STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID SAMIR KIRIAKUS,

Defendant-Appellant.

UNPUBLISHED
December 29, 2022

No. 355962
Wayne Circuit Court
LC No. 18-009439-01-FC

Before: GARRETT, P.J., and O'BRIEN and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions for one count of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, one count of felon in possession of a firearm, MCL 750.224f, and five counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a second-offense habitual offender, MCL 769.10, to 25 to 50 years' imprisonment on the count of second-degree murder, 15 to 30 years' imprisonment on each count of assault with intent to commit murder, three to five years' imprisonment on the count of felon in possession of a firearm, and two years' imprisonment on each count of felony-firearm. We affirm.

I. BACKGROUND

This case arises from an October 2018 shooting involving four victims, Miami Saad (Miami), Saad Saad (Saad), Mykail Rea, and Jimmie Jobah. Miami and Saad are siblings, and Rea and Jobah were friends of Saad. Defendant and Miami were in a dating relationship for roughly one year that ended in early October 2018.

On the date in question, Miami, Saad, Rea, and Jobah were driving around Detroit and decided to stop at a McDonald's for food. While at McDonald's, Miami and Saad saw defendant pull up in a vehicle next to the restaurant, at which point Saad exited the group's car and started an argument with defendant. Defendant became angry and left. Before leaving, though, he allegedly said, "I'll be right back. I've got something for y'all." The group left the restaurant shortly thereafter and headed to Miami and Saad's home.

While getting on the freeway, the group was assailed with gunfire from an approaching vehicle. Jobah was hit by the gunfire, and Miami called 911. Miami drove the group back to her and Saad's home, where police and emergency personnel met them. Jobah had been shot in the head and died from his injury. Rea was "grazed" by a bullet, but no one else was injured.

Miami initially told police that defendant and Kenneth Finney were responsible for the shooting. She never actually saw them or any specific vehicle during the incident, however, and her statement to police was based on Saad's and Rea's assertions during and after the shooting that defendant and Finney were responsible. While Saad testified at trial that he was unable to see who actually shot at them or what car was being driven, he testified at the preliminary examination and initially told police that he had seen defendant's car on the freeway and identified defendant and a passenger as responsible for the shooting. Rea testified at trial that he believed defendant was the shooter. Rea explained that he was looking behind the car as the group was driving home and realized they were being chased. He identified the vehicle chasing them as the same type defendant was driving earlier at the McDonald's. Given the earlier confrontation at McDonald's and his view of the vehicle that shot at them, Rea assumed defendant was responsible.

Finney—the man Miami and Saad initially told police was involved with defendant in the shooting—testified that he received a call from defendant shortly after midnight on the day of the shooting saying, "I need that s**t . . . ." Finney said that he interpreted this as defendant looking for a weapon. Finney told defendant, "[I]t's wherever you left it." Finney met up with defendant later that night around 1:00 a.m. or 2:00 a.m. The two drove around, went to a bar, bought drugs, and eventually returned to their neighborhood and went their separate ways. Finney saw defendant again a day or two later. Finney was asked at trial whether he recalled a conversation from that day "about something being taken care of," to which Finney said, "[W]e was just saying like everything [is] all cool. Everything [is] all done, you know. And that was really it." Finney could not recall, however, any particular statement that defendant was actually involved in the shooting at issue. This contradicted Finney's testimony from the preliminary examination that defendant admitted responsibility for the shooting.

Finney was ultimately ruled out as a suspect in the shooting, but defendant was not. During their investigation into defendant, police secured a warrant for defendant's cell-phone-tower data, which placed defendant's phone—which defendant was using on the night of the shooting, according to Finney—near the scene of the shooting around 1:00 a.m. when the shooting occurred.

Defendant was charged with one count of first-degree premeditated murder, MCL 750.316(1)(a), three counts of assault with intent to commit murder, one count of felon in possession of a firearm, and five counts of felony-firearm. The prosecution later amended the charges to include an additional count of second-degree murder.

Before trial, the prosecution moved to exclude testimony about a prior shooting and felonious assault involving Miami as irrelevant and otherwise unduly prejudicial. The trial court agreed that the prior incidents were irrelevant and granted the prosecution's motion.

