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S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEJA DARNELL DAVIS,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 351935
Wayne Circuit Court
LC No. 19-000475-01-FC

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Deja Davis, appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

Shortly after midnight on August 22, 2018, Brittany Campbell was shot dead outside her home. Several hours before her death, she met with her friends Asia Berry and Miesha Gamet at Berry's duplex on Pingree Street. At the time, Berry was dating Davis's cousin, Donte Dodson, and Davis lived in the upper level of the duplex. After she arrived, Campbell's son and Berry's son went to play games in another room, and Campbell drank some wine with Dodson, Berry, and Gamet. Davis eventually joined them. He sat on the arm of the couch next to Campbell and talked with her. At some point, he touched her breasts and her groin area. Campbell got angry, told him not to do it again, and warned him that if he did she would spray him with mace. Davis responded by massaging her shoulders, so Campbell sprayed his face with mace. She stayed for a few minutes, called her friend Demesia Lee to pick her up, and then left with her son before Lee arrived.

Approximately 20 minutes after she left, Campbell returned to the duplex to get a green folder and a shoe that she had left behind. While on the porch, Davis apologized for touching her. Campbell was still upset. She yelled that she was not a punk and showed Davis that she had a gun. Davis told her "we good," and Campbell put the gun away and left. Dodson and Davis then asked Berry and Gamet if they knew where Campbell lived. They were told she lived on Euclid Street.

Lee picked Campbell up at her Euclid residence and drove her back to the Pingree area so she could retrieve the items she had left behind. On route, Campbell ran into Berry and Gamet, who were heading to a nearby liquor store. Berry and Gamet returned to the Pingree residence to get Campbell's items, but they were unable to find the green folder. They returned the shoe to Campbell, and, although Campbell displayed her gun again and was upset that the folder was missing, the three women parted ways without incident.

Lee drove Campbell to her home. He testified that he saw a red Dodge Durango drive past, pull into a vacant lot across the street from Campbell's residence, and turn off its lights. Campbell got out of Lee's vehicle and headed to her home. Lee heard her say "what you want" and "are you serious" to someone, and then he heard a gunshot, a short pause, and then multiple gunshots. He drove away, flagged down a police car, and told the officers that someone had been shot on Euclid Street. When the officers arrived, they found Campbell had been shot multiple times. The officers drove her to the hospital, but she died of her injuries.

At trial, the prosecution presented evidence that after asking where Campbell lived, Davis left the Pingree home and obtained a .45-caliber Taurus handgun from Dodson's brother-in-law. Around midnight, Davis and Dodson were at the Pingree residence. Surveillance video shows that Dodson's red Durango left the residence just after 12:05 a.m. and returned just before 12:15 a.m. Campbell was shot by a .45-caliber gun during that window of time. Data from Dodson's tether indicated that he was in the Pingree area when she was shot. Further, the prosecution presented evidence from Davis's ex-girlfriend, Davina Sturgis, that approximately two weeks after the murder a man called her and asked if Davis could stay with her. She initially identified the caller as Davis. The caller told Sturgis that Dodson and Davis took the Durango to Campbell's residence and that Davis, using the gun he obtained from Dodson's brother-in-law, shot Campbell several times after she fired a shot at him. Davis and Dodson then returned to the Pingree residence.

Cellular data from Davis's phone indicates that after the shooting, Davis remained near the Pingree residence. Dodson, who was in the same vicinity, exchanged multiple calls with Davis. And, approximately one hour after the murder, Davis's cellular phone pinged off a tower in the area near Campbell's residence. Around the same time, Dodson's tether pinged from his brother-in-law's residence. The prosecution argued that, based on that evidence, Davis returned to investigate the crime scene and Dodson returned the gun. Davis called Dodson at 2:59 a.m. and again at 3:44 a.m. Dodson performed an internet search at 10:31 a.m. for the "woman killed on Euclid Street," and he searched for hotels in the area. By 7:36 p.m., Dodson exchanged text messages with a woman listed in his phone as "Gabby Deja sis." During the exchange, he was asked what "her name" was and he directed Gabby to Campbell's Facebook page using her username and a description of her hair. Gabby texted him a photograph of Campbell and Dodson confirmed that was the woman they were talking about. Gabby advised Dodson to stop talking about "it" and to delete the text messages.

