

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 26, 2013

v

VAUGHN MITCHELL,
Defendant-Appellant.

No. 293284
Wayne Circuit Court
LC No. 08-013700-FC

ON REMAND

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

This is the second time this case is before this Court. A jury convicted defendant, Vaughn Mitchell, of first-degree premeditated murder, MCL 750.316(1)(a); first-degree felony murder, MCL 750.316(1)(b); carjacking, MCL 750.529a(1); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). The trial court sentenced defendant to life imprisonment for each murder conviction and to 15 to 25 years' imprisonment for the carjacking conviction, concurrent sentences to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appealed as of right, arguing, among other things, that the trial court erroneously admitted into evidence his confession to the police and bullets recovered from the victim's body. We remanded to the trial court for an evidentiary hearing and findings of fact concerning these two issues, and we declined to address defendant's remaining claims at that time. *People v Mitchell*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2011 (Docket No. 293284), slip op at 9-10, 14, 17. Our Supreme Court reversed this Court's opinion in part and remanded to this Court for further proceedings; the Court concluded that the trial court did not err by denying defendant's motion to suppress his confession and that defendant's claim regarding the bullets recovered from the victim's body lacked merit, making an evidentiary hearing unnecessary. *People v Mitchell*, 493 Mich 883; 822 NW2d 224 (2012). On remand, we now address the remaining claims raised by defendant. We remand for modification of defendant's judgment of sentence to reflect a single conviction and sentence for first-degree murder supported by two different theories and affirm in all other respects.

I. FACTUAL BACKGROUND

In our previous opinion, we summarized the facts of this case and the pertinent testimony at defendant's trial as follows:

Defendant's convictions arose out of the June 21, 2008, shooting death of Michael Jordan during an apparent dispute over a gun and associated carjacking. Defendant was tried jointly with his father, codefendant Vaughn Brown, before separate juries. Brown was not a part of defendant's life growing up, and they had a strained relationship. They had reconnected a few years before the shooting.

At the joint trial, Ellis Odum testified that he lived across the street from defendant. On the evening of the shooting, Odum saw several young people socializing on the street, including the victim and defendant. Brown was sitting in his van, which was parked on the street. Brown's brother testified that the rear window of the van was darkly tinted and one could not see through it at night. Odum testified that later that night, when he went inside his house, he heard approximately six gunshots. When it became quiet, Odum went outside and saw someone "moving from the field [vacant lot] and coming down toward the street light." Odum eventually recognized the person as defendant. In defendant's hand was a .32 or .38 short-barrel revolver, which he then placed in his pocket. When Odum asked him what was going on, defendant said, "sh-h-h, it's me." Defendant then crossed the street and entered the passenger side of Brown's van. Odum continued:

Upon getting into the passenger side of his father's vehicle, I'm watching, then I conversate, he pulls up to in front of my house, no headlights. Upon pulling up in front of my house, I can hear—we both heard—you can hear noise coming from the left. At that point in time, they cut out their headlights. I look, you can see the [victim's] body, like, near the curb, you see him coming toward the curb. He pulled right to him, to the side of him, and he reached out of the driver's side and shot him about 5 times.

Odum explained that Brown was in the driver's seat and defendant was in the passenger seat. The driver's side of the van pulled up alongside the victim's body, which was on Odum's side of the street. Odum believed that Brown reached out of the van and shot the victim. He could not determine the type of gun in Brown's hand. After "firing shots into him, they went to go speed off, and they got to the corner, and he stopped, and [defendant] got out, he ran back to his body." Defendant had a gun. He looked around, took the contents of the victim's pockets, "ran across the street and jumped and got into the [victim's] vehicle and drove off in the vehicle."

Odum testified that he was aware the victim owned a revolver like the one he saw in defendant's hand. Approximately a week before the shooting,

defendant had the victim's gun and showed it to Odum. The victim wanted his gun back or \$150. Odum believed that defendant had agreed to pay and that Brown was bringing defendant the money.