On the day of defendant's trial, before jury selection, defense counsel objected to the admission of Jobah's autopsy photographs, arguing that the images' prejudicial effect outweighed any probative value to the relevant issues. After viewing the photographs, the court allowed them

to be admitted, explaining that the images were relevant and that "[their] probative value [was] not substantially outweighed by unfair prejudice." The forensic pathologist who conducted Jobah's autopsy testified at defendant's trial, and, during his testimony, both autopsy photographs were admitted. As the prosecution presented the first photograph, a brief pause was taken for unidentified crying individuals to leave the courtroom.

The jury ultimately found defendant guilty on all counts except first-degree premeditated murder; it found him guilty of second-degree murder instead. Defendant was sentenced as stated earlier. This appeal followed.

II. INEFFECTIVE ASSISTANCE

On appeal, defendant argues that he is entitled to a new trial because his trial counsel provided ineffective assistance in numerous ways. Defendant claims his counsel was ineffective by (1) failing to request suppression of cell phone evidence, (2) failing to object to the qualifications of Deputy Jacob Garza, an intelligence analyst with the St. Clair County Sherriff's Office, who testified as an expert on cell-phone mapping, (3) failing to challenge the reliability of Garza's testimony, (4) failing to challenge Garza's exhibits and data, (5) failing to present critical information regarding a pretrial evidentiary issue, and (6) failing to seek a mistrial or other curative relief when the autopsy photographs were admitted.[1] We disagree.

A. STANDARD OF REVIEW

Ordinarily, whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law—the trial court's factual findings supporting its decision are reviewed for clear error, while the court's determination of whether those facts violated the defendant's right to the effective assistance of counsel is reviewed de novo. *People v Dixon-Bey*, 321 Mich App 490, 515; 909 NW2d 458 (2017). "Defendant, however, failed to obtain an evidentiary hearing to expand the record, so there are no factual findings to which this Court must defer, and this Court's review is instead limited to errors apparent on the record." *People v Haynes*, ___ Mich App ___, ___; ___ NW2d ___ (2021); (Docket No. 350125), slip op at 16.

B. ANALYSIS

To establish a claim of ineffective assistance, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Effective assistance is "strongly presumed," *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012), and the defendant bears the heavy burden of proving otherwise, *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). Defendant bears the burden of establishing the factual basis of his ineffective assistance claims. *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014).

[1] Because this sixth allegation of ineffective assistance is related to defendant's separate challenge about admissibility of the autopsy photographs, it will be addressed in our discussion of that issue.

1. SUPPRESSION OF CELL PHONE EVIDENCE

Defendant's first ineffective assistance claim faults his trial counsel for not moving to suppress his cell phone data, which defendant asserts was inadmissible because the searches for both his phone and its data were conducted via constitutionally inadequate warrants. Defendant claims that both warrants were constitutionally deficient because they lacked a sufficient nexus between the alleged criminal activity and the items to be searched.

"A search warrant may be issued only on a showing of probable cause that is supported by oath or affirmation." *People v Nunez*, 242 Mich App 610, 612; 619 NW2d 550 (2000).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. [*People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007) (quotation marks, citation, and alterations omitted).]

"A magistrate's finding of probable cause and his or her decision to issue a search warrant should be given great deference and only disturbed in limited circumstances." *People v Franklin*, 500 Mich 92, 101; 894 NW2d 561 (2017).

Here, the magistrate issued two separate warrants, both on the day of the shooting. The first warrant provided for a search of defendant's home, along with any vehicles and cell phones discovered at the residence. Specific to cell phone evidence, the warrant stated, in relevant part:

> The person, place or thing to be searched is described as and located at:
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> * * *
>
> Any and all cellular phones associated with [defendant] . . . . Further you are commanded to effect [sic] a complete forensic evaluation (search) of the cellular phones which may be located in the area to be searched. A complete forensic download of the cellular telephones to include (but not limited to): any and all contact information located in the contacts area of the phone, any and all outgoing/incoming phone calls[;] any and all text messaged [sic] made from and/or received[; and] any and all video(s) [or] images contained within the cellular telephone.

The warrant did not indicate any specific evidence expected from the phone, but rather stated that investigators were seeking "paperwork or other documentation with [defendant's] information" and "any and all evidence pertaining to the . . . shooting . . . ." The supporting affidavit for this warrant outlined the details of the shooting and ongoing investigation, providing information about the altercation at McDonald's and statements from the victims that defendant was responsible for

the subsequent shooting. The affidavit also provided a specific mobile phone account belonging to defendant and confirmed his registration of a vehicle type allegedly involved in the shooting.