Both Dodson and Davis were arrested in connection with Campbell's murder. After his arrest, Davis told the police that he did not know and had not met Campbell. At trial, he argued that he was not the individual who called Sturgis, and he highlighted evidence indicating that Dodson's brother-in-law sold his gun prior to Campbell being shot. The jury, however, convicted him as charged.

II. ADMISSION OF EVIDENCE

A. STANDARD OF REVIEW

Davis argues that the trial court erred by admitting the following evidence: (1) Sturgis's testimony regarding the telephone call, (2) Dodson's text message exchange with Gabby and his internet search, and (3) Davis's statements to the police after his arrest but before he requested a lawyer. Davis's lawyer objected to the admission of Sturgis's testimony, arguing that it was inadmissible hearsay. He also objected to Dodson's text-message exchange with Davis's sister and his internet search. We review for an abuse of discretion preserved challenges to a trial court's decision to admit the evidence. *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). However, Davis's lawyer did not object to the admission of the video depicting Davis's statements to the police, nor did he object to the police officer's testimony that after giving some statements Davis chose to end the interview. Accordingly, we review that unpreserved challenge for plain error affecting Davis's substantial rights. See *People v Roscoe*, 303 Mich App 633, 648; 846 NW2d 402 (2014).

B. ANALYSIS

1. STURGIS'S TESTIMONY

Davis argues that Sturgis's testimony regarding the phone call she received was inadmissible hearsay. " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). However, certain statements made outside of a trial are, by definition, not hearsay. See MRE 801(d). As relevant to this case, "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement . . . ." MRE 801(d)(2)(A). "A statement cannot be used as a party admission unless the party made the statement." *Merrow v Bofferding*, 458 Mich 617, 633; 581 NW2d 696 (1998). In order to admit evidence as a party-opponent admission, the party seeking its admission has the burden of showing by a preponderance of the evidence that the statement was actually made by the defendant. *Id*. at 633 n 14.

Davis primarily argues that because Sturgis gave conflicting statements as to whether he was or was not the person who called her after the murder, the caller's statements could not be considered a party-opponent admission. However, Sturgis initially told the police that she believed the caller was Davis.[1] Additionally, Sturgis testified that the caller was a male and that he sometimes used the pronoun "I" when referring to Davis's actions. During the conversation, the caller recounted in detail the events leading up to Campbell's death, including actions taken by Davis when no one else was around. Based on the level of detail, it is logical to infer that the caller was present when Campbell maced Davis, when she returned to collect her personal belongings, when Davis and Dodson asked about and learned where she lived, when the murder weapon was

[1] Sturgis's original statement to the police identifying Davis as the caller is not hearsay because it is a statement of identification made after perceiving the declarant. See MRE 801(d)(1)(C).

obtained, and when Campbell was repeatedly shot in the street. The only two males drinking alcohol at the duplex prior to Campbell's death were Davis and Dodson. Sturgis was familiar with Dodson and was confident that he was not the caller because Dodson spoke with a lisp, but the caller did not. Finally, Sturgis stated that after she refused to allow the caller to stay at her home, her house was vandalized. Two police detectives who spoke with Sturgis also testified that she seemed nervous and afraid to be involved in the case. In light of this evidence, the trial court did not err by determining that the prosecution had proved by a preponderance of the evidence that Davis was the individual who made the statements during the phone call. As a result, the trial court did not abuse its discretion by admitting the testimony as a party-opponent admission under MRE 801(d)(2)(A).

2. DODSON'S TEXT MESSAGES

Next, Davis argues that the following text-message exchange between Dodson and "Gabby Deja sis" was inadmissible hearsay:

> *Gabby*: Yo.
>
> *Dodson*: Yo, yo.
>
> *Gabby*: Y'all good?
>
> *Dodson*: Hell yeah. Talking to his aunt, my cousin.
>
> *Gabby*: Word of advice, stop talking about it. You never know.
>
> *Gabby*: What the name was?
>
> *Dodson*: It's official, fam.
>
> *Dodson*: Girl name?
>
> *Gabby*: I don't want you jammed up at all. Y'all got enough shit. But okay, that good.
>
> *Gabby*: But yeah.
>
> *Gabby*: Her name.
>
> *Gabby*: I'm only asking cuz I'm seeing a few questionable posts on [Instagram].
>
> *Dodson*: Facebook Bambi Campbell, red hair.
>
> *Gabby*: [Photograph message of Campbell's Facebook profile page with her picture.]
>
> *Dodson*: Yeap.