Detective Sergeant William Tyrrell, a firearms examiner with the State Police Crime Laboratory, testified at trial as a ballistics expert. Two bullets were recovered from the victim's body. Detective Sergeant Tyrrell concluded, based on the rifling of the bullets, that the bullets were fired by two different weapons. The diameter of the bullets indicated that the weapons were a nine millimeter, a 357, or a 38 special. There were no weapons to examine.

Detective Dale Collins interviewed defendant after his arrest. The videotaped interview was admitted at the joint trial and played for defendant's jury.¹ During the interview, defendant stated that in March or April 2008, he owned a Smith & Wesson long-nosed 38 special handgun, and that he and the victim had "done some bullshit together." Defendant asked the victim to keep his gun because he did not want it in his vehicle. When defendant asked for the gun to be returned, the victim offered an excuse for not having it. Sometime later, the victim came across a different .38-caliber gun and gave it to his brother Mark, who had apparently partnered with defendant to sell marijuana. Mark then gave the gun to defendant. A few days later, the victim asked for the gun, but defendant refused. Later, when the victim again asked for the gun, defendant asked the victim for his own gun in return.

According to defendant, the victim had promised Brown² the gun in defendant's possession as payment for a debt. On the day of the shooting, when Brown asked defendant for the gun, defendant said the victim no longer had a gun to give. Brown called the victim. That night, defendant was outside with a group of people, and had the gun on him, when the victim drove up demanding the gun. Defendant told the victim to "chalk that up baby—tit for a tat—where mine at." The victim disagreed and demanded \$150 or his gun. Defendant walked away and explained the situation to Brown. He and Brown went to the store together, and Brown suggested that defendant fight the victim. Defendant said he "don't really know how to fight for fun" and "[i]f I get into a fist fight one of us have to go." Brown then suggested that defendant hit the victim in the knees with a club or a bat to let him know that he was serious. Defendant planned to beat the victim with an old tie rod.

When defendant and Brown returned from the store, they parked further down the street. The victim approached Brown's van and again demanded money or his gun. Defendant stepped out of the van, leaving the gun inside. When the

¹ The videotape was not played for Brown's jury.

² During the interview, defendant declined to identify Brown, referring to him as "John Doe."

victim reached for the gun, defendant hit him with the tie rod and hit him again as he was trying to run away. The victim ran toward a vacant lot, “leaking out of his head,” and his pants fell down as he was running. Defendant ran after him because he believed that the victim was going to retrieve his AK-47, and defendant began “beating this muthafucka brains in with this gun.” At that point, the victim was on the ground, near the curb.

After the beating, defendant looked through the victim’s pockets and took “maybe ten dollars.” He then walked back to Brown’s van, still holding the gun. He entered the van, and they “pulled up the street.” Defendant “heard some shots fired” and then jumped out of the van. He denied shooting the victim and taking the victim’s keys or car. He did not know who took the car.

At the joint trial, defendant testified on his own behalf, admitting the truth of most of his statement to the police. He admitted beating the victim, but denied shooting him or taking his car. Defendant testified that Brown shot the victim. According to defendant, after he beat the victim and entered Brown’s van, Brown drove to where the victim was lying and shot him several times. Defendant jumped out of the van and ran away.

Brown testified that he did not know the victim. On the night of the shooting, defendant called him. He believed that defendant was going to ask him for money, so he drove his van to the street where defendant lived. Defendant approached the van and asked whether you are “even” with another person if the other person loses something of yours and you tell them that you lost something of theirs. Later, defendant spoke to the victim next to the van and Brown overheard the victim say that he wanted money for his “piece.” Defendant then grabbed an item from the floor of the van and started chasing the victim, hitting him with the item. Defendant then shot the victim five times. Brown drove his van slowly up the street. He saw the victim on the ground and defendant running toward the van, flagging him down. Defendant got in the van. But when Brown began driving, defendant asked him to pull over to the other side of the street and stop. Defendant then leaned across Brown, reached out the driver’s window, and shot the victim five more times, holding the gun with both hands. Brown drove around the corner, stopped, and then defendant jumped out and disappeared.