The second warrant provided for a search of defendant's phone itself for its data, including any cell tower or location data associated with defendant's phone number. Similar to the first warrant, this warrant did not indicate what specific evidence was being sought. The supporting affidavit for this warrant cited the same facts as in the warrant to search defendant's home, though the affiant now added:

> [I]t is known that mobile communication devices are often used to plan, commit, and conceal criminal activity and evidence. Therefore, data obtained from mobile communication devices and records created by these devices can assist law enforcement in establishing the involvement of a possible suspect or suspects.
>
> Records created by mobile communication devices can also assist law enforcement in establishing communication activity/behavior, patterns, anomalies, patterns of life and often the identity of the device user. This is most effectively accomplished by reviewing a larger segment of records ranging prior to and after the incident under investigation if possible.
>
> The aforementioned information combined with your affiant's training and experience causes him/her to believe that the execution of this search warrant will assist with the furtherance of this criminal investigation.

Defendant asserts that the warrant to search his home was faulty because its supporting affidavit "did not assert or even suggest there was any evidence a phone was involved in the offense[s]" and "d[id] not even conclusively establish that a phone would likely be found inside [defendant's] home." Defendant similarly claims that the warrant to search his phone's data was faulty because its supporting affidavit was not sufficiently specific and "d[id] not state any facts connecting his phone to criminal activity."

We disagree and conclude that the warrants here were sufficiently supported by probable cause. The magistrate, reading the affidavits and proposed warrants in a common-sense and realistic manner, had a substantial basis to conclude that there was a fair probability that evidence of criminality would be found within defendant's home and from his cell phone data. In particular, the first affidavit referenced the initial altercation at McDonald's, the freeway shooting and defendant's alleged involvement, his ownership of a vehicle suspected in the shooting that was registered to defendant's home address, and his ownership of a cell phone. The second affidavit, in addition to these facts, explicitly added what evidence of criminality was being sought from those records. In our view, and giving the magistrate the requisite deference, these facts were sufficient to infer a reasonable probability that evidence of criminality would be discovered at defendant's home, either from his phone, vehicle, or elsewhere, and thus the warrants were sufficiently supported.

In support of his argument that the warrants issued in this case were constitutionally deficient, defendant cites numerous cases that held search warrants deficient under allegedly similar circumstances. See *United States v Lyles*, 910 F3d 787 (CA 4, 2018); *United States v*

Griffith, 432 US App DC 234; 867 F3d 1265 (2017); *United States v Brown*, 828 F3d 375 (CA 6, 2016); *Commonwealth v White*, 475 Mass 583; 59 NE3d 369 (2016). All of these cases, however, are nonbinding, see *People v Fomby*, 300 Mich App 46, 50 n 1; 831 NW2d 887 (2013); *People v Bell*, 276 Mich App 342, 349; 741 NW2d 57 (2007), distinguishable, and do not otherwise convince us that the search warrants in this case were constitutionally deficient under either the United States or Michigan constitutions.

Regardless, even if the warrants were constitutionally deficient, we agree with the prosecution that the evidence would clearly be admissible under the good-faith exception. That exception provides that the exclusionary rule "does not bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant ultimately found to have been defective." *People v Goldston*, 470 Mich 523, 525-526, 533-541; 682 NW2d 479 (2004). Here, the cell-tower data was admissible even if the search warrant was defective because the evidence was seized in reasonable, good-faith reliance on the warrant, the information in the supporting affidavits was not false or misleading, and the issuing magistrate did not wholly abandon his or her judicial role. See *id*. at 531 (explaining that the good-faith exception will not apply when "the magistrate wholly abandons his [or her] judicial role or where an officer relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable") (Quotation marks and citation omitted.) The affidavits accurately listed defendant's address and ownership of a vehicle and cell phone possibly involved in the relevant crimes, while appropriately summarizing the investigation implicating defendant as a suspect.