Gabby: [Emoji.]

Gabby: Okay, no more talking about this. Delete this thread please and I'm about to.

Dodson: Okay, sis.

Gabby: Love you all, and keep you all head up.

The exchange occurred several hours after Campbell was murdered.

The trial court admitted the texts messages under MRE 804(b)(3), which provides an exception to the general rule against hearsay when the declarant is unavailable as a witness and allows for the admission of:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Davis argues that the statements were not against Dodson's interest because they "amounted to nothing more than neighborhood gossip or curiosity about the murder." He also argues that the only statements tending to inculpate Dodson came from Gabby's directive that Dodson stop talking about the murder and delete the exchange. However, "statements against penal interest are not limited to direct confessions." *People v Barrera*, 451 Mich 261, 270; 547 NW2d 280 (1996). "Moreover, it is well established that a particular piece of evidence need not by itself prove the declarant guilty." *Id.* at 270-271. Instead, "[t]he proffered statement need only be 'a brick in the wall' of proving the declarant's guilt." *Id.* at 271. Thus, "the statement need not have been incriminating on its face, as long as it was self-incriminating when viewed in context." *Id.*

Here, prior to making the challenged statement, Dodson was present when Davis was sprayed with mace by Campbell. After she left, Dodson and Davis asked where she lived. Then, shortly after midnight, Dodson's red Durango left the Pingree residence. A red Durango was seen waiting near Campbell's Euclid residence shortly thereafter and Dodson's tether pinged in that area. Later, Dodson's tether pinged at his brother-in-law's residence where the gun had been obtained. Moreover, Dodson conducted an internet search for "woman killed on Euclid" approximately ten hours after Campbell was murdered. He also searched for hotels in the area. In light of that evidence, his statements in the text-message exchange were another "brick in the wall" of proving that he was involved in Campbell's death. Therefore, although not a direct confession, in context, the statements during the exchange tend to subject Dodson to criminal liability for his role in Campbell's death.

Additionally, the statements were trustworthy. In order to be admissible as a statement against interest, the statement "must afford a basis for believing the truth of the matter asserted." *Id*. at 274. The statement was voluntarily given, made shortly after the events in question, was made to someone who appeared to be a family member to whom Dodson would likely speak the truth. See *id*. at 274 (listing factors indicating that a statement is reliable). Moreover, it was capable of independent corroboration because Campbell's Facebook name, physical description, and the confirmation that an image sent by Gabby was, in fact, Campbell, can be objectively verified.

In sum, because the statements were made by Dodson, were against his interest, and were reliable, the trial court did not abuse its discretion by admitting the text-message exchange under MRE 804(b)(3).

3. DODSON'S INTERNET SEARCH

Davis also argues that the trial court abused its discretion by admitting evidence that Dodson conducted an internet search for "woman killed on Euclid Street." That statement, however, is not hearsay because it was not offered to prove the truth of the matter asserted. See MRE 801(c). The prosecution did not introduce the search for "woman killed on Euclid Street" to prove that a woman was killed on Euclid Street. Instead, it was admitted to show that shortly after the murder Dodson was aware that a woman had been killed on Euclid Street and he was interested in knowing what information might be available regarding the death. Because the internet search was not hearsay, the trial court did not abuse its discretion by admitting it.

4. DAVIS'S STATEMENTS TO THE POLICE

Finally, Davis argues that the trial court plainly erred by admitting his statements to the police. At trial, the prosecution presented evidence that Davis agreed to speak with the police, and the following portion of his interview was played for the jury:

> *Q*. All right [Davis], back in August, late August 22nd, it was a house party on Pingree, do you remember—recall going to a party in that time period on Pingree?
>
> *A*. What am I here for?
>
> *Q*. I'm telling you, I'm asking you.
>
> *A*. I don't know.
>
> *Q*. Hmm?
>
> *A*. I don't know.
>
> *Q*. You don't know? You know a Brittany Campbell?
>
> *A*. No.