Brown’s jury was unable to reach a verdict, and he was later retried and acquitted. Defendant was convicted and sentenced as indicated. [*Mitchell*, unpub op at 1-4.]

II. ANALYSIS

A. SEVERANCE & BROWN’S TESTIMONY

In his statement of the questions presented, defendant requests that this Court decide whether the trial court should have allowed his jury to hear Brown’s testimony. However, defendant does not argue this issue in his appellate brief. Instead, defendant argues that the trial

court should have granted Brown's pretrial motion to completely sever defendant and Brown's trial. We conclude that neither issue is properly before this Court. Defendant has abandoned the issue regarding Brown's testimony by failing to address it in his appellate brief. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009) ("Defendant has abandoned this issue by failing to provide any analysis in the text of his brief on appeal."); see also *People v Coy*, 258 Mich App 1, 19-20; 669 NW2d 831 (2003) ("Where a defendant raises an issue in his statement of questions presented but fails to argue the merits in his brief, the issue is abandoned."). And, defendant's argument regarding severance is not properly before this Court because of defendant's failure to raise it in his statement of the questions presented. See *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008) (declining to address an issue that was not raised in the defendant's statement of the questions presented); see also *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) (explaining that an issue is waived if it is not raised in the statement of questions presented).

Although we decline to award defendant relief on these issues because of his failure to properly present them to this Court, we note that a complete severance of defendant and Brown's trial would not necessarily have precluded Brown from testifying at defendant's separate trial. We also note that defendant has not demonstrated that his jury should have been precluded from hearing Brown's testimony, see *People v Hana*, 447 Mich 325, 350; 524 NW2d 682 (1994), quoting *Zafiro v United States*, 506 US 534, 540; 113 S Ct 933; 122 L Ed 2d 317 (1993) ("[A] fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant."), and that defendant has not shown that the trial court erred by failing to sever the trial where the presence of separate juries "significantly lessened" the potential for prejudice and the prosecutor's theory that both codefendants intended to kill Jordan and shot him at different times reconciled the codefendants' antagonistic testimony so that the juries did not have to accept the testimony of one codefendant over the other but could accept and reject parts of each codefendants' testimony when considering it in conjunction with Odum's testimony, which the prosecutor argued outlined the actual events of the murder, see *id.* at 360-361 (explaining that the risk of prejudice is reduced by the presence of separate juries and a prosecution theory that reconciles the codefendants' antagonistic testimony).

B. EXPERT TESTIMONY

Defendant next argues that the trial court erred by permitting Detective Sergeant Tyrrell to testify at trial when he was not listed on the prosecution's witness list. Defendant contends that he did not have a fair trial because he did not have fair notice of or an opportunity to rebut Detective Sergeant Tyrrell's testimony. We conclude that defendant has waived this issue. The record illustrates that defense counsel insisted that the prosecutor produce Detective Sergeant Tyrrell at trial, knowing that he was not a listed witness. By affirmatively requesting Detective Sergeant Tyrrell's production at trial, any claim of error has been waived and is not susceptible to review on appeal. See *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