Though he fails to elaborate this point, defendant asserts in a single sentence that the affidavits here, like that in *Brown*, 828 F3d 375, "w[ere] so lacking in probable cause that reliance upon [them] in executing the warrant[s] was unreasonable such that the Good Faith exception to the exclusionary rule did not apply." In *Brown*, the Sixth Circuit concluded that probable cause to search a drug-dealing suspect's home was lacking because the "affidavit fail[ed] to include facts that directly connect[ed] the [defendant's] residence with the suspected drug dealing activity, . . . even [though] the defendant [was] a known drug dealer." *Id*. at 384. In concluding that the good-faith exception did not apply, the *Brown* Court emphasized that the police officers waited an inordinate amount of time—22 days—into their investigation of the defendant before seeking a warrant to search his residence, and they discovered no new evidence during those 22 days. *Id*. at 385. The Court reasoned that "if the police officers did not think the evidence established probable cause to search [the defendant's] residence" initially, "the record provides no reason to think their assessment had changed" 22 days later. *Id*. The Court concluded that this, combined with the lack of any "plausible connection" between "the residence [and] the alleged drug dealing activity," rendered "official belief" in the "existence" of probable cause "entirely unreasonable." *Id*. at 385-386.

This case is clearly distinguishable from the circumstances deemed outside the good-faith exception in *Brown*. There was no delay in the officers' investigation in this case that could render their reliance on the warrants objectively unreasonable, and the warrants themselves explained a plausible connection between the items to be searched and defendant's suspected criminal activities. Everything about the investigation in this case suggests that the officers reasonably believed, in good-faith, that the warrants upon which they relied were properly issued, and thus the good-faith exception to the exclusionary rule would apply.

Accordingly, defendant's ineffective assistance claim regarding suppression of the cell-tower evidence fails.[2]

2. WITNESS'S QUALIFICATIONS AS AN EXPERT

Defendant alternatively asserts that his trial counsel rendered ineffective assistance in multiple respects concerning Garza's expert testimony on cell-phone mapping. As this Court has explained:

> A trial court may permit testimony by a "witness qualified as an expert by knowledge, skill, experience, training, or education" if the court determines that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." MRE 702. An expert may offer an opinion at trial if his or her testimony "is based on sufficient facts or data," if the testimony "is the product of reliable principles and methods," and if the witness "has applied the principles and methods reliably to the facts of the case." MRE 702. The trial court must also ensure that the expert's testimony is relevant. [*People v McFarlane*, 325 Mich App 507, 518; 926 NW2d 339 (2018).]

Defendant first faults his trial counsel for failing to object to Garza's qualifications as an expert or otherwise requesting a *Daubert*[3] hearing on the issue. Defendant notes that Garza had never previously been qualified as an expert and argues that he knew nothing about cell-phone-tower mapping. According to defendant, his trial counsel's failure to challenge Garza's status as an expert forced defendant "to defend against unreliable junk science that was presented to the jury as if it were proof positive that [defendant] was the shooter."

While defendant is correct that Garza had never testified as an expert in cell-phone mapping before, Garza testified that he had seven years of experience in this area as an intelligence analyst, with at least one year of additional training and experience related to new software (which was utilized in this case) that automatically provided location data when inputting particular phone records. According to Garza, he had earlier training with cell-phone mapping under more antiquated software that required additional hands-on work from investigators, but he was trained to use the newer software by its creator.

Defendant insists that Garza was not qualified because he said during cross-examination, "I'm not a cell phone tower expert, I don't know how specifically they're built and all of that." This argument conveniently ignores that Garza's statement was in response to detailed questioning

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[2] We acknowledge the prosecution's argument that this evidence would have been alternatively admissible under the inevitable-discovery doctrine, but we decline to address that issue in light of our other holdings.

[3] See *Daubert v Merrell Dow Pharms, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), superseded by statute on other grounds as stated in *Elward v Electrolux Home Prods*, unpublished opinion of the United States District Court for the Northern District of Illinois, issued June 1, 2020 (Case No. 15-cv-09882).

on the working of cell-phone towers themselves. Contrary to defendant's assertions, this was not an admission that Garza was not an expert on the process of location mapping from cell-tower data. The fact that Garza was not an expert in every aspect of cell-phone towers was a suitable subject for cross-examination, but did not render Garza unfit to testify as an expert in cell-phone mapping. See *Surman v Surman*, 277 Mich App 287, 309-310; 745 NW2d 802 (2007) ("Gaps or weaknesses in [a] witness'[s] expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility. The extent of a witness's expertise is usually for the jury to decide.") (Quotation marks and citation omitted.)