Q. You don't?

A. Not really.

Q. Never met her?

A. No.

Q. You ever been maced by any females?

In response to the last question, Davis asked for a lawyer and the interview ended. At trial, Davis's request for a lawyer was not played for the jury. However, the prosecutor asked one of the detectives conducting the interview, "[D]id there come a point in time when Davis had asked to stop the interview?" The detective answered, "Yes."

Davis argues that the statements he made during the interview were not relevant and that, even if relevant, they should have been excluded under MRE 403. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." During the interview, Davis denied knowing Campbell and he denied having ever met her. That was not true.[2] Multiple witnesses testified that he had met Campbell hours before her death. "A jury may infer consciousness of guilt from evidence of lying or deception." *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008). Thus, the jury could infer that during his police interview Davis lied about his having met Campbell because he was conscious of his guilt and was attempting to avoid being connected with her death.

Next, under MRE 403, relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." "[E]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010) (quotation marks and citation omitted). "[M]ost evidence presented against a criminal defendant" is "damaging and prejudicial." *People v Railer*, 288 Mich App 213, 220-221; 792 NW2d 776 (2010). On appeal, Davis asserts that his statements during the interview had no probative value. As explained above, however, the falsity of his statements was probative as to his consciousness of guilt. Moreover, the evidence was only prejudicial because it was probative of Davis's consciousness of guilt. Thus, although the evidence was prejudicial, the probative value of the evidence was not *substantially* outweighed by the danger of unfair prejudice. Accordingly, we discern no plain error related to the admission of the recorded portion of his interview.

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[2] Davis argues that he was not technically lying because he had only just met Campbell and did not really know her. That argument is not, however, relevant to the admissibility of the evidence. Rather, it is something that could be considered by the jury as it determines what weight to assign to the statements made during the interview.

Davis also argues that the admission of his interview was unfairly prejudicial because it amounted to an improper comment on his right to remain silent. Generally, "if a person remains silent after being arrested and given *Miranda*[[3]] warnings, that silence may not be used as evidence against that person," and a prosecutor's reference to the defendant's post-arrest, post-*Miranda* silence violates the defendant's "due process rights under the Fourteenth Amendment of the United States Constitution." *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). More particularly, the prosecution cannot use a defendant's silence in its case-in-chief as evidence of defendant's guilt or to impeach a defendant's exculpatory testimony. *Id*. at 213-214. However, a single reference to a defendant's silence, in some circumstances, does not constitute a violation of the defendant's right to remain silent. See *People v Dennis*, 464 Mich 567, 577-583; 628 NW2d 502 (2001).

In *Dennis*, our Supreme Court held that, although the prosecution elicited testimony that the defendant had invoked his right to remain silent, reversal was not warranted. *Id*. at 581-582. In reaching its conclusion, the Court relied on the following factors:

> (1) the limited nature of the improper testimony, (2) the lack of any effort by the prosecution to improperly use defendant's invocation of the *Miranda* rights against him, (3) the strong curative instruction used by the trial court, and (4) that defendant did not testify so there is no concern of his post-*Miranda* silence having been used for impeachment purposes. [*Id*. at 583.]

Most of those factors are relevant here. First, the detective's testimony was brief and there were no follow-up questions relating to it. Second, the prosecutor did not make any attempt to improperly use Davis's invocation of his right to remain silent against him. Instead, during closing argument, the only portion of Davis's interview that was relied upon and highlighted was the fact that he had lied about knowing and meeting Campbell. Finally, Davis did not testify, so there was no concern that his silence would be used to impeach him. Thus, although the reference to Davis's invocation of the right to remain silent was improper, under the facts of this case, there was no violation of Davis's constitutional right to due process. See *id*. at 583. Consequently, Davis cannot show that the isolated comment on his invocation of his right to remain silent is plain error affecting his substantial rights.