C. JURY INSTRUCTIONS

Defendant next raises two claims of instructional error: (1) the trial court erroneously instructed the jury on the intent element for first-degree premeditated murder and (2) the court erred by failing to give a mere-presence instruction when instructing the jury on aiding and abetting. Defendant, however, waived this jury-instruction issue because trial counsel expressly approved the jury instructions. See *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012). But, notwithstanding the waiver, defendant has failed to show plain error. See *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999). The prosecution charged defendant with first-degree premeditated murder as a principal and as an aider and abettor. To convict a defendant of premeditated murder under an aiding-and-abetting theory, “the prosecutor was required to show that at the time of the [killing] the defendant either had the premeditated and deliberate intent to kill the victim or that [he] participated knowing that the principal possessed this specific intent.” *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988). Viewing the court’s instructions as a whole, see *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997), it is clear that the jury was properly instructed that, to convict defendant of first-degree premeditated murder, it had to find that he either intended to kill the victim or that he assisted Brown with knowledge that Brown intended to kill the victim. Furthermore, with respect to a mere-presence instruction, such an instruction was neither requested by defendant nor supported by the evidence. See *id.* (“A trial court need not give requested instructions that the facts do not warrant.”). Indeed, defendant himself testified that he was not merely present. He admitted possessing a weapon and inflicting a savage beating on the victim that fractured his skull. He also admitted calling Brown to the scene for “advice.” Accordingly, there is no plain error.

D. PROSECUTORIAL MISCONDUCT

Defendant argues that he was deprived of a fair trial when the prosecutor engaged in the following alleged misconduct: elicited testimony from Odum that Odum was willing to take a polygraph examination, appealed to community sentiments against violent crimes and to feelings of compassion toward the victim and his family, referred to facts not in evidence, expressed his personal opinion during closing argument, and called an unlisted expert witness (Detective Sergeant Tyrrell) to testify. Defendant did not object at trial to any of the instances of alleged misconduct. “Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

With respect to defendant’s argument regarding Odum’s testimony, the record does not demonstrate that the prosecutor improperly elicited from Odum that he was willing to take a polygraph examination to establish that he was telling the truth. Rather, it was Brown’s counsel who elicited the comments challenged by defendant.

With regard to defendant’s claim regarding appeal to community sentiments against violent crimes and to feelings of compassion toward the victim and his family, it is well established that “prosecutors should not resort to civic duty arguments,” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), or appeal to the sympathies and emotions of the jurors, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). In this case, the statements by the prosecutor challenged by defendant are not an improper appeal to community sentiment

against violent crimes or civic-duty argument; rather, the prosecutor was merely arguing the evidence of this violent crime by using passionate language, which is not improper. See *People v Abraham*, 256 Mich App 265, 276-277; 662 NW2d 836 (2003); *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). However, the prosecutor’s characterization of defendant and Brown as “widow makers” in conjunction with his request of the jurors to “see [Jordan’s] wife weeping about his demise” improperly appealed to the sympathies and emotions of the jurors. See *Watson*, 245 Mich App at 591. Nevertheless, given the substantial evidence in this case, particularly the eyewitness testimony from Odum and defendant’s confession, defendant has demonstrated neither prejudice nor an error that would move this Court to exercise our discretion to reverse his convictions. See *Carines*, 460 Mich at 763-764.

With respect to defendant’s argument that the prosecutor improperly referred to facts not in evidence and improperly expressed his personal opinion during closing argument, we find no plain error. See *id.* The prosecutor’s comment concerning the possible crushing of Brown’s van and of the victim’s silver Pontiac were permissible inferences from the evidence. See *Watson*, 245 Mich App at 588. Moreover, the prosecutor’s arguments concerning the loudness of a gun in close proximity to one’s ears and the size of an AK-47 were also permissible. Although there was no testimony regarding the loudness of a gun being fired in close proximity to one’s ears or the exact size of an AK-47, there was testimony that an AK-47 is an assault rifle. Both of the prosecutor’s statements were permissible comments involving matters that the jurors could infer from their common knowledge and experiences. See *People v Simon*, 189 Mich App 565, 567-568; 473 NW2d 785 (1991) (explaining that factfinders may and should use their common sense, everyday experience, and general knowledge).

With regard to defendant’s argument that the prosecutor improperly called Detective Sergeant Tyrrell, an unlisted expert witness, to testify, there is no plain error. As previously discussed in subsection B, *supra*, defense counsel insisted that the prosecutor produce Detective Sergeant Tyrrell to testify at trial, thereby waiving any claim of error.