Defendant provides other record cites to support his assertion that Garza lacked knowledge about cell-phone mapping, but those cites do not actually support defendant's assertion. They show that Garza never manually did any mapping with rulers; he was not personally involved with getting search warrants or subpoenas; he input the relevant data into the software but did not have individual cell towers memorized; and his education and training did not explain exactly how cell phones connect to different towers if signals are overlapping but was instead more focused on using the particular mapping software. While the latter two record cites arguably reflect on the extent of Garza's knowledge regarding the finer details of cell-tower technology, this issue is one of weight, not qualification or admissibility. See *Surman*, 277 Mich App at 309-310.

Accordingly, we conclude that Garza was properly qualified as an expert in cell-phone mapping. He had sufficient skill, training, and expertise to qualify as an expert, with any deficiencies in his applicable knowledge being an issue of weight and credibility reserved for the jury. Defendant's trial counsel was not ineffective for failing to object or otherwise pursue further action on this matter. See *People v Savage*, 327 Mich App 604, 617; 935 NW2d 69 (2019) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.") (Quotation marks and citation omitted.)

3. RELIABILITY OF EXPERT'S TESTIMONY

Defendant relatedly faults his trial counsel for failing to object to or otherwise challenge the reliability of Garza's testimony. Defendant argues that the cell-phone data only provided that the phone connected to a particular tower at a given time, not that the phone was actually located in a particular place.

We agree with the prosecution, however, that defendant's argument is deficient because defendant has failed to submit any expert opinion to countervail Garza's testimony. As such, there are no facts in the record supporting defendant's contention that Garza's statements were actually inaccurate, and defendant has failed to establish the factual predicate of his claim. See *Douglas*, 496 Mich at 592.[4]

[4] In his brief on appeal, defendant cites two scholarly articles to support his assertion that, after an initial cell-phone mapping, additional steps are necessary to accurately pinpoint a cell phone's location. Yet defendant is not an expert in this area, and he cites no basis for us to find an expert's opinion questionable because a layman asserts that it is.

Moreover, we note that defendant's trial counsel took advantage of cross-examination by repeatedly questioning Garza on the extent of his knowledge regarding both cell-phone mapping and the underlying cell-tower technology. This was an appropriate trial strategy to attempt to nullify Garza's testimony, and we will not second-guess reasonable trial strategy on appeal. See *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

4. EXPERT'S EXHIBITS AND DATA

Defendant also asserts that his trial counsel provided constitutionally deficient representation by failing to object to or otherwise challenge Garza's exhibits and underlying data. Defendant argues that one of the prosecution's exhibits showing an image of defendant's cell phone's purported locations was substantially different from—and thus inaccurately depicted—the underlying cell-tower data.

As with defendant's previous argument, however, there are no facts in the record supporting defendant's contention that Garza's exhibits and data were inaccurate. Defendant fails to present any countervailing expert testimony or affidavit to support his allegation of inaccuracy. Accordingly, defendant has again failed to establish the factual predicate of his claim. See *Douglas*, 496 Mich at 592.

5. THE PRETRIAL EVIDENTIARY ISSUE

Defendant next argues that his trial counsel's performance was ineffective because his counsel failed to present critical information when the trial court was considering whether to allow testimony on the prior shooting.[5] On this issue, defendant notes that the trial court was never informed that the prior shooting occurred late at night and involved the same vehicle being driven by Miami here. According to defendant, his trial counsel's failure to present these similarities led the court to improperly exclude evidence of this earlier event at trial. We disagree.

Defendant's contention at trial and on appeal is that the prior shooting is relevant to the identity of the shooter in this case. He seemingly argues that, because the shooter in a previous shooting was unidentified, it raises questions about whether defendant was the shooter in this case. With this understanding of defendant's proffered reason for admitting evidence of the prior shooting, we fail to see how the similarities between the shooting in this case and the previous shooting that defendant faults his trial counsel for not presenting would have affected the trial court's decision. While it is true that both shootings occurred at night and that they both involved Miami's car, defendant does not explain why these similarities make the prior shooting relevant, let alone why they make the prior shooting relevant to the potential identity of the shooter in this case. He instead summarily asserts that "[t]hese details established the relevance of the prior shootings," without further elaboration. It is incumbent upon defendant, as the appellant, to explain his argument on appeal, which he has failed to do. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave

[5] While defendant attempted to also have evidence of a previous felonious assault involving Miami admitted at trial, he does not argue on appeal that his trial counsel was ineffective for failing to present additional evidence about the felonious assault.

it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

Regardless, contrary to defendant's assertions, the at-issue shooting and the previous shooting are hardly similar. The prior shooting occurred while no one was inside Miami's vehicle while it was parked in her driveway. The police report of the shooting recounts that Miami "heard a loud noise and discovered damage to her vehicle parked in the driveway"—the windshield was "busted." The shooting at issue in this case occurred while Miami was in her vehicle driving it onto the freeway when a car pulled up alongside her vehicle and open fired. Clearly, the two shootings took place in decidedly different places under markedly different circumstances. The similarities that defendant emphasizes—that both shootings occurred at night and involved Miami's car—do not make the shootings sufficiently similar as to make the prior shooting in any way relevant to this case.

Therefore, defendant was not prejudiced when his trial counsel failed to present this additional information, and his ineffective assistance claim on this matter fails.

III. THE AUTOPSY PHOTOGRAPHS

Defendant also claims that he is entitled to a new trial because the trial court improperly denied his motion to exclude the autopsy photographs from evidence, and his counsel otherwise performed deficiently when he failed to object when the photographs were admitted. We disagree.

A. STANDARD OF REVIEW

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McKewen*, 326 Mich App 342, 349 n 2; 926 NW2d 888 (2018). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *Id.* However, whether a rule or statute precludes admission of evidence is a question of law, reviewed de novo. *People v Propp*, 508 Mich 374, 383; 976 NW2d 1 (2021). "A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law." *Id.*

B. ANALYSIS

Defendant asserts that the trial court erred by admitting the autopsy photographs despite the objection of trial counsel and there being no dispute on Jobah's manner of death. Defendant claims that these images had virtually no probative value and were therefore not relevant under MRE 401, and otherwise unfairly prejudiced defendant and were thus inadmissible under MRE 403. We disagree.

The instant case falls squarely within the analysis of *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995).[6] In *Mills*, our Supreme Court, like this Court here, was asked whether various images depicting a burn victim's wounds were admissible under MRE 401 and 403.[7] *Mills*, 450 Mich at 66. Addressing the defendant's argument related to MRE 401, the *Mills* Court concluded that the images were relevant, in pertinent part, because (1) their depiction of the nature and extent of the injuries in question informed on the defendants' intent, and (2) they corroborated an expert's testimony concerning the injuries and, therefore, implicated credibility. *Id*. at 68-74. On the issue of intent, the Court reasoned as follows:

> It is well established in Michigan, as well as in most jurisdictions, that all elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. The prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements. The elements of the offense are always at issue. Thus, the prosecution may offer all relevant evidence, subject to MRE 403, on every element. The claim that evidence that goes to an undisputed point is inadmissible has also been rejected in criminal cases.
>
> In the instant case, the intent of the defendants was a direct issue because it was an element of the charged offense, *intent* to commit murder. . . . Further, it has been held that evidence of injury is admissible to show intent to kill.
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> * * *
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> The photographs were essential in proving intent because they illustrated the nature and extent of the injuries. The severity and the vastness of the victim's injuries were of consequence to the determination whether the defendants' acts were intentional. [*Id*. at 69-71 (citations omitted).]

In light of *Mills*, we conclude that the autopsy photographs here were relevant. They went to the issue of whether defendant intended to kill Jobah, an element for both first- and second-degree murder. See *People v Bass*, 317 Mich App 241, 265; 893 NW2d 140 (2016) (listing the elements of first-degree murder, which includes "the intentional killing of a human"); *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (listing the elements of second-degree

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[6] Superseded on other grounds by statute as stated in *Cass v MacLaren*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 31, 2014 (Case No. 5:13-CV-10984).

[7] Under MRE 401, relevant evidence is "evidence having 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." Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

murder, which includes that the killing be done with "malice," which in turn can be "the intent to kill").[8] *Mills*' analysis also explicitly forecloses defendant's reliance on the photographs only being relevant to allegedly uncontested issues as rendering them inadmissible. As in *Mills*, defendant here pleaded not guilty, and the prosecution thus had the burden to prove intent as a requisite element for the charged offenses. Further, the images were relevant because they corroborated the forensic pathologist's testimony and thus went to his credibility. Accordingly, contrary to defendant's argument on appeal, the photographs were relevant under MRE 401.

Turning to defendant's argument related to MRE 403, he argues that the photographs should have been excluded because they were gruesome[9] and were likely to stir emotion in the jurors. "Gruesomeness alone need not cause exclusion." *Mills*, 450 Mich at 76. Thus, that the photographs were gruesome is not, standing alone, a reason to exclude the photographs. As the *Mills* Court explained:

> [I]f photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than on oral description, and to the extent calculated to excite passion and prejudice, does not render it inadmissible in evidence. [*Id*. at 77 (quotation marks and citation omitted).]

The photographs here were admissible for a proper purpose, so that they may cause passion and prejudice does not render them inadmissible. The question is whether the photographs' probative value was *substantially* outweighed by the danger of *unfair* prejudice, and we cannot conclude that it was. Again, turning to *Mills*, the Court reasoned:

> In the instant case, the relevancy of the photographs was not substantially outweighed by the danger of unfair prejudice. The photographs are accurate factual representations of the injuries suffered by [the victim] and the harm the defendants caused her. The photographs did not present an enhanced or altered representation

[8] On appeal, the prosecution also argues, without elaboration, that the autopsy photographs were relevant to the issues of premeditation and deliberation. We fail to see how the photographs are relevant to either issue, however—they show neither that defendant thought about the killing beforehand nor that he measured and evaluated the decision to kill. See *Bass*, 317 Mich App at 266 ("To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.") (Quotation marks and citation omitted.)

[9] The prosecution conceded at trial that the photographs were "a little bit graphic." The images' graphic depictions can be further inferred from the reaction from those in the courtroom who started crying when the first image was presented. Regarding the photographs' accuracy, the forensic pathologist explicitly testified to this fact.

> of the injuries. Although the photographs are graphic, their probative value was not substantially outweighed by their possible prejudice. [*Id.*]

Like the Court in *Mills,* we conclude that the photographs' probative value in this case was not substantially outweighed by the danger of unfair prejudice. The photographs were relevant for the reasons previously explained, and they otherwise accurately depicted Jobah's injury without enhancement or alteration. Thus, "[a]lthough the photographs are graphic, their probative value was not substantially outweighed by their possible prejudice." *Id.*

Defendant insists that his trial counsel was nevertheless ineffective for not objecting to the photographs a second time when they were admitted and for not asking for a mistrial after they were admitted. Defendant argues that such action was necessary to prevent the prosecution's "attempt to inflame the jurors and appeal to their emotions," which defendant contends happened because, when the photographs were admitted, " '[c]rying people' immediately reacted and had to leave the courtroom," and "the Court even had to ask the state to cease displaying the photo[s] in order to avoid distracting the jury."[10]

A second objection to the photographs themselves would have been futile, however, because the photographs were properly admitted for the reasons previously explained. A request for a mistrial or other curative relief would have likewise been futile because, again, the photographs were properly admitted, and nothing in the record suggests that the jurors were emotionally influenced by the autopsy photographs, contrary to defendant's assertions. Defendant is correct that there was a brief pause in the proceedings when the prosecution presented the first autopsy photograph so that "[c]rying people could exit the courtroom," and the court did seemingly request that the image not be unnecessarily displayed, stating, "Excuse me, Doctor. If you do not need the exhibit to be published during this questioning—thank you." But these circumstances do not show that the photographs actually inflamed the jurors' emotions such as to cause undue prejudice. Nothing in the record suggests that those crying in the courtroom were jurors, particularly given that jurors would not have been able to leave the courtroom during proceedings. The court's statement regarding publication did not suggest any purpose related to jurors' reactions or prejudice. In fact, the court subsequently told the prosecution that "there's nothing wrong with you publishing the [autopsy] photo[s], but you should publish [them] when it assists your witness in testifying." The prosecution then presented the second autopsy photograph with no related issues identified in the record. Accordingly, defendant's trial counsel was not ineffective for failing to make a *second* objection to the autopsy photographs or otherwise request curative relief.

Affirmed.

/s/ Colleen A. O'Brien
/s/ James Robert Redford

[10] Defendant does not claim that he was prejudiced by any outburst from the crowd, but rather, that the crowd's outburst, in conjunction with the court's statement shortly thereafter, evinced the photographs' prejudicial effect on the jury.