Davis also argues that his trial lawyer provided ineffective assistance by failing to object to the admission of his statements during the interview and the detective's testimony that Davis stopped the interview. To establish ineffective assistance by his or her lawyer, the defendant must show that his lawyer's "performance was objectively deficient" and "that the deficiencies prejudiced the defendant." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). As explained above, Davis's statements during the interview were properly admitted. As a result, Davis's lawyer was not ineffective for failing to raise an objection to those statements. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel."). Moreover, although the detective's testimony was plainly a comment on Davis's invocation of his right to remain silent, Davis's lawyer, however, may have chosen not to object to the brief

[3] *Miranda v Arizona*, 384 US 436; 86 SCt 1602; 16 L Ed 2d 694 (1966).

comment in order to avoid drawing attention to it. See *Randolph*, 502 Mich at 12 (recognizing that a lawyer may strategically decide not to object to an obvious error).

Moreover, when evaluating whether a lawyer's deficient performance prejudiced the defense, we must consider whether the defendant has shown that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 9. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Davis has not made that showing in this case. Davis's trial took place over seven days. The improper testimony was elicited from one witness in response to one question. Thereafter, the prosecutor made no references to the improper testimony. Instead, as recognized by Davis on appeal, the prosecutor used the interview testimony to argue that Davis had lied to the police about his knowledge of Campbell. No inferences arising from the invocation of the right to remain silent were made. Thus, the impact of the improper testimony was significantly lessened by the briefness of the testimony and the lack of reference to it thereafter. Further, the linchpin of the case was not an isolated reference to Davis's silence. Rather, it was his phone call to Sturgis. In that call, Davis detailed his altercation with Campbell, including that she maced him, that she left behind a green folder, and that when she returned she yelled at Davis and flashed a gun at him. Testimony from other witnesses present during those events corroborated these details. Davis described retrieving a gun from Dodson's brother-in-law. That gun was a .45-caliber Taurus. Campbell was shot multiple times by a .45-caliber gun. In the call, Davis told Sturgis that he took Dodson's vehicle. Surveillance showed that vehicle leaving the Pingree residence shortly before the shooting, and a witness testified that it was parked near Campbell's residence with the lights turned off. Davis told Sturgis that Campbell spoke with him before the shooting; a witness recalled hearing Campbell ask questions before she was shot. In the call to Sturgis, Davis claimed that Campbell shot at him, so he returned fire. A witness testified that he heard a single shot, a pause, and then several additional shots.[4] Davis then left the scene in the Durango. Surveillance footage shows the vehicle returned to Pingree after the shooting. Thereafter, Davis's cellular phone records show that he returned to the murder scene. Later, he asked to stay with Sturgis, who lived in a different area. When she declined his request, her house was vandalized. When he was arrested in connection with Campbell's murder, Davis lied about knowing her. In light of the substantial evidence supporting the jury's verdict, Davis cannot show that there is a reasonable probability that, but for his lawyer's failure to object to the brief reference to his decision to invoke his right to remain silent, the result of the proceedings would have been different.

III. SEARCH WARRANT

A. STANDARD OF REVIEW

Davis next argues that the trial court erred by allowing the admission of evidence obtained from Davis's cellular phone as a result of an unconstitutional search warrant. Davis did not move before trial to suppress the evidence that the police seized from his cellular phone pursuant to a search warrant. Accordingly, this issue is unpreserved, see *People v Snider*, 239 Mich App 393,

[4] The police did not discover any physical evidence indicating that Campbell actually fired her gun.

406; 608 NW2d 502 (2000), and we review it for plain error affecting Davis's substantial rights, see *Roscoe*, 303 Mich App at 648.

B. ANALYSIS

Davis argues that the search of his cellular phone was unconstitutional because it was based on a general warrant without probable cause linking the cellular phone to Campbell's murder. "A magistrate may issue a search warrant only when it is supported by probable cause." *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). "Probable cause to issue a search warrant exists if there is a substantial basis for inferring a fair probability that evidence of a crime exists in the stated place." *People v Brown*, 297 Mich App 670, 675; 825 NW2d 91 (2012). "Appellate scrutiny of a magistrate's determination that probable cause exists 'requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a "substantial basis" for the finding of probable cause.' " *People v McGhee*, 255 Mich App 623, 635; 662 NW2d 777 (2003), quoting *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