Finally, we reject defendant’s last argument that the cumulative effect of the prosecutor’s misconduct deprived him of a fair trial. Defendant has not established more than one instance of misconduct, i.e., more than one error, to demonstrate cumulative error denying him a fair trial. See *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007) (“Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal.”).

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel at trial. Because defendant failed to establish grounds for a *Ginther*³ hearing, our review is limited to errors apparent in the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). “To establish ineffective assistance of counsel, a defendant must show (1) that the attorney’s performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney’s error or errors, a different outcome reasonably would have resulted.”

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

People v Werner, 254 Mich App 528, 534; 659 NW2d 688 (2002), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant bears the burden of overcoming the presumption that counsel rendered effective assistance. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). This Court does not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if the strategy was unsuccessful. *Id.* at 715.

Defendant argues that defense counsel was ineffective for failing to request an evidentiary hearing on the issue of whether his recorded confession was the fruit of an unlawful pre-*Miranda* interrogation. However, our Supreme Court concluded that the trial court properly admitted defendant's confession, *Mitchell*, 493 Mich at 883; therefore, defendant was not deprived of the effective assistance of counsel on this basis.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct. As discussed in subsection D, *supra*, the only instance of misconduct was the prosecutor's appeal to the jury's sympathies and emotions by characterizing defendant and Brown as "widow makers" and requesting that the jurors "see [Jordan's] wife weeping about his demise." Given the significant evidence in this case, such as the eyewitness testimony from Odum and defendant's confession, defendant has failed to demonstrate a reasonable probability that, but for counsel's failure to object to this instance of misconduct, the result of his trial would have been different. See *Werner*, 254 Mich App at 534.

Defendant also argues that defense counsel was ineffective for failing to object to the trial court's jury instructions. As discussed in subsection C, *supra*, defendant's claims of instructional error are without merit. Therefore, counsel was not ineffective for failing to make a futile objection. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

For these reasons, defendant has not established that he was denied the effective assistance of counsel at trial.⁴

F. CUMULATIVE EFFECT OF ERRORS

Defendant argues that even if a single error does not require reversal, the cumulative effect of several errors deprived him of a fair trial. However, the only error in this case concerned one instance of prosecutorial appeal to juror sympathy and emotion. Defendant has

⁴ We note that defendant argues that, in the event that this Court concludes that his trial counsel did not sufficiently object to the trial court's decision to allow his jury to listen to Brown's testimony, counsel's failure to sufficiently object deprived him of the effective assistance of counsel. At trial, defense counsel objected to the trial court's decision to permit defendant's jury to listen to Brown's testimony, arguing that Brown's testimony was unfairly prejudicial because it was antagonistic toward defendant and Brown had a motive to lie. Therefore, counsel sufficiently objected to the court's decision regarding Brown's testimony to preserve the issue for appellate review. See *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Accordingly, we do not address a claim of ineffective assistance of counsel with respect to Brown's testimony.

not established a cumulative effect of errors denying him a fair trial. See *Dobek*, 274 Mich App at 106.

G. DOUBLE JEOPARDY

Defendant's final argument is that his two convictions and sentences for first-degree murder arising from the death of one individual constitute a double-jeopardy violation. We agree. "[D]ouble jeopardy protections are violated when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim." *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005). Although defendant did not raise this issue below, the double-jeopardy violation is a plain error affecting defendant's substantial rights that seriously affected the fairness, integrity, and public reputation of the judicial proceedings. See *Carines*, 460 Mich at 763-764. Accordingly, we remand for the limited purpose of modifying defendant's judgment of sentence to reflect a single conviction and sentence for first-degree murder supported by two alternative theories: premeditated murder and felony murder. See *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998).

We remand for modification of defendant's judgment of sentence to reflect a single conviction and sentence for first-degree murder supported by two different theories and affirm in all other respects. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering