] Importantly, as discussed above, the portions of the video showing defendant actively deleting information from his cell phone were admissible under the crime-fraud exception to the attorney-client privilege. Thus, even if pretrial counsel had ensured confidentiality for the entire conversation with defendant, the portions involving the active commission of the crime would still

counsel when they were alone related to defendant's explanation that his original story was a lie, he lied to protect Kenneth Gibson, and a claim of the actual version of events. Relevantly, the version of events defendant told pretrial counsel, in what defendant might have believed to be confidence, matched the version of events defendant ultimately told the police in his oral and written statements. Because there is no challenge to defendant's statements to police being admissible, the story defendant told pretrial counsel would have come into evidence anyway. Moreover, as also discussed above, the fact that defendant relayed the same facts to pretrial counsel in supposed confidence, as he reported to the police when he knew his statements would be used against him at trial, lent credence to his claims about how the victim's murder actually occurred.

In sum, even if pretrial counsel had ensured confidentiality before speaking with defendant in the interrogation room, the evidence adduced from their conversation would have been admitted as a result of defendant telling the same version of events to police in an undisputedly admissible manner. Further, evidence that defendant told the same story to police and his attorney supported that his final story, which limited his involvement in the shooting of the victim, would be believed by the jury. Consequently, even though pretrial counsel's representation fell below an objective standard of reasonableness, defendant has not established that there was a reasonable probability that absent the error, the outcome of trial would have changed. *Id*. Thus, his claim fails under the second prong of *Strickland*, 466 US at 694.

Defendant, in his Standard 4 brief, also contends his trial counsel was ineffective for failing to object to his video interrogation being played to the jury on the grounds of ineffective assistance of pretrial counsel. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Savage*, 327 Mich App 604, 617; 935 NW2d 69 (2019) (quotation marks and citation omitted). The argument asserted by defendant on appeal lacks merit because it relies on application of the exclusionary rule in response to a claim of ineffective assistance of counsel. Specifically, defendant contends the video of his interrogation would not have been played to the jury if trial counsel had argued pretrial counsel was ineffective for failing to advise defendant to remain silent. However, our Supreme Court has held that "[e]xcluding defendant's confession because of attorney error does not fulfill the goal of the exclusionary rule by deterring the police from future misconduct." *Frazier*, 478 Mich at 250. In other words, "[t]he exclusionary rule is a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights," which does not apply here because "this case presents *no* police misconduct whatsoever." *Id*. at 247, 250 (quotation marks and citation omitted).

Consequently, even if trial counsel had moved to suppress evidence of the interrogation on the basis of ineffective assistance of pretrial counsel, the motion would have been denied as lacking merit. *Id*. at 250. Because "[f]ailing to advance a meritless argument or raise a futile objection

---

have been shown to the jury. This is relevant because the portions of the video showing defendant deleting information from his cell phone and discussing such with his attorney were undoubtedly prejudicial as related to his conviction of destruction of evidence. However, because those portions of the video would have been played regardless of the confidential nature of the conversation, the prejudice of those portions of the video are not relevant to this analysis.

does not constitute ineffective assistance of counsel," defendant's argument in this regard fails. *Savage*, 327 Mich App at 617 (quotation marks and citation omitted).

Defendant next claims in his Standard 4 brief that his trial counsel was ineffective for failing to use a peremptory strike against Juror AZ. "[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which we normally decline to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (citations omitted). And "this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror." *Unger*, 278 Mich App at 258.

Assuming, without deciding, that a reasonably competent trial attorney would use a peremptory strike on a potential juror the attorney expressly, though incorrectly, believed to be biased against their client, this claim still lacks merit under the second prong of *Strickland*, 466 US at 694, which requires determining whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Here, as established above, defendant has not shown that Juror AZ actually was biased against defendant. Thus, his claim of ineffective assistance of counsel must fail because he has not shown a reasonable probability that the outcome of trial would have changed, if one unbiased juror was replaced with another. *Id.*

Finally, defendant claims that counsel was ineffective for failing to request jury instruction on the lesser included offenses of manslaughter and involuntary manslaughter based on Kenneth Gibson's contention that shooting the victim was an accident. We disagree.

"Manslaughter is murder without malice." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003) (quotation marks and citation omitted). There are "two forms of manslaughter: voluntary and involuntary." *Id*. at 535. Voluntary manslaughter requires a "show[ing] that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id*. "Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Id*. at 536. Because "the elements of voluntary and involuntary manslaughter are included in the elements of murder," "when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*. at 541.

Counsel is not ineffective for "failing to advance a meritless argument[.]" *Ericksen*, 288 Mich App at 201. Again, the testimony from codefendant Kenneth Gibson's trial cannot be considered in deciding whether a rational view of the evidence supports giving either instruction. MCR 7.210(A)(1). Regardless, for obvious reasons, neither voluntary nor involuntary manslaughter are supported by a rational view of the evidence. As to voluntary manslaughter, it is not clear that the 19-year-old unarmed victim was the individual who had unlawfully entered defendant's apartment, and, in any event, there was sufficient time for any excited passion on defendant's part to cool under a reasonable man standard. As to involuntary manslaughter, the victim was being held at gunpoint; in other words, Kenneth Gibson committed a felonious assault.

People v Avant, 235 Mich App 499, 505-506; 597 NW2d 864 (1999); *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998).

Moreover, even if we accepted defendant's arguments otherwise, counsel's decision whether to request a jury instruction on a lesser included offense is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996); *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982) ("The decision to proceed with an all or nothing defense is a legitimate trial strategy."). The decision to forgo an instruction on a lesser included offense and instead attempt to "force the jury into an 'all or nothing' decision" does not constitute ineffective assistance of counsel. *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981).

Affirmed.

/s/ Mark T. Boonstra
/s/ Elizabeth L. Gleicher
/s/ Anica Letica