Davis argues that there was not a substantial basis to infer a fair probability that evidence related to Campbell's murder would be found on his cellular phone. We disagree. In the affidavit supporting his request for a warrant, the police detective set forth the facts that led him to believe Davis was the person who shot and killed Campbell. In particular, he recounted statements from Gamet indicating that Campbell sprayed Davis in the face and statements from Dodson indicating that he heard Davis shoot Campbell and that the next morning Davis acknowledged that he had killed Campbell and that he did not care that the "block" was going to be "hot now." He also averred that he had a reasonable basis to believe the cellular phone in question was Davis's based on statements made by Berry and by information available in a law-enforcement database. In addition, the detective averred;

> 8. Based upon the foregoing, along with affiant's training and experience, (criminals that act in concert, use cell phones to make calls and send text messages or photographs to communicate and coordinate their actions before, during and after criminal acts)[.] Affiant believes that there is sufficient cause for the issuance of this search warrant and that these phone records may reveal the motive and help in the investigation of this fatal shooting.

Given that the information recited, there was probable cause to believe that Davis murdered Campbell. Furthermore, although Davis argues that the warrant lacks particularity because it simply avers that criminals use cell phones before, during, and after committing criminal acts, he ignores that the information presented showed that he was acting in concert with Dodson. The detective did not just allege that criminals use cellular phones. He alleged that based on his training and expertise, when two or more individuals engage in the same criminal act, they use their cellular phones before, during, and after engaging in criminal behavior. And he set forth facts showing that Davis and Dodson were acting in concert. Finally, he averred that the actual device to be searched was, in fact, Davis's cellular device. Taken as a whole, the affidavit allows for a substantial inference that there is a fair probability that evidence of the murder existed on Davis's

cellular phone. See *Brown*, 297 Mich App at 675.[5] And, because the warrant was supported by probable cause that evidence of the murder existed on Davis's cellular phone, Davis's contention that evidence obtained from his cellular phone should have been suppressed lacks merit. Further, because a motion to suppress would have been futile, Davis cannot show that his lawyer was ineffective for failing to make such a motion. See *People v Posey*, 334 Mich App 338, 369; 964 NW2d 862 (2020).

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Next, in his pro se brief filed pursuant to Administrative Order No. 2004-6, Standard 4, Davis argues that the prosecutor committed misconduct during closing and rebuttal argument. Because there was no objection to the prosecutor's allegedly improper arguments, we review this issue for plain error. See *People v Mullins*, 322 Mich App 151, 172; 911 NW2d 201 (2017).

B. ANALYSIS

Davis argues that several of the prosecutor's arguments were not supported by the evidence. First, he asserts that the prosecutor's argument that Sturgis "told you" that Campbell asked Davis "what the fuck are you doing here?" is a misstatement because Sturgis testified that Davis was not the person who called her. However, a prosecutor is permitted to "argue reasonable inferences from the evidence." *People v Anderson*, 331 Mich App 552, 565; 953 NW2d 451 (2020) (quotation marks and citation omitted). Here, as explained above, the evidence supported a reasonable inference Davis was the person who called Sturgis. The prosecutor's argument, therefore, was not improper.

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[5] Davis also suggests that the police sought carte blanche to "rummage" through his cellular phone without any limitations. The warrant, however, was limited to evidence related to the murder. As a result, Davis's reliance on *People v Hughes*, 506 Mich 512; 958 NW2d 98 (2020) is misplaced. In *Hughes*, a search warrant was issued that allowed the police to search the defendant's cellular device for evidence related to drug trafficking; however, the police also searched the device for incriminating data related to an armed robbery. *Id*. at 516. Our Supreme Court held that in order to satisfy the particularity requirement of the Fourth Amendment, searches "of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant." *Id*. "Any search of digital cell-phone data that is not so directed, but instead is directed at uncovering evidence of criminal activity not identified in the warrant, is effectively a warrantless search . . . ." *Id*. at516-517. In contrast, the warrant in this case was limited to recovering cell-data related to Campbell's murder, and there is nothing on the record suggesting that the detective's went beyond the scope of their warrant to search for incriminating data related to other crimes.

Davis also argues that the following argument by the prosecutor was unsupported by the evidence:

> . . . if you recall, [] Sturgis received a call shortly after the September 5th date, needing a place to stay. I need somewhere to stay.
>
> * * *
>
> And when she talked to you about the call and how it—and how it progressed, the word I was used multiple times. I need somewhere to stay. . . . I need somewhere to stay, as we talked about.
>
> * * *
>
> He starts looking up places to stay. How does that corroborate [] Sturgis when she says that the person said I need a place to stay?

However, although Sturgis testified that the caller stated "Deja" needed a place to stay, not "I" need a place to stay. She later testified that she recalled the caller saying, "I need somewhere to stay." Consequently, the prosecutor's argument did not misstate the evidence, and the argument was not improper.

Next, Davis asserts the prosecutor committed misconduct by making the following statements during closing argument:

> Claims he didn't even know [Campbell]. Lie number three. False exculpatory statement.
>
> * * *
>
> He's the one who touched her, but he lies to the detectives. Wants to remove himself from the case. Wants to divorce himself from the murder that he committed.
>
> * * *
>
> Lie number four, you know [the victim]? No. No. Not really. Never met her? Uh-uh. Lies about knowing [the victim].

Then, during rebuttal argument, the prosecutor said, "He lied about knowing Campbell. He doesn't know her government name. Come on. You know her name's Brittany." This argument is supported by the record. During his police interview, Davis stated that he did not know Campbell and had never met her. Given that there was substantial testimony showing that Davis had met Campbell hours before her death, the prosecutor was free to argue the reasonable inference that he had lied during the police interrogation. This argument was not improper. See *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007) (stating that a "prosecutor [is] permitted to argue from the facts that defendant or defendant's witnesses were unworthy of belief.").

Davis additionally asserts that the prosecutor committed misconduct by stating that Davis waited for Campbell across the street from the Euclid residence before shooting her. He contends that this argument was untrue and was unsupported by the record because an evidence technician testified no physical evidence was found across the street from the Euclid residence. However, Lee testified that, while he and Campbell were in his car on Euclid Street, he saw a red Dodge Durango park in a vacant area across the street from the Euclid residence and turn off its headlights. Davis's statements to Sturgis also support an inference that he went to the Euclid residence in Dodson's Durango and that, while there, he shot Campbell several times. The evidence that he was in the vehicle, coupled with the testimony supporting that it was present before Campbell got out of Lee's vehicle allows for a reasonable inference that Davis was lying in wait. The prosecutor's argument was proper.

Davis next argues the prosecutor committed misconduct by arguing:

> [Davis] doesn't show his emotion. He had held it in. He acted like it was not a big deal and he—he was calculated . . . .
>
> * * *
>
> Now, ladies and gentlemen, I submit to you that [defendant] played it cool. He played it cool when he was sprayed in the face with mace. But he's the only one that had the problem. He's the only one that had an issue with the mace.
>
> * * *
>
> And the only person responsible was [defendant], ladies and gentlemen. He was the one who was unhappy and he kept that emotion inside of him.
>
> He acted like he was cool. He acted like he was fine. He acted like he was apologetic.

Gamet and Berry testified did not appear angry or upset after his face was sprayed with mace. However, Sturgis testified she knew Davis for many years and even dated him for a period of time. She said he did not express anger in a typical manner. Instead, he would become very calm and quiet, holding his emotions inside. Sturgis stated that if you did not know Davis well, you would assume he was not angry when he was actually upset. From the evidence, a reasonable inference could be made that Davis was angry when his face was sprayed with mace. Thus, the prosecutor's argument was not improper.

The prosecutor's argument that Davis displayed a consciousness of guilt is also supported by the record. The prosecutor argued:

> But when he talks to the detectives, what am I here for? What am I here for? And when he said something he said, yeah, waiting for [someone] to let me know exactly what we—what was said. Consciousness of guilt. He knew.
>
> He also texted this [other person]. Just letting you know it's a warrant for me. If they catch me in traffic, they're going to keep me or they're going to take

> me when I go to court on the first. He was anticipating getting taken into custody, because he knew what he did.
>
> * * *
>
> Why would you even be using a second phone contacting—or excuse me, to contact [] Do[d]son after? Why wouldn't you just be using the same phone? Consciousness of guilt. Trying to remove yourself from the situation, using your other phone.

Davis asserts that the evidence only showed he knew he had a warrant for his arrest, not that he was conscious of guilt related to the murder. Here, the text messages showed that, contrary to what Davis told the police, he was aware that there might be a warrant out for his arrest because of statements that Dodson made when he was arrested. In turn, it is reasonable to infer that his assertion during the interrogation that he did not know why he was arrested appears to be misleading or false. The prosecution is permitted to argue that certain evidence shows a consciousness of guilt, including of lying or deception. See *Unger*, 278 Mich App at 227. The fact that other inferences—including the inference preferred by Davis—could also be drawn from the evidence does not make the prosecutor's argument improper.

The prosecutor also argued the jury should infer Davis's consciousness of guilt from his use of a different cell phone to contact Dodson after the murder occurred. Again, the record supports the prosecutor's argument. Davis's cellular records show that before the murder, Davis communicated with Dodson on one phone, and after the murder, he used a different phone. It is reasonable to infer that the switch in phones was intended to hide evidence of the crime. Thus, the argument was proper.

Davis also argues that his trial lawyer provided ineffective assistance because he did not object to the above instances of alleged prosecutorial misconduct. However, because the prosecutor did not commit misconduct, any objection would have been futile. Davis's lawyer was not ineffective for failing to raise a futile objection. *Erricksen*, 288 Mich App at 201.

V. EXCULPATORY EVIDENCE

Davis also argues in his Standard 4 brief that his defense lawyer was ineffective because he did not investigate, find, and introduce exculpatory evidence. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Muhammad*, 326 Mich App 40, 66; 931 NW2d 20 (2018) (quotation marks and citation omitted). Davis's claims relating to allegedly exculpatory evidence are related to Sturgis's testimony about the cell phone conversation she had with someone discussing specifics of the crime. Davis argues if certain evidence had been admitted, the jury would have believed he was not the caller. Specifically, he asserts that his lawyer should have admitted cellular phone records showing that there were no calls to or from Sturgis, no text messages to or from Sturgis relating to the Campbell's murder, and no application on his cellular phone that would have allowed Davis to use a fake cell phone number from which to call Sturgis. "As with any other claim of ineffective assistance, [] 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). In this case, Davis has presented no evidence that, if introduced, his cellular phone records would have shown what he claims they would have shown. Accordingly, he has not established the factual predicate for this claim.

Davis also argues his lawyer was ineffective for failing to elicit exculpatory testimony from Sturgis. He asserts that his lawyer should have asked Sturgis about her efforts to discover the identity of the caller. Those efforts were explored at the preliminary examination, where Sturgis testified that she called the number back, did not receive an answer, and eventually received a text message from the number. The text message was received while Davis was in jail, and it included a photograph, which showed a portion of a body without tattoos. Davis contends this photograph was not of him, because his body had tattoos in the locations in question. Davis suggests that such evidence would have supported he was not the person who called Sturgis, because the cell phone number in question was active while he was in jail and sent a photograph of a person who was not him. However, Sturgis also testified at the preliminary examination that she believed the caller used an application that allowed the caller to co-opt someone else's cell phone number to shield the caller's actual cell phone number. Therefore, on the basis of Sturgis's testimony about the application, it is reasonable to infer that the cell phone number she called back and received text messages from was not the caller's actual cell phone number. Consequently, the fact that the cell phone number was active while Davis was in jail and sent a photograph of someone other than Davis is not necessarily exculpatory.

Moreover, considering the evidence in question would not have undermined the prosecution's claim against Davis, trial counsel's strategic decision not to elicit the testimony form Sturgis during trial was not objectively unreasonable. Instead, the lawyer's focus on Sturgis's change of heart about the caller's identity on the basis of the caller's voice, which was substantively relevant to the defense's theory of the case, fell within the wide range of professionally competent assistance guaranteed under the United States and Michigan Constitutions. See *People v Jackson (On Reconsideration)*, 313 Mich App 409, 431; 884 NW2d 297 (2015).

VI. CUMULATIVE ERROR

Davis also contends this Court should reverse his convictions on the basis of the cumulative effect of the various errors that occurred during the trial. However, "absent the establishment of errors, there can be no cumulative effect of errors meriting reversal *People v Green*, 313 Mich App 526, 537; 884 NW2d 838 (2015) (quotation marks, citation, and alteration omitted).